

<b>Tong v Fordham Univ.</b>
2020 NY Slip Op 33299(U)
October 7, 2020
Supreme Court, New York County
Docket Number: 155646/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

*Justice*

-----X

AUSTIN TONG,

Plaintiff,

- v -

FORDHAM UNIVERSITY, JOSEPH MCSHANE, KEITH  
ELDREDGE

Defendant.

-----X

**INDEX NO.** 155646/2020

**MOTION DATE** 10/19/2020,  
11/22/2020

**MOTION SEQ. NO.** 001 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Austin Tong (motion sequence number 001) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3211, (a) (1) and (a) (7), of the respondents Fordham University, Joseph M. McShane and Keith Eldredge (motion sequence number 003) is granted and this proceeding is dismissed, and the Clerk of the Court is directed to enter judgment in favor of said respondents; and it is further

ORDERED that counsel for petitioner shall serve a copy of this order along with notice of entry within twenty (20) days.

## MEMORANDUM DECISION

In this proceeding, petitioner Austin Tong (Tong) seeks relief pursuant to CPLR Article 78 from a disciplinary order issued by the respondent Fordham University (Fordham; motion sequence number 001), while respondents move collectively to dismiss Tong's petition pursuant to CPLR 3211 (a) (1) and (a) (7) (motion sequence number 003). For the following reasons, the petition is denied, and the motion to dismiss is granted.

## BACKGROUND FACTS

Tong is a fourth-year undergraduate student at Fordham University's Gabelli School of Business. *See* verified petition, ¶¶ 4, 12. The named co-respondents Father Joseph M. McShane (McShane) and Keith Eldredge (Eldredge; collectively, respondents) are, respectively, Fordham's President and Vice President/Dean of Students. *Id.*, ¶¶ 13-14. Tong commenced this proceeding to challenge certain disciplinary penalties that Eldredge imposed on him in a June 14, 2020 letter decision in response to student complaints about two social media posts that Tong made on his Instagram account on June 3 and 4, 2020. *Id.*, ¶¶ 15-41; notice of motion, Eldredge affirmation, exhibit L.

Specifically, on June 3, 2020, Tong, using the username "comrademeow," posted an image on his Instagram account of retired police captain David Dorn, who was shot dead while protecting a friend's pawn shop in St. Louis from looters who had emerged in the wake of the riots that arose from initially peaceful demonstrations in that city over the killing of George Floyd while in police custody. *See* notice of motion, Eldredge affirmation, ¶ 21; exhibit F. Tong's post bore the caption "Y'all a bunch of hypocrites." *Id.* Fordham notes that Tong's June 3 post received over 70 mostly negative comments from his social media followers in the 24

hours after he posted it, and that the majority of those comments accused Tong of posting with the intention of marginalizing and/or insulting the Black Lives Matter (BLM) movement (which has sought to raise awareness of George Floyd's killing). *Id.*, Eldredge affirmation, ¶¶ 22-23; exhibit F; Soebke reply affirmation, ¶¶ 4-8; exhibit A.

On June 4, 2020, again using the username "comrademeow," Tong posted another image on his Instagram account, a picture of himself holding an AR-15 rifle along with the caption "Don't tread on me." *Id.*, ¶ 24; exhibit G. Fordham notes that Tong's June 4 post was met with over 120 mostly negative comments, some of which expressed similar concerns about Tong's opinion of the BLM movement and/or concerns about Tong being armed. *Id.*, ¶¶ 25-26; exhibit G Soebke reply affirmation, ¶¶ 4-8; exhibit B. Fordham also notes that some of Tong's social media commenters were his Fordham classmates who contacted the university to file complaints, both about Tong's Instagram posts and to express fears for their own safety.<sup>1</sup> *Id.*, ¶¶ 27-29; exhibits H, I. At some point after he made the June 4 post, Tong himself commented on the post, stating that he did not intend to advocate violence against anyone, but rather intended his posts as a memorial to the Tiananmen Square massacre which had also occurred on June 4 (1989) in Beijing, China. *See* verified petition, exhibit B. Tong avers that he is a Chinese American who immigrated to the United States when he was six years old. *Id.*; verified petition, ¶ 3.

