SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ELNAZ POURASGARI

Plaintiff,

- v -

NEW YORK UNIVERSITY,

Defendant.

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INDEX NO. 157815/2020

MOTION DATE 10/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 16, 17, 29, 30, 31, 32, 33, 34

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

Upon the foregoing documents, it is

ORDERED, ADJUDGED and DECLARED that the petitions for relief, pursuant to CPLR Article 78, of petitioners Marc Santonocito, Elnaz Pourasgari, and Ashley Storino (Index Nos. 157787/2020, 157815/2020 and 157947/2020, motion sequence number 001) are granted; to wit:

(i) It is declared that the separate Decisions made by Respondent New York University ("Respondent" or "NYU") to suspend Petitioners Marc Santonocito, Elnaz Pourasgari, and Ashley Storino (collectively, "Petitioners") for the fall 2020 semester are arbitrary, capricious and constitute an abuse of discretion;

(ii) the Decisions are annulled, voided and vacated;

(iii) Respondent is directed to remove the disciplinary suspension from each of Petitioners' official student records;

(iv) Respondent shall allow Petitioners to immediately return to their fall 2020 classes and receive extensions of time to complete work missed as a result of the Decisions; and it is further

ORDERED that Petitioners' application for attorneys' fees is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

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

MEMORANDUM DECISION

In this Article 78 proceeding, three petitions (Index Nos. 157787/2020, 157815/2020 and 157947/2020) are consolidated for disposition.

The three petitions seek an order (i) declaring the separate Decisions (*infra,* at p. 6) made by Respondent New York University ("Respondent" or "NYU") to suspend Petitioners Marc Santonocito ("Santonocito"), Elnaz Pourasgari ("Pourasgari") and Ashley Storino ("Storino") (collectively, "Petitioners") for the fall 2020 semester to be arbitrary, capricious and constituting an abuse of discretion; (ii) annulling, voiding and vacating the Decisions; (iii) directing Respondent to remove the disciplinary suspension from each of Petitioners' official student records; (iv) allowing Petitioners to immediately return to their fall 2020 classes and receive extensions of time to complete work missed as a result of the Decisions; and (v) awarding Petitioners attorneys' fees, costs and filing fees[1]. The three petitions are consolidated for disposition[2].

Simultaneous to the filing of their petitions, Petitioners moved, by Order to Show Cause ("OSC"), for issuance of a temporary restraining order staying the Decisions, and all the sanctions imposed therein, pending a hearing. On September 25, 2020, the Court heard the OSC applications of Santonocito and Pourasgari and granted the same to the extent of allowing Santonocito and

[1] In their Notice of Motion, Petitioners seek attorneys' fees. However, Petitioners' submissions do not address attorneys' fees and in Respondent's opposition papers, attorneys' fees are likewise not addressed. As such, the Court deems this prayer for relief abandoned and it is thus denied.

[2] While Petitioners were disciplined separately and brought separate Article 78 applications before this Court, the factual circumstances are virtually identical for all Petitioners and they are represented by the same counsel. At a teleconference before the Court held October 15, 2020, counsel for Petitioners agreed that the Court would resolve all petitions globally via written decision.

Pourasgari to continue attending their fall 2020 virtual classes until their petitions are decided on the merits[3]. The OSC application of Storino was heard and granted on October 15, 2020[4].

Respondent opposes all three petitions and moves for their dismissal in their entirety.

BACKGROUND

The Petitioners

Marc Santonocito (Index No. 157787/2020)

Petitioner Santonocito is currently enrolled for academic year 2020-2021 at the NYU School of Professional Studies (NYSCEF doc No. 4, Affidavit of Santonocito, ¶ 2). He is a sophomore majoring in Sports Management (*Id.*). He resides in an apartment off-campus which he shares with three other NYU students (NYSCEF doc No. 1, ¶ 4).

On August 12, 2020, Santonocito "hosted a small gathering of approximately 12-13 friends…at [his] private apartment" (NYSCEF doc No. 4, Affidavit of Santonocito, ¶ 14). He claims that "although [he] was present in the apartment, [he was] social distancing" (*Id.*).

On August 14, 2020, Santonocito attended a small gathering of approximately 10-12 friends "at an outdoor, private rooftop connected to a private apartment" (*Id.*, ¶ 16). He claims that "he walked to and from this small gathering with a mask on" (*Id.*).

On August 20, 2020, Santonocito took a COVID-19 test and the test results released on August 21, 2020 showed that he was negative for COVID-19 (*Id.*, ¶¶ 20-21).

