In the

Court of Appeal

of the

State of California

SECOND APPELLATE DISTRICT
DIVISION SEVEN

B284707

JOHN DOE,

Petitioner and Appellant,

v.

OCCIDENTAL COLLEGE,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE MARY H. STROBEL · CASE NO. BS147275

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Pursuant to California Rules of Court, rules 8.208 and 8.488, Appellant John Doe certifies that he knows of no person or entity that must be disclosed under California Rules of Court, rule 8.208, subdivisions (e)(1) or (2).

Dated: May 4, 2018

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

A fair hearing and an opportunity to be heard are the cornerstones of a fair process; the greater the harm and right at stake, the more process is due. Never has this principle rung truer than in the current climate concerning the controversial and one-sided adjudication of sexual assault cases by universities. These institutions have exceeded their traditional roles of providing students with an education, and now venture into the arena normally reserved for law enforcement and trained professional investigators. It is an area in which these institutions are neither adept nor experienced. Consequently, many of these institutions have adopted policies and procedures that sacrifice safeguards that protect students who are wrongfully accused of false and damaging claims of sexual misconduct.

In this case, Appellant John Doe ("Appellant"), an exemplary student with a promising future, was falsely accused of engaging in sexual misconduct with another student, complainant Jane Roe, and Occidental College ("Respondent" or the "College") failed to provide him with a fair and impartial procedure to defend himself. At the conclusion of a deficient disciplinary proceeding, Respondent sided with Roe, concluding that Appellant engaged in sexual assault and non-consensual contact. Respondent subsequently expelled Appellant from the college and placed a notation on his student record indicating that he engaged in sexual misconduct, thereby devastating his academic and career prospects.

As set forth below, Respondent's determination and sanction must be set aside because Respondent failed to afford Appellant a fair

hearing, and Respondent's determination is not supported by the evidence in this case.

II. STATEMENT OF APPEALABILITY

This appeal is from a judgment of the Los Angeles County Superior Court denying a petition for writ of mandate and is authorized by the Code of Civil Procedure section 904.1, subdivision (a)(1). (See *Telish v. California State Personnel Board* (2015) 234 Cal.App.4th 1479, 1482 fn. 1 ["The judgment denying the petition for writ of mandate is appealable"].)

III. STATEMENT OF THE CASE AND FACTS

A. OCCIDENTAL'S SEXUAL MISCONDUCT POLICY.

1. General Policy Overview.

The procedures governing Occidental's resolution of sexual assault claims are set forth in the College's Sexual Misconduct Policy ("Policy"). (See generally AR1-29.) The Policy applies to all Occidental community members, including students, and it prohibits "all forms of sexual or gender-based harassment, discrimination or misconduct, including sexual violence, [and] sexual assault." (AR1-2.) According to the Policy, when Occidental receives a report of sexual harassment or sexual violence, it "will respond promptly and equitably." (AR3.) Any individual who is affected by sexual harassment—whether as a Complainant, Respondent, or third party—purportedly "will have equal access to support and counseling" through Occidental. (AR10.)

The Policy prohibits sexual assault, defining the conduct as "[h]aving or attempting to have sexual intercourse with another individual: . . . [3] Where that individual is incapacitated." (AR6-7.)

Similarly, non-consensual sexual contact is defined as having "sexual contact with another individual: . . . [2] Without effective consent; or [3] Where that individual is incapacitated." (AR7.) Sexual contact is defined to include "intentional contact with the intimate parts of another . . . ." (*Id*.)

The Policy explains that "consent means positive cooperation in act or attitude to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (AR7.)

The Policy also sets forth a definition of "Incapacitation":

> Incapacitation is a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless. An individual is incapacitated, and therefore unable to give consent, if s/he is asleep, unconscious, or otherwise unaware that sexual activity is occurring.

(AR8.) The Policy recognizes that incapacitation may result from the use of alcohol; however, the Policy explains that *"[c]onsumption of alcohol . . . alone is insufficient to establish incapacitation*." (*Id*., emphasis added.) A determination of whether the consumption of alcohol rendered an individual incapacitated requires an assessment "of how the consumption of alcohol . . . impact[s] an individual's" (1) "decision-making ability"; (2) "awareness of consequences"; (3) "ability to make informed judgments"; or (4) "capacity to appreciate the nature and the quality of the act." (*Id*.) Moreover, an evaluation of incapacitation requires an "assessment of whether a Respondent

knew or should have known, that the Complainant was incapacitated." (*Id*.) An individual's intoxication, however, does not diminish their responsibility to obtain consent under the Policy. (AR9.)

2. Reporting and Investigation of Complaints for Alleged Sexual Misconduct.

Reports of sexual harassment are to be investigated and resolved in a fair and impartial manner. (AR13.) Upon receipt of a report, the Title IX team is to conduct an "Initial Title IX Assessment," to consider the nature of the report, the safety of the individual and of the campus community, and the Complainant's expressed preference for resolution. (AR17.) At the conclusion of the initial assessment, the Title IX team either resolves the report informally or refers the matter for investigation to "gather all relevant facts and determine if there is sufficient information to refer the report to a hearing panel for disciplinary action using the College's Formal Resolution procedures." (AR19.)

When the Title IX team determines that disciplinary action may be appropriate, the College designates an investigator "who has specific training and experience investigating allegations of sexual harassment and sexual misconduct." (AR18; see AR20.) The investigator may be either an employee of the College or an external investigator engaged to assist the College in fact gathering; the investigator selected "must be impartial and free of any conflict of interest." (AR18; see AR20.) The investigation typically will include interviews with the complainant, the respondent, and any witnesses, supplemented by the gathering of any physical, documentary, or other evidence; the investigation is purportedly "designed to provide a fair

and reliable gathering of the facts" and to be "thorough, impartial and fair." (*Id*.; see AR20.) All parties are to receive an opportunity to present witnesses and other evidence. (AR18.) The complainant and respondent must have an "equal opportunity to be heard, to submit evidence, and to identify witnesses who may have relevant information." (AR21.)

At the conclusion of the investigation, a report is forwarded to the Title IX coordinator and the Hearing Coordinator. (AR18.) "Where there is sufficient information set forth that, if proven, would constitute a violation of policy, the College will have the discretion to institute Formal Resolution proceedings against the Respondent." (*Id*.) If the threshold has been established, the Hearing Coordinator issues a Notification Letter to the respondent and complainant to provide the parties a brief summary of the conduct at issue and the specific policy violations, and refers the report for pre-hearing procedures. (AR21; AR23.) The respondent is not provided an opportunity to appeal this initial threshold determination if the threshold is satisfied; in contrast, a complainant *may seek review* by the Vice President for Student Affairs and Dean of Students *if the threshold is not satisfied*. (See AR21.)

3. Procedures for Pre-Hearing Formal Resolution Proceedings.

After the Notification Letter is provided to the complainant and respondent, the Hearing Coordinator meets with the parties and explains the hearing process. (AR23.) The parties then receive a Notice of Hearing, with the date, time, and place of the hearing, as well as the names of the individuals hearing the case. (*Id*.) The

hearing may take place before a hearing panel or the college may engage an external adjudicator to serve as a panel member or in lieu of the panel. (AR22.) A Hearing Coordinator is also present at hearing panel meetings but is not a voting member; the purpose of the Hearing Coordinator is to, inter alia, ensure that the policies and procedures are appropriately followed throughout the hearing. (*Id*.)

Prior to the hearing, the parties must "have the opportunity to review all investigative documents, subject to the privacy limitations imposed by state and federal law, at least five (5) business days prior to the hearing." (AR23.) The investigative documents include the investigative report, witness statements or interviews, statements or interviews by the parties, and any other documentary information that will be presented to the hearing panel. (*Id*.) The Hearing Coordinator, however, reviews the evidence to "determine whether the proffered information contained therein is relevant and material to the determination of responsibility given the nature of the allegation." (AR23.) The Hearing Coordinator is granted authority to "redact information that is irrelevant, more prejudicial than probative, . . . immaterial," constitutes personal opinion, and statements as to general reputation for any character trait including honesty. (AR23-24.)

4. Occidental's Hearing Panel Procedures.

The hearing process includes the complainant, the respondent, any approved advisors or support persons, witnesses, and the hearing panel. (AR24.) The hearing is "intended to provide a fair and ample opportunity for each side to present his/her account of the incident and for the hearing panel to determine the facts of the case" and whether the Policy was violated. (AR25.)

The panel or external adjudicator is charged with reviewing all pertinent information collected prior to the hearing. The panel or external adjudicator is also advised by the Hearing Coordinator; the Hearing Coordinator is present at hearing panel meetings but is not a voting member. (AR22; AR25.)

At the commencement of the investigation, the investigator summarizes the investigation, and the parties and hearing panelists are permitted to subsequently question the investigator. (AR25.) The complainant and respondent also provide information, are questioned by members of the panel or external adjudicator, and the panel or external adjudicator *may* pose questions suggested by the respondent to the complainant, and vice versa. (*Id*.) The complainant and respondent are not permitted to directly question one another; instead, they may submit questions to the hearing panel in writing, and those questions are posed "at the sole discretion of the hearing panel." (*Id*.) The parties are also permitted to call witnesses; however, witnesses must have observed the conduct in question or have information relevant to the incident. (AR23.) The hearing panel has no obligation to allow the parties to directly question witnesses and may require questions to witnesses to be submitted in writing. (AR26.)

After all the information is presented, the panel or external adjudicator must complete their deliberations within two days. (*Id*.) The panel or external adjudicator evaluates whether the respondent violated any provision of the Policy under a preponderance of the evidence standard. (*Id*.) Under the Policy, the preponderance of the evidence means "'more likely than not,' based upon all of the relevant information." (*Id*.)

If the respondent is found responsible for violating the Policy, the panel or external adjudicator recommends an appropriate sanction to the Hearing Coordinator. (*Id*.) The hearing panel's findings must be in writing and include the findings of fact and rationale for the panel's determination. (*Id*.) The Hearing Coordinator, in consultation with the Title IX Coordinator, reviews the recommendations and imposes an appropriate sanction. (*Id*.) Sanctions range from a formal warning to expulsion but leave open the possibility for Occidental to impose alternative sanctions instead of, or in addition to, the enumerated sanctions. (AR27.) At the conclusion of the hearing, Occidental notifies the parties of the hearing panel's determination through an outcome letter. (*Id*.)

5. The Policy's Administrative Appeal Process.

The appeal process is to be conducted in an impartial manner by an impartial decision-maker. (*Id*.) The Policy allows either party to appeal the hearing panel's determination to the Vice President for Student Affairs and Dean of Students, or designee. (*Id*.) The Policy, however, provides only limited grounds for appeal: (1) whether a procedural or substantive error occurred that significantly affected the outcome of the hearing; or (2) there is new evidence that was unavailable at the original hearing or investigation that could substantially impact the original finding or sanction. (AR28.) Each party is permitted to respond to the other party's appeal; however, the burden lies with the appealing party, as the original decision is presumed to have been determined reasonably and appropriately. (*Id*.) The appeal process is confined to the record of the original proceeding and documentation concerning the grounds for appeal, and

it is deferential to the original hearing body. (*Id*.) The appeals officer is to render a determination within 15 days of the appeal submission. (*Id*.) The appeal decision is final. (*Id*.)

B. FACTS CONCERNING JANE ROE'S ALLEGED SEXUAL ASSAULT.

Appellant and Jane Roe were first-year students at Occidental College in the fall of 2013, and both resided at Braun Hall with Appellant living on the second floor and Roe living on the third floor. (AR144.) According to Roe, she and Appellant had a class together and conversed for the first time on a class trip to an African market, and subsequently met again at a "dance party" in Appellant's dorm room on the night of September 6, 2013. (AR144-145.) The alleged incident underlying the instant appeal occurred the following night. (*Id*.)

1. Jane Roe Invites Herself Into Appellant's Dorm Room.

Before midnight on September 7, 2013, Appellant was in his room listening to music with friends of his roommate, W7. (See AR191; AR147-148.) Appellant had earlier participated in a sports team initiation, and one witness, $W8_1$,[1] indicated that she "heard that a

[1] In creating the administrative record for the instant proceeding, two witnesses were labeled "W8." To distinguish between the two, $W8_1$ refers to Jane Roe's female friend while $W8_2$ refers to Appellant's male teammate. Similarly, two witnesses were labeled "W6"; consequently, $W6_1$ refers to Jane Roe's friend who is an Occidental student, whereas $W6_2$ refers to the Occidental counselor referenced in these facts.

lot of freshmen team members were drunk on beer and hard alcohol."[2] (AR164.)

At this time, Roe, who had also been consuming alcohol, encountered W7 after having walked to the second floor from her third-floor dorm room in Braun Hall. (AR147.) According to Roe, she left her third-floor dorm room because "she realized she was bored" and still "wired with energy." (*Id*.) Roe heard music playing in one of the second-floor rooms and encountered W7, who informed her that Appellant was having a dance party. (*Id*.) W7 described Roe as walking normally, but her speech was slurred, so he "concluded that she had been drinking or was drunk." (AR191.) When W7 informed Roe that Appellant was having a party by himself, W7 indicated that Roe replied, "Oh, [Appellant]'s there?" (*Id*.) W7 reported that he let Roe into his room. (AR147-148.) However, Roe claimed that Appellant called out to her and purportedly "pulled her into his room." (*Id*.)

Roe claimed that when she entered Appellant's room, three females who were in the room left "very quickly," and she and Appellant began dancing together. (AR148.) While they danced, Roe received calls from W2 and $W6_1$; Roe reported that she could not recall the substance of the conversation, but later reported to investigators that W2 and $W6_1$ somehow "realized she was really

[2] Witnesses, including W2 (AR186), W3 (AR169), $W6_1$ (AR183), W7 (AR190), $W8_1$ (AR175), and W10 (AR164), indicated that Appellant was intoxicated on the evening of September 7, 2018. Apparently, only Jane Roe seemed to believe Appellant was "clearly conscious of everything . . . he did." (AR466:24-25.)

intoxicated, and that they should not have left her alone." (*Id*.) Roe stated that W2 and $W6_1$ "soon came looking for her." (*Id*.)

Thereafter, W2 and $W6_1$ arrived at Appellant's room, and Roe recalled seeing them sitting on Appellant's bed. (*Id*.) Although Roe had claimed W2 and $W6_1$ realized she was "really intoxicated," Roe also remembered that $W6_1$ took out a bottle of vodka and permitted Roe to drink from it. (*Id*.) Roe continued to dance with Appellant, and later removed her shirt, mistakenly believing she had worn a bandeau underneath, so that she was dancing while only wearing her bra on the upper half of her body. (*Id*.) W2 stated that she never saw Appellant touch Roe in an inappropriate manner. (AR187.) But Roe claimed that W2 "flipped out," told Roe to put her shirt on, and grew angry with Appellant. (AR148.) Roe subsequently put her shirt back on. (*Id*.) W2 noted that Appellant "did not say or do anything to prevent W2 from putting Jane's shirt back on her." (AR187.)

Roe recalled that she and Appellant kissed while on his bed and talked about music. (AR148.) W2 described Appellant and Roe as "equally – assumed to be, like, into each other." (AR551:14-15.) W2 stated that if Roe came on to him, he would "respond in the same way." (AR555:12-20.) Appellant said that while they were sitting and talking on the bed, he asked Roe if she wanted to have sex, and she replied, "Yes." (AR491:21-25.)

Roe contended that at some point, W2 and $W6_1$ "were getting really worried about [her]," and trying to find out how to persuade her to leave the room. (AR148.) According to W2, when she tried to take Roe out of the room, Appellant would "grab her wrist and say, like, 'No. She's not leaving. She's staying here. You guys can leave.'"

(AR553:19-21.) However, $W6_1$ stated that Appellant did not grab Roe "or otherwise physically try to prevent her from leaving." (AR181.)

Despite claiming that there "was a 'big hole' in her memories of the evening," Roe specifically remembered that Appellant told her to "get rid of W2 and $W6_1$," let them take her up to her room on the third floor, and she could then walk back downstairs to his second-floor room. (AR148.) Roe also specifically recalled providing her phone number to Appellant. (*Id.*) And Roe remembered Appellant telling her to return to his second-floor room "so [Appellant] can fuck [her]." (*Id.*)

W2 recalled that Appellant left his room, and W2 and $W6_1$ took Roe to her room on the third floor of Braun Hall, despite Roe's resistance to leaving.[3] (AR187; AR149; AR181.) W2 stated that as they walked up the stairs to the third floor, it was not as though she and $W6_1$ "had to, like, carry her. . . . [I]t's not like she was totally incapable of holding herself upright." (AR557:11-17.) W2 confirmed that Roe knew that W2 and $W6_1$ were taking her to her room. (AR557:25; 558:1-2.) In fact, W2 confirmed that Roe "knew, like, the general idea of, like, where she was, . . . who she was with, like what was going on." (AR560:12-14.) W2 also was not concerned

[3] After leaving Roe in her room, W2 met with $W8_2$, and indicated that Roe was okay. (AR176.) $W6_1$ described Roe as being drunk, but "not falling over drunk. She could still walk. . . . I don't remember her falling or tripping." (AR179.)

about Roe throwing up or blacking out; instead, W2 described Roe as drinking more than "would seem smart." (AR559:1, 8-10.)

2. Jane Roe Returns to Appellant's Dorm Room to Engage in Sexual Intercourse.

While in her bed, Roe sent a text message to her friend in Tennessee, writing "I'mgoingtohavesexnow." (AR149.) Roe also exchanged text messages with Appellant. (AR188; AR208-211.) Appellant texted Roe to see when she would return to his room, and Roe replied, "Okay do you have a condom[?]" (AR209.) When Appellant responded affirmatively, Roe replied, "Good give me two minutes[.]" (*Id*.)

Roe walked to her door, peered through the peek hole, and was able to see $W6_1$'s head, as well as one of the resident assistants, W19. (AR149.) Roe later described herself to investigators as "freaking out because [she was] really drunk and [did not] want the RA to see [her]." (*Id*.) Roe texted Appellant, telling him that her RA and $W6_1$ were present,[4] and Appellant told her to tell them she had to use the restroom. (*Id*.) During their text message exchange, Roe told Appellant her room number in Braun Hall. (AR210.)

Roe opened her door and interacted with $W6_1$, falsely telling $W6_1$ that she had to use the restroom. (AR149.) Roe then walked down the hallway, past the restroom, and down the stairs unassisted; Roe "remembered feeling excited that she had succeeded in sneaking past the bathroom." (*Id*.) Roe later told investigators that as she

[4] Roe had initially wrote "[W6]" followed by "I'd out ride my door[.]" (AR210.) When Appellant sought clarification, Jane Roe corrected the misspelling, and responded "[W6] is outside my door." (*Id*.)

descended the stairs, she felt "really dizzy" and "really sick" and she vomited in a trash can. (*Id*.) W7 saw Roe and he helped her while she vomited and brought her into the men's restroom so that she could finish. (*Id*.) Roe told W7 that she felt better, and they left the restroom; Roe walked unaided to[5] Appellant's room and W7 went the opposite direction. (AR191; see also AR528:2-6.)

When she arrived at Appellant's room, Roe indicated that she told Appellant that she had thrown up, and that Appellant offered her a piece of gum. (*Id*.) In contrast, Appellant does not recall Roe telling him anything about vomiting or offering her gum. (AR490:18-20.) Roe indicated that she remained in Appellant's room from approximately 12:50 a.m. until approximately 2:00 a.m. and her recollections of what happened during that time were "non-linear." (AR149.) According to Roe, she could recall asking Appellant if he had a condom, having sex with him,[6] performing oral sex, leaving the room, and later returning. (AR150.) Roe reported hearing individuals

[5] A floor plan of the second and third levels demonstrates that Roe had to either travel to the opposite end on the third level of her L-shaped hall and then descend the stairs to travel from her room on the third floor to Appellant's room on the second floor, or descend the stairs and travel to the opposite end of the second floor. (See AR253-254.)

[6] Jane Roe's statements to investigators were inconsistent. She indicated that she had sex with Appellant, but when prompted further by investigators, she stated, "Well, I can't really remember actually having intercourse." (AR210.)

knock on the door to ask if she was okay, including W3[7] and W15, and Appellant telling Roe that his roommate entered the room. (*Id*.) W7 stated that, at some point, he walked into the room for approximately 15 seconds; he saw Appellant and Roe engage in what "he observed to be sexual intercourse" and could see Roe's legs moving, and he believed Roe was fully conscious. (AR192.) W7 stated, "[T]his was like a conscious, like voluntary movement, not that it was just like her legs kind of like hanging there and she was unconscious type thing." (AR528:17-20.) Roe told investigators that "she remembered that she did not move very much" or converse with Appellant. (AR150.) According to Roe, this is not something that she would have done had she been sober. (*Id*.)[8]

At some point, Appellant left his room; W3 had been standing outside the room, and he knocked on the door to ask Roe whether she was okay. (AR171.) W3 informed investigators that, at this time, he asked Roe *three times* whether she was okay. (*Id*.) Roe responded to

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[7] The next day, W3 told Roe that W7 also walked into the room. (AR150.)

[8] Roe told investigators, and later, the adjudicator, that she had never drunk as much as she did on September 7 and 8 and she described herself as the "'baby' of her social group, so others watched over her when she drank and kept her out of trouble." (AR156; AR465:5-6.) In contrast, W8 had heard from W2 that Roe "had problems with drinking too much, and that it was normal for her to drink as much as she did on the night of September 7. (AR176.) Jane Roe's friend, $W6_1$, also indicated previous times when she drank and noted that her level of intoxication on September 7, 2013 was not "out of the ordinary." (AR179.)

W3 each time, first telling W3 that "she was okay," before again repeating affirmatively that she was okay, and then finally confirming a third time that she was okay.[9] (*Id*.)

At approximately 2:00 a.m., Roe left Appellant's room and walked upstairs to her third-floor room unassisted. (AR150.) W3 stated that he saw Roe walk up the stairs; he did not express any concern about her mobility or any impairment to investigators. (AR171.) Once Roe made it to the top of the stairs, W2 saw her and asked where she had been (AR150); Roe told W2 that "she was fine and that she was just hanging out." (AR188.) W2 walked with Roe to her room, where her roommate, W4, was present. (AR150.) After W2 left, Roe told W4 that she had thrown up, and the two walked to the bathroom. (*Id*.) W8$_1$, who described herself as intoxicated that night (AR164), was also in the restroom and described Roe as "pretty intoxicated," and noted that W4 was upset with Roe. (AR163.) W4 and Roe then returned to their room; W4 stayed with Roe for approximately 10 minutes before leaving her alone again. (AR150-151.)

According to W4, Roe was "very incapacitated," and "could not control her motor skills or her speech." (AR158.) Notwithstanding W4's characterization of Roe's condition as "incapacitate," after W4 left Roe alone in their room, Roe again got up and left the room

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[9] W7's statements to investigators appears to place this series of events at some point immediately after Roe entered Appellant's room the first time, not the second time when the purported incident occurred. (See AR191.) However, based on the circumstances surrounding W3's statements, it is more plausible that he knocked on the door after Roe made returned to Appellant's room.

unaided. (See AR151.) Roe found her phone and key card, put on her shoes, and walked down the stairs of Braun Hall and to Stewart-Cleland Hall to meet up with other friends. (*Id*.) Once there, Roe conversed with another student, Stauffer, and recalled joking about Nascar racing. (*Id*.)

Eventually, while at Stewart-Cleland Hall, Roe received a phone call from W4 and recalled that Stauffer somehow ended up talking with W4, joking about how Roe was "going at it" with another guy. (AR151.) W4 subsequently met with Roe at Stewart-Cleland Hall. (*Id*.) Though Roe had not consumed alcohol for some time, W4 claimed that Roe was slurring her speech, buckling under her own weight, and she had to be assisted by another student, Grayson Burden, to help Roe back to Braun Hall. (AR159.) While at Braun Hall, W4 walked Roe back to her room, and refused to leave until Roe fell asleep. (AR151.)

3. Jane Roe's Conduct the Day After the Incident.

Roe informed investigators that she woke up the next day, on September 8, 2013, at around 9:00 a.m., feeling light-headed and dehydrated. (AR151.) Roe woke up to find several missed calls and "freaked out" voicemails, which somehow led Roe to immediately believe that something happened between her and Appellant. (*Id*.) After reviewing her text messages, Roe believed there was a possibility that she had had sex with Appellant. (*Id*.)

At some point between approximately 9:15 a.m. to 9:30 a.m., Roe went to the bathroom, saw $W8_1$, and told $W8_1$ that she was still drunk. (AR151.) $W8_1$ told Roe to go back to her room and sleep, but Roe was unable; instead, Roe met a friend for coffee and croissants

before returning to her room to meet with W2. (AR151-152.) Roe told W2 that "she may have had sex" with Appellant. (AR152.) According to Roe, she and W2[10] were able to account for Roe's whereabouts the prior evening, except for one hour. (*Id*.) Although Roe claimed to feel slightly intoxicated the next day, Roe still went to the gym, studied at the library, and had dinner with her friend. (*Id*.) Roe also contacted Appellant to see if some of her belongings were still in his room. (*Id*.)

While she was at the library, Roe indicated she was "friended" on Facebook by W3, who asked Roe if he could talk to her. (*Id*.) Although the sequence of events is not entirely clear, it appears that W3 eventually met with Roe at her dorm room and told her that she had sexual intercourse with Appellant, and that W3 knew this because he and another individual, W7, had walked in on them. (*Id*.) According to Roe, despite reviewing her text messages—one of which read "I'mgoingtohave sex now" (AR236)—and telling W2 that she may have had sex with Appellant, she was "very in shock" upon hearing this. (AR152.) W3, however, described Roe as stating, "Yeah, I figure that might've happened." (AR172.)

Roe subsequently told W4 what she had learned from W3, causing W4 to assign a series of tasks for Roe to complete, including going to the store to obtain Plan B and going to the Emmons Health Center. (AR152.) When Roe returned to her dorm room from the drug store at approximately 11:00 p.m. or 11:20 p.m. with her friend,

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[10] W2 conceded that Jane Roe "had some idea of where she was, of what was taking place, and of what would happen if she went to [Appellant's] room." (AR189.)

W19, Roe encountered Appellant. (*Id*.) Roe and Appellant spoke away from W19, and Roe indicated that Appellant told her that they had had sex. (AR152-153.) Appellant and Roe met again later, and, according to Roe, Appellant was apologetic, and "particularly apologetic about the fact that this was how she lost her virginity." (AR153.)

W7 stated that on the following Monday, September 9, 2013, he saw Roe voluntarily sit next to Appellant in class. (AR193.) Appellant and Roe also exchanged text messages. (See AR212-222.)

4. Witnesses W4 and Professor Danielle Dirks Influence Jane Roe into Believing that She Was a Victim of Sexual Assault.

According to Roe, W4 "realized very quickly that what had happened was legally considered rape."[11] (AR153.) Roe, however, did not initially characterize the sexual activity as rape. (*Id*.) When Roe met with $W6_2$, a counselor at Emmons Health Center, $W6_2$ did not make any express findings that Roe had been sexually assaulted, and instead simply stated that her situation "sucks." (*Id*.) Notwithstanding, $W6_2$ asked Roe whether she desired to speak with Occidental's Survivor Advocate, identified only as Nadia. (*Id*.) Roe

[11] W4 openly conceded that she had never even spoken with Appellant before she concluded that it was "obvious to [her] it was rape." (AR161.) Moreover, in her interview with investigators, W4 was adamant that what had occurred between Roe and Appellant was rape. (*Id*.) According to W4, Roe had sex that she purportedly could not remember, and was intoxicated to the point of having impaired speech and not being able to control her motor skills. (*Id*.)

met with Nadia, provided her the details of the incident, and Nadia instructed Roe to go to Santa Monica to obtain a rape kit. (*Id*.)

