

LAW OFFICE OF MARK S. MISHLER, P.C.

750 BROADWAY - ALBANY, NEW YORK 12207

April 26, 2016

Submitted electronically.

Brian T. Stephenson, Associate Director
Community Standards
University at Albany

Re: **Appeal of Ariel C. Agudio**
Case # 00259-001-2016

Dear Mr. Stephenson:

This letter supplements Ms. Agudio's letter appealing the decision and recommendation of the Student Conduct Board.¹

As you are aware, I am Ms. Agudio's lawyer. I will address legal issues relating to: (1) defects in the student conduct pre-hearing process in this case, (2) procedural and substantive defects in the hearing itself, including the failure on the part of the University to comply with its own rules and principles, (3) significant new evidence obtained after the hearing, and, (4) the unfair and unwarranted nature of the decision and of the extraordinarily severe recommendation that Ms. Agudio be dismissed from the University.

The disciplinary findings and the recommended sanction of dismissal must be reversed.

¹ I note that Ms. Agudio's letter is, of necessity, quite brief. She is able to share some aspects of who she is as a person, and the importance of being able to continue her college education, but she cannot discuss what happened in the January 30th incident which is the subject of this case. Based on the actions of the University in commencing and pursuing criminal charges against Ms. Agudio, she is prevented from fully defending herself. The criminal charges commenced by the University against Ms. Agudio remain pending. In addition, as of the date of this appeal, the Albany County District Attorney's Office has now taken the almost unprecedented step of presenting a misdemeanor case such as this to a grand jury (with the explicit threat that there might be additional charges brought against Ms. Agudio). Given the unfair manner in which the University and the DA's Office have handled this matter to date, Ms. Agudio is not going to relinquish her constitutionally protected right to remain silent. So, due to the decisions made by the University, Ms. Agudio is severely hampered in her ability to respond to the allegations or to explain why the Board's decision and recommendation are wrong.

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Preliminarily, it must be stated that this process has been tainted by an extreme lack of fairness from the beginning. It is evident the University decided almost immediately that Ms. Agudio and her two co-referred parties, Ms. Burwell and Ms. Briggs, had done something so heinous that they needed to be publicly humiliated and punished for their purported transgressions. The entire UPD investigation process was designed and structured from the outset with the goal of *confirming* the determination of guilt that had already been reached. It was not an effort to objectively uncover the facts. In view of the manner in which this case has been handled by the University so far, we have little expectation that Ms. Agudio will be treated fairly in this appeal process.

However, even at this late stage the process, the University has a choice.

Either the University will continue down the retaliatory, punitive, one-sided path it has been on in this case, a path clearly guided more by concern for the University's reputation than by a search for justice, *or*, as we hope, the University will choose to live up to the principles it espouses and show a willingness to examine what justice would truly look like in this case.²

We hope the University chooses the path of justice. Justice, in this case, would mean that Ms. Agudio is not further subjected to punishment and vilification for the heresy of stating that she believed she had been the victim of a racially biased incident. Justice would mean that the experiences and perceptions of Ms. Agudio and her co-referred parties would be trusted. It is not too late, but it requires that this appeal be reviewed with an open mind.

² Ms. Agudio has said that the thing she loved most about this University, until the events of and aftermath of the January 30th incident, were the lessons she learned - that appeared to be fostered by the University - about the importance of becoming an open-minded person, learning more about her own culture and background as well as the cultures of other students. She was inspired by the principles of fairness and inclusion promoted by the University. She still hopes, although it is difficult for her to maintain this hope, that the University will, in this appeal, do the right thing.

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This letter presents a perspective that clarifies the multiple ways in which this process has been unfairly tainted against Ms. Agudio and the reasons why the Student Conduct Board decision and sanction recommendation must be reversed.

We are aware that this case has taken on out-of-the ordinary significance for the University. We are also aware - and ask the University to acknowledge - that there are a range of opinions as to what actually happened on the CDTA bus on January 30th and regarding how to interpret those events.

Unfortunately, the Student Conduct Board was not given a chance to fairly and properly explore what occurred and how to interpret what happened on the bus. This is the result of procedural and substantive choices made by the Community Standards office and the University Police Department prior to the hearing and at the hearing. Due to those choices, the Board was presented with an incomplete, one-sided, unreliable, and biased interpretation of what happened on the bus. The presentation was cloaked with a veneer of objectivity, but it was anything but objective.

We hope, and demand, that the leadership of the University recognize the grave harm to which Ms. Agudio has been subjected as a result of the biased, unfair and punitive path this case has followed within the University.

We hope, and demand, that the leadership of the University recognize that UPD Inspector Burlingame (the lead UPD investigator, referring party, and the primary witness at the hearing), lacks any expertise to evaluate whether the bus incident involved racial bias directed towards Ms. Agudio and her co-referred parties. We hope someone at a higher level of the University can see the flaws in the framework and narrative he constructed and pursued. (Just as a quick, initial example, is it truly so difficult to accept that there is an element of racism involved when a non-African-American person shouts at a group of African-American women, "you're ignorant, get a job"? Doesn't that bring to mind old, prejudicial derogatory, and painful stereotypes regarding African-American people, particularly, African-American women? Inspector Burlingame did not think so and was dismissive of even the possibility that someone might interpret that remark in such a manner.)

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The findings against Ms. Agudio must, in fairness, be reversed. If that request is not granted, or if it is granted only in part, then the sanction of dismissal must be replaced with a lesser sanction that would permit Ms. Agudio to continue with her education without any interruption.

As Ms. Agudio notes in her letter of appeal, she has been an outstanding student and member of the University community since arriving on campus. Not only has Ms. Agudio excelled academically, but, until this case - half-way through her Junior year - she was never subjected to any other student conduct referrals. Her record of achievement shows that Ms. Agudio is a thoughtful, serious, and good person and student. She does not deserve the treatment to which she has been subjected by the University so far in the course of this student conduct process.

The University's procedures provide for three possible grounds for an appeal of a student conduct case: (1) procedural error, (2) new evidence, and/or (3) sanction severity.

Ms. Agudio appeals on all three of the permitted grounds for appeal. Each will be addressed below.

PROCEDURAL ERRORS

A. Pre-hearing errors and defects.

The University's policies state:

The Student Conduct System encourages student involvement in the conduct proceedings and relies on full and open discussion of cases with all parties concerned in order to render a fair judgment. (Section 4, B, II, of the "Community Rights and Responsibilities" document.)

This statement of principles - which encourages participation by the referred student in the process and also incorporates the premise that "*full and open discussion*" is the basis of fair decision-making - was read into the record by the Board chairperson at the March 9th hearing.

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Unfortunately, the manner in which this particular proceeding was conducted was completely at odds with this statement of principles. The University, as explained below, thus failed to comply with its own rules and policies.

Rather than a process which would have allowed and encouraged Ms. Agudio to participate fully in the hearing, she was affirmatively prevented from participation in the hearing, as a direct result of pre-hearing choices made by Community Standards and UPD.

In addition, the same pre-hearing choices also rendered it impossible for there to be a “full and open discussion” of this case.

She could not *participate* - which the University itself says is essential to a fair hearing - because of several factors, *all* the result of pre-hearing choices made by Community Standards and UPD, including:

- (1) the refusal to disclose all of the documentation on which the charges were based,
- (2) the University’s commencement of related criminal charges, making it impossible for Ms. Agudio to defend herself without relinquishing her right to remain silent, and
- (3) the related problem that her co-referred parties were also subject to criminal charges commenced by the University, making it impossible for Ms. Agudio to call witnesses on her own behalf at the student conduct hearing,

There could not be a “full and open discussion” at the hearing - again, which the University says is necessary for a fair process - based on the same factors listed above.

How could there be a “full and open discussion” when - as a result of the University’s refusal to share full information and documentation - only one side (the referring party) has access to a voluminous number of relevant and material documents which are relied upon as the basis of the charges?

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How could there be a “full and open discussion” when one side (the referred party, Ms. Agudio) is precluded as a result of the University’s actions from testifying or from calling her key witnesses?

What is most distressing about this, *and what should be disturbing to the leadership of the University*, is that *all* of these concerns were raised ahead of time and could have been corrected in advance of the hearing.

The University - acting through the Community Standards office and UPD - *could* have made this a fair process, but refused to take steps that could have been taken to do so. In other words, the University itself *created*, and, in fact, insisted on, a flawed process despite being provided ample notice of the existence of the flaws and the availability of remedies. (The Community Standards office could, for example, have simply provided us in advance of the hearing with all of the witness statements, which were relied upon by the referring party, but which we did not receive until much later, after the hearing.)

Here is the background to the above assertion.

A number of procedural concerns were raised with the Community Standards office prior to the March 9th hearing. These concerns - all relating to the fairness of the process - were brought to the University’s attention through correspondence, telephone conversations, and e-mail exchanges with the Community Standards office.

The procedural and due process concerns raised prior to the hearing are set forth in detail below and in the attached copies of correspondence. Although this is detailed and lengthy, it is essential that the University administration see the extensive efforts we made prior to the hearing to make this particular process adhere to principles of fundamental fairness and due process. The Community Standards office had ample notice of our deep concerns as to the nature of this process and, for the most part, simply ignored or refused to even consider the points we made.

Ms. Agudio wanted to be able to defend herself at the student conduct hearing. She could not do so as a direct result of decisions made by the Community Standards office, decisions which were neither necessary nor proper.

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Attached to this letter as Exhibits A, B and C, and incorporated herein, are copies of three letters submitted to the Community Standards office prior to the hearing.

2/23/16 letter to Mr. Stephenson

This letter (Exhibit A) explained that it was impossible for Ms. Agudio to determine what course of action she wished to take in regard to the student conduct referral without having access to all of the information and evidence the UPD would rely upon and utilize at the hearing. Specifically, we insisted that the University disclose all of the audio/video footage, all documentation of the approximately 40 interviews UPD conducted of alleged witnesses, all written statements from such individuals, all medical records relating to the alleged injury alleged to have been caused by Ms. Agudio, and all other information reviewed by the UPD and relied upon to support the referral against Ms. Agudio.

I note that all of these requests were for materials the UPD claimed, in the referral documentation, to have relied upon in preparing the referral. (That is - - - *all we were asking for was to be provided with the very documentation which the referring party (UPD) itself said they had relied upon.*)

This letter noted the unfairness of putting Ms. Agudio through a process which could result in severe penalties, yet at the same time refusing to provide meaningful access in advance to the evidence on which the charges were based.

The University's response to the 2/23 letter essentially denied most of the requests with the explanation that "there is no formal discovery under the University's" rules. This response is, of course, not truly a response at all. It is a disingenuous statement, not the level of intellectual honesty one would expect of a University official. We had raised substantive concerns as to the inherent unfairness of this particular process if we were required to proceed without access to the information requested (which, again, *is the information the UPD itself identified as providing the basis for the referral*). Responding by saying, 'that is not how we do things here' is absurd.

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The response from Community Standards was alarming as it indicated to us that there was no concern on the part of the University - acting through Community Standards - as to the fairness of the proceeding against Ms. Agudio. It also sent the clear message that something other than a search for the truth was going on, something closer to a scheme to punish Ms. Agudio at all costs, regardless of the facts.

3/2/16 letter to Ms. Lauricella

On behalf of Ms. Agudio, I again wrote to the University on 3/2 in an effort to obtain some basic fairness in regard this process.

By the time this letter (Exhibit B) was sent, the University had taken the additional step of filing criminal charges against Ms. Agudio.³

The 3/2 letter described the dilemma facing Ms Agudio: either she had to relinquish her constitutionally protected right to remain silent in the face of criminal charges or she would have to relinquish her right to defend herself at the University student conduct hearing. We pointed out that it would be impossible for both sets of rights to be protected. It was either one or the other. This letter listed the numerous ways in which the University's actions were unfair and inappropriate, and expressed our strong concern that the University's actions seemed akin to:

an inquisitorial "star chamber", a McCarthyite congressional hearing, or, perhaps most appropriately, to the court system faced by African-Americans in the deep South during the height of Jim Crow where African-Americans were presumed guilty, denied proper representation, denied access to impartial decision-makers, "tried" on the basis of incomplete and unreliable evidence, and were subjected to rushed and fundamentally unfair legal proceedings.

³ It must be noted that it was *the University*, acting through UPD, which prepared, filed and commenced the criminal charges. It is not true, as was asserted at the hearing (Hearing transcript, p. 6), that such charges were commenced by the District Attorney's office. The University made this choice and took this action.

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We asked:

How else can this process be characterized? You have denied most of our requests for evidence, you insist on conducting a hearing where the evidence will consist solely of hearsay, you insist on placing Ms. Agudio in the position where she could only defend herself by relinquishing her constitutional right to remain silent, you insist on denying her the right to be represented counsel, you insist on proceeding when she would likely be precluded from presenting key witnesses on her behalf, you insist on placing Ms. Agudio through a process run and controlled by the University administration which has already clearly pre-determined her guilt, and you insist on rushing into a proceeding when there is no good reason to do so.

We asked that the charges be withdrawn or that the hearing be postponed due to the inherent unfairness of the process as it was proceeding at that point.

3/7/16 letter to Ms. Lauricella

Having been informed that the scheduled hearing was going to go forward despite our objections, I wrote a follow-up letter on March 7th (Exhibit C) reiterating our concerns and stating that Ms. Agudio could not and would not participate in the scheduled hearing. Among other points, we focused on the fact that we had still not been provided with the close to 40 recorded witness interviews and witness statements, which, to reiterate, *the UPD itself said provided the basis for the referral charges against Ms. Agudio.*

We also specifically asked that the 3/7 letter be shared with the members of the hearing committee or panel.

The purpose of this request was to attempt to ensure that the members of the panel were, at least, made aware of the fairness and due process concerns raised on behalf of Ms. Agudio.

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E-mail correspondence of 3/8/16

Late in the evening of March 8th (the evening before the scheduled hearing), Ms. Lauricella sent me an e-mail stating:

I received your letter dated March 7, 2016 The Student Conduct Hearing set for tomorrow, Wednesday, March 9, 2016, at 9:30 a.m. . . . will proceed as scheduled.

You also requested that your letter be provided to the Student Conduct Board Members hearing this case. While we will not provide them a copy of your letter, we will inform the Student Conduct Hearing Board members that upon the advice of her Advisor and Counsel, that Ms. Agudio will not be directly participating in the Student Conduct Hearing due to her pending criminal case.

I responded to her that same evening, in an e-mail, as follows:

Ms. Lauricella:

We specifically asked that my entire March 7th letter be provided to the Student Conduct Board to ensure that the Board members know:

- (1) Ms. Agudio would like to be present at the hearing would like to defend herself at the hearing,
- (2) she cannot do so because the University commenced related criminal charges against her and Ms. Burwell and Ms. Briggs, meaning that not only can Ms. Agudio not testify, but neither could either of her two key witnesses,
- (3) she is also hampered in defending herself because the University has refused to provide us with all of the evidence on which the referral is based, and

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(4) that Ms. Agudio cares deeply about her education and being able to continue as a student at the University at Albany where she has been an outstanding student.

Those are the main points made in my March 7th letter. To simply say she is not present because her lawyer has advised her not to due to the criminal charges does not properly inform the Board members of our position and the reasons for our position.

I do not understand any reason why our request can not be honored. I do not know why the University is afraid to share full information with the members of the Student Conduct Board. Is the University afraid that the Board members will not do the University's bidding if they were provided with full information or if they were informed of our concerns as to the lack of fundamental fairness in this process?

Please, have the decency to share the information with the Board that we have asked to be shared. We submit that basic fairness dictates that you share my March 7th letter as requested.

Thank you.

No response was received from Ms. Lauricella, or anyone else in the Community Standards office, to this e-mail.

The point of providing all of this detail concerning our pre-hearing efforts to establish a more fair process for Ms Agudio is to demonstrate that *the University had clear notice of our concerns, yet pushed forward with complete disregard to the objections raised*. As mentioned above, the University could have taken a different path, but that would have required a true commitment to a search for truth and fairness and would have created a risk, apparently an unacceptable risk for the University, that the hearing might not go the way they wanted.

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B. Procedural Errors at the Hearing

We were shocked to realize, upon review of the hearing transcript, that the members of the Student Conduct Board were prevented by the Community Standards office from knowing that we had serious procedural concerns relating to this case or the nature of those concerns. They were not informed of our concerns. This, again, was a *choice* made by the University, acting through the Community Standards.

The procedural errors at the hearing itself mostly tracked and echoed the concerns we had raised prior to the hearing. So, there was not a “full and open” discussion, as such a discussion could not occur as a result of the choices made by the University prior to the hearing. Those choices, as discussed above, affirmatively prevented Ms. Agudio from participating in the hearing. She had not been provided with essential documentation relating to the charges, she would not be able to call her co-referred parties as witnesses, she would not be able to testify herself.⁴

In addition, other procedural errors occurred at the hearing.

Lack of impartial board

One example relates to the composition of the Board, information that was not available to us prior to the hearing. It appears from the transcript that at least six out of the seven Board members were University employees and that at least four of those were high-ranking administrators - to wit, the Associate Director for New Student Programs, the Director of College Housing, the Assistant to the Dean, and the Associate Dean.

The heavy weighting of the Board with high level administrators and other University employees is troubling.

⁴ The actions of the University in preventing Ms. Agudio from participating in the hearing and in preventing a “full and open discussion” from occurring were in violation not only of Ms. Agudio’s due process rights, but violated the University’s own rules and procedures, which emphasize the necessity of participation and full and open discussion.

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First, one of the two witnesses presented to the Board was Joseph Brennan, the Vice-President of the University, that is, one of the highest-ranking members of the administration, in fact, as he testified, he reports directly to the University President and serves as a member of the University's Executive Committee. (Hearing transcript, p. 108.

Dr. Brennan's testimony - and, indeed, the whole reason he was brought in to testify - was focused on the harm that had been caused to the University and the University's reputation allegedly due to the actions of Ms. Agudio and her co-referred parties. The Board was told by a person above them in the University hierarchy that these students had done something very bad (they had allegedly "created a false portrayal of this University" [Transcript, p. 109]), that they had harmed the University (he took at least 8 pages of testimony explaining the damage Ms. Agudio and the other referred parties had purportedly caused to the University, harm to rankings, harm to fund-raising, harm to recruitment, etc. [Transcript, pp. 112 - 119], and, his position that there had to be consequences imposed on them for their actions (Transcript, p. 119.)

That does not quite sound like an impartial hearing body. How could it be under such circumstances? Most of the Board members work for Vice-President Brennan. He told them what he expected them to do.⁵

⁵ We also note that this intense focus on the "reputation" of the University has created an atmosphere on campus that leads to extraordinarily inappropriate pressure on University employees. For example, according to the Albany Times Union, a U Albany official recently made a "decision to hide issues of the student-run newspaper . . . that called attention to a rise in reported campus sexual assaults" so that recently accepted students and their families would not see the issue of the paper. As reported in the Times Union, the statistics highlighted by the student paper were accurate, the University official just did not want prospective students and families to know. See: "Decision to hide UAlbany student newspapers 'inappropriate'", TU, April 16, 2016, attached hereto as Exhibit D. These types of actions are the result of placing the University's reputation at the center of decision-making, rather than having truth and accuracy being primary. We submit that the same danger exposed in the Times Union article of "reputation" trumping all else, has also played out in this case.

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Second, even without Dr. Brennan's testimony, unless the Board members had been living in a bubble for the month prior to the hearing, they must all have been well aware that the University leadership had pre-determined the "guilt" of Ms. Agudio and the co-referred parties.

By the time of the hearing, the position of the administration had been made plain by the statements and actions taken, including the widely publicized commencement of criminal charges *by* the University against Ms. Agudio and the other two women.

Again, it is simply not possible - even if the majority of the Board members sincerely attempted to be impartial - that they could have been at the time of the hearing. Ms. Agudio could not have objected at the hearing, because - due to the University's pre-hearing choices, as discussed above - she was affirmatively precluded from participation in the hearing.

Hearsay

The entire substantive case presented by the referring party, Inspector Burlingame, at the hearing consisted of hearsay.

Most of the testimony presented by Vice-President Brennan also consisted of hearsay.

Obviously, neither of them were present on the CDTA bus on January 30th when the underlying incident occurred. All of their assertions relating to what did or did not happen on the bus were hearsay.

We understand that the University's rules allow for hearsay testimony.

But, that general rule does not answer the question of whether - in this particular set of circumstances - the total reliance on hearsay evidence was proper or fair.

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NOTE: pp. 15 - 19 have been modified from the original to redact certain identifying information relating to potential witnesses.

It was not fair, and, actually, was, under the circumstances of this case, a gross violation of Ms. Agudio's due process rights.

First, in this case, there are individuals with first-hand knowledge of what occurred on the CDTA bus on January 30th. There was no valid reason to rely solely on hearsay.

In addition to Ms. Agudio and her two co-referred parties (none of whom could testify, as explained above), there were some 30 - 40 other individuals on the bus with direct, first-hand knowledge. The overwhelming majority of these individuals are University at Albany students. These are not unavailable witnesses.

Second, permissible or not, hearsay evidence (for example, Inspector Burlingame telling the Board what he says someone else says they heard or saw) is not deemed to be very reliable and is not considered to be the best way for a fact-finder to make factual determinations. Both Burlingame and Brennan basically told the Board - - 'trust me', 'I'm an experienced police officer/ administrator', essentially saying, 'do what I tell you, because I'm very smart, I have reached a conclusion as to what happened on the bus - although I was not there - and you should accept what I tell you'. That is not really how the fact-finding process is supposed to work.

Third, one must ask, why is it that none of the other individuals on the bus were presented as witnesses?

The only reason is that Inspector Burlingame and Community Standards knew it could be problematic for them, that it could interfere with the pre-determined goal of having Ms. Agudio and the other two found guilty and kicked out of school.

For example, what if they had presented [redacted] We suspect that [redacted] - who by all accounts (except her own) - was very intoxicated, would likely have not been a very coherent witness, not helpful to the referring party.

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How about _____ -? If she were presented as a witness, the Board would have been informed that she is the person who forcefully pulled Ms. Agudio's hair extensions out of her head. Also, probably not a very good witness for the referring party. Probably not a witness who would help to advance their goal.¹

Or, what about another student, who told the UPD that "the drunk girl" (_____) told Ms. Agudio and the other two referred parties to "go get a job", which this witness says was "one of the many pointless insults" that _____ said to Ms. Agudio and the two other referred parties. Also, probably not a great witness for the referring party.

Or, how about another student, who in a videographed interview with UPD, in response to a question about whether there were racial slurs used on the bus, acknowledged that some people said they had heard this, and added that the "n" word can be said in a "non-racist" way.

There are other examples as well. The point is that although individuals with first-hand accounts were available to be presented as witnesses, the choice was made not to present anyone with first-hand knowledge. First-hand accounts can be messy. There can be contradictions and inconsistencies. Not everyone remembers hearing or seeing the same thing.

¹ We also wish to note, as another example of the biased manner in which this entire matter has been handled, that the UPD never commenced any charge against _____, who, by her own admission, engaged in a fight and tore hair extensions out of Ms, Agudio's head, an act requiring some force.

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In other words, first-hand accounts - as compared with hearsay - are real. Hearsay is filtered and interpreted, particularly when the person providing the hearsay evidence has a clear position and purpose.²

The total reliance on hearsay in this case under all of the circumstances present, was unfair and fatally tainted the integrity of the hearing.

Improper “opinion” evidence

One of the central issues in this case is whether Ms. Agudio believed, and had a basis to believe, that there was a racial component to the incident on the bus.

This was not explored at the hearing, other than by Inspector Burlingame’s expressed opinion that there was nothing racial about the incident.

Who is he to make this judgment? And, why did the Board simply take him at his word?

Mentioned above is the ‘you’re ignorant, get a job’ comment, which is certainly susceptible of being interpreted as a racist comment when directed towards three Black women by a person who is not Black.

In addition, there is the disparity in responses to, on the one hand, a loud white person, which the other white people on the bus don’t care about, and, on the other hand, to an allegedly loud Black person, who is immediately perceived (by the white people) to be “disruptive”. That is also, certainly, subject to interpretation as a racially charged event.

² The brief summaries of some potential first-hand testimony presented above is based on information contained in written witness statements and/or in video interviews of witnesses taken by the UPD investigators (and not provided to us until after the hearing).

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Plus, as mentioned above, there is at least one other bus passenger who acknowledged in his UPD interview that others may have heard the “n” word being said on the bus, and, apparently, it would not have been so unusual.

Inspector Burlingame, who has no qualifications, insight or experience that could provide him with “expertise” as to whether a situation involved elements of racism, should not have been permitted to express his opinions on this subject, which was at the core of this case. By allowing him to opine on this issue, the integrity of the hearing was significantly impaired.

The integrity of this hearing process was destroyed prior to the hearing and at the hearing to such an extent as to have rendered this hearing procedurally defective and fundamentally unfair.

NEW EVIDENCE

There are major issues of post-hearing new evidence which, had it been available to Ms. Agudio prior to the hearing, would likely have had a significant impact on the hearing and on Ms. Agudio’s participation in the hearing.

Witness statements and interviews

The above section, addressing procedural errors, discussed the issue of the approximately 40 witness interviews and statements relief upon by UPD in preparing and pursuing the referral in this case, but which the University refused to provide to us in advance of the hearing.

After the hearing, we did obtain all of those statements and video recorded witness interviews through the District Attorney’s Office.

To be clear - we repeatedly requested access to this evidence prior to the hearing.

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The University, which had access to all of this as these were statements taken and interviews conducted by the UPD, repeatedly refused to provide the evidence to us. We got it later, from another source. This is, beyond any doubt, “new evidence”, that is, evidence we did not have access to prior to the hearing but obtained afterwards.

The significance of this evidence cannot be overstated. There are some 30 or so written statements of people on the bus and at least as many video recorded interviews. Some of the information that came to light in these interviews and statements is mentioned above. The fact is that these statements and interviews, when viewed as a whole, contain many pieces of information which could be helpful to Ms. Agudio, many pieces of information which are not, and numerous inconsistencies and contradictions.

Had this information all been available prior to the hearing, that very well might have tipped the balance for Ms. Agudio and she might have chosen to be present and to testify.

There is absolutely no valid reason that this evidence was not provided.

The University’s refusal to do so irrevocably tainted the integrity and fairness of the hearing.

Medical documentation

A similar issue exists regarding medical documentation for . Again, we had repeatedly requested access to this documentation prior to the hearing. It was, explicitly relied upon by Inspector Burlingame in commencing the student conduct referral. Yet, the University repeatedly refused to disclose this information.

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The medical documentation is relevant and is not fully supportive of the allegations made against Ms. Agudio.

Again, there was no valid reason this information could not have been provided prior to the hearing. And, again, this irrevocably tainted the hearing process.

The “new evidence” described above, which, of course, was not “new” to Inspector Burlingame or the Community Standards office, should have been provided to us prior to the hearing. There is no valid reason for the University’s refusal to provide this evidence, which had been requested multiple times. Ms. Agudio’s due process rights were violated by the University’s repeated refusal to do so.

SEVERITY OF THE SANCTION

The recommended sanction of dismissal from the University is the most severe penalty possible within the University’s student conduct system.

This penalty is not justified by the evidence, is not warranted, and is the result of an unprecedented effort by the University to retaliate against Ms. Agudio for her insistence on expressing her perceptions of what occurred on the CDTA bus on January 30th including her perception and belief that this incident involved racism directed against her and her friends.

If this entire matter is not reversed based on the arguments set forth above, then the sanction must, in fairness, and in consideration of all of the circumstances, be reduced to a penalty that would not interfere with Ms. Agudio’s continued pursuit of her education.

Ms. Agudio has been a member of the national honor society of collegiate scholars, has been an active member of a community-service based fraternity, has been awarded the Spellman Academic Achievement Award each year she has been at the University. Prior to this case, she had never been referred for an alleged student conduct referral and had never been arrested.

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The evidence, such as it is, does not establish Ms. Agudio's guilt. It does seem to establish that the incident on the bus was chaotic and that different people heard and saw different things, or, at least, remembered different things. This significant lack of clarity further renders the proposed penalty of dismissal excessive.

This case could have been an opportunity for the University to teach and to engage young people in an educational and restorative process. One topic such a process could have addressed would have been the important notion that different people might interpret the same situation in different ways.

Instead, the University - so far - has chosen to make this as punitive as possible and to close out the possibility of using this as a "teaching" opportunity.

We submit that it is still not too late, although it is getting close.

The University can modify the proposed penalty of dismissal and, by doing so, could make an enormous impact in regard to healing the University community.

One of the ironies of how the University has handled this case is shown by the virulent and explicit racism to which Ms. Agudio and others have been subjected on social media and elsewhere after the University "decided" that Ms. Agudio and the co-referred parties had not told the full truth. Expelling Ms. Agudio from the University will certainly not end racism on this campus. It will, however, serve to intimidate, belittle and isolate others who experience racism at this University.

CONCLUSION

Thank you for your attention to the concerns raised in this letter and in Ms. Agudio's letter.

We also join in and incorporate herein, to the extent relevant to Ms. Agudio, the arguments contained in the appeals of Ms. Agudio co-referred parties, Ms. Burwell and Ms. Briggs.

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We respectfully ask the University to overturn the findings of the Judicial Board. In the alternative, we ask the University to reduce the sanction from “dismissal” to a penalty that would permit Ms Agudio to continue with her education at the University at Albany without interruption.

Very truly yours,

A handwritten signature in cursive script that reads "Mark S. Mishler". The signature is written in black ink and is positioned above the printed name. A horizontal line extends from the end of the signature across the page.

Mark S. Mishler

Attorney at Law