Following the Instagram posts, two members of Fordham's Department of Public Safety traveled to Tong's Long Island home on June 4, 2020 and met with him at approximately 9:00 p.m. to discuss the reaction to the posts. *See* notice of motion, Eldredge affirmation, ¶¶ 30-31. Tong told them that he had purchased the AR-15 rifle legally earlier that day to be able to protect himself and his family during the ongoing BLM protests, but he asserted that his Instagram posts

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<sup>1</sup> The court notes that the student complaints that Dean Eldredge subsequently received about Tong's posts were dated June 4 and 5, 2020. *See* notice of motion, Eldredge aff, exhibits H, I.

were solely related to the anniversary of the Tiananmen Square massacre. *Id.*, Eldredge affirmation, ¶ 32. Tong also gave the Fordham Public Safety officers a handwritten note in which he stated that he had purchased the AR-15 rifle earlier that day “to keep the household safe . . . due to the chaotic and violent situation right now,” but reiterated that his June 4 Instagram post was intended as a memorial on the anniversary of the Tiananmen Square massacre and not as an incitement to violence against protesters. *Id.*, ¶ 35; exhibit J. Finally, Tong agreed to take down the June 4 post from his Instagram account. *Id.*, ¶ 33. Following a hearing on June 10, 2020, Dean Eldredge imposed the following sanctions on Tong: 1) disciplinary probation; 2) access restriction; 3) mandatory meetings to complete an “implicit bias” program; 4) a letter of apology; and 5) parental notification. See notice of motion, Eldredge affirmation, exhibit L.

Tong contends that Fordham violated its own “University Code of Conduct” when Eldredge decided to impose the subject penalties. See verified petition, ¶¶ 42-57. Respondents contend that Tong violated the Code of Conduct, that Eldredge correctly followed the applicable procedural rules in reviewing Tong’s violations, and that Fordham was within its authority to impose the subject penalties. *Id.*, notice of motion, Eldredge affirmation, ¶¶ 1-62. Tong’s opposition papers note that the United States Department of Education (US DOE) sent Fordham a letter dated August 20, 2020 notifying it that the US DOE had commenced a civil investigation into whether Fordham’s disciplinary sanctions against Tong violated 20 USC § 1094 (c) (3) (B). See Paltzik affirmation in opposition ¶¶ 18-26; exhibit E. Respondents’ reply papers include a copy of another letter dated September 21, 2020 in which Fordham agreed to cooperate with the US DOE’s investigation, and to comply with its requests to produce documents, records and

transcripts. *See* Eldredge reply affirmation, exhibit B. The US DOE investigation is evidently still ongoing.

Prior to that, Tong commenced this Article 78 proceeding by filing a petition and notice of petition on July 23, 2020 (motion sequence number 001). *See* verified petition. Tong's petition set forth causes of action for: 1) an "Article 78/Free Speech" claim; 2) a declaratory judgment; and 3) breach of implied contract. *Id.*, ¶¶ 58-77. On July 23, 2020, Tong also submitted an Order to Show Cause with a Temporary Restraining Order (TRO) that sought to preclude Fordham from taking any action to enforce the June 14, 2020 disciplinary order (motion sequence number 002). *See* order to show cause. On August 6, 2020, the court "So-Ordered" a stipulation between the parties in which Tong agreed to withdraw his Order to Show Cause, and Fordham agreed to stay its enforcement of the June 14, 2020 disciplinary order pending the resolution of this proceeding. *See* notice of motion, Ryan affirmation, ¶¶ 4-5; exhibit C (stipulation). The stipulation also granted respondents' request for an extension of time to respond to Tong's petition, which they did by filing a pre-answer motion to dismiss on August 14, 2020 (motion sequence number 003). *Id.*; notice of motion. The matter is now fully submitted.

