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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

14 JOHN DOE, an individual

15 Petitioner,

16 v.

17 OCCIDENTAL COLLEGE

18 Respondents

Case No.: BS147275

[Hon. Mary H. Strobel]

**PETITIONER'S OPENING BRIEF IN
SUPPORT OF PETITION FOR WRIT OF
MANDAMUS**

Date: May 23, 2017

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Place: Department 82

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I. INTRODUCTION.

This case arose amid a highly-publicized movement at Occidental College (hereafter “Occidental” or “College”) to stem a purported tide of sexual violence on campus. On April 18, 2013, Professor Danielle Dirks, in association with 37 students, faculty, and alumni at Occidental, filed a federal complaint with the Office of Civil Rights (“OCR”)¹ to pressure the College to take action against male students accused of sexually assaulting female students. Some students also sued Occidental, claiming the College ignored sexual violence and tolerated a hostile environment for female “survivors” of sexual assault. (*Id.*) In September 2013, Occidental settled with at least ten of these complainants,² who all received monetary settlements from Occidental. (*Id.*)

Against this backdrop, John Doe was an 18-year-old freshman when Jane Roe, a freshman one month shy of her 18th birthday, went to John Doe’s dorm room one evening, arranged to return to have sex with him, left his room, then returned and engaged in a sexual activity for about an hour, left to go back to her own room, and then went to watch TV in another dorm lounge. A week later, Jane Roe reported John Doe for sexual assault, claiming she had been incapacitated from alcohol and could not “specifically recall having sexual intercourse with Mr. [Doe].” Occidental eventually expelled John Doe for violating Occidental’s Sexual Misconduct Policy (hereinafter the “Policy”).

As set forth below, Occidental denied John Doe a fair hearing, and Occidental’s findings are not supported by the evidence.

II. STATEMENT OF FACTS.

A. JANE ROE INITIATES SEXUAL CONTACT WITH JOHN DOE.

On September 7, 2013 around 7:00 p.m., following his sports team’s initiation, John Doe was intoxicated in his dorm room in Braun Hall. (AR 124.) By 11:00 p.m., W3 recalled that Doe was “slurring his words, stumbling over the others when he got up, dancing around and generally moving in a way that indicated that he was inebriated.” (AR 124.)

Elsewhere in and around Braun Hall, unbeknownst to John Doe, Jane Roe was also consuming

¹ Tyle Kingkade, *Occidental College Sexual Assault Response Subject of Federal Complaints*, (January 23, 2014) *The Huffington Post*.

² Jason Felch, Jason Song, *Occidental College Settles in Sexual Assault Cases* (September 18, 2013) *Los Angeles Times*.

1 alcohol with W2, W6, and other friends. (See AR 119-123.) At some point after 11:00 p.m., Jane Roe
2 returned to her dorm room on the third floor of Braun Hall; feeling “wired with energy,” she went
3 downstairs to the second floor in search of people. (AR 125.) Roe voluntarily entered Doe’s room; she
4 was not stumbling or falling from what W7 recalled. (*Id.*)

5 According to her statements to Occidental’s private investigators three weeks after the incident,
6 Jane Roe’s recollection shows that she was conscious and aware of her surroundings that night. Roe
7 recalled that she was dancing with Doe. (AR 126) While dancing, W6 recounted, “Jane Roe was kind
8 of riding on top of John Doe. Her hips were moving.” (AR 129.) Roe became hot while she was
9 dancing and removed her shirt, but W2 “flip[ped] out’ and told her she needed to put her shirt back on.”
10 (*Id.*) Roe recalled that Doe “told her to let [W2 and W6] take Jane Roe upstairs to her room and then
11 she should return to his room alone,” and, “John Doe told her to come back down ‘so he can fuck me.’”
12 (AR 126-127.)

13 Jane Roe also remembered going back to her dorm room and messaging John Doe. (AR 129.)
14 Between 12:31 and 12:41 a.m., Roe sent Doe five text messages, including, “Okay do you have a
15 condom” and “Good give me two minutes.” (AR 131; AR 209; AR 224-225.) Roe also recalled texting
16 her friend in Tennessee, “I’mgoingtohave sex now. [sic]” (AR 130.)

17 Roe remembered feeling dizzy and sick while walking from the third floor to the second floor of
18 Braun Hall, and recalled vomiting into a trash can. (AR 132.) Doe’s roommate helped Jane Roe while
19 she was sick, but believed she had the capacity to understand where she was and to walk back upstairs to
20 her room without his assistance. (AR 133.) Instead she went to Doe’s room, and Roe reported she had
21 “a series of ‘non linear recollections’ about what happened. (*Id.*) For instance, Roe remembered Doe
22 telling her to get on the bed (AR 134), and she recalled asking Doe if he had a condom because she was
23 not using birth control. (*Id.*) Jane Roe told PII several times that she “had sex” with John Doe, but later
24 stated that she only specifically recalled performing oral sex on him and did not remember having sexual
25 intercourse. (*Id.*) In contrast, John Doe did not remember that she performed oral sex on him. (AR
26 492:11.) Roe remembered Doe telling her that his roommate had entered the room, which according to
27 Doe and W7, occurred while Doe and Roe were having sexual intercourse. (AR 133-134, 136.)
28 Witness W3 stated that he went to John Doe’s room to check on Jane Roe. (AR 135.) While Doe was

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1 in the bathroom, W3 knocked on his door and asked Roe three times if she was okay, and each time she
2 responded that she was fine. (*Id.*) Roe remembered putting her shorts on before walking back upstairs
3 to her dorm room unassisted. (AR 134, 136.) However, as Roe recalled, she “didn’t feel like going to
4 sleep,” so she found her phone and key card, put on her shoes, walked down the stairs and across the
5 grassy area between her dorm and Stewart-Cleland Hall unaided and alone to socialize with friends in
6 the common room of Stewart-Cleland Hall, (AR 137), where Roe specifically recalled making fun of
7 NASCAR. (AR 137-138.)

8 **B. OCCIDENTAL PROFESSORS AND JANE ROE’S FRIENDS PERSUADE**
9 **HER TO REPORT SEXUAL ASSAULT.**

10 In the morning on September 8, 2013, Roe initially communicated with W2, “I think I had sex
11 with John Doe last night.” (AR 564:10-13.) Later that evening, W3 informed Roe, “[Y]ou and John
12 Doe might have had sex.” (AR 589:22.) On Monday, September 9, 2013, Doe’s roommate noted that
13 Roe voluntarily sat next to Doe in the class they shared. (AR 193.) In the days after Roe and Doe had
14 sex, Roe spoke with many people about the incident, including John Doe, W4, W3, W7, W2, W20³, W6,
15 her parents, staff at the Emmons Health Center, “Survivor Advocate” Nadia Palacios, and Professor
16 Movindri Reddy, Ph.D., a member of the Occidental Sexual Assault Coalition. (AR 140, 153.) When
17 Roe spoke to Professor Dirks on September 9, Dirks used the phrase “rape” to describe the incident, but
18 Roe corrected her by saying, “Oh, I am not calling it rape yet.” (AR 166.) Roe was hesitant to define
19 the incident as “rape” but noted that her roommate, W4, “realized very quickly that what happened was
20 legally considered rape,” and her “Survivor Advocate” encouraged her to get a rape kit. (AR 153, 166.)
21 Roe stated that W4 “pushed her to realize that she had been sexually assaulted.” (AR 154.)

22 At this time, Roe was meeting with Professor Movindra Reddy every day to talk about the
23 incident and frequently speaking with Professor Dirks. (AR 154, 167-168.) Roe stated to the PII
24 investigator that upon reflection about the evening, “She described herself as ‘a hopeless romantic’ who
25 wanted the loss of her virginity to be a more special event.” (AR 150) Professor Dirks commented that
26 Roe’s reluctance to call the incident “rape” was “was consistent with other victims of sexual assault
27

28 ³ W20 is Dr. Danielle Dirks, sociology professor, leader of the Occidental Sexual Assault Coalition, and
author of *Confronting Campus Rape: Legal Landscapes, New Media, and Networked Activism*.

1 whom [Dirks] ha[d] talked to on campus.” (AR 167.) Professor Dirks also told Roe that “there was a
2 pattern at the College of male students who repeatedly engaged in the practice of having sex with highly
3 intoxicated women.” (AR 166.) Professor Dirks theorized that Roe was “in a strong state of denial’
4 about the events” and was suffering from Post-Traumatic Stress Disorder. (AR 167.) Jane Roe stated
5 that she filed the complaint partially as a result of these statements by Dirks. (AR 155.)

