USCA No. 20-35582
(District of Idaho Dct No. 4:15-CV-00430-REB)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUN YU,	)
	)
Plaintiff/Appellant,	)
	)
vs.	)
	)
IDAHO STATE UNIVERSITY,	)
	)
Defendant/Appellee.	)
	)

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Idaho
Honorable Ronald E. Bush, District Court Chief Magistrate Judge

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I.

STATEMENT OF JURISDICTION

The Federal District Court of Idaho ("District Court" or "Court") had original jurisdiction over Mr. Jun Yu's ("Mr. Yu" or "Appellant") claim pursuant to 28 U.S.C. §§ 1331, 1332, 1343, and 1367. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court had jurisdiction to declare the rights of the parties and grant all further relief deemed necessary and proper as Appellant brought a private right of action for intentional discrimination pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et.seq*. On May 31, 2020, the Court entered its Trial Decision, With Findings of Fact and Conclusions of Law. 1-ER-4-90.[1] The Court found Mr. Yu could not prevail on his claim and that the Appellee, Idaho State University ("ISU" or "Appellee") was entitled to Judgment in its favor. On June 1, 2020, the Court issued its Judgment. 1-ER-3. On June 29, 2020, Appellant timely filed a Notice of Appeal. 6-ER-1357-62. Accordingly, the Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[1] The Excerpt of Record begins with ER-0001 with each successive number having four numbers some of which are leading zeros. Where there are leading zeros, the number in the brief will exclude the leading zeros. Eg,.ER0004 that appears in Volume 1 will be referred to as 1-ER-4.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court Erred in Finding the Appellant had Failed to Establish through Direct Evidence that He Was the Victim of Intentional Discrimination.

2. Whether the District Court Erred in Finding that the Appellant had Failed to Show Through Circumstantial Evidence that the Appellee's Actions Were a Substantial Departure From Accepted Academic Norms and Indicative that the Appellee's Faculty Failed to Exercise Professional Judgment.

3. Whether the District Court Erred in Finding that Mr. Yu was not a Victim of Intentional Discrimination in Violation of Title VI.

4. Whether the District Court Erred in Refusing to Accept that Implicit Bias to Include Aversive Racism is Relevant in Determining if the Appellee's Actions were Acts or the Combination of Acts were Indicative of Intentional Discrimination.

5. Whether the District Court Erred in Finding that Mr. Yu's Dismissal From Idaho State University was Warranted Where Under the Substantive Due Process Standard of Review Involving an Established Liberty Interest, A Warning of Dismissal and Compliance With Established Procedures Was Required.

III.

STATEMENT OF THE CASE

Mr. Yu is a citizen of China who grew up in a Chinese cultural and language context. 1-ER-6, 2-ER-107, 2-ER-149, 2-ER-339, 2-ER-342. In 2008, Mr. Yu was accepted into Idaho State University's (ISU) Doctoral Clinical Psychology Program ("ISU's Program"), and Mr. Yu was the only student from China during his time in the program. 1-ER-8, 1-ER-70, 2-ER-218 p. 2-285,[2] 2-ER-231 p. 3-334, 2-ER-342 and 2-ER-360. Mr. Yu's TOEFL score of 94 exceeded ISU's admission's requirement.[3] 2-ER-107. Mr. Yu completed all coursework in English, taught classes in English, made presentations in English, published papers in English, completed all required clinical practicums in English, and successfully defended his dissertation in English. 2-ER-107. By July 13, 2012, apart from completing his final internship, Mr. Yu had successfully completed all requirements to be awarded his Clinical Psychology Ph.D. 2-ER-107, 2-ER-276 p. 3-513, 2-ER-358. Mr. Yu was qualified and approved by ISU to do an internship, which he constructed with the Cleveland Clinic Center for Autism ("CCCA") and Dr. Cheryl Chase, a psychologist in private practice, located in the Cleveland, Ohio area. 1-ER-22,

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[2] This citation format follows the court reporter's on the transcript and is trial day two, page 285, and does not refer to pages 2 through 285.

[3] TOEFL stands for Test of English as a Foreign Language. The standardized, multi-part test is designed to measure the English proficiency on non-native-English speaking people.

2-ER-107, 2-ER-169-171, 2-ER-310, 2-ER-358.

On October 31, 2012, a contract was entered into between the Cleveland Clinic Foundation and ISU to enable Mr. Yu to participate in the internship. 2-ER-108, 2-ER-171, 2-ER-351. The contract was to commence on January 2, 2013. 2-ER-108, 2-ER-171. On April 4, 2013, Dr. Mark Roberts, ISU's Director of Clinical Training, was informed that Mr. Yu had been dismissed without notice from the internship at the CCCA. 2-ER-108. On May 3, 2013, Mr. Yu was informed that the Graduate Faculty of the Psychology Department of ISU had voted to dismiss him entirely from ISU's Program. 1-ER-29, 2-ER-108, 2-ER-173, 2-ER-311, 2-ER-354. Mr. Yu was advised that he could appeal the decision of the Graduate Faculty by following the procedures delineated in the ISU Graduate Catalog.

On May 9, 2013, Mr. Yu submitted his appeal to the Graduate Faculty of the Psychology Department. On May 17, 2013, the Graduate Faculty of the Department of Psychology denied Mr. Yu's appeal. 1-ER-30, 2-ER-173, 2-ER-133, 2-ER-340. On June 26, 2013, Mr. Yu submitted his appeal to the Dean of Idaho State University College of Arts and Letters. 2-ER-340. On July 30, 2013, the Dean issued her decision on Mr. Yu's appeal, denying Mr. Yu the relief he sought and advising Mr. Yu of his right to appeal. 1-ER-31, 2-ER-340. On August 28, 2013, Mr. Yu submitted his appeal of the Dean of Idaho State University College of Arts

and Letters decision to the Dean of ISU's Graduate Schools. 2-ER-340. On October 2, 2013, Dr. Cornelis J. Van Schyf, B. Pharm., D.Sc., DTE, Dean of the Graduate School, Idaho State University, denied Mr. Yu's appeal and thereby made Mr. Yu's dismissal effective on October 2, 2013. 1-ER-31, 2-ER-149, 2-ER-341, 2-ER-361.

On September 16, 2015, Mr. Yu timely filed his complaint and demand for jury trial in the Federal District Court of Idaho. 1-ER-31, 2-ER-311. In his complaint against Idaho State University, Mr. Yu alleged a violation of Title VI of the 1964 Civil Rights Act, a violation of Procedural Due Process pursuant to 42 U.S.C. § 1983, and Negligent Infliction of Emotional Distress. 2-ER-108, 2-ER-311. On March 29, 2017, Mr. Yu filed an amended complaint and demand for jury trial. The amended complaint alleged a violation of Title VI of the 1964 Civil Rights Act, a deprivation of Mr. Yu's procedural and substantive due process rights in violation of the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983, Negligent Infliction of Emotional Distress, Promissory Estoppel, and thirteen (13) counts of Breach of Contract. 2-ER-311, 3-ER-393-408. On August 25, 2017, the Defendant/Appellee, Idaho State University, filed a renewed motion for summary judgment wherein it asserted that the Court lacked jurisdiction on the state court claims based on the Eleventh Amendment. 2-ER-311. On January 26, 2018, the Federal District Court of Idaho issued its Memorandum Decision and Order wherein it maintained jurisdiction on Mr. Yu's

Title VI claim of discrimination. However, the Court dismissed all state court claims holding that the Eleventh Amendment precluded the Court from exercising jurisdiction on Mr. Yu's state claims. 2-ER-325.

A four-day bench trial before the Honorable Ronald E. Bush was held on February 26, 27, 28 and March 1, 2019, the parties having consented to proceed before a Magistrate Judge. 2-ER-148-309. Final briefing of the parties was completed on April 8, 2019. The Court issued its Decision on May 31, 2020. 1-ER-4-90. In that decision, the Court correctly concluded that (1) ISU was a "program or activity receiving Federal financial assistance" for purposes of satisfying the elements of Title VI, 1-ER-83, (2) that Mr. Yu was a member of a protected class, 1-ER-83, (3) Mr. Yu's dismissal from ISU's Clinical Psychology Doctoral Program was an adverse educational action, 1-ER-84, and (4) that pursuant to an adverse inference only that Mr. Yu established that he was treated worse than similarly situated students not in his protected class. 1-ER-84.

However, in that decision, notwithstanding significant evidence to the contrary, the Court erroneously concluded that the evidence provided at trial established that Mr. Yu was not qualified to continue in ISU's Clinical Psychology Doctoral Program as it was determined that Mr. Yu was dismissed from the program solely because Mr. Yu's "professional progress was unsatisfactory and that he lacked clinical competence in key areas." 1-ER-83.

The Court erroneously concluded that Mr. Yu was not treated differently than

similarly situated students despite Mr. Yu providing evidence that he was treated differently than similarly situated students who were not members of Mr. Yu's protected class in regard to: (1) being apprised of inadequacies of performance and their consequences on academic standing, 1-ER-72-78 and (2) receiving formal remediation for perceived academic deficiencies. 1-ER-18, 1-ER-19, 1-ER-72-74, 1-ER-81, 2-ER-114-115, and 2-ER-118. In concluding that Mr. Yu could not prevail on his Title VI claim, the Court stated the following:

> "The Court is persuaded that the ISU faculty and officials involved in the decision to dismiss Yu were properly exercising their professional judgment as to Yu's eligibility to continue his studies at ISU. The Court is not persuaded that, in making such a decision, they substantially departed from accepted academic norms. 1-ER-88."

Yet the Court also noted that in the case of *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978), that Justice Powell importantly observed that Ms. Horowitz "was warned of her clinical deficiencies and given every opportunity to demonstrate improvement or question the evaluations." *Id* at 93. 1-ER-88.

The Judgment of the Court was issued on June 1, 2020. 1-ER-3. Mr. Yu timely filed his Notice of Appeal of the District Court's Decision on June 29, 2020. 6-ER-1357-62.

IV.
SUMMARY OF THE ARGUMENT

This case involves a Chinese international student being dismissed from ISU's Clinical Psychology Doctoral Program. From the very beginning of his enrollment until his dismissal, direct evidence showed Mr. Yu was the victim of intentional discrimination as illustrated in *In re Rodriguez*, 487 F.3d 1001, 1008–09 (6th Cir. 2007). While ISU conceded Mr. Yu was progressing as expected, ISU maintained that throughout Mr. Yu's enrollment at ISU, his performance in clinical practicums and an internship warranted Mr. Yu's dismissal from the program.

ISU justified dismissing Appellant by alleging Appellant was not making satisfactory progress toward degree completion; yet at the time ISU voted to dismiss him from the program Mr. Yu: 1) was a student in good standing; 2) was not on any probation or disciplinary status; 3) had successfully defended his doctoral dissertation; 4) had completed all degree requirements except for internship; 5) had already started an internship, for which ISU had approved his readiness and also approved the internship proposal; 6) had never been warned that he was at risk for dismissal, nor specifically that if he should not successfully complete the CCCA internship he would be terminated from the program; and 7) had never been provided a formal Plan of Remediation as required by the American Psychological Association (APA) standards nor in the format mandated

by ISU policy. 5-ER-1124, 1-ER-9, 2-ER-168, p.1-82, 2-ER-276 p. 3-513, 1-ER-81, 2-ER-192 p. 2-180, 2-ER-206 p. 2-237 – 2-ER-207 p. 2-238, 5-ER-1050-58, 6-ER-1336.

As established at trial, the circumstantial evidence showed the following: (1) that Mr. Yu was a victim of ISU's failure to follow the standards mandated by their program accreditor, the APA, (2) that Mr. Yu was a victim of ISU's cultural incompetence, and (3) that Mr. Yu was a victim of aversive racism. Mr. Yu enjoyed a liberty interest protected by the U.S. Constitution to attend a public university free of discrimination. Under the substantive due process standard, Mr. Yu was entitled to receive a warning that his continued alleged unsatisfactory performance could result in his dismissal from the program. Further, Mr. Yu was never provided a formal Plan of Remediation as required by the APA nor in the format mandated by ISU policy. The actions of ISU were arbitrary, capricious and a substantial departure from accepted academic norms. The direct evidence and circumstantial evidence standing alone established that Mr. Yu was a victim of intentional discrimination in violation of Title VI. The two taken together leave no doubt. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 134, 120 S. Ct. 2097, 2101, 147 L. Ed. 2d 105 (2000): *see Pottenger v. Potlatch Corp.*, 329 F.3d 740, 746-747 (9th Cir. 2003); *see Saetrum v. Vogt*, 673 F. App'x 688, 690 (9th Cir. 2016).

V.

STANDARD OF REVIEW

The standard of review of the Appellate Court was recently articulated as follows:

> **…**because we are reviewing factual findings after a trial, we must give those findings substantial deference. We cannot reverse merely because we would have reached a contrary conclusion based on the evidence. *See Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 572 (9th Cir. 2005). Rather, we can reverse only if the district court's findings are clearly erroneous to the point of being illogical, implausible, or without support in inferences from the record. *See Hinkson*, 585 F.3d at 1251.

Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, No. 18-16105, 2020 WL 2703707, at *7 (9th Cir. May 26, 2020).

VI.

ARGUMENT

The Court Erroneously Concluded that Mr. Yu was Not a Victim of Intentional Discrimination by the Appellee in Violation of Title VI.

A. The Court Erred in Concluding that Mr. Yu Failed to Establish Through Direct Evidence that he was the Victim of Intentional Discrimination in Violation of Title VI.

"Direct evidence is evidence 'which, if believed, proves the fact [of discriminatory animus] without inference or presumption.'" *Mayes v. Winco Holdings, Inc.*, No. 4:12-CV-00307-EJL, 2014 WL 1652661, at *7 (D. Idaho Apr. 23, 2014), *rev'd and remanded,* 846 F.3d 1274 (9th Cir. 2017) citing *Coghlan v. American Seafoods Co.,* 413 F.3d 1090, 1095 (9th Cir.2005) (citation omitted). The Court erroneously concluded that there was no direct evidence to establish that Mr. Yu was the victim of intentional discrimination. The Court reasoned that as Mr. Yu was enrolled in a course of study that required him to relate to patients or clients whose primary language was English "that the ability to communicate clearly and to understand clearly are especially important skills." 1-ER-85. The Court further concluded that "[i]t was entirely appropriate for ISU faculty to discuss Yu's fluency in English (or limitations to the same), both among themselves and with Yu directly, because it became an issue in his course of study." 1-ER-85. Taking facts the Court deemed relevant into consideration, the Court concluded that Mr. Yu was not the victim of intentional discrimination.

At first blush and ignoring additional facts that were at the Court's disposal, the Court's analysis seems rational. Yet relevant facts dismissed by the Court at trial establish that Mr. Yu was the victim of intentional discrimination.

It is important to note that Appellee knew that Mr. Yu's career goal was to return to China to provide parent/child skills training. 2-ER-163-64, 2-ER-223 p. 2-302, 5-ER-1041. Notwithstanding this knowledge, Appellee pointed to Mr. Yu's English as a reason for dismissing him from the program. Therefore, the emphasis Appellee placed on Mr. Yu's English language skills and his becoming fluent in the nuances of the English spoken by English-speaking American clients is puzzling. The latter observation is especially relevant when the facts show that Mr. Yu completed all coursework in English, taught classes in English, made presentations in English, published papers in English, completed required clinical practicum work with clients in English, and defended his dissertation in English. 2-ER-107. Further, while Mr. Yu was turned down for an externship for Fall 2010 to Spring 2011 for an alleged lack of fluency in English, ISU still assigned Mr. Yu to teaching and research duties. 2-ER-192 p. 2-181. Indeed, it would be a violation of ethical standards, which mandate there should be competent faculty teaching students, and that a university should not have an underperforming student with poor communication skills be assigned teaching responsibilities. 2-ER-191 p. 2-177, 2-ER-192 p. 2-178. While the Court concluded that Mr. Yu's

application to ISU was welcomed as it presented an opportunity to grow the diversity of ISU's Program, 1-ER-85, Mr. Yu's actual experience was not reflective of the opportunity presented.

Direct evidence of intentional discrimination can be established by a showing that an individual has the physical, cultural or linguistic characteristics of a national origin group and that a Plaintiff's/Appellant's accent and/or speech pattern played a motivating part in an adverse decision; *see* 29 CFR § 1606.1 and *see* generally *In re Rodriguez*, 487 F.3d 1001, 1008–09 (6th Cir. 2007). Further, "language is a close and meaningful proxy for national origin"; *see Yniguez v. Arizonans For Official English*, 69 F.3d 920, 948 (9th Cir.1995).

From the very beginning of Mr. Yu's association with Appellee, the Appellee through Dr. Mark Roberts, the Director of Clinical Training, expressed a concern about Mr. Yu's language fluency and ability to communicate in English. 2-ER-276 p. 3-512. Dr. Roberts remarked "I can't understand him (Mr. Yu)" during an admissions committee meeting; this prejudicial remark was immediately noted by Dr. Nicole Prause, who informed Dr. Roberts that she understood Mr. Yu just fine. 2-ER-154 p. 1-26. Indeed, while Mr. Yu was working as a teaching assistant for Dr. Prause, she noted that Mr. Yu had no trouble effectively communicating with students. 2-ER-154 pp. 1-26--1-27. Nevertheless, Dr. Roberts still remarked that Mr. Yu's English speech was "choppy or halting" and, in an

evaluation, referred to Mr. Yu's Chinese language as "a liability." 2-ER-276 p. 3-512, 1-ER-13. Dr. Roberts cited "poor linguistic communication with English-speaking patients and supervisors" as a reason for dismissing Mr. Yu from the program. 5-ER-1252. Furthermore, Dr. Shannon Lynch, who at the time of Mr. Yu's termination from ISU was serving as the Chair of the Appellee's Department of Psychology, also made a disparaging remark about Mr. Yu's English. Indeed, at one point in speaking to Mr. Yu's spouse, Dr. Lynch described Mr. Yu's English as being terrible. While Dr. Lynch testified that she believed that she did not say that Mr. Yu's English was terrible (2-ER-295 p. 4-592), Ms. Jocelyn Eikenburg, the spouse of Mr. Yu, has a vivid recollection of Dr. Lynch's comment and has no doubt about the words Dr. Lynch spoke. 2-ER-156 pp. 1-34--1-35.

In November 2011, under Dr. John Landers' supervision at Eastern Idaho Regional Medical Center (EIRMC), Mr. Yu was abruptly dismissed from an externship without warning or remediation for allegedly being "unable to grasp the communication nuances". 2-ER-163, 2-ER-205 p. 2-231, 5-ER-1041. After the externship dismissal, Dr. Landers and Dr. Roberts had a conversation on December 12, 2011, about Mr. Yu wherein Dr. Roberts took notes. 2-ER-109, 3-ER-675. Under the category Substantive Performance Deficits, paragraph 3 "Rapport Building", Dr. Roberts wrote: "Problems possibly related to lack of fluent expressive English language, but Jun may have been routinely missing non-

verbal signals of patients in American culture." 3-ER-675. However, Dr. Landers did not tell Dr. Roberts that Mr. Yu had a problem expressing himself in English. Indeed, Dr. Landers testified that Mr. Yu did not have a problem expressing himself in English and stated: "If we are talking about pronunciation, if we are talking with articulation, if we are talking about fluency, those were not my concerns." 2-ER-288 pp. 4-563--4-564.

Dr. Prause testified that where a supervising clinician is concerned about the ability of a student therapist to create an alliance or effectively communicate with a patient or client a test may be given to confirm or dispel the supervisor's concern. The test results will provide quantitative assessments that will either eliminate the supervisor's concerns or provide information that would suggest that a remediation regimen would be appropriate for the student. These tests have been available for "decades" to assess the effectiveness of a student's ability to form alliances with patients and clients. 2-ER-154 p.1-28, 2-ER-155 p.1-29. Notwithstanding the availability of methods such as testing, Appellee failed to make a professional assessment to obtain the objective data to confirm or dismiss its subjective opinion that Mr. Yu's spoken English was affecting his ability to create alliances or effectively communicate with a patient or client. 2-ER-163 p. 1-64, 2-ER-168 p. 1-82, 2-ER-277 p. 3-518, 2-ER-305 p. 4-632.

In April 2013, Mr. Yu was abruptly dismissed without warning or

remediation from his CCCA internship for allegedly having "not made progress". 2-ER-205 pp. 2-231--2-234, 5-ER-1106, 5-ER-1120-22. This dismissal was also predicated on Appellee's Department of Psychology (Department), chaired by Dr. Lynch, having done no investigation. The Department did not investigate the comments reportedly made by Dr. Thomas Frazier regarding Mr. Yu not being ready for the internship; nor did they look into why Dr. Frazier quit being a supervisor for Mr. Yu since the first week of the internship. 2-ER-306 pp. 4-634--4-635. While Dr. Speer made an unprofessional conclusion about Mr. Yu without prior warning or remediation, the Department valued Dr. Speer's perspective, but first omitted and later discounted the perspective of Dr. Chase because of what they perceived, without the benefit of a thorough investigation, was Mr. Yu's "very limited client contact" when working with Dr. Chase. 2-ER-306 p. 4-635, 2-ER-307 pp. 4-637--4-638, 4-ER-832-46, 5-ER-1250-52. Had the Department actually spoken with Dr. Chase, it would have learned (1) that Dr. Chase did not have the same concerns as Dr. Speer in regard to how Mr. Yu was progressing in the internship, (2) why Mr. Yu was not allowed to administer tests during the first three months of the internship, (3) that Mr. Yu was involved in direct clinical service to clients, (4) that Mr. Yu prepared clients for testing, and (5) that Dr. Chase had planned to give Mr. Yu more responsibility had the internship continued. 2-ER-181 pp. 2-137- -2-ER-183 p. 2-145, 2-ER-185 pp. 2-

152--2-ER-186 p. 2-154, 5-ER-1127-28. Notably, despite Appellee pointing to CCCA supervisors to support their case, Dr. Speer and Dr. Frazier failed to provide live testimony at trial.

Nevertheless, in her letter to Mr. Yu denying his appeal from dismissal from ISU's Program, Dr. Lynch wrote: "Most importantly, your demonstrated failure at the Cleveland Clinic provided explicit evidence that your lack of satisfactory progress is not the result of a linguistic problem alone." 5-ER-1125. Based on the evidence presented at trial there is no doubt that Mr. Yu's accent and/or speech pattern played a motivating part in Mr. Yu's dismissal from ISU. Additionally, notwithstanding the availability of testing that had been around for decades to measure a student's ability to create alliances or effectively communicate with a patient or client, none was ever given to Mr. Yu.

The trial record established Mr. Yu is an individual with linguistic characteristics of a national origin group and that Mr. Yu's accent and/or speech pattern played a motivating part in the adverse decision to dismiss Mr. Yu from ISU's Program. Therefore, the trial record shows through a preponderance of evidence, established by direct evidence, that Mr. Yu was the victim of race or national origin discrimination. The Court finding that there was not direct evidence of intentional discrimination was clear error.

B. The Court Erred in Concluding that Mr. Yu Failed to Establish Through Circumstantial Evidence that he was the Victim of Intentional Discrimination in Violation of Title VI.

a. The Court Erred in Finding that Mr. Yu Failed to Demonstrate that the Actions or Inactions of the Appellee Directed Toward or Affecting his Enrollment Established Circumstantial Evidence of Intentional Discrimination.

Appellee attempted to show that the actions or inactions it took or failed to take in dismissing Mr. Yu from its Clinical Psychology Doctoral Program were legitimate and based on its judgment of Mr. Yu's level of competency rather than on any actions or inactions on the part of Appellee or its faculty. This was done primarily through the testimony of Dr. Roberts (2-ER-246-81, 2-ER-282-84) and Dr. Lynch (2-ER-293-308). Of significance, Appellee provided no expert testimony to support or confirm its position. Largely by not giving enough weight to the testimony of Mr. Yu's witnesses and overlooking or rejecting the testimony of Mr. Yu's expert witnesses, the Court erroneously concluded as follows:

> Yu has not proven that he met ISU's legitimate educational expectations. The record contains a preponderance of evidence, both in contemporaneous documents and in trial testimony, that Yu's professional progress was unsatisfactory and that he lacked clinical competence in key areas. The evidence presented in this case failed to persuade that Yu was dismissed for any reason other than his inability to gain, or to demonstrate, the degree of clinical competence expected of a fifth-year clinical psychology doctoral student. 1-ER-83 and 1-ER-84…ISU put forth persuasive evidence that Yu lacked clinical competency even after years of training and

> numerous opportunities to improve. Yu, who bore the burden of persuasion, did not put forth persuasive evidence to prove all the elements of his claim under Title VI, 42 U.S.C. § 2000d, which prohibits intentional discrimination based on race or national origin. 1-ER-89.

However, as will be demonstrated in detail herein, Mr. Yu established through expert testimony that the treatment he endured and the actions that ISU failed to take were arbitrary, capricious and a substantial departure from accepted academic norms. The Court erred when it failed to realize that had the Appellee: (1) complied with APA Ethical Principles of Psychologists and Code of Conduct (APA Ethical Standards), 5-ER-1129-53, and APA Guidelines and Principles for Accreditation of Programs in Professional Psychology (APA Accreditation Standards), 5-ER-1154-87, (2) complied with cultural competence standards (included in APA standards and state licensure requirements) in training an international student from China, and (3) not been engaged in aversive racism, Mr. Yu would have successfully completed the program and received his Doctorate in Clinical Psychology.

1. In Dismissing Mr. Yu from its Program, ISU was in Violation of APA Ethical Standards and APA Accreditation Standards, Which Was a Very Far Departure from Accepted Academic Norms.

Dr. Gerald P. Koocher was called to testify as an expert witness on behalf of Mr. Yu. Dr. Koocher was allowed to testify regarding the Appellee's adherence or non-adherence to APA Ethical Standards or APA Accreditation Standards in force

when Mr. Yu was enrolled at ISU. Dr. Koocher's qualifications are impressive and impeccable. Of note Dr. Koocher is the author of *Ethics in Psychology and the Mental Health Professions: Standards and Cases (third edition*) published by Oxford University Press. This publication was the textbook used by Appellee in the teaching of ethics in its Clinical Psychology Doctoral Program while Mr. Yu was a student. 2-ER-274 p. 3-507, 2-ER-275 p. 3-508. Dr. Koocher is a Fellow of the American Psychological Association and a Fellow of the American Association for the Advancement of Science. 2-ER-186 p. 2-156. Dr. Koocher served as the Dean of the College of Science and Health at DePaul University where in that capacity he oversaw the doctoral programs in psychology. 2-ER-186 p. 2-157. Dr. Koocher also served as President of the American Psychological Association in 2006 and served on its Board of Directors for ten years. 2-ER-187 p. 2-160.

In his testimony, Dr. Koocher was critical of the actions and inactions taken by the Appellee that impeded Mr. Yu's ability to obtain his doctorate. Dr. Koocher noted that if a student is in academic jeopardy, the university should be "putting the student on notice that they are in jeopardy, putting them on notice as to what the jeopardy is, giving them the opportunity to have a remedial plan, presenting that plan in a formal way, and monitoring that plan through to a conclusion. In addition, if one were going to impose the ultimate sanction on the student, there should be some sort of procedure, hearing, appearance before the faculty where the

student has the opportunity to present their view of the situation, present a defense as it were." 2-ER-191 pp. 2-175--2-177, 5-ER-1143, 5-ER-1168. Dr. Koocher noted "There were a number of instances in which Mr. Yu was not put on notice, where a written remedial plan was not provided, or when there was no follow-up on any remedial plan." 2-ER-191 pp. 2-175--2-176. Dr. Koocher testified that putting a student on notice, providing a formal plan of remediation, and following up on that plan were accepted academic norms. 2-ER-191 p. 2-176, 5-ER-1143, 5-ER-1168. Further, Dr. Koocher specifically noted that in Mr. Yu's case, ISU failed to follow these norms. 2-ER-191 pp. 2-176—2-177, 5-ER-1143, 5-ER-1163.

Dr. Koocher also observed that ISU's Director of Clinical Training (DCT) failed to appropriately monitor Mr. Yu's progress at placements, including the externship and internship, in a timely manner. Dr. Koocher testified that the DCT "is expected to oversee student's placements by communicating with the placement site back and forth on the student's progress, and assuring that the facility, where the student is being trained, is adequate and meets the requirements that are necessary to recognize the experience." Dr. Koocher's testimony shows that ISU's DCT failed in this task. 2-ER-192 pp. 2-178–2-181, 5-ER-1135, 5-ER-1166-67. At trial, Appellant presented that Student 20 was given timely monitoring and follow-up assistance, including meeting with the student 5 times to discuss his progress, during his off-site placement at an externship. 2-ER-115, 2-ER-235 p. 3-348, 6-

ER-1282-84.

Dr. Koocher testified to the significance of progressing to internship: "First, of course, is being sure that the student has proper training. And this is designated by the training director signing off before the student can apply to internship, that they are prepared and qualified to go an internship." 2-ER-192 p. 2-180, 6-ER-1335.

Prior to entering the internship, Mr. Yu was presented with three options to complete his internship. 5-ER-1090-91. One of the options provided to Mr. Yu was to "propose an accommodated internship in China." 5-ER-1091. Mr. Yu never received any indication that the option of pursuing an internship in China would be foreclosed to him should he not be successful in the internship at CCCA and Dr. Chase. 2-ER-171 p. 1-96. Through Mr. Yu's doctoral dissertation, which he successfully defended, it was clear that Mr. Yu was successful in his Summer 2011 independent clinical work with patients/clients in China for that dissertation, and the Court found "The study itself was a success" and "the parents and caregivers were very satisfied with Yu's services." 1-ER-9, 1-ER-10, 5-ER-1061, 2-ER-194 p. 2-186, 2-ER-222 p. 2-300, 2-ER-305 pp. 4-630--4-632. However, when Mr. Yu was abruptly dismissed from his internship at CCCA, he was denied the opportunity to propose an internship in China which he had arranged. 2-ER-191 pp. 2-175--2-176, 2-ER-205 p. 2-232, 5-ER-1120-26.

Despite this obvious success in Mr. Yu's clinical work in China for his doctoral dissertation, which represented 49% of his clinical hours at ISU, ISU denied Mr. Yu the opportunity to participate in an internship in China, adding that such an internship "might put Chinese patients at risk of harm" which was a conclusion in a letter signed by Dr. Lynch; at trial, Dr. Lynch contradicted this conclusion by admitting "I don't have empirical information" to show that Mr. Yu would do harm to any clients in China. 2-ER-305 p. 4-632, 5-ER-1059-60, 5-ER-1125.

When a student who is participating in a doctoral program in Psychology fails to complete an internship for reasons other than professional misconduct, per applicable APA standards, students are typically allowed to complete another internship attempt taking into account the student's individual and cultural diversity. 5-ER-1135, 5-ER-1163, 5-ER-1167-68. With knowledge that ISU had denied Mr. Yu the opportunity to complete an internship in China, notwithstanding Mr. Yu's excellent clinical performance in his native country, Dr. Koocher was asked what typically happens in a clinical psychology program when a student fails to complete an internship. Dr. Koocher answered:

> A. The answer to that question would be bifurcated, and it would really depend to the reason why the student failed to complete the internship. If a student were dismissed from an internship because of malfeasance, such as sexual intimacies with a client or substance abuse problem, it would not be unusual for the program to dismiss the student

> as personally unsuited for the profession or as risky to the profession in some way.
>
> In any other circumstance, the usual remedy would be to find an alternative model where the student could acquire that experience, such as helping them to apply for an internship in another year, find another appropriate activity to substitute for that, especially if the reason for the internship was not a character flaw or legal violation, but rather it was perceived a need for remediation.
>
> Q. Now, in your review of the documents, what do you -- what did you find ISU did in this particular case?
>
> A. The surprising thing to me, in seeing ISU's response, was that they terminated him from the program rather than making available some other remedial course of action for him to complete his training. 2-ER-193 p. 2-182.

Notwithstanding ISU's insistence that it had followed all relevant standards, policies and procedures in its treatment of Mr. Yu; generally, when doctoral students in Psychology are at risk of termination, the applicable APA Ethical Standards and APA Accreditation Standards dictate that students are warned of the risk to their continued participation in the program, and provided an opportunity for remediation per APA standards and the program's own policies. As to providing a student who is at risk of being dismissed from the program with adequate warning and an opportunity for remediation, and how ISU treated the Appellant, Dr. Koocher testified:

> Q. Now, Dr. Koocher, could you please tell us what the typical practice for a training program when the student might be at risk for termination?

> A. When a student is at risk for termination from a whole training program, there would, again, be notice to the student, remediation, if that were a potential option, or some other due process where the student could be heard and respond to concerns of the program.
>
> Q. Now, Dr. Koocher, did ISU's treatment of Mr. Yu comport with what you just explained?
>
> A. No, it did not. 2-ER-193 p. 2-184.

Dr. Koocher explained that Mr. Yu "was never notified he was at risk for termination from the program." 2-ER-193 p. 2-184.

When Dr. Koocher was asked, based upon his extensive expertise in relevant areas of running a doctoral program in Clinical Psychology, as to whether Mr. Yu's termination from ISU's Program was appropriate, Dr. Koocher testified:

> "His dismissal, in this context, was frankly over the top, unreasonable, unwarranted, and extremely detrimental to him. It far exceeds, as an action by the university, any valid data that they had to dismiss him from the program…It was excessive, unreasonable, and very far outside the norm of any doctoral program that I am familiar with." 2-ER-194 pp. 2-186--2-187.

2. In Dismissing Mr. Yu From its Program, ISU Failed in its Obligation to Comply with Cultural Competence Standards in its Treatment of Mr. Yu Which was a Substantial Departure from Accepted Academic Norms.

Dr. Shannon Chavez-Korell (Dr. Chavez) was called to testify as an expert witness in the field of multicultural competence in psychology on

behalf of Mr. Yu. Dr. Chavez's credentials are also impressive and impeccable. Dr. Chavez has a Bachelor of Science Degree in Psychology, a Master of Arts Degree in Community Counseling, and a Doctor of Philosophy Degree with a major concentration in Counseling Psychology from Pennsylvania State University and holds a license to practice Psychology. 2-ER-199 pp. 2-207--2-208. Dr. Chavez is a member of the American Psychological Association and five of its Divisions; one of which is Division 45, the Society for the Psychological Study of Culture, Ethnicity and Race. 2-ER-199 p. 2-208.

At the time of her testimony, Dr. Chavez had been teaching at the college/university level for 13 years. During ten of those years, Dr. Chavez taught graduate classes in Multicultural Counseling and Group Counseling. 2-ER-200 p. 2- 210. Dr. Chavez has written and published peer-reviewed journal publications and book chapters in the field of multicultural competence. 2-ER-200 p. 2-212. For the past 12 years at the time of her testimony, Dr. Chavez focused specifically on multicultural psychology. 2-ER-200 p. 2-212. At the time of her testimony, Dr. Chavez was employed by the Michigan School of Psychology where she served as the Chief Academic Officer for the School. 2-ER-201 pp. 2-214-215. Dr. Chavez's responsibilities in that role included leading the faculty in oversight of all their academic programs to include an

APA-accredited Clinical Psychology program, a master's Program in Clinical Psychology, as well as a master's Certificate in Applied Behavioral Analysis. 2-ER-201 p. 2-215. The Court deemed Dr. Chavez competent to testify as an expert on cultural competence. 2-ER-203 p. 2-223. Dr. Chavez testified that there are three domains of multicultural competence: (1) Cultural awareness of self and others, (2) Cultural knowledge of self and others, and (3) Skills that are culturally appropriate and relevant that will allow a person or organization to apply sensitive intervention strategies. 2-ER-202 p. 2-218, 5-ER-1167, 5-ER-1174-75. Dr. Chavez specifically stated:

> "It is my opinion that Mr. Yu, a student who's assigned grades and evaluations across semesters was consistent with satisfactory progress, was a victim of the cultural incompetence of the ISU faculty. And as a result of that incompetence suffered serious harm while he was a student in the doctoral program at ISU. As a result of this incompetence, the ISU faculty failed to adequately and properly address the diversity and cultural challenges faced by Mr. Yu." 2-ER-203 p. 2-224, 5-ER-1050-58.

Dr. Chavez emphasized the significance of Mr. Yu having progressed to internship: "So…the ISU faculty signed that letter for readiness for internship for Mr. Yu. So, they were confirming that he's ready for internship." 2-ER-206 p. 2-237 -- 2-ER-207 p. 2-238, 6-ER-1335.

Dr. Chavez provided specific instances of how the Appellee's multicultural incompetence adversely affected Mr. Yu. Dr. Chavez pointed specifically to an incident that was a hollow suggestion for Mr. Yu to build alliances with English

speaking patients/clients and a missed opportunity for remedial training:

> Q. And then when I looked at the Clinical Training Committee's response in their semi-annual evaluation, it indicated that Mr. Yu was in satisfactory progress, and there was a suggestion that he immerse himself in English-speaking contexts. It was a suggestion.
>
> Q. Why is that important to you?
>
> A. That's important to me because it struck me as unusual in that as an international student studying in the United States in Idaho, he is constantly immersed in an English-speaking context without actual -- I mean, that is the reality of his experience. So, it seemed like an empty suggestion to me. And as I further evaluated what the concern was, Dr. Atkins scored him a one, which represented below expectations, for his ability to form working alliances. And, so, I was thinking -- so, the training committee said "immerse yourself in English-speaking context," but that doesn't directly take on working alliances.
>
> Q. Why not?
>
> A. Well, working alliances are a lot more nuanced, a lot more -- that can be defined by culture. So, that stood out to me as a missed opportunity. And, so, from a cultural competence perspective, I think a remediation or a recommendation, at that point, that could be more specific to what his needs were, his cultural challenges that he was experiencing would focus on what does it mean to build a working alliance, and how do working alliances look differently across cultural groups. 2-ER-204 p.2-227.

Dr. Chavez pointed out that there existed a lack of formal consultation for Mr. Yu; if, as Appellee alleged, Mr. Yu was having language difficulties, there was a need for formal remediation. Dr. Chavez testified: "…when I look across these

missed opportunities, that is one of the trends is that, you know, not only the cultural incompetence but the lack of formal, appropriate remediation, you know, to meet the student where they are at in growing, ideally for growing their cultural competence." 2-ER-205 p.2-231. Additionally, Dr. Chavez noted the lack of formal remediation in off-site placements: "so what's striking to me in terms of externship is -- you know, is that it ended abruptly without any remediation at all" and "I…again what struck me was similar to the externship, was that he was dismissed [from internship] with very limited feedback and no formal remediation" 2-ER-205 pp.2-231--2-232.

Dr. Chavez testified that Appellee had overlooked the cultural issues related to Mr. Yu's training and failed in Appellee's obligation to use consultants in helping Mr. Yu to develop his clinical competence with native English-speaking clients or patients which should have been tried at least from the second semester of Mr. Yu's clinical work. In this regard Dr. Chavez testified:

> And I also think if the language piece continued, this would be a great opportunity for consultation. And I didn't see that documented. And, so, I would think, you know, consulting, whether it's within the university or outside of the university with someone who is a -- is involved in clinical training for students in psychology programs, who has work -- worked with international students, particularly Chinese international students and also second language speakers, those could have been really valuable consultations in how can we best support our student in really developing his clinical competence.

> And so I saw that as another missed opportunity in just the second semester of his clinical work. 2-ER-204 p. 2-229.

It was Dr. Chavez's expert opinion that ISU overlooked the cultural issues related to Mr. Yu's training. Dr. Chavez opined that considering the multicultural incompetence of the Appellee, the dismissal of Mr. Yu from the Appellee's doctoral program in clinical psychology was excessive, unjustified, objectively unreasonable and a substantial deviation from what should have been considered especially since there was no formal remediation. Specifically, Dr. Chavez testified:

> Q. Now, based on your experience -- expertise in multicultural competency, do you have an opinion about whether Mr. Yu's dismissal from Idaho State University's clinical psychology doctoral program was appropriate?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> A. It's my opinion that Mr. Yu was inappropriately dismissed from the school. It seemed this decision seemed excessive and unjustified and -- and objectively unreasonable. And in my opinion is further evidence of the harm he's experienced.
> And, you know, I would also add that in my experience, that this really -- it's my opinion that this is a substantial deviation from what would be considered…
>
> Q. Yes. In your -- is it your opinion that -- that the way Mr. Yu was treated in regards to multicultural competency was a substantial departure from any academic norms?
>
> A. I do.

> Q. Why?
>
> A. Yeah, it's a -- in my experience, in my opinion, it's a substantial departure considering there was no formal remediation and it seems unreasonable. 2-ER-205 p. 2-233, 2-ER-206 p. 2-234.

Upon cross examination, Dr. Chavez stated that the actions of Appellee were: (1) intentional decisions not to support Mr. Yu in the face of well documented challenges in regard to diversity in culture, and (2) that Appellee specifically and intentionally discriminated against Mr. Yu because Mr. Yu is Chinese. Dr. Chavez's specific and unequivocal testimony speaks volumes:

> Q. You were talking in general terms.
>
> A. Sure. Right.
>
> Q. And is that all you're doing is talking in general terms?
>
> A. No, no. I'm saying that in this case for ISU, there was an intentional decision not to intervene. It's not documented. There was never a formal intervention. So, I consider that an intentional decision to not support Mr. Yu while he was facing what I thought was well-documented challenges in regards to diversity in culture.
>
> Q. And do you believe that decision not to intervene was specifically based on his national origin?
>
> A. I believe that it was intentional. I don't -- can I give my opinion further than that? I -- you know, I think it's hard to remediate something you don't have yourself. So, it's hard to remediate the cultural struggles he might be having when that's lacking from the faculty themselves. And I saw markers of that.
>
> Q. All right. But that would then be unintentional then; right?
>
> A. It's intentional. It's a competency domain. We are required -

> - many states require multicultural training to keep our license up even. It's intentional.
>
> Q. Well, I'm sorry to interrupt, but I don't think I got the answer then. Did they specifically intentionally discriminate because he was Chinese?
>
> A. My opinion is yes.
>
> Q. And based on what?
>
> A. Based on the inaction and the decision not to support him. 2-ER-208 pp. 2-243-2-244.

3. The Dismissal of Mr. Yu was Unwarranted and was the Product of Intentional Aversive Racism and was a Substantial Departure from Academic Norms.

Dr. Leslie W. Zorwick (Dr. Zorwick) was called to testify as an expert witness on aversive racism and its application in the current case. Dr. Zorwick received her Bachelor of Arts degree in Psychology and Philosophy with the highest honors from Emory University and received her master's and Doctorate degrees in Psychology from the Ohio State University. 2-ER-209 pp. 2-246, 2-247. Dr. Zorwick is a member of the American Psychological Society, the Society for Personality and Social Psychology, which is the American Psychological Association Division 8, and the Southwestern Psychological Association. 2-ER-209 p. 2-247. Dr. Zorwick is presently a tenured professor at Hendrix College in Conway, Arkansas. 2-ER-209 p. 2-247. At the time of Dr. Zorwick's testimony she taught the following courses: Stereotyping and Prejudice, Racial Justice and

the Bible which is co-taught with a faculty member in Religious Studies, Social Psychology, Psychology and Law, and Statistics. 2-ER-209 p. 2-248. During her tenure at Hendrix College, Dr. Zorwick has served in the following administrative roles: the chair of the Human Subjects Review Board, which is the branch of Hendrix College Institutional Review Board that oversees all research conducted with human participants, the chair of the college's Diversity and Dialogue Committee, and Dr. Zorwick chaired the committee that authored the College's Strategic Plan on Diversity and Campus Climate. At the time of her testimony, Dr. Zorwick was serving as the Chair of Hendrix College Department of Psychology. 2-ER-209 p. 2- 249, 2-ER-210 p. 2-250. Dr. Zorwick served as an expert on aversive racism in the case of *Spurlock v. Fox*.[4] Dr. Zorwick was accepted to testify as an expert on aversive racism in the present case. 2-ER-211 p. 2-256.

Dr. Zorwick importantly testified that "Aversive racism rests on the assumption that prejudice today doesn't look the same as prejudice use to look" as "the social norms have changed tremendously." 2-ER-211 p. 2-255. Dr. Zorwick explained that aversive racism is how racism tends to manifest now in that people can simultaneously "hold a generalized belief in egalitarianism, which is the idea that we should treat everybody the same, but that they can also know negative

[4] *Spurlock v. Fox*, No. 3:09-CV-0756, 2010 WL 3807167 (M.D. Tenn. Sept. 23, 2010).

stereotypes and be profoundly influenced by those negative stereotypes they've learned about race that they pick up on in their socialization;" 2-ER-211 p. 2-255. In nearly four pages of her testimony (2-ER-213 pp. 2-262--2-265), Dr. Zorwick explained how aversive racism triggers intentional behavior or specific acts even if aversive racism operates subconsciously and in subtle, indirect ways. Of importance to this case is that Dr. Zorwick was able to opine to a certainty that through a pattern of intentional and repeated choices made by the Appellee through its faculty, Mr. Yu's race and international status affected the way he was treated by Appellee in Appellee's Clinical Psychology Program. The specific testimony is:

> Q. So, for the record then, Dr. Zorwick, do you have an opinion whether Mr. Yu was a victim of aversive racism while he was a student in the doctorate clinical -- the doctorate of clinical psychology program at Idaho State University?
>
> A. I do. The evidence pretty clearly points to the presence of aversive racism, because there are multiple strong examples of each of these hallmarks of what tends to be happening when aversive racism is present.
>
> Q. And the next question would be how positive are you of this being there?
>
> A. I think I am as positive I can be based on the amount of time I have spent thinking about these issues, reading about aversive racism, and my professional expertise.
>
> Q. All right. And how certain of your -- how certain are you of your conclusion?

> A. I am certain.
>
> Q. And what is that opinion?
>
> A. My opinion is that Mr. Yu's race and international status impacted the way he was treated by the faculty in the Idaho State University Clinical Psychology Program. I believe this happened through a pattern of intentional repeated choices made by those faculty.
>
> I believe that some of these decisions deviate from professional norms. And I believe this because there are strong specific examples of each of these hallmarks of aversive racism in the present in this case. 2-ER-215 p. 2-273 and 2-ER-216 p. 2-274.

Dr. Zorwick identified the five characteristic hallmarks of aversive racism: (1) Ambiguity in Judgment Criteria, (2) Race Neutral Explanations, (3) Racial Microaggressions, (4) Challenging Interracial Interactions, and (5) Post-Hoc Justifications. 2-ER-213 p. 2-265, 2-ER-214 pp. 2-266--2-268. In turn, Dr. Zorwick provided a detailed analysis of each characteristic to show that Mr. Yu was a victim of intentional aversive racism. 2-ER-216 p. 2-274--2-ER-221 p. 2-296.

The Court erred in misunderstanding Dr. Zorwick's testimony on aversive racism and the five hallmarks of aversive racism that are present in Mr. Yu's case. What follows are examples of the Court's clear errors. Regarding what Dr. Zorwick testified on the hallmark of ambiguity in judgment criteria/decision-making shown through ISU's discussion of Mr. Yu's English language, the Court erred in characterizing her testimony as "nonsensical." 1-ER-54. Dr. Zorwick

testified: "There is a lot of ambiguity that puts the onus on Mr. Yu to magically improve his English language skill without a clear directive of what that expected level of proficiency would look like," 2-ER-216 p. 275 and "So it's unclear what they want him to do about this. They are acting like bringing up the [English language] concern counts as giving him remediation." 2-ER-216 p.2-276. Dr. Zorwick pointed out that ISU failed to provide a professional assessment of what the specific alleged problem was and what Mr. Yu needed to do to remediate it. This failure was against not only professional standards, but also ISU's own policy governing a Plan of Remediation, which would include: 1) problem identification; 2) course of action to remediate the problem; 3) measurable objectives; and 4) method and specific time to determine if objectives have been met. 1-ER-18, 1-ER-19, 2-ER-131, 6-ER-1335-36 In the case of comments about Mr. Yu's English language, ISU never professionally assessed what the specific problem was, and didn't follow its remediation policy.

The Court erred in mischaracterizing Dr. Zorwick's testimony on race-neutral explanations, another hallmark of aversive racism. Dr. Zorwick clearly articulates the gist of this testimony:

> That shift away from acknowledging race as a meaningful part of education and Mr. Yu's experience to race neutrality is one of those hallmarks that tends to be indicative it trying basically to come up with a way to explain race had nothing to do with our decisions and to even create more ambiguity about why we did what we did. 2-ER-219 p. 2-287

However, the Court erroneously ignored the thrust of Dr. Zorwick's testimony and instead stated: "But...she did not say what ISU should have done differently so as to avoid engaging in aversive racism." 1-ER-56. In fact, the point of Dr. Zorwick's testimony was to reveal how ISU's actions or inactions evidenced aversive racism, which is something that ISU should not have been engaged in.

The Court erred in its mischaracterization of Dr. Zorwick's testimony on the hallmark of racial microaggressions, particularly when the Court stated, "…she explained that ISU framed Yu's multilingualism as a liability. But this characterization is not supported by the evidence." 1-ER-56-57. In fact, Appellee wrote in its evaluation of Mr. Yu, "If Jun is to apply this November to APPIC sites, he must identify sites where his Chinese language is a strength rather than a liability," which the Court quoted. 1-ER-13. Clearly the record supported Dr. Zorwick's testimony.

The Court erred in its interpretation of Dr. Zorwick's testimony on the hallmark of challenging interracial interactions. In response to Dr. Zorwick pointing out how "ISU privileged the experience of white native English speakers over Yu's experience when evaluating Yu's complaint against Dr. Landers after Yu was dismissed from the EIRMC" externship the Court stated: "ISU's handling of Yu's complaint against Dr. Landers was entirely reasonable…. If there was a

flaw somewhere in that process, Dr. Zorwick failed to point it out." 1-ER-61-62. In fact, Dr. Zorwick had pointed out the unreasonableness in how the complaint was handled: "when Idaho State privileges the experience of those other students -- right? when Mr. Yu is arguing, like, a rule violation happened but the response is, 'Well, but other students say he's doing a good job as a supervisor,' that really communicates a disconnect about the experience of Mr. Yu…." 2-ER-220 p. 2-291, 3-ER-676-79. Testimony by both Dr. Koocher and Dr. Chavez showed there were violations of professional standards in how Mr. Yu was supervised, including by Dr. Landers.

The Court erred in its findings regarding Dr. Zorwick's testimony on the hallmark of post-hoc justifications. "The Court does not agree that ISU reframed the events of 2011 as a post-hoc justification of Yu's dismissal." 1-ER-63-64. However, the Court failed to recognize that events prior to internship (including those events of 2011) which ISU pointed to as dismissal-worthy after voting to dismiss Mr. Yu, were not communicated to Mr. Yu as being dismissal-worthy prior to internship; specifically, Mr. Yu was never warned he was at risk of dismissal from ISU's Program for the alleged concerns when they were communicated to him prior to internship. 1-ER-81, 4-ER-683-84, 5-ER-1062-65. Furthermore, ISU's allegation in Fall 2011, that Mr. Yu's professional progress was unsatisfactory, was predicated on Dr. Landers' unprofessional

supervision/evaluation which violated professional standards and substantially departed from accepted academic norms. 2-ER-191 pp. 2-175--2-176, 2-ER-205 p. 2-231, 2-ER-206 p. 2-234.

Of importance is that Dr. Zorwick unequivocally states that in her professional opinion, the aversive racism present in this case was an example of intentional discrimination.

> Q. Do you have an opinion of whether or not this was intentional discrimination?
>
> A. Aversive racism says what we do, the choices that we make are our intentions. And so there are the things that I do that are based actively in choices that I am making, and then there's how I describe that to you. And how I describe what I am doing may not be the same as what I actually did.
> So, we should give weight to the choices people make about students and how those students are treated independent of how people describe their motives after the fact.
> So, I believe it was intentional. I believe it happened through active and repeated choices.
>
> Q. All right. So, just to be clear, that in this example of aversive racism, regarding Idaho State University, it is your professional opinion that the discrimination was intentional?
>
> A. That's correct. 2-ER-224 pp. 2-306--2-307.
>
> Q. Now, people like yourself, who deal with aversive racism and intentionality, I believe that after 1999, or whatever, the -- have they come to believe that aversive racism is, in fact, intentional racism?
>
> A. I think that the way we talk about it moves away from really that people can accurately tell us what their intentions were, because we are so influenced by wanting to see ourselves in a

> positive light. And so I -- I think that the way that I am describing this is consistent with so much research that I have read.
>
> We use language like "unconscious" or "implicit" to describe the structure of attitudes and the way that we measure them, and that comes with a connotation that can sound from the outside of our field. Like that jargon means we are saying people aren't responsible for what they do. But that's not what we mean by those terms.
>
> We say the only thing that communicates intent is the decision and the impact it has and if that impact is different for different groups of folks. 2-ER-228 p. 2-325, 2-ER-229 p.2-326.

In *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985), the Court, in giving deference to decisions the Court termed genuinely academic, held:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. ***Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment***. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513, 88 L. Ed. 2d 523 (1985) (Emphasis added.).

The testimony of Dr. Koocher, Dr. Chavez and Dr. Zorwick established that Appellee's faculty behavior was a substantial departure from accepted academic norms that demonstrated that Appellee's actions toward Mr. Yu were not done in the exercise of credible and reasonable professional judgment. Substantive or procedural departures as other circumstances surrounding an adverse action are

evidence to support a finding of intentional discrimination. *United States v. Redondo-Lemos*, 27 F.3d 439, 443 (9th Cir. 1994) and *Veasey v. Abbott*, 830 F.3d 216, 288 (5th Cir. 2016) both citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

C. The Court Erred in Rejecting that Implicit Bias and Aversive Racism as Testified to by the Appellant's Expert was Inapplicable in Determining if the Appellee's Actions were Indicative of Intentional Discrimination.

a. Implicit Bias is Relevant in Determining if a Person is the Victim of Intentional Discrimination.

"Implicit bias is the term now used to define biases that an individual is generally thought to be unaware of." Michael Selmi, *The Paradox of Implicit Bias and A Plea for A New Narrative*, 50 Ariz. St. L.J. 193, 200 (2018). "Within the legal literature, implicit bias is commonly defined as unconscious, pervasive, and beyond one's control. This is a message, however, that can be difficult to reconcile with our governing legal standards, which often turn on one's ability to control one's behavior." *Id*. at 195. Nevertheless, whereas in the present case a student brings a case of discrimination under Title VI, the student must show that the educational institution or individual acted with intentional discriminatory purpose.

Therefore, in an educational setting, even where the Appellee intentionally performs a discriminatory act, the student still must demonstrate that the educational institution or individual "had the specific intent to discriminate on the grounds of some protected category, such as race or national origin." Darren

Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 Wash. U. J.L. & Pol'y 23, 41 (2014). Given the intent to discriminate element, there is little wonder that some courts have excluded expert testimony on the concept of unconscious bias or similar theories, as courts have opined that such testimony would not help a jury decide the issue of intentional discrimination and provide an unfair advantage to the Plaintiff. See *Haydar v. Amazon Corp., LLC*, No. 2:16-CV-13662, 2019 WL 5079704, at *5 (E.D. Mich. Oct. 10, 2019) and *Jackson v. Scripps Media, Inc.*, No. 18-00440-CV-W-ODS, 2019 WL 6619859, at *5 (W.D. Mo. Dec. 5, 2019) Implicit bias, also called aversive racism "rests on a contradiction between explicit and implicit attitudes. This form of modern prejudice characterizes the racial attitudes of many well-intentioned people who possess strong egalitarian values and believe themselves to be nonprejudiced but who nonetheless hold negative racial feelings and stereotypes." In deed implicit bias coexists with egalitarian beliefs and the denial of personal prejudice." *See* Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 Cal. L. Rev. 1, 13–14 (2016). "Aversive racists aspire to be nonprejudiced. They do not discriminate against minority-group members in situations with strong egalitarian norms, where discrimination would be obvious to others and themselves." *Id* at 14. Indeed, the

very thought that they could act in a motive to unlawfully discriminate against someone is aversive to an aversive racist. *Id.* at 15.

Since, 1981, the 9th Circuit has held that employers must not make decisions motivated by discriminatory attitude or that are rooted in concepts that reflect discriminatory attitudes. *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1343 (9th Cir. 1981). Thereafter, in 2012, a District Court in the Ninth Circuit held that expert testimony regarding implicit bias in intentional discrimination was relevant. This holding provides appellants like Mr. Yu a legal basis to assert that implicit bias, aversive racism, or unconscious bias is important and relevant in determining whether an educational institution has engaged in intentional discrimination.

In the case of *Samaha v. Washington State Dep't of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, (E.D. Wash. Jan. 3, 2012), Mr. Samaha, a person of Arab descent, wanted to introduce Professor Anthony Greenwald as an expert witness to testify on the subject of implicit bias. Mr. Samaha's position was that Dr. Greenwald's testimony was relevant as it would "provide a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the plaintiff's race, color, and/or ethnic origin substantially motivated the defendant actions outlined in the complaint." *Id*. at *1.

The Defendant brought a motion in limine to exclude the testimony of Dr. Greenwald on the basis that the testimony of this expert witness about implicit bias was not relevant and failed to apply the principles and methods reliably to the facts of the case. However, it was Plaintiff's position that Dr. Greenwald's testimony on implicit bias was relevant to establishing intentional discrimination and helpful to the trier of fact to understand how implicit bias functioned in the workplace. The Court stated the following in allowing the testimony of Dr. Greenwald and denying the Defendant's motion in limine:

> Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer ***intentionally discriminated against an employee***. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 250–51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (recognizing the relevance of unconscious stereotyping in the workplace where "an employer acts on a basis of belief" and that basis amounts to nothing more than an improper stereotype); *see also Lynn v. Regents of the Univ. of California,* 656 F.2d 1337, 1343 n. 5 (9th Cir.1981) (explaining that an employer must not make decisions motivated by a "discriminatory attitude[ ] relating to race ... or [that] are rooted in concepts which reflect such discriminatory attitudes"); *Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 58–60 (1st Cir.1999) (stating that the ultimate question is whether an employer acted "because of" an employee's protected class, "regardless of whether the employer consciously intended to base the evaluation on race, or simply did so because of unthinking stereotypes or bias") *Id*. at *4. (Emphasis added.)

The case of *Martin v. F.E. Moran, Inc.*, No. 13 C 3526, 2018 WL 1565597

(N.D. Ill. Mar. 30, 2018) is also instructive. In this case, the Court allowed the testimony of Dr. Destiny Peery, a social psychology expert, to provide an opinion about the "potential relevance of implicit bias" to the case. *Id.* at 20. "Dr. Peery explained that in her review, she explored the concepts of explicit bias, stereotyping, aversive racism and social tuning, all of which are interrelated and under the umbrella of implicit bias." *Id*. Dr Peery testified that "although implicit bias operates relatively automatically, an individual can be aware of implicit bias and prevent such biases from influencing decision making. "***In other words, an individual's behavior can be intentional even if the activation of certain information influencing those behaviors is not***." *Id*. (Emphasis added.)

The case of *Woods v. City of Greensboro*, 855 F.3d 639 (4th Cir. 2017) involved a discrimination claim brought by a minority business owner that arose out of the Defendant denying Plaintiff an economic development loan. In addressing the issue of whether implicit bias was relevant in regard to finding intentional discrimination, the Court unequivocally stated the following:

> "Indeed, it is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, ***though perhaps implicit, is no less intentional***." *Id* at 651-652. (Emphasis added.)

Woods v. City of Greensboro, 855 F.3d 639, 651–52 (4th Cir. 2017).

The cases of *Samaha v. Washington State Dep't of Transp., Martin v. F.E.*

Moran, Inc., and *Woods v. City of Greensboro* show that Courts have recognized that implicit bias, aversive racism, or unconscious bias are important and relevant factors in determining whether an employer or educational institution has engaged in intentional discrimination, and that this position is grounded in both science and law.

In the present case, the District Court adhered to the strict requirements of its duties as the gatekeeper. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[5] The District Court allowed Dr. Leslie W. Zorwick to testify as a qualified expert in the area of aversive racism on behalf of Mr. Yu. In qualifying Dr. Zorwick as an expert in aversive racism, the Court found that (1) Dr. Zorwick's testimony was based upon enough facts or data, and (2) Dr. Zorwick's testimony was the product of reliable principles and methods. However, in its Trial Decision, Findings of Fact, and Conclusions of Law, the Court stated the following:

> The Court is familiar with theories of prejudice which are discussed interchangeably with the theory of aversive racism described by Dr. Zorwick's, but which carry different names, such as unconscious bias or implicit bias. They have a common thread of a lack of awareness on the part of the person who carries such an unconscious bias, and a belief that

[5] "The Federal Rules of Evidence 702 allows for the testimony by a qualified expert who will assist a trier of fact in understanding the evidence or in determining a fact in issue, so long as "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Samaha v. Washington State Dep't of Transp.* at *2.

> a concerted effort by an individual to understand the possible presence of such unconscious bias can help lessen its pernicious effects. ***That theory underlies the testimony of Dr. Zorwick and, to some extent, the testimony of Dr. Chavez. But Dr. Zorwick apparently would suggest that even the most egalitarian individuals, of whatever race, can be unaware of their unconscious bias (as the name describes) but still be intentionally racist. That simply makes no sense***. This example is illustrative of that disconnect, as Dr. Zorwick opines that ISU faculty members were aversively racist toward Yu by being "less aware" of structural barriers that might face Yu as an international Chinese student. Even more telling, Dr. Zorwick offered no explanation of what those structural barriers might be, how they might relate to a Chinese international student's progress in the doctoral program, or how, exactly, a lack of knowledge about such things (whatever they might be) becomes an intentional, micro-aggressive, act of discrimination against Yu. Such a connection, if any can be drawn, would depend in the first instance upon the actual fact of "structural barriers" faced by Asian students at ISU, which were not described. Second, there would need to be evidence that other students were provided more help or support than was provided to Yu. Again, the record is nearly absent of any such evidence. (Emphasis added.) 1-ER-57-58.

Based upon the actions of Appellee, the applicable science and the testimony of Mr. Yu's expert witnesses, the Court's position is clearly erroneous. *Daubert* demands that an expert opinion must have both a legal and scientific fit. Dr. Zorwick's testimony and that of Dr. Chavez were directly relevant to the issue of intentional discrimination so the legal fit was satisfied. As demonstrated earlier herein, Dr. Zorwick's and Dr. Chavez's education and real-world experience exceeded the qualifications for them to testify as experts in their fields. Dr. Chavez's testimony was about professional standards, not theories; nevertheless both Dr. Zorwick and Dr. Chavez provided extensive testimony showing that their

research had been validated and that it could be reliably applied to the legal issue of intentional discrimination that was in dispute. *See* David L. Faigman et. al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389, 1391 (2008). Scientific fit also requires judges to have a sophisticated understanding of both science and the law**.** *Id* at 1392. The ruling of the Court demonstrates a lack of the requisite sophistication needed to have an adequate understanding of both science and the law. Lastly, the Court's position rejects developed jurisprudence and science that implicit bias, aversive racism, or unconscious bias are important and relevant factors in determining whether an employer or an educational institution has engaged in intentional discrimination.

D. The Court Erred in Finding that Mr. Yu's Dismissal was Warranted Where Under the Substantive Due Process Standard of Review in Cases Involving a Liberty Interest, a Warning of Dismissal and Compliance with the Institution's Rules was Required.

Two important cases inform all cases where a student is alleging that the student's academic dismissal from a program violated the due process clause of the Fourteenth Amendment to the United States Constitution. The first case is *Board of Curators of the University of Missouri v. Horowitz,* 435 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978) and *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). *Horowitz* involved a medical student who was dismissed from the university's medical school. The student had received excellent grades on written examinations and

had otherwise met academic standards. However, ***with notice but without a hearing***, the university dismissed Ms. Horowitz from its medical school for alleged deficiencies in *clinical performance*, peer and *patient relations*, and personal hygiene. The Court granted Certiorari "to consider what procedures must be accorded to a student at a state educational institution whose dismissal may constitute a deprivation of "liberty" or "property" within the meaning of the Fourteenth Amendment." *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 80, 98 S. C t. 948, 950, 55 L. Ed. 2d 124 (1978). In reversing the Court of Appeals, the U.S. Supreme Court held:

> Assuming the existence of a liberty or property interest, respondent has been awarded ***at least as much due process as the Fourteenth Amendment requires***. ***The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment***. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 84–85, (1978). (Emphasis added.)

However, the Court went further and stated the following:

> "We agree with the District Court that respondent "was afforded full procedural due process by the [school]. In fact***, the Court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct.***"… But we have frequently emphasized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 85 -86. (Emphasis added.)

Regents of Michigan v. Ewing was another case involving a six-year Inteflex program of study that would culminate in the awarding of an undergraduate degree and medical degree. Ewing was dismissed from the program after failing a two-day written examination administered by the National Board of Medical Examiners. Ewing failed five of the seven subjects on the examination. After considering Ewing's overall record, Ewing was dropped from the program. Ewing administratively appealed his dismissal from the program, and then sued in Federal Court from which appeals ensued. With citation to *Horowitz*, the U.S. Supreme Court in *Ewing* stated the following:

> . . . we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program.

Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 222, 106 S. Ct. 507, 511, 88 L. Ed. 2d 523 (1985).

Through *Horowitz* and *Ewing,* the U.S. Supreme Court established the Court's unwillingness to impose specific procedural requirements for academic dismissals. Indeed, there is nothing in either *Horowitz* or *Ewing* that mandates that all the procedures used by the defendants in these seminal cases are required. Indeed, the Court in *Horowitz* flatly suggested that Ms. Horowitz received more due process than she was entitled to. Yet, the Court in *Horowitz* stated that Ms. Horowitz had received ***at least as much due process as the Fourteenth***

Amendment requires as the university ***fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment.*** The Court refused to set forth the entirety of the due process owed a student where a dismissal from a university or college is based on actual or perceived academic deficiencies where an established liberty interest was involved. However, in reviewing the dismissal under the required substantive due process standard, the Court would at least ascertain if the student had: (1) been appraised of the faculty's dissatisfaction with the student's academic progress, and (2) received a warning of the danger that this dissatisfaction posed to the student's timely graduation and continued enrollment in determining whether the academic institution's actions were a substantial departure from accepted academic norms as to demonstrate the faculty's or academic institution's failure to exercise professional judgment.

It has been established that to be free to pursue an education without governmental discrimination is a liberty interest protected by the 14th Amendment. *See Thomas v. Gee*, 850 F. Supp. 665, 671 (S.D. Ohio 1994) citing *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Therefore, ISU's dismissal of Mr. Yu based on an alleged poor clinical performance without any warning of the consequences of an alleged unsatisfactory performance must be reviewed under the substantive due process standard.

a. Mr. Yu was Dismissed from ISU Without Ever Receiving Any Warning of ISU's Faculty's Dissatisfaction with his Alleged Deficiencies of his Clinical/Professional Progress and the Danger this Posed to his Continued Enrollment in ISU's Doctorate in Clinical Psychology Program.

Appellee sought to establish there was no evidence to sustain a finding that Mr. Yu was treated differently than similarly situated students not of Mr. Yu's protected class. Thus, Appellee argued that Mr. Yu could not establish a prima facie case of discrimination and his claim must fail as a matter of law.

Nevertheless, and as a direct result of Appellee's inaction during the discovery process, the Court drew an adverse inference and found that Mr. Yu was treated differently than similarly situated students. 1-ER-81-82. During discovery, Mr. Yu received a number of student records that were introduced into evidence. 5-ER-1254-1272, 6-ER-1275-1301. At trial, Mr. Yu testified that he never received any warning of dismissal and pointed to students who did receive warnings of dismissal should their professional or academic progress not improve: 2-ER-232 pp. 3-338--3-339, 2-ER-234, p. 3-345, 2-ER-235 p. 3-348, 2-ER-236 p. 3-352, 2-ER-236 pp. 3-354--3-355, 2-ER-238 p. 3-363. The Court found that Mr. Yu "was never placed on a formal Plan of Remediation or warned that he was at risk of dismissal due to unsatisfactory professional progress." 1-ER-81 ¶ 184. While ISU expressed its dissatisfaction with Mr. Yu's professional progress, it failed to warn Mr. Yu of the danger that ISU's dissatisfaction posed to

Mr. Yu's timely graduation and continued enrollment in its Clinical Psychology Doctoral Program. This failure was an arbitrary and unwarranted departure from ISU's past practice of warning students as well as a substantial departure from academic norms. 2-ER-191 pp. 2-175--2-177, 2-ER-193 p. 2-184, 2-ER-194 pp. 2-186--2-187, 5-ER-1143, 5-ER-1168.

Notably, the Court erred in finding Mr. Yu was not similarly situated to these other students who had been warned of the risk for dismissal. First the Court ignored how Student 16 and Student 20 had unsatisfactory professional progress and yet were warned of risk of dismissal, unlike Mr. Yu. 2-ER-116, 2-ER-235 p. 351 -- 2-ER-236 p. 3-353, 6-ER-1287-92, 2-ER-115, 2-ER-235 p. 3-348, 6-ER-1282-84. More importantly, the Court failed to recognize that Mr. Yu was materially similarly situated to all of these students who were deemed to be in academic jeopardy, but were warned that they could be dismissed from the program should their alleged unsatisfactory progress continue. 5-ER-1255, 5-ER-1257-59, 5-ER-1264, 5-ER-1266, 5-ER-1268-72, 6-ER-1276, 6-ER-1284, 6-ER-1288, 6-ER-1290-92, 6-ER-1299 . Though the student records were not identical, they were similar in a material respect; namely, when a student is at risk for dismissal for any alleged unsatisfactory "academic" or "professional" progress, that student is given a warning of the risk for dismissal. *See Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1125-1126 (9th Cir. 2009).

b. Mr. Yu was Dismissed from ISU Without Ever Being Placed on a Clinical Training Committee (CTC) Formal Remediation Plan Which Required a Warning of Consequences if Remediation Objectives Were Not Met.

As recognized by Appellee's witness, Dr. Mark W. Roberts, in a communication to Student 37, it was ISU's Clinical Psychology Doctoral Program's responsibility to "fully inform" its students of the "expectations and the consequences for failure to address concerns." 5-ER-1269. The communication goes on to state the following: "The Clinical Training Committee and I will do whatever we can to help you succeed. Please seek out help at any point this spring." 1-ER-73, 5-ER-1269. Providing a student who is perceived to be unsatisfactorily performing either academically or professionally with a remediation plan is a primary method available to ISU in fulfilling the stated responsibility. ISU is accredited by the APA. While ISU maintains that it "reserves the right" to implement a formal plan of remediation (1-ER-18, 6-ER-1335-36), ISU was required to comply with the APA Ethical Standards and Accreditation Standards, which mandate providing remediation to doctoral students in need of guidance to be successful in the program. 5-ER-1143, 5-ER-1168. Further, ISU was required to comply with its own policy and procedures as outlined in the applicable Clinical Student Handbook which reads in relevant part as follows:

The CTC reserves the right to construct a formal Plan of Remediation

> to address potential challenges that may make a student currently unready for internship training. In such instances, a formal Plan of Remediation will be constructed by the Clinical Training Committee. These steps would be triggered by one of three events: 1) a student dismissal from an external training site; 2) an Unsatisfactory (U) grade in any professional course (PSYC 7724, Community Practicum; PSYC 7725, Clinic Practicum; PSYC 7726 Supervision Practicum; PSYC 7727, Psycho-educational Evaluation; or PSYC 7748, Clinical Externship); or 3) any other concern regarding professional development that leads the Clinical Training Committee to believe that a formal remediation plan is warranted. A written Plan of Remediation ***will include*** the following six elements:
>
> 1. Problem identification
> 2. Course of action to remediate the problem
> 3. Measurable objectives
> 4. Method and specific time to determine if objectives have been met
> 5. ***Consequences if objectives are not met***
> 6. Process of appeal. (Emphasis added.) 1-ER-18, 1-ER-19, 2-ER-131, 6-ER-1335-36. Mr. Yu presented Student 37's formal Plan of Remediation, which was consistent with the above-quoted policy, and then Mr. Yu testified that he was not provided a formal remediation plan per this policy. 2-ER-163, p. 1-63, 2-ER-164 p. 1-65, 2-ER-174 p. 1-108, 2-ER-233 p. 3-343, 2-ER-234 p. 3-345, 2-ER-240 p. 3-370, 5-ER-1270-72. The Court failed to recognize Appellant was materially similarly situated to Student 37 as both "academic" or "professional" deficiencies could be addressed through remediation; Appellant and Student 37 were subject to the same policy or standards, and Student 37 received a formal

Plan of Remediation while Appellant did not. *Id.* Additionally, as reflected herein, Dr. Koocher, Dr. Chavez and Dr. Zorwick all observed that Mr. Yu did not receive any remediation per professional standards. 2-ER-191 pp. 2-175--2-177, 5-ER-1143, 5-ER-1168, 2-ER-204 p. 2-227, 2-ER-205 pp. 2-231--2-232, 2-ER-216 p. 2-276, 2-ER-220 p. 2-291. The Court found that Mr. Yu "was never placed on a formal Plan of Remediation." 1-ER-81. During the trial ISU maintained that throughout Mr. Yu's enrollment in ISU's Program, Mr. Yu's professional progress was unsatisfactory. However, ISU's failure to provide any formal plan of remediation to Mr. Yu was an arbitrary and unwarranted departure from ISU's obligation to provide a formal plan of remediation as well as a substantial departure from accepted academic norms. 2-ER-194 pp. 2-186--2-187, 2-ER-205 p. 2-233, 2-ER-206 p. 2-234, 2-ER-215-16 pp. 2-273--2-274, 5-ER-1143, 5-ER-1168.

VII.
CONCLUSION

Based on the foregoing arguments and authorities, Mr. Yu respectfully requests that this Court reverse the District Court's Judgment and remand the case for further proceedings consistent with this Court's decision.

VIII.
STATEMENT OF RELATED CASES

Mr. Yu is unaware of any known related cases pending in this Court.

RESPECTFULLY SUBMITTED this 9th day of December 2020.

APPELLANT
By Appellant's Attorney
Idaho Employment Law Solutions

/s/ Ronaldo A. Coulter

RONALDO A. COULTER

CERTIFICATE OF COMPLIANCE

I RONALDO A. COULTER, hereby certify that pursuant to Fed.R. App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief is proportionally spaced, has a typeface of 14 points or more, Times New Roman and contains 13,701 words.

DATED this 9th day of December 2020.

APPELLANT
By Appellant's Attorney
Idaho Employment Law Solutions

/s/ Ronaldo A. Coulter

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