## DISCUSSION

### *Standard of Review*

#### *New York State Law*

The court initially notes its role in an Article 78 proceeding is normally to determine, upon the facts before an administrative body, whether a challenged administrative body determination had a "rational basis" in the record or was "arbitrary and capricious." *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale &*

*Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). An administrative decision will only be found “arbitrary and capricious” if it is “without sound basis in reason, and in disregard of the facts.” See *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Conversely, if there is a “rational basis” for the administrative body’s determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

However, this case does not involve review of a typical “administrative body determination.” Instead, Tong’s petition requests the court to review Fordham’s disciplinary ruling against him. In such cases, the Appellate Division, First Department, has held that “[i]t is well established that judicial review of an educational institution’s disciplinary determination involving nonacademic matters is limited to whether the institution *substantially adhered to its own published rules and guidelines and was not arbitrary and capricious.*” *Matter of Quercia v New York Univ.*, 41 AD3d 295, 296 (1<sup>st</sup> Dept 2007) (emphasis added), citing *Matter of Harris v Trustees of Columbia Univ.*, 98 AD2d 58, 70 (1<sup>st</sup> Dept 1983) (Kassal, J., dissenting), *revd on dissenting op* 62 NY2d 956, (1984); see also *Matter of Acevedo v Preston High Sch.*, 118 AD3d 576 (1<sup>st</sup> Dept 2014); *Kickertz v New York Univ.*, 110 AD3d 268 (1<sup>st</sup> Dept 2013); *Matter of Constantine v Teachers Coll.*, 85 AD3d 548 (1<sup>st</sup> Dept 2011); *Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315 (1<sup>st</sup> Dept 2006); *Matter of Fernandez v Columbia Univ.*, 16 AD3d 227 (1<sup>st</sup> Dept 2005). Therefore, the court shall apply this standard of review to the present proceeding.

#### *Federal Regulations*

As an initial matter, the court notes that Fordham's September 21, 2020 letter to the US DOE acknowledged as follows:

“Fordham is a recipient of federal financial assistance from the [DOE] and subject to the requirements of Title IV, Title IX, and the Final Rule on Free Inquiry. For example, Fordham receives federal financial assistance indirectly under Title IV and through a Direct Grant under the 2020 Coronavirus Aid, Relief, and Economic Security Act (“the CARES Act”), Public Law 116-136. It would be illogical for the [DOE] to defer to the courts on issues of free speech pursuant to Title IX and the Final Rule on Free Inquiry, but to proceed under Title IV with an investigation of whether, in the handling of Mr. Tong's discipline, Fordham violated its own policy on freedom of speech.”  
*See* Eldredge reply affirmation, exhibit B.

Pursuant to the federal Higher Education Resources and Student Assistance law, the US DOE is authorized to conduct civil investigations of “private institutions of higher education” which receive federal funding, and to impose a range of fines and other penalties if the US DOE determines that an institution “substantially misrepresented the nature of its educational program.” 20 USC § 1094 (c) (3) (B). The “Final Rule on Free Inquiry” referred to in the letter<sup>2</sup> distinguishes between “public institutions of higher education,” which are obliged to guarantee students' free speech rights in accordance with the First Amendment to the United States Constitution, and “private institutions of higher education,” such as Fordham, which must guaranty those rights in accordance with “their own stated institutional policies regarding freedom of speech, including academic freedom.” 34 CFR §§ 75.500 (b)-(c), 34 CFR 76.500 (b)-(c). In its September 21, 2020 letter, Fordham acknowledged that it is a “private institution of higher education” which receives federal funding, and averred that its “educational program” includes institutional policies to protect students' freedom of speech. *See* Eldredge reply affirmation, exhibit B. The Fact Sheet that the US DOE issued upon the enactment of the “Religious Liberty and Free Inquiry Final Rule” states that:

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<sup>2</sup> The full name of the rule is the “Religious Liberty and Free Inquiry Final Rule.”

“The [US DOE] recognizes that state and federal courts have a well-developed body of case law to determine whether a public institution has violated the First Amendment, or whether a private institution has violated its own stated institutional policies regarding freedom of speech, including academic freedom. *Accordingly, the [US DOE] will rely upon a final, non-default judgment by a state or federal court to determine whether a public or private institution has violated these material grant conditions. A public or private institution must report any such final, non-default judgment to the [US DOE] no more than 45 calendar days after such judgment is entered.*”

See <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-delivers-promise-protect-free-inquiry-and-religious-liberty>; fact sheet - “U.S. Department of Education, Religious Liberty and Free Inquiry Final Rule” (emphasis added).

These federal regulations indicate that the US DOE’s “20 USC §1094 Investigation” into Fordham’s handling of this matter does not supersede this court’s jurisdiction to determine, in the first instance, whether Fordham violated its own institutional free speech policies.

As a result of the foregoing, the court finds that there are no legal impediments to its reviewing Tong’s Article 78 petition, and that such a review is properly conducted pursuant to the combined “substantial adherence/arbitrary and capricious” standard described in the cited Court of Appeals and First Department case law. The court also finds that it was incumbent upon Fordham to comply with the US DOE’s disclosure requests, inasmuch as the US DOE is authorized to investigate this matter concurrently in accordance with 20 USC § 1094 (c) (3) (B).

#### *School Regulations*

Fordham has produced copies of several of the university’s “institutional policies” that Eldredge applied when he reviewed the complaints against Tong. First, Fordham presents the portions of its “University Code of Conduct” that provide as follows:

“The following actions are considered violations of the University Code of Conduct and are punishable by sanctions imposed in accordance with the published student conduct procedures of the University:

\* \* \*

“6. Physical abuse, sexual abuse, threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person.

\* \* \*

“9. Engaging in or inciting others to engage in conduct which interferes with or disrupts any University function, or which prevents or limits the free expression of the ideas of others, or which physically obstructs or threatens to obstruct or restrain other members of the University community or visitors.

\* \* \*

“11. Engaging in lewd, licentious, or disorderly conduct.

\* \* \*

“13. Violation of the published University regulations, including but not limited to those regarding Motor Vehicles, Residence Halls, and the McGinley Student Center.”  
See notice of motion, Eldredge affirmation, ¶¶ 7-10; exhibit A.

Fordham next cites the portion of its “Off-Campus Conduct Policy” that provides as follows:

“Fordham students are expected to adhere to the University Code of Conduct established by Fordham University on as well as off campus. This applies to students in Fordham off-campus housing as well as students residing in non-University housing off Fordham property. The University reserves the right to investigate and subsequently apply University discipline in certain off-campus situations.”  
*Id.*, Eldredge aff, ¶ 11; exhibit B.

Fordham also cites the portions of its policy on “Bias-Related Incidents and/or Hate Crimes” which provide as follows:

“In accordance with its mission, Fordham University welcomes and respects the fundamental dignity of students, faculty, and staff from all backgrounds and identities, strives to create a community that does the same and facilitates the education and development of students as men and women for and with others, bias-related incidents and hate crimes are unacceptable and antithetical to these goals as they send a powerful message of intolerance and discrimination, disrupt the community and educational environment and erode standards of civility.

“It should be noted, however, that the University values freedom of expression and the open exchange of ideas. The expression of controversial ideas and differing views is a vital part of University discourse. Although the expression of an idea or point of view may be offensive or inflammatory to others, it may not constitute a hate crime or bias-related incident. While this value of openness protects the expression of controversial ideas, it does not protect or condone harassment or expressions of bias or hate aimed at individuals or groups that violate the Student Code of Conduct.

\* \* \*

“Not all hateful behavior rises to the level of a crime. Bias-Related Incidents refer to any act or behavior that is a violation of the Student Code of Conduct and reasonably

believed to be motivated by a consideration (real or perceived) of race, color, creed, religion, age, sex, gender, national origin, marital or parental status, sexual orientation, citizenship status, veteran status, disability, or any other basis prohibited by law.” *Id.*, Eldredge affirmation, ¶¶ 12-14; exhibit C.

Fordham has also produced two excerpts from its Student Handbook, the first of which sets forth the procedural rules that apply to the university’s “Student Conduct System.” *See* notice of motion, Eldredge affirmation, ¶¶ 16-19; exhibit D. The relevant procedural rules provide:

“When a Code of Conduct violation is alleged, the process is observed as follows:

1. A student accused of violating the Code of Conduct shall be notified of the alleged violation(s) and shall have the opportunity, within a reasonable amount of time, for a hearing to discuss them. This hearing is the student’s opportunity to present their full and final version of the facts and shall consist of a meeting between the accused student and the Dean of Students or a designated hearing officer. The only participants in the hearing are the accused student and the hearing officer except for those situations in which a Residential Life staff member is assigned to accompany the student during the hearing (see below). In keeping with the Recording policy in the University Regulations, notes may be taken by the student or hearing officer and the hearing will not be recorded or transmitted by the hearing officer or the student. . . .
2. An accused student shall be free from student conduct sanctions pending the conclusion of their hearing, except in cases of refusal or failure to appear or where the Dean of Students determines that the health, safety and/or well-being of the community or of the accused student is endangered by that student’s presence on campus. In these cases, the Dean of Students may take appropriate interim measures, including, but not limited to, temporary suspension of the accused student.