6 On or about September 15, 2013, Jane Roe reported John Doe to Occidental’s Title IX Office
7 that she believed her level of intoxication caused her to be incapacitated and therefore unable to consent
8 to sex with John Doe on September 8, 2013. (AR 115, 153.) Jane Roe did not claim that she was
9 forced, intimidated, physically harmed, or resisted sex in any way. (*Id.*)

10 On October 1, 2013, Occidental hired Public Interest Investigators, Inc. (“PII”) (AR 115.) PII
11 investigators Keith Rohman and Cathleen Watkins interviewed Jane Roe, eight freshman students and
12 Dirks, as requested by Roe and Dirks. (AR 117; AR 439: 23-24.)

13 During the PII investigation, on October 31, 2013, Los Angeles Deputy District Attorney Alison
14 Meyers declined to pursue criminal charges against John Doe based on lack of evidence:

15
16 Witnesses were interviewed and agreed that the victim and suspect were both drunk,
17 however, that they were both willing participants exercising bad judgment. I
18 interviewed the victim regarding the facts of the case. I explained to her the definition
19 of PC 261 (a)(3) [rape of an intoxicated person] and the lack of evidence as to certain
20 elements. Specifically **the facts show the victim was capable of resisting based on**
21 **her actions.** More problematic is the **inability to prove the suspect knew or**
22 **reasonably should have known that she was prevented from resisting if she was in**
23 **that state.** It would be reasonable for him to conclude based on their communications
24 and her actions that, even though she was intoxicated, she could still exercise reasonable
25 judgment. That charge is therefore declined based on insufficient evidence.
26 (AR 96-97, emphasis added.)

27 John Doe forwarded Meyers’ Charge Evaluation Worksheet to investigator Watkins to be
28 included as evidence in the investigation, and she included it as Exhibit 1 to her report. (AR 94-95; AR
117.) Notably, Exhibit 1 was redacted entirely from Watkins’ report and Occidental did not allow this
evidence in John Doe’s hearing. (AR 199-203; AR 658 fn 4.) Once the criminal case had been rejected,
John Doe agreed to be interviewed by PII as soon as he could obtain an Occidental-approved advisor.
(AR 117.) However, on November 14, 2013, PII finalized its report without interviewing John Doe.
(AR 117; AR 439:21-22.)

1 **C. ADJUDICATOR MARILOU MIRKOVICH FINDS PETITIONER**
2 **RESPONSIBLE FOR POLICY VIOLATIONS.**

3 John Doe's hearing was held before private attorney Marilou Mirkovich on December 7, 2013.
4 (AR 654.) The adjudicator's role was to "render a decision of responsibility for violation(s) to the
5 Sexual Misconduct Policy." (AR 314.) Present at the hearing were Cherie Scricca, Ed.D. (hearing
6 coordinator), Jane Roe, Professor Movindri Reddy, Ph.D. (Jane Roe's advisor), Amy Munoz (John
7 Doe's advisor), Cathleen Watkins (lead investigator), and John Doe. (AR 655.) Investigator Watkins,
8 Jane Roe, John Doe, and W7, W2, W3, W4, and W5 testified at the hearing. (*Id.*) Two days later, on
9 December 9, 2013, Marilou Mirkovich issued her "External Adjudicator's Decision (hereafter
10 "Decision") with her opinion that:

11 1.) that sexual intercourse occurred between the Respondent and the Complainant, 2.) that
12 although the Complainant engaged in conduct and made statements that demonstrated
13 consent to sexual intercourse with Respondent, she was incapacitated at that time; and 3.)
14 that the Respondent should have known that the Complainant was incapacitated at that
15 time. (AR000665-AR000666)

16 Accordingly, Marilou Mirkovich found Petitioner responsible for sexual assault and non-
17 consensual sexual contact under the College's Policy. On December 20, 2013, Doe was sanctioned with
18 "Permanent Separation from the College." (AR 683.) Doe appealed the sanction on January 6, 2014
19 (AR 977-995), and on January 22, 2014, Andrew G. Celli, Jr. of the law firm Emery Celli Brinckerhoff
20 & Abady LLP submitted a response to Doe's appeal on behalf of Roe. (AR 1275-1278.) On February
21 12, 2014, Maria Hinton, J.D., Occidental's Assistant Director for Housing Services, concluded that
22 Doe's grounds for appeal, "fail[ed] to demonstrate that there was a procedural or substantive error that
23 significantly affected the outcome of the case," and Doe was ordered permanently expelled from
24 Occidental. (AR 1315.)

25 The following day, John Doe filed his writ petition seeking court review of Occidental's Title IX
26 administrative action. ⁴

27 ⁴ February 19, 2014 Hon. James C. Chalfant granted Doe's stay application, which has allowed Doe to
28 continue his education elsewhere. On September 15, 2015, Petitioner filed a civil complaint against
Occidental as LASC case no. BC594472. On September 18, 2015, Hon. Robert H. O'Brien declined to
relate the two cases under LASC Rule 3.3(f). On October 16, 2015, Occidental removed the civil case
to federal court, where the matter is stayed pending resolution of this writ matter. (*Doe v. Occidental*

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III. ARGUMENT

A. OCCIDENTAL'S TITLE IX PROCEEDINGS WERE UNFAIR.

I. "Fair Hearing" Is Reviewed De Novo.

Code Civ. Proc. § 1094.5 authorizes a trial court to issue a writ of administrative mandate where an agency has deprived a petitioner of a fair hearing. (Code Civ. Proc., § 1094.5, subd. (b); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152; *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239 [hereinafter "*Doe USC*"].) In determining whether an agency provided a petitioner with a fair hearing, a reviewing court independently evaluates whether "the administrative proceedings were conducted in a manner consistent with the minimal requisites of fair procedure demanded by established common law principles." (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442 [hereinafter "*Rosenblit*"], noting *John A. v. San Bernardino City Unified School Dist.* (1982) 33 Cal.3d 301, *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, and *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, superseded on other grounds by statute as stated in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655.) That is, the petitioner is entitled to an independent judicial determination of the fair hearing issue. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

Students facing lengthy suspension or expulsion have interests qualifying for protection of the Due Process Clause. (*Goss v. Lopez* (1975) 419 U.S. 565, 577 [for suspensions of less than ten days from high school, students are not entitled "to confront and cross-examine witnesses"].) The severity of the deprivation is one of several factors that must be weighed in deciding the exact due process owed the student. (*Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 86.) In this case, expulsion from the College could not be more severe, resulting in the loss of an "an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training." (*Goldberg v. Regents of University of Cal.* (1967) 248 Cal.App.2d 867, 876 [hereinafter "*Goldberg*"].) Due Process requires, *inter alia*, "proper advance notice of the hearing specifying the particular charges and suggesting that [the student] might wish to obtain

College, USDC case no. CV 15-08160 DDP (AFMx).

1 counsel.” (*Doe USC, supra*, 246 Cal.App.4th at 246, quoting *Goldberg, supra*, 248 Cal.App.2d at 872;
2 see also *Brown v. Univ. of Kansas* (D.Kan. 2014) 16 F.Supp.3d 1275, 1289-1290, *aff’d*, (10th Cir. 2015)
3 599 F. App’x 833 [“An essential principle of due process is that a deprivation of life, liberty or property
4 ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”].)

5 **2. Occidental’s Proceedings Typified by Lack of Impartiality.**

6 Occidental’s Policy requires the College “to provide for fair and equitable procedures for
7 determining when [its] policy has been violated.” (AR 2.) Under California law, “The right to a fair
8 procedure includes the right to impartial adjudicators. (*Applebaum v. Board of Directors* (1980) 104
9 Cal.App.3d 648, 658.) Moreover, “[f]airness requires a practical method of testing impartiality.’
10 (*Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 444.)” (*Rosenblit, supra*, 231
11 Cal.App.3d at p. 1448.) Correspondingly, “[A]n actual bias [on the part of adjudicators] need not be
12 proven; only an unacceptable *probability* of actual bias.” (See *Nasha LLC v. City of Los Angeles* (2004)
13 125 Cal.App.4th 470, 483, *emphasis added*; see also *Nightlife Partners v. City of Beverly Hills* (2003)
14 108 Cal.App.4th 81, 90 [“due process in an administrative hearing also demands an *appearance* of
15 fairness and the absence of even a *probability* of outside influence on the adjudication.”], italics in
16 original.)

17 During the Fall of 2013, Professors Reddy and Dirks were embroiled in a highly-publicized
18 political movement to pressure Occidental and other institutions to hold male students responsible for
19 alleged sexual violence. For the 2013-2014 school year, Occidental reported 60 forcible sexual
20 offenses, becoming the U.S. college with the highest rate of sexual misconduct at 2.8%, which is 4.7
21 times higher than the rate of the second-highest California school that year (Claremont McKenna
22 College at 0.6% with 8 offenses total), 20 times the rate of Stanford University (0.14% with 26 cases
23 total), and 35 times the rate at UCLA (0.08% with 33 cases total.)⁵ Occidental’s sexual assault rate
24 during the 2013 -2014 school year was a statistical outlier at five times higher than the rate of sexual
25 offenses that occurred at the College the prior year and the following year. (*Id.*) It was amid this
26 climate, piqued by harsh media criticism of Occidental’s perceived ineptitude in handling Title IX
27 proceedings, that Marilou Mirkovich was expected to make impartial determinations about John Doe

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⁵ Source: <https://ope.ed.gov/campussafety/#!/institution/details>

1 allegedly sexually assaulting a female student. These highly anomalous circumstances do not support
2 the appearance of fairness or the absence of a probability of outside influence on the administrative
3 action.⁶

4 Occidental's proceedings against Doe were infected by prevalent bias⁷, as most poignantly
5 demonstrated by Danielle Dirks' blatantly gender-biased statements, including that "John Doe fit the
6 profile of other rapists on campus in that he had a high GPA in high school, was his class valedictorian,
7 was on the [sports] team, and was 'from a good family.'" (AR 155.) Additionally, Occidental's Title IX
8 Coordinator Lauren Carella told Doe not to prepare an opening statement in advance of the hearing.
9 (AR 656 fn 3.) When, at the hearing, Doe was informed that he could make an opening statement, the
10 hearing was paused briefly so Doe could prepare his thoughts—without the assistance of his attorney,
11 who was not allowed to attend the hearing. (*Id.*) Conversely, on the day of the hearing, Roe read from
12 typed, lengthy, detailed opening and closing statements, which included a personal biography
13 highlighting high school memories and defaming Doe as a "rapist." (AR 463:12-368:20.)

14 Moreover, John Doe struggled to obtain an Occidental-approved campus advisor for the Hearing,
15 and after many rejections (see AR 42, 48, 60, 62, 63, 67, 68, 70, 72, 74, 76, 78, 80, 82, 84, 89), secured
16 Amy Munoz, Associate Vice President for Hospitality Services. (AR 655, 952.) Ms. Munoz had no
17 experience assisting with sexual assault matters, in contrast to Professor Reddy, and provided no
18 meaningful advice to Doe. Ms. Munoz was not allowed to speak during the Hearing, and did she not
19 encourage Doe to address inconsistent witness testimony or to pose follow-up questions. The denial of a
20 Hearing advisor of his choice, forced John Doe, an emotionally distraught 18-year-old freshman, to
21 defend himself against charges prosecuted by Ph.D. faculty members. The Hearing was Doe's only
22 opportunity to highlight Roe's inconsistent statements and impeach her credibility, and Occidental's
23 denial of an effective advisor of his choice prejudiced Petitioner's defense of Occidental's charges
24

25 ⁶ Occidental's concern about adverse publicity is shown in the College's unsuccessful attempt to have
26 the case records sealed by this court, which was also opposed by the Los Angeles Times.

27 ⁷ Occidental's Title IX personnel, advisors, outside contractors, adjudicators, and consultants lacked
28 gender diversity. If female students were required to engage with an all-male entourage to address
sexual assault by a male perpetrator, it would be reasonable to criticize such an arrangement as non-
supportive to female victims, as potentially reflecting gender bias, and to pose a barrier to the process of
female victims reporting sexual assault.

1 against him.

2 That Ms. Mirkovich’s findings were influenced by bias is shown in her Decision, where she
3 selectively highlighted only the evidence that tended to support the predetermined decision to hold John
4 Doe responsible for sexual assault, and discounted and ignored all countervailing evidence. (See Exhibit
5 B.) Also notable is Ms. Mirkovich’s double standard in acknowledging that Doe “was more intoxicated
6 than he had ever been” on September 7, that he did not recall the oral sex from Jane Roe, and that he
7 was so impaired that he “did not have actual knowledge of the Complainant’s incapacitation;” yet she
8 did not hold Jane Roe responsible for engaging in non-consensual sexual activity with Doe while he was
9 incapacitated. (AR 663; AR 665.)

10 Also significant is Ms. Mirkovich’s decision to ignore the LAPD investigation, based on her
11 statement that “the elements and standard of proof in a criminal investigation differ from the elements
12 and standard of proof in the Policy.” (AR 658 fn 4.) After interviewing Jane Roe, Deputy District
13 Attorney Alison Meyers concluded that her statements did not generate a reasonable suspicion of sexual
14 intercourse with a person who was “prevented from resisting” due to intoxication which was “known or
15 reasonably should have been known by the accused.” (AR 58-59; see also Pen. Code, § 261, subd.
16 (a)(3).) The *reasonable suspicion* standard for John Doe to be held to answer in the criminal case was
17 lower than the *preponderance of the evidence* standard to be applied by Ms. Mirkovich to evaluate Jane
18 Roe’s allegations. The fact that Ms. Mirkovich came to the opposite conclusion from DDA Meyers,
19 under the higher preponderance of evidence standard, shows that Ms. Mirkovich did not weigh the
20 evidence fairly.

21 3. **Adjudicator Purposefully Omitted Questions Critical to Establishing**
22 **John Doe’s Defense.**

23 As King Solomon recognized three thousand years ago, “In a lawsuit the first to speak seems
24 right, until someone comes forward and cross-examines.” (Proverbs 18:17 (NIV).) In California
25 student disciplinary matters that turn on credibility, the College must provide for the questioning of the
26 complainant, either directly or indirectly, by the accused student. (See, *Doe v. Regents of University of*
27 *California* (2016) 5 Cal.App.5th 1055, 1084 [hereinafter “*Doe UCSD*”].) In addition, students are to
28 have “ample opportunity to hear and observe the witnesses against them.” (*Doe USC, supra* 246

1 Cal.App.4th at p. 246, citing *Goldberg, supra*, 248 Cal.App.2d at p. 882.) Where the student is faced
2 with the severe sanction of expulsion, Due Process does not permit admission of *ex parte* hearsay
3 evidence given by witnesses not under oath and not subject to examination by the accused student.
4 (*Gonzales v. McEuen* (1977) 435 F. Supp. 460, 467.) In *Gonzales*, the district court rejected the use of
5 hearsay statements in a school discipline proceeding on the grounds “that the accused student [was]
6 deprived of his constitutional right to confront and cross-examine his accuser.” (*Id.*, 435 F.Supp. at p.
7 469.)

8 Although John Doe was assured “a fair and ample opportunity” to present his account of the
9 incident, Occidental’s promise was not fulfilled. (AR 430:11-12.) Adjudicator Marilou Mirkovich
10 asked Jane Roe, in some form, only 15 of the 38 questions John Doe submitted for Jane Roe.⁸ (See
11 Exhibit C.) In her Decision, Ms. Mirkovich wrote that she asked “each parties’ written questions to the
12 other party and each witness, unless those questions had already been asked and responded to, related to
13 the Los Angeles Police Department investigation, or were not relevant to the subject matter of this
14 hearing.” (AR 656.) However, her blanket statement does not sufficiently explain why Ms. Mirkovich
15 ignored many of the most relevant questions that challenged Roe on her prior inconsistent statements to
16 PII investigators.

17 At the hearing, Roe presented conflicting descriptions of her state of mind (compare AR 642:7-8
18 [“basic words would come up that would trigger *graphic memories* of the night] with AR 643:8-9 [“I
19 cannot remember having sexual intercourse with John Doe. I *wasn’t consciously there*”], (emphasis
20 added), and the only detail she was unequivocally able to recall at the hearing was one that would make
21 Doe appear sober and accountable (AR 467:23-25 [“I was drunk to the point of being
22 unconscious... When I told John Doe he consciously gave me chewing gum”].) Yet, during the
23 investigative interview conducted within three weeks of having sex with John Doe, she indicated that
24 she remembered many details of the evening. (See Exhibit A.) John Doe’s questions to Jane Roe, and
25 other witnesses, were essential to showing the inconsistencies between Roe’s hearing testimony and her
26

27 ⁸ Ms. Mirkovich misrepresented to Doe that all of his questions had already been asked. (AR 482:6-15.)
28 Because John Doe was denied the advisor of his choice, an attorney, he did not understand that he could
challenge the misrepresentation or inquire why so many important questions were not asked. John Doe,
an 18-year-old college freshmen, humbly acquiesced to Ms. Mirkovich’s apparent authority.

1 earlier statements to investigators, thereby exposing major discrepancies in her testimony. Ms.
2 Mirkovich ignored John Doe's questions and did not address Jane Roe's inconsistent and selective
3 memory in her Decision at all. (AR 656.) An impartial, fact-seeking adjudicator would have confronted
4 Jane Roe on the significant changes in her testimony, which tend impeach her credibility and her claim
5 of incapacitation.

6 **4. Occidental Denied John Doe Reasonable Access to Evidence.**

7 A fair process required the College to present the evidence to the accused student to allow for a
8 reasonable opportunity to prepare a defense and to respond to the accusation: ". . . requiring John to
9 request access to the evidence against him does not comply with the requirements of a fair hearing. (See,
10 e.g., *Goss*, 419 U.S. at p. 582.)" (*Doe USC, supra*, 246 Cal.App.4th at pp. 245-246.)

11 On December 1, 2013, six days before the Hearing, Cherie Scricca told Doe that the 180-page
12 investigation report and Exhibits 1-8 could be viewed on the online portal OneHub. (AR 333.) The
13 OneHub portal only allowed for the documents to be read on screen, but not to be saved, forwarded,
14 downloaded, printed, or marked up. (AR 337; see also AR 338-339.) Occidental told Doe that a
15 hardcopy was available for review in the Title IX office, but he could not have a copy. (AR 336.) The
16 documents also contained unexplained redactions to entire sections. (See AR 26-28, 154-155, 177, 200-
17 203.)

18 Doe and his attorney repeatedly objected to this "cumbersome and unworkable" presentation of
19 the evidence. (AR 337, 340, 343, 352, 359, 361, 362, 363, 378.) Cherie Scricca generally directed Doe
20 to Occidental's Policy for answers, stating, "The policy answers your questions and concerns including
21 those regarding redaction of materials," (AR 337) and Occidental's counsel reasoned "[T]he College
22 does not, under its policies, provide unredacted versions of the investigative report to the parties or to
23 the hearing panel/adjudicator." (AR 396.) Occidental's denial of reasonable access to the evidence
24 prevented John Doe from being able to prepare a more thorough defense to Occidental's charges against
25 him.
26

27 **5. Cumulative Impact of Unfairness**

28 The "cumulative impact" of the legal, political, and media pressure on Occidental to address the

1 purported wave of sexual violence on campus, the denial of reasonable access to evidence, the denial of
2 an advisor of his choice, the lack of an impartial adjudicator, the refusal to ask John Doe's questions
3 raise a "notable stench of unfairness" that permeates Occidental's administrative hearing against
4 Petitioner. (*Rosenblit, supra*, 231 Cal.App.3d at p. 1445.)

5 **B. FINDINGS OF FACT UNSUPPORTED BY EVIDENCE.**

6 **1. Independent Judgment, a Trial De Novo, Required Where**
7 **Administrative Process Affects a Vested Fundamental Right.**

8 California courts have undertaken to protect vested fundamental rights "from untoward
9 intrusions by the massive apparatus of government." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 142-143.)
10 Here, the "massive apparatus" is the intrusion and pressure imposed on the College by the U.S. Dept. of
11 Educations, Office of Civil Rights, and since Occidental's administrative action substantially affects
12 Petitioner's vested, fundamental right to continue his education, "the trial court not only examines the
13 administrative record for errors of law but also exercises its independent judgment based upon the
14 evidence disclosed in a limited trial de novo." (*Id.* at p. 143.) The Court must exercise its independent
15 judgment and find an abuse of discretion if the findings are not supported by the weight of the evidence;
16 in effect, a trial de novo.⁹ (Code Civ. Proc. § 1094.5, subd. (c); *Shuffer v. Board of Trustees* (1977) 67
17 Cal.App.3d 208, 219, citing *Greenhill v. Bailey* (8th Cir. 1975) 519 F.2d 5, 7.)

18 **2. Substantial Evidence Test.**

19 Even where the court is not required to reweigh the evidence,

20 . . . this does not mean we must blindly seize any evidence in support of the respondent
21 in order to affirm the judgment. . . . "[I]f the word "substantial" [is to mean] anything at
22 all, it clearly implies that such evidence must be of ponderable legal significance.
23 *Doe v. University of Southern California*, 246 Cal.App.4th at 248-249.

24 **3. Adjudicator's Findings Supported by Neither the Weight of the**
25 **Evidence, Nor Substantial Evidence.**

26 ⁹ A court must determine on a case-by-case basis whether an administrative decision affects a vested
27 fundamental right. (*Bixby v. Pierno, supra*, 4 Cal.3d at p. 144.) "A right is deemed fundamental on
28 either or both of two bases: (1) the character and quality of its economic aspect; or (2) the character and
quality of its human aspect." (*JKH Enters., Inc. v. Dep't of Indus. Rels.* (2006) 142 Cal.App.4th 1046,
1059.) John Doe possessed a vested contractual right to continue to attend Occidental uninterrupted,
free from the reputational harm and stigmatization that inherently accompanies sexual assault allegations
and determination of responsibility.

1 Occidental's charges against Petitioner may be supported only if Jane Roe was incapacitated at
2 the time she returned to his room and engaged in sexual activity.¹⁰ Under the Policy, "Incapacitation is a
3 state where an individual cannot make an informed and rational decision to engage in sexual activity
4 because she lacks conscious knowledge of the nature of the act (e.g. to understand the who, what, when,
5 why or how of the sexual interaction) and/or is physically helpless." (AR 8.) Although he does not
6 remember it occurring, Petitioner does not dispute that sexual intercourse occurred between Roe and
7 Doe, nor Ms. Mirkovich's findings that Roe demonstrated consent and made statements that indicated
8 that she consented to sexual intercourse. (AR 659-660.) Doe disputes Ms. Mirkovich's opinion that
9 Roe was incapacitated at the time she was demonstrating consent, and that Doe should have known that
10 Roe was incapacitated at the time she was demonstrating consent to sexual activity. (AR 661-665.)

11 **4. Roe's Statements in October 2013 Are More Reliable Than Her**
12 **December 2013 Hearing Testimony.**

13 During her investigation interview on October 9, 2013, Roe relayed personal thoughts and
14 feelings and recalled events that occurred when she was alone, indicating that the memories were
15 derived from her own independent knowledge. For instance, Roe recalled being "wired with energy"
16 when she was back in her room. (AR 147.) She "recalled *feeling* hot" before she took off her shirt and
17 that she "*thought* she had a bandeau on." (AR 148, emphasis added.) Roe noted that while she was
18 making out with Doe on the bed, she and Doe "talked about what type of music to listen to," which none
19 of the other witnesses, other than Doe, would have known about. (*Id.*) Roe independently recalled that
20 she and Doe created a ruse to come back down to Doe's room, and that Doe told her "to come back
21 down 'so he can fuck me.'" (*Id.*) Only Roe could have known that she was "freaking out" because she
22 didn't want her R.A. to see her, or that "she thought to herself, 'W6. Oh crap, what are you doing here.'"
23 (AR 149.) Roe recalled internally "feeling excited that she had succeeded in sneaking past the
24 bathroom." (*Id.*) "[Roe] remembered asking John Doe if he had a condom as she had not used any birth
25 control." (AR 150.) Roe also recalled "three voices asking her if she was ok" and later speculated that
26
27

28 ¹⁰ "An assessment of whether "Respondent knew or should have known, that the Complainant was
incapacitated" is also required. (AR 8.)

1 they may have been W3, W16, and W15, although in reality there was only a single voice (W3) asking
2 Roe three times if she was okay. (*Id.*) Jane Roe also recalled John Doe saying that his roommate just
3 entered the room, which occurred while they were having sex. To emphasize, she remembered the
4 invasion of their privacy, but claimed no memory of her first sexual intercourse that was occurring at the
5 very same moment. (*Id.*) Given the independent knowledge she conveyed to investigators, including
6 information about events that occurred as she was having sex with John Doe, two conclusions can be
7 drawn: 1) Jane Roe’s memory in October 2013 is more accurate than her memory at the hearing in
8 December 2013; and 2) Jane Roe’s assertion that she “wasn’t consciously there” while having sex with
9 John Doe is not reliable.

10
11 **5. Facts Do Not Establish Roe’s Incapacitation.**

12 The heart of the problem with Marilou Mirkovich’s contentions is her finding that Jane Roe “did
13 not have the capacity to appreciate the nature and quality of the act.” (AR 958.) This finding cannot be
14 squared with undisputed contrary evidence that although Roe may have been intoxicated, she was
15 certainly not incapacitated. While in Doe’s room, Roe took off her shirt, a culturally recognized
16 indication of her intent to escalate a sexual encounter; yet Ms. Mirkovich unreasonably redefined this
17 act, not to show Roe’s capacity and intent, but rather to justify her incapacitation. (AR 664.) Jane Roe
18 texted John Doe from her dorm room to ask him if he had a condom in preparation for sexual
19 intercourse, and assured him she would return to his dorm room to have sex. (AR 131, 209, 224-225.)
20 She also texted her friend in Tennessee that she intended to have sex that night. (AR 130.) She then left
21 her dorm room, snuck past W6, and navigated her way unassisted down her hallway and down a flight
22 of stairs back to John Doe’s room. (AR 131-133.) The text messages Roe sent to John Doe over a 24-
23 minute period indicate that she was aware that she was going to engage in sexual activity with Doe and
24 had the capacity to coordinate sneaking out of her room to return to the same room she had been in
25 earlier. Roe’s text message to her friend also reveals that she wanted to share the news that she was
26 about to engage in sexual activity. Further, her question to Doe about whether he had a condom
27 indicates that she was lucid enough to be concerned about the possibility of pregnancy or contracting a
28 sexually transmitted disease. These facts demonstrate that Jane Roe had conscious knowledge that she
was going to engage in sexual intercourse (i.e., “what”), with John Doe (i.e., “who”), in John Doe’s

1 room (i.e., “where”), that night (i.e., “when”), undoubtedly because they had been flirting with each
2 other in Doe’s room earlier that evening (i.e., “why”).

3 **6. No Outward Signs of Incapacitation.**

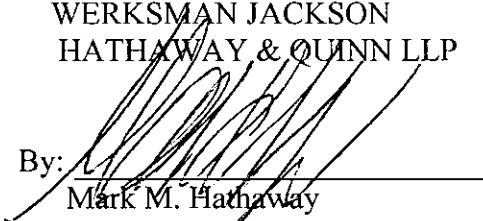
4 Roe was intoxicated, but had the capacity to dance with Doe, flirted with him, sent him text
5 messages asking whether he had a condom, and voluntarily navigated to his dorm room to have sex.
6 These were not the confused acts of an incapacitated young woman, but indications of a woman who
7 was consciously pursuing sexual activity with Doe. Along with the text message evidence, it was
8 reasonable for Doe to assume that Roe was a willing sexual partner with the capacity not only to
9 affirmatively consent, but also that she could *initiate* sexual intercourse. Although adjudicator
10 Mirkovich “recognizes that the fact that Complainant successfully navigated herself, under her own
11 power to the Respondent’s room, indicates both that, at the time, she had an awareness of where she was
12 and that her motor skills were sufficiently intact to enable her to walk unassisted,” Ms. Mirkovich
13 ultimately reached the unreasonable conclusion that the witness testimony of Jane Roe’s friends was
14 somehow more compelling than Jane Roe’s own perceptions and outward signs that she was not
15 incapacitated. (AR 663-666.) Ms. Mirkovich’s opinion is not supported by the greater weight of the
16 reliable, credible evidence, and no reasonable trier of fact could have found that Doe reasonably should
17 have known that Roe was incapacitated and unaware of sexual activity based on the entire record.

18 **IV. CONCLUSION.**

19 For the foregoing reasons, Petitioner respectfully requests this Court to set aside the findings and
20 sanctions imposed by Respondents.

21 WERKSMAN JACKSON
22 HATHAWAY & QUINN LLP

23 DATED: March 24, 2017

24 By: 
25 Mark M. Hathaway
26 Jenna E. Eyrich
27 Attorneys for Petitioner
28

PROOF OF SERVICE

1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF LOS ANGELES)

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action;
5 my business address is 888 West Sixth Street, Suite 400, Los Angeles, California 90017.

6 On March 24, 2017, I served the foregoing document described PETITIONER'S OPENING BRIEF IN SUPPORT OF
7 PETITION FOR WRIT OF MANDAMUS on all interested parties listed below by transmitting to all interested parties a true
8 copy thereof as follows:

9 Jonathan M. Brenner
10 SIDLEY AUSTIN LLP
11 555 West Fifth Street, Suite 4000
12 Los Angeles, California 90013
13 Telephone: (213) 896-6000
14 Facsimile: (213) 896-6600
15 E-mail: jbbrenner@sidley.com
16 ATTORNEYS FOR RESPONDENT OCCIDENTAL COLLEGE

17 **BY FACSIMILE TRANSMISSION** from FAX number (213) 624-1942 to the fax number set forth above. The facsimile
18 machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the
19 machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

20 **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily
21 familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be
22 deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the
23 ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date
24 or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

25 **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope
26 to be delivered by process server.

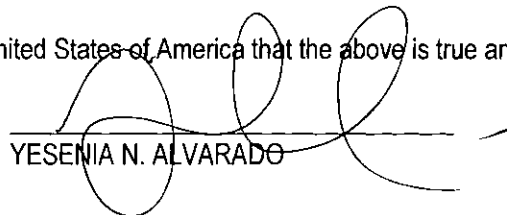
27 **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or
28 delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or
package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it
is to be served.

BY ELECTRONIC TRANSMISSION by transmitting a PDF version of the document(s) by electronic mail to the party(s)
identified on the service list using the e-mail address(es) indicated.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on March 24, 2017 in Los Angeles, California


YESENIA N. ALVARADO

03/28/2017

03/29/2014

Exhibit A

Statements made by Jane Doe during Investigation Interview on October 9, 2013	Statements made by Jane Roe during Hearing on December 7, 2013
<p>“She said she heard the sound of music from one of the rooms and ran into W7, who is in her African Revolutions class. She asked W7 where the music was coming from, and he said his roommate was having a dance party. Jane Doe noted that she has always loved dancing, particularly when she is drunk.” (AR 147.)</p>	<p>Q: “Do you recall Mr. W7 saying to you that Mr. John Doe was having a dance party?” A: “I don't know if those were the exact words but he said something about -- I think he said something about dancing.” (AR 476: 2-6.)</p>
<p>Jane Doe said that when she entered the room, she found the lights off, and three women in the room with John Doe. Jane Doe said she did not know the women's names. According to Jane Doe when John Doe saw her, he called out to her excitedly, "Jane!" (AR 147.)</p>	<p>Not discussed during Hearing.</p>
<p>“Jane Doe said that the three women left John Doe's room ‘very quickly’ after she arrived. She stated the women were W7's friends. (AR 148.)</p>	<p>Not discussed during Hearing.</p>
<p>She remembered dancing with John Doe and that W2 and W6 were sitting on John Doe's bed.” (AR 148.)</p>	<p>Not discussed during Hearing.</p>
<p>“According to Jane Doe W6 took out a bottle of vodka, which she drank from, and then she danced more. She said she was drinking straight from the bottle, and remembered alcohol spilling on her. She stated that she knew she was drinking Smirnoff and it should have burned her throat going down, but it didn't because she was so intoxicated at the time.” (AR 148.)</p>	<p>Not discussed during Hearing.</p>
<p>“As Jane Doe continued to dance with John Doe, she recalled feeling hot and took off her shirt. She stated that she thought she had a bandeau on over my bra, but this was not the case.” (AR 148.)</p>	<p>“I mean, I remember thinking that I thought I had a bandeaux on, you know, like the little -- ...-- bralet things.” (AR 471: 13-15, 17.)</p>
<p>“Jane Doe stated that when she took off her shirt, ‘W2 flip[ped] out and [said], ‘You need to get your shirt on.’” (AR 148.)</p>	<p>“That was only something I remembered a couple weeks after. I was in the room with W2 and she was helping me to piece together the night, and she had mentioned something about how she was upset that I had taken off my shirt. And from what I remember, she just kept saying like, ‘Jane Doe put your shirt back on, put your shirt back on,’ and was just</p>

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Statements made by Jane Doe during Investigation Interview on October 9, 2013	Statements made by Jane Roe during Hearing on December 7, 2013
	<p>getting very, I don't know, anxious about it." (AR 473:19 – 474:1.)</p> <p>Q: "Now, did you remember that, or was that what told you?"</p> <p>A: "It was -- I eventually remembered it, but I hadn't remember it until -- I get flashbacks sometimes. If someone says a word or does something --" (AR 474: 2-7.)</p>
<p>"At another point, Jane Doe stated, John Doe pushed her on to the bed and 'we ma[d]e out for a while.' She said that the two also talked about what type of music to listen to." (AR 148.)</p>	<p>Not discussed during Hearing.</p>
<p>While Jane Doe and John Doe were on the bed 'making out,' Jane Doe recalled, John Doe told her to get rid of W2 and W6. He told her to let them take her up to her room and then come back to his room. (AR 148.)</p>	<p>Q: "Do you recall that when you were on -- on the bed with Mr. John Doe he had communicated to you to get rid of Ms. W2 and Mr. W6?"</p> <p>A: "I barely remember it."</p> <p>Q: "What do you recall?"</p> <p>A: "I -- I -- it's one of those really faint things where I think he said that I needed to -- I think he said I needed to convince them to take me upstairs and then come back down."</p> <p>Q: "Okay."</p> <p>A: "I'm not sure." (AR 474:16 – 475:2.)</p>
<p>"Jane Doe said John Doe also told her to give him her number, so he could text her to come back down." (AR 148.)</p>	<p>Q: "Do you recall giving your cell phone number to Mr. John Doe?"</p> <p>A: (No audible response.)</p> <p>Q: "No?"</p> <p>A: "No." (AR 479: 4-8.)</p>
<p>"She stated that John Doe told her to come back down 'so he can fuck me.'" (AR 148.)</p>	<p>Q: "Now, in your interview with Ms. Watkins, I believe that you said that Mr. John Doe said to you while you were -- while you were in his room with Ms. W2 and Mr. W6, to come back down so he could fuck you. Now, do you actually remember him saying that?"</p> <p>A: "I'm not sure anymore, honestly. I'm really not sure."</p> <p>Q: "Okay. Now, do you think that's because time has passed and you don't remember it, or are you --"</p>

Statements made by Jane Doe during Investigation Interview on October 9, 2013	Statements made by Jane Roe during Hearing on December 7, 2013
	A: "I think after reading the report and reviewing all of the statements, I question so much of my memory that (unintelligible) said -- that I read that I did that I don't remember. And there are things that people said happened that completely conflict with what I think happened." (AR 475: 3-18.)
"Jane Doe stated that after W2 and W6 put her to bed, she lay there for about five minutes. She recalled sending a text to best friend in Tennessee, stating, 'I'mgoingtohave sexnow,' without any spaces between the words." (AR 149.)	"I don't remember sending any of the texts that I sent that night. The only way that I knew about them was the next morning when I woke up and specifically W12's texts were the first that I saw because I woke up and had, I think, three or four missed calls from her and text messages." (AR 478: 4-9.)
<p>"Meanwhile, Jane Doe stated that John Doe was texting her asking where she was." (AR 149.)</p> <p>"She stated that John Doe was still texting her, and she texted back that her RA and W6 were there. Jane Doe stated that John Doe told her to say she had to go to the bathroom." (AR 149.)</p>	"I don't remember any of the texts from that night." (AR 479:25 – 480:1.)
<p>"Jane Doe said she looked out the peek hole in the door and saw W6's head. She said she could also see her neighbor, W19 and was one of the R.A.s. Jane Doe said she was very concerned about this. She said, 'I am freaking out because I am really drunk and I don't want the RA to see me.'" (AR 149.)</p> <p>Jane Doe stated that when she saw W6's head through her peep hole, she thought to herself, 'W6. Oh crap, what are you doing here?' Jane Doe expressed this as if her internal thought was upset and frustrated. However, she stated that when she opened the door, she was more congenial with him and said, 'Whoa, W6 what are you doing-here' in a friendly way. Jane Doe said she did not remember what W6 said in response...Jane Doe stated that she told W6</p>	<p>Q: "Do you recall trying to sneak out around or avoid Mr. W6 and the RA?"</p> <p>A: "The only memory that I -- I have two memories from that point. One is looking through the little peephole in our door and I remember looking through and seeing W6's spikey hair--"</p> <p>Q: "Okay."</p> <p>A: "-- through the -- through the viewing hole. And then I remember just seeing myself in the mirror before I went down the stairs, which is right by the bath room. There's a mirror." (AR 479: 10-20.)</p>

Statements made by Jane Doe during Investigation Interview on October 9, 2013	Statements made by Jane Roe during Hearing on December 7, 2013
<p>she had to go to the bathroom. She said she walked down the hall to the bathroom, but did not enter it. She said she walked past the bathroom and down the stairs. She stated she remembered feeling excited that she had succeeded in sneaking past the bathroom.” (AR 149.)</p>	
<p>“However, as she walked down the stairs, Jane Doe said she did not feel well. She stated she was holding onto the rail as she walked down, and was feeling ‘really dizzy’ and ‘really sick.’ She also felt very nauseous, and, after she got to the second floor, she threw up in a trash can. She said someone came up behind her as she vomited and held her hair. She stated she was later told this was W7, who also took her into the men's bathroom where she finished throwing up.” (AR 149.)</p>	<p>Q: “Do you recall throwing up, vomiting on the way back down to Mr. John Doe's room?” A: “I remember being over a trash can.” Q: “I'm sorry?” A: “I remember being over the trash can, yeah.” Q: “Did you recall that the next morning, or is that something that came back to you after?” A: “That was something that W7 told me.” Q: “So you --” A: “I've -- remember it after.” Q: “Okay.” A: “Yeah, after. Or was it W3 who told me that W7...” (AR 480: 2-14.)</p>
<p>“Jane Doe stated she then walked to John Doe room, and she believed that this was when John Doe pulled her into the room. She stated, ‘I think I told him I threw up and I think he gave me a piece of gum.’” (AR 149.)</p>	<p>Q: “Do you recall when you went into -- after you had vomited and you went into Mr. John Doe's room, did you communicate to him that you had vomited?” A: “Yeah. I said that I threw up, and he (inaudible).” Q: “Do you recall that you told him that you had vomited.” A: “Yeah.” (AR 480: 15-22.)</p>
<p>“She remembered asking John Doe if he had a condom as she had not used any birth control.” (AR 150.)</p>	<p>Q: “Do you recall having any communication with Mr. John Doe that evening about various forms of birth control?” A: (No audible response.) Q: “No? Okay.” (AR 480:24 – 481:3.)</p>
<p>“She stated she remembered having sex with John Doe. When questioned about this, however, she said she could not specifically recall having intercourse with him. She stated she did recall performing oral sex on him.” (AR 150.)</p>	<p>Q: “Do you have any recollection of being on top of Mr. John Doe?” A: “No. I don't remember any of the intercourse.” Q: “Okay. Do you recall having oral sex with him?” A: “I have one -- like one minute like, I'm</p>

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Statements made by Jane Doe during Investigation Interview on October 9, 2013	Statements made by Jane Roe during Hearing on December 7, 2013
	sorry, a second of -- (unintelligible) I only -- we were sitting in class, I think the Wednesday after. We talked probably, and John Doe said something in class, and I just went back to (inaudible). It's the first time that I remembered it." (AR 476: 25 – 477: 9.)
"She remembered John Doe leaving the room at one point and returning very quickly." (AR 150.)	Not discussed during Hearing.
"She also remembered hearing a knock at the door, and the sound of three voices asking her if she was ok. She believed that one of the voices may have been W3 and another was a woman named W16 (In a follow-up conversation with Lauren Carella, Jane Doe said that the third voice was W15. Carella forward this information to PII.)" (AR 150.)	Q: "As we sit here today, do you recall anyone asking how you were doing that night? Saying, 'Are you okay?' Anything like that?" A: "I know that W3 asked me. I -- I can't remember it." (AR 481: 4-8.)
"Jane Doe stated she did not recall how many times she and John Doe had sex that night. She stated she remembered that she did not move very much." (AR 150.)	Not discussed during Hearing.
She recalled getting her shorts back on, but not her belt, and said that her belt and earrings were in John Doe's room the next day." (AR 150.)	Not discussed during Hearing.
"She stated she remembered John Doe telling her to get on the bed, but did not recall any other conversation with him during this period." (AR 150.)	Q: "Do you recall anything that was said between you and Mr. John Doe after you went down the second time to his room?" A: (No audible response.) Q: "No?" A: "I don't remember any conversations." (AR 481:23 – 482:3.)

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Exhibit B

Evidence Cited by Marilou Mirkovich in Her December 9, 2013 Decision	Countervailing Testimony from the Investigation Report and December 7, 2013 Hearing
<p>“Because of that concern, Ms. W2 and Mr. W6 decided to stay behind to take care of the Complainant because of her level of intoxication.” (AR 662.)</p>	<p>W2 and W6 “mutually decided” to stay with Jane Roe to make sure she was “honestly safe” and to “keep her company.” However, they were not so concerned about Jane Roe’s alcohol consumption that they thought that she might vomit or have alcohol poisoning. They also did not want to go to Mt. Fiji “badly” and “didn’t really see any harm in just staying.” (AR 544:7-12.)</p>
<p>“After returning to her room, the Complainant went to the second floor of Braun Hall and encountered [W7]. [W7] stated that the Complainant appeared drunk and was leaning up against the wall for support. W7 then observed the Complainant walk into the dormitory room he shared with the Respondent.” (AR 662.)</p>	<p>According to W7, when Jane Roe walked into his dorm room, “she wasn’t stumbling or falling over herself.” (AR 511:8.) W7 also had a conversation with Roe about the music playing in his dorm room. (AR 125.)</p>
<p>“Ms. W2 was concerned that the Complainant did not know what she was doing; therefore, Ms. W2 began attempting to remove the Complainant from the Respondent's room. (AR 662.)</p>	<p>When asked if she had concerns that Jane Roe “didn’t know what she was doing,” W2 responded: “A little bit, yeah. She seemed -- I mean, like, I think that she knew, like, the general idea of, like, where she was, you know, who she was with, like what was going on. But like I said before, I don't think that, you know, she had, like, a -- a -- like -- like a next goal in mind. She was just kind of, like, going along with whatever -- like with whatever happened.” (AR 560:12-18)</p> <p>According to W2, she was trying to remove Jane Roe from the room: “Mostly because, like, the only person that I, like, really knew was Jane Roe And just because she wasn't -- like, I wanted to get her to a safe place and it didn't exactly seem like it was, like, the best place for her to be because they kept on kissing and -- but I wasn't sure how she would feel about that, so I kept trying to take her out of the room.” (AR 550:5-11)</p> <p>W2 did not want to leave Jane Roe in John Doe’s room, “Because she was our friend and we didn't want her to do something that --</p>

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	like, you know, she would regret or that she wasn't happy with." (AR 554:11-15)
<p>"Ms. W2 encountered some resistance in her efforts to remove the Complainant from the Respondent's room. As a result, when the Respondent left his room, Ms. W2 and Mr. W6 removed the Complainant from the Respondent's room, and they escorted the Complainant to her dormitory room." (AR 662.)</p>	<p>According to W2, while she was trying to get Jane Roe to leave John Doe's room, Jane Roe voiced objection and told W2 that she wanted to stay: "I think that she said that she wanted to stay, but it wasn't, like, a very, like, definitive, like, 'No. I want to stay.' It was just like 'No,' like, 'Let's stay,' you know. It wasn't like she was really, like, actively, like, fighting me trying to take her out of the room. (AR 552:4-8)</p>
<p>"Ms. W2 stated that, although she and Mr. W6 did not carry the Complainant to her room, the Complainant was walking like an intoxicated person; thus, to escort the Complainant to her room, Ms. W2 and Mr. W6 each linked arms with the Complainant and supported her when they were returning the Complainant to her room." (AR 662-663.)</p>	<p>W2 stated: "I think that she walked as an intoxicated person would, but she, like, still made it up to her room with -- it's not like W6 and I had to, like, carry her. It might have, you know, been like linking arms with her or something like that a little bit to, like, help her walk a little bit, but it's not like she was totally incapable of holding herself upright. (AR000557:8-17.)</p>
<p>"After the Complainant left her room to return to the Complainant's room, she vomited in the hallway of the second floor of Braun Hall. W7 discovered the Complainant vomiting and assisted her by holding back her hair and directing her to the bathroom. The Complainant then returned to the Respondent's room." (AR 663.)</p>	<p>W7 testified that after Jane Roe vomited, "I asked her if she was fine. And then she said yes. And then she went back to the room." (AR 515:13-15)</p>
<p>"As stated above, neither the Complainant nor the Respondent has a recollection of any verbal communication when the Complainant returned to the Respondent's room." (AR 663.)</p>	<p>Although Jane Roe told adjudicator Mirkovich, "I don't remember anything being said I think that entire time" (AR 478:23-479:2), she also recalled "I was drunk to the point of being unconscious. I vomited, and a fellow student witnessed that. When I told John Doe he consciously gave me chewing gum." (AR 467:23-25.)</p> <p>During the investigation, Jane Roe recalled having the following conversations with John Doe while in his dorm room:</p>

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	<p>“Jane Roe stated she then walked to John Doe room . . . She stated, ‘I think I told him I threw up and I think he gave me a piece of gum.’ (AR 149.)</p> <p>“She remembered asking John Doe if he had a condom as she had not used any birth control.” (AR 150.)</p>
<p>“The Complainant subsequently recalled giving the Respondent oral sex; however, the Respondent does not recall this act. The Complainant states, and the external adjudicator believes, she has no recollection of having sexual intercourse with the Respondent.” (AR 663.)</p>	<p>In the investigation report, investigator Watkins recalled: “She stated she remembered having sex with John Doe. When questioned about this, however, she said she could not specifically recall having intercourse with him. She stated she did recall performing oral sex on him . . . Jane Roe stated she did not recall how many times she and John Doe had sex that night. She stated she remembered that she did not move very much.” (AR 150.)</p> <p>According to investigator Watkins’ hearing testimony: “We -- in the -- I was present with another investigator at the time and so in the drafting of that the way this is drafted, it was discussed subsequently with that other investigator just to be sure on what our recollections were. And the joint recollection of both of us and our notes was that she had said yes, she had sex with him, and then -- but then when we said well, what do you remember about that or tell us about that or probed for details, then it was like, ‘Well, I can't really remember actually having intercourse.’ (AR 639:4-14.)</p> <p>During the hearing, Jane Roe referenced having “graphic memories of the night.” (AR 642:7-8.)</p> <p>Regarding Roe’s recollection of oral sex, Ms. Watkins stated during the hearing, “My recollection -- particularly I remember asking her -- I remember her saying that they had</p>

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	oral sex. And I remember specifically asking her was that you performing it with him or him performing it on you, and she had a very straight answer. 'No. It was me giving him oral sex.' So there were -- and that was in the sort of sequence of events. So that struck me as strictly her recollection." (AR 637:13-20.)
<p>"After the sexual intercourse, when the Complainant left the Respondent's room, she encountered Ms. W2 who escorted the Complainant to her room. At this time, the Complainant did not mention to Ms. W2 that she had sexual intercourse with the Respondent." (AR 663.)</p>	<p>W2 recounted the following: Q: "Did she communicate to you that she had come from Mr. John Doe's room?" A: "No." Q: "Did you ask her where she had been?" A: "Yes. I asked her and she simply said that she had been on the second floor." Q: "Did you ask her, 'Were you in Mr. John Doe's room?'" A: "No, I didn't ask her." (AR 563:12-20.)</p>
<p>"When the Complainant and Ms. W2 arrived at the Complainant's dormitory room, Ms. W4 was present. Ms. W4 stated that Ms. W2 was supporting the Complainant because the Complainant had trouble walking on her own. Ms. W4 testified, and the adjudicator believes, that at that time the Complainant was not making sense, was slurring her words, could not unbutton her clothing, and could not drink water without it dribbling down her face." (AR 663.)</p>	<p>W2 testified: "She looked like how she had looked like her -- then. There was, like, nothing alarming about her appearance except for the fact that she was, like, a lot less steady on her feet than she had been earlier." Q: "Was she slurring her words?" A: "Um-hmm." Q: "Yes?" A: "Yes." (AR 563:2-11.)</p>
<p>"The Complainant testified that she learned that she had sexual intercourse with the Respondent when Mr. W3 advised her of what he had seen in the Respondent's dormitory during the early hours of September 8, 2013. Mr. W3 testified that when he told the Complainant that she had sexual intercourse with the Respondent, she stated that she did not know she had had sexual intercourse with the Respondent, and he believed that statement." (AR 664.)</p>	<p>W2 testified at the hearing that Jane Roe told W2 in the morning right when she woke up that she believed she'd had sex with John Doe: Q: "Okay. So when you returned when you went to Ms. Jane Roe's room the next morning, was she there alone?" A: "Yes." Q: "Okay. And how did the communication with her begin that morning?" A: "She outright said, like, 'I -- I think I had sex with John Doe last night.'" Q: "Okay. Was that the first thing that she said when you walked in?"</p>

Evidence Cited by Marilou Mirkovich in Her December 9, 2013 Decision	Countervailing Testimony from the Investigation Report and December 7, 2013 Hearing
	<p>A: "Pretty much." Q: "Pretty much?" A: "Yeah." Q: "How did she look? Did she appear --" A: "Like she had just woken up. Like, she still had her pajamas." Q: "Did she seem -- did you ask her -- did she seem that she had been crying or --" A: "No." (AR 564:6-24.)</p> <p>W3 did not speak with Jane Roe until around 9:00 p.m. after she told W2 she thought she'd had sex with Doe. (AR 588:18-22.) His exact recollection is as follows: Q: "Okay. The next day, did you have any communication with Ms. Jane Roe about what had happened the early that night?" A: "Yeah. I had messaged her on Facebook asking her if she remembered anything. Actually, I have the conversation still because it's in Facebook chat. But I asked her, you know, if she remembered anything and she said no, she's still trying to piece it all together. And then I said, like, 'Can we talk?' And she's, like, 'Sure. I'm in my room.'" So I came up and I talked to her and I told her what -- kind of like what we think might have happened the night before; so . . . I think -- I think I just said, like, 'So you don't remember anything from last night?' And she said, 'No.' And I kind of told her, 'Well, we think that -- like you and John Doe might have had sex.' And then she said, 'Yeah. I was worried that that might have been what happened.' And I think that was about all that we said." (AR 586:4-16; 589:19-24.)</p> <p>Q: "Okay. And was it your impression when you were speaking to Ms. Jane Roe that she -- she did not know that she had had sex with Mr. John Doe?" A: "Yeah. She did not know if they might</p>

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<p>In that regard, the Complainant does not recall creating or sending the text messages contained in the investigators' report during that time period and other events during that period, including having sexual intercourse with the Respondent. Thus, during that period the Complainant's level of intoxication by alcohol was so significant that she experienced "blackouts."</p>	<p>have. Yeah." (AR 590:18-21.)</p> <p>Roe remembered sending at least one of the text messages and the specific sequence of events during which texts were sent during her interview with investigator Watkins: "Jane Roe stated that after W2 and W6 put her to bed, she lay there for about five minutes. She recalled sending a text to best friend in Tennessee, stating, 'I'mgoingtohavesexnow,' without any spaces between the words. Meanwhile, Jane Roe stated that John Doe was texting her asking where she was. Jane Roe said she looked out the peek hole in the door and saw W6's head. She said she could also see her neighbor, W19 and was one of the R.A.s. Jane Roe said she was very concerned about this. She said, "I am freaking out because I am really drunk and I don't want the RA to see me." She stated that John Doe was still texting her, and she texted back that her RA and W6 were there. Jane Roe stated that John Doe told her to say she had to go to the bathroom." (AR 149.)</p>

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

EXHIBIT C

Exhibit C

Questions John Doe Prepared for Jane Roe	Questions Marilou Mirkovich Asked Jane Roe
1. On September 7th at about midnight were you in John and W7's dorm room dancing with John lying down on his bed, grabbing John and trying to kiss him? (AR 408.)	Not asked at Hearing.
2. Were you excited and happy? (AR 408.)	Not asked at Hearing.
3. Were your friends trying to get you to leave John's room and go to bed? (AR 408.)	Not asked at Hearing.
4. Before you left John's did you agree to come back to his room and have sex with him? (AR 408.)	Not asked at Hearing.
5. Did you tell the investigators that John told you to come back down "so he can fuck you? (AR 408.)	"Now, in your interview with Ms. Watkins, I believe that you said that Mr. John Doe said to you while you were -- while you were in his room with Ms. W2 and Mr. W6, to come back down so he could fuck you. Now, do you actually remember him saying that?" (AR 475: 3-7.)
6. And you gave John your cell phone number so he could text you when to come back, isn't that correct? (AR 408.)	"Do you recall giving your cell phone number to Mr. John Doe"? (AR 479: 4-5.)
7. You went up to your room and waited and then John texted you to come back like you had planned, is that correct? (AR 408.)	Not asked at Hearing.
8. When you were going back to John's room, did you try to avoid being seen by W6 and your resident advisor? (AR 408.)	"Do you recall trying to sneak out around or avoid Mr. W6 and the RA?" (AR 479: 10-11.)
9. Were you excited when you were able to sneak out past them? (AR 408.)	Not asked at Hearing.
10. Just before you went back downstairs to John's room, did you text a friend back home, "I'mgoingtohavensexnow"? (AR 408.)	"Do you remember a text message that you sent to your friend -- the last name is W12?... And did you -- when you wrote that, there was a text message wherein you wrote, I think, 'The world is' -- I think there were two: "The world is moving" and 'I'm going to have sex tonight.'" (AR 477: 14-15, 21-24.)
11. Did you text to John "Okay do you have a condom."? (AR 408.)	[Leading] "And so you don ' t have any recollection of the text messages that you sent to John Doe or the text -- Mr. John Doe and the text messages that you received from him? (AR 479: 21-24.)
12. And did John text back "Yes,"? (AR 408.)	Same as #11

Questions John Doe Prepared for Jane Roe	Questions Marilou Mirkovich Asked Jane Roe
13. And did you reply, "Good give me two minutes?" (AR 408.)	Same as #11
14. The next day, Sunday, did you tell people that you had a difficult time remembering what happened that night? (AR 408.)	Not asked at Hearing.
15. The next morning, W2 came over to your room and to help you piece together the events of the previous night, is that right? (AR 408.)	Not asked at Hearing.
16. Did you tell W4 that you and W2 had accounted for all of your activities the previous night, except for the hour when you went back to John's room to have sex? (AR 408.)	Not asked at Hearing.
17. You remember details of that night that happened before and after you went back to John's room, but aren't sure you remember what happened during that hour, is that right? (AR 408-409.)	Not asked at Hearing.
18. But in your statement, you told the investigators about a number of things that you do remember happening about that time, correct? (AR 409.)	Not asked at Hearing.
19. You remembered John telling you to come back down so you can have sex, right? (AR 409.)	Same as #4
20. You remember giving John your cell phone number so he could text you when to come back, yes? (AR 409.)	Same as #20
21. You remember texting your friend back home, "I'm going to have now", correct? (AR 409.)	Same as #10
22. You remember being excited to sneak out of your room to get back to John's room like you had planned, true? (AR 409.)	Not asked at Hearing.
23. You remember throwing up on the way to his room? (AR 409.)	"Do you recall throwing up, vomiting on the way back down to Mr. John Doe's room?" (AR 480: 2-3.)
24. You remembered that when you got downstairs to John's room that he gave you a piece of gum? Is that right? (AR 409.)	Not asked at Hearing.
25. You told the investigators that you remembered asking John if he had a condom	"Do you recall when you went into -- after you had vomited and you went into Mr. John

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Questions John Doe Prepared for Jane Roe	Questions Marilou Mirkovich Asked Jane Roe
because you had not used any birth control, is that right? (AR 409.)	Doe's room, did you communicate to him that you had vomited?" (AR 480: 15-17.)
26. And you asked for a condom because you knew you were going to have intercourse, not just oral sex, true? (AR 409.)	Not asked at Hearing.
27. You remembered that John left you alone in his room at one point, correct? (AR 409.)	Not asked at Hearing.
28. You remembered that while John was out of the room, someone knocked on the door, and asked if you were ok.? (AR 409.)	"As we sit here today, do you recall anyone asking how you were doing that night? Saying, "Are you okay?" Anything like that? (AR 481: 4-6.)
29. You remembered responding three times that you were fine, correct? (AR 409.)	Not asked at Hearing.
30. You told the investigators that you remembered performing oral sex on John when you were in his room, correct? (AR 409.)	"Do you recall having oral sex with him?" (AR 477:3.)
31. And you also remember that John said that his roommate W7 had just came in room, correct? (AR 409.)	Not asked at Hearing.
32. And W7 came in the room right when you were having sex, correct? (AR 409.)	"Do you have any recollection of Mr. W7 coming in?" (AR 481: 19-20.)
33. W7 told the investigators that right when he came in the room he saw you and John having sex without any covers on, didn't he? (AR 409.)	Not asked at Hearing.
34. And W7 saw that you were conscious because he saw you moving, true? (AR 409.)	Not asked at Hearing.
35. And you were conscious and aware because you heard John say that W7 just came in, and you remember that, correct? (AR 409.)	Not asked at Hearing.
36. You remember John telling you about W7 right when you were having sex, but are not able to remember that you were having sex at that very same time, is that right? (AR 410.)	Not asked at Hearing.
37. So even if you don't remember now, or have blocked it out, at the time you and John had sex in his room, you were conscious and aware, isn't that right? (AR 410.)	Not asked at Hearing.
38. Isn't it true that you agreed to have sex, went back to his room to have sex, and you were aware that sexual activity was occurring when you were in John's room? (AR 410.)	Not asked at Hearing.

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Questions John Doe Prepared for Jane Roe	Questions Marilou Mirkovich Asked Jane Roe
39. Is it true that Jane Roe successfully avoided her friends and RA and walked unaided down a flight of stairs while en route to John Doe's room? (AR 407.)	Not asked at Hearing.
40. How do you think Ms. Jane Roe remembers details that occurred during sex, yet doesn't remember sexual intercourse? (AR 412.)	Not asked at Hearing.
41. Ms. Jane claims that she remembers Mr. John saying that his roommate just came in, is that correct? (AR 411.)	Not asked at Hearing.
42. Could you read page 7 of Ms. Jane Roe's statement? Just the first paragraph of the top of the page.	Not asked at Hearing.

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