On August 25, 2020, Santonocito received an email from NYU's Office of Student Conduct ("OSC") informing him that the NYU OSC was in receipt of an incident report alleging

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[3] In the Order dated September 25, 2020, this Court granted the OSC applications of Santonocito and Pourasgari on the conditions that, pending a hearing: (i) "[a]ttending virtual classes is the only activity that Petitioner[s] [are] allowed to engage in at Respondent's campuses and/or premises"; (ii) Petitioners shall "observe conduct in accordance with Federal, State, City and CDC guidelines relating to COVID-19"; and (iii) Petitioners shall "observe and comply with all directives, guidelines and rules from Respondent other than those at issue in this proceeding."
[4] As counsel for Petitioners agreed that the Court would resolve all petitions globally, it is understood that the OSC application of Storino was granted subject to the same conditions set forth in the Court's September 25, 2020 Order.

that Santonocito "attended a large gathering at an off-campus location without proper use of masks and social distancing" and that, consequently, Santonocito was being charged with potentially violating university policies related to the COVID-19 pandemic (NYSCEF doc No. 4 at 22).

Elnaz Pourasgari (Index No. 157815/2020)

Petitioner Pourasgari is currently enrolled for academic year 2020-2021 at the NYU College of Arts and Sciences (NYSCEF doc No. 4, Affidavit of Pourasgari, ¶ 2). She is a junior majoring in Biology (*Id.*). She resides in an apartment off-campus which she shares with four other NYU students (NYSCEF doc No. 1, ¶ 4). The apartment allegedly has a "private rooftop" (*Id.*, ¶ 9).

On August 19, 2020, Pourasgari was tested for COVID-19 and on August 20, 2020, she received the results indicating that she was negative for COVID-19 (*Id.*, ¶¶ 16-17).

On August 22, 2020, Pourasgari attended "a small gathering of less than 15 people "at a friend's off-campus, private, rooftop" (*Id.*, ¶ 18). She claims that she "walked to and from this small gathering with [her] suitemate, and [they] wore masks" (*Id.*, ¶ 20). Furthermore, according to Pourasgari, "[she] did take the mask off in the presence of [her] suitemate at this small private gathering given that [she] was on private property, with [her] suitemate and others in [her] social bubble, [they] were outside, and [they] were maintaining social distances from those outside [their] social bubble" (*Id.*).

On August 25, 2020, Pourasgari received an email from NYU OSC informing her that the office was in receipt of an incident report alleging that Pourasgari "attended a large gathering at an off-campus location without proper use of masks and social distancing" and, consequently, she was being charged with potentially violating university policies (NYSCEF doc No. 4 at 21).

Ashley Storino (Index No. 157947/2020)

Petitioner Storino is currently enrolled for academic year 2020-2021 at the NYU Stern School of Business. She resides in an apartment off-campus which she shares with three other NYU students (NYSCEF doc No. 1, ¶ 4). Storino's apartment allegedly has a "private outdoor rooftop" (*Id.*).

On August 12, 2020, Storino "attended a small gathering of approximately 12-13 friends…at a private, off campus apartment" (NYSCEF doc No. 4, Affidavit of Storino, ¶ 14). She claims that she "walked to and from this small gathering with a mask on" (*Id.*).

On August 14, 2020, Storino "hosted a small gathering of approximately 10-12 friends…at [her] outdoor, private rooftop connected to [her] private apartment" (*Id.*, ¶ 17).

On August 19, 2020, Storino took a COVID-19 test and the test results showed that she was negative for COVID-19 (*Id.*, ¶¶ 20-21).

On August 25, 2020, Storino received an email from NYU OSC informing her that the office was in receipt of an incident report alleging that Storino "attended a large gathering at an off-campus location without proper use of masks and social distancing" and, consequently, she was being charged with potentially violating University Policies (NYSCEF doc No. 4, at 20).

All Petitioners herein claim that they are members of the NYU Track and Field team (the "Track and Field Team") (NYSCEF doc No. 4, Affidavit of Santonocito, ¶ 4; NYSCEF doc No. 4, Affidavit of Pourasgari, ¶ 5; NYSCEF doc No. 4, Affidavit of Storino, ¶ 6). Their counsel further alleges that that is "how they came to be in [their social] bubble." (Transcript at 38:19-22 ["This is a group – a social bubble – deliberately formed by a group of students who are track and field athletes. That's how they came to be in the bubble and how they came to be friends."])

The Disciplinary Charges Against Petitioners[5]

Petitioners were all requested to attend a Conduct Conference via Zoom ("Conduct Conference") at different times on August 26, 2020 to discuss the incidents involving them and were further warned that Respondent would consider sanctions, including their suspension from NYU. The Conduct Conferences proceeded as scheduled on August 26, 2020.

On August 27, 2020, each of the Petitioners received a letter from Respondent (collectively, the "Decisions") setting forth Respondent's finding that Petitioners violated sections B1 and E1 of the NYU Student Conduct Policy (the "Student Conduct Policy"). Sections B1 and E1 of the Student Conduct Policy, which the Decisions against Petitioners cite as grounds for the disciplinary action, both prohibit students from engaging in conduct that poses a danger to the health, safety or welfare of the NYU community. Prohibited conduct under sections B1 and E1 is described as follows:

> "University Student Conduct Policy/B1: 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."
>
> "University Student Conduct Policy/E1: 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."