*“Response to Alleged Violations*

Any member of the University community may, within a reasonable amount of time after alleged misconduct, file a report with the Dean of Students Office or designates such as Office of Residential Life staff, Resident Directors, or Resident Assistants or via the Department of Public Safety against a student for alleged violation of the Code of Conduct. The Dean of Students Office may also initiate a student conduct investigation on behalf of the University. The Dean of Students, or their designate, will usually undertake a preliminary investigation to determine whether the situation can be handled informally by mutual consent without the initiation of student conduct proceedings. In instances where the Dean of Students or their designate determines that a student conduct hearing shall be initiated, the Dean of Students or their designate will notify the accused student of the specific alleged violation(s), and will schedule a hearing.”

*Id.*, notice of motion, exhibit D.

The second excerpt from Fordham’s Student Handbook sets forth the “Student Conduct Sanctions,” which authorize the university to impose penalties which include, inter alia, expulsion, suspension, several types of probation, reprimands, financial restitution and other incident-specific measures. Eldridge affirmation, exhibit E.

With all of the foregoing as background, the first question before the court is whether Fordham “substantially adhered” to the procedural and substantive student disciplinary rules cited above when Eldredge issued the decision to impose the subject sanctions on Tong. For the following reasons, the court finds that Fordham substantially adhered.

### *Substantial Adherence*

The procedural requirements of Fordham’s “Student Conduct System” state that a student accused of violating the university’s “University Code of Conduct” with respect to “Conduct Involving Non-Academic Matters” must be: 1) notified of the alleged violation(s) and that (s)he shall have the opportunity to discuss them at a hearing to be held within a reasonable amount of time; 2) afforded a hearing with the Dean of Students (within a reasonable amount of time) at which the accused student may present his/her full and final version of the facts; and 3) afforded the right to be free of any sanctions pending the conclusion of their hearing. *See* notice of motion, Eldredge affirmation, ¶¶ 16-19; exhibit D. Fordham asserts that Tong “was notified of his alleged violations via a letter dated June 8, 2020, . . . was given the opportunity to present his full version of the facts at a hearing with the Dean of Students [on June 10, 2020], . . . was not subjected to any disciplinary sanctions prior to his hearing, . . . [and] after the hearing, the Dean of Students considered all of the facts and evidence presented to him and made the decision to issue disciplinary sanctions against [Tong].” *See* respondents’ mem of law at 13. Fordham presents copies of the notification and decision letters that it sent to Tong on June 8 and July 14,

2020, respectively. *See* notice of motion, Eldredge affirmation, exhibits K, L. Tong responds that to focus on procedural matters “is a red herring, since it is obvious that Tong was granted a disciplinary hearing and the hearing then occurred.” *See* petitioner’s mem in opposition at 17. Fordham’s reply papers repeat its assertion that the university “followed all of its policies and procedures related to student discipline.” *See* respondents’ reply mem at 14. The court notes that Fordham’s June 8, 2020 notification letter stated as follows:

“Your actions may constitute a violation of the following University Code of Conduct articles, University Regulations and/or Office of Residential Life policies:

1. Violation of University Regulations relating to Bias and/or Hate Crimes;
2. Threats/Intimidation;
3. Disorderly Conduct.

In view of this, I intend to conduct a hearing to further investigate these allegations and make a determination as to whether you are responsible for violation of these policies or articles. It is your responsibility to contact my office by no later than Tuesday, June 9 at 5 pm to schedule this disciplinary hearing . . .”

*See* notice of motion, Eldredge affirmation, exhibit K.

The court finds that Tong’s acknowledgments that he received this letter and thereafter scheduled and participated in a hearing with Dean Eldredge on June 10, 2020 constitutes his admission that Fordham “substantially adhered” to the student disciplinary procedures set forth in the Student Handbook.

#### *Arbitrary and Capricious*

The court’s second inquiry is to determine whether the institution’s disciplinary determination regarding a nonacademic matter “was not arbitrary and capricious.” *Matter of Quercia v New York Univ.*, 41 AD3d at 296. In this regard, a determination will only be considered “arbitrary and capricious” if it is “without sound basis in reason, and in disregard of the facts,” but not if there is a “rational basis” in the record for the determination. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*,

*Westchester County*, 34 NY2d at 231-232. Here, the challenged determination is set forth in the portion of Dean Eldredge's July 14, 2020 decision letter that stated as follows:

"I find that your actions constitute a violation of the following University Code of Conduct articles, University Regulations and/or Office of Residential Life policies:

1. Violation of University Regulations relating to Bias and/or Hate Crimes;
2. Threats/Intimidation."

*See* notice of motion, Eldredge affirmation, exhibit L.

In its motion, Fordham argues that the evidence and the statements that Tong made during the June 10, 2020 hearing with Dean Eldredge provide a "rational basis" for the determination that Tong had violated Fordham's University Code of Conduct regulations relating to "Bias and/or Hate Crimes" and "Threats/Intimidation." *See* respondents' mem of law at 15-20. Fordham specifically asserts that "[a]lthough [Tong] ultimately argued that his June 4, 2020 Instagram post was solely related to the anniversary of the Tiananmen Square incident, Dean Eldredge believed, and common sense dictated, that it was impossible to ignore the temporal proximity between that post and [Tong's] post from just several hours earlier regarding the death of officer David Dorn to which [Tong] received significant criticism, outrage and scorn." *Id.* at 17. Fordham also notes that Tong told the Public Safety officers that he purchased the AR-15 rifle specifically because of family safety concerns due to BLM protests, and that he had admitted to them that he could not recall ever having made any previous Instagram posts about Tiananmen Square. *Id.*

Fordham further notes that several of the students whose complaints Dean Eldredge reviewed stated that they believed that Tong's posts were intended to harass and threaten them for their support of the BLM movement, which they asserted Tong was clearly aware of from the comments they made to his posts. *Id.*; Soebke reply affirmation, exhibits A, B. Finally, Fordham notes that Dean Eldredge's own research disclosed a finding by the U.S. Equal

Employment Opportunity Commission that the Revolutionary War-era “Gadsden flag,” which features the saying “don’t tread on me,” has been “‘interpreted to convey racially-tinged messages in some contexts,’ including its use by persons associated with white-supremacist groups.” *Id.*; notice of motion, Eldredge affirmation, ¶ 50; <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-shelton-d-v-us-postalservice-gadsden-flag-case>. Fordham concludes that, based on this evidence “Dean Eldredge arrived at the rational conclusion that . . . [Tong’s] June 4, 2020 post could be viewed as a continuing threat and a warning to those who disagreed with his June 3, 2020 post,” and he “could not rule out the possibility . . . that [Tong] was merely using the Tiananmen Square anniversary as a way to veil his threats towards those who disagree with him.” *See* respondents’ mem of law at 19.

The court finds that the timing, content, and context of Tong’s Instagram posts justify the two foregoing inferences that Dean Eldredge drew about Tong’s intent to harass and threaten his fellow students via his Instagram posts because of their opposing views regarding the BLM movement. Having so found, the court further finds that it was reasonable for Eldredge to uphold two of the three Code of Conduct violations that had been lodged against Tong; namely, those for: 1) “threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person”; and 2) a “Bias-Related Incident.” which is defined as “any act or behavior that is a violation of the Student Code of Conduct and reasonably believed to be motivated by a consideration (real or perceived) of race, color, . . . , or any other basis prohibited by law.” As a result, the court concludes that the evidentiary record in this matter provides a “rational basis” for Dean Eldredge’s decision to impose university sanctions on Tong. Tong nevertheless raises several arguments in opposition.

First, Tong argues that Fordham’s motion should be denied because “respondents are presently under investigation by the [US DOE] for the conduct at issue in the case at bar.” *See* petitioner’s mem in opposition at 11-12. However, as the court explained above, the US DOE’s governing regulations provide that, in the first instance, it “will rely upon a final, non-default judgment by a state or federal court to determine whether a public or private institution” has “violated its own stated institutional policies regarding freedom of speech, including academic freedom.” *See* <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-delivers-promise-protect-free-inquiry-and-religious-liberty>; fact sheet - “U.S. Department of Education, Religious Liberty and Free Inquiry Final Rule.” Such a state court decision will inform the US DOE’s ultimate resolution of a 20 USC § 1094 (c) (3) (B) investigation. The federal regulations do not require this court’s decision to be held in abeyance pending the results of the US DOE’s investigation, as Tong claims. Therefore, the court finds Tong’s first opposition argument unavailing.

Tong next argues that “Eldredge betrays his arbitrariness by blatantly misrepresenting numerous material facts and defying logic.” *See* petitioner’s mem in opposition at 12-17. However, upon review, none of the 13 allegedly “misrepresented facts” that Tong identifies could reasonably be considered “material” enough to undermine the rational basis for Eldredge’s decision. For example, Tong’s assertions that an AR-15 rifle is not an “automatic weapon” and that his June 4 Instagram post only depicts him “holding” the firearm but not “brandishing” it are non sequiturs. *Id.* at 13-14. Similarly, Tong’s observation that the phrase “don’t tread on me” can be used in non-racist contexts is unpersuasive, and his assertion that the Fordham Public Security officers who visited his home on June 4, 2020 stayed there for a long time is immaterial. *Id.* His multiple suggestions that any perceived threats from his Instagram posts would only

have been felt by anonymous internet users ignores the fact that he was demonstrably aware that those internet users included a number of his Fordham classmates. *Id.* Similarly, his multiple assertions that, because Fordham is currently conducting its classes via remote learning he is incapable of posing a threat to campus security, likewise ignores the likelihood that Fordham will eventually reopen its physical campus, as well as the fact that a motivated shooter can use a firearm anyplace that he can carry it – on campus or off. *Id.* The court concludes that Tong has failed to identify any “misrepresented material facts” which would undercut the rational basis for Eldredge’s decision.

Tong next argues that “respondents arbitrarily disregarded their own clear policies and rules on free speech and expression.” *See* petitioner’s mem in opposition at 17-23. However, as the court observed above, by conceding that he “was granted a disciplinary hearing and the hearing then occurred, Tong admitted that Fordham “substantially adhered to its own published rules and guidelines.” *Matter of Quercia v New York Univ.*, 41 AD3d at 296. Tong nevertheless asserts that “the disputed question in this matter is not procedural; rather, the question is one of substance, specifically whether Respondents arbitrarily disregarded their policies and rules on free speech.” *See* petitioner’s mem in opposition at 17. However, somewhat counterintuitively, Tong also asserts that “this is not a First Amendment case - which of course Petitioner never contended.” *Id.* at 20.

A close reading shows that Tong appears to have constructed his entire “arbitrary disregard of free speech rules” argument by analogy to the unpublished 2019 decision of this court (Bannon, J.) in *Matter of Awad v Fordham Univ.* (64 Misc 3d 1234(A), 2019 NY Slip Op 51418(U) [Sup Ct, NY County 2019]). However, that decision does not relate to the facts of Tong’s case. In *Awad*, Justice Bannon found that Dean Eldredge had acted improperly by

denying a group of Fordham students permission to form a “Students for Justice in Palestine” (SJP) club dedicated to promoting a campus policy of “Boycott, Divestment and Sanctions of Israel.” 64 Misc3d 1234(A), \*1. She observed that Eldredge’s “disapproval of SJP was made in large part because the subject of SJP’s criticism is the State of Israel, rather than some other nation,” which “renders his determination arbitrary and capricious, since the defense of a particular nation is not a factor countenanced by Fordham’s rules, regulations, and guidelines for the approval of student clubs.” 64 Misc 3d 1234(A), 2109 NY Slip Op 51418(U) \*7.

Here, by contrast, “threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person” clearly *do* violate Fordham’s University Code of Conduct, and Eldredge’s decision to sanction Tong for violating that Code with his threatening Instagram posts is entirely in line with the university’s rules. Tong’s suggestion that Eldredge is improperly favoring BLM supporters in the same way that he improperly disfavored the SJP club relies on a false equivalence. Tong was not seeking permission to promote a contentious viewpoint, as the SJP club was; rather, Eldridge determined that his Instagram posts sought to intimidate and/or silence fellow students who hold opposing views in support of the BLM movement via an implied threat of potential violence. Therefore, the *Awad* decision is inapplicable to the facts of this case, and Tong cannot invoke its holding to support his petition.<sup>3</sup>

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<sup>3</sup> The court notes in passing that a much more persuasive analogy can be drawn to the long line of Article 78 decisions that holds that a reviewing court may not weigh evidence, choose between conflicting proof, or substitute its assessment of either evidence or witness credibility for that of the fact-finder. *See e.g., Matter of Amatulli v Bratton*, 156 AD 3d 559 (1<sup>st</sup> Dept 2017); *Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314 (1<sup>st</sup> Dept 2007); *Matter of Edwards v Safir*, 282 AD2d 287 (1<sup>st</sup> Dept 2001). Pursuant to the rationale stated in that body of case law, it would be improper for the court to second guess Eldredge’s finding that Tong’s references to the Tiananmen Square massacre were “contrived,” and that he merely offered them as an unpersuasive, last-minute justification for his Instagram posts (neither of which mentioned that incident).

Tong next argues that “respondent McShane is a proper party in this proceeding.” *See* petitioner’s mem in opposition at 23-25. However, this argument is moot in light of the court’s decision to dismiss Tong’s petition as meritless.

Tong finally argues that he “is entitled to a preliminary injunction & expedited discovery.” *See* petitioner’s mem in opposition at 25-27. That argument is similarly moot for the same reason.<sup>4</sup>

In sum, the court finds Tong’s opposition arguments to be unpersuasive and reiterates the finding that respondents have demonstrated a rational basis in the record to support Eldredge’s decision to impose university sanctions on Tong. As a result, the court concludes that Fordham’s disciplinary decision satisfies the hybrid “substantial adherence/arbitrary and capricious” standard of review. Thus, the final question concerns whether the sanctions imposed by Eldridge were “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.” *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 233, *citing Matter of Stolz v Board of Regents*, 4 AD2d 361, 364 (3d Dept 1957). The court finds that they were not.

#### *Shocking the Conscience*

As noted above, Fordham’s Student Handbook authorizes “Student Conduct Sanctions” including expulsion, suspension, several types of probation, reprimands, financial restitution and other incident-specific measures. Eldredge affirmation, exhibit E. The court notes that “university disciplinary probation” is among the types of probation specifically provided for in the Student Handbook. *Id.* The court also notes that the remaining sanctions Eldredge chose

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<sup>4</sup> The argument is also moot as Tong withdrew his motion for a TRO in the August 6, 2020 stipulation that disposed of motion sequence number 002. *See* notice of motion, Ryan affirmation, exhibit C. Further, Tong’s petition does not include a cause of action for injunctive relief. *See* verified petition, ¶¶ 58-77.

appear to be “incident specific” in that they were tailored to protect Tong’s fellow students against the possibility of him bringing a firearm on campus, and to apprise Tong and his family of the seriousness with which Fordham treats safety issues. The sanction involving the “implicit bias program” is particularly in accord with the wording of the Student Handbook’s “other sanctions” provision which states that “work or research projects may also be assigned.” *Id.*; exhibit E. The court finally notes that Tong’s opposition papers contain no argument that the sanctions in the decision were excessive. In view of these factors, the court finds that said sanctions were neither “disproportionate to Tong’s offense” nor so excessive as to be “shocking to one’s sense of fairness.” As a result, the court concludes that Tong has failed to demonstrate that Fordham’s disciplinary decision was an “arbitrary and capricious” ruling.

#### *Dismissal Motion*

Turning to respondents’ motion to dismiss the petition, the Court of Appeals has held that a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, \* \* \* may be appropriately granted . . . where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, the court has found that the documentary evidence refuted Tong’s assertion that Fordham’s disciplinary decision was arbitrary and capricious. As a result, the court concludes that Tong’s Article 78 petition should be dismissed as meritless, and that respondents’ motion to dismiss the petition should consequently be granted. The court notes that Respondents are now instructed to comply with their responsibility to “report [this] final, non-default judgment to the [US DOE] no more than 45 calendar days after such judgment is entered.”

**CONCLUSION**

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Austin Tong (motion sequence number 001) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3211, (a) (1) and (a) (7), of the respondents Fordham University, Joseph M. McShane and Keith Eldredge (motion sequence number 003) is granted and this proceeding is dismissed, and the Clerk of the Court is directed to enter judgment in favor of said respondents; and it is further

ORDERED that counsel for petitioner shall serve a copy of this order along with notice of entry within twenty (20) days.

  
20201007113328 CED:MEAD099REC7B2085AF1BB27A704B6B4F0FF19

10/7/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE