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**IN WHITMAN COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

ROBERT BARBER,

Petitioner,

vs.

WASHINGTON STATE UNIVERSITY
Respondent

NO.

**MOTION TO STAY AGENCY ACTION
PENDING REVIEW, AND MEMO IN
SUPPORT**

I. MOTION

Comes now, Stephen Graham, attorney for the defendant, and respectfully moves the court to stay the disciplinary suspension of ROBERT BARBER pending review of this matter. This motion is made pursuant to RCW 34.05.550 and is supported by separately filed declarations and memorandum.

Dated this 2nd day of November, 2016.

Stephen Graham, WSBA #25403
Attorney for Petitioner

III. MEMORANDUM

RCW 34.05.550(2) provides that “a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.” Section (3) provides:

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1 If judicial relief is sought for a stay or other temporary remedy from agency action
2 based on public health, safety, or welfare grounds the court shall not grant such relief
unless the court finds that:

- 3 (a) The applicant is likely to prevail when the court finally disposes of the matter;
4 (b) Without relief the applicant will suffer irreparable injury;
5 (c) The grant of relief to the applicant will not substantially harm other parties to the
proceedings; and
6 (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify
the agency action in the circumstances.

7 Washington Courts have not specifically addressed the above-cited statute to the extent
8 necessary here. Therefore, as stated by the Washington legislature in enacting the WAPA, as
9 well as the Washington appellate courts interpreting this provision, a reviewing court looks to
10 decisions by other courts addressing the Federal Administrative Procedure Act (“APA”) in
11 interpreting Washington State’s similar version of the law. *See Wells Fargo Bank v. Dep’t of*
12 *Rev.*, 166 Wn. App. 342, 355, 271 P.3d 268 (2012) (noting that “the APA’s purpose is ‘to
13 achieve greater consistency with other states and the federal government in administrative
14 procedure,’ and, thus, ‘courts should interpret provisions of [the APA] consistently with
15 decisions of other courts interpreting similar provisions of other states, the federal government,
16 and model acts.’”) (*citing* RCW 34.05.001).

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18 **1. Based on a proper balancing of the factors, case law mandates a stay.**

19 The Federal APA language in 5 U.S.C. § 705 is nearly identical and equivalent to the
20 Stay language of RCW 34.05.550. One well-known Federal court case to interpret the stay
21 requirements of the Federal APA is *Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288
22 (6th Cir. 1987). In *Celebrezze*, the court used language that virtually mirrors the language of
23 RCW 34.05.550(3). The court enumerated the four elements that the movant needs to establish
24 for a stay, which are:

1 (1) the likelihood that the party seeking the stay will prevail on the merits... ; (2) the
2 likelihood that the moving party will be irreparably harmed absent a stay; (3) the
3 prospect that others will be harmed if the court grants the stay; and (4) the public
interest in granting the stay.” for the Petitioner to receive an order granting a stay.

4 *Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d at 290 (citing *Cuomo v. United States*
5 *Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C.Cir. 1985)). In addition to enumerating
6 the factors that need to be established, the *Celebrezze* court further clarified how the movant
7 can establish these factors factors by providing the following, more-specific explanation:

8 To justify the granting of a stay, a movant need not always establish a high
9 probability of success on the merits. [citation omitted]. . . Indeed, the
10 language courts have used to describe the “success factor” has varied, and
11 we have previously found that the variance can best be reconciled by
12 recognizing that **the four considerations are factors to be balanced and**
13 **not prerequisites to be met.** *DeLorean*, 755 F.2d at 1229. The probability
14 of success that must be shown is inversely proportional to the degree of
15 irreparable injury the plaintiffs will suffer absent an injunction. *Cuomo*, 772
16 F.2d at 974; *DeLorean*, 755 F.2d at 1229. **Thus, a stay may be granted**
with either a high probability of success and some injury or vice versa.
Cuomo, 772 F.2d at 974. . . . at a minimum the movant must show “serious
questions going to the merits and irreparable harm which decidedly
outweighs any potential harm to the defendant if a [stay] is issued.”
DeLorean, 755 F.2d at 1229. (bold emphasis added).

17 *Id.* at 290 cited verbatim by *Kindhearts for Charitable Humanitarian Dev. Inc. v. Geithner*,
18 676 F. Supp. 2d 649, 652 (USDC, No. Dist. Ohio, 2009).

19 **2. Irreparable harm is mandated when constitutional interests are at stake.**

20 The court in *Kindhearts* extended the analysis of the *Celebrezze* court and through
21 Judge Carr, defined what constitutes irreparable harm. A finding of irreparable harm is
22 mandated when the administrative sanction applies to a constitutionally protected interest:

23 A plaintiff demonstrates irreparable harm “if the [plaintiff’s] claim is based
24 upon a violation of the plaintiff’s constitutional rights.” *Overstreet v.*
Lexington-Fayette Urban County Gov’t, 305 F.3d 566, 578 (6th Cir.2002);
25 *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) .
26 . . *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir.1992); *McDonell v. hunter*,

1 746 F.2d 785, 787 (8th Cir.1984) . . . **[W]hen reviewing a motion for a**
2 **preliminary injunction, if it is found that a constitutional right is being**
3 **threatened or impaired, a finding of irreparable injury is mandated.”**
4 *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.), crt. Denied, 534 U.S. 951,
122 S.Ct. 347, 151 L.Ed.2d 262 (2001) (citing *Elrod v. Burns*, 427 U.S.
347, 373, 96 S.Ct. 2673, 49 L.Ed 547 (1976)).

5 *Kindhearts*, at 653.

6 Robert Barber has suffered irreparable harm as he is being deprived of his liberty and
7 property rights which are granted by the United States Constitution Due Process Clause. U.S.
8 Const. amend. XIV, § 1. In *Goss v. Lopez*, the United States Supreme Court reaffirmed the
9 liberty right that “[t]he Due Process Clause...forbids arbitrary deprivations of liberty ‘where a
10 persons good name, reputation, honor, or integrity is a stake because of what the government is
11 doing to him...’” 419 U.S. 565, 574 (1975). In addition, in *Goss*, the Supreme Court ruled that
12 “[p]rotected interests in property are normally ‘not created by the Constitution. Rather, they are
13 created and their dimensions are defined’ by an independent source such as statutes or rule
14 entitling the citizen to certain benefits.” *Id.* at 772-73 (citing *Bd. Of Regents v. Roth*, 408 U.S.
15 564, 677, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)). The *Goss* court then held that since an
16 Ohio statute granted a right to education to children between certain ages, the right now became
17 a property interest of the children that could not be taken away without Due Process of law. *See*
18 *Goss*, at 572-73.

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21 **3. A grant of relief to the applicant while judicial review is pending will not**
22 **substantially harm the agency and the public health, safety, or welfare.**

23 Mr. Barber does not pose a threat to the safety of other students. The alleged incident
24 happened back in July, 2016, and Mr. Barber has not been in any trouble since. If the school
25 felt Mr. Barber was a true danger to his classmates they could have sought an interim
26 suspension.

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1 In *Kindhearts*, Judge Carr noted that if the “[the agency has] not demonstrated that time
2 is of the essence... [then the] defendants [WSU] have failed to show a pressing need for
3 immediate continuation of the [sanction] process.” See *Kindhearts* at 654. Part of the key
4 language that needs to be drawn from *Kindheart* is that WSU cannot show that “time is of the
5 essence” since WSU has taken three to four months to come out with an initial order. *Id.* It
6 should be noted that in *Kindhearts* the sanction process had been ongoing for more than three
7 years.

8
9 A case more to the point is *Goss v. Lopez*. In *Goss*, the court noted that a school could
10 immediately remove a student “whose presence poses a continuing danger to persons or
11 property or an ongoing threat of disrupting the academic process.” *Goss*, at 582. *Goss* lends
12 support in showing that if WSU thought Mr. Barber presented a continuing danger, then WSU
13 could have immediately removed him from school and then provided notice and hold a hearing.
14 Since WSU did not do this and took three to four months to have a first hearing, by WSU’s
15 actions, it cannot be argued that substantial harm will occur by this Court staying the “Final
16 Order.”
17

18
19 **4. The public’s interest in the protection of constitutional interests will be
20 advanced by a Stay.**

21 WSU expelled Robert Barber but did not provide proper due process when depriving
22 him of his liberty and property rights when carrying out sanctions. Nevertheless, the University
23 Appeals Board affirmed the finding of misconduct. Judge Carr spoke to the judicial duty of
24 protecting public interests when constitutional rights are at stake:

25 The Public clearly has a substantial state in the government being able to
26 perform its duties without interference. **The public also, however, has a**

1 **fundamental and great interest in seeing the Constitution upheld and**
2 **ensuring that remedies be provided when the government has acted in**
3 **derogation of constitutional rights.**

4 *Kindhearts for Charitable Humanitarian Dev. Inc. v. Geithner*, 676 F. Supp. 2d 649, 655
5 (USDC, No. Dist. Ohio, 2009) (bold emphasis added). Thus, clearly the public interests will be
6 advanced by this Court ordering a stay for Robert Barber to remain at WSU while judicial
7 review is pending.

8 **5. The Petitioner is likely to prevail.**

9 Even if the legal standard were a likelihood of success on the merits, we have met that
10 burden. As we have made clear in our petition, the school cannot destroy records. RCW
11 34.05.494 states: “The agency record consists of any documents regarding the matter that were
12 considered or prepared by the presiding officer for the brief adjudicative proceeding or by the
13 reviewing officer for any review. The agency **shall** maintain these documents as its official
14 record.” (Emphasis added). “WSU's rule provides a limited right to cross-examination.” Alpha
15 Kappa Lambda Fraternity v. Washington State Univ., 152 Wash. App. 401, 417, 216 P.3d 451,
16 459 (2009)(citing WAC 504-26-403). This court is unable to review the questions posed, and
17 how they were re-phrased, and whether questions were omitted without a record. A
18 Washington case on point for the right of cross-examination is Stone v. Prosser Consol. Sch.
19 Dist. No. 116, 94 Wash. App. 73, 971 P.2d 125 (1999). That case explained:
20

21 ...we should note first that federal law, unlike Washington law, does not provide
22 students the right to confront and question adverse witnesses at the expulsion hearing.
23 L.Q.A. v. Eberhart, 920 F.Supp. 1208, 1219 (M.D.Ala.1996), *aff'd*, 111 F.3d 897 (11th
24 Cir.1997). Second, it is risky to base an expulsion on hearsay statements bolstered by a
25 school official's testimony that the proponent is reliable. As stated in *Colquitt*, a case
26 with remarkably similar facts, reliance on the official's opinion of the absent witnesses'
 credibility “is a particularly egregious departure from the adversarial standard.” 298
 Ill.App.3d at 865, 232 Ill.Dec. 924, 699 N.E.2d 1109. On balance, the risk that Josh's
 interests were deprived by the refusal to offer him the opportunity to confront and

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question the adverse witnesses is compelling. **He should have been provided the opportunity to cross-examine unless the burden on the school administration was prohibitive.**

Id at 94 Wash. App. 73, 77, 971 P.2d 125, 127 (1999). The due process for getting suspended from college should be greater than a high school discipline. A greater property interest is at stake.

Dated this ____ day of November, 2016

Stephen Graham, WSBA#25403
Attorney for Robert Barber

Dated this 2nd day of November, 2016.

Stephen T. Graham, WSBA #25403
Attorney for Petitioner