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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

OCT 16 2017

Sherri R. Carter, Executive Officer/Clerk
By N. DiGiambattista, Deputy

JOHN DOE,

Petitioner,

vs.

SAMUEL D. GLICK, ETC, ET AL,

Respondents

CASE NO: BS163739

RULING ON PETITION FOR WRIT OF
MANDATE

Petitioner John Doe ("Petitioner") seeks an administrative writ of mandate compelling Respondent Pomona College ("Respondent") to set aside its decision imposing a two-semester suspension on Petitioner in connection with an alleged sexual assault.

Statement of the Case

Alleged Sexual Misconduct

Petitioner is an undergraduate student attending Pomona College. Petitioner met Jane Roe, a Pitzer College student, around winter break during his freshman year at Pomona College when he dated Roe's friend. (AR 199-200.) Petitioner and Roe later engaged in a flirtatious conversation on Facebook around March 1, 2015. (Ibid.) Petitioner and Roe continued their conversation over the following days, and met at a party at Pomona College on March 5, 2015, where they talked and kissed. They planned to see each other the following day at a "Day Party" at Claremont McKenna College. (AR 200.)

1
2 On March 6, 2015, Petitioner and Roe met at the "Day Party" at Claremont
3 McKenna College. Roe smoked marijuana prior to the party, and drank a cup of "cheap beer" at the
4 party. (AR 201.) According to Petitioner, he consumed three to four 12-ounce beers prior to the party
5 and one additional beer at the party. (AR 202.) After talking at the party, Petitioner and Roe eventually
6 made their way to Petitioner's residence hall and his dorm room. (AR 203-208.) In her investigative
7 interview, Roe claimed that Petitioner told her he needed to use a restroom, but instead of finding a
8 nearby restroom, Petitioner "tricked" her into accompanying him back to his dorm room. (AR 208.) Key
9 card records showed that Petitioner and Roe entered the dorm building at approximately 4:56 pm. (AR
10 229.)

11
12 According to Roe's investigative interview, once inside Petitioner's dorm room, she did not initiate
13 kissing Petitioner but "'panicked really hard,' as a result of Post-Traumatic Stress Disorder (PTSD) from
14 two previous sexual assaults she experienced." (AR 208-209.) Believing that Petitioner was going to
15 assault her, she "'just let it happen' in order to 'get through it.'" (Ibid.) According to Roe, she and Petitioner
16 "ended up in his bed, but she was unsure of how they got there" and she "ended up naked except for her
17 underwear." (Ibid.) Roe stated that she "resisted" Petitioner's verbal and physical attempts to remove her
18 underwear by "holding onto her underwear and refusing to remove them." (Ibid.) According to Roe,
19 Petitioner "touched her 'everywhere' on her body" and "she did not know what to do so she kissed John
20 Doe back." (Ibid.) Roe stated that Petitioner then "briefly tried to force her to touch his penis" but "she
21 resisted doing this." (Ibid.) Roe stated that Petitioner then initiated touching her vagina and inserted
22 "multiple fingers" into her vagina, but she did not consent to this and "laid there in an unresponsive
23 manner." (AR 210.)

24
25 According to Petitioner, Roe removed her shirt voluntarily and he removed his shirt. (AR 214.)
26 Roe "did not appear to be unhappy or uncomfortable as they were kissing and touching each other."
27 (Ibid.) Petitioner denied placing Roe's hand on his penis and asserted that his shorts remained on
28

1 throughout the encounter. (Ibid.) Petitioner denied that he attempted to remove Roe's underwear and,
2 believing that she had been wearing a swimsuit, stated, "Jane Roe touched my right hand and moved it
3 down to her vagina area, at which point I started fingering her, moving her swimsuit out of
4 the way." (Ibid.) According to Petitioner, "Jane Roe did not ask for his consent to put his hand on her
5 vagina, and he did not give consent to her to do this." (Ibid.) After Roe placed his hand on her vagina,
6 Petitioner inserted his fingers into her vagina, believing that Roe's "action of taking his hand and placing it
7 on her vagina was Jane Roe initiating sexual contact with him and providing nonverbal consent." (AR
8 215.)

9
10 Roe produced text messages with her friend, Sasha Forbath, from around the time of the alleged
11 sexual assault. Between 4:36 pm and 4:38 pm, before entering Petitioner's dorm, Roe texted Forbath, "I
12 went to Pomona with him Fuck this is a bad idea" and Forbath advised, "Just leave if you think you'll
13 regret it or feel uncomfortable!" (AR 211.) Forbath then wrote, "Are you sure you want to do this with
14 him?" and Roe replied, "Yea I'll be fine but let's meet at the coup at like 5:45," to which Forbath
15 responded "Hahaaha [cry-laughing emoticon] Fuck that boy." (AR 211; AR 340-343.) At 4:52p.m., Roe
16 moved up her requested meeting time with Forbath, texting Forbath "Let's go 5:30." At 5:10 p.m., Roe
17 sent a text, "Yea come now pls!." When Forbath responded that she was already back at Pitzer with
18 some friends and did not want to leave right away, Roe replied, "No dude pls come get me I really need
19 u ... Pls come you know I would do this for you ... I'm not okay." (AR 212, AR 344-345.)

20
21 Roe left Petitioner's dorm and met with Forbath and another friend Missy Pekarek at the College's
22 Coop dining area. (AR 217-218.) Forbath and Pekarek both reported that Roe informed them that she
23 "felt pressured" by Petitioner, that he had "fingered her" without her consent, and that she told him to stop
24 but that he did not stop. (AR 219-220.)

25
26 Administrative Proceedings

1 On November 10, 2015, Roe filed a Title IX complaint against Petitioner for the alleged sexual
2 misconduct. (AR 192.) Between November 20, 2015 and March 15, 2016, investigators interviewed Roe,
3 Petitioner, and approximately 20 witnesses. (AR 196-199.)
4

5 In January 2016, the Respondent's Board of Trustees approved a new Sexual
6 Misconduct, Harassment, and Discrimination Policy and Procedures. (AR 77-122.) On December 10,
7 2015, Respondent informed Petitioner that the sexual misconduct policy was in the process of being
8 reviewed. (AR 71.) On February 11, 2016, Respondent emailed Petitioner a copy of the new 2016
9 sexual misconduct policy. (AR 132.) Petitioner was not informed in that email that the new policy would
10 apply to his case. (Ibid.)
11

12 On March 28, 2016, investigator Li Fellers issued her investigation report, which included
13 summaries of witness statements. Fellers concluded that "based on the preponderance of evidence, ...
14 there is enough evidence to move this allegation forward for a hearing before an External Adjudicator."¹
15 (See AR 192-246.) On or about April 8, 2016, Title IX Coordinator Daren Mooko issued to Petitioner a
16 Statement of Alleged Violation, which charged Petitioner with digitally penetrating Roe's vagina on March
17 6, 2015 without her consent. (AR 189-190, 248, 394.) Petitioner was apparently informed of the outcome
18 and given the investigation report during an in-person meeting with Dean Mooko on April 8, 2016. (Oppo.
19 8:19-20; AR 394.) The investigation report stated that the definitions of sexual misconduct from the policy
20 in place at the time of the incident would apply. (AR 193; see AR 1-31 [2013 policy].) A footnote stated
21
22
23

24
25 ¹ Roe subsequently alleged that Petitioner had violated a no contact order, and in
26 February 2016 she filed an additional complaint for harassment. Fellers found
27 insufficient evidence to move to a hearing on this claim. In January 2016, Petitioner
28 filed a complaint against Roe for non-consensual sexual conduct that occurred on
March 6, 2015, when Roe allegedly took Petitioner's hand and placed it on her vagina
without his consent. (OB 7-8; Oppo. 7, fn. 16-17.) This complaint is not at issue for this
writ petition.

1 that the adjudication of the complaint would follow the procedures in the new 2016 sexual misconduct
2 policy. (AR 193 and fn. 1.)
3

4 An administrative hearing was held before external adjudicator Joseph Costa on
5 May 17, 2016. Roe did not appear at the hearing. The external adjudicator heard testimony from
6 Petitioner, investigator Fellers, German Rojas (Petitioner's roommate), and Dean Moya Carter. He also
7 considered Fellers' investigation report and attached exhibits. The external adjudicator concluded that
8 Petitioner did not obtain Roe's consent to penetrate her digitally on March 6, 2015 and violated the
9 relevant Pomona College policies. He concluded that the appropriate sanction was a two-semester
10 suspension, finding that "this is a case in which Jane Roe articulated that John Doe may not have been
11 aware that the Incident was not consensual." The external adjudicator also found that Petitioner "was
12 earnest in his statements at the hearing that he believed that he had consent." (AR 657-680.)
13

