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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

JUN YU

Plaintiff,

vs.

IDAHO STATE UNIVERSITY,

and

JOHN/JANE DOES I through X, whose
true identities are presently unknown,

Defendants.

Case No. 4:15-cv-00430

**DEFENDANT'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Pursuant to Dist.Idaho.Loc.Civ.R. 7.1(b)(1), Defendant Idaho State University ("ISU") submits that the following background and material facts are not in dispute in the record before the Court:

1. The Plaintiff, Jun Yu, is a citizen of The People's Republic of China. (*See* First Amended Complaint and Demand for Jury Trial (Dkt. 41) (hereinafter "Amended Complaint"), ¶1.)

2. ISU is an institution of higher education established in Pocatello, Idaho, and consisting of such colleges, schools and departments as authorized by the Idaho State Board of Education. *See* Idaho Code § 33-3001. It is an arm of the State of Idaho, as previously held by this Court in both *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 647 F.Supp. 190 (D.Idaho 1985) and *Sadid v. Idaho State University*, 837 F.Supp.2d 1168 (D. Idaho 2011):

a. The Idaho state treasurer is also treasurer to ISU's board of trustees. *See* Idaho Code § 33-3004.

b. In a state court action, if ISU's "board has no money out of which to pay any judgment obtained against it, the judgment creditor must bring his action in [the Idaho Supreme Court] based upon such judgment, and ask for a recommendatory judgment to the Legislature." *Moscow Hardware Co. v. Regents of Univ. of Idaho*, 19 Idaho 420, 113 P. 731 (1911).

c. ISU has been granted the power "[t]o acquire by purchase, gift or the exercise of the right of eminent domain and hold and dispose of real or personal property or rights or interests therein." *See* Idaho Code § 33-3804. However, "[a]ll rights and title to property, real or personal, belonging to or vested in the Idaho State University are ... vested in its board of trustees and their successors." Idaho Code § 33-3005.

d. Although ISU's corporate status is that of "a body politic and corporate and a separate and independent legal entity," the Idaho State Legislature has clearly confirmed ISU "as a governmental instrumentality for the dissemination of knowledge and learning." *See* Idaho Code § 33-3803.

3. In 2005, Plaintiff attained a master's degree in education from Shanghai Normal University. (*See* Deposition of Jun Yu taken July 26, 2016 (hereinafter "Yu Depo"), 10:20 –

11:4, pertinent excerpts of which are attached to the Affidavit of Counsel in Support of Defendant’s Renewed Motion for Summary Judgment as Exhibit “A.”) He was subsequently admitted to the clinical psychology doctoral program at ISU for the Fall 2008 term as an international student. (*Id.*, 11:5-8; 15:4-6; Amended Complaint ¶¶15 and 16.)

4. In the Spring 2010 semester, Plaintiff took the first of two completed practicum courses from adjunct ISU professor, Cheri Atkins, Ph.D. (*See* Amended Complaint, ¶¶66 and 68.). In her evaluation of Plaintiff for that practicum, Dr. Atkins rated his “[a]bility to form a working alliance with patients” as “B,” or “Below Expectations.” (*See* Deposition of Cheri Atkins, Ph.D. taken August 12, 2016 (hereinafter “Atkins Depo”), 26:11-12; 64:12 – 65:2, pertinent excerpts of which are attached to the Affidavit of Counsel in Support of Defendant’s Renewed Motion for Summary Judgment as Exhibit “B”; Deposition Exhibit 24, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “C.”)

5. That rating was significant to Dr. Atkins because, as she testified at her recent deposition, “you don’t give ‘B’s’ very often.” (*See* Atkins Depo, 65:3-5.) She also testified: “[a]nd, honestly, ‘M’s’ [‘Meets Expectations’ marks] aren’t that great either, even though they say meets. You know, we’re talking about doctor level students who should be getting ‘E’s.’” (*Id.*, 46:16-19.) In her mind, “[i]t was not just an accent that’s a problem. It was the whole language and ability to communicate with the kids and patients that [she] was concerned about.” (*Id.*, 54:5-19.) She testified that “[t]here was something real about [Plaintiff’s] ability to communicate.” (*Id.*, 55:4-8.)

6. In her evaluation for that practicum, Dr. Atkin’s identified what she perceived as the problem:

Jun is obviously a bright and talented young man. ... In terms of his performance on this practicum, I would be doing Jun a

disservice if I did not give him feedback regarding the impact of his language skills to his clinical work. While I have witnessed dramatic improvements over the past year or so with conversational English, **his conversational skills are still subpar for doctoral level training experience in both assessment and treatment.**

(See Affidavit of Counsel, Exhibit “C” at ISU Documents 0063 (emphasis added).

7. Plaintiff signed the foregoing evaluation, confirming he had discussed it with Dr. Atkins, and also that the evaluation had been “carefully read” to him and “thoroughly reviewed” with him by Dr. Atkins on May 6, 2010. (*Id.* See also Atkins Depo, 65:6-14.)

8. Plaintiff completed a second practicum with Dr. Atkins during the Summer 2010 semester. (See Amended Complaint, ¶68.) Unfortunately, his difficulties with communication in a clinical setting persisted. In her evaluation of Plaintiff for this practicum, Dr. Atkins wrote:

Fluent English is **still** a concern, especially when treating younger children. Also, language was at times a concern during supervision as I was not always confident he fully understood my instructions.

(See Atkins Depo, 43:11-23; Deposition Exhibit 25, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “D,” at ISU Documents 0068 (emphasis added).)

9. The second practicum evaluation from Dr. Atkins, like the first, was carefully read to and reviewed with Plaintiff, who confirmed that such review and discussion occurred on July 28, 2010. (See Affidavit of Counsel, Exhibit “D” at ISU Documents 0068. See also Atkins Depo, 66:4-19.)

10. Subsequently, during the Fall 2011 semester, Plaintiff enrolled in an externship at Eastern Idaho Regional Medical Center (“EIRMC”) in Idaho Falls, Idaho, under the supervision of John Landers, Ph.D. (See Deposition of John E. Landers, Ph.D. taken August 12, 2016

(hereinafter “Landers Depo”), 21:7-14, pertinent excerpts of which are attached to the Affidavit of Counsel in Support of Defendant’s Renewed Motion for Summary Judgment as Exhibit “E.”)

11. The work with Dr. Landers at EIRMC was very different from that Plaintiff was previously involved with under the supervision of Dr. Atkins. It occurred in an in-patient setting where all of the patients, by definition, presented with complicated cases; they were suicidal, dangerous to others, or gravely disabled on account of mental illness. (*Id.*, 19:13 – 20:9.)

12. Plaintiff’s difficulties with communication in the clinical setting previously identified and discussed with him by Dr. Atkins continued, and on November 4, 2011, he was dismissed from that externship. (*Id.*, 17:8-21.) In his letter of dismissal, which was sent to ISU Clinical Program Director, Dr. Mark Roberts, Dr. Landers wrote:

... I have consistently observed that Jun Yu is **unable to grasp the communication nuances that are required to build rapport with difficult patients, administer standardized tests with difficult patients, conceptualize clients from a broad perspective and coherent psychological theory, and provide feedback to patients and other hospital providers regarding the outcome of psychological assessment.** My hope at the beginning of the year was to be able to see Jun Yu progress quickly through the above skill sets at the level expected of an advance doctoral student; however, this has not occurred. Additionally, I have found that some interactions between Jun Yu have led to some reported difficulties with patients that has impacted the perceived quality of care that we provide to our patients at EIRMC.

(*See* Landers Depo, 16:17 – 17:13; Deposition Exhibit 13, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “F.”)

13. During his deposition, Dr. Landers explained what he meant by reference to Plaintiff’s difficulty with communication nuances: “being able to look at all the variables involved and detect: Is my communication, is my testing, are the things that I’m doing hurting or enhancing this relationship?” (*See* Landers Depo, 20:11 – 21:6.) Because of that difficulty and

the risks to the difficult patients associated with their complicated cases, Dr. Lander's believed Plaintiff was not a good fit for that externship. (*Id.*, 28:23 – 30:5.)