Roe later met with Movindiri Reddy, a professor at Occidental and supporter of Occidental's Sexual Assault Coalition ("OSAC"), and told her what happened between her and Appellant. (AR153.) Particularly, Roe told Professor Reddy she had sexual intercourse with Appellant, but purportedly could not remember doing so. (*Id*.) Professor Reddy put Roe in contact with Professor Danielle Dirks, co-founder of OSAC. (AR154.)

On September 9, 2013, Dirks and Roe exchanged several text messages and met for several hours. (AR154; AR166.) Dirks immediately referred to the incident with Appellant using the word "rape." (AR166.) Roe, however, corrected Dirks, and stated, "Oh, I am not calling it rape yet."[12] (*Id*.) Dirks also informed Roe that there was apparently a "pattern at the College of male students who repeatedly engaged in the practice of having sex with highly intoxicated women." (*Id*.)

On September 10, 2016, Roe met with Dirks at her office. (*Id*.) Roe told Dirks about her account of the incident, and Dirks photographed all text messages between Roe and Appellant that she and Roe deemed relevant. (*Id*.) Dirks described Appellant's communications with Roe after the incident as "manag[ing],"

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[12] Dirks seemed to attribute Roe's hesitancy about calling the incident with Appellant "rape" with a "strong state of denial." (AR167 [providing Dirks's statement to investigators concerning Roe's statement that she was not yet able to call the incident "rape."].)

"disingenuous," and an attempt to paint himself as a victim.[13] (AR168.) Dirks also told Roe that Appellant "fits the profile of other rapists on campus in that he had a high GPA in high school, was his class valedictorian, was on the [sports] team, and was 'from a good family.'" (AR155.) After Dirks interviewed Roe, they compiled a "lengthy list of people who may have had contact with Jane that evening"; however, Dirks distilled that list to five witnesses whom she believed were key to an investigation—W4, W2, W7, W3, and W6[1]. (AR168.)

Roe stated that she eventually decided to report Appellant after seeing how much the incident affected her emotionally while also seeing Appellant unaffected. (AR154.) Roe also conceded that W4 "*pushed her* to realize she was sexually assaulted.". (*Id*., emphasis added)

5. Jane Roe and Dirks Report the Incident to the Los Angeles Police Department.

Roe eventually told her mother about the incident, who ordered her to report it to the Los Angeles Police Department ("LAPD"); Roe complied. (AR155.) According to Roe, the officer asked her if Appellant forced her into his room, and after Roe responded that

[13] Dirks based these conclusions not on any expert training, certification, or academic or professional research, but rather on her anecdotal opinion that "based on her experience working with other students on the Occidental Campus, [Appellant] was 'acting in the same way all these other young men [involved in sexual assaults] have acted' by checking in on Jane Roe after the incident, and seeking to manage her . . . by being nice." (AR168.)

Appellant had not,[14] the officer informed her that there was no rape. (*Id*.) Although Dirks was not present during Roe's report to the LAPD, Dirks attested that "the police officer who spoke with Jane was not sympathetic to her." (AR167.)

C. OCCIDENTAL CONDUCTS ITS TITLE IX SEXUAL ASSAULT INVESTIGATION.

On September 15, 2013, Roe filed a complaint against Appellant. (AR655.) Respondent retained Public Interest Investigations ("PII") on October 1, 2013 to investigate Roe's complaint. (AR115; AR437.) As part of PII's investigation, Investigators Cathleen Watkins and Keith Roman interviewed Jane Roe and witnesses W2, W3, W4, W5, $W6_1$, W7, W8, W9, and Dirks. (See AR117.)

On November 13, 2013, Appellant's attorney submitted to PII Investigators a copy of Los Angeles County District Attorney's ("DA") declination worksheet, detailing the DA's decision to decline prosecution of Appellant for Roe's complaint. (See AR94-98.) Notably, the declination worksheet provides that "[w]itnesses were interviewed and agreed that the victim and suspect were both drunk, however, that they were both willing participants exercising bad judgment." (AR96.) It also provides, "Specifically the facts show the victim was capable of resisting based on her actions. . . . It would be reasonable for [Appellant] to conclude based on the communications

[14] Roe had previously told non-law enforcement investigators that Appellant pulled her into the room. (AR149 ["Jane Doe stated she then walked to [Appellant's] room, and she believed this was when [Appellant] pulled her into the room."].)

and her actions that, even though she was intoxicated, she could still exercise reasonable judgment." (AR96-97.)

The PII investigators did not interview Appellant as part of their investigation; Appellant was unable to give an interview due to a then-pending criminal investigation. (AR116-117.) After the DA Office declined to prosecute Roe's complaint (see AR53), Appellant had difficulty finding an Occidental-trained advisor willing to assist him during any potential interview. (See AR48; AR62; AR63; AR67; AR72-74; AR80; AR89; AR117.) Once Appellant was able to obtain an advisor on November 6, 2013 (AR70; AR76), he considered whether to subject himself to an interview; Investigator Watkins informed Appellant's attorney that "PII's investigation was otherwise completed, and if [Appellant was] going to be making himself available, he should contact PII by 2 p.m. on November 14th." (AR117.) PII was not contacted by that time, and PII concluded its investigation and submitted its Report of Investigation to Interim Title IX Coordinator Lauren Carella on or about November 14, 2013. (AR115.) The existence of the DA declination worksheet containing the investigating officer's summary of witness statements—indicating that witnesses agreed that the victim and suspect were both drunk, however, that they were both willing participants exercising bad judgment—was referenced in the report but improperly omitted as an exhibit to the report, and thus not considered by the Title IX Office. (See AR115-AR299.)

Title IX Hearing Coordinator Cherie Scricca sent Appellant and Roe a letter dated November 19, 2013, informing them that Scricca had found sufficient information upon which an adjudicator could

determine a violation of Respondent's Policy. (AR306; AR308.) The letter alleges that the purported policy violations included sexual assault and non-consensual contact. (AR308-309.) The letter further informed Roe and Appellant that Scricca would move forward with a formal hearing for Roe's complaint. (*Id*.) Scricca also sent Appellant another letter, also dated November 19, 2013, regarding Respondent's hearing process. (See AR313.) Appellant received a letter dated November 27, 2012, notifying him that his disciplinary hearing was scheduled for December 7, 2013 at 9:00 a.m., and Marilou Mirkovich, an attorney, would be serving as the adjudicator. (AR329.)

According to the hearing notice, the hearing materials would be available to Appellant for his review[15] "no later than December 2, 2013," just five days before his hearing. (*Id*.) Appellant was ultimately notified that the documents were available for him to review on December 1, 2013 at 8:59 p.m., just five days and 12 hours prior to his hearing. (AR334.) A hard copy of the hearing materials was made available to Appellant on December 3, 2013; however, Respondent prohibited Appellant from reviewing the hard copy outside of the Title IX office, and Appellant could not reproduce the review material in any form. (AR336.)

On December 3, 2013, the following individuals were requested to attend Appellant's disciplinary hearing as witnesses: W2 (AR370), W3 (AR366), W4 (AR364), W5 (AR374), W6 (AR368), and W7.

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[15] Although Appellant was permitted to "share these documents," he was prohibited from forwarding or copying the documents; the documents were only made accessible through a website called One Hub. (AR330.)

(AR372.) Notably, Dirks, who had significant contact with Roe concerning the purported incident (see AR255-299), was not contacted by Respondent to serve as a witness. (See AR377.)

Respondent held Appellant's disciplinary hearing on December 7, 2013. During the hearing, Ms. Cathleen Watkins of PII summarized her investigation, identified points of agreement, and points of disagreement regarding the witnesses' statements concerning the circumstances of the incident. (See generally AR436-462.) After Ms. Watkins provided her statements, Roe provided her opening statement (see generally AR463-468), openly accusing Appellant of rape in front of the adjudicator. (AR465.) The adjudicator asked questions of Roe (see AR471-481), but when Appellant sought to ask questions of Roe, the adjudicator simply told Appellant that his questions had already been asked. (AR482:6-15.)

When it came time for Appellant to provide his opening statement to the adjudicator, Appellant informed her that Ms. Carella, the Interim Title IX Coordinator, told Appellant not to prepare an opening statement, and he had no knowledge that he would be providing an opening statement on the day of the hearing. (AR484.) Nevertheless, Appellant—who was only 18 years old, had no legal experience, no effective advisor, and who was proceeding against an attorney adjudicator and Ph.D.-level faculty—proceeded and provided an impromptu statement while being interrupted by the adjudicator on two occasions. (See generally AR485-490.) First, the adjudicator did not want Appellant to read the Policy definition of incapacitation, which was relevant to the proceeding. (AR488:2-6.) Second, the adjudicator argumentatively interrupted Appellant and precluded him

referencing the police investigation that did not result in any prosecution. (AR489:14-21.)

After the disciplinary hearing, Mirkovich rendered her determination on or about December 9, 2013, just two days later. (AR654.) In rendering her determination, Mirkovich indicated that she applied the preponderance of evidence standard and ultimately found that Appellant and Roe engaged in sexual intercourse during the early morning of September 8, 2013 (see AR658-660), and confusingly concluded that Roe both consented to sexual intercourse with Appellant—thus, implying she had the capacity to consent—but that Roe was incapacitated at the time she engaged in the conduct or statements that indicated she consented to sexual intercourse with Appellant. (AR663.) Mirkovich also concluded, erroneously, that Appellant knew or should have known that Roe was incapacitated. (AR665.)

Appellant received a letter dated December 13, 2013 stating that he was found responsible for sexual assault and non-consensual sexual contact. (AR673.) Occidental issued its sanctions in a letter dated December 20, 2013, informing Appellant that he would be permanently separated from the College; his student status was terminated effective immediately. (AR683.) Appellant, however, was permitted to appeal Respondent's findings in writing by January 6, 2014. (*Id*.)

Appellant submitted his appeal on January 6, 2014.[16] (See generally AR692-976.) Appellant submitted his amended appeal on January 8, 2014. (See generally AR977-1262.) In his appeal, Appellant raised several issues concerning the deficiencies in Respondent's disciplinary hearing, including the lack of rights for the accused, lack of diversity resulting in gender bias, the introduction of significantly irrelevant and prejudicial materials, the lack of a hearing panel, Respondent's failure to ask relevant questions during the disciplinary hearing, and Occidental's misstated standard of proof. (AR699-703; AR984-999.) Appellant also challenged whether Mirkovich's decision was supported by the findings (AR991-992) and argued that there was new evidence that was not available at the hearing that would substantially impact the original findings or sanctions. (AR992-994.)

On February 12, 2014, Maria Hinton, recently promoted to Assistant Director for Housing Services at Occidental, rendered her determination of Appellant's appeal. (See AR1308-1315.) Hinton concluded that Appellant lacked standing with respect to several of his claims. (AR1310-1313.) When addressing the merits of claims for which Hinton determined Appellant had standing, Hinton concluded that the claims failed to demonstrate that there was any procedural or substantive error that significantly affected the outcome of Respondent's administrative determination. (AR1315.) Thus,

[16] On January 22, 2014, Roe, through her legal counsel, filed her response to Appellant's administrative appeal. (See AR1275-1278.)

Respondent upheld the external adjudicator's determination and the resulting sanctions. (AR1316.)

Appellant challenged Respondent's decision by filing a petition for writ of administrative mandamus with the California Superior Court pursuant to Code of Civil Procedure section 1094.5. The trial court, however, denied Appellant's writ petition. Consequently, Appellant respectfully appeals the findings and resulting sanctions and requests this Court to set aside the College's determination.

IV. STANDARD OF REVIEW

On appeal from a judgement on a petition for writ of mandate, the scope of this Court's review is the same as that of the trial court. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239 [hereinafter "*Doe USC*"], citing *California Department of Corrections and Rehabilitation v. California State Personnel Board* (2015) 238 Cal.App.4th 710, 716.)

Code of Civil Procedure section 1094.5 authorizes a trial court to issue writ of administrative mandate where an agency has deprived an appellant of a fair hearing. (Code Civ. Proc., § 1094.5, subd. (b); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152.) In determining whether an agency provided an appellant 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.) Thus, on appeal, a challenge to the procedural fairness of the administrative hearing is reviewed de novo.

(*Doe USC*, *supra*, 246 Cal.App.4th at p. 239, citing *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

Code of Civil Procedure section 1094.5 also allows a reviewing court to inquire into whether there was a prejudicial abuse of discretion in the underlying administrative hearing. Subdivision (b) "defines 'an abuse of discretion' to include instances in which the administrative order or decision 'is not supported by the findings, or the findings are not supported by the evidence.'" (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 147; Code Civ. Proc., § 1094.5, subd. (b).) Where an administrative agency's decision substantially affects a vested, fundamental right, "the trial court not only examines the administrative record for errors of law but also exercises its independent judgment based upon the evidence disclosed in a limited trial de novo." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) Where an administrative agency's decision does not substantially affect a fundamental vested right, an appellate court reviews an appeal panel's substantive decision for substantial evidence. (Code Civ. Proc., § 1094.5, subd. (c).)

V. ARGUMENT

A. RESPONDENT FAILED TO PROVIDE APPELLANT A FAIR PROCESS.

As explained below, Respondent's disciplinary process was deficient, lacked appropriate safeguards to ensure that Appellant received a fair disciplinary hearing, and contravened traditional common law notions of fairness. Respondent's determination must be set aside on this independent ground.

1. Legal Standard Regarding Fair Administrative Hearing.

In the school disciplinary setting, the requirement of a fair trial under Code of Civil Procedure section 1094.5 means "that there must have been 'a fair administrative hearing.'" (*Doe USC*, *supra*, 246 Cal.App.4th at p. 239, citing *Gonzalez v. Santa Clara County Department of Social Services* (2014) 223 Cal.App.4th 72, 96.) "Where student discipline is at issue, the university *must comply* with its own policies and procedures." (*Id*.)

A fair procedure requires, at the very minimum, that "students facing suspension . . . must be given some kind of notice and afforded some kind of hearing." (*Goss v. Lopez* (1975) 419 U.S. 565, 579.) Such notice must be "reasonably calculated to apprise interested parties of the pendency of the action . . . and an opportunity to present their objections." (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 24.) The hearing, in turn, is not required to be formal, but "in being given an opportunity to explain his version of the facts at this discussion, the [accused] student [must] first be told what he is accused of doing and what the basis of the accusation is." (*Goss v. Lopez*, *supra*, 419 U.S. at p. 582.)

2. Respondent Failed to Conduct an Equitable, Thorough, and Fair Process Consistent with Its Policy By Excluding Evidence Obtained Through the Criminal Investigation.

As set forth in Respondent's Policy, when Occidental receives a report of sexual harassment or sexual violence, it "will respond promptly and equitably." (AR3.) The Policy emphasizes that reports of sexual harassment must be investigated and resolved in a fair and impartial manner. (AR13; see also AR20 [the investigation is

"designed to provide a fair and reliable gathering of the facts" and to be "thorough, impartial and fair"].) To that end, investigations typically include interviews with the complainant, the respondent, and any witnesses, and is supplemented *by the gathering of any physical, documentary, or other evidence*. (*Id*.) Investigators gather information from the parties and other individuals who may have information relevant to the determination, and any available evidence, including documents, communication between the parties, and other electronic records as appropriate. (AR21.) Moreover, the complainant and respondent are required to have an "equal opportunity to be heard, to submit evidence, and to identify witnesses who may have relevant information." (*Id*.) The Hearing Coordinator, however, reviews the evidence to "determine whether the proffered information contained therein is relevant and material to the determination of responsibility given the nature of the allegation."[17] (AR23.)

As evidenced by the record, Respondent improperly excluded from the hearing any reference to LAPD's criminal investigation into Roe's complaint in violation of its duty to resolve matters equitably and fairly. (See AR489:14-21; 628:11-14; 142 [redacting criminal investigative report from list of exhibits]; 656, at fn. 2 ["The external adjudicator asked each parties' written questions . . . unless those

[17] The Hearing Coordinator is granted authority to "redact information that is irrelevant, more prejudicial than probative, . . . immaterial," constitutes personal opinion, and statements as to general reputation for any character trait including honesty. (AR23-24.)

questions . . . related to the LAPD investigation"].) Notably, Respondent also did not provide any basis for excluding evidence obtained through LAPD's investigation.[18] It is apparent that Respondent could not provide any justifiable basis for excluding the information obtained through the police investigation because the information is relevant, material, and highly probative.

The primary evidence disclosed by Appellant to Respondent was a DA declination worksheet that memorialized and summarized statements made by witnesses. This information was relevant to Respondent's disciplinary proceeding against Appellant because the witness statements contained therein directly concerned the incident. Significantly, the worksheet provides that "[w]itnesses were interviewed and agreed that the victim and suspect were both drunk, however, *that they were both willing participants exercising bad judgment*." (AR96, emphasis added.) This evidence was certainly material to the proceeding; by precluding Appellant from even referencing this information, Respondent effectively precluded Appellant from impeaching any witness who spoke with LAPD investigators and later told PII investigators that Jane Roe was *not* a willing participant. That is, Respondent deprived Appellant of an "'opportunity to test and rebut the evidence against him'" (*Doe USC*,

[18] Mirkovich argued in her decision that that "elements and standard of proof in a criminal investigation differ from the elements and standard of proof in the Policy," ostensibly in order to explain why the DA rejection worksheet was not considered. (AR658, fn. 4.) This explanation wholly ignores that the DA worksheet has summaries of *witness statements* pertinent to Respondent's disciplinary proceeding that should have been considered for their impeachment value.

supra, 246 Cal.App.4th 221, 240), of his rights under the Policy mandating that an investigation provide a fair and reliable gathering of the facts (AR20), and of his right to submit evidence in support of his defense. (AR21.)

Ultimately, Respondent's exclusion of any evidence concerning LAPD's investigation contravenes Respondent's Policy-imposed duty to resolve matters in a fair, thorough, and impartial manner. As such, this Court must set aside Respondent's determination.

3. Respondent Failed to Afford Appellant a Fair and Impartial Disciplinary Process Consistent with its Policy.

In addition to providing a thorough disciplinary investigation and the opportunity to present evidence in his defense, Respondent was also required to afford Appellant an *impartial* and *fair* process. (AR3, AR13.) As set forth below, there is an unacceptable probability of actual bias underlying Respondent's determination, and this Court must find that such a determination is a fatal departure from Respondent's Policy.

a. Legal Standard Concerning Biased Decision-Makers.

A hearing conducted by a biased reviewer is but one manner by which the fairness of a hearing may be compromised. (See *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1448 ["The right to a fair procedure includes the right to impartial adjudicators"].) An adversarial party acting as an advisor to a supposedly neutral decision-maker can create an appearance of unfairness and bias. (See *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [hereinafter "*Nightlife Partner*"].) A petitioner who establishes an "unacceptable probability of actual bias on the part of those who have

actual decision-making power over their claims" may successfully prevail on a claim that he or she was deprived of a fair hearing. (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483 [hereinafter "*Nasha*"].) Actual bias need not be proven; only an unacceptable probability of actual bias need be established. (*Id*.; see also *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1022.) A showing of bias or prejudice must be made asserting "concrete facts" and "established by "clear averments." (*Nasha*, *supra*, 125 Cal.App.4th at p. 483.)

b. Title IX Hearing Coordinator Cherie Scricca Improperly Advised External Adjudicator Mirkovich

Here, the Title IX Office was the actual decision-maker that guided the ultimate determination against Appellant. The Title IX Office's adversarial position with respect to Appellant raises an unacceptable probability of bias.

Respondent's Policy charges the hearing panel, or, in this case, the external adjudicator, with evaluating whether a respondent violated any provision of the Policy under a preponderance of the evidence standard. (See AR26.) Although this provision attempts to portray the ultimate determination of the disciplinary proceeding as being made independent of Respondent, this portrayal is illusory. This is apparent by the fact that the external adjudicator relies only on evidence that Respondent's hearing coordinator deems relevant and more probative than prejudicial. (AR23-24.) Further eroding Respondent's attempt to portray the external adjudicator as an independent decision-maker is the Policy provision mandating that the

hearing coordinator be present at hearing panel/adjudicator meetings and advise the decision-maker. (AR22; AR25.) Ultimately, the external adjudicator is a proxy for Respondent's Title IX Office, which serves as the external adjudicator's advisor and a gatekeeper over which evidence is disclosed or not disclosed to the external adjudicator.

That an adversarial party acting as an advisor to a supposedly neutral decision-maker may create an appearance of unfairness and bias is exemplified in *Nightlife Partners*, *supra*, 108 Cal.App.4th 81. *Nightlife Partners* concerned club owners who were denied permits from the City of Beverly Hills. During the permit application process, City Attorney Terrence Boga "had taken an 'active and significant part' in [the club owners'] unsuccessful application renewal process." (*Id*. at pp. 84, 86.) Administrative review of the denial of the club owners' application was heard by David Holmquist, advised and assisted by City Attorney Bogs; Holmquist denied the club owners' appeal. (*Id*. at pp. 84-85.) On appellate review, the Court of Appeal upheld the trial court's order, and, in doing so, explained that the "objectionable overlapping role of advocate and decision-maker occurred when Boga acted as both an advocate of City's position and as advisor to the supposedly neutral decision-maker. . . . There was a clear *appearance* of unfairness and bias. This was sufficient to support the trial court's ruling." (*Id*. at p. 94, emphasis added.)

Similar to *Nightlife Partners*, this Court should find that there is a clear appearance of unfairness and bias due to the adversarial positions between the Title IX Office and Title IX Office Hearing Coordinator Scricca on one hand and Appellant on the other. By the

completion of Respondent's disciplinary hearing, Scricca had already made her own determination against Appellant. (See AR306; AR308 ["Based upon review of the information set forth in the investigation report, I (Cherie Scricca) find there is sufficient information upon which an adjudicator could make a determination of a violation of the [Policy]."].) Scricca rendered inexplicable and unduly prejudicial evidentiary determinations against Appellant, such as excluding evidence of relevant summarized witness statements about the incident made to LAPD in the course of a police investigation. (See AR96 ["[w]itnesses were interviewed and agreed that the victim and suspect were both drunk, however, that they were both willing participants exercising bad judgment."].) Scricca also unfairly released information that was to be used at the hearing late in the evening of December 1, 2013—just five days before Respondent's December 7, 2013 hearing date—knowing that Appellant, an 18-year-old freshman without any legal background—bore the responsibility of defending himself in Respondent's process. (AR334.) Further, after exercising her control over the admissibility of evidence presented at the hearing, Scricca was also vested with the opportunity to "impose an appropriate sanction" in consultation with the Title IX Coordinator. (AR26.)

Just as with the city attorney in *Nightlife Partners*, Scricca held an "active and significant part" in Respondent's disciplinary action *against* Appellant. (See *Nightlife Partners*, *supra*, 108 Cal.App.4th at p. 86.) Notwithstanding Scricca's preconceptions that were adversarial to Appellant, she was required—pursuant to Respondent's flawed policy—to be present at all meetings with the external

adjudicator and to *advise* Mirkovich, who was somehow expected to render an independent determination. (AR22; AR25.) Scricca's active and significant participation in Respondent's disciplinary process creates a clear *appearance* of unfairness and bias.

c. Mirkovich, Herself, Was A Biased Decision-Maker Who Rendered the Determination Against Appellant

Not only did Title IX Hearing Coordinator Scricca improperly advise the purportedly "external" adjudicator, Marilou Mirkovich; Mirkovich, herself was also biased against Appellant. This is reflected through Mirkovich's antagonistic conduct towards Appellant during Respondent's disciplinary proceeding. For example, Mirkovich refused to ask Roe 29 of the 38 questions submitted by Appellant (AR482:6-15), in violation of his right to a fair disciplinary procedure. (See *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1084 ["[W]here the Panel's findings are likely to turn on the credibility of the complainant, and respondent faces very severe consequences if he is found to have violated school rules, we determine that a fair procedure requires a process by which the respondent may question, if even indirectly, the complainant."].) Mirkovich, an attorney, also misrepresented to the 18-year-old Appellant forced to represent himself, that the questions he submitted had all been asked. (AR482:6-15.)

Mirkovich's refusal to pose Appellant's questions was not harmless; Appellant's questions struck at the heart of the basis of Roe's claim—namely that she could not recall certain events, and was thus "incapacitated" and unable to consent to sexual activity. Further,

Appellant's questions served to do what Respondent refused—test and question the veracity of Roe's claims. Appellant's questions were designed to illustrate for the adjudicator that Roe had made statements indicating her consciousness and awareness before, during, and after the sexual activity, undermining her claim of incapacitation. (AR401-410.)

When Roe was asked simple questions posed by Appellant, she could not provide clear responses. For example, Appellant asked whether Roe recalled telling PII investigators that Appellant told her to return to his room to have sex, which reflects her ability to recall the evening and her capacity to understand the nature of the conduct in which she engaged. (See AR475:3-6.) Roe responded evasively, telling Mirkovich that she was not sure. (AR475:7-18.) Additionally, Appellant posed the question of whether Roe remembered vomiting on the way to his room; Roe similarly provided evasive responses, telling Mirkovich that she "remembered being over a trash can" but never clearly stated she vomited. (AR480:2-11.) Nevertheless, Roe subsequently testified that she told Appellant that she had thrown up. So, despite not being entirely certain about vomiting, Roe inexplicably and inconsistently told Mirkovich that she told Appellant she had done so. (AR480:2-22.) Had Appellant's additional 29 questions been posed to Roe, the frailty of her tenuous claim, and her dubious credibility, would have become more apparent to Mirkovich. Specifically, Mirkovich would have been exposed to evidence demonstrating that Roe was able to recall extensively the events that occurred, undermining Roe's claim that she had experienced "blackouts" and incapacitation. (AR 664.) An impartial adjudicator

should have at least asked the questions posed by Appellant to properly evaluate the veracity and credibility of Roe's claims of memory loss, since they were relevant to her decision. The fact that she did not suggests that she had already decided Appellant's guilt, which is not the hallmark of a fair process. (See *Doe v. Brandeis Univ.* (D. Mass. 2016) 177 F.Supp.3d 561, 573 ["Whether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. . . . If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."].)

Moreover, Mirkovich's bias was evident through the disparity in her treatment of Roe and Appellant during the disciplinary hearing. Mirkovich demonstrated curt and contentious reactions to Appellant (see, e.g., AR489:14-21) while essentially prompting and drawing Roe to answers supporting her claim. (See, e.g., AR471:20 [Q: "Okay. So you don't think you did that -- you did anything like that ever before that night?" (referring to Jane Roe removing her shirt]; AR471:25-472:1-3 ["And you said your friends were -- and the report says your friends were commenting on how drunk you were. Do you recall what they were saying?"].) In addition, as explained more in depth below in Section V.B.2.a., Mirkovich incorrectly conflated "intoxication" with "incapacitation"—to Appellant's detriment and Roe's benefit—in contravention of the Policy, resulting in a completely unfounded determination that Appellant violated Respondent's Policy.

Mirkovich's bias manifested through her failure to Appellant's questions to Roe, her disparate treatment of the parties, and through her failure to apply the correct standard of incapacitation in rendering her determination. Consequently, it is apparent that Respondent's disciplinary proceeding is belied by unacceptable probability of actual bias that egregiously deprived Appellant of a fair disciplinary process and an opportunity to defend himself. (See *Nasha L.L.C. v. City of Los Angeles*, *supra*, 125 Cal.App.4th at p. 483.)

4. The Cumulative Impact of Respondent's Improprieties Rendered the Process Unfair.

This Court may consider the cumulative impact that Respondent's misconduct and policy violations had on the outcome of its determination against Appellant. (See *Rosenblit v. Superior Court*, *supra*, 231 Cal.App.3d 1434.)

In *Rosenblit v. Superior Court*, *supra*, 231 Cal.App.3d 1434, the Court of Appeal reviewed the fairness of a hospital's hearing, which resulted in the permanent suspension of a doctor's medical staff membership and privileges. In concluding that the proceedings "had a notable stench of unfairness," the *Rosenblit* Court reviewed the cumulative impact of the manner in which [respondent] Hospital initiated its proceedings. (*Id*. at p. 1445.) There, the respondent hospital provided troublingly vague notice of charges; the petitioner was informed that he was being suspended for poor clinical judgment and then later notified of professional deficiencies with regard to 30 different cases "without any indication as to what purported deficiency applied to each one." (*Id*. at p. 1446.) Furthermore, the respondent hospital refused to provide the petitioner with copies of the

problem charts related to the 30 cases, precluding the petitioner from having the charts thoroughly reviewed by his experts. (*Id*. at p. 1447.) Additionally, the petitioner's hearing panel conducted a private voir dire, which compromised the petitioner's ability to obtain a fair hearing. (*Id*. at p. 1448.)

Similar to *Rosenblit*, this Court should review the cumulative impact of the manner in which Respondent conducted its disciplinary proceedings. As noted above, Respondent failed to comply with its own policies and procedures by inexplicably excluding relevant, material, and highly probative evidence from the hearing, allowing Cherie Scricca to advise and influence the external adjudicator in rendering a determination in the proceeding, and permitting Mirkovich to serve as the external adjudicator.

To exacerbate matters, the very structure of Respondent's disciplinary proceeding ensured that Appellant, and other individuals similarly accused of sexual assault, would be deprived of any meaningful opportunity for review at any administrative level. This is because, in this matter, the external adjudicator, and only the external adjudicator, makes findings of fact, the sufficiency of which cannot be reviewed on appeal under Respondent's Policy. (See AR28 [noting two grounds for review, none of which include a review of the evidence].) Thus, no matter how deficient, problematic, or biased factual findings may seem, they stand unquestioned and untested. Moreover, the way evidence is made available to an accused student deprives the student of any meaningful opportunity to prepare to defend him or herself. In this case, Appellant was provided with copies of the evidence to be used against him just five days before his

hearing. (AR329; AR334.) Although Appellant was permitted to "share these documents," this opportunity was only gratuitous, as he was not permitted to forward or copy the documents; the documents could only be accessed through a website called One Hub. (AR330.)

In sum, this Court should find that the cumulative impact of how Respondent conducted its disciplinary proceeding against Appellant contains a notable stench of unfairness. (*Rosenblit v. Superior Court*, *supra*, 231 Cal.App.3d at p. 1445.)

B. RESPONDENT'S FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

At the conclusion of Respondent's disciplinary proceeding, Respondent found Appellant responsible for sexual assault and non-consensual sexual contact. In determining whether these findings are supported by the evidence, this Court should find that Respondent's determination substantially affects a vested fundamental interest, triggering de novo review. Should this Court determine that no vested fundamental right is substantially affected, Respondent's decision is reviewed for substantial evidence. Under either standard, however, Respondent's determination is not supported by the evidence.

1. Respondent's Administrative Decision Substantially Affects a Vested Fundamental Right, Implicating De Novo Review.

a. Legal Standard Concerning Vested Fundamental Right

A court must determine on a case-by-case basis whether an administrative decision affects a vested fundamental right. (*Bixby v. Pierno*, *supra*, 4 Cal.3d 130, 144.) As explained by the California Supreme Court, in a court's case-by-case analysis of the

existence of a vested fundamental right, a court is to consider:

> the nature of the right of the individual: whether it is a fundamental and basic one, which will suffer substantial interference by the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him. . . . [¶] In determining whether the right is fundamental, courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation.

(*Id*.)

Further, to determine whether a fundamental right is affected, it is apparent that a court considers rights beyond those determined to be fundamental in constitutional law jurisprudence. For example, in accordance with its principle of determining a fundamental right on a case-by-case basis, the *Bixby* Court considered whether the decision of a Commissioner of Corporations—approving a recapitalization plan—involved a fundamental right, implicating independent review. (*Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 133.)

b. Respondent's Determination Substantially Affects a Vested Fundamental Right

Similar to the *Bixby* Court, this Court should find that Respondent's determination substantially affects a vested fundamental right. As the record clearly reflects, Respondent expelled Appellant after finding him responsible for committing sexual assault and non-consensual sexual contact, adding to Appellant's transcript a permanent notation of expulsion. (AR673.) Such a finding and its ramifications are compelling enough for this Court to determine that a vested, fundamental right was substantially affected.

Respondent's improper expulsion deprived Appellant of his right to complete his degree at his chosen school and affected his ability to pursue a career. (*Furey v. Temple Univ.* (E.D. Pa. 2012) 884 F.Supp.2d 223, 245-48 ["Expulsion denies the student the benefits of education at his chosen school. Expulsion also damages the student's academic and professional reputation, even more so when the charges against him are serious enough to constitute criminal behavior. Expulsion is likely to affect the student's ability to enroll at other institutions of higher education and to pursue a career."].) Additionally, Respondent's charge "plainly calls into question [Appellant's] 'good name, reputation, honor, or integrity.'" (*John Doe v. The Rector and Visitors of George Mason University* (2016) 149 F.Supp.3d 602, 61321 (hereinafter "*Doe GMU*") citing *Wisconsin v. Constantineau* (1971) 400 U.S. 433, 437 ["Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."].) Further, as the *Doe GMU* Court explained, Appellant's "expulsion constitutes an alteration of his legal status as a student." (*Doe GMU*, *supra*, 149 F.Supp.3d at p. 613, citing *Sciolino v. City of Newport News, Va.* (4th Cir. 2007) 480 F.3d 642, 649 [termination of employment constitutes a qualifying alteration of status].) Further, Appellant's transcript will contain a permanent notation indicating that he was expelled from the College unrelated to his academics, which "may well lead to the public's learning that [Appellant] was expelled for misconduct" should he seek to pursue future academic

and employment endeavors.[19] (*Doe GMU*, *supra*, 149 F.Supp.3d at p. 613.) "Any reasonable person will conclude that a non-academic justification for an expulsion implies 'the existence of serious character defects.'" (*Id*., citing *Sciolino v. City of Newport News, Va.*, *supra*, 480 F.3d at p. 646, fn. 2.) Based on the forgoing, clearly Respondent's actions have substantially affected Appellant's vested fundamental right and interest in his reputation, his contractual interest with Respondent, and "protected liberty interest." (See *id*.) Consequently, this Court should review whether the facts support the findings under its independent judgment.

2. Respondent's Findings Are Not Supported by the Evidence.

At the conclusion of Respondent's disciplinary hearing, Mirkovich concluded that it is more likely than not that Roe was "incapacitated at the time she engaged in the conduct or statements that indicated she consented to sexual intercourse with [Appellant]" (AR664) and that Appellant should have known that Roe was incapacitated. (AR665.) Regardless of the standard of review utilized by this Court, the record simply does not support Respondent's determination.

[19] This position is consistent with the United States Supreme Court's wisdom concerning the effects of a disciplinary notation on a student's record. In *Goss v. Lopez*, *supra*, 419 U.S. at p. 575, the Supreme Court elaborated that "charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." (Emphasis added.)

a. The Evidence Does Not Support Mirkovich's Conclusion that Jane Roe was Incapacitated.

In rendering her determination, Mirkovich erroneously concluded that the evidence established all the elements of sexual assault and non-consensual contact. (AR666.) Mirkovich somehow found that Jane Roe was incapacitated under the standard set forth in Respondent's Policy. Yet, the Policy requires that in order for a person to be deemed "incapacitated," that person must be unable to "make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless." (AR8.) Simply put, the facts *do not* support such a determination, and Roe's conduct amply demonstrates that she was fully aware of the nature of her actions and capable of making rational decisions.

As the record makes clear, Appellant was in his room with friends that evening (AR147-148), prior to Roe travelling alone from her third-floor dorm room, down a flight of stairs, and walking normally down the hall into Appellant's room and interjecting herself into his affairs. (AR191.) While in Appellant's room, Roe and Appellant kissed and described as "equally . . . into each other." (AR551:14-15.) When Appellant asked Roe whether she wanted to have sex, she did not respond nonsensically; she responded affirmatively to Appellant's question with "yes." (AR491:21-25.) Roe even recalled that she and Appellant communicated about her going to her room with W2 and W6[1] and then returning by herself so they could engage in sexual activity. (AR148.) Roe provided

Appellant with her phone number and left with W2 and $W6_1$ to the third floor. (AR149; AR181.) W2 indicated that she and $W6_1$ did not have to carry Roe. (AR557:11-17.) Roe admitted that she knew W2 and $W6_1$ were taking her to her room. (AR557:25; 558:1-2.) Similarly, W2 conceded that Roe knew "the general idea of, like, where she was, . . . who she was with, like what was going on" (AR560:12-14) and even later told $W8_2$ that Jane Roe was okay. (AR176.) When Roe returned to Appellant's room to engage in sexual intercourse later that evening, she herself performed, and recalled performing, oral sex on Appellant.[20] (AR150.) There is no evidence demonstrating Roe's *incapacitation* (distinguishable from *intoxication*) from the time she first met with Appellant to the point she initially returned to her room.

Roe's subsequent conduct further validates her ability to appreciate the nature of her actions and make rational decisions. While in her room, Roe capably communicated her intentions to her friend, and specifically recalled communicating such intentions, by sending a text message providing "I'mgoingtohave sex now," demonstrating that she was aware of the sexual activity she would engage in. (AR236; AR149.) Roe's awareness of pending sexual activity is further evidenced by a text message conversation that *she initiated* with Appellant, asking him whether he "ha[d] a condom" and

[20] Considering Appellant's intoxicated state, Jane Roe's conduct could reasonably be interpreted as her sexually assaulting Appellant. Yet, Respondent deliberately placed the blame and onus of the act on Appellant, which may be violation of Title IX. (See generally *Doe v. Miami University* (2018) 882 F.3d 579, 692-594.)

asking Appellant to "give [her] two minutes" after he responded that he had a condom. (AR209.) This was not incoherent banter by an incapacitated individual; the text messages were spelled appropriately[21] and the communications that were exchanged were both logical and responsive. That is, these messages were a coherent orderly exchange of thoughts about the conduct that Roe planned to engage in with Appellant.

Roe also displayed mental acuity while leaving her room to walk downstairs, back to Appellant's room. Roe evaded $W6_1$ by cajoling him into thinking that she was leaving her room to use the restroom, and she even felt "excited that she had succeeded in sneaking past the bathroom." (See AR149.) Roe had to walk down her hallway, past the restroom, and then walk down the stairs to Appellant's room, unassisted. Roe was even able remember and pinpoint the location of Appellant's dorm room—among the eight to ten rooms in his wing of the second floor of Braun Hall—without having to rely on Appellant for assistance or directions. (See AR208-211.) Roe indicated her desire to escalate the sexual encounter by removing her shirt and exposing her bra. Roe understood that sexual intercourse was imminent when she returned to Appellant's room to have sexual intercourse, and when she asked for a condom. (AR 126-127.) Roe clearly understood "the who, what, when, where, why or how of the sexual interaction": who (Appellant), what (sexual

[21] Roe even sent Appellant a text message that corrected a prior message that she had sent to him, again demonstrating awareness and rational decision-making abilities. (See AR210 [editing "I'd out ride my door" to "[W6] is outside my door."].)

intercourse requiring a condom), when ("give me two minutes"), where (in Appellant's dorm room), and how (by tricking her friends to obtain privacy in Appellant's dorm room.) Roe's outward manifestations of her capacity are indeed the most important judge of her capacity to consent. Outward manifestations of actions cannot be divorced from having the capacity to carry out those actions, similar to stating that one lacks capacity to walk, despite actively taking steps forward.

Roe's ability to comprehend her surroundings and appreciate the nature of the conduct she was engaged in is evidenced by other witnesses. W3 told investigators that he asked Roe three times whether she was okay; Roe clearly communicated to W3 each time, telling him that she was okay. (AR171.) Additionally, W7 stated that when he walked into his and Appellant's room, he could see Roe's legs moving (AR192), which he described as "a conscious, like voluntary movement." (AR528:17-20.) Finally, the DA declination worksheet, which summarized statements obtained from witnesses, provided that *"*[*w*]*itnesses were interviewed and agreed* that the victim and suspect were both drunk, however, that *they were both willing participants* exercising bad judgment." (AR96, emphasis added.) Ultimately, the facts more than adequately demonstrate that Roe was fully aware of the nature of her actions and capable of making rational decisions. These facts, however, went largely ignored by Mirkovich in rendering her flawed determination. Instead, Mirkovich unilaterally engaged in a one-sided analysis, ignoring the Policy's recognition that the mere "[c]onsumption of alcohol . . . *alone is insufficient to establish incapacitation*." (*Id*., emphasis

added.) This Court must set aside Respondent's flawed and unsupportable determination.

b. The Evidence Does Not Support Mirkovich's Conclusion that Appellant Should Have Known Jane Roe Was Incapacitated

Mirkovich analyzed whether Appellant knew or should have known that Roe was "incapacitated." (AR665.) Mirkovich concluded that, under a sober respondent standard, Appellant would have somehow observed and fully appreciated the following: (1) that Roe had vomited shortly before engaging in sexual intercourse; (2) that Roe was swigging vodka in his room after drinking alcohol throughout the evening; (3) that Roe's removal of her shirt was inconsistent with her customary behavior; (4) that Roe's speech was slurred; (5) that Roe was having difficulty standing and walking; and (6) that Roe's friends in his room were concerned that Roe did not know what she was doing and they were trying to remove her from his room. (AR665.) Even if this Court were to assume that Roe was incapacitated (she was not), this Court must not accept Mirkovich's woefully deficient conclusion that Appellant knew or should have known that Roe was incapacitated.

With regard to Mirkovich's conclusion that Appellant knew or should have known Roe allegedly vomited prior to engaging in sexual intercourse (AR665), the only way Appellant would have become aware of this fact is if Roe had told him she had vomited. Roe claimed she told Appellant that she had vomited and that Appellant had provided her a piece of gum. (AR149.) However, Roe was unsure whether she had even vomited. (AR480:2-11.) In contrast, Appellant

could not recall whether Roe told him that she had vomited. (AR490:18-20.) Regardless, both Appellant and Roe conceded that their memories of the evening were less than clear. (See AR490:22-23; AR308-309.) Moreover, even if Roe did inform Appellant that she had vomited, vomiting in and of itself is not dispositive of an individual's incapacity.

Further, any imputed knowledge would necessarily need to be tempered by other facts that would have been observed by a "sober respondent," which Mirkovich failed to consider. Appellant had witnessed Roe engage in comprehensible text message communications with him and walk to and from her third-floor room to his second-floor dorm room while sneaking by other individuals. When considering Roe's active conduct that was known to Appellant, it is apparent that Roe's alleged statement to him—that she vomited—should not, and must not, give rise to any imputed knowledge that Roe was incapacitated.

Next, Mirkovich concludes that Appellant knew or should have known that Roe was incapacitated based on Roe "swigging vodka in his room *after drinking alcohol throughout the evening*." (AR665.) This conclusion is not supported by the record, as there is no indication that Appellant was with Roe at any point prior to her arrival into his room. Consequently, it would have been impossible for Appellant to have known how much alcohol Roe had consumed prior to having purportedly consumed vodka in his room. Therefore, this basis for imputing knowledge onto Appellant is without evidentiary support.

Mirkovich also concludes that Appellant should have known that it was not Roe's customary behavior to remove her shirt. (AR665.) However, customary behavior, by its very nature, implies similar behavior that has taken place over multiple occasions. By the time of the purported incident, classes had only been in session for one week and Roe was a freshman in college. (See AR464:22-25; AR465:1.) Additionally, Roe's testimony reveals that, although Roe and Appellant shared one class together, she had only interacted with Appellant on one occasion prior to the incident, at an African fair on September 2, 2013. (See AR469:4-6; see also AR144-145.) That is, the record reflects that, at best, Appellant had only interacted with Roe once prior to the incident, at a fair, which is a much different setting than a dorm room late on a Saturday evening. Mirkovich's claim that Appellant would have known of Roe's customary practices in any circumstances strains credulity, given that the extent of Appellant's previous interaction with Roe was a single brief encounter. This unfounded conclusion cannot be sustained.

Mirkovich's fourth and fifth conclusions are equally without support. Mirkovich argues that Appellant knew or should have known that Roe was incapacitated because Roe's speech was slurred and she was having difficulty standing and walking. (AR665.) However, the only periods of time when Appellant would have seen Roe is while she was in his room, initially with W2 and $W6_1$ and later when she returned to engage in sexual intercourse. Neither W2 or $W6_1$ indicated that she was struggling to stand or walk while in Appellant's bedroom. Moreover, given that Roe had walked from her third-floor dorm room, down a flight of stairs, to his second-floor hall,

and found his room without any help on his part, it is inconceivable that Appellant would have or should have believed Roe had difficulty walking to the extent that she was incapacitated. It is apparent that Mirkovich bases these grounds on the erroneous assumption that Appellant was omnipresent; he was not. These determinations are not supported by any evidence or reasonable inferences based on the evidence and cannot support Mirkovich's flawed determination.

Lastly, Mirkovich contends that Appellant knew or should have known Roe was incapacitated because Roe's friends in his room were concerned that Roe did not know what she was doing and they were trying to remove her from his room. (AR665.) However, Mirkovich's conclusion assumes that Appellant was inexplicably able to know that $W6_1$ and W2 were purportedly thinking that Roe did not know what she was doing. Moreover, the record does not reflect that either $W6_1$ or W2 verbally or physically expressed concern that Roe "did not know what she was doing" while in Appellant's room. Moreover, it can hardly be said that individuals desiring to leave with their friend from another individual's room is indicative of a person's incapacity. That is, there are several reasons any individual would desire to leave with their friends from another person's room late in the evening. As with the aforementioned inherently flawed determinations, this conclusion cannot stand.

In sum, Mirkovich's finding that Appellant knew or should have known that Roe was incapacitated is based on claims that are either not supported by the evidence or, in turn, based on deficient and flawed rationale. Consequently, even if this Court assumes that Roe was incapacitated—she was not—Appellant did not know or have

reason to know she was. Respondent's erroneous determination that Appellant committed sexual assault and non-consensual contact must be set aside on this independent basis.

VI. CONCLUSION

Based on the foregoing, Appellant John Doe respectfully requests this Court to set aside Respondent Occidental College's findings and resulting sanctions against him.

Dated: May 4, 2018

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), the undersigned certifies that this brief contains 13,662 words, according to the Microsoft Word word count program. The word count includes footnotes but excludes the proof of service.

Dated: May 4, 2018

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