14 On July 25, 2016, Dean of Students Miriam Feldblum denied Petitioner's
15 administrative appeal and upheld the consecutive two-semester suspension. (AR 986-995.)
16

17 Writ Proceedings 18

19 On July 26, 2016, Petitioner filed a petition for writ of administrative mandate. On
20 July 28, 2016, Petitioner file an amended petition. On August 23, 2016, the court granted, with
21 conditions, Petitioner's motion for a stay of the administrative action pending court review. The court has
22 received Petitioner's opening brief in support of the petition, Respondent's opposition, Petitioner's reply,
23 and the administrative record. The court held a hearing on July 18, 2017. At the conclusion of the
24 hearing, the court ordered the parties to submit supplemental briefing regarding what questions Doe
25 sought to pose to Roe which were not posed, and whether any failure to pose those questions was
26 prejudicial to Roe. The court has received supplemental briefing from the parties and the matter was
27 taken under submission on August 22, 2017. The court now issues its decision on the writ.
28

1 **Standard of Review**

2
3 **Fair Hearing**

4
5 "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on
6 appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha*
7 *L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

8
9 **Independent Judgment or Substantive Evidence Standard**

10
11 Petitioner seeks a writ of mandate under California Code of Civil Procedure section 1094.5. CCP
12 section 1094.5 does not specify which cases are subject to independent review, leaving that issue to the
13 courts. (*Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 811.) In cases reviewing decisions which affect
14 a vested, fundamental right, the trial court exercises independent judgment on the evidence. (*Bixby v.*
15 *Pierno* (1971) 4 Cal. 3d 130, 143.) In all other cases, the court determines whether the findings are
16 supported by substantial evidence in light of the whole record. (See CCP § 1094.5(c).)

17
18 Case law supports that there is no fundamental vested right in a private college education. (See
19 e.g. *Gurfinkel v. Los Angeles Community College Dist.* (1981) 121 Cal.App.3d 1, 6 [no fundamental right
20 to higher education under California constitution].) Two recent Court of Appeal cases have applied
21 substantial evidence review of the administrative findings of student sexual misconduct proceedings.
22 (See e.g. *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 238, 239, 248-249; *Doe v.*
23 *Regents of the University of California* (Nov. 22, 2016) 5 Cal.App.5th 1055, 1073-1074.)

24
25 Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to
26 support a conclusion (*California Youth Authority v. State Personnel Board* (2002) 104 Cal. App. 4th 575,
27 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid
28 value. (*Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267, 305 n. 28.) "Courts may reverse an

1 [administrative] decision only if, based on the evidence ..., a reasonable person could not reach the
2 conclusion reached by the agency." (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602,
3 610.)

4 5 Analysis

6
7 Petitioner contends that, for various reasons, the administrative proceedings
8 were unfair. (OB 10-13.) Petitioner further contends that the evidence does not support the findings
9 under either the independent judgment or the substantial evidence standard of review. (OB 14-15.)

10 11 Substantial Evidence Review

12
13 As noted by the external adjudicator, under the college's policy, consent to one form of sexual
14 activity (such as kissing) does not necessarily give consent to other forms of sexual activity (such as
15 vaginal penetration.) Also, consent can be withdrawn. (AR 674; see *Oppo*. 14.)

16
17 In her interview, Roe stated she never gave consent for Petitioner to touch her vagina. (AR 210.)
18 That interview statement is consistent with her text messages and her statements to friends after she left
19 Petitioner's room. Among other things, after Roe entered the room, only 14 minutes passed before she
20 started texting her friends to come and get her, which was consistent with someone who was not
21 consenting to the encounter. (AR 676; 212, AR 344-345.) Petitioner's friends both reported that Roe
22 informed them that she "felt pressured" by Petitioner, that he had "fingered her" without her consent, and
23 that she told him to stop but that he did not stop. (AR 219-220.) This is substantial evidence. (See *In re*
24 *Estate of Odian* (2006) 145 Cal.App.4th 152, 168.) Roe first reported she had frozen during the incident
25 and had not given consent. She later stated she had asked Doe to stop. While these statements are
26 inconsistent, a reasonable decisionmaker could choose to believe the later report to be more accurate,
27 especially in light of the interviews with Petitioner's friends.

1 Moreover, a reasonable decisionmaker could disbelieve Petitioner's testimony on Roe's alleged
2 consent to digital penetration. (AR 676.) Under the substantial evidence test, the adjudicator's credibility
3 determination is entitled to deference unless "a reasonable person could not reach the conclusion" based
4 on the evidence. (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.) Not
5 considering Petitioner's arguments that the hearing was unfair (discussed below), the record contains
6 substantial evidence to support the findings that Petitioner violated the college's policies with respect to
7 Non-Consensual Sexual Intercourse, which includes non-consensual vaginal penetration by a finger. (AR
8 194, 672-678.) However, as discussed further below, Petitioner did not have any opportunity to question
9 Roe directly or indirectly to challenge her inconsistent statements.

11 Fair Procedure

13 "Generally, a fair procedure requires 'notice reasonably calculated to apprise interested parties of
14 the pendency of the action ... and an opportunity to present their objections.'" (*Doe v. University of*
15 *Southern California* (2016) 246 Cal.App.4th 221, 240 [hereafter *Doe v. USC*].) "[I]n student disciplinary
16 proceedings, due process requires 'an 'informal give-and-take' between the student and the
17 administrative body dismissing him that would, at least, give the student 'the opportunity to characterize
18 his conduct and put it in what he deems the proper context.'" (*Ibid.*; see also *Dixon v. Alabama State Bd.*
19 *of Ed.* (5th Cir. 1961) 294 F.2d 150, 159.)

21 Bias

23 Petitioner contends that the external adjudicator, Costa, showed bias by incorporating the
24 investigation report by reference, and by, according to Petitioner, reaching illogical conclusions about who
25 removed Roe's clothing. (OB 10-11; see e.g. AR 663.) "Bias and prejudice are never implied and must
26 be established by clear averments." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581-582.)
27 Petitioner must show "an unacceptable probability of actual bias on the part of those who have actual
28 decisionmaking power over their claims." (*Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th

1 470, 483.) Petitioner only shows his disagreements with Costa's decision, which is insufficient to
2 establish bias. Petitioner has not cited to evidence that the decisionmakers were actually biased, or that
3 there was an unacceptable risk of bias.

4
5 Reliable Evidence

6
7 Petitioner contends that the proceedings were unfair because verbatim witness statements were
8 not created by the investigator, and that the investigative report and interview notes produced to him were
9 unreliable. (OB 12-13.)

10
11 Petitioner was initially provided with a 55-page investigation report with over 100 pages of
12 attachments, including Roe's text messages that are summarized above and in the report. (AR 189-387.)
13 Pursuant to the college's request, the investigator did not create or maintain verbatim witness statements,
14 or record the student interviews. (AR 789-790; see also 479, 909-911.) The investigator did maintain
15 notes from witness interviews, which were provided to both Petitioner and Roe in advance of the hearing
16 at Petitioner's request. (AR 454, 999-1280.)

17
18 Petitioner attempts to analogize this procedure to *Doe v. USC, supra*, where a student was
19 disciplined for misconduct that was not alleged in the investigation report. (See 246 Cal.App.4th at 225,
20 245-246.) The student in *Doe v. USC* "was not provided any information about the factual basis of the
21 charges against him, [and] he was not allowed to access any evidence used to support those accusations
22 unless he actively sought it through a written request." (Id. at 248.) Here, Petitioner does not claim any
23 issue with notice of the charges against him. Prior to the hearing, he was provided the detailed
24 investigation report and the interviewer's notes. Petitioner does not claim that the external adjudicator
25 relied on any other evidence that was not provided to him.

26
27 Citing *Gonzales v. McEuen* (C.D. Cal. 1977) 435 F. Supp. 460, Petitioner also argues that due
28 process does not permit the admission of "ex parte hearsay" evidence given by witnesses not under oath

1 and not subject to examination by the accused student. (OB 12.) However, *Gonzales* is distinguishable.
2 First, in *Gonzales*, the district court rejected the use of hearsay statements in a school discipline
3 proceeding where the school board's own rules provided that hearsay evidence could not be the sole
4 basis for decision. (*Gonzales, supra*, 435 F.Supp. at 469.) Here, the college has no such hearsay rules,
5 and explicitly prohibits cross-examination by the parties against each other. (AR 106.) Second, recent
6 California decisions on this issue have indicated that full, trial-like proceedings with cross examinations
7 are not required. (See e.g. *Doe v. USC, supra* at 245.) A recent student discipline case also rejected an
8 argument that an investigator's report was inadmissible because it contained hearsay. (*Doe v. Regents*
9 *of the University of California* (2016) 5 Cal.App.5th 1055, 1075.)

10
11 The court is not persuaded that the proceedings were unfair because the external adjudicator
12 relied, in part, on an investigator's report and interview notes.

13
14 Opportunity to Question the Complainant

15
16 Petitioner also contends that the proceedings were unfair because he did not have the
17 opportunity to question Roe, directly or indirectly. (OB 11-12; Reply 9.)

18
19 "[A]lthough [courts] recognize the value of cross-examination as a means of uncovering the truth
20 [citation], [courts] reject the notion that as a matter of law every administrative appeal ... must afford the
21 [accused] an opportunity to confront and cross-examine witnesses." (*Doe v. USC, supra* at 245.) "In
22 administrative cases addressing sexual assault involving students who live, work, and study on a shared
23 college campus, cross-examination is especially fraught with potential drawbacks." (Ibid.)

24
25 In *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055 ("*Regents*"), the Court
26 of Appeal stated that "there is no requirement under California law that, in an administrative hearing, an
27 accused is entitled to cross-examine witnesses." (*Regents, supra* at 1084.) However, the Court of

1 Appeal provided the following analysis of the fair procedure requirements in a sexual misconduct
2 proceeding:

3
4 Yet, in the instant matter, where the Panel's findings are likely to turn on the
5 credibility of the complainant, and the respondent faces very severe consequences if he is found
6 to have violated school rules, we determine that a fair procedure requires a process by which the
7 respondent may question, if even indirectly, the complainant. (*Regents, supra* at 1084.)
8

9 In *Regents*, UCSD permitted the student charged with misconduct to submit written
10 questions to the panel to ask the complainant. The complainant testified at a hearing attended by the
11 accused student. The Court of Appeal found that this indirect questioning satisfied procedural fairness.
12

13 Here, only Petitioner and Roe were present in his room when the alleged sexual assault took
14 place. Roe claimed she never gave consent for Petitioner to touch her vagina. (AR 210.) Petitioner
15 claimed that Roe initiated this contact by placing his hand on her vagina area. (AR 214-215.) As in
16 *Regents*, the external adjudicator's findings were likely to turn on the credibility of the complainant (Roe),
17 and Petitioner faced very severe consequences if he was found to have violated school rules. (See also
18 AR 670-677 [findings].) Therefore, "a fair procedure requires a process by which the respondent may
19 question, if even indirectly, the complainant." (*Regents, supra* at 1084.)
20

21 Roe did not attend the evidentiary hearing before the external adjudicator, either in person or via
22 the "electronic means" such as Skype that were made available. (See AR 714-715.) While the external
23 adjudicator indicated that Petitioner could have submitted questions to be asked to Roe if she attended
24 the hearing, that option was ineffectual because she did not appear. (See *Ibid.*)
25

26 In opposition, Respondent argues that "Petitioner had ample opportunity to call Roe's account
27 into question." Respondent cites evidence that the investigators re-interviewed Roe after interviewing
28

1 Petitioner, and that Petitioner repeatedly commented on Roe's allegations. (Oppo. 11; see e.g. AR 196-
2 198, 199-200, 206-207.)

3
4 Respondent's policy re indirect questioning of the complainant

5
6 The 2013 policy

7
8 When the investigation of this complaint was initiated, Respondent's discrimination and
9 harassment policies and grievance process was that as approved by the Board of Trustees on May 18,
10 2013 ("2013 Policy") (AR 1- 31). Neither party points to any particular rule or procedure in the 2013
11 Policy allowing an accused to submit questions to the Investigator to be asked of the complainant. See,
12 generally, Section IV, Investigation Procedures, subsection A.7., which states only that respondent will
13 have the opportunity to respond, in writing, to the Statement of Alleged Policy Violations or the Results
14 Notification Memorandum.

15
16 The 2013 Policy also provides for a hearing before the sexual misconduct Hearing Board.
17 Section V.A.6 states that "neither party shall be allowed to directly question or cross-examine the other
18 during the hearing. Questions may be submitted to the Chair by both parties, who will then decide
19 whether those questions are relevant to the matter and in compliance with Title IX requirements."

20
21 The 2016 Policy.

22
23 Respondent changed its discrimination and harassment policy in 2016. As previously stated,
24 Petitioner was originally sent the new policy on February 11, 2016, but not informed it would apply. (AR
25 132). Later, in her March 28, 2016 Report of Investigation, Fellers indicated that Dean Mooko had
26 directed that the adjudication of the complaint follow the procedures in the "current Pomona policy that
27 was approved in January 2016." (AR 193, fn 1).

1 The 2016 Policy (AR 133-178) eliminated the sexual misconduct Hearing Board, and replaced it
2 with an External Adjudicator to conduct any hearing. (Section IV.H and V, AR 156 – 159). The 2016
3 Policy allows the accused student, after reviewing the results of the investigation, to request in writing that
4 the external adjudicator “overturn the determination of the Title IX Coordinator’s assessment based on
5 improper investigative procedures.” A party asserting “improper investigative procedures should outline
6 additional steps that party believes are necessary for a proper investigation, including: Posing any follow-
7 up issues or questions for any witness [or] the Complainant.” (AR 102.) This option for requesting follow-
8 up questions for the investigation was not part of the 2013 Policy, which applied when Roe first filed her
9 complaint in November 2015. (See AR 11-12.)

10
11 Doe submitted a “Request to Overturn the Title IX Coordinator’s Determination and for Additional
12 Steps.” (AR 853-854). This document included a request that additional questions be asked, including a
13 question of when Jane changed her story from “no discussion of consent or no consent” to stating that
14 she resisted and said “No.” (AR 854).

15
16 The record includes a ruling by the External Adjudicator dated April 29, 2016, on Petitioner’s
17 “request to overturn the Title IX Coordinator’s determination and request for additional steps.” (AR 438-
18 441.) At the end of his ruling, the External Adjudicator states: “[Petitioner] inserts questions that he
19 believes would be relevant to the inquiry. The Procedures more appropriately provide how questions can
20 be asked at a hearing. For these reasons, I do not see any reasons why the recommendation of the Title
21 IX Coordinator to proceed to a hearing ... should not be followed.” (AR 441.) The External Adjudicator
22 impliedly rejected the premise that additional steps should take place, including additional questioning of
23 Roe, prior to the hearing. Respondent’s 2016 Policy provides that “the decision of the External
24 Adjudicator under this provision may not be appealed, and any further appeals by either party may not be
25 based on the ground of improper investigative procedures.” (AR 103).

26
27 Although it is not entirely clear what the External Adjudicator meant by the statement “the
28 procedures more appropriately provide how questions can be asked at a hearing,” the External

1 Adjudicator may have been referring to the "Hearing Protocols" in the 2016 Policy. These procedures
2 state that the "Complainant and Respondent may be present at the hearing if they choose or they may
3 choose to participate in the hearing remotely. However, neither party shall be allowed to directly question
4 or cross-examine the other during the hearing. Five (5) calendar days prior to the hearing, questions, if
5 any, shall be submitted to the External Adjudicator by both parties in writing, who will then decide whether
6 those questions are relevant to the matter and in compliance with Title IX requirements; this does not
7 preclude either party from submitting written questions during the hearing for the External Adjudicator's
8 consideration." (AR 106)

9
10 The record contains correspondence between Petitioner and Doe which indicates that four days
11 before the hearing Doe was still preparing questions to be asked at the hearing, and that Doe said the
12 witnesses at the hearing should be Jane Roe, Melissa Pekarek, Sasha Forbath, Maya Carter and
13 German Rojas. (AR 476-477). Although it appears Doe did not submit questions prior to the hearing, he
14 did present questions to be asked in his "Request to Overturn the Title IX Coordinator's Determination
15 and for Additional Steps," presumably submitted the month before.² Because Roe did not attend the
16 hearing, Doe was unable to pose any questions to her through the External Adjudicator.

17
18 At the hearing, the External Adjudicator stated in his opening remarks that Petitioner had the right
19 to pose questions to any of the witnesses and to submit questions to the complainant and to the external
20 adjudicator in advance for review. Further he states "My understanding is that the complainant was
21 permitted to answer any questions that would have been submitted by way of written response. . . . "You
22 also have a right to submit questions for the complainant, but that's through the external adjudicator for
23

24
25
26 ² Although Doe's request is not dated, the External Adjudicator's ruling is dated April 29,
27 2016. The 2016 Policy states that the External Adjudicator is to determine whether
28 there were improper investigative procedures within 7 calendar days of the response to
the statement of alleged policy violations. (AR 103).

1 review. That would have had to have been done in advance. If she was here, I – you know, it would be a
2 different story.” (AR 714 - 715).

3
4 Respondent’s May 6, 2016 e-mail to Roe provides “you asked if you will be permitted to provide a
5 written statement to questions that the Respondent may ask in advance. Yes, that is permitted. If and
6 when the Respondent submits questions for you, I will request the EA set as his priority a review of the
7 questions and a determination of which are relevant to the matter and in compliance with Title IX. Once
8 those questions are approved, I can send them to you for your response.” However, the 2016 Policy
9 does not appear to have a procedure by which the complainant could choose to respond to the accused’s
10 questions in writing. Nor does the record reflect that Doe was made aware of this unwritten policy. The
11 record reflects that Doe was first told that Jane Roe would not be participating in the hearing on May 16,
12 2016, two days before the scheduled hearing. (AR 490)

13
14 Under the circumstances here, including Roe’s failure to attend the hearing, and the External
15 Adjudicator’s decision not to pursue the additional steps requested by Doe, including questions to be
16 asked of Roe, Petitioner did not have any opportunity to question Roe directly or indirectly. This raises
17 serious fairness questions.

18
19 Prejudice to Doe

20
21 The court specifically directed the parties to address in the supplemental briefing whether Doe
22 was prejudiced by being unable to pose questions directly or indirectly to Roe. Specifically, Doe had
23 asked that certain questions be posed in his Request to Overturn the Title IX Coordinator’s report. (AR
24 854). The most relevant question is as follows:

- 25
26 1. When did Jane change her story from “no discussion of consent or not
27 consent” to stating she resisted and said “No.”?

1 Respondent argues that this question was essentially answered at the hearing by witness
2 Investigator Li Fellers. Fellers testified: "when Roe spoke about being frozen and not being able to do
3 anything, she was kind of explaining her overall reaction to what was going on. And then when we
4 began to try to get into the details of what occurred . . . she said that she had said no." (AR 782-783).
5 An explanation from Fellers is not the same as an explanation from Roe.
6

7 Doe highlighted this discrepancy in Roe's statements during his arguments made at the hearing.
8 (See, e.g., AR 753, 808-809, 114-115)). However, the External Adjudicator never resolved this factual
9 question, or addressed it at all in his decision. The EA appeared to believe Roe's initial version of
10 events – that she froze. He does not mention the change in Roe's story that she said "No," and
11 concludes "John Doe may not have realized he engaged in a non-consensual encounter." (AR 677). It
12 would be hard to reconcile that conclusion with a belief Roe had actually said "no." The External
13 Adjudicator concluded that even crediting Doe's version of events – Roe placed Doe's hand on her
14 vaginal area- Roe still did not manifest clear consent. The EA apparently did not find the discrepancy in
15 Roe's account of the incident significant and did not discuss it when evaluating credibility. It is difficult to
16 discern whether the EA would have reached a different conclusion had Roe been asked to explain the
17 discrepancy prior to, or at the hearing.
18

19 The EA appears to have misunderstood the policy allowing Petitioner to suggest additional
20 questions to be asked in response to the Title IX Coordinator's determination. The EA did not analyze
21 whether the questions were appropriate and should be posed to Roe. (AR 441) Further, Respondent
22 appears to have told Roe she could answer Doe's questions in advance in writing, a procedure not found
23 in either the 2013 or 2016 Pomona policy. Finally, the Complainant did not attend the hearing
24 personally, or through Skype, even though the hearing date was arranged to accommodate Roe's
25 schedule. Petitioner was unable to ask the EA to pose questions to Roe at the hearing. It is entirely
26 unclear whether the EA would have made the same credibility determinations had Roe been questioned.
27 The court finds that cumulatively, these conditions were prejudicial to Petitioner and denied him a fair
28 hearing.

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Conclusion

The petition is GRANTED for the reasons stated above. Petitioner to lodge and serve a proposed form of judgment and a proposed form of writ within 10 days.

Dated this 16th of October, 2017.

MARY STROBEL

MARY H. STROBEL,
JUDGE OF THE SUPERIOR COURT