[5] The remainder of the citations in this memorandum decision will be refer to documents under Index No. 157787/2020 unless otherwise noted.

To support the Decisions, Respondent referenced alleged admissions made by Petitioners during the Conduct Conferences wherein Petitioners admitted to attending gatherings without wearing masks and observing social distancing.[6][7][8]

The Decisions imposed the following sanctions:

(i) Suspension from NYU for the fall 2020 semester until December 31, 2020 with eligibility to resume course of studies in the January 2021 term;

(ii) Probation upon return to NYU until August 31, 2021; and

(iii) Submission of a research and reflection paper focusing on the role young people have played in the transmission of COVID-19 in the United States due on October 1, 2020.

On September 2, 2020, Petitioners separately appealed the Decisions on grounds that: (i) a material procedural error occurred as neither section B1 nor section E1 advise anyone that failing to wear a mask or to socially distance in an off-campus private residence constitutes an action prohibited under these policies (NYSCEF doc No. 4, p. 2-4); (ii) that relevant evidence, such as the fact that they tested negative for COVID-19 after the reported incidents,[9] was not considered (*Id.*, pp. 4-6); and (iii) that the sanctions imposed are substantially disproportionate to the offense charged (*Id.*, pp. 6-8).

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[6] In the letter to Santonocito, Respondent stated that "[d]uring [the zoom] conversation, [Santonocito] stated that [he] attended two social gatherings where [he] did not wear a mask or properly social distance [and] this was confirmed through the photos that were posted on social media."

[7] In the letter to Pourasgari, Respondent stated that "[d]uring [the zoom] conversation, [Pourasgari] stated that [she] attended one social gathering where [she] did not wear a mask or properly social distance [and] this was confirmed through the photos that were posted on social media."

[8] In the letter to Storino, Respondent stated that "[d]uring [the zoom] conversation, [Storino] stated that [she] attended two social gatherings where [she] did not wear a mask or properly social distance [and] this was confirmed through the photos that were posted on social media."

[9] This is not the case for Pourasgari, who took the test prior to the reported incident.

On September 11, 2020, Respondent denied Petitioners' respective appeals as they allegedly failed to raise procedural errors that could be grounds for appeal. Respondent also maintained that Petitioners were disciplined under applicable policy provisions as "[section] B1 and E1 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." Finally, Respondent upheld the sanctions it imposed, asserting that the severity of Petitioners' misconduct warranted the same.

Petitioners then separately commenced the Article 78 proceedings before this Court, arguing that Respondent's Determinations against each of them violate NYU's policies and procedures, are fundamentally unfair, arbitrary and capricious, and constitute an abuse of discretion (NYSCEF doc No. 1, ¶ 1).

DISCUSSION

Notice

Petitioners argue as a preliminary matter that Respondent "provided no notice to Petitioner[s], or the NYU community at large, that Petitioner[s] were subject to discipline, let alone suspension for the semester, for failing to wear a face mask and socially distance outside on the private, off-campus rooftop of a private residence during summer break with members of [Petitioners'] social bubble." (Index No. 157815, NYCSEF doc No. 14, p. 12) They further argue that "[n]owhere in the COVID Policy or [Student] Conduct Policy does it inform NYU students that engaging in this type of conduct, outside on the rooftop of a private residence, with a limited number of people, during summer break before stepping foot on campus, and in conjunction with following all applicable state, city, and additional health guidelines, could possibly result in sanctions…" (*Id.*). While Petitioners do not explicitly raise the issue of "pre-conduct notice" in their papers, the gist of Petitioners' argument is that at no point did Respondent provide advance

notice that their off-campus conduct during summer break would subject them to sanctions. The Court thus must address notice before turning to the other legal matters at issue in this proceeding.

To assess whether Petitioners were afforded sufficient pre-conduct notice, the Court evaluates each communication that was sent by Respondent to Petitioners prior to when they engaged in the alleged misconduct in early August.

Pre-Conduct Notice

The July 30, 2020 Notice from Marc Wais to NYU Students

This written communication, entitled "NYU Returns: IMPORTANT COMMUNICATION – COVID-19 Testing, Quarantining, and Early Arrival Procedures for Fall 2020-2021," (the "July 30 Notice") was emailed to all students on July 30, 2020 by Marc Wais, the Senior Vice President for Student Affairs (NYSCEF doc No. 31, Exhibit A). As the title indicates, the contents of this notice are clearly directed to the coming academic year and pertain to conduct within the academic year taking place on NYU's campus. The Court cites to the following relevant provisions of the July 30 Notice to demonstrate that it is clearly limited in scope:

- "*Key Takeaways:* Students from the tri-state 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."

- "*Introduction:* All students coming from or having spent time in the 14 days prior to departure in states designated by NY State (in conjunction with NJ and CT) as "restricted" or coming from international points of departure must arrive on August 18-19 and must quarantine in New York for two weeks before entering any NYU academic or administrative buildings."

- "*Quarantining and Early Arrival:* The 14-day quarantine must, by law, be completed before students attend any inperson classes or enter NYU academic or administrative facilities."

- "*Quarantining for Students who Do Not Live in NYU Housing*: We recommend that students arrive by August 18-19 so that they can fully participate in campus

activities, including in-person classes, on the first day of the semester. Students will be required to attest that they completed the mandatory 14-day quarantine – as well as submit a negative COVID-19 test — before coming to campus."

- "*Compliance with Safety and Health Rules*: The University plans to strictly enforce the new safety and health rules we are putting in place for academic year 2020-2021.... To have a successful semester, we must all strictly abide by the new COVID-19 health and safety protocols — wearing a mask, keeping social distance, handwashing, not coming to class if you feel sick, being tested, etc."

- "*Conclusion:* In advance of and over the course of fall 2020, everyone will be tested at least once. Many will be tested two or more times. Our goals — to safely reassemble on campus for the fall, to prevent the spread of COVID-19, and to keep each other safe as we fulfill our academic mission — greatly rely on a strong testing program, such as this."

A comprehensive reading of the July 30 Notice thus provides that this document did not give pre-conduct notice that a rooftop private gathering over the summer break could result in sanctions including suspension. The Court further notes that Respondent's stated policy of testing each student for COVID-19 "in advance of" the fall semester can be implied as a tacit acknowledgement that Respondent's guidelines do not encompass the types of conduct students may or may not have engaged in over their summer break.

The July 30, 2020 Notice from President Andrew Hamilton

This written communication, entitled "A Letter to Parents from NYU President Andrew Hamilton," (the "Letter to Parents") was emailed to all parents and guardians of students on July 30, 2020 by Andrew Hamilton, the University President (NYSCEF doc No. 31, Exhibit B). The Court cites to the following relevant provisions of the Letter to Parents to demonstrate that it is clearly limited in scope to the forthcoming academic year and pertains to conduct within the academic year taking place on NYU's campus:

- "All of us at NYU are looking forward to welcoming your student for the fall semester, whether in person here in New York, participating in "Go Local" at an NYU global site, or studying remotely."

- "We have done a great deal of planning and work to make the University safer for those who are returning to campus. As we look ahead to the coming academic year, we know the risk from COVID19 cannot be eliminated; however, with conscientious adherence to the safety and health protocols NYU has put in place — particularly mask wearing, physical distancing, and avoiding large gatherings — we believe it can be managed effectively."

- "We will be communicating the necessity of following our new health rules repeatedly and extensively to everyone on campus."

- "Throughout higher education, there is concern about students' willingness to abide strictly by new health rules on campus."

- "Accordingly, the new safety rules will form part of required student conduct throughout the semester. Breaches will be treated seriously and referred to the student disciplinary process; egregious or repeated cases could result in serious sanctions, including but not limited to suspension."

A comprehensive reading of the Letter to Parents thus provides that this document did not give pre-conduct notice that a rooftop private gathering over the summer break could result in sanctions including suspension. While the last cited provision makes clear that students may be subject to serious discipline for conduct violations, the potential sanctions are explicitly limited to conduct occurring during the semester.

The August 5, 2020 COVID Policy

Respondent issued its "Policy on Requirements Related to Access to NYU Buildings and Campus Grounds Resulting from the COVID-19 Pandemic" (the "COVID Policy") effective August 5, 2020 (NYSCEF doc No. 6). The Court cites to the following relevant provisions of the COVID Policy to demonstrate that it is clearly limited in scope to the forthcoming academic year and pertains to conduct within the academic year taking place on NYU's campus:

- "In accordance with these principles, this Policy sets forth requirements for Members of the NYU Community, which, for purposes of this Policy, includes faculty, staff, students, Vendors, and Visitors, entering NYU Buildings and while on Campus Grounds during the COVID-19 pandemic."

- "To Whom This Policy Applies: This Policy applies to all Members of the NYU Community who may be in NYU Buildings and on Campus Grounds in New York."

- "All Members of the NYU Community are required to wear face coverings at all times while in NYU Buildings and on Campus Grounds."

- "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."

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

A comprehensive reading of the COVID Policy thus provides that this document did not give pre-conduct notice that a rooftop private gathering over the summer break could result in sanctions including suspension. The policy bans gatherings, but only those in NYU buildings, and the definition of "Campus Grounds" specifically precludes private residences.

The August 14, 2020 Written Communication and Video from Craig Jolley

On August 14, 2020, a follow-up written communication entitled "Your Action Required: Community Standards in the Context of COVID-19" (the "August 14 Notice") was e-mailed to all students by Craig Jolley, Director of the Office of Student Conduct and Community Standards (NYSCEF doc No. 31, Exhibits C and D). The August 14 Notice set forth additional conduct requirements for the academic year and required students to watch a video about the COVID-19 safety measures, and to sign an affidavit stating that they viewed the video and acknowledged the policies no later than August 24, 2020. The Court cites to the following relevant provisions of the

August 14 Notice and its accompanying video to demonstrate that the materials are clearly limited in scope to the forthcoming academic year:

- "As stated in our July 30th communication, the University plans to strictly enforce our safety and health rules we are putting in place for *academic year 2020-2021*." (emphasis added)
- "[A]ll students enrolled for the Fall 2020 semester must complete the following three tasks, regardless of whether you will be on campus, in person or remote."
- "The NYU Rules of Gatherings should be applied when you're off-campus as well. Bars and parties should be avoided[10] because of their well-documented role in spreading the Coronavirus."
- "Students may face disciplinary action including restriction from campus buildings, removal from the residence halls, and possibly even suspension and de-enrollment, through the Office of Student Conduct."

Unlike the earlier written communications, the August 14 Notice and video clearly provide notice that off-campus gatherings such as those at issue here may be subject to sanctions. As August 14 was the first date that off-campus gatherings were mentioned, it is undisputed that when Petitioner Santonocito hosted a social gathering on August 12, 2020, he had no prior notice that such act could result in imposition of sanctions by Respondent. Santonocito viewed the complete video on the morning of August 14, 2020 and submitted his affidavit at 11:05 a.m. on that day (NYSCEF doc No. 31, p. 5). Of course, when Santonocito attended another social gathering on the evening of August 14, he had already viewed the video and submitted his affidavit. As to Petitioners Pourasgari and Storino, the record shows that neither of them had any prior notice that attending a private gathering off campus could result in imposition of sanctions, as they both viewed the video and submitted their affidavits after the reported incidents, on August 28 and 26, respectively (Counsel for Petitioners' email to the Court dated October 16, 2020).

[10] "Should be avoided" is a recommendation, not a directive. The Cambridge Dictionary defines "should" as "used to say or ask what is the correct or best thing to do."

However, the Court notes that regardless of whether Petitioners viewed these materials and signed their affidavits before or after attending their social gatherings, Petitioners were still not under pre-conduct notice *for the specific social gatherings they attended in early August*. Critically, nothing in the August 14 Notice and video suggest that the enforcements described therein take effect immediately. The communications specifically note that Respondent plans to enforce these rules during the upcoming semester and throughout the academic year but make no reference to their enforcement during the Summer 2020 break. Therefore, as soon as Petitioners viewed the video, and signed the affidavits, they were on notice that the type of conduct they engaged in could subject them to sanctions them *during the academic year*, but Petitioners were afforded no notice that engaging in the same conduct in early August, prior to the start of the semester, would subject them to potential discipline.

The Court additionally notes that on September 3, 2020, after taking disciplinary action against Petitioners, Respondent issued another written communication to all students entitled "Keeping Each Other Safe: Additional Guidance on University Expectations" to the NYU community (the "Additional Guidelines") (NYSCEF doc No. 8). The Additional Guidelines expanded the ban on gatherings to off-campus locations, noting that students are expected to "*stay away from gatherings where there are no masks or distancing, even at off-campus private residences.*" *Id.* (emphasis in original). The Additional Guidelines explicitly state that attending a gathering where masks and distancing are not enforced "will likely" result in suspension (*Id.*). Respondent's decision to issue the Additional Guidelines on September 3 can be read as an acknowledgment that its earlier communications did not sufficiently advise students that off-campus gatherings would subject students to discipline.

Notwithstanding the fact that pre-conduct notice is lacking here, the Court wishes to impress that care and safety during COVID-19 is critical and must be regulated. However, regulations of student behavior during these unprecedented times must still be conducted in a fair manner. The Court acknowledges care that must be taken to avoid potential "super spreader" events, but the precautions must still be done in a manner that affords *notice* to students of the specific types of conduct prohibited.

Furthermore, "suspension," the sanction imposed on Petitioners here, is such an indelible, pejorative sanction that it should only be ratified when clear, unambiguous and full pre-conduct notice is given. This sanction would plague a student throughout his/her academic life, and possibly his/her entire career.

In summary, the Court finds that the requisite pre-conduct notice from Respondent to Petitioners was not achieved, and the relief sought by Petitioners should be granted on the issue of pre-conduct notice alone.

Post-Conduct Notice

Petitioners contend that they were also not afforded post-conduct notice as Respondent failed to provide "[w]ritten notice . . . detailing the date and location of the incident, nature of alleged conduct, and applicable policies alleged to have been violated" pursuant to Respondent's Student Conduct Policy (NYSCEF doc No. 14 at 7). As the specific dates and locations of the gatherings were not referenced, the Decisions were not "based on a preponderance of the evidence" as required by the Student Conduct Policy (*Id.*).

However, on August 25, 2020, Petitioners were each specifically informed, in writing, that Respondent had received an incident report regarding their alleged attendance at an off-campus gathering without proper use of masks and social distancing (NYSCEF doc No. 32, ¶ 7,

Ex. A). While Petitioners are correct that the specific time and location of the subject gatherings were not provided in the initial letters sent to them, Petitioners admitted to attending the gatherings and not wearing a face covering or social distancing at the time the photos were taken, and Petitioners were further provided with a fair opportunity to, and did, defend themselves against the charges alleged both during the Conduct Conference and thereafter on appeal. The photographic proof provided to Respondent confirmed Petitioners' attendance at the off-campus gatherings and demonstrated that neither masks nor social distancing was observed.

Petitioners thus were all afforded post-conduct notice of the offensive conduct and potential sanctions.

However, as addressed *supra,* given the harsh sanction involved here, the Court finds that Respondent owed Petitioners concise advance notice that the particular conduct they engaged in, at the time they engaged in it, was violative of a specific provision of the Student Conduct Policy. Regardless of the Court's assessment of whether it was prudent of Petitioners to engage in the conduct at issue, a party cannot be penalized with such a harsh sanction as suspension without clear, concise, and full advance notice.

Notwithstanding the Court's conclusion that the relief sought by Petitioners should be granted on the issue of pre-conduct notice alone, assuming arguendo that Petitioners were afforded sufficient notice, the Court addresses the remaining issues in this proceeding.

Standard of Review

The Court's 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 (1st 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, Petitioners have requested the Court to review Respondent's disciplinary rulings against them. "Courts have a 'restricted role' in reviewing determinations of colleges and universities." *Powers v St. John's Univ. Sch. of Law*, 25 N.Y.3d 210, 216 (2015). Under well-settled law, determinations made by professional educators with regard to students are entitled to great deference and not generally subject to judicial review. *See Susan M. v New York Law Sch.*, 76 N.Y.2d 241 (1990); *Olsson v Bd. of Higher Educ. of the City of New York*, 49 N.Y.2d 408 (1980); *Tedeschi v Wagner Coll.*, 49 N.Y.2d 652 (1980). Accordingly, 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 (1st Dept 2007), *citing Matter of Harris v Trustees of Columbia Univ.*, 98 AD2d 58, 70 (1st 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 (1st Dept 2014); *Kickertz v New York Univ.*, 110 AD3d 268 (1st Dept 2013); *Matter of Constantine v Teachers Coll.*, 85 AD3d 548 (1st Dept 2011); *Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315 (1st Dept 2006); *Matter of Fernandez v Columbia Univ.*, 16 AD3d 227 (1st Dept 2005).

Therefore, the Court shall apply this standard of review to the present proceeding.

Fundamental Fairness

As a preliminary matter, the Court notes that as NYU is a private university, Petitioners' argument that Respondent "committed fundamental fairness violations" (NYSCEF doc No. 14 at 7) is misplaced. As the Appellate Division has stated, the "relationship [of a private university] with its students "is essentially a private one such that, absent some showing of State involvement, [its] disciplinary proceedings do not implicate the 'full panoply of due process guarantees.'" (*Doe v Skidmore Coll.*, 152 AD3d 932, 934-35 (3d Dep't 2017); accord *Ebert v Yeshiva Univ.*, 28 AD3d 315, 315 (1st Dep't 2006) ("The 'fundamental fairness' promised by this private university's disciplinary rules is circumscribed by the informal processes and limitations described therein, and was not intended to afford petitioner the full panoply of due process rights").

However, the Court notes that notwithstanding the fact that Respondent is a private university and Petitioners are not entitled to the full extensions of due process, they were nevertheless owed full, advance notice that their conduct would subject them to potential sanctions.

The next question before the Court is whether Respondent "substantially adhered" to its procedural and substantive student disciplinary rules cited. For the following reasons, the court finds that Respondent substantially adhered.

Substantial Adherence

As discussed *supra,* the evidentiary record reflects that Petitioners were afforded post-conduct notice as the charges against them were adjudicated by Respondent in accordance with the procedures set forth in Section III, Forums for Resolution, of the Student Conduct Procedures (NYSCEF doc No. 33, ¶ 28, Ex. G at p. 3-5). As required therein, Petitioners were provided with written notice of the charges against them by email and advised that a remote "Conduct Conference" was scheduled to be held via Zoom the following day (*Id.*, ¶ 28). The Conduct Conferences were subsequently held with each Petitioner, as scheduled, in accordance with Section III(B) of the Student Conduct Procedures. During the Conduct Conferences, Petitioners admitted they attended the gathering(s) in question and neither wore a face mask nor maintained social distance from others while at the gatherings (NYSCEF doc No. 32, ¶ 8).

Petitioners' conduct in this regard was confirmed in photographic evidence provided to Respondent (*Id.* ¶ 9, Ex. B). The photographs posted on social media show Petitioners standing near other individuals at rooftop parties, without wearing any sort of face covering (*Id.*, Ex. C). As Respondent determined that a violation of the Student Conduct Policy was found to have occurred, Respondent: (i) suspended Petitioners for the Fall 2020 semester, (ii) placed Petitioners on disciplinary probation for the 2020-2021 academic term, and (iii) required Petitioners to write a short research and reflection paper relating to COVID-19 (*Id.*, ¶ 11, Ex. D). All such sanctions are authorized by the Student Conduct Procedures (NYSCEF doc No. 33, ¶ 24, Ex. G at 5). Petitioners were provided Respondent's determination and the sanctions imposed, in writing, within 10 days of the Conduct Conference, as required by Section III(B) of the Student Conduct Procedures (*Id.*, ¶ 33, Exs. G, K).

As discussed, Petitioners argue that Respondent failed to substantially comply with its own procedures as it failed to provide them with written notice of the "date and location of the incident" upon which the charges were based as required by the Student Conduct Procedures (NYSCEF doc No. 14 at 6-7). As this Court has already concluded, while Petitioners are correct that the specific time and location of the subject gatherings were not provided in the initial letters sent to them, Petitioners still admitted to the conduct with which they were charged. Petitioners are also correct that Respondent's policies permit a further investigation following the initial disciplinary charges, and Respondent here did not conduct a further investigation (NYSCEF doc No. 1, ¶ 77). However, there is nothing in the Student Conduct Procedures that requires a further investigation. The procedures merely state that Respondent "may conduct such additional investigation as they deem appropriate" (NYSCEF doc No. 33, Ex. G at III(B)). Furthermore, "perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance" (*Doe,* 152 AD3d at 935).

The Court therefore finds that Respondent "substantially adhered" to the student disciplinary procedures set forth in its Student Conduct Procedures.

Arbitrary and Capricious

The Court's next inquiry is to determine whether Respondent's disciplinary determinations regarding a nonacademic matter "were 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 the Decisions sent to each Petitioner that stated as follows:

> "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, specifically:
>
> *University Student Conduct Policy/B1. 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...,*
> *University Student Conduct Policy/E1. 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."*
>
> (NYSCEF doc No. 2).

Petitioners argue that neither B1 nor E1 "remotely advises them, or anyone in the NYU community, that failing to wear masks or socially distance" constitute acts punishable under these policies. According to Petitioners, B1 is intended to proscribe bullying, threatening, or abusive behavior while E1 is intended to proscribe disorderly conduct. Thus, Petitioners maintain that it was irrational and capricious for NYU to rely on these policies to discipline them for any misconduct related to COVID-19.

Respondent argues that B1 and E1 prohibit a broad range of conduct that poses a risk to or otherwise implicates the health and safety of the NYU community. Although these policies provide examples of prohibited conduct, Respondent maintains that "such examples are just that— illustrative, non-exhaustive examples—as both sections B1 and E1 explicitly state that conduct prohibited by those sections 'includes but is not limited to' the examples given" (NYSCEF doc No. 33, ¶ 21).

The Court concludes that had Respondent afforded Petitioners sufficient pre-conduct notice, sections B1 and E1 would have provided a rational basis for discipline, as the Court cannot second guess the scope of policies that may properly fall within the purview of the educational institution which issued and implements them. The Court notes that while attending a private gathering would not, in normal times, be considered disruptive behavior, in the midst of a deadly global pandemic, attending a social gathering without proper safety protocols in place could certainly be deemed behavior that has the potential to endanger "the safety, security, health or welfare of the community." Furthermore, as discussed *supra,* Petitioners were required to submit electronic affidavits stating that they read and agreed to abide by the Student Conduct Policy – which contains sections B1 and E1 – to support the health and safety of oneself and others within the NYU community. In fact, Petitioners themselves admitted in this proceeding that section "E1 is intended to proscribe disorderly conduct, which can include a failure to abide by the COVID Policy or any related governmental orders issues concerning public health" (NYSCEF doc No. 14, p. 5). Additionally, the Student Conduct Policy provides that "the University may take 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" (NYSCEF doc No. 5, p. 6). Thus, it would have been rational for Respondent to rely on applicable provisions under the Student Conduct Policy had Petitioners been afforded pre-conduct notice.

In sum, the Court finds Petitioners' opposition arguments on this specific matter to be unpersuasive and reiterates the finding that Respondent's disciplinary decision would have satisfied the hybrid "substantial adherence/arbitrary and capricious" standard of review, had Respondent afforded Petitioners sufficient pre-conduct notice.

The final issue to be addressed is whether the sanctions imposed by Respondent 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).

Shocking the Conscience

In evaluating the appropriateness of nonacademic discipline, such as that imposed here, the Court is limited to evaluating whether the penalty imposed is so disproportionate to the offense as to be shocking to one's sense of fairness. *Powers v St. John's Univ. Sch. Of Law*, 25 NY3d (2015); *Beilis v Albany Medical Coll. of Union Univ.*, 136 AD2d 42, 45 (3d Dept 1988). A result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals." *Pell*, 34 N.Y.2d 222, 234 [1972]). "The Court is not allowed to simply substitute its judgment as to the appropriate measure of punishment for that determined appropriate by the [university]." *Bilicki*, 2019 N.Y. Misc. LEXIS 7154 at *18 citing *Pell v Bd. of Educ. of Union Free Sch. Distr.* #1, 34 N.Y.2d 222 (1974) and *Kelly v Safir*, 96 N.Y.2d 32 [2001]). "Even if this Court were to assume a lesser penalty to be more appropriate, it is not proper to substitute such a view to replace the judgment upheld by the [university]." *Bilicki*, 2019 N.Y. Misc. LEXIS 7154 at *19 citing *Scahill v Greece Cent. Sch. Dist.*, 2 NY3d 754 (2004).

Of course, in the instant case, the issue of whether the sanction shocks the conscience is of no moment as the imposition of sanctions in the first place was improper. However, the Court

writes to address the fact that if in fact Respondent had given proper notice, the sanctions would have been upheld.

Petitioners argue that the imposed sanctions are substantially disproportionate to the alleged offenses given that Petitioners adhered to local New York City and State guidelines for small private gatherings (NYSCEF doc No. 14 at 12). However, Respondent is entitled to maintain requirements for its students' behavior that are stricter than local ordinances.

Petitioners further contend that Respondent's sanction of a semester-long suspension is completely unwarranted as Petitioners all tested negative for COVID-19 following the gatherings, and their classes in the fall 2020 semester are all virtual, meaning they do not even have to enter a campus building to attend their classes and therefore cannot possibly endanger their fellow students (NYSCEF doc No. 14 at 16). Petitioners conclude that the sanction of a suspension completely disregards the factual circumstances at hand.

The Court is unpersuaded by Petitioners' arguments on this matter, and finds that, once again, had proper notice been afforded, the punishments would not constitute egregious sanctions. Furthermore, even if the Court were in agreement that Respondent's sanctions are unduly harsh, the Court cannot micromanage sanctions or substitute its own judgment for that of Respondent. Regardless of whether Petitioners ever posed an actual threat to the health or safety of the NYU community, the fact of the matter is that the type of conduct Petitioners engaged in has played a substantial role in the transmission of COVID-19 and can have a direct impact on the universities; indeed, similar events have resulted in COVID-19 outbreaks and several higher education institutions needing to close to all in-person instruction for the Fall 2020 semester. (NYSCEF doc No. 32, ¶ 16). It is frankly of no moment whether the Court agrees that Respondent chose sanctions that were most fittingly tailored to the egregiousness of Petitioners'

conduct. In summary, had Respondents afforded Petitioners sufficient pre-conduct notice, the sanctions imposed would have all been upheld by this Court.

The Court concludes that although Respondent substantially adhered to its own procedures, did not act arbitrarily in relying on sections E1 and B1 of the Student Conduct Policy, and imposed proper sanctions, the relief sought by Petitioners is nevertheless granted solely on the ground that Petitioners were not afforded clear, concise, full advance notice that the conduct they engaged in, at the time they engaged in it, would subject them to potential discipline.

CONCLUSION

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that the petitions for relief, pursuant to CPLR Article 78, of petitioners Marc Santonocito, Elnaz Pourasgari, and Ashley Storino (Index Nos. 157787/2020, 157815/2020 and 157947/2020, motion sequence number 001) are granted; to wit:

(i) It is declared that the separate Decisions made by Respondent New York University ("Respondent" or "NYU") to suspend Petitioners Marc Santonocito, Elnaz Pourasgari, and Ashley Storino (collectively, "Petitioners") for the fall 2020 semester are arbitrary, capricious and constitute an abuse of discretion;

(ii) the Decisions are annulled, voided and vacated;

(iii) Respondent is directed to remove the disciplinary suspension from each of Petitioners' official student records;

(iv) Respondent shall allow Petitioners to immediately return to their fall 2020 classes and receive extensions of time to complete work missed as a result of the Decisions; and it is further

ORDERED that Petitioners' application for attorneys' fees is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

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

10/21/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE