UNIVERSITY OF NORTH DAKOTA

May 20, 2011

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Sent by U.S. Mail & Facsimile 215-717-3440

Robert L. Shibley Foundation for Individual Rights in Education 601 Walnut Street, Suite 510 Philadelphia, PA 19106

Re: Warner Rehearing

Dear Vice President Shibley:

I have been asked by President Kelley to respond to your letter of May 11, 2011. We have thoughtfully reviewed this request for rehearing and find that it does not meet the standard. This finding is more fully discussed below.

The student judicial process at the University follows the Code of Student LIFE (Code), web address: http://und.edu/student-affairs/code-of-student-life.pdf. The Code is based on an educational disciplinary process, which outlines the rights and responsibilities of our students. It is not a legal process. When a violation of the Code such as Mr. Warner's occurs, the case is referred to the Dean of Students Office. The Code outlines all of the specific procedures (specifically Article V., page 15). If the Judicial Officer believes that a violation warranting suspension has occurred, he or she may refer the case to the Student Relations Committee (SRC/Committee) (see Appendix VII: Student Relations Committee (SRC) page 53). This is what happened in Mr. Warner's case. This Committee is comprised of faculty and students and is the only entity that has the authority to suspend a student from the University.

In summary, the accused student is provided with a Process Advisor who is a resource regarding the hearing process and attends the hearing. The accused student may bring a Personal Advisor or an attorney as well. Mr. Warner was accompanied by both a Process Advisor and hired by Mr. Warner, Mr. Steven Light, Esquire. A Judicial Officer is assigned from the Dean of Students Office to present the case. The accused student presents his or her case to the Committee and has an opportunity to question the witnesses.

Neither the Process Advisor nor the accused student's attorney may speak directly to the Committee but both are available to speak with the accused student during the hearing process. It is not unusual for them to confer before a witness is questioned or a statement is made. Mr. Warner had various conversations with his attorney and his advisor. During the hearing process, both the accused student and

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the complainant have the opportunity to share their information with the Committee by making an opening and closing statement, deciding if they want to provide information and tell their side of the issue, and answering questions posed by the Committee and the other side. Each side has the ability to call witnesses (see section IV.B.4.e; page 54). Mr. Warner made an opening statement. Mr. Warner presented witnesses. He questioned his witnesses and the University's witnesses. He chose not to testify during the hearing—indicating that the statement that he gave to Student Services Officer, Jeffrey Powell, would suffice.

In preparation for the hearing, the accused student is informed of the witnesses who will be at the hearing and the information that will be presented so he can prepare questions and consult with his or her attorney if applicable. Mr. Warner had the statements of the University's witnesses before the hearing. He actively participated in questioning the witnesses and the victim. He made a closing statement. He received all the process he was due.

In response to your request to inform you of any information that we believe is in error, I provide the following:

You have indicated that Mr. Powell asked Officer Vigness "not to begin his investigation until after the UND hearing took place." This is not the case. Mr. Powell did not ask Officer Vigness to delay the police investigation. Mr. Powell would not have asked to have the investigation delayed since it is always in the best interest of the victim and the accused to have an investigation completed in a timely and thorough manner. As is always the case, he would have told Officer Vigness that the University was going to proceed with its own investigation whether or not the Grand Forks police department investigated.

Many months after the case was concluded and approximately two months after the arrest warrant was issued, Mr. Light, on behalf of Mr. Warner, asked the University to rehear the case in light of a determination made by Officer Vigness that the victim was not telling the truth. There are two issues here. One, assuming arguendo that the University were going to re-hear this case, Mr. Light's notification in July of a May finding makes it very difficult for the University to have another hearing. The participants are no longer on campus in July; they may no longer be students. Second, Officer Vigness based his conclusion on eight statements purportedly made by the victim. You included five of them in your letter so I will not reiterate them here. According to Mr. Light's July 28, 2010 letter, he intended "to present new testimony from Detective Vigness of the Grand Forks Police Department regarding the inconsistencies in [the victim's] statements to police and against Mr. Warner. Mr. Warner also intends to present evidence of [the victim's] current arrest warrant, for filing a False Report to Law Enforcement, issued on May 17, 2010, in relation to this case. . . . This information was not available during Mr. Warner's initial hearing." Mr. Light is incorrect. Testimony, including contradictory testimony, was received from the witnesses and both the victim through her statement and testimony and

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the accused through his statement on the issues of: "the report of sexually assaulted"; the first meeting at the fraternity; the issue of "drinking and 'making out' with Caleb" and "them having sexual intercourse"; the "text message"; and "one of Caleb's roommates . . . saw the next morning and joked with her." Clearly, the only "new testimony" would be that of the opinion of Officer Vigness, i.e. that the victim lied to the police. This would not be substantial new evidence. This would be an unproved allegation. Further, it would not be the best evidence. The statements of the actual witnesses are the best evidence and that is what was heard by the SRC. Finally, to have a law enforcement officer come in and make an unproven allegation that in his opinion, the victim lied would be very prejudicial.

You are correct when you assert that a rehearing may be granted when "substantial new information, unavailable during a prior hearing and relevant to the alleged violation, has been discovered." Code § 2 Art. III(7)(b)(emphasis added). However, most of the information provided in Officer Vigness' incident report, attached in support to his Affidavit of Probable Cause, was heard by the SRC in the original hearing. The only difference is that a police officer would deliver the information this time—instead of the witnesses previously called. You acknowledge: "To be sure, being charged with making a false report to law enforcement is not the same as being guilty of such crime." I agree. Further, it is not appropriate as a trigger for a rehearing in a student issue because it is not the best information and it is not new information. Finally, contrary to your insinuation, your assumption that the victim's failure to return to North Dakota to defend herself against this charge is because she fears being found guilty. You cannot assume that; in fact, I cannot even assume that she is aware of this charge. Finally, the law deems that she is innocent until proven guilty.

A rehearing must be based on "substantial new information, unavailable during a prior hearing." That is not the case in this instance; most of the allegations and contradictory statements were provided and considered during the hearing. Most of the new information regarding the "inconsistencies in the [victim's] statements to police and against Mr. Warner" that Mr. Light wants to present have already been addressed. A Committee comprised of faculty and students heard the case and determined that Mr. Warner had violated the Code. This was not a legal process but an educational one. It is not appropriate that either you or I second-guess the findings of the Committee. They heard the witnesses. They judged their credibility.

I understand your concerns that Mr. Warner be treated fairly. The University has the same concerns. Each student is treated with respect and dignity. Each student is given an opportunity to know about what he has been accused. Each student is given help to proceed with a hearing. Each student is given information about the witnesses against him. Mr. Warner was treated fairly. Additionally, counsel selected by Mr. Warner ably represented him throughout the hearing process. Mr. Warner's request for a rehearing was evaluated; however, he has not met the "substantial new information" standard under the CODE.

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Thank you for your attention to this matter. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

Julie Ann Evans General Counsel

cc: Robert O. Kelley, President

Lori Reesor, Vice President for Student Affairs