IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS HAYDEN BARNES,	*	
	*	
Plaintiff,	*	
	*	
-vs-	*	
	*	Case No. 1:08-cv-00077-CAP
RONALD M. ZACCARI, *et al.*,	*	
	*	
Defendants.	*	
	*	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Plaintiff Hayden Barnes ("Barnes") was expelled from Valdosta State University ("VSU") without any notice or hearing because he protested the environmental impact of a proposed parking deck. These starkly damning facts are entirely undisputed.[1]

The defendants never have denied that Mr. Barnes' communications about the parking deck were the *sole* reason for terminating him and depriving him of the usual protections of due process guaranteed by the Constitution and enshrined in VSU policies. They have argued only that they were justified in doing so. The VSU Defendants (including former President Ronald Zaccari, Valdosta State University, the Board of Regents, Vice President for Student Affairs Kurt Keppler, and Dean of Students Russ Mast) insist that their ouster of Hayden Barnes was

constituted "threats" – most notably use of the phrase "S.A.V.E.–Zaccari Memorial Parking Garage" in a satirical collage posted on Facebook.com.[2]

Such claims are sheer nonsense. This Court already has found "the inclusion of the word 'memorial' by its mere utterance in a photo collage … posted on an internet website simply cannot be rationally construed as likely to incite immediate violence, even in the wake of the Virginia Tech tragedy that the defendants allude to in their motion." [Dkt. # 37, Order Denying in Part Defendants' Motions to Dismiss, at 15.] This initial view of the facts has been roundly confirmed on the record compiled in discovery, bolstered by detailed contemporaneous notes and correspondence that document key meetings and discussions.

The undisputed evidence shows that Barnes' peaceful protest about the parking deck sparked immediate criticism and intense monitoring by the University President. Dr. Zaccari's outrage that Barnes would not simply "go away" and accept the "visionary" master plan that included the parking deck – Zaccari's self-proclaimed "legacy" – gave way to a pretextual and shameful campaign to exploit

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[2] The VSU Defendants initially included Victor Morgan, Director of the Valdosta State University Counseling Center, but plaintiff has moved to dismiss Dr. Morgan from the case. *See* Dkt. #161. Additionally, VSU counsel Laverne Gaskins originally was among the VSU Defendants, but sought separate representation after discovery commenced. *See* Dkt. # 67.

the Virginia Tech tragedy to silence a student critic. The scheme was conducted with the assistance of the other defendants and the substantial misuse of con-

that plaintiff was not a threat to Zaccari or anyone else. Similarly, Gaskins claims not to be culpable because she repeatedly advised Zaccari and the other defendants that expulsion for the reasons given, and without a hearing, would violate Barnes' rights under the First and Fourteenth Amendments as well as the Americans With Disabilities Act ("ADA"). Nevertheless, she helped craft and implement the scheme to remove the plaintiff from VSU.

While some defendants may be more sympathetic than others, each had a share of responsibility for the events that led to this case, and each contributed to the deplorable outcome. The record overwhelmingly supports summary judgment on the plaintiff's claims under the First and Fourteenth Amendments, the ADA, the Rehabilitation Act, and his contract with VSU.

BACKGROUND

the ADA.[4] In addition, Barnes resumed regular sessions with Leah McMillan, a therapist in the VSU Counseling Center, whom he had first met when he was a student in 2005. McMillan Counseling notes at 1 (hereafter Ex. 20)

On March 22, 2007, the VSU student newspaper, *The Spectator*, ran a story regarding plans to construct a large parking deck on campus. The structure was a project that arose from a "Master Plan" Dr. Zaccari had helped develop between 2002 and 2004 at the direction of the Board of Regents. Zaccari letter to Board, June 21, 2007 at 6 (hereafter Ex. 5). As a consequence, Zaccari described the plan and [(p)-17.2416(vB( )-43(p)0.027501468(f)5.41336(pooun)17.2424(s)-7.5574(pe)-B( )-43

environmentally friendly alternatives.[5] The flyers urged students to "oppose the parking garage plan" and to "demand alternatives," and it listed telephone numbers for the VSU President, the Board of Regents, and the Governor.

Barnes' flyers prompted an immediate negative reaction from Dr. Zaccari. On March 23, 2007, Zaccari became aware of the flyers and directed Thressea Boyd, his administrative assistant, to find out who posted them. Ex 5 at 1; Zaccari Dep. 49:5-6 (hereafter Ex. 4). On March 26, Zaccari complained about Barnes to members of Students Against Violating the Environment ("S.A.V.E."), a campus environmental organization. Ex. 5 at 1-2; Ex. 4 at 47:4-9, 50:12-22. That same day, members of S.A.V.E. contacted Barnes to tell him the University President was angry about the flyers. *Id.* at 50:12-15, 51:4-5 ("Mr. Barnes received information from the students that I was upset.").

and that "this wasn't personal, it was a policy issue." Ex. 1 at 154:1-6, 155:9-11. However, the mere fact that a student had protested the project was sufficiently notable to Zaccari, that he had his assistant forward Barnes' letter to the Chancellor, stating that "Mr. Barnes is withdrawing his opposition to VSU's parking garage." Ex. 4 at 70:14-71:23; March 26 email from Thressea Boyd to Beheruz Sethna (hereafter Ex. 24).

The apology notwithstanding, Barnes remained keenly interested in the issue and did not suggest that he had changed his mind or that he would speak no further about the proposed construction. Ex. 4 at 69:4-70:7, 71:44-72:4. Shortly thereafter, he wrote a letter to the editor of the *Spectator* articulating his opposition to the parking deck, and he also created a satirical collage protesting the project, which he posted on Facebook.com. [6] The letter to the editor would later be published on April 19, 2007. *The Spectator* Letter (hereafter Ex. 21).

During this time, Barnes conducted additional research on the proposed construction and contacted the project manager about obtaining an environmental

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[6] The collage included images of a multi-level parking structure, a bulldozer, a globe flattened by a tire tread, an asthma inhaler, a photo of Zaccari, and a picture of a public bus under a no-smoking style "not allowed" red circle and slash. It also included slogans such as "more smog," "bus system that might have been," "climate change statement for President Zaccari," and "S.A.V.E.-Zaccari Memorial Parking Garage." Facebook.com collage (hereafter Ex. 25).

impact statement. After speaking to the project manager, he learned the Board was scheduled to vote on the project the following day. Ex. 1 at 156:22-157:3, 160:5-14. Based on this information, Barnes accessed the Board of Regents website to obtain phone numbers so that he could call and state his position on the proposed parking deck. He spoke to several Board members, and respectfully expressed his opposition to the project.[7] Barnes also sent emails that outlined his environmental concerns and proposed alternatives to the project. Barnes' emails to VSU faculty, April 2007 (hereafter Ex. 55).

One Board member he contacted was Vice Chancellor Linda Daniels. She immediately called Dr. Zaccari about the communication from Barnes and urged him to deal with the possible protest at the campus level and to get the student to "see a different perspective."[8] Daniels testified that she wanted to forestall the

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possibility of any protest at the April 17, 2007 Board meeting at which the parking deck proposal was to be considered because, in her view, it would only consist of "a very tedious kind of uninformed objections about a parking deck" that "are all

Barnes went to the April 16 meeting with Dr. Zaccari, which was also attended by Dean Mast.[11] Zaccari was "agitated" because Barnes had not ceased his opposition to the parking deck project, and opened the meeting by complaining

Board he "began to view Mr. Barnes' behavior as the inability to listen, opposition to the administrative policies of the University and the University system of Georgia, and interested in only promoting self interests." Ex. 5 at 3; Ex. 4 at 109:23-111:13, 116:1-119:23.

He was particularly put off by a follow-up email Barnes sent him just after their April 16 meeting, providing data on campus bus systems other universities had used as an alternative to student parking.[12]

Zaccari, including a letter from Dr. Winders discussing Barnes' medical history and diagnoses. *Id*. at 24:2-25:18.

On April 20, Dr. Zaccari attended a faculty senate breakfast, where he made some remarks about Barnes (without naming him), mentioning that there had been a protest but the Board had approved the parking deck. Ex. 4. at 197:15-200:5. Dr. Michael Noll, one of Barnes' professors who attended, discerned that Barnes was the subject of Zaccari's ire and asked if he could help with the situation. However, Zaccari rejected the offer, and he told Professor Noll that "[t]his is not a faculty senate issue," that "it would be handled from the administration side and the faculty. And I asked him not to discuss it."

at some point on April 20, 2007.[16] Regardless how the satirical collage came to Zaccari's attention, the President ultimately seized upon it as the principal

Tanner brought the Access Office file to the meeting and disclosed to the group that Barnes was registered with the Office and that he suffered from "depressive disorder, agoraphobia, … was on medications but had gone into the hospital … due to inability to function."[19] Dr. Tanner also disclosed that Barnes was seeing a Dr. Kevin Winders who practiced with Psychological Consultants, P.C. in Savannah, Georgia. Ex. 30 at 4; Ex. 27 at 26:11-16.

After the meeting, Maj. Farmer investigated Zaccari's professed nap4-29.0706(m)mtnd

therapeutic history.[22] Bottom line, however, McMillan confirmed there was no evidence Barnes was a threat to himself or anyone else. Ex. 27 at 42:19-22. At that point, Maj. Farmer concluded Leah McMillan "gave me exactly what I needed to know … that I didn't have to worry about whether or not [Barnes] was a danger to anybody else."[23]

Four days later, on April 24, 2007, Zaccari summoned McMillan to his office to discuss Barnes' advocacy about the parking deck and his treatment history.[24] Zaccari said he was concerned about Barnes' continued advocacy and claimed Barnes had been making indirect threats against him. Ex. 20 at 13; Ex. 11 at 106:8-12. Once again, without seeking a release, McMillan provided details

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[22] McMillan told Maj. Farmer that Barnes had a general anxiety disorder, a panic disorder. Ex. 30 at 6. *See also* Ex. 27 at 41:14-15. She added that in the past Barnes had an irrational thought pattern, but there was no evidence of him harming himself or anybody else. Ex. 27 at 41:18-23. McMillan also told Farmer she thought Barnes might be suffering from ADD, and that he might be suffering from a bipolar schizo-affective disorder. Ex. 30 at 6; Ex. 27 at 41:24-25, 42:17-18. However, McMillan told Maj. Farmer that she was in touch with Barnes' psychiatrist, and that Dr. Winders did not perceive any paranoia or irrational thought. Ex. 20 at 6; Ex. 27 at 41:15-17.

[23] Ex. 27 at 43:17-20. *See id*. at 41:20-23 (McMillan told Farmer that there was no evidence that Barnes would harm anybody); 42:19-22 (no evidence he would hurt himself or others); 92:22-25 (on April 20, McMillan told Farmer that Barnes was no threat).

[24] Ex. 11 at 17:12-18:9; Ex. 4 at 170:5-7. *See also* Ex. 20 at 13.

about Barnes' therapeutic history.[25]

evaluated Barnes in person on April 30, 2007.[28] In a letter dated May 2, 2007, Dr. Winders again confirmed that nothing in his re-evaluation of Barnes "led me to think that he was dangerous to himself or others."[29]

On April 25, 2007, Defendant Keppler and VSU officials who report to him discussed the situation with Barnes. Attending the meeting were Dean Mast, Dr.

"memorial" was not used in a threatening manner, but that Barnes was saying "this is a building that is going to be designated with your name on it; that you're

[Barnes] is a danger/threat) (emphasis in original). According to Maj. Farmer's notes, Zaccari wondered "how do we present to a [third] party that a threat exists?" *Id*. At this point, the discussion focused on the possibility of "administrative withdrawal," which, according to the meeting notes, would not

24. However, Gaskins raised "due process concerns [and] ADA concerns" about the process with Neely and Zaccari. Ex. 8 at 58:9-61:1. *See also* Ex. 4 at 236:11-14. She also expressed concerns about violating Barnes' First Amendment rights. Ex. 8 at 60:16-18. But Neely dismissed Gaskins' words of caution, saying, "[w]e'll worry about the lawsuit later."[32]

On May 3, 2007, Defendant Zaccari summoned Defendant Keppler, Thressea Boyd, Defendant Mast, Major Farmer, Police Chief Scott Doner, Defendant Gaskins, Dr. Tanner, Dr. Levy and Dr. Morgan to his office for a meeting on Barnes.[33] Zaccari told the group he had communicated with the Board of Regents and had determined that Board Policy 1902 grants the President the authority to unilaterally "withdraw any student from campus if he feels they pose a danger."[34] Zaccari informed the group that he was planning to administratively withdraw Barnes, despite the fact that some in the meeting

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[32] Ex. 8 at 68:13-17. Following the telephone call, Neely faxed Gaskins a number of pages containing various Board of Regents Policies as well as a proposed medical withdrawal policy dated August 11, 1983 that was never adopted by VSU. May 1, 2007 fax from Neely to Gaskins (hereafter Ex. 43). *See also* Ex. 41 at 22:11-23:22; Ex. 8 at 52:23-54:17.

[33] Ex. 30 at 10-15. *See also* Ex. 38 at 25:13-26:5; Ex. 27 at 53:12-15; Ex. 9 at 90:5-9.

[34] Ex. 30 at 13; Ex. 27 at 57:11-12. *See also* Ex. 38 at 26:23-27.

continued to raise concerns about the decision.[35] At this point, the decision had

agreed.[37] On May 8, 2007, Barnes met with McMillan in her office to discuss the

on the VSU Campus." McMillan letter to Zaccari, May 8, 2007 (hereafter Ex. 50); Ex. 11 at 165:3-6. McMillan hand-delivered a copy of the letter to Zaccari that day. Ex. 11 at 214:22-215:1.

Although University Counsel Gaskins testified that the two letters should have satisfied the conditions set forth in the Withdrawal Notice, defendant Zaccari took no action on them.[38] In fact, Zaccari testified that he felt "blind-sided" by the fact that McMillan had written a letter on Barnes' behalf, and believed the Counseling Center should have communicated with him first since McMillan knew "full well the concern that I had." Ex. 4 at 250:6-17. Accordingly, after reading the letters, and without any consultation with anyone else, Zaccari rejected their conclusions. He simply stuck them in a file and did not notify the Board. *Id.* at 254:4-255:14.

The Administrative Appeal

On May 21, 2007, Barnes appealed his administrative withdrawal to the Board of Regents. Ex. 3. Under the process, letters were to be sent to Elizabeth Neely, the same Board counsel who had advised Zaccari he had unilateral authority to

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[38] Ex. 8 at 144:7-21, 154:21-25 (letters should have satisfied the conditions); *id*. at 161:10-169:6 (Zaccari received the letters but continued the expulsion anyway). *See also* Ex. 11 at 135:21-24, 165:10-166:4 (May 8 letters should have resulted in Barnes' reinstatement).

granted where some, but not all, of the issues before the court may be "deemed established for the trial of the case. This adjudication serves the purpose of speeding up litigation by eliminating before trial matters with respect to which there is no genuine issue of fact." 1946 Advisory Comm. Notes to Fed. R. Civ. P. 56(d). Accordingly, the Federal Rules of Civil Procedure provide that "[a]n interlocutory summary judgment may be rendered on liability alone, even when there is a genuine issue on the amount of damages." Fed. R. Civ. P. 56(d)(2)(A),

ARGUMENT

tradition." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."). Indeed, the very "purpose of education is to spread, not to limit, ideas and views." Shanley v. N.E. Indep. Sch. Dist., 462 F.2d 960, 972 (5th Cir. 1972). Accordingly, "[t]he Constitution guarantees students (and all people) the right to engage not only in 'pure speech,' but 'expressive conduct,' as well." Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004). The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Healy, 408 U.S. at 180; see also Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 669-71 (1973).

Just as the First Amendment protects freedom of expression, it prohibits actions by state officials to punish individuals for the exercise of that right. The Eleventh Circuit and the Supreme Court have long held that state officials "may not retaliate against private citizens because of the exercise of their First Amendment rights." Bennett v. Hendrix, 423 F.3d 1247, 1255 (11th Cir. 2005). See also Georgia Ass'n of Educators v. Gwinnett County Sch. Dist., 856 F.2d 142, 145 (11th Cir. 1988); Singer v. Fulton County Sheriff, 63 F.3d 110, 120 (2d Cir. 1995)

("retaliatory prosecution goes to the core of the First Amendment"). Such prohibited retaliation may take the form of suspension from school. *E.g.*, *Castle v. Marquardt*, 632 F. Supp. 2d 1317, 1336 (N.D. Ga. 2009).

A First Amendment retaliation claim "depends not on the denial of a constitutional right, but on the harassment [the plaintiff] received for exercising his rights." *Hendrix*, 423 F.3d at 1253. The Eleventh Circuit has articulated a three part test for such a claim. The plaintiff must show that: (1) his speech or act was constitutionally protected; (2) the defendant's retaliatory conduct adversely affected the protected speech; and (3) there was a causal connection between the retaliatory actions and the adverse effect on the speech. *Id*. at 1250 (citations omitted). That test is met easily in this case.

"most pristine and classic form." Edwards v. South Carolina, 372 U.S. 229, 235 (1963). Although some parties in this case have referred to Barnes' "actions" regarding the parking deck, all such references relate only to the plaintiff's peaceful expression of his environmental concerns.[39]

It is evident that Defendant Zaccari had nothing but disdain for Mr. Barnes' views, and he considered the student's position on the parking deck uninformed. Ex. 4 at 89:5-13. See also Ex. 27 at 22:4-7. But this does not alter the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Bridges v. California, 314 U.S. 252, 270-271 (1941). Nor does it matter whether Barnes' speech was sufficiently "informed" on a public issue to satisfy Defendant Zaccari. See Castle, 632 F. Supp. 2d at 1335-36. Indeed, the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

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[39] Ex. 2. See, e.g., Ex. 11 at 62:1-12 (when McMillan refers to Hayden's "actions" she is talking about his speech); Ex. 4 at 67:4-12 (Barnes' flyer is confined to his political opinions).

In this case, the speech at issue was neither "caustic" nor "unpleasantly sharp." Quite to the contrary. In his flyer distributed on campus, Mr. Barnes focused entirely on his environmental concerns about the proposed landfill, and he supported proposed alternatives to the project with research. Ex. 22. The same is true of his letter to the editor of The Spectator, Ex. 21, as well as letters he sent to state officials. Ex. 55. In the few telephone conversations Mr. Barnes had with members of the Board of Regents, he focused on his substantive concerns regarding the project, and he was unfailingly polite.. Ex. at 99:6-8. Even when Defendant Zaccari confronted Barnes about the flyers he distributed on campus, Barnes listened quietly and engaged in a civil exchange of views.[40] All of

retaliatory conduct would likely deter a person of ordinary

"go away" and remain silent, Dr. Zaccari immediately put him under surveillance, and sought and obtained confidential information about Barnes from the Access Office and the Counseling Center. *See, e.g.*, Ex. 4 at 181:14-182:13; Ex. 18 at 23:3-24:19; Ex. 11 at 20:2-5; Ex. 8 at 233:25-234:2. Such misuse of confidential information clearly supports a First Amendment retaliation claim. *E.g.*, *Bloch v. Ribar*, 156 F.3d 673, 680-81 (6th Cir. 1998).

But defendants' actions did not end there. Defendant Zaccari enlisted the other defendants in implementing a scheme to remove Mr. Barnes from VSU because of his protected expression. Such drastic adverse action undoubtedly satisfies the test for retaliation. This Court most recently found that a suspension from school of ten days is a "long-term suspension" that plainly constitutes an adverse effect" in the context of First Amendment reta

Defendants' Retaliatory Actions Directly Caused the Adverse Impact on Barnes' Speech

There is no question but that the defendants' retaliatory actions led directly to the adverse impact on Barnes. Indeed, the VSU defendants have never denied it,

the other defendants. Under the First Amendment, Zia's fragile sensibilities do not define the limits of free speech.

Barnes' Expression Was Not a "True Threat" as a Matter of Law

First Amendment law is quite clear that the government cannot restrict "mere advocacy." Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam). Before it can constitutionally sanction expression on the grounds that it threatens violence, the government must prove that the speech is intended to incite imminent lawless action and is likely to produce such action. Id. In the context of a "threat," this principle applies only to "a serious statement or communication which expresses an intention to inflict injury at once or in the future as distinguished from idle or careless talk, exaggeration, or something said in a joking manner." United States v. Zavrel, 384 F.3d 130, 136 (3d Cir. 2004). Thus, expression may be considered a "true threat" only where the statement "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976). This narrow doctrine applies only where the speaker means to communicate a serious expression of an intent to commit an act of

Black, 538 U.S. 343, 359 (2003). See Shackelford v. Shirley, 948 F.2d 935, 938-939 (5th Cir. 1991) (First Amendment requires "true threats" be narrowly defined to include only speech that "falls outside the realm of public dialogue").

In applying this test, Defendant Zaccari's subjective feelings about Barnes' collage are not dispositive. United States v. Alaboud, 347 F.3d 1293, 1297 (11th Cir. 2003) ("offending remarks must be measured by an objective standard"). Accordingly, the defendants have the burden to prove that Barnes made a threatening statement "under such circumstances that a reasonable person would construe [it] as a serious expression of an intention to inflict bodily harm." United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983).

Obviously, use of the word "memorial" on a Facebook page in co

Rhetorical statements "employing 'loose, figurative, or hyperbolic language' are entitled to protection to ensure 'public debate will not suffer for a lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our nation.'" *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990)).

In any event, for all of Zaccari's professed concern about the Facebook.com collage, he never asked Barnes what he meant by the term, nor did he direct

The Record Confirms That Barnes' Expression Was Not Perceived as a Threat

The record in this case shows Defendant Zaccari's professed concern with campus security was a sham, and that his real agenda was to retaliate against Barnes for his political views. He castigated Barnes for his flyers and began investigating him when he would not "go away." As Zaccari explained to the Board, he was concerned that Barnes was "mocking" him, that he wouldn't listen, and that the student manifested "opposition to the administrative policies of the University and the University System of Georgia."[43] Even before he dug up the Facebook collage, Zaccari had begun to look for ways to neutralize Barnes or banish him from campus.[44] And, after he had the collage to use as ammunition, Zaccari specifically avoided recourse to any university disciplinary or judicial remedies that would have required him to substantiate his concerns.[45]

Ultimately, however, it matters not whether Zaccari's concerns were genuine, a mere pretense to mask his true purpose, or the product of an overactive imagination. The record makes clear no reasonable person could have construed

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[43] Ex. 5.

[44] Ex. 4 at 190:12-191:6 (Zaccari asked Vice President Louis Levy to review Barnes' academic record).

[45] Ex. 30; Ex. 27 at 54:20-57:15; Ex. 4 at 247:10-248:9.

any of Barnes' communications as a threat, and, in fact, none of the other defendants agreed with Zaccari's overheated claims. Defendant Keppler testified he "did not perceive a physical threat" and that he thought Zaccari's security response was "overkill."[46] Dean Mast likewise testified that the word memorial "means many things" and that he did not perceive the collage as a threat.[47] Dean Richard Lee met with both Keppler and Mast and testified that the consensus of the group was that there was no danger and Zaccari's concern was an "overreaction" to

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[46] Ex. 9 at 28:16-20; 152:1-6. See also id. at 30:14-19 ("I do believe I said that I thought [the Facebook.com collage] wasn't [a threat]."); id. at 63:8-16 (does not recall anyone but Zaccari suggesting that Barnes was a threat); id. at 76:17-77:2 ("Counselors can't say Barnes is a threat because there is nothing to support Barnes is a threat."); 106:22-24 ("If it was me, I would probably be upset. I would

the collage.[48] University counsel Laverne Gaskins, who met with Zacarad the others multiple times to deal with the situation, never believed Barnes was a threat.

observations with Dr. Kevin Winders, who had been Barnes's personal psychiatrist since he was a teenager, and, in every meeting she had with others at VSU, reaffirmed her conclusion that Barnes was entirely peaceful.

name on it.[52] Morgan explained in detail to Zaccari and the other defendants why Barnes was no threat, and that he could not be withdrawn under VSU's medical withdrawal policy.[53]

Although Dr. Zaccari directed the VSU campus police to take inquiries after he learned of the Facebook collage, Major Ann Fader determined right away that Barnes was not considered a threat to anyone. Her initial inquiry on April

57:11-61:23; Ex. 36 at 75:14-17. Farmer testified that, "to me, it was clear that

Barnes, and to find a way of doing so without triggering any of the campus policies that would require a hearing or any evidence of a danger.

Defendants' Actions Belie Any Genuine Concern About Campus Security

However much Dr. Zaccari may claim that he (and he alone) harbored some subjective belief that Barnes' political speech was "threatening," his actions at the time – and those of the other defendants – speak far louder than words. Barnes was singled out for unfavorable treatment based on his political views long before any security claims arose, and Dr. Zaccari explored the possibility of academically withdrawing Barnes prior to latching on to the infamous Facebook collage as a "threat."[57] When Dr. Zaccari called campus police, they immediately determined

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pay grade."); 178:4-6 ("after Dr. Zaccari had talked with the Board of Regents, it was moot for me to be involved at that point"). See Ex. 10 at 31:17-22 (Zaccari informed us of his decision to withdraw Barnes "and that had . . . made this decision"); 52:4-16 (Mast did not share his opinion with Zaccari that the Facebook.com collage was not a threat "because that "would've been my Vice President's responsibility."); Ex. 8 at 139: 3-23.

[57] See, e.g., Ex. 27 at 28:1-7 (Dean Mast had already gathered information on Barnes' previous school and his employment); Ex. 29; Ex. 4 at 190:1-192:10 (defendant checked about possible academic withdrawal before learning about Facebook collage).

that Barnes did not constitute a security problem, and it was unnecessary even to interview the student.[58]

It is even more revealing that in implementing the withdrawal decision, defendants' actions were entirely inconsistent with actual security concerns. The Withdrawal Notice slipped under Barnes' dormitory door on May 7, 2007 described him as a "clear and present danger," yet VSU's makeshift process regarding Barnes thoroughly undermines any such claim. To begin with, the Notice cites the Facebook collage, which was discovered on April 20, as support for the decision, yet the defendants spent over two weeks arguing and discussing how to implement the expulsion. Once the Notice was delivered, Barnes was given another four days to vacate the VSU campus.[59] One reason that was given for the delayed decision was the belief that Barnes should be permitted to finish

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[58] See, e.g., Ex. 27 at 43:17-20 (after conferring with Leah McMillan on April 20 "I didn't have to worry about whether or not [Barnes] was a danger to anybody else."); id. at 34:1-35:13 (after the April 20 meeting, Farmer started to look for "red flags," but "there were no kind of reports" where there had been any trouble with Hayden Barnes."); Doner Dep. 21:3-10 (VSU police never interviewed Hayden Barnes) (hereafter Ex. 31).

[59] Memo to staff regarding Barnes' administrative withdrawal, May 9, 2007 (hereafter Ex. 46).

at 1329. In this regard, "[a] school's decision to suspend a student" violates substantive due process where "the right affected 'is within the concept of ordered liberty.'" C.B. v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996) (quoting Palko v. Connecticut

law is a property interest protected by the Due Process Clause of the Fourteenth Amendment."); Castle, 632 F. Supp. 2d at 1330 (citing O.C.G.A. § 20-4-11(2) for

substantial suspension, and more closely resembles an expulsion. Either way, its nomenclature is irrelevant for due process purposes.

In this circumstance, procedural due process "requires notice and an opportunity to be heard." Castle, 632 F. Supp. 2d at 1330. See Matthews v. Eldridge, 424 U.S. 319, 333 (1976); Goss v. Lopez, 419 U.S. 565 (1975). This encompasses both the right to be heard "at a meaningful time and in a meaningful manner." Eldridge, 424 U.S. at 333. Thus, at a minimum, "[d]ue process requires notice and some opportunity for a hearing before a student at a tax-supported college is suspended for misconduct." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961) (emphasis added). See also Zinermon v. Burch, 494 U.S. 113, 127 (1990) (same); Goss, 419 U.S. at 580, 582 (same). "A fair hearing in a fair tribunal is a basic requirement of due process." Davis, 120 F.3d at 1402-04, and as Justice Felix Frankfurter observed, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Moreover, the lack of a fair hearing cannot be remedied by providing some avenue of appeal. When procedural due process requires a pre-deprivation opportunity to be heard, "the availability of any post-deprivation hearing is

irrelevant." Hudson v. Palmer, 468 U.S. 517, 534 (1984); Zinermon, 494 U.S. at 132; Castle, 632 F. Supp. 2d at 1333-34.

The Defendants Knowingly Evaded Due Process Requirements

The Defendants frankly admit in this case that Hayden Barnes was accorded none of the rights that due process is supposed to provide – no notice, no pre-deprivation hearing, and no guarantee of fairness. Quite to the contrary, they knowingly and consciously evaded due process protections that otherwise provided by VSU and Board of Regents official policies.

VSU Policies Require Notice and a Hearing

Although the Defendants claimed to rely on Board of Regents Policy 1902 in withdrawing Barnes from VSU,[64] they followed none of the procedural requirements set forth in this or any other university policy. Board Policy 1902 was adopted in the 1960s to deal with the problem of "disorderly" and "disorderly" during student demonstrations.[65] Specifically, it provides that:

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[64] See Ex. 2 ("pursuant to Board of Regents policy 1902, you are hereby notified that you have been administratively withdrawn from Valdosta State University").

[65] Section 1902 provides that "No one shall assemble on campus for the purpose of creating a riot, or causing destruction of property, or creating a disorderly diversion, which interferes with the normal operation of the University." Ex. 37 at 60.

date, time, and location of the hearing; (2) The accused s

Withdrawal Procedure,[b]efore a student may be withdrawn for mental health reasons there must first

Zaccari worked with Gaskins and a representative of the Board of Regents to create an "administrative withdrawal" process that would permit him to decide unilaterally when a student presented a "clear and present danger" to the university.[68] Zaccari said that he wanted to find a process that would not require the presentation of evidence.[69] The result, which required no notice, hearing, or evidence of any kind, created a situation that, in the words of the Board representative, provided "no due process at the campus level."[70] In its place, Defendant Zaccari personally dictated two conditions for readmission to VSU:

attesting to the fact that he was no danger to himself or others.[72] However, under the procedure created by Zaccari and Gaskins, the President was to be the sole judge of whether the conditions had been met. Ex. 23 at 3-17. Accordingly, Zaccari, who was more than a little surprised to receive the letters, and quite annoyed that McMillan would write a letter approving the student's readmission, said he felt "blind-sided" by their support of Hayden Barnes.[73] Consequently, despite the fact that the defendant had dictated the terms and conditions of readmission – and because he believed that Barnes would never be able to satisfy them so quickly – President Zaccari simply stuck the letters in a file and ignored them.[74]

The appeal process was equally illusory. The Board attorney who had advised Zaccari and Gaskins in creating the evidence-free administrative withdrawal "process," was also directly responsible for overseeing Barnes's administrative appeal, a situation Gaskins described as a violation of process. Ex. 8 at 170:8-17. That process dragged on through three school terms, and at the same time state Attorney General's contacted Mr. Barnes directly in their defense of the university system at a time when Mr. Barnes was represented by counsel. The

[72] Ex. 48; Ex. 50.

Ex. 4 at 250:6-15.

[74] Ex. 4 at 250:3-257:5.

Board eventually voted without comment to rescind the withdrawal," but only

both denial of benefits and intentional discrimination based on his disability. Specifically, knowing that Plaintiff had availed himself of counseling services at the VSU campus, the VSU Defendants misused that knowledge to concoct a phony justification for an "administrative withdrawal." McMan and others aided these efforts by revealing confidential information to the VSU Defendants regarding Mr. Barnes's diagnoses and treatment.

Elements of ADA and Rehabilitation Act Claims

Plaintiff alleged that the defendants, in their official capacities, intentionally discriminated against him because of his disability and therefore in violation of Title II of the ADA and the Rehabilitation Act. (Co

Defendants' Actions Clearly Violated the Law

Barnes is a Qualified Individual

A disability under the ADA is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). A "physical or mental impairment" includes mental or psychological disorders and the definition of "major life activities" includes learning. Cf. Kirbens v. Wyo. State Bd. of Medicine, 992 P.2d 1056 (Wyo. 1999). Undisputed facts gleaned through discovery hav

Plaintiff was treated for these disorders with medication prescribed by his physician and therapy. Ex. 13 at 84:21; 84:25. Dr. Winders further determined that Barnes suffers "some tendency towards [Attention Deficit Hyperactivity Disorder], but his anxiety symptoms are affecting his ability to concentrate more than anything else." Ex. 14; Ex. 13 at 25:13. Dr. Winders prescribed Plaintiff medication to address his ADHD symptoms. Ex. 13 at 51:12. In November 2006, Dr. Winders informed the VSU Access Office that Plaintiff's emotional disorders, which result in "panic attacks and anxiety have caused a great deal of difficulty in functioning in school and in life in general." Ex. 14. In light of the foregoing, undisputed facts demonstrate that Plaintiff is a qualified individual with a disability under the ADA and the Rehabilitation Act.

Defendants Are Subject to the ADA and Rehabilitation Act

This Court already has found that the defendants are subject to the provisions of Title II of the ADA and Section 504 of the Rehabilitation Act. Specifically, this Court found:

> Under Title II of the ADA, a suit against an individual is not authorized; rather, only a "public entity" is subject to liability. 42 U.S.C. § 12132. However, in an official capacity suit for relief, the real party in interest is the governmental entity. Thus, a suit against a state official in his or her official capacity is in effect against a "public entity" and is authorized by § 12132. Given that a "public entity" means an agency of the state, the court treats Barnes's ADA claim against all defendants,

including individuals in their official capacities, as claim

garage, Dr. Zaccari sought and obtained confidential information about Barnes from the Access Office and the Counseling Center. See supra pp. 12-17. Upon his return to campus from the Board of Regents meeting at which the parking garage was approved, Zaccari summoned Kimberly Tanner, Director of VSU's Access Office for a meeting, and asked Tanner to "provide him with any supportive information for how to deal with Hayden." Ex. 18 at 22:24-26:2( )-267.241(hi)2.1

VSU'S EXPULSION OF HAYDEN BARNES VIOLATED PLAINTIFF'S CONTRACTUAL RIGHTS

Plaintiff Barnes had a written contract with VSU and the Board of Regents, those defendants breached the written contract, and the breach actually and proximately caused him damages. It is well established that "a college or university and its students have a contractual relationship and the terms of the contract are generally set forth in the school's catalogs and bulletins." Raethz v. Aurora Univ., 805 N.E.2d 696, 699 (Ill. App. 2d Dist. 2004); Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984).

In particular, a failure to provide due process to a student pursuant to the educational contract gives rise to a cause of action. See e.g. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) (graduate student filed suit against various officials of the School of Education of Georgia State University and the University's Board of Regents). This includes breaches of contract arising from a failure to adhere to established university disciplinary procedures. See Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990); Corso, 731 F.2d at 533.

This Court already has held that "VSU and the Board of Regents, as entities of the state, waived their immunity [from the breach of contract claim] by statute." Dkt. #37, Order on Motion to Dismiss, citing O.C.G.A. § 50-21-1(a). Accordingly,

the only issue remaining is whether the contract was breached resulting in damages to Plaintiff. The claim for breach of contract has been established, and there remains no dispute of material fact on any element of the breach.

Under Georgia law, breach of contract claims require that a plaintiff show the breach of a contract and damages. *Boland v. Ford Motor Co.*, 288 Ga. App. 625, 629 (2007). In the present case, the Board's and VSU's policies and provisions, including those in the VSU Code of Conduct, constitute a binding

breached its contract with Barnes by disclosing the terms of his Access Office

Defendants' actions in failing to provide the procedures and rights guaranteed by their own policies have imposed substantial economic damages upon Barnes, as well as significant mental anguish. Compl. [Dkt. # 1] at ¶¶ 101-102. Defendants have not disputed that these damages occurred, the precise extent of which may be determined at a damages trial. All of these reasons, the breach of contract claim should be granted.

Each of the Defendants is Liable Under 42 U.S.C. 1983

Dr. Zaccari undoubtedly was the driving force that led to the withdrawal of Hayden Barnes from VSU, and he asserted ultimate authority for the decision. But he did not act alone. Each of the defendants participated in, and contributed to, the series of events that led to Mr. Barnes' ouster. See, e.g., Zalter v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986) ("A causal connection may be established by proving that the official was personally involved in the acts that resulted in the constitutional deprivation.").

For purposes of Section 1983 analysis, it does not matter whether other defendants had a "vote" in the ct

subject to Section 1983 liability when he breaches a dut

In this case, Dr. Zaccari has acknowledged that he made the decision to administratively withdraw Mr. Barnes from the University. Ex. 2; Ex. 4 at 226:20-25 ("I made the decision to withdraw Mr. Barnes."). But he convened a number of meetings with other defendants that he later claims were for the purpose of seeking their advice. See

Here, however, Keppler and Mast acquiesced in a process that they knew violated Barnes' rights because they concluded that this order was not for them to second-guess.[77] Their passivity in response to a blatant disregard of court

Yet, she actively assisted Zaccari in drafting the Withdrawal Notice, and assisted him afterward in defending his decision to the Board. Id. at 171:14-179:9; Drafts of Zaccari's appeal to the Board of Regents (hereafter "Exhibit 51").

Although Gaskins' efforts to advise Zaccari of his legal obligations were laudible, her professional obligations did not end there. Georgia Bar rules require that when an attorney for an organization is aware that a proposed action will lead to a violation of law "which reasonably might be imputed to the organization," the lawyer is ethically bound to ask for reconsideration, to seek a second opinion for presentation to higher authorities, or to refer the matter to a higher authority in the organization, "including the highest authority that can" act on the organization's behalf. Ga. Rules of Prof. Conduct § 1.13(b). If the organization persists in a course of conduct that clearly is contrary to law and to the organization's legitimate interests, Bar rules permit the attorney to resign from the matter. Id. at § 1.13(c). However, Gaskins did none of these things, and continued to help defend actions that she knew to be illegal.

Leah McMillan similarly failed to adhere to her professional obligations. As she testified, the student's "contract" with the VSU Counseling Center obligates her to protect the confidentiality of those she counsels. Ex. 11 at 74:9-80:5. Indeed, she acknowledged it is necessary to obtain a waiver from a student in order

to communicate with the school's administration about whether the student is a threat.[78] Doing so is not just a matter of professional courtesy—it is a condition of a therapist's license with the State of Georgia.[79] Here, however, McMillan knowingly disclosed details of Barnes' medical history and treatment, on more than one occasion, without first obtaining a waiver. *See supra* pp. 16-17. Although McMillan later tried to make up for her lapse in professional conduct, the information she disclosed was a central part of the alleged scheme to expel Barnes.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be granted in its entirety.

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[78] Ex. 11 at 126:18-128:20. Indeed, McMillan did seek such a waiver after the fact, when Barnes asked her to write such a letter on his behalf. *Id.* at 134:2-4, 136:8-9.

[79] *See* Ga. Code § 43-10A-17(a)(6) ("unprofessional conduct shall . . . include any departure from, or the failure to conform to, the minimal standards of acceptable and prevailing practice of the specialty"); § 43-10A-17(a)(8) (a therapist shall not violate any federal or state rule or regulation "which statute, law, or rule or regulation relates to . . . the practice of the specialty").

Respectfully submitted this 23rd day of December, 2009,