

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

James Galdikas, et al.,)
) Appeal from the
) Plaintiffs-Appellants,) United States District Court for
) the Northern District of Illinois,
v.) Eastern Division
)
Stuart Fagan, et al.,) No. 01 C 4268
)
Defendants-Appellees.) Judge Suzanne B. Conlon

BRIEF FOR DEFENDANTS-APPELLEES
STUART FAGAN, ET AL.

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Appellate Court No: 02-2210

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JURISDICTIONAL STATEMENT

Appellants' statement of this Court's jurisdiction is not complete and correct, for the following reason. Appellants contend that the District Court's original jurisdiction over their state law claims arose from 28 U.S.C. § 1367(a), "since the state law claims are inexorably related to the federal claims so that they form part of the same case or controversy." Appellants' Br. 1. Appellees agree that the District Court initially had jurisdiction over the state law claims under 28 U.S.C. § 1367(a), but maintain that the District Court properly relinquished jurisdiction over those claims after dismissing two of Appellants' federal claims, pursuant to 28 U.S.C. § 1367(c)(2)-(3). As discussed in Section III. C of this Brief, Appellees disagree that the state claims are "inexorably related" to the federal claims that survived dismissal, or that they form part of the same case or controversy as the federal claims.

On July 3, 2002, the District Court granted the Appellants' unopposed motion for entry of stipulation to correct or modify the record so that the Civil Cover Sheet now reflects the basis of jurisdiction as the existence of a federal question.

STATEMENT OF THE ISSUES

1. Whether the District Court properly found that plaintiffs, complaining about their university's failure to secure accreditation for the Master of Social Work (MSW) program, had failed to state claims for deprivation of substantive due process or procedural due process.
2. Whether the District Court properly dismissed, and later declined to exercise supplemental jurisdiction over, plaintiffs' state law claims arising from the failure to achieve accreditation.

3. Whether the District Court properly granted summary judgment to the defendants after concluding they did nothing to curtail any clearly established First Amendment rights of the plaintiffs during a university alumni dinner.

4. Whether the District Court properly denied plaintiffs leave to amend their complaint to identify unnamed security guards defendants after the deadline for serving defendants had passed.

STATEMENT OF THE CASE

The plaintiffs are a group of former students at Governors State University (“the University” or “GSU”) who have brought two federal and two state law claims arising from the fact that their Master of Social Work (“MSW”) program at GSU failed to win accreditation from the Council for Social Work Education (“CSWE”) in 2000. They have sued defendants, including former GSU President Paula Wolff, her successor Stuart Fagan, the former Acting Chair of the MSW program Joan Porche, and members of the GSU Board of Trustees, all in their individual capacities, for state law claims of fraud and promissory estoppel and federal Section 1983 claims of deprivation of substantive and procedural due process. In addition, they have sued the Defendants for alleged First Amendment violations stemming from incidents at a GSU alumni dinner in 2001. Appellants’ statement is otherwise complete and correct.

STATEMENT OF FACTS

I. Graduate Social Work Students’ Eligibility for Licensure in Illinois

Governors State University is a public university located in University Park, Illinois. The University established a graduate social work program in 1997, and suspended program classes

in late 2000. A2 at 2, 9.^{1/} Classes resumed in May 2002. The plaintiffs were students in that program at various times. Several of the plaintiffs completed their coursework and earned MSW degrees from the University. SuppApp270. In this case, the plaintiffs allege that the failure of the MSW program to become accredited adversely affected their ability to become licensed social workers. A2 at 9.

As plaintiffs noted in their Statement of Facts, the claims arising from the fate of the MSW program were dismissed on the pleadings by the District Court. Br. 7 n.7. Therefore, defendants recognize that the District Court and this Court must take as true the facts alleged by the plaintiffs and recounted below, and defendants confine their statement of facts to those this Court may consider, while noting that they contest the accuracy of those facts. As the District Court recounted, the plaintiffs sued GSU President Stuart Fagan, former GSU President Paula Wolff, former Acting Chair of the MSW Program Joan Porche and members of the GSU Board of Trustees. Op. 2. The students claim that the GSU defendants erroneously advertised that their MSW graduate program was approved for accreditation by the Council for Social Work Education. *Id.* The students also claim that the defendants took no steps to gain accreditation, failed to hire adequately qualified academics to lead the program, and failed to establish the kind of top-flight curriculum needed to win accreditation. *Id.* The plaintiffs alleged that the defendants knew the program would not be accredited, but made representations to the contrary. The Council for Social Work Education denied the program accreditation twice in the period from the program's inception until 2000. *Id.* In November 2000, GSU representatives informed

^{1/} “A_” refers to plaintiffs’ separately bound appendix; “SA_” refers to plaintiffs’ required short appendix; “SuppApp_” refers to defendants’ supplemental appendix; “Br.” refers to plaintiffs’ brief; “Op.” refers to the District Court Memorandum Opinion and Order of October 10, 2001.

the students in the program that CSWE had denied accreditation candidacy. Shortly thereafter, GSU suspended MSW classes. Op. 3.

The Illinois Legislature took steps in August 2001 to suspend for several years the requirement that applicants for a social work license graduate from an accredited program. Accordingly, former GSU program participants, including plaintiffs, are now eligible for temporary licensure as social workers if they meet the remaining requirements of Illinois law.^{2/}

II. The 2001 Governors State University Alumni Event

A. Preparations

On January 27, 2001, the Alumni Association of Governors State University sponsored a University alumni reception and dinner event. SuppApp79. The event consisted of three segments: a 3 p.m. Town Meeting, 4 p.m. alumni networking receptions, and 6 p.m. alumni dinners. Featured speakers at the dinner included President Fagan, State Senator Debbie Halvorson, and Cook County Commissioner Jerry Butler. A6 at 4. The GSU Alumni Association created the invitation list by identifying all GSU graduates as of August 2000, and eliminating any whose addresses bore zip codes determined to be beyond driving distance to the University. SuppApp201. Invitees were asked to return Response Cards for the event by January 15, indicating which of the three events they planned to attend. *Id.*

^{2/} 225 ILCS 20/9.5 enables graduates of the program to become licensed social workers despite the University's unaccredited program. This Court may take judicial notice of the law. *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977). The law recognizes "temporary" status for those graduates until December 31, 2004. The statute further provides a mechanism for students to become permanently licensed if they complete "supplemental coursework" either at GSU if accreditation is achieved prior to December 31, 2003 or at another accredited university after that date. 225 ILCS 20/9.5(a)(5), 225 ILCS 20/9.5(b)(5). Thus, GSU graduates can secure permanent licenses simply by completing "supplemental" courses in the coming years.

In the weeks leading up to the alumni event, the University's security staff and development staff both refined plans to help the attendees move as quickly and comfortably as possible to all three scheduled events. On January 18, 2001, GSU Director of Public Safety Albert Chesser drafted a memorandum regarding security for the alumni event. SuppApp213. The memo states, in part: "We believe in taking a proactive approach to provide executive security for the President and Provost, special guest and speakers. The event will have [Department of Public Safety ("DPS")] support for the alumni and guests throughout the activity scheduled. Campus access will be open and we expect a positive impact in handling the potential protestors and/or disturbances." *Id.* University officials initially anticipated that about 250 alumni and guests would attend. SuppApp202. As the January 15 due date for responses arrived, it became apparent that the event would attract a much larger crowd. On January 25, two days before the event, Director Chesser wrote a second memo, noting that the plans for "open" campus access had changed. Accordingly, he wrote on that date that security staff would close two of the university's six entrances, and monitor the remaining four entrances. SuppApp214; A-6, Ex. 5 (map appears on last two, unnumbered pages). Both memos were addressed to Alumni Association Director Rosemary Hullett and to President Fagan. SuppApp213-14. However, Director Chesser recalls providing the memos to University Vice President Tim Arr rather than to President Fagan, SuppApp211, and President Fagan has no recollection of receiving the memos. SuppApp216.

Originally, the Alumni Events committee planned to stage receptions and dinners for each of the University's colleges all in the GSU Hall of Governors and Hall of Honors. As it became clear that the attendees would not fit in these spaces, the committee decided to devote

one space to each of the five colleges' receptions and one to each college's dinner.

SuppApp202. The plan was revised to direct all alumni to enter through the atrium in the main building, and to proceed to the smaller venues for their schools' events. *Id.*

As of January 26, 2001, 977 invitees had responded that they would attend some or all of the program. SuppApp170. On that day, Director Chesser met with representatives of the alumni association to discuss crowd management plans for the upcoming event. SuppApp173. At the meeting, it was agreed that "D[e]partment of P[ublic] S[afety] will only allow picket signs outside in the vestibule area, but not to stop any flow of guest attendance." SuppApp214. Moreover, "[t]here will not be any protestors allowed with posters / picket signs within the town hall meeting," and "[n]o picket signs will be allowed in the receptions." *Id.* Further, it was determined that the school's library and classrooms would be "clos[ed] . . . off for the benefit of that affair." SuppApp177.

On the day of the event, attendees entered the building "through the main entrance of the GSU building . . . [which] opens into the front of a large atrium area where the registration tables were located." SuppApp202. Several registration tables sat in the atrium, each of which was equipped to handle an alphabetically determined group of confirmed attendees. Once a University official confirmed that an attendee had registered for the event, he or she gave the person a pre-printed name tag and dinner ticket. *Id.* Non-registrants who arrived specifically "for the Alumni Events" were permitted to attend the networking reception, but were not allowed to attend the dinner. *Id.* The security policies for the alumni event were formulated entirely by DPS and the alumni association. The defendants took no part in the crafting of the policies. Plaintiffs have pointed out that the Board met in executive session on January 12,

2001, prior to the Alumni dinner. A6 at Ex. 14. The minutes of that meeting indicate that the Trustees heard from the University's lawyer regarding possible litigation options, settlement options and budget implications arising from the failure to achieve MSW accreditation; and reviewed a draft press release regarding the situation. *Id.* The dinner was not among the topics discussed. *Id.*

B. The Event

About twenty graduate social work students arrived at the University for the event's 3 p.m. kickoff. Some had picket signs to express frustration with the University's accreditation efforts. SuppApp57. After demonstrating freely for half an hour, some of the students tried to enter the building with their picket signs. The students contend that security guards informed them that they could not enter the atrium with signs. SuppApp58, SuppApp196-98. When some students approached staff members at the tables, they were told they could not attend the dinner. SuppApp202-03. At least one of those workers said the students "stayed in the atrium until they made a decision to leave . . . [and] interacted with alumni and guests without interference." SuppApp203.

Several of the plaintiffs claimed their sole or primary purpose in attending the alumni event was to take part in a scheduled meeting between State Senator Debbie Halvorson, who was a guest speaker at the dinner, and the graduate social work students. SuppApp57. Whether such a meeting was ever finalized is unclear, as none of the students planning to attend could name the scheduled time for the meeting. One student testified that the meeting was set for "the room adjacent to the cafeteria," SuppApp269, but others confessed they did not know where they were to find the senator or what she looked like. *E.g.*, SuppApp58. There is no evidence that the

students were prevented from meeting with Senator Halvorson in the atrium or anywhere else that would not have interfered with the alumni event.

During the event, the library shut-down policy was enforced as planned, and a few graduate social work students were denied access to the library in accord with this policy.^{3/} SuppApp59. While the students were attending the alumni event, they tried to “educate the public” and “get as much publicity” as possible. SuppApp52. They were eventually told that the University policy was to restrict them from the various organized events, which were sponsored by the alumni association for alumni attendees. SuppApp62. The students left after about an hour. *Id.* None of them waited outside the building to find Senator Halvorson. *Id.*

C. The Participants

Just two of the named defendants attended the University’s alumni event on January 27, 2001. Trustee Bruce Friefeld arrived at the University in time to attend the 6 p.m. dinner. SuppApp179. The student protest had dispersed by the time of his arrival, and he neither saw nor took any actions with regard to the students. President Stuart Fagan was on hand throughout the alumni event. Making his way through clusters of alumni, and attending the town hall meeting in the Center for the Performing Arts from 3 p.m. until 4 p.m., President Fagan saw neither protestors nor their signs. Midway through the event, Director Chessier informed President Fagan that the students were demonstrating outside the atrium area, and President

^{3/} There is a suggestion that a security guard made one exception to this generally applicable policy, and that the student permitted to enter the library was not a graduate social work student. SuppApp59. The record does not contain any suggestion that all members of other groups were admitted to the library while all social work students were barred. Similarly, there is conflicting testimony regarding student access to some restrooms, but there is no evidence that the graduate social work students were denied access to certain restrooms inside GSU because of the nature of their protest. SuppApp75; A6, Ex. 4, at 31.

Fagan responded that he was an “advocate of free speech, and the students should be allowed to protest and in no situation whatsoever should there be any physical altercation at all.”

SuppApp75. President Fagan’s remark on the night of the dinner is unsurprising. He had previously accepted the students’ call for an informal discussion regarding their frustrations in early December. He accommodated the students’ chanting, marching and formal remarks at a December 15 Board meeting. SuppApp221-22. In fact, after the December Board meeting, the students were invited to a University holiday party, where they leafleted. SuppApp207.

SUMMARY OF THE ARGUMENT

The students assert four distinct causes of action arising from the CSWE’s refusal to accredit the MSW program: a Section 1983 substantive due process denial; a Section 1983 procedural due process denial; and state law claims of fraud and promissory estoppel. The District Court correctly dismissed all of these claims. Neither education, third-party accreditation of a degree, or fulfillment of a contract — the rights the students assert — are fundamental ones, an essential predicate for a substantive due process claim. Additionally, the students have failed to show that the GSU defendants’ failed bid for accreditation was an abuse of government power that “shocked the conscience” and therefore gave rise to a substantive due process claim. The students’ asserted academic injuries are not insubstantial, but they are undeniably less grave than life-threatening government actions found not to shock the conscience.

Plaintiffs’ claim of a procedural due process violation is also faulty. First, they have failed to identify a property interest of which they were deprived. Illinois law has not

specifically embraced a right to post-secondary education as a property right. While a student who has asserted a contractual relationship with his or her school might be said to have a protectible interest in the rights created by the contract, these plaintiffs have striven not to assert a breach of contract by the individual GSU defendants. Further, the students' injury – the denial of accreditation – was inflicted by the Council for Social Work Education, a third party that does not meet the “state action” requirement for a Section 1983 violation. Finally, the availability of an adequate state-law postdeprivation remedy, a lawsuit in the Illinois Court of Claims, forecloses the argument that plaintiffs were denied the opportunity to be heard at a meaningful time and in a meaningful manner.

Plaintiffs' state law promissory estoppel claim is simply unmatched to the facts of this case. The promissory estoppel doctrine permits a plaintiff to pursue a contract claim where consideration is lacking. But in the present case, the plaintiffs gave consideration in the form of tuition, and a straightforward breach of contract suit was called for. A standard breach of contract suit against the individual GSU defendants would be fruitless, however, because they were merely acting as agents of the University in any of their representations to the students, and therefore are insulated from contract liability. The students' state law fraud claim fails as well. The students have not met the pleading threshold laid out in Federal Rule of Civil Procedure 9(b) because they have not specified the conversations, presentations or documents that contained fraudulent misrepresentations, or the individual defendants responsible for any of the misrepresentations. In addition, having dismissed both the due process claims and the state law claims, the District Court properly declined a subsequent request to permit repleading of the state law claims, finding that there was no supplemental jurisdiction over those claims. At that point,

the only remaining federal claims were premised on alleged First Amendment violations that supposedly occurred during a GSU alumni event in January 2001. The District Court properly concluded that the actions taken on that night were wholly unrelated to the students' complaints that the GSU defendants had earlier engaged in a four-year course of misrepresentation culminating in the failure to achieve candidacy in November 2000.

The students' First Amendment claims are without foundation. First, the record reveals no direct involvement by any of the named defendants in the preparations for the dinner at which the First Amendment violations are alleged to have occurred. Additionally, only two of the named GSU defendants even attended the alumni dinner, and neither even saw the students. The students cannot sustain the burden required to show that the Board of Trustees conspired at a January 12 meeting to curtail their speech at the dinner, as the minutes of the meeting clearly reflect that the alumni dinner was not even an item of conversation. As important, the speech curbs applied during the dinner did not violate the First Amendment. The GSU representatives who created the security plan – defendants not among them – applied time, place and manner restrictions appropriate to each sector of the GSU campus, none of which were designed to restrict any particular point of view. The security guards reasonably followed the lead of those representatives in applying the restrictions. Even if this Court were to find that the GSU defendants participated in the security arrangements, they would be protected by qualified immunity. Public forum analysis is fact-intensive, and plan architects might have miscalculated while reasonably believing they were complying with First Amendment forum requirements. Further, it is elementary that if the GSU defendants did not participate in the security plan, the plan is not evidence that those defendants were retaliating against the students for their previous

exercise of free speech rights. Additionally, there is no evidence that any GSU defendant had a desire to retaliate against the students for the frustrations they voiced.

Finally, the District Court properly dismissed the plaintiffs' complaint against the "unnamed, known security guards." The students let the 120-day service period lapse without identifying or serving any of those guards. Instead of seeking the guards' names independently, such as by visiting the campus and reading the guards' badges or asking their names, the students served an interrogatory on the GSU defendants weeks before the service deadline was to expire. Further, when the plaintiffs sought leave to replead and to name the security guards, they did not assert good cause for the failure to serve the security guards. The District Court, already immersed in the developed case against the GSU defendants, wisely exercised its discretion to work toward resolution of the remaining claims and not permit joinder of additional parties at that stage of the proceedings.

ARGUMENT

I. The Council for Social Work Education's Frustration of the University's Accreditation Efforts Did Not Deprive the Students of Substantive Due Process

The students have alleged that President Fagan and members of the Board of Trustees, acting in their individual capacities, deprived them of substantive due process rights in violation of the Fourteenth Amendment to the U.S. Constitution, "as prohibited by 42 U.S.C. § 1983." Br. 5. The claim cannot survive rigorous scrutiny under this Court's substantive due process framework. This Court reviews the district court's decision to grant Defendants' motion to dismiss *de novo*. *Hickey v. O'Bannon*, 287 F.3d 656, 657 (7th Cir. 2002). In order to survive review under Federal Rule of Procedure 12(b)(6), a complaint must contain facts sufficient to

state a claim as a matter of law. *Id.* While this Court must accept all well-pleaded facts as true, it need not grant the truth of legal conclusions or unsupported conclusions of fact. *Id.* at 657-58.

The substantive component of the Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”

Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Because the right to substantive due process does not appear in the text of the Constitution, the Supreme Court has “always been reluctant to expand the concept.” *Id.* Accordingly, it has deployed the Due Process Clause in only those rare cases where plaintiffs assert “fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Id.* at 720-21.

The first step in substantive due process analysis is to reduce the plaintiff’s claim to “a careful description of the asserted fundamental liberty interest.” *Khan v. Gallitano*, 180 F.3d 829, 833 (7th Cir. 1999), quoting *Glucksberg*, 521 U.S. at 720. This Court has instructed that once the fundamental right at issue has been specifically identified, it must “examine our Nation’s history, legal traditions, and practices,” to see what place that interest has. *Khan*, 180 F.3d at 834, quoting *Glucksberg*, 521 U.S. at 710. In the event this Court determines the asserted right is not deeply rooted in the nation’s history and legal traditions, it must assess whether, in the alternative, the plaintiffs have asserted an instance of “egregious” official conduct that “shocks the conscience.” *Khan*, 180 F.3d at 836, quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Each segment of this three-step test reveals fatal flaws in the students’ claims.

A. The Students' Description Is Too Vague

The Supreme Court has resolutely limited the category of “fundamental rights” to include the right to marry and to enjoy marital privacy, to have children and to direct their upbringing, to use contraception, to elect an abortion and the like. *Glucksberg*, 521 U.S. at 720. Too, the Court has persistently resisted plaintiffs’ attempts to describe the rights they want vindicated in vague or rhetorical terms. For instance, in *Glucksberg*, the Supreme Court rejected the plaintiffs’ exhortations to recognize a right to die, instead evaluating whether the Due Process Clause protected a “right to commit suicide which itself includes a right to assistance in doing so.” *Glucksberg*, 521 U.S. at 723. Lower courts in this Circuit have followed suit. For instance, in *Khan*, this Court rejected plaintiff’s request to protect her right to contract, in favor of the more precise question whether she had a right “to be free from state officials tortiously interfering with [her] existing contractual relationships.” 180 F.3d at 834; *see also Winters v. Illinois State Bd. of Elections*, 197 F. Supp. 2d 1110, 1114 (N.D. Ill. 2001) (examining not the right to vote, but to have “the tie-breaking member of a redistricting commission chosen by some means other than lot”), *aff’d*, 122 S. Ct. 1433 (2002).

The students have variously decried their loss of the right to “education,” “continuing education once a . . . course of study [has begun],” “completion of an education,” “receipt of the education to which [the students were] promised,” and “entitlement to their MSW degrees.” Br. 15-16. None of these descriptions is sufficiently precise or concrete when compared with those employed in *Glucksberg* or *Khan*. Notably, although the plaintiffs insist they are vindicating the right to an education, the thrust of their complaint is that the lack of accreditation “would not

permit plaintiffs to qualify for work as licensed social workers in the State of Illinois.” Br. 16.^{4/}

The District Court accurately described the right at issue as the right to a graduate degree bearing the accreditation of a third party. This Court could parse the right even further, and ask whether the students who were midway through the program had a right to complete their degrees^{5/} and whether those who had received degrees had a right to a third-party seal of approval. In any event, there were no fundamental rights asserted in this case.

B. The Defendants Did Not Deprive the Student-Plaintiffs of a Fundamental Right

The plaintiffs recognize that “education is not among the rights afforded explicit or implicit protection under the Constitution.” Br. 15, citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973). Nevertheless, they urge that courts have recognized a property interest in education in some circumstances. Br. 15, citing *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978); *Goss v. Lopez*, 419 U.S. 565, 572 (1975); *Betts v. Board of Educ.*, 466 F.2d 629, 633 (7th Cir. 1972). However, the issue in *Horowitz*, *Goss*, and *Betts* was not whether the plaintiffs had been deprived of *substantive* due process but whether they were entitled to *procedural* due process in connection with the government action relating to education. *Horowitz*, 435 U.S. at 85; *Goss*, 419 U.S. at 574; *Betts*, 466 F.2d at 633. The plaintiffs also rely on the fact that students “have substantive due process rights while they are enrolled in school.” Br. 15, citing *Wood v. Strickland*, 420 U.S. 308, 326 (1975). This Court

^{4/} The Illinois Legislature has eliminated any immediate barrier that the CSWE may have interposed between these student-plaintiffs and Illinois social work jobs. This Court has noted that some injuries may be best ameliorated by the political process. *See, e.g., Plotkin v. Ryan*, 239 F.3d 882, 885 (7th Cir. 2001).

^{5/} Given plaintiffs’ laments regarding the worth of a non-accredited degree, this claim appears specious, and plaintiffs do not develop it in their brief.

has specifically held that *Wood* does not create a freestanding fundamental right to education. *Dunn v. Fairfield Comm'ity High Sch. Dist.*, 158 F.3d 962, 966 (7th Cir. 1998). There simply is no fundamental right to education recognized under the Constitution, and the district court properly laid the students' substantive due process claim to rest on that ground.

Even further afield is the students' claim that they had a fundamental right to the prestige that would result if a third-party accrediting body blessed the GSU social work program. In *Dunn*, this Court refused to recognize a fundamental right to an education where the student-plaintiffs both received failing grades as the result of school disciplinary action. 158 F.3d at 966. That one of the students graduated without honors as a result of the "F" on his record did not change the analysis. *Id.* Plaintiffs are asking for the equivalent of "honors," a recognition that this Court has indicated falls well outside the purview of fundamental rights.

Moreover, the decision to withhold accreditation was made not by the defendants, but by the Council on Social Work Education. This Court has called "utterly preposterous" the notion that decisions by an academic accrediting body are "a form of state action and therefore a possible source of constitutional" rights. *Waller v. Southern Illinois Univ.*, 125 F.3d 541, 542 (7th Cir. 1997). The court explained that dealings between a public university and a private accrediting body would create, at most, a third-party beneficiary contract right in the students. *Id.* Or, if the university promised the students it would abide by the accrediting body's standards, it might be said to have created, and then breached, a contract with the students. *Id.* But, of course, the right to contract damages is not a fundamental one protected by the Constitution. *See Khan*, 180 F.3d at 834 (where plaintiff is seeking damages "flow[ing] from a breach of contract," that plaintiff "has available the traditional remedy of contract law: a suit for

damages”). Even where a plaintiff alleges a tort stemming from a contractual relationship, the right to be insulated from that tort is not a fundamental right if the “state-law remedy for whatever injury the defendants caused . . . is []adequate under the federal constitution.” *Id.* at 835.

The GSU student-plaintiffs have brought fraud and promissory estoppel claims against individual GSU defendants for exactly the same actions that the plaintiffs claim constitute a violation of substantive due process. *Khan* clearly channels such garden variety state law claims to state court and bars their assertion under the guise of substantive due process and Section 1983 in federal court.^{6/} Illinois has waived its sovereign immunity only to the extent of permitting these claims — which are really against the University — to be heard in the Illinois Court of Claims. *See, e.g.,* 705 ILCS 505/8(d); *Association of Mid-Continent Universities v. Board of Trustees of N.E. Ill. Univ.*, 721 N.E.2d 805, 810 (Ill. App. Ct. 1999). The Court of Claims is empowered to offer these plaintiffs the same remedy — money damages — that they seek in their purported Section 1983 claims. The remedy is, therefore, not only constitutionally adequate but identical to what the plaintiffs have erroneously sought in the federal forum. In short, this Court’s *de novo* review will confirm the propriety of the district court’s decision to dismiss plaintiffs’ substantive due process claim.

C. The Failure To Achieve Accreditation Was Not an Egregious Abuse of Government Power

The student-plaintiffs’ backstop argument, that the defendants’ alleged actions “shock the conscience,” and therefore impaired their substantive due process rights even in the absence of a fundamental right, is without support in fact or law. This Court has intimated that even in the

^{6/} *See* Section III *infra* for a discussion of the flaws in these claims.

absence of a fundamental right, an “executive abuse of power” that is so arbitrary as to “shock[] the conscience” may constitute a deprivation of substantive due process. *Dunn*, 158 F.3d at 965, quoting *Lewis*, 523 U.S. at 846; *Rochin v. California*, 342 U.S. 165 (1952). But the Supreme Court cautioned that only conduct “intended to injure in some way *unjustifiable by any government interest*” should be deemed shocking. *Lewis*, 523 U.S. at 849 (emphasis added).

Whether a particular government action is “conscience-shocking” appears to be a two-part question. Courts have frequently found a government action not to shock because the action itself did not appear to inflict severe injury. Thus, a municipal failure to give a worker safety training that could have prevented his work-related death was not shocking. *Collins v. City of Harker Hts.*, 503 U.S. 115, 128-29 (1992). Nor was the loss of a job based on questionable allegations of workplace theft. *Schacht v. Wisconsin Dep’t of Corrections*, 175 F.3d 497, (7th Cir. 1999), *criticized on other grounds*, *Higgins v. Mississippi*, 217 F.3d 951 (7th Cir. 2000).

Even government coercion of an independent businessman to oust his lawyer did not shock the conscience. *Khan*, 180 F.3d at 836. Additionally, courts have weighed the “arbitrariness” of the government action in light of the legitimate interests it served. Thus, the decision in *Collins* not to train was not shocking because “decisions concerning the allocation of resources to individual programs . . . involve a host of policy choices” better made by officials than by judges. *Collins*, 503 U.S. at 128-29. Extremely harsh punishment by school officials did not shock the conscience because it was designed to serve the “legitimate interest” of maintaining classroom discipline. *Dunn*, 158 F.3d at 966. Indeed, this Court has stated that where the government is not acting in its role as “regulator of the general . . . welfare,” but “in a . . . business context . . .

[it] has considerable discretion.” *Wroblewski v. City of Washburn*, 965 F.2d 452, 458 (7th Cir. 1992).

The plaintiffs seem to be asserting that the defendants abused government power by failing to advise them contemporaneously of each development in their ongoing pursuit of accreditation. Br. 18. This claim, even if true, reveals substantial problems in establishing and running the MSW program, rather than an “egregious abuse” of government authority. It certainly is no more outrageous than overt coercion or punitive excesses, held by this Court in *Khan and Dunn* not to shock the conscience. And if the termination of the plaintiff’s job in *Schacht* did not shock the conscience, the defendants’ failure to secure the job credential of accreditation could hardly do so. Moreover, in dealing with the Council for Social Work Education, and in suspending the social work program, the defendants were acting in the “business context.” *Wroblewski*, 965 F.2d at 458. GSU could invest only so much in the struggling MSW program. Illinois law barred the GSU Board of Trustees from “creat[ing] any liability or indebtedness of funds from the State Treasury in excess of the funds appropriated to [it].” 110 ILCS 670/15-40. Relatedly, the Board of Trustees of GSU was required to obtain approval from the Illinois Board of Higher Education prior to establishing a new “unit of instruction” such as the graduate social work program, and the State Board was authorized to tell GSU that the program was “not . . . economically justified.” 110 ILCS 205/7. That the GSU Board’s investments did not produce the expected result of accreditation is better described as a business miscalculation than as a conscience-shocking ploy. *Wroblewski*, 965 F.2d at 458.

II. The GSU Defendants Neither Owed Nor Deprived the Students of Procedural Due Process in Their Handling of the Accreditation Process

Plaintiffs must jump two hurdles in pursuing a procedural due process claim: they must establish that they were deprived of a constitutionally protected property interest, and they must demonstrate that inadequate process was observed in the taking of that property from them.

Youakim v. McDonald, 71 F.3d 1274, 1288 (7th Cir. 1995). Plaintiffs clear neither hurdle.

A. Neither Graduate Degrees Nor Accreditation Are Protected Property Interests

The student-plaintiffs contend that the GSU defendants deprived them of a constitutionally protected property interest without due process of law. The exact object of that interest is not entirely clear, as plaintiffs variously refer to “a degree,” “their continuing education in an accredited graduate school program,” “a valuable degree,” Br. 19-20, and “expected degrees” and “an education.” A2 at 14. It can fairly be said that plaintiffs think they have a constitutionally protected property interest in (a) receiving degrees and (b) accreditation.

Property, for purposes of a procedural due process claim, is a “legitimate claim of entitlement.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A claim of entitlement is “defined by existing rules or understandings that stem from an independent source such as state law.” *Id.* For instance, in *Easter House v. Felder*, 910 F.2d 1387, 1394 (7th Cir. 1990), this Court held that an adoption agency had a property interest in renewal of its license because state statutes and regulations suggested that the state agency defendants were to renew licenses in all but a few circumstances. Illinois courts have not clearly identified a right to post-graduate education. Plaintiffs cite to no Illinois case or statute indicating that they were entitled to receive masters degrees in social work. In fact, the very case that plaintiffs cite in support of their

putative property rights states that “[i]t is not clear whether, in Illinois, a property interest exists in a degree expected from a public institution of higher education.” *Alexander v. Kennedy-King Coll.*, 1990 WL 179691, at *4 (N.D. Ill. Nov. 2, 1990).²⁷ Unlike the plaintiffs in *Easter House*, these plaintiffs have not shown an entitlement under state law to continuation of the graduate social work program. And it is downright farfetched to say that plaintiffs had an entitlement under Illinois law to a degree blessed by a third-party accrediting agency.

At most, this Court has suggested that, absent a state-created right to post-secondary education, a student who has a contractual relationship with a school may have a protectible property interest in the rights conferred by the contract. *Waller*, 125 F.3d at 542. Breach of such a contract, whether the offer was of third-party accreditation or of program completion, could be construed as a deprivation of property. *Id.* However, *Waller* does nothing to buttress plaintiffs’ claims. Plaintiffs have assiduously avoided any claim that GSU made or breached a contract with them. This strategy is understandable, as a federal suit against state university GSU itself – the maker of the contract – would founder on sovereign immunity grounds. *See, e.g., Ass’n of Mid-Continent Universities*, 721 N.E.2d at 810.

B. No Process Was Due the Plaintiffs, Whose Injury Was Inflicted by a Private Entity

Plaintiffs’ procedural due process claim was brought pursuant to 42 U.S.C. § 1983. A2 at 14. It is axiomatic that Section 1983 plaintiffs “must show that [they were] deprived of a federally secured right by one acting under color of state law.” *Miller v. Webber*, 1997 WL 299447, at *3 (E.D. Pa. May 30, 1997). The “under color of state law” requirement is the

²⁷ This Court has never considered the precise question of the right to post-secondary education in a published opinion.

equivalent of “state action.” *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). Where a private party, and not a state actor, is responsible for the wrong the plaintiffs allege, the suit cannot proceed under Section 1983. For instance, in *Miller*, a plaintiff sued several school district officials under Section 1983 when she was assaulted by a man who became her employer under the auspices of a high school vocational program. 1997 WL 299447, at *1. The court dismissed the girl’s Section 1983 claims against the school district and its officials because the harm she complained of had been inflicted by a private party rather than the district officials. *Id.* at *3. Similarly, in *Waller*, this Court called “preposterous” the notion that a neutral accrediting body met the “state action” requirement for pursuing a due process claim. 125 F.3d at 542.

The same situation prevents the imposition of Section 1983 liability against the GSU defendants in this case. The plaintiffs have alleged that they were deprived of accreditation. But the Council for Social Work Education was in sole control of the ultimate decision whether to grant accreditation. This Court has acknowledged that academic accreditation can be a dicey business. *See Chicago Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools & Colls.*, 44 F.3d 447, 449 (7th Cir. 1994). Just as in *Miller*, where a third-party action was insufficient to sustain a Section 1983 claim, the Council’s autonomous accreditation decision, and its impact on the social work program and its graduates, cannot support a claim for procedural due process against the GSU defendants.

C. Plaintiffs Have Rebuffed the Adequate Remedies Available to Them Under State Law

Due process has been recognized as a “flexible concept,” which “varies with the particular situation.” *Doherty v. City of Chicago*, 75 F.3d 318, 323 (7th Cir. 1996), citing *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The guarantee of procedural due process requires

that a plaintiff have “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* But a “meaningful” opportunity may be afforded either before or after the alleged deprivation, depending on the circumstances. *Id.* Where the government deprivation at issue was visited on the plaintiff not by an “established state procedure,” but by “random and unauthorized conduct,” this Court has recognized that “the state cannot know when [such a deprivation] will occur” and is, therefore, not required to provide a predeprivation opportunity to be heard. *Id.* Instead, due process demands will be satisfied by a meaningful postdeprivation remedy. *Id.* Accordingly, where a plaintiff’s claim is based on the “random and unauthorized” acts of state actors, and where the plaintiff has not either availed himself of state law remedies or challenged the fairness of those remedies in his complaint, the Section 1983 claim must fail. *Id.* For instance, in *Doherty*, where the plaintiff was denied requested zoning permits, this Court held that she failed to state a claim for procedural due process because she had not explained “why she cannot pursue her claim in the Illinois state courts.” *Id.* at 324-25. That is precisely the situation presented by the student-plaintiffs.

The touchstone of the “random and unauthorized” conduct that may be remedied in a postdeprivation proceeding is whether the state could have predicted the action at issue. There is no question that the state could not have predicted the questionable staffing choices or curriculum oversights by the GSU defendants that the plaintiffs contend caused the accreditation failure. The defendants’ alleged course of action is accurately described as “random” and “unpredictable.” For that reason, the state could have offered no meaningful predeprivation hearing. The plaintiffs must therefore either take advantage of the state’s proffered postdeprivation remedies or make a “colorable objection” to them in their complaint. They have

done neither. As discussed below, in Sections III.A-B, the gravamen of plaintiffs' claim is that GSU committed fraud and broke a promise to them – claims that plainly sound in tort and contract. The Illinois Legislature has specifically directed those claims to the Court of Claims. *See, e.g., Association of Mid-Continent Universities*, 721 N.E.2d at 810. Plaintiffs have never explained why the Court of Claims is an inadequate forum for obtaining the damages they seek. As in *Doherty*, their complete silence is a sufficient basis for rejecting their Section 1983 procedural due process claims. And, as this Court suggested in *Doherty* that a state court remedy for a state law claim is inherently adequate, the plaintiffs could not make a “colorable objection to the validity of the State’s procedures” at any rate. 75 F.3d at 323.

D. Qualified Immunity

Government officials exercising discretionary functions merit qualified immunity if their conduct does not violate a clearly established constitutional or statutory right of which a reasonable official would have known. *Wilson v. Layne*, 526 U.S. 603, 614 (1999). Here, there was no clearly established fundamental right to an accredited graduate degree under the Constitution, and no recognized property right to such an education under Illinois law. Even if this Court were to recognize such rights in this case, they would not have been clearly established at the time of these events, reasonable GSU officials would not have believed themselves to have been acting unlawfully, and a grant of qualified immunity would be appropriate. *See, e.g., Prue v. City of Syracuse*, 26 F.3d 14, 18-19 (2d Cir. 1994).

III. The District Court Correctly Dismissed the Students' State Claims and Sent Them to State Court

A. The Students' Promissory Estoppel and Fraud Claims Were Based on the Same Facts Underlying the Nullified Due Process Claims and Thus Were Properly Dismissed for Want of Supplemental Jurisdiction

The students have brought two federal Section 1983 claims and two state law claims stemming from the GSU defendants' handling of the accreditation process. Those claims all arise from a four-year narrative culminating in the denial of accreditation, in which the key questions are what the defendants may have said and whether the individual defendants relied on those statements. The plaintiffs have also sued the GSU defendants for violating their First Amendment rights. That claim arose from acts taken on a single evening well after the denouement of the accreditation matter, and it involves questions about the details of security planning and execution. The District Court dismissed the students' due process claims with prejudice, and the state fraud and promissory estoppel claims without prejudice. In response, the students attempted to revive their fraud and promissory estoppel claims in a Second Amended Complaint. Because the federal claims stemming from the failure to achieve accreditation had been dismissed with prejudice, the students urged that the state law claims arose from the "same operative nucleus of facts," as the still-viable First Amendment claims. But the students made no attempt to explain how their quest for tort and contract damages was relevant to the alleged First Amendment claims remaining in the case. The District Court denied leave to amend. This denial is reviewed for abuse of discretion. *Cacia v. Norfolk & W. Ry.*, 290 F.3d 914, 921 (7th Cir. 2002).

This Court has held that a "common nucleus of operative facts" linking federal and state claims is a predicate for the District Court's exercise of supplemental jurisdiction over state

claims. *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995). This Court suggested in *Ammerman* that “operative” facts are those which are “highly relevant” to both the state and the federal claims. *Id.* at 425. The “relevance” touchstone has led several courts to relinquish supplemental jurisdiction over state claims. For instance, *Ammerman* was applied in a case where a female employee sued her electrical company employer for Title VII sexual discrimination violations and for state law claims arising from an on-the-job electrocution unrelated to the alleged discrimination. *Eager v. Commonwealth Edison Co.*, 187 F. Supp. 2d 1033, 1039-40 (N.D. Ill. 2002). The court dismissed the state law claims, reasoning that while the employer-defendant was alleged to have been responsible for both the discrimination and the electrocution, neither set of the facts had any effect on the merits of the other claim. *Id.* at 1040. Similarly, in *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 295 (D.C. Cir. 2000), the appeals court concluded that taxicab companies’ challenges to new city taxi regulations were state law claims. The court then stated that the companies’ allegations that the city taxi commissioner intentionally crashed into a taxicab during the pendency of the regulatory challenge – even if a viable Section 1983 claim – did not create the required nucleus of operative fact with the regulatory challenge. *Id.* at 296.

When the District Court considered the students’ motion for leave to amend their complaint to replead the state law fraud and promissory estoppel claims, the *only* live federal claims were those pertaining to the First Amendment. Although the subject of the students’ protests was the accreditation process, whether they were unconstitutionally prevented from speaking out does not depend at all on the facts underlying the accreditation denial. Applying the *Ammerman* rule that where the facts underlying the state claim are unrelated to the merits of

the federal claim and vice versa, the District Court properly concluded there was no basis for supplemental jurisdiction. The decision was also a sound exercise of discretion, as the subject and scope of discovery and dispositive motions arising from each of the two claims were widely divergent, and incapable of generating any litigation efficiencies.

B. The Students' Promissory Estoppel Claim Fails as a Matter of Law

The students have invoked the doctrine of promissory estoppel against the GSU defendants, but it is a poor match with the facts of this case. A promise may become legally binding either because it is supported by consideration or because it induces reliance. *Workman v. United Parcel Serv., Inc.*, 234 F.3d 998, 1001 (7th Cir. 2000). If supported by consideration, the alleged breach of the promise is to be remedied by a breach of contract claim; if induced by reliance, the promise may be enforceable by virtue of promissory estoppel. Accordingly, when the plaintiff and defendant have exchanged consideration, any disputes over enforcement of their agreement are channeled into the breach of contract remedy. *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 869-70 (7th Cir. 1999). The putative contract in this case was supported by consideration in the form of tuition payments. *See Johnson v. Lincoln Christian College*, 501 N.E.2d 1380, 1384 (Ill. App. Ct. 1986) (“tuition . . . constitutes sufficient consideration”). Indeed, this Court and Illinois state courts have both indicated that student complaints regarding the quality of education or the awarding of degrees are properly brought as contract claims. *See, e.g., Waller*, 125 F.3d at 543; *Lincoln Christian College*, 501 N.E.2d at 1384. The students have refused to sue any defendant associated with GSU, or the University itself, for breach of contract. The claim the students did bring – promissory estoppel – was correctly dismissed by the District Court.

Moreover, a properly pleaded claim for breach of contract would have fared no better in the District Court. First, at least based on the facts asserted in the First Amended Complaint that formed the basis for the District Court's dismissal, the terms of the alleged offer and acceptance are vague indeed. The students do not specify the document or conversation in which promises were made, or the particulars of those promises. A2 at 5-9. More important, perhaps because the students would rather litigate in federal court than in the Illinois Court of Claims, the students have targeted the GSU defendants in their individual capacities rather than GSU itself. A2 at 3-4. Under Illinois law, all of those officers and employees of the University were acting as agents of the University when they discussed the social work program with students. *See, e.g., Eychaner v. Gross*, 747 N.E.2d 969, 980 (Ill. App. Ct.), *appeal granted*, 755 N.E.2d 476 (Ill. 2001). In Illinois, when a person knows he or she is dealing with an agent rather than a principal, the agent is not liable on the contract. *Storm & Assoc., Ltd. v. Cuculich*, 700 N.E.2d 202, 211 (Ill. App. Ct. 1998). The allegations of the Second Amended Complaint make clear that the plaintiffs knew that the defendants were acting as agents of GSU in the course of the accreditation process. A3 at 12-14. Accordingly, as plaintiffs admit that they knew the individual defendants were agents of GSU, *Storm* insulates those individual defendants from contract liability. The plaintiffs are required to seek their remedy based on an alleged contract with GSU in the Court of Claims. *See Association of Mid-Continent Universities*, 721 N.E.2d at 810. In no event, however, can the plaintiffs succeed in a breach of contract suit against the individual defendants themselves. *See, e.g., Cunningham v. Lewenson*, 741 N.Y.S.2d 885, 886 (App. Div. 2002) (university agents cannot be held liable for inducing university to breach its contract with plaintiff).

C. The Students' Failed To Plead a Viable Fraud Claim

The students elected to bring their state law fraud claim in federal court, thereby subjecting themselves to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The students are simply wrong in their assertion that the state law claim need only meet the standards of “proper particularity for Illinois law.” Br. 24. *See Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 470 (7th Cir. 1999).

This Court has said that the Rule 9(b) particularity standard requires plaintiffs to plead “the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.” *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992). Thus, “loose references to mailings and telephone calls” will not suffice. *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994). “Moreover, when the complaint accuses multiple defendants of participating in the scheme to defraud, the plaintiffs must take care to identify which of them was responsible for the individual acts of fraud.” *Id.* For instance, when a plaintiff sued a financial services company for RICO, alleging *inter alia* a scheme to send out fraudulent mutual fund reports and prospectuses, this Court found her pleadings insufficiently particular. “[T]he complaint does not even mention the general time frame in which the reports were sent, much less pin down or even approximate any dates. Nor does the complaint provide any detail as to the precise reports involved or who prepared or sent the reports.” *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 352-53 (7th Cir. 1992), *abrogated on other grounds*, *Beck v. Prupis*, 529 U.S. 494 (2000). The failure was particularly egregious, because the plaintiff had access to the allegedly fraudulent documents. *Id.*

The students' complaint falls far short of this Court's 9(b) requirements. Plaintiffs report that they "pled that defendants Fagan, Wolff, Porche and the [seven] Trustees made misrepresentations to the plaintiffs that, 'they would graduate from a fully accredited Program and would be able to become licensed social workers in the State of Illinois.' Further, defendants Fagan, Wolff, Porche and the Trustees made misrepresentations that the MSW program was 'approved' by the CSWE." Br. 25 (citations omitted). This pleading does not specify which of the ten named defendants "was responsible for the individual acts of fraud," as required by *Jepson*. It leaves entirely unclear whether these communications were made in face-to-face conversations, speeches, telephone calls, individual letters, form letters, or brochures, and thus fails to provide even the "loose reference[]" to mailings and telephone calls" described as insufficient in *Jepson*. This opacity is all the more troublesome as the student recipients clearly had access to the communications.

IV. The GSU Defendants Did Nothing to Violate the Students' First Amendment Rights

This Court reviews the District Court's grant of summary judgment *de novo*. See *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). Summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001).

The students alleged in their First Amended Complaint that President Fagan, the members of the Board of Trustees, former President Wolff, and former Acting Program Chair Porche^{8/} conspired to deprive them of their First Amendment rights at the January alumni dinner,

^{8/} As plaintiffs noted in their brief, they later voluntarily withdrew their First Amendment claims against Porche and Wolff, as neither was employed by GSU when the alumni dinner took place. Br. 30 n.8.

in violation of 42 U.S.C. § 1983. The District Court properly granted the GSU defendants summary judgment on this claim, as none of them were directly involved in formulating or executing security plans for the alumni dinner, and the students “faile[ed] to provide evidence [that] defendants conspired to suppress plaintiffs’ First Amendment rights. SA at D6.

A. The GSU Defendants Had No Input in the Security Arrangements for the Alumni Dinner

Section 1983, the statute pursuant to which the students aim to recover damages from President Fagan and the Trustees, “creates a cause of action based upon personal liability and predicated upon fault.” *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). “An *individual* cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation.” *Id.* Accordingly, absent a showing of “direct responsibility for the improper action,” an official will not be held individually liable simply because he supervised others alleged to have acted unconstitutionally. *Id.* Thus, where a prisoner alleged that he was wrongly barred from the prison library, the prison superintendent and the state Commissioner of Corrections were not individually liable under Section 1983. Although they oversaw employees who were involved in the denial of access, and had established some policies pertaining to law library access, there were no allegations that either was “personally involved” in the constitutional violation and claims against them were properly dismissed. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). Individual liability was permitted, in contrast, where a sheriff was fully aware of a “pervasive pattern” in his department to execute writs of restitution after their expiration date and a plaintiff sued on the basis that she was deprived of her property after the execution of a stale writ. *Wolf-Lillie*, 699 F.2d at 870.

The claims against the trustees may be dispatched easily. None, except Bruce Friefeld, attended the alumni dinner, saw the protestors or spoke to any of the security guards alleged to have restricted the students to the atrium during the alumni event. Friefeld arrived after the plaintiffs had left and the alleged First Amendment violations had already taken place. Thus, none of the trustees “participated in” the alleged constitutional deprivation, one of the two available bases for Section 1983 liability. *Wolf-Lillie*, 699 F.2d at 869.

Nor did the defendants cause the deprivation, as the students have alleged, by conspiring in advance of the dinner to curtail their protests. In order to survive summary judgment on a claim of conspiracy to violate Section 1983, a plaintiff must show the existence of an agreement and acts that “raise the inference of mutual understanding” in that they are “unlikely to have been undertaken without an agreement.” *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000) (citations omitted). “[V]ague, conclusory” allegations will not do. *Id.* (citations omitted). In one analogous case, a city attorney attending a meeting of the city Health and Sanitation Commission asked that a police officer attend a residential clean-up under discussion, department officials set a date for the residential clean-up at a later meeting, and a police officer attending the clean-up ultimately arrested the property owner during the clean-up for disorderly behavior. *Starzenski v. City of Elkhart*, 87 F.3d 872, 879 (7th Cir. 1996). This Court rebuffed the plaintiff’s conspiracy allegations, reasoning that there was no evidence the parties agreed in advance that the police officer arrest her. *Id.* They agreed only that a police officer should attend, and “agreeing to have a police officer present because of anticipated trouble is not unconstitutional.” *Id.* In contrast, this Court found evidence of a conspiracy where a political party official sought to have a crony appointed to a state job and met with

representatives of the governor's office, who had been advised of the official's wishes, and later forwarded only the approved candidate's name to the relevant hiring official. *Tarpley v. Keistler*, 188 F.3d 788, 793 (7th Cir. 1999). Because the state acted in complete conformance with the party official's wishes, the evidence could indicate a conspiracy, the Court reasoned. *Id.*

The present case is reminiscent of *Starzenski*. The students' allege that (1) the trustees had permitted them to demonstrate on two previous occasions (the December 15 Board meeting and holiday party); (2) the trustees met with their attorney in executive session to discuss the students' possible lawsuits against the school on January 12; (3) the GSU director of security circulated a courtesy copy of his draft security arrangements for the alumni dinner to President Fagan on January 18; (4) the director revised his plans on January 25 to limit picket signs to the exterior of the building, again copying President Fagan; and (5) security guards limited picket signs to the exterior of the building on the day of the event. As in *Starzenski*, the fact that the alleged conspirators held a meeting is, on its own, insufficient to indicate the existence of a conspiracy. Indeed, the minutes of the trustees' January 12 meeting reveal that the dinner was *not* discussed, unlike the meeting in *Starzenski*, which focused on the plaintiff. Moreover, the students do not state what the trustees allegedly agreed to in their meeting — to limit pickets outside the building? To limit them in the lobby? To restrict leafletting? Chanting? Whereas in *Tarpley*, the court could compare the alleged agreement with the conspirators' ultimate behavior, the students have given this Court no basis for comparing Director Chesser's plan with the trustees' alleged agreement. Additionally, the students have not alleged that Director Chesser consulted any of the trustees while he finalized the security plans. In short, plaintiffs allege

nothing to refute the evidence that the trustees did not hatch an agreement at the January 12 meeting, and their bare speculation cannot survive a motion for summary judgment.

The plaintiffs' allegations against President Fagan are more involved but no more weighty. They claim that he was kept abreast of Director Chesser's plans via courtesy copies of security memos. President Fagan, however, has no recollection of receiving the memos. SuppApp216. And Director Chesser has testified that he actually provided them to Vice President Timothy Arr rather than to President Fagan. SuppApp211. Assuming arguendo that President Fagan did receive the memos, all he learned was that Director Chesser planned to shut down numerous entrances to the building, situate security guards in the lobby, and direct any protesters to leave their signs outside of the building. SuppApp214. As this Court noted so aptly in *Starzenski*, "agreeing to have a police officer present because of anticipated trouble is not unconstitutional, and the plaintiffs proffer[] no evidence . . . that the defendant agreed to or requested" that the officer act unconstitutionally. *Id.* at 879.

Plaintiffs allege that Director Chesser and President Fagan "appeared to be working together to develop a plan to handle the MSW students." Br. 32. First, this contention is unsupported by the record, which shows that Director Chesser worked directly with alumni coordinator Rosemary Hullett. SuppApp173-75. Notably, there is no memo from President Fagan to Director Chesser revising, or even commenting on, the security plans. There is record testimony that Hullett and Director Chesser met once the RSVP list was complete and officials had grasped the unprecedented number of expected attendees, to refine their security plans and agree to further limit access to the building. SuppApp174. The students resort to the testimony of plaintiff Christy Polaski that a security guard told her that someone had informed him that

President Fagan had directed someone to “close[] the building.” A6, Ex. 6, at 100. But, of course, the remark of the guard (a non-defendant before the District Court) was inadmissible hearsay, and “therefore unuseable in summary judgment proceedings.” *Minor v. Ivy Tech State College*, 174 F.3d 855, 856-57 (7th Cir. 1999).

B. There Was No First Amendment Violation

Even if the defendants had taken a direct role in formulating security plans for the alumni dinner, they cannot be held liable under Section 1983 unless they took part in “an alleged constitutional deprivation.” *Wolf-Lillie*, 699 F.2d at 869. There was no such deprivation, because the students were asked to observe First Amendment boundaries that were reasonable in light of the forum where they chose to speak. “Even protected speech is not equally permissible in all places and at all times.” *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985).

The constitutionality of a regulation of speech on government property depends on which of three descriptions best fits the property. A “traditional public forum,” such as a sidewalk or park, has historically been used “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). A designated or limited public forum is created when the government has opened a nontraditional forum for public discourse, for instance opening a government building after hours for a school board meeting. *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1296-97 (7th Cir. 1996). And when government offers only “selective” rather than “general” access to a forum, the forum remains nonpublic. *Arkansas Educational Television Comm’n v. Forbes*, 523 U.S. 666, 679-80 (1998). The same government

property may be the site of different types of fora. *See, e.g., Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 699-700 (7th Cir. 1998) (distinguishing between a “public forum” sidewalk area, and “nonpublic forum” meeting rooms). In the present case, the GSU defendants tailored their actions appropriately to each sector of the University campus during the dinner.

Plaintiffs assert that the GSU defendants had created a “for[um] generally open to all students” and were “prohibited from excluding students . . . based on the content of their speech.” Br. 37, citing *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). But the Court in *Widmar* specifically explained universities may “impose reasonable regulations compatible with [their] mission upon the use of its campus and facilities.” *Widmar*, 454 U.S. 268 n.5. This Court has amplified, observing that even when government designates a public forum, it can also revoke that designation or limit it in accord with the character of the forum. *Acorn*, 150 F.3d at 700. Sister circuits, too, have explained that the nature of an educational forum can evolve with circumstances. Accordingly, when the school campus is used for a ceremony or structured event that is distinct from the ordinary routine of classes and study, courts have tended not to find a traditional public forum. For instance, several circuits have found that graduation ceremonies or sports events are not public fora because they are not intended to serve as opportunities for the free exchange of ideas. *See, e.g., Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (basketball games are “controlled events”).

Though it might arguably be said that areas of the GSU campus functioned as widely accessible limited public fora during regular school hours when students mingled freely between

classes, the same can hardly be said of the campus during the alumni dinner, a “controlled event” featuring invited speakers, invited guests, name tags and formal dinners — in short, permitting only “selective” access as in *Forbes*. During the alumni event, GSU modified the scope of any limited public forum it may have designated in the past to create a nonpublic forum. Director Chesser and the Alumni Committee officials agreed that only those alumni who had been invited to the event and had confirmed their attendance would be allowed into the closed rooms where the individual college receptions and dinners were being held. SuppApp202. They agreed that student access to building facilities such as the library would be closed. SuppApp177. Finally, they agreed that students not attending the alumni event would be permitted in the atrium of the lobby but would not be permitted to attend the individual college events. The GSU campus during the alumni event is best described as a nonpublic forum; at most, limited public forums were arguably found on the exterior walkways and in the atrium. Multi-fora descriptions are not uncommon for large, heavily populated venues. *Acorn*, 150 F.3d at 700, 702-03.

Government is permitted to apply reasonable, content-neutral time, place, and manner restrictions in a nonpublic or a limited public forum, or content-based restrictions that are narrowly-drawn to serve a compelling state interest in public fora. *Perry*, 460 U.S. at 46. The students were allowed unfettered access to speak to the dinner attendees on the campus walkway outside the building, a measure meeting the requirements for a public forum and, a fortiori, for a limited public forum. Similarly, the modest curbs the students were asked to observe in the atrium were entirely reasonable and fit well within this formulation. The students were asked to remain in a twenty-by-forty foot area traversed by all attendees on their way to the registration tables, and asked to leave their pickets and signs outside. SuppApp282. Given the University’s

expectation that 900 people would be milling about during the alumni dinner, it was far from onerous to ask the students to make way for guest traffic while they spoke out. *See, e.g., Acorn*, 150 F.3d at 703-04 (though forum was traditionally reserved for leafletting, it was not permitted in a narrow walkway where it would impede pedestrian traffic). The restrictions did not aim to cramp the content of the students' speech — they were permitted to voice their opinions to guests in attendance. SuppApp282-83. Thus, the manner of speech – picketing and marching – may have been curtailed, but the students were provided the alternate expressive channel of moderated conversations with guests. These measures, too, were well within the requirements for a public forum and, therefore, those for the nonpublic forum found in the University atrium that night.

Reasonable time, place and manner restrictions on speech are allowed in non-public fora so long as they are viewpoint neutral. *Perry*, 460 U.S. at 47. Moreover, such restrictions may be imposed if it is “reasonable to anticipate that interference with the government mission *may* occur, even though it has not yet occurred.” *Paff v. Kaltenbach*, 204 F.3d 425, 433 (3d Cir. 2000). In the present case, GSU officials who are not defendants in this lawsuit barred students from the closed meeting rooms reserved for alumni networking receptions in order to facilitate meaningful one-on-one networking conversations, and closed extraneous school areas like the library in order to focus staff efforts on the alumni events. This reasonable restriction was not applied to favor or disadvantage any particular viewpoint, as *no* organized group was permitted to carry their message of protest to those closed areas.^{9/} Although a subgroup of those excluded

^{9/} The plaintiffs have alleged that students who were not participating in demonstrations were allowed to use some of the closed facilities. While the GSU defendants contest this allegation, even if it is true, the evidence suggests that any exceptions to the general policy were extended by people who are not defendants in this lawsuit. Additionally, any exceptions granted to

from the confirmed-guest-only event, the MSW students, did espouse a viewpoint that was not complimentary to the University, that group was not singled out. The GSU defendants did not cross the view-point neutral line laid out in *Perry*.

C. Retaliation

The students have alleged that even if the University's plan was a reasonable time, place or manner restriction on their speech the night of the alumni dinner, it nevertheless violated the First Amendment because it was imposed "for retaliatory reasons." Br. 35.

Courts have recognized three methods for proving retaliatory motive: chronology (*Walker v. Thompson*, 288 F.3d 1005, (7th Cir. 2002) (a plaintiff *may* plead chronology to show retaliation)); direct evidence (*Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994); or burden-shifting (*Vukadinovich v. Board of School Trustees*, 278 F.3d 693, 699 (7th Cir. 2002)). None of these methods aid the students.

The students rely solely on chronology to establish the GSU defendants' retaliatory motive: "[t]he students had previously spoken out on December 5 and December 15, 2000, and January 5, 2001. On at least one occasion, December 15th, some students carried picket signs and distributed literature. . . ." Br. 36. In other words, plaintiffs allege that the GSU defendants *passed up* two opportunities to impose retaliatory speech restrictions after the December 5 exercise of First Amendment rights. The GSU defendants' passivity on December 15 and January 5, combined with the Alumni Committee's fear of overcrowding on the night of the alumni dinner, leads *not* to an inference that barring picket signs, asking non-registrants to remain in the lobby, shuttering the library and directing all traffic through a single university

individuals who, unlike the MSW students, had no intention of staging traffic-obstructing demonstrations, would have been viewpoint-neutral in nature and therefore acceptable.

entrance was a retaliatory measure, but to the conclusion that it was a reasonable security plan best described as a time, place and manner restriction on speech.

The students have utterly failed to present any direct evidence of retaliatory motive. Such evidence might include disparaging comments by defendants enforcing the time, place and manner restrictions or “repeated” application of neutral restrictions against protesters over a period of weeks. *Sloman*, 21 F.3d at 1469. Not only have the students not cited any disparaging remarks by any of the GSU defendants, President Fagan has testified that he told Director Chesser “the students should be allowed to protest.” SuppApp75. There is simply no evidence that any defendant’s behavior revealed an intent to retaliate against the students for their previous speech.^{10/} Plaintiffs cannot survive a burden-shifting test because, as just illustrated, the record is devoid of any evidence establishing that the defendants’ asserted basis for their actions – crowd control – were pretextual. *Vukadinovich*, 278 F.3d at 699.

D. Qualified Immunity

The District Court could properly have granted summary judgment to the defendants based on qualified immunity. *Wilson* instructs that government officials performing discretionary functions generally are granted a qualified immunity and are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 526 U.S. at 614, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The first step in a qualified immunity analysis is determining whether the government conduct, in fact, violated a constitutional right.

^{10/} Notably, the students *chose* to leave the atrium area where they were permitted to speak with dinner attendees and to wait for Senator Halvorson. They also *chose* to abandon the exit to the building, where they were permitted to display their picket signs to every person entering or leaving the building, because it was “cold.” A6 at 21.

Saucier v. Katz, 533 U.S. 194, 201 (2001). As demonstrated above, the students cannot cross this elementary threshold. Assuming arguendo that they can, the second question is whether, in light of clearly established legal rules, the government officials would “understand that what [they are] doing violates that right.” *Wilson*, 526 U.S. at 615. Identifying which sectors of large land parcels might be public fora, limited public fora, and nonpublic fora is a fact-intensive exercise, making clear legal rules difficult to discern from case to case. For that reason, where officers of the Capitol police enforced a ban on expressive conduct on the Capitol grounds against a protestor at the foot of the Capitol steps, the court found the officers qualifiedly immune. *Lederman v. United States*, 291 F.3d 36, 46-47 (D.C. Cir. 2002). Although the entire Capitol grounds had previously been held to be a public forum, the court reasoned that “some areas within a large public forum may be nonpublic if their ‘use’ is ‘specialized.’” *Id.* at 46 (quotations and citations omitted). The court concluded that the foot of the Capitol steps was a public forum, but that a reasonable police officer could have believed that the sidewalk’s “proximity to the Capitol altered the First Amendment balance with respect to demonstration activities there.” *Id.* at 47.

Just so here. It bears repeating that the GSU defendants were not involved in the formulation of the security plan. But even if they had been, it would strain reason to expect the them to appreciate the fact-intensive subtleties of where the forum might have shaded from “public” to “limited public” to “nonpublic” on this exceptional night. The same analysis applies to the non-defendants who actually decided on the security arrangements for the night, Director Chesser and Rosemary Hullett. As for the security guards (also not defendants before the District Court), they were reasonable to rely on Director Chesser and Ms. Hullett’s determination

of which level of speech was appropriate for each sector of the building. *Paff*, 204 F.3d at 433-34 (officer was reasonable to accept a postmaster’s decision to ban traffic-inducing leafletting on the sole sidewalk leading to the post office three hours before the April 15 tax deadline). In short, it was more than reasonable for GSU representatives Chesser and Hullett and for the security guards to have imposed the restrictions they did in the areas they did in light of *Acorn* and other public forum cases. Moreover, the Illinois Campus Demonstrations Policy Act, which applies to GSU, specifically charges the GSU administration with “maintaining decorum and order on the campus of [the] institution” by “establish[ing] a step by step approach to secure the reasonable operation of university activities.” 110 ILCS 10/2, 10/1. This law endorses the “sector by sector” approach to speech that Director Chesser and Ms. Hullett adopted (again, with no guidance or input by the GSU defendants), and reinforces the reasonableness of their belief that their actions were appropriate. The district court could properly have granted summary judgment based on qualified immunity.

V. The Decision To Forbid Repleading To Name Security Guard Defendants Was Well Within the District Court’s Discretion

This Court reviews the District Court’s dismissal based upon the exercise of discretion pursuant to Federal Rule of Civil Procedure 4(m) for abuse of discretion. *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383 (7th Cir. 1998). This Court reviews the District Court’s denial of a motion for reconsideration for abuse of discretion. *Talano v. Northwestern Med. Faculty Foundation*, 273 F.3d 757 (7th Cir. 2001).

The students filed their initial Complaint on June 7, 2001. That complaint identified among the defendants seven “unnamed, known security guards.” A1 at 1-2. The students did not go to campus to ask the officers their names, or take any other autonomous steps to identify

these defendants. Ninety days later, the students served the GSU defendants with an Initial Interrogatory seeking to learn the identities of the officers on duty during the alumni dinner. Before the defendants responded to the interrogatory, on October 10, the District Court acted *sua sponte* to dismiss the claims against the officers. The District Court issued its dismissal order 125 days after the plaintiffs filed their initial complaint. One month later, the District Court denied plaintiffs' motion for leave to amend the complaint and name the officers – now nineteen in number. The District Court denied that motion, relying on Federal Rule of Civil Procedure 4(m). Plaintiffs then moved for reconsideration, which the district court denied. SA-Tab C.

Rule 4(m) flatly states that “[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff *shall dismiss the action* without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m) (emphasis added).

The Advisory Committee notes to Rule 4(m) recommend that the court grant additional time for service “if there is good cause for the plaintiff’s failure to effect service.” Fed. R. Civ. P. 4(m) Advisory Committee Notes. The Advisory Committee provided two examples of good cause: when the expiration of the statute of limitations would bar re-filing and when the defendant is evading service. *Id.* Further, district courts are to “protect pro se plaintiffs” who are confused about compliance with the rule. *Id.* One rationale of Rule 4(m) is to avoid prejudicing a defendant’s conduct of the lawsuit. *See Troxell*, 160 F.3d at 383.

This Court has held that if the district court “properly sets out the relevant law and makes no factual findings that are clearly erroneous, an abuse of discretion exists only if its decision was arbitrary or unreasonable.” *Troxell*, 160 F.3d at 383. Neither in moving for leave to amend the complaint to name the officers (and presumably to serve them at that point)^{11/} nor in their brief to this Court did the Plaintiffs assert any “good cause” for their failure to effect service. In fact, plaintiffs never specifically moved for an extension of time to serve the defendants, choosing instead to seek leave to amend and summarily informing the District Court that the GSU defendants had agreed to accept service — a gracious but legally meaningless accommodation. The plaintiffs’ conspicuous silence on this score is not surprising as they have recourse to none of the three predicates for leniency. The applicable statute of limitations for the Section 1983 claims against the officers was two years, *see Mitchell v. Donchin*, 286 F.3d 447, 450 n.1 (7th Cir. 2002), meaning that even in face of the District Court’s refusal to permit repleading, the plaintiffs could have filed a separate cause of action against the officers. The GSU defendants were not attempting to evade process. And the plaintiffs were not proceeding pro se. True, the plaintiffs did ask the GSU defendants to share the names of the officers on duty during the alumni dinner, and time elapsed while that request was pending. But the plaintiffs were not required to rely on the GSU defendants’ speedy cooperation. They could easily have

^{11/} As plaintiffs accurately recount, the GSU defendants did agree to accept service on the security guards in the event the District Court permitted an amendment of the complaint. The GSU defendants also did not oppose the plaintiffs’ effort to amend the complaint and name the guards. This gesture of civility does not change the fact that the District Court acted well within its authority in dismissing the defendants in the first instance and in denying leave to amend in the second instance. Nor does it shift from the plaintiffs the burden to show good cause for their failure to serve. The GSU defendants’ effort to accommodate the plaintiffs *if* the District Court exercised its discretion to permit repleading should not be misconstrued as a waiver of the argument that the plaintiffs violated Rule 4(m).

gone to the campus and asked the officers their names or read their badges. This inquiry surely would have yielded the names of at least some defendants, permitting timely service of process, obviating the application of Rule 4(m), and leaving them the option of repleading to add names as they became available. *See, e.g.*, SA-Tab B (granting plaintiffs' motion to add a plaintiff via repleading).

In denying the plaintiffs' motion for reconsideration of the dismissal, the District Court accurately stated the Rule; the dearth of facts recited reflects the plaintiffs' own failure to explain or justify their passivity. As required by *Troxell*, the District Court properly stated the law and accurately recounted the facts. Moreover, reviving the suit against the security guards would have entailed a new round of discovery and motions, possibly prejudicing the defendants in their effort to resolve the live claims remaining at that point. Given the plaintiffs' refusal to seek the guards' names independently, and their nonchalant approach to the initial service deadline and the Rule 4(m) standards, both the Court's initial decision and its denial of the motion for reconsideration were reasonable exercises of discretion and should be affirmed.

Assuming *arguendo* that this Court concludes the District Court's decision should be reversed and the plaintiffs should have been given leave to name the security guards, the First Amendment analysis remains the same. The security guards acted pursuant to Director Chesser's lawful security plan, calling for reasonable restrictions within the University's nonpublic forum that night. As the curbs were entirely consistent with the requirements of the First Amendment, the GSU defendants remain entitled to summary judgment whether or not the guards are included in the case caption.

CONCLUSION

For the foregoing reasons, the judgments of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief of Defendants-Appellees contains 13,953 words and complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B).

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 19, 2002, she caused two copies of the foregoing Brief for Defendants-Appellees , one copy of the Supplemental Appendix, and one copy of a digital media disk containing a copy of the aforesaid brief, to be delivered via United States mail, postage prepaid, to the following:

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