

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

Ashley Storino,

Petitioner.

Index No.

Hon. _____

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

VERIFIED PETITION

New York University,

Respondent.

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Petitioner Ashley Storino (“Petitioner” or “Ashley”), by and through her attorneys, Price, Meese, Shulman & D’Arminio, P.C., as and for her verified petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), respectfully alleges as follows:

PRELIMINARY STATEMENT

1. This action is brought pursuant to Article 78 of the CPLR to vacate, void and annul Respondent New York University’s (“NYU” or “Respondent”) decision dated August 27, 2020 (the “Decision”), and NYU’s final appeal denial dated September 21, 2020 (the “Appeal Denial”) (collectively the “Determination”), imposing disciplinary suspension on Petitioner for the Fall 2020 semester, disciplinary probation through August 31, 2021, and an academic assignment to be done by October 1, 2020, in order “*to be considered for reinstatement in January*” 2021. Respondent’s Determination violates NYU’s policies and procedures, is fundamentally unfair, arbitrary and capricious, and constitutes an abuse of discretion. The Decision is attached as *Exhibit A* and the Appeal Denial is attached as *Exhibit B*.

2. Petitioner is asking this Court to: declare that the Respondent acted arbitrarily, capriciously and abused its discretion contrary to law; vacate, void and annul Respondent's Determination; direct Respondent to remove the disciplinary suspensions from Petitioner's official student record; allow Petitioner to immediately return to her 100% online fall semester class schedule; award Petitioner attorney fees and costs of disbursement for this proceeding; and for such other and further relief as the Court deems proper and just.

3. Petitioner submits an Order to Show Cause with a request for a TRO; and the instant Verified Petition and an Emergency Affidavit both to be utilized as her affidavits pursuant to CPLR §105(u). Petitioner seeks an immediate stay of Respondent's Decision and Respondent's Appeal Denial because without it this proceeding is moot because (a) by the time it is heard Petitioner will have lost too much class time and Petitioner will not be able to complete her Fall 2020 classes; and (b) the academic sanction imposed is due October 1, 2020, and Petitioner must commence it within a few days to have it completed on time.

THE PARTIES

4. Petitioner is an individual and an NYU student who is residing in a private apartment unaffiliated with NYU, located at 401 E 13th Street, New York, NY 10003, pursuant to a twelve (12) month lease. Petitioner's lease includes her apartment and a private, outdoor rooftop connected to her apartment. Petitioner lives off-campus with three other NYU students. Petitioner's permanent residence is in Trumbull, Connecticut.

5. Respondent NYU is a private university operated as a domestic corporation duly organized and existing by virtue of the laws of the State of New York with its principle place of business located at 70 Washington Square South, New York, New York 10012.

JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by CPLR § 7801. Venue is proper in this County pursuant to CPLR § 506(b) because Respondent's principle place of business is located in the County of New York, Respondent made the Determination complained of in this County, and all of the events took place in this County.

7. The Determination is final and cannot be adequately reviewed by another Court, entity, or officer.

NYU's CHARGE

8. On Tuesday, August 25, 2020, Petitioner received an email from Respondent's Office of Student Conduct that Petitioner allegedly violated University Student Conduct Policy **B1, E1, and E3**: *"it is alleged attended a large gathering at an off-campus location without proper use of masks and social distancing. Photos of the gathering were posted on social media and shared with our office through the University's anonymous reporting channels. Therefore, you are charged with potentially violating the following policies"* (the "Charge"). See Ex. C, p. 22.

9. NYU's Charge did not contain the date and location of the alleged large gathering, only the date the Office of Student Conduct received an anonymous incident report. *Id.*

10. NYU's Charge did not state that Petitioner was in the photographs, when the photographs were taken, or where the photographs were taken. *Id.*

11. NYU's Charge did not state how Respondent determined it was a "large gathering". *Id.*

12. NYU's COVID Policy (as defined below) E3 applies to on-campus conduct only; therefore, it should not have been charged. Ex. E.

13. NYU's Charge did not allege sufficient facts to support a violation of NYU's Conduct Policy E1. Ex. D, p. 3.

14. NYU's Charge did not allege sufficient facts to support a violation of NYU's Conduct Policy B1. *Id.* at p.2.

15. NYU's Charge did not contain facts to support the alleged violations. *Id.*

16. NYU's Charge was fundamentally unfair.

17. NYU's Charge was arbitrary and capricious.

18. NYU's Charge was an abuse of discretion.

NYU'S DECISION

19. On Thursday, August 27, 2020, in the evening, Petitioner received a Resolution of Student Conduct Matter which indicated that she had engaged in conduct which intentionally and recklessly disregarded the rules and threatened the health and safety of others in violation of the NYU Student Conduct Policy, specifically University Student Conduct Policy B1 and E1. Ex. A.

20. The NYU Office of Student Conduct imposed the following sanctions: suspension from the university until December 31, 2020; disciplinary probation until August 31, 2021; and an educational sanction in the form of a paper due October 1, 2020. *Id.*

21. NYU's Decision does not reflect any of these additional facts: (a) Petitioner was only in one (1) of three (3) photographs shown her during the Conduct Conference; (b) Petitioner and her friends were abiding by the NYC Gatherings Guidelines (defined below); (c) the photograph was taken at a large gathering, not a small gathering at the off-campus, private, unaffiliated apartment of NYU of 10 -12 members of her social bubble two (2) of whom lived in the apartment; (d) the photograph evidences a small gathering not a large one; and (e) the small gatherings occurred when NYU was on summer break and when NYU was closed. *Id.*; Ex. J.

22. NYU's Decision is not based on a preponderance of the evidence as required by the Procedures Policy. *Id.*

23. Respondent determined that Petitioner violated B1 and E1 with no evidence that supports either Disorderly Conduct or Harassment, Intimidation or Bullying. *Id.*

24. Respondent's Procedures Policy states that following a conduct conference Respondent's conduct administrator *will make a determination based on a preponderance of the evidence, as to whether the respondent violated NYU policy*. If a violation of policy has been found, the conduct administrator shall then determine appropriate sanctions. (emphasis added) Ex. F, p. 4.

25. Respondent did not have any off campus COVID-19 policy so it utilized inapposite provisions of the Conduct Policy to charge Petitioner.

26. Respondent then issued the strongest possible sanction permitted under its Procedures Policy (as defined below) for a Conduct Conference – a suspension. Ex. A; Ex. F.

27. NYU's Decision states:

Considering the importance of creating a safe environment during a global pandemic, the *University will not tolerate conduct which intentionally and recklessly disregards the rules and threatens the health and safety of others. Your behavior in this situation is unacceptable and in violation of the NYU Student Conduct Policy [B1 & E1]*.

Ex. A, p. 1.

28. NYU's Decision does not set forth *any* facts that support that Petitioner intentionally and recklessly disregarded the rules and threatened the health and safety of anyone.

29. Petitioner was on summer break on August 12 and August 14, 2020, and living in her private, unaffiliated NYC apartment. NYU was closed.

30. Petitioner abides by New York State's executive orders and wears a face mask covering her mouth and nose when she is in a public place and unable to maintain, or when not maintaining, social distance.

31. Petitioner and her social bubble, consisting of a small group of friends, followed New York City's guidelines on Tips on Getting Together Safely which recommends that persons should **"Develop and stick to a pandemic "social bubble": Try to limit in-person social gatherings to a core group of friends or family, even if you are attending a larger gathering, to minimize exposure to people outside your immediate group."** Ex. I, p. 1.

32. Petitioner's social bubble consisted of primarily other track athletes and her roommates. This group talked, and generally hung out between their respective off-campus residences.

33. Respondent's "NYU Returns" policies required that: "Students from the tristate area must be tested and submit the results no more than 14 days before they plan to first enter any NYU academic or administrative building."¹

34. Petitioner registered for two blended courses in addition to her online courses. Petitioner chose to take the blended courses online so all her fall 2020 courses were online.

35. Petitioner has not entered any NYU academic or administrative building since the spring semester, when NYU's classes moved online, to the present.

36. Petitioner took the required COVID-19 test on August 19, 2020, at an NYU testing facility.

¹ NYU Returns: <https://www.nyu.edu/life/safety-health-wellness/coronavirus-information/messages-to-the-community/nyu-returns-important-communication-covid-19-testing-quarantining-and-early-arrival-procedures-for-fall-2020-2021.html>

37. Petitioner's initial test results were lost by Respondent's testing center. Petitioner subsequently took another COVID-19 test which was negative.

38. Petitioner adhered to all known New York State, New York City, and NYU health and safety guidelines, policies, and regulations governing COVID-19.

39. Petitioner did not intentionally engage in or threaten to engage in behavior(s) that, by virtue of its intensity, repetitiveness, or otherwise, endanger or compromise the health, safety or well-being of oneself, another person, or the general University community.

40. Petitioner did not intentionally act in a disorderly, disruptive, or antagonizing behavior that interfered with the safety, security, health or welfare of the community, and/or the regular operation of the University.

41. Petitioner followed: (a) all New York State ("NYS") and NYC health and safety orders, laws, policies, and regulations governing COVID-19, during her summer break and beyond; and (b) all of NYU's COVID policies for her return to NYU for the 2020 – 2021 academic school year.

42. The sanctions in NYU's Decision are not fundamentally fair.

43. NYU's Decision's sanctions are arbitrary and capricious.

44. NYU's Decision's sanctions are an abuse of discretion.

45. NYU's Decision is not fundamentally fair.

46. NYU's Decision is arbitrary and capricious.

47. NYU's Decision is an abuse of discretion.

NYU'S APPEAL DENIAL

48. On September 2, 2020, Petitioner sent an Appeal Letter and accompanying Affidavit to NYU's Office of Student Conduct as, and in support of, her appeal of NYU's Decision. Ex. C.

49. Pursuant to NYU's Procedures Policy, the appeal was sent to the Office of Student Conduct which transmitted it to the Dean of the Stern School of Business. Ex. F.

50. Petitioner's Affidavit set forth facts regarding the date and location of two small gatherings of people in her social bubble as permitted by New York City's guidelines on safe gatherings. One was in a social bubble member's apartment, and one was on her private apartment rooftop. Ex. C, p. 11-12, ¶12 - 18.

51. Petitioner's Affidavit stated that these two small gatherings occurred when NYU was closed. *Id.*

52. Petitioner's Affidavit advised that she took the required NYU COVID test at the NYU location. Ex. C, p. 12, ¶20.

53. Petitioner's Affidavit advised that no one in her social bubble tested positive for COVID-19 as of September 1, 2020. Ex. C, p. 14, ¶32.

54. Petitioner's Affidavit provided **new facts** that were not contained in the Charge or the Decision. Ex. C, p. 10 – 14.

55. NYU's Appeal Denial did not contain the date and location of the alleged incidents.

56. NYU's Appeal Denial erroneously stated that: "*the majority of your challenges relate to decisions as to the application of the Student Conduct Policy to the nature and circumstances of your conduct, which do not present potential procedural errors, and are thus not available grounds for appeal.*" Ex. B, p. 1.

57. NYU's Appeal Denial erroneously stated that: "the material you provided *is not new* or previously unavailable and therefore does not impact the finding of responsibility." Ex. B, p. 2.

58. NYU's Appeal Denial erroneously ignored NYU's Procedures Policy, which requires that a finding of responsibility be based on a preponderance of the evidence, when it stated that: "*It is not within our scope to reassess evidence already submitted.*" (emphasis added) *Id.*

59. The evidence submitted in Petitioner's Affidavit in support of her appeal was not contained in the Charge or the Decision.

60. NYU's Appeal Denial stated that Petitioner in her appeal: reference[s] the University's Covid-19 on-campus guidelines, specifically drawing a distinction between **mandatory on-campus requirements** and **guidance for off-campus behavior**. Student Conduct Policy B/1 and E/1 clearly state that *it is a violation to engage in behavior that either endangers, compromises, or interferes with the health and safety of the University community*. While the *Covid-19 on-campus guidelines serve to reinforce the principle of this provision*, they do not provide license to behave in a manner that endangers the health of the NYU community in other contexts. ***The University Student Conduct Policy applies to you as a student of NYU***. *Id.* at p. 1-2.

61. NYU's Appeal Denial makes it clear that NYU did not have an off-campus COVID-19 policy.

62. NYU's Appeal Denial erroneously states that there was "guidance for off-campus behavior" in place at the time of the incident.

63. NYU's Appeal Denial erroneously applied "guidance for off-campus behavior" that was sent out to the NYU community without being incorporated into the NYU Conduct Policy in deciding the appeal.

64. NYU's Appeal Denial misapplied Student Conduct Policy B/1 and E/1 without sufficient facts to support its decision.

65. NYU's Appeal Denial is fundamentally, arbitrary and capricious and an abuse of discretion on its face because it states that the "*NYU Student Conduct Policy applies to "you as a student of NYU."*" (emphasis added).

66. NYU's Appeal Denial did not contain any rationale for its determination regarding sanctions:

do not find that the sanctions imposed are substantially disproportionate to the determination, given that you were found to have engaged in actions (specifically failing to socially-distance and to wear a facial covering at gatherings) that endangered and compromised the health and safety of the NYU community. (emphasis added)
Id., p. 2.

67. NYU's Appeal Denial did not contain the date and location of the serious "**conduct violation**". *Id.*

68. NYU's Appeal Denial did not provide *any* facts to evidence that Petitioner's "**conduct**" had or could have had any impact on members of the NYU community. *Id.*

69. Petitioner was on summer break and NYU was closed during the alleged incidents.

70. Petitioner took NYU's mandatory COVID-19 return to school test. Respondent lost Petitioner's original test; however, a subsequent test was negative for the virus.

71. Petitioner has not set foot on the NYU campus or grounds other than to take the mandatory COVID-19 test required to return to school.

72. All of Petitioner's fall 2020 classes were 100% online.

73. None of the members of Petitioner's social bubble tested positive for COVID-19.

74. NYU's Appeal Denial did not state the evidence or rationale for upholding the Decision. Ex. B.

75. NYU's Appeal Denial was not based on a preponderance of the evidence.

76. NYU's Appeal Denial is not fundamentally fair.

77. NYU's Appeal Denial is arbitrary and capricious.
78. NYU's Appeal Denial is an abuse of discretion.

NYU STUDENT CONDUCT POLICIES

79. Respondent NYU issued its "University Student Conduct Policy" effective August 12, 2020, which superseded the "University Student Conduct Policy Dated August 2019" (the "Conduct Policy"). Ex. D.
80. The relevant provisions in this matter are:

III. PROHIBITED CONDUCT

B. BULLYING, THREATENING, AND ABUSIVE BEHAVIOR

1. Engaging in or threatening to engage in behavior(s) that, by virtue of their intensity, repetitiveness, or otherwise, endanger or compromise the health, safety or well-being of oneself, another person, or the general University community, or that disrupt the effective continuation of the academic/educational process for individual students or for the general University community.

This includes, but is not limited to, threatening, tormenting, mocking, intimidating, maliciously or inappropriately ridiculing another's work or comments beyond the scope of scholarly inquiry, and exploiting known psychological or physical vulnerabilities or impairment. [Ex. C, p.2]

...

E. DISORDERLY CONDUCT

1. Disorderly, disruptive, or antagonizing behavior that interferes with the safety, security, health or welfare of the community, and/or the regular operation of the University.
2. ...
3. Failure to abide by the Policy on Requirements Related to Access to NYU Buildings and Campus Grounds Resulting from the COVID-19 Pandemic, **or any related governmental orders issued concerning public health.** (emphasis added) [Ex. C, p. 2-3]

...

IV. CONDUCT OUTSIDE THE UNIVERSITY CONTEXT

The *University shall not use its powers to interfere with the rights of a student beyond the University environment. Conduct that occurs off-campus, online, over social media, or outside the context of a University program or activity, should generally be subject only to the consequences of the applicable authority and/or public opinion.* Notwithstanding, the University *may* take student disciplinary action for conduct occurring outside the University context which *substantially disrupts the regular operation of the University or threatens the health, safety, or*

security of the University community. When conduct constitutes violations of both University policy and public law, a student may be subject to both University student conduct action as well as public sanctions.

81. Respondent issued its “Policy on Requirements Related to Access to NYU Buildings and Campus Grounds Resulting from the COVID-19 Pandemic” effective August 5, 2020 (the “COVID Policy”) which is attached as *Exhibit E* and states that the COVID Policy “*applies to all Members of the NYU Community who may be in NYU Buildings and on Campus Grounds in New York.*” (emphasis added) Ex. E, p. 1.

82. Other relevant portions of the COVID policy are:

A. Face Coverings *All Members of the NYU Community are required to wear face coverings at all times while in NYU Buildings and on Campus Grounds. Face coverings must cover both mouth and nose.* (emphasis added) [Ex. D, p.2]

...

B. Physical Distancing *While in NYU Buildings, all Members of the NYU Community are expected to maintain a distance of at least six feet from others to the greatest extent possible* (except as may be required for safety reasons or for the core activity, e.g., moving equipment), including when entering NYU Buildings, while transiting through them, and in work spaces. All non-essential gatherings of any type should be avoided.

...

Definitions

Campus Grounds means any space outside of NYU Buildings which is used by NYU, including but not limited to, plazas, walkways, and loading docks.

...

Members of the NYU Community means any person who is in an NYU Buildings or on Campus Grounds, including faculty, staff, administrators, students, interns, volunteers, Vendors, and Visitors.

NYU Buildings means any building, owned or leased by NYU, in which NYU conducts any of its operations, including but not limited to, for classes, activities, and administrative functions. Such NYU Buildings include, but are not limited to, classrooms, laboratories, residence halls, administrative offices, balconies, hallways, and vestibules

83. Respondent issued its Policy “Student Conduct Procedures” effective January 2, 2020 (the “Procedures Policy”) which is attached as *Exhibit F*.²

² NYU’s Procedures Policy was superseded on September 15, 2020, which is after the Determination was made and well after the alleged violations; therefore, the prior policy which is attached is applicable to this case.

84. Respondent's Procedures Policy allows for the use of a Conduct Conference as a forum to resolve a dispute. Ex. F, p. 3. The Procedures Policy states that if a conduct conference is the chosen forum then: "*Written notice will be sent to the respondent [in this case the Petitioner] detailing the date and location of the incident, nature of alleged conduct, and applicable policies alleged to have been violated.*" *Id.* (emphasis added).

85. Respondent's Procedures Policy also states that the "*conduct administrator may conduct such additional investigation as they deem appropriate. After the meeting, the conduct administrator will make a determination based on a preponderance of the evidence, as to whether the respondent violated NYU policy.*" *Id.* (emphasis added).

86. Respondent's Procedures Policy also states that:

If a violation of policy has been found, the conduct administrator shall then determine appropriate sanctions. The conduct administrator shall issue a written decision to the respondent generally within ten (10) business days of the conduct conference. Sanctions issued after a conduct conference may include the full range of sanctions, with the exception of expulsion from the University.

Ex. F, p. 4.

87. NYU's COVID Policy does not govern the off-campus wearing of face masks or the use of social distancing by students.

88. On or about September 3, 2020, a day after Petitioner filed her appeal of the Decision, Marc Wais, Senior Vice President for Student Affairs, sent out a message entitled "**Keeping Each Other Safe: Additional Guidance on University Expectations**" to the NYU community (the "Additional Guidelines") which is attached as *Exhibit G* (emphasis added). These Additional Guidelines included the following statement "*stay away from gatherings where there are no masks or distancing, even at off-campus private residences.*" [emphasis in original]. *Id.* at p. 4.

89. These Additional Guidelines also placed the NYU community on notice of the following potential sanctions:

Sanctions may include restriction from campus (remote learning only), immediate removal from the residence halls and cancellation of the housing license, or suspension from the University. In general, *if a student is found to have participated in a gathering that impacts the community's health and safety, including by violating public health guidelines, they will likely be suspended for one academic semester.* If a student is found to be the instigator of a party that impacts the community's health and safety, including by violating public health guidelines, they will likely be suspended for the full academic year. [emphasis added].

Id.

90. Petitioner did not receive notice that small gatherings off-campus, in private residences, with her social bubble, could result in suspension or disciplinary action until September 3, 2020, the day after she filed her appeal of the Decision.

91. NYU's suspension of Petitioner for fall semester for small off-campus private residence gatherings that occurred when NYU was closed is not permissible by any NYU Conduct/COVID Policy.

92. Additionally, the Additional Gatherings lists as permissible conduct “[k]eep to small groups of people, and preferably out-of-doors” exactly the description of Petitioner’s conduct; therefore, NYU’s Appeal Decision violates *its current guidelines for off-campus conduct.*

93. At the time of filing of this Verified Petition, Respondent NYU still does not have a COVID policy governing the wearing of masks or social distancing in off-campus private residence. All that exists over a month later is the Additional Guidelines.

94. Indeed, the Additional Guidelines also state that: The *University has no desire to subject its students to conduct proceedings.* We have no wish to create a “Gotcha!” atmosphere *or to pursue minor, passing deviations from our safety and health rules.”*

95. NYU charged Petitioner with being at “*a large gathering at an off-campus location without proper use of masks and social distancing*” (emphasis added) without providing the date and location of the alleged gathering or any other facts supporting the allegation. The referenced photograph had six people in it in addition to Petitioner. *See Exhibit J.*

96. At the virtual Conduct Conference, Petitioner was shown three photographs which allegedly proved she was not wearing a mask and social distancing *at a large social gathering* according to the Charge. Ex. C, p. 21.

97. Ashley was in one of the photographs which was taken in the private off-campus, unaffiliated residence of a member of her social bubble. Ex. J.

98. Ashley walked to and from this small gathering with a mask on.

99. The second photograph was taken on the private rooftop of her apartment during a small gathering of her social bubble. Ashley was not in the photograph, but she was present in the apartment. Ashley was social distancing in her apartment. Ex. J.

100. Ashley was not in the third photograph. Ashley was not present at that gathering, which, upon information and belief, was taken at an outdoor, private rooftop connected to a private apartment. *See Ex. J.*

101. NYU was on summer break on August 12 and August 14, 2020.

102. NYU was closed on August 12 and August 14, 2020.

103. Ashley’s “conduct” could not have endangered the NYU community or disrupted NYU’s operations.

104. NYU required all returning students to take a test for COVID-19 prior to starting classes.

105. Ashley took her mandatory test for COVID-19 at an NYU health facility on August 19, 2020.

106. Respondent's testing center lost Petitioner's test results.

107. Subsequently Ashley took another test and it was negative.

108. There is no factual basis for Respondent's determination that Ashley "intentionally and recklessly disregards the rules and threatens the health and safety of others."

109. Ashley's conduct was guided by NYS's Phase 4 rules, NYC's Gathering Guidelines and the myriad of information provided by NYU regarding the requirements to return to NYU for the fall 2020 term.

110. NYU did not provide Ashley with notice that her conduct violated NYU's fluid safety and health rules.

111. NYU sent Ashley a video to be watched prior to August 26, 2020, which did not advise Ashley or the NYU community as a whole that failing to wear a mask or socially distance in a private, off-campus apartment, during summer break, was a violation of NYU's policies or could result in a suspension, especially when NYU was not in session.

112. To date, NYU does not have a COVID/Conduct Policy that makes failure to wear a mask or socially distance in a private residence or outside on private grounds a violation.

113. NYU's Additional Guidance issued September 3, 2020, one day after Petitioner issued her appeal *is the only relevant guidance on this issue*. It states that provides guidance to NYU's off-campus students on what is, and is not, acceptable to Respondent.

114. NYU's Additional Guidance also states that NYU does not want to subject its students to conduct proceedings and that NYU does not want *to pursue minor, passing deviations from our safety and health rules*.

115. To the extent that Respondent believes that Petitioner took any action, when she was off-campus in private residences and NYU was closed, that NYU did not like or felt might compromise the NYU community, NYU wrote no policy or guideline that in any way conveyed this information to Petitioner.

116. NYU made every student watch a video that never advised any member of the NYU community that off-campus conduct would result in Conduct Policy violations and serious sanctions.

117. NYU failed to provide notice to Petitioner that her conduct, which followed NYC's Guidelines for safer gatherings, was violative of NYU's Conduct Policy and would result in a suspension.

118. NYU's actions in this matter are an abuse of discretion.

119. NYU's actions are not fundamentally fair.

120. NYU's actions are arbitrary and capricious.

121. NYU's actions are an abuse of discretion.

NEW YORK STATE COVID REGULATIONS

122. On April 15, 2020, New York State Governor issued Executive Order 202.17 which provided that: "Effective at 8 p.m. on Friday, April 17, 2020 *any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a **mask or cloth face-covering when in a public place** and unable to maintain, or when not maintaining, social distance.*" (emphasis added).

123. On June 28, 2020, New York State's Interim Guidance for Higher Education during the COVID-19 Public Health Emergency (the "NYS Guidelines") (*Exhibit H*) provides that each

institution of higher education designates a “Responsible Person” to ensure that the institution meets the guidelines. Respondent is covered by the NYS Guidelines. Ex. H, p. 14.

124. The NYS Guidelines provide that Respondent must:

ensure that a distance of at least six feet is maintained among individuals while on campus, inclusive of employees and students, to the extent possible”. ... Any time individuals come within six feet of another person who does not reside in the same residence (i.e., roommate), acceptable face coverings must be worn. Individuals should be prepared to don a face covering if another person unexpectedly comes within six feet.

...

This provision *should not be construed to require physical distancing among roommates, or require face coverings to be worn while inside an individual’s residence*. For the purposes of this guidance, students who share the same residence (i.e., dormitory room) should be considered members of the same household.

Ex. F, p. 5.

125. *The NYS Guidelines do not require Respondent to establish off-campus policies.*

Id.

126. On July 20, 2020, the New York State Governor issued Executive Order 202.53 allowing New York City to enter Phase 4 of the New York Forward reopening plan.

127. In the Phase 4 of the New York Forward reopening plan *social gatherings of up to fifty (50) people are permitted*.³

128. Petitioner abided by the NYS Guidelines throughout her time in her apartment in NYC.

129. Specifically, Petitioner never participated in any social gathering that violated the Phase 4 rule of no more than fifty (50) people.

130. Petitioner followed both Phase 4 rules and NYC Gathering Guidelines in creating and functioning in a small, social bubble of fellow track team members who were all following the same guidelines and, as a result, none of them had or have COVID-19.

³ New York Forward Reopening: What You Need to Know: <https://forward.ny.gov/reopening-what-you-need-know>.

131. It is fundamentally unfair that Petitioner is suspended for attending two, small social gatherings with 15 or less people present which is 70% or more less than the 50 permitted to gather pursuant to NYS Guidelines.

NEW YORK CITY COVID GUIDELINES

132. New York City published a guide entitled: “*COVID-19 Tips for Getting Together Safely*” (the “NYC Gathering Guideline”) (*Exhibit I*), which provides in relevant part:

Safer gathering

- **Develop and stick to a pandemic “social bubble”:** *Try to limit in-person social gatherings to a core group of friends or family, even if you are attending a larger gathering, to minimize exposure to people outside your immediate group.*

- ...

- **Avoid big gatherings:** The more people there are gathered close together, the higher the possibility of spread is.

- **Enjoy the weather:** COVID-19 is more likely to spread when you meet indoors. *Organize gatherings outside in the fresh air to further reduce risk.*

- ...

Safer sports

- **Run, walk, bicycle:** These are safe sports to do alone or with others — **just keep at least 6 feet apart when you do or wear a face covering.** (emphasis added)

133. Petitioner developed and stuck to a pandemic social bubble in accordance with the NYC Gathering Guideline.

134. Petitioner talked, walked, ran and hung out with the members of her social bubble.

135. Petitioner wore her mask in public including when she was running with her social bubble and not able to socially distance.

136. Petitioner’s social bubble was a small group of track athletes well below the Phase 4 gathering size permitted by New York State.

137. Petitioner did not attend any large gatherings.

138. Petitioner's lease in NYC commenced on August 1, 2020, and she abided by all the NYS, NYC and NYU orders, regulations, policies and guidelines of which she had notice while living in NYC.

139. It is fundamentally unfair that Petitioner is suspended from NYU and considered Persona Non Grata under its policies.

FIRST CAUSE OF ACTION

RESPONDENT'S CHARGE WAS MADE IN VIOLATION OF NYU'S POLICIES AND PROCEDURE, IS ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION

140. Petitioner repeats and realleges each and every allegation as if fully set forth herein.

141. Respondent charged Petitioner without facts sufficient to support any of the three charged Conduct Policy violations rather than investigate an anonymous report.

142. Respondent arbitrarily alleged that Petitioner was at a "large gathering" despite photographic evidence to the contrary in Respondent's possession. *See Ex. J.*

143. Respondent's Charge violated Respondent's Procedures Policy. Ex. F, p. 3.

144. Respondent improperly rushed the Conduct Conference and the resulting Decision without providing Petitioner time to seek assistance from Petitioner's parents, an advocate, or an attorney.

145. NYU's Charge was fundamentally unfair.

146. NYU's Charge was arbitrary and capricious.

147. NYU's Charge was an abuse of discretion.

148. The sanctions in NYU's Decision are not fundamentally fair.

149. The sanctions in NYU's Decision are disproportionate to Petitioner's actions.

150. The sanctions in NYU's Decision are arbitrary and capricious.

151. The sanctions in NYU's Decision are an abuse of discretion.

SECOND CAUSE OF ACTION

**RESPONDENT'S DECISION WAS MADE IN VIOLATION OF NYU'S POLICIES AND
PROCEDURE, IS ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF
DISCRETION**

152. Petitioner repeats and realleges each and every allegation as if fully set forth herein.

153. Respondent determined that Petitioner violated NYU's Conduct Policy, B1 & E1 based on different facts than were alleged in the Charge.

154. Respondent's Decision that Petitioner violated Respondent's Conduct Policy is not based on the facts in the Charge.

155. Respondent's Decision should have found that Petitioner was *not responsible* for the Charge.

156. Respondent should have issued another charging document if Respondent learned alternate facts that Respondent alleged violated NYU's Conduct Policy.

157. Respondent should have held another Conduct Conference based on the new facts/charges.

158. Respondent's failure to follow its Procedures Policy is fundamentally unfair to Petitioner, arbitrary and capricious, and constitutes an abuse of Respondent's discretion.

159. Petitioner was not on notice of the facts upon which Respondent determined that Petitioner violated the Conduct Policy at the time of the Conduct Conference.

160. Respondent's Decision effectively determined that Petitioner violated a non-existent NYU Conduct/COVID Policy.

161. Respondent acknowledged this fact in the NYU Additional Guidelines correspondence sent to Petitioner and the entire NYU community on September 3, 2020. Ex. G, p. 2.

162. NYU's Additional Guidelines specifically, and **for the first time**, advise students to "stay away from gatherings where there are no masks or distancing, even at off-campus private residences." Ex. G, p. 4.

163. At the time NYU's Decision was issued on August 27, 2020, no such guidance existed; therefore, it was arbitrary and capricious, and an abuse of discretion to issue the Decision finding Petitioner violated a non-existent NYU Conduct Policy or guideline.

164. NYU's Additional Guidelines specifically state that students should "[k]eep to small groups of people, and preferably out-of-doors" (*Id. at p. 3*); however, NYU's Decision determined that Petitioner violated NYU's Conduct Policy by being outdoors with a small group of her social bubble, on her off-campus private apartment rooftop and being indoors with members of her social bubble in the private, off-campus apartment of some members of her social bubble.

165. NYU's Decision must be overturned because NYU did not give Petitioner or the NYU community any policy or guidelines covering what conduct is and is not acceptable to NYU when students are off-campus, on summer break when NYU was closed.

166. Respondent issuing sanctions to Petitioner without notice of what conduct is acceptable is fundamentally unfair, arbitrary and capricious, and an abuse of discretion.

167. NYU's Decision is fundamentally unfair, arbitrary and capricious and an abuse of discretion because it is not in keeping with NYC's Gathering Guidelines.

168. Petitioner's conduct complied with NYS, NYC, and NYU orders/regulations/policies/guidelines regarding COVID-19; therefore, Petitioner is not responsible for the Charge and NYU's Determination must be overturned.

169. NYU's Decision is *ultra vires*.

170. Respondent's Decision that Petitioner violated its Bullying, Threatening, and Abusive Behavior Policy (B1) and its Disorderly Conduct Policy (E1) because she did not wear a mask or social distance in two small gatherings of her social bubble held off-campus in a private residence and outdoors on her private apartment rooftop on summer break, when NYU was closed strains all credulity.

171. The only NYU Conduct Policy that pertains to wearing masks and social distancing is the COVID Policy that, by its language, only covers on campus conduct. Ex. D & E.

172. Respondent acted in an arbitrary and capricious manner when it determined that Petitioner violated Conduct Policy B1 and E1.

173. Respondent abused its discretion when it determined that Petitioner violated Conduct Policy B1 and E1.

174. The sanctions in NYU's decision are fundamentally unfair, an abuse of Respondent's discretion and arbitrary and capricious.

175. Respondent Charged Petitioner was at a large gathering, despite photographic evidence to the contrary, and NYU's Decision upheld the Charge but referenced small gatherings and issued the most severe sanctions permitted as a result of the Conduct Conference. Ex. D & F.

176. NYU's Decision states that it imposed the listed sanctions: "*Due to the serious nature of [Petitioner's] conduct and the disruption it has caused*" without providing any evidence, let alone a preponderance of the evidence, to support the imposition of the most severe sanctions.

1. NYU's Decision is not fundamentally fair.
2. NYU's Decision is arbitrary and capricious.
3. NYU's Decision is an abuse of discretion.
4. The sanctions in NYU's Decision are not fundamentally fair.
5. The sanctions in NYU's Decision are disproportionate to Petitioner's actions.
6. The sanctions in NYU's Decision are arbitrary and capricious.
7. The sanctions in NYU's Decision are an abuse of discretion.

THIRD CAUSE OF ACTION

RESPONDENT'S APPEAL DETERMINATION WAS MADE IN VIOLATION OF NYU'S POLICIES AND PROCEDURE, IS ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION

8. Petitioner repeats and realleges each and every allegation as if fully set forth herein.
9. NYU's Appeal Denial did not contain the date and location of the serious "**conduct violation**" in violation of NYU's Procedures Policy. F, p. 3.
10. NYU's Appeal Denial did not provide *any* facts to evidence the "*serious nature of the conduct violation.*" *Id.*
11. NYU's Appeal Denial did not provide *any* facts to evidence that Petitioner's "**conduct**" had or could have had any impact on members of the NYU community.
12. NYU's Appeal Denial ignored vital facts presented by Petitioner in her Affidavit.
13. NYU's Appeal Denial ignored all the evidence that Petitioner was not, and could not, be any danger to the NYU Community.
14. NYU's Appeal Denial did not state the evidence or rationale for upholding the Decision. Ex. B.
15. NYU's Appeal Denial was not based on a preponderance of the evidence. Ex. B.

16. NYU's Appeal Denial upheld sanctions that were not based on any evidence, let alone a preponderance of evidence.

17. NYU's Appeal Denial issued the most severe sanctions possible for a Conduct Conference stating that Petitioner was "*found to have engaged in actions (specifically failing to socially-distance and to wear a facial covering at **gatherings**) that endangered and compromised the health and safety of the NYU community*" (emphasis added) without any factual basis for that determination.

18. NYU's Appeal Denial did not take in account any of the facts provided by Petitioner in conjunction with her appeal.

19. NYU's Appeal Denial is not fundamentally fair.

20. NYU's Appeal Denial is arbitrary and capricious.

21. The sanctions in NYU's Decision are not fundamentally fair.

22. The sanctions in NYU's Decision are disproportionate to Petitioner's actions.

23. The sanctions in NYU's Decision are arbitrary and capricious.

24. The sanctions in NYU's Decision are an abuse of discretion.

WHEREFORE, Petitioner respectfully requests that a judgment be entered herein as follows:

- A. Declare that Respondent's Determination is arbitrary, capricious, and an abuse of discretion contrary to law; and
- B. Annul, void and vacate Respondent's Determination; and
- C. Direct that Respondent remove the disciplinary suspension from Petitioner's official student records; and

- D. Allow Petitioner to immediately return to her Fall 2020 classes and receive extensions of time to complete work missed as a result of Respondent's Determination; and
- E. Award Petitioner attorney fees, costs and filing fees for this proceeding; and
- F. Award any other and further relief as the Court deems just and proper.

Dated: White Plains, New York
September 26, 2020

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By: s/Jacqueline E. Esposito
Jacqueline E. Esposito, Esq.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Ashley Storino, being duly sworn, deposes and says:

1. I am Ashley Storino.
2. I have read the foregoing petition and its factual contents are true to my personal knowledge, except as to those matters alleged therein to be upon information and belief, and as to those matters, I believe them to be true.

Ashley Storino
Ashley Storino

Sworn to before me this
26 day of September, 2020

~~DESILU JERMAINE SMITHEN~~
 NOTARY PUBLIC STATE OF NEW YORK
 , Notary Public
 NEW YORK COUNTY
 LIC. # 01SM6201906
 COMM. EXP. 8/4/2021