14. In addition to sending the November 4, 2011 letter to Dr. Roberts, Dr. Landers prepared an evaluation of Yu's performance in the externship. (*Id.*, 36:21-25; Deposition Exhibit 14, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit "G.") In that evaluation, Dr. Landers stated:

Considering Jun's developmental level in the program and the general assumption that ISU's program is designed to produce generalists, **I would state that he is significantly lagging in all of the "B" rated areas of functioning primarily as it relates to cultural awareness and competency.**

(*See* Affidavit of Counsel, Exhibit "G" at ISU Documents 0039 (emphasis added).)

15. By "cultural awareness," Dr. Landers was referring to an awareness, by the provider (in this case, Plaintiff), of the patient's culture: "So, it's being able to perceive exactly what your needs are from your particular background and be able to meet those needs or join with you as a therapist or as a psychologist." (*See* Landers Depo, 38:9 – 39:10.) "[C]ulture is a broad multi-varied issue. It has nothing to do with Jun being from China." (*Id.*, 41:9-11.)

16. According to Dr. Landers, the problem resulting in the termination of Plaintiff's externship at EIRMC was Plaintiff's "inability to adopt the needs, wants, desires, values, whatever of the person that he's working with at that time." (*Id.*, 44:8-22.) "[T]he issue is he was not aware of himself in the room and how it affected other people; nor was he aware of other people in the room and how they were reacting to him." (*Id.*, 46:7-11.)

17. The very same concerns expressed by Dr. Atkins and Dr. Landers regarding Plaintiff's clinical skills were once again pointed out to Plaintiff in his Spring 2012 Clinical Training Program Semi-Annual Student Evaluation by Drs. Haight and Roberts:

Jun assisted with a family therapy case for Haight which involved school refusal. **Both supervisors observed difficulties in clinical process skills that yielded Below Expectations ratings. Specifically, Jun appears to struggle with alliance formation, sensitivity to client signals during sessions, and the ability to adjust assessment/treatment given ongoing circumstances. These were discussed thoroughly with Jun who disagreed with these conclusions and considered them unjustified.**

(See Yu Depo, 58:21 – 59:10; deposition Exhibit 3, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “H” (emphasis added).)

18. Plaintiff was concerned that Dr. Haight and Dr. Roberts believed he was still having difficulties with his clinical process skills; however, he did not approach either professor to discuss what he could do to fix the problem. “... I was expecting them to provide the plans to address their concerns.” (See Yu Depo, 62:17 – 63:15.)

19. In the Fall of 2011, Plaintiff applied for internships through the Association of Psychology Postdoctoral and Internship Centers (APPIC). (See Yu Depo, 53:13-15.) During Plaintiff’s time at ISU, there was an “internship crisis” and a lot of applicants were not matched. (*Id.*, 55:2-11.) Although he had interviewed with some facilities, Plaintiff was not matched for an APPIC internship. (*Id.*, 55:18 – 57:12.)

20. At some point in this same timeframe, Plaintiff filed a complaint with the Idaho Human Rights Commission, alleging he had suffered discriminated in several particulars, including his supervision by Dr. Atkins and Dr. Landers. (*Id.*, 42:23 – 52:14; 53:13-18.) Following a rather detailed factual investigation, on November 16, 2012, the Idaho Human Rights Commission issued its determination:

There is no dispute that Complainant has shown academic success in Respondent’s clinical psychology doctoral program. However, **evidence shows that beginning in about the third year of the program, concerns were raised by multiple educators about Complainant’s ability to communicate with and effectively**

assess and treat patients. There is no dispute that these types of concerns led to his dismissal from a paid externship. **Nevertheless, the evidence does not support unlawful race or national origin discrimination. As a clinical psychologist, being able to effectively communicate with and relate to patients is essential to successful performance and treatment. The evidence shows that Respondent's criticisms and recommendations were reasonable and non-discriminatory.**

(See Yu Depo, 43:2 – 44:6; Deposition Exhibit 16, p.14, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “I” (emphasis added).)

21. Following his non-selection for an APPIC internship, Dr. Roberts informed Plaintiff he had three options: (1) reapply for an APPIC internship; (2) create a non-APPIC internship in China; or (3) create a non-APPIC internship in the U.S. (See Yu Depo, 58:14-18.) The choice among the three alternatives was left up to Plaintiff, and he chose to create a proposal and pursue a non-APPIC internship with the Cleveland Clinic Center for Autism. (*Id.*, 65:22 – 67-18.)

22. On November 12, 2012, Dr. Roberts sent Plaintiff a letter stating that Jill Hedt, Ph.D. had reviewed his proposal for the Cleveland Clinic internship and was concerned about the lack of due process safeguards in the proposal. (See Yu Depo, 70:9 – 71:2; Deposition Exhibit 5, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “J.”)

23. On November 19, 2012, Plaintiff sent Dr. Roberts a letter stating that he had been fully informed of the limits of the internship proposal with Cleveland Clinic, but that he nonetheless desired to proceed with it. (See Yu Depo, 73:20 – 76:16; Deposition Exhibit 2, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “K.”)

24. Previously, by email dated July 31, 2012, Plaintiff was specifically informed by Kathy Kaderly, Cleveland Clinic’s Director of Professional Development, that Cleveland Clinic does not have a due process procedure for students such as him, and that his only recourse if he

were dismissed from the internship would be through ISU's grievance program. Plaintiff responded: "I completely understand." (*See* Affidavit of Counsel, Exhibit "L.")

25. As Plaintiff commenced his internship with Cleveland Clinic, the ongoing difficulties he displayed in his clinical skills, all of which had been brought to his attention and discussed with him, came to a head. In January of 2013, shortly after the commencement of the internship, his supervisor (Dr. Speer) contacted Dr. Roberts and expressed concerns about Plaintiff's skills, indicating that he was not as far along as she would have expected and that he "appeared to manifest a slow learning curve." (*See* Deposition of Mark Roberts, Ph.D. taken July 20, 2016 (hereinafter "Roberts Depo"), 39:15 – 43:22, pertinent excerpts of which are attached to the Affidavit of Counsel in Support of Defendant's Renewed Motion for Summary Judgment as Exhibit "O.")

26. In April 2013, Dr. Speer prepared an evaluation of Plaintiff, and stated bluntly that he was not making progress. (*See* Yu Depo, 83:20 – 84:17.) Plaintiff was dismissed from the Cleveland Clinic internship at the beginning of April 2013. (*Id.*, 85:25 – 86:2.)

27. At that point, Plaintiff began to experience distress about his status with ISU: After his dismissal from the Cleveland Clinic internship but before his dismissal from the ISU program, he contacted the ISU Student Service Office to express concern that Dr. Roberts was going to dismiss him. (*Id.*, 96:18 – 97:15.)

28. By letter dated May 3, 2013, Plaintiff was dismissed from the ISU clinical psychology doctoral program for failure to make satisfactory progress in the program. (*See* Yu Depo, 95:11-23; Deposition Exhibit 17, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit "M.") Plaintiff received this letter and knew he had been

dismissed from the program at ISU sometime between May 3, 2013 and May 17, 2013. (*See* Yu Depo, 104:24 – 105:6.)

29. Plaintiff chose to appeal the May 3, 2013 dismissal pursuant to the ISU grievance procedures in place at the time; however, those procedures nowhere purport to make such process a mandatory precursor to asserting a claim for alleged discrimination in litigation. To the contrary, they plainly state that “[s]tudents receiving letters of dismissal will automatically be dropped from all graduate courses in the program from which they are being dismissed, **regardless of whether they choose to appeal...**” (*See* Yu Depo, 126:1 – 127:4; Deposition Exhibit 10 at p.3 of the excerpt of the Idaho State University Graduate Catalog 2013-2014, a true and correct copy of which is attached to the Affidavit of Counsel as Exhibit “N.”)

30. Plaintiff brought this action on September 16, 2015, when he filed his Complaint (Dkt. 1) alleging that he was denied educational opportunities on account of his race and national origin.

31. Plaintiff filed an Amended Complaint on March 29, 2017.

DATED this 25th day of August, 2017.

KELLY, TALBOY & SIMMONS, PA

By: /s./Michael E. Kelly
Michael E. Kelly, Of the Firm
Attorneys for Defendant Idaho State University

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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