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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

JOHN DOE, an individual,

Petitioner,

v.

TIMOTHY P. WHITE, an individual in his official capacity as Chancellor of the California State University; THE TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, a California corporation; and DOES 1 to 20 inclusive,

Respondents.

Case No. BS168476

[Hon. James C. Chalfant, Dept. 85]

NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATE

Date: July 12, 2018
Time: 09:30 a.m.
Place: Department 85

TO CHANCELLOR TIMOTHY P. WHITE AND THE TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Petition of John Doe for Writ of Administrative Mandate came on regularly for hearing on July 12, 2018, in Department 85, before James C. Chalfant, Judge of the Los Angeles County Superior Court, presiding. Mark M. Hathaway, of Werksman Jackson Hathaway & Quinn LLP, appeared for Petitioner, and Maria A. Starn, Office of General Counsel for California State University, appeared for Respondents Chancellor Timothy P. White and The Trustees of the California State University.

The Court having considered the Administrative Record lodged with the court, the pleadings, briefs, and orders issued in this case and applicable case law, and the oral arguments of counsel tendered

at the hearing, and finding that Respondents failed to afford Due Process in their Title IX administrative action against Petitioner in that Respondents failed to provide adequate notice of the charges, failed to disclose all evidence on which Respondents relied, failed to provide Petitioner an opportunity to question witnesses directly or indirectly where credibility was an issue and Jane Roe was unwilling to participate, and failed to present substantial evidence in support of their Title IX administrative decision against Petitioner, and finding good cause to order Respondents to set aside the Title IX decision and sanctions imposed on Petitioner, the Court granted Petitioner's Petition for Writ of Mandate, pursuant to the attached statement of decision, or tentative ruling, which is now final.

WERKSMAN JACKSON
HATHAWAY & QUINN LLP

Dated: July 12, 2018

By: _____
Mark M. Hathaway, Esq.
Jenna E. Eyrich, Esq.
Attorneys for Petitioner JOHN DOE

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

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

On July 12, 2018, I served the foregoing document NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATEOTICE OF ORDER OVERRULING DEMURRER OF RESPONDENT TIMOTHY WHITE on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Maria A. Stam
The California State University
Office of the Chancellor and General Counsel
401 Golden Shore, Fourth Floor
Long Beach, CA 90802-4210
Telephone: (562) 951-4500
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ATTORNEYS FOR RESPONDENTS

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

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

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

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

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

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

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

Executed on July 12, 2018 in Los Angeles, California _____
Yesenia N. Alvarado

John Doe v. Timothy P. White, et al.,
BS 168476

Tentative decision on petition for writ of mandate: granted

Petitioner John Doe ("Doe") seeks a writ of mandate directing Respondents Timothy P. White ("White") and the Trustees of the California State University ("Trustees") to set aside the findings and sanctions imposed against him.

The court has read and considered the moving papers, opposition, and reply,[1] and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner Doe commenced this proceeding on March 15, 2017. The operative pleading is the Amended Petition ("FAP") filed March 21, 2017. The FAP alleges in pertinent part as follows.

On March 5, 2016, the Delta Chi fraternity at SLO hosted an off-campus party at the main fraternity house. FAP ¶82. Doe was an active member of the Delta Chi fraternity, but he did not reside at the fraternity house. Id. Doe, SLO student Jane Roe ("Roe"), and approximately 300 other guests attended the event. Id. The main event took place under a "wedding-like tent" on the basketball court behind the fraternity house. Id.

At the party, Doe and Roe danced together and kissed while dancing. FAP ¶¶ 91-93. Roe asked to use a restroom, and Doe led her to a restroom in the room of student Garrett Braun ("Braun") within the fraternity house. FAP ¶98. After Roe exited the restroom, she and Doe continued kissing in Braun's bedroom. FAP ¶99. After about five to seven minutes, Braun returned to the room to retrieve a dry shirt. FAP ¶100. Doe and Roe offered to leave the room, but Braun allowed them to stay. FAP ¶101. Braun later reported that the interaction between Doe and Roe appeared consensual. FAP ¶102. After Braun's interruption, Roe became flustered, grabbed her belongings, and insisted on leaving. FAP ¶104. Doe offered to call for a "sober ride," but Roe declined and left on her own. Id.

After the party, Roe texted her roommate stating that she had been assaulted by a "random guy" at the party, who held her down, slapped her, and bit her lip while attempting to kiss her. FAP ¶¶ 108-09. Roe's roommate alerted the Residential Advisor ("RA"), who then spoke with Roe about the incident. FAP ¶109. Roe refused to report the incident or provide the RA with the name of her assailant. FAP ¶110.

SLO investigated the incident between March 7 and July 27, 2016 through Tera Bisbee ("Bisbee") and Stephanie Jarrett ("Jarrett"). FAP ¶113. Neither Bisbee nor Jarrett are licensed

[1] Respondents filed an opposition, but recently filed a notice of non-opposition to remand. The non-opposition states that Respondents are not opposed to an order remanding the matter to California Polytechnic University, San Luis Obispo ("SLO") so that SLO can set aside its findings and Doe's expulsion, reopen its investigation, accord Doe a new hearing, and take further action consistent with the court's decision in John Doe v. The Trustees of California State University, LASC BS167261. On July 10,2018, Petitioner filed an objection to remand.

investigators. FAP ¶114. On March 23, 2016, Jarrett sent Doe an email stating that he was a witness to an incident and asking Doe to contact her. FAP ¶121. On March 29, 2016, Jarrett sent a follow-up email. FAP ¶122. Doe did not open either email until April 1, 2016. FAP ¶123.

On April 1, 2016, Bisbee sent Doe an email informing Doe that he was named as a potential respondent in a report of sexual misconduct. FAP ¶124. The email also stated that Bisbee was issuing a "no contact" order between Doe and Roe. FAP ¶125. On the same day, Jarrett sent Doe a warning letter about his failure to respond to the March 23 and March 29, 2016 emails. FAP ¶126.

On April 12, 2016, Doe wrote to the Title IX office requesting specific notice of the allegations. FAP ¶130. Doe and his counsel subsequently met with Bisbee and Jarrett to discuss the tentative findings of the investigation. FAP ¶132. At this meeting, Doe was provided with an oral summary of the evidence collected. Id. Doe provided his account of the incident. Id. He also identified three witnesses who could testify to his interactions with Roe. FAP ¶135. Bisbee and Jarrett did not interview these witnesses. FAP ¶136.

On July 27, 2016, Bisbee and Jarrett issued their investigation report concluding that Doe had engaged in sexual misconduct. FAP ¶150. The report contained no statement by Roe, who refused to participate in the investigation. FAP ¶¶ 152-54. The report also contained evidence not disclosed to Doe. FAP ¶155. On July 28, 2016, Brian Gnandt ("Gnandt") issued an Investigation Outcome notice stating that the Trustees had found sufficient evidence of a violation of Executive Order 1097. FAP ¶169.

Doe appealed the investigation outcome. FAP ¶172. On September 12, 2016, Doe provided supplemental information and comments to support his original appeal. FAP ¶174. These materials included a witness statement from Braun and a summary prepared by a licensed private investigator. FAP ¶175.

On May 20, 2016, CSU Chancellor appeal officer Marcie Gardner ("Gardner") denied Doe's appeal. FAP ¶181. In denying the appeal, Gardner considered evidence never provided to Doe. FAP ¶183.

On September 22, 2016, the SLO Associate Dean of Students and Director for Student Rights and Responsibilities issued Doe a Notice of Conference. FAP ¶191. The letter informed Doe of his right to appear at a hearing on the sanctions to be imposed following the conclusion of the appeal. Id. The University proposed that Doe be expelled from the University system. Id. Doe attended the hearing with his counsel. FAP ¶193.

On December 9, 2016, the hearing officer recommended that Doe be expelled based on the finding that Doe engaged in sexual misconduct, including physical harm. FAP ¶194. On December 14, 2016, the Vice-President for Student Affairs adopted the hearing officer's recommendation. FAP ¶195.

Doe appealed the sanctions decision to the CSU Chancellor. FAP ¶198. On January 18, 2017, Pamela Thomason ("Thomason"), the CSU Systemwide Title IX Compliance Officer, denied Doe's appeal. FAP ¶200.

Doe alleges that Respondents' actions, sanctions, and decision are invalid because SLO failed to grant him a fair hearing, or any hearing at all. FAP ¶208. SLO committed a prejudicial abuse of discretion in that it failed to proceed in the manner required by law. Id. SLO's decision is not supported by the findings, and the findings are not supported by the evidence. Id.

2. Course of Proceedings

On April 7, 2017, Doe moved to stay the administrative decision by the University to expel Doe. On May 2, 2017, the court granted the motion to stay, ruling that Doe had demonstrated a colorable claim/reasonable prospect of success that he had been denied a fair hearing because he had been given no opportunity to examine any of the witnesses against him, and the decision-makers relied upon evidence never disclosed to him. Doe also met the criteria of irreparable harm and that a stay would not be against the public interest under CCP section 1094.5(g).

On June 27, 2017, the court overruled White's demurrer challenging his status as a proper Respondent and whether the FAP states a valid cause of action against him.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15.

CCP section 1094.5 does not on its face specify which cases are subject to independent review, leaving that issue to the courts. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. In cases reviewing decisions which affect a vested, fundamental right the trial court exercises independent judgment on the evidence. Bixby v. Pierno, (1971) 4 Cal.3d 130, 143. See CCP §1094.5(c). A private university's factual findings in a student discipline case are evaluated under the substantial evidence standard. Doe v. University of Southern California, ("USC") (2016) 246 Cal.App.4th 221, 239, 248-49. The student discipline decisions by the Regents of the University of California are also reviewed under a substantial evidence standard. Doe v. Regents of University of California, ("UCSD") (2016) 5 Cal.App.5th 1055, 1073. However, that standard may not apply to all state universities; the Regents are a semi-autonomous agency under the California Constitution and California State University (sometimes "CSU") is not.

Doe asserts that the independent judgment standard applies because he possesses a vested fundamental right to pursue his education, to his reputation, and to continued access to education independent of his sex. Pet. Op. Br. at 13. He adds that he paid tuition, attended classes, and remained in good standing before the accusation, and argues that he possessed a "contractual right" to attend SLO. Reply at 11. Doe provides legal authority that the value of higher education is "an interest of almost incalculable value" to students who are enrolled and pursuing it, and attendance at a public university is "a benefit somewhat analogous to that of public employment." Goldberg v. Regents of University of California, (1967) 248 Cal.App.2d 867, 876. Reply at 11, n.2. He notes that demotions and discharge of public employees is governed by the independent judgment standard of review. Id.

The pertinent right at issue is Doe's right to pursue his education at a CSU school. Unlike food, shelter, and clothing, there is not a fundamental interest in higher education. Gurfinkel v. Los Angeles Community College Dist., (1981) 121 Cal.App.3d 1, 7 (examining fundamental rights with respect to community college). It is an important interest, however. The issue is not free from doubt and an appellate court easily could conclude otherwise, but the court believes that it would be anomalous to apply an independent judgment standard to CSU student disciplinary decisions when substantial evidence test applies to the student disciplinary decisions of private universities and the University of California. The substantial evidence standard governs the

court's review of the evidence.

"Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, ("California Youth Authority") (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The Doe has the burden of demonstrating that the agency's findings are not supported by substantial evidence in light of the whole record. Young v. Gannon, (2002) 97 Cal.App.4th 209, 225. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

The question of whether a university has complied with the requirements of fair procedure is an issue of law reviewed by the court *de novo*. USC, supra, 246 Cal.App.4th at 239. *See* Pet. Op. Br. at 8.

The agency's decision must be based on the evidence presented at the hearing. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Topanga, 11 Cal.3d at 515.

An agency is presumed to have regularly performed its official duties (Evid. Code §664), and the Doe therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137. "[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion." Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691.

The propriety of a penalty imposed by an administrative agency is a matter in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. Lake v. Civil Service Commission, (1975) 47 Cal.App.3d 224, 228. Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. Nightingale v. State Personnel Board, (1972) 7 Cal.3d 507, 515. The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions. Cadilla v. Board of Medical Examiners, (1972) 26 Cal.App.3d 961.

C. Governing Law

With respect to student discipline, neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that discipline may be imposed by any procedure the school choses, not matter how arbitrary. Goss v. Lopez, ("Goss") (1975) 419 U.S. 565, 576. "The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences.... Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." Id. at 579-80. At a minimum, students facing

academic discipline such as suspension or expulsion must be given notice and afforded a hearing. Id. at 579. The hearing need not be formal, but the student must first be told what he is accused of doing and the basis of the accusation before "being given an opportunity to explain his version of the facts at this discussion." Id. at 582.

Even where constitutional due process does not apply, common law requirements for a fair hearing under CCP section 1094.5 do not allow an administrative decision-maker to rely on evidence not revealed to the accused. USC, *supra*, 246 Cal.App.4th at 247. Generally, a fair procedure provides "notice reasonably calculated to apprise interested parties of the pendency of the action... and an opportunity to present their objections." Id., at 240. The notice required in a student disciplinary action must identify the specific rules that the student is alleged to have violated, and must also provide the factual basis for the accusation. Id. at 243-44. It is insufficient to provide the accused student with only a list of rules that may have been violated. Id.

A student disciplinary hearing need not include all the safeguards and formalities of a criminal trial. Andersen v. Regents of University of California, (1972) 22 Cal.App.3d 763, 770. There is no right to counsel in an academic disciplinary proceeding. Charles S. v. Board of Education, (1971) 20 Cal.App.3d 83, 90. If a student has retained counsel, the university is not required to permit the attorney to participate in the disciplinary proceeding, and may in fact prohibit the attorney from speaking during the hearing. Doe v. Regents of University of California, ("UCSD") (2016) 5 Cal.App.5th 1055, 1082.

Fair procedure in a student discipline matter requires a process by which the accused student may question the complaining student, particularly if the findings are likely to turn on the credibility of the complainant. UCSD, *supra*, 5 Cal.App.5th at 1084. However, there is no California authority requiring that the accused student be permitted to directly question the complainant. Goldberg v. Regents of University of California, ("Goldberg") (1967) 248 Cal.App.2d 867, 881. A procedure by which the accused student submits questions to be asked by the hearing officer or panel is sufficient to satisfy the fair procedure requirements. UCSD, *supra*, 5 Cal.App.5th at 1084. In disciplinary matters involving sexual assault, the United States Department of Education Office for Civil Rights "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." USC, *supra*, 246 Cal.App.4th at 245.

There is no formal right to discovery in student conduct review hearings. Goldberg, *supra*, 248 Cal.App.2d at 881-83. However, the accused student is entitled to the names of the witnesses who will testify against him or her, and a summary of the witnesses' proposed testimony. USC, *supra*, 246 Cal.App.4th at 246. An accused student is entitled to copies of all of the evidence presented to or considered by the decision-maker, including any investigative report prepared by the university. Id. at 247. An administrative tribunal may not rely on its own information or consider as evidence matter that was not introduced at a hearing of which the parties had notice or were present. Id. at 248. This information must be provided by the university prior to the hearing, and the university may not require the accused student to specifically request this information. Id. at 246. The student is not necessarily entitled to the names of non-testifying witnesses, or to the investigator's notes of the witness interviews unless the failure to disclose such information would prejudice the student. UCSD, *supra*, 5 Cal.App.5th at 1095-96.

While California law does not require any specific form of disciplinary hearing, a

university is bound by its own policies and procedures. Berman v. Regents of University of California, (2014) 229 Cal.App.4th 1265, 1271-72. The trial court's determination of whether the university complied with its own hearing requirements requires application of the rules of statutory interpretation and construction. Id. at 1271.

D. CSU Executive Orders

California State University's procedures for reporting and adjudicating sexual misconduct are set forth in Executive Order 1097 Revised June 23, 2015 ("EO 1097R") (AR 1-22) and Executive Order 1098 Revised June 23, 2015 ("EO 1098R") (AR 23-56).

1. EO 1097R

According to EO1097R, California State University "will respond to all Complaints and will take appropriate action to prevent, correct, and discipline conduct that violates this policy." AR 6. To report alleged violations, a student may submit a formal written complaint to a Title IX Coordinator. Id. After making a preliminary inquiry into the allegations, the Title IX Coordinator will determine whether to open an investigation. AR 8. In cases where the Complainant does not want to pursue an investigation, the campus may determine that circumstances warrant initiating an investigation regardless. Id. In making this determination, the Title IX Coordinator should consider "the seriousness of the allegation(s), the age of the Complainant, whether there have been other Complaints against the Respondent, and the risk to the Campus community if the Respondent's alleged conduct remains unaddressed." Id.

If the investigation goes forward, the Title IX Coordinator must promptly investigate the Complaint or assign the task to another Investigator. AR 11. The Title IX Coordinator shall ensure that the investigation is "sufficient, appropriate, impartial, and in compliance with [EO 1097R]." Id.

Prior to or during the initial interview with the accused student, the Title IX Coordinator must (1) explain to the accused student investigation procedure and timelines and answer any questions about them, (2) inform the accused student of his rights, including the right to have an advisor, (3) provide the accused student with a copy of EO 1097R, (4) describe the Complainant's allegations against him, (5) provide the accused student with an opportunity to respond to the allegations, including by accepting documentary evidence and witness lists and scheduling other meetings, and (6) discuss any interim remedies. AR 10. During the investigation, the Complainant and the accused student must have equal opportunities to present relevant witnesses and evidence. AR 11. The investigator retains discretion to determine relevance. Id.

Before reaching a final conclusion or issuing a final investigation report, the investigator must (1) advise the parties, verbally or in writing, of any evidence upon which the findings will be based and (2) give them an opportunity to respond to the evidence, including presenting further relevant evidence or arguments that could affect the investigation's outcome. AR 11. The investigator must give careful consideration to any relevant evidence, information, or arguments provided by the parties. Id.

The normal investigation shall be completed within 60 working days of the intake interview. AR 12. Within the investigation period, the investigator must prepare an investigation report summarizing the allegations, the investigation process, the preponderance of the evidence standard, the evidence considered, and appropriate findings. AR 12. Relevant exhibits and

documents, must be attached to the report. Id. Within ten working days of this report's issuance, the Title IX Coordinator must notify the Complainant and the accused student in writing of the investigation's outcome, their right to request a copy of the report, and their right to file an appeal. Id.

Said appeals challenging the investigation outcome are filed with the Office of CSU's Chancellor ("Chancellor"). AR 12. Appeals must be based on one or more of the following three appeal issues: (1) the investigation outcome is unsupported by the evidence based on the preponderance of the evidence standard; (2) prejudicial procedural errors impacted the investigation outcome to such a degree that the investigation did not comply with EO 1097R; or (3) new evidence has come to light that was not available at the time of the investigation. AR 12-13.

The Chancellor's decision is final and concludes the Complaint and appeal process. AR 14.

2. EO 1098R

Following an appeal, a Student Conduct Administrator ("Administrator") will notify the accused student of the violations and proposed sanctions or range of sanctions. AR 35. If the student does not accept the proposed sanction during a conference with the Administrator, the case proceeds to a sanction hearing. AR 37. The sanction hearing is limited to determining appropriate sanctions; the findings of the investigation are not under review. AR 39. At the hearing, the Administrator and the charged student each put on the evidence in their case and may ask questions of the witnesses. AR 39. The investigation report and any appeal response is entered into evidence. AR 40.

Following the hearing, the hearing officer prepares a written report recommending sanctions, if any, as well as any recommendations regarding additional remedies based only on the investigative report and the information received at the hearing. AR 41. The SLO president then reviews the investigative report and the hearing officer's report and issues a decision regarding appropriate sanctions. Id.

The Complainant and the charged student may file an appeal of the SLO president's decision to the CSU Chancellor. AR 42. The Chancellor's review is limited to determining whether the sanction is reasonable under the facts and circumstances as determined by the investigation and whether any prejudicial procedural errors occurred during the hearing. AR 43. The Chancellor's response is final, and concludes the sanctions appeal process. Id.

E. Statement of Facts

1. Reporting

On March 6, 2016, RA Tyler Lee ("Lee") received a text message from resident Anna Lorentzen ("Lorentzen") stating: "Hi Tyler it's Anna[.] [K]ind of a weird question but I'm just wondering how to go about reporting an attempted rape." AR 57. Lee asked Lorentzen if he could come and speak with her. Id. Lorentzen agreed and they met in her room with Roe present. Id.

Lorentzen informed Lee that the incident involved her roommate Roe. AR 57. Roe informed Lee that around 12 or 1 a.m. the previous night, she rolled her ankle in front of the Delta Chi fraternity. AR 57-58. Roe went inside an apartment attached to a Delta Chi house and a few males gave her ice to soothe her ankle. AR 57. After using the restroom, one of these males

attempted to kiss her. Id. She kissed him and sat down on his bed because her ankle was hurting. Id. He then attempted to kiss her again and she said "no." Despite her protest, he threw her down on the bed and got on top of her. Id.

Roe read Lee the text message that she sent Lorentzen after the incident:

> "I slipped in a puddle and rolled my ankle earlier in the night but it got kinda better. I wasn't even like drunk either. It was raining so I was waiting inside [t]his random guys' apartment with other people and I had to pee so he let me use his bathroom upstairs[,] and when I got out of it he was like waiting for me in the Room and he like started trying to start something with me and I didn't really want to because he wasn't cute so I just sat down on his bed cause my ankle was hurting so bad. [I]t was an awkward situation. And then he like pushed me down and like got on top of me and I told him I didn't want to do anything with him so I asked him to get off and he didn't and so I started telling him multiple time[s] getting louder and then I slapped him in the face and he slapped me hard back. And I started cussing a shit ton and he like forcefully started kissing me and bit my lip so hard it started to bleed and he used his feet to pin down mine and moved my ankle in a way that ended up making [it] 20x worse and I yelled at him [and] kept telling him he was hurting me and then he pinned my shoulders down and he tried taking my shirt off and he ended up getting it off and that's why I punched him and he got off me and was like what the fuck and I started crying [and] grabbed my shirt and ran to the bathroom and locked myself in it and called an uber[,] fixed my hair[,] and then got out and ran downstairs and into the pouring rain crying on my fucked up ankle. [A]nd when I got in the uber[,] the driver asked if he needed to beat anyone up for me. But now I legit can't walk whatsoever and probably have to use crutches again." AR 57.

Lee asked Roe if he could relate the incident to Coordinator of Student Development Jill Rounds ("Rounds"). AR 57. Roe assented but stated that "she just doesn't want to keep having to tell the story." AR 58. After Roe told Rounds, Rounds and Lee told Roe that they are mandated reporters and asked her what she wanted to do. Id. Roe declined to provide Doe's name but instead asked if the fraternity could be put on notice of the incident. Id.

On March 7, 2016, Jarrett, SLO Assistant Dean of Students and Deputy Title IX Coordinator, informed other college administrators about the incident. AR 59.

On the same day, the university also issued a "Crime Alert" notifying members of the campus community that an off-campus sexual assault had occurred during the previous night. AR 62.

2. The Investigation

Although Roe did not file a formal complaint, the campus determined that the severity of the allegations and potential harm to others if the allegations were substantiated, warranted initiating an investigation. AR 93.

a. Correspondence with Roe

On March 7, 2016, Jarrett contacted Roe, informing her that Jarrett had a report that Roe

had been the victim of sexual misconduct. AR 60. Jarrett asked Roe if she would meet with her. Id.

On March 14, 2016, Bisbee, an interim Title IX Coordinator, emailed Roe to inform her that the campus would still like to meet with her to do an intake, but that it understood her present desire not to participate. AR 65. Bisbee informed Roe that the campus would nonetheless conduct a confidential investigation into the incident. Id. Bisbee also told Roe that she could disclose the name of the accused party and still otherwise not participate in the investigation. Id.

On March 29, 2016, Roe responded to Jarrett's email. AR 60. Roe apologized for the late response and stated: "I understand that you're trying to help and are just doing your job to make sure I'm fine, but I am doing okay. I do not need a meet with anyone and talk about the whole incident." Id.

b. Witness Interviews

(i). Steven Pollock

On March 9, 2016, Jarrett interviewed Steven Pollock ("Pollock"), Delta Chi's president. AR 63. Pollock reported that he was unaware of anyone that was severely intoxicated or aggressive that evening. Id.

On March 14, 2016, Pollock contacted Bisbee to provide additional information about the incident. AR 63. Pollock reported that (1) Andrew Exton ("Exton"), a Delta Chi member, exchanged texts with the victim's roommate after the incident, (2) the incident may have occurred in Braun's room, and (3) Braun saw the victim with the person accused. Id. Pollock did not disclose the name of the accused because, according to him, it would be speculative. Id.

(ii). Mason Copp

On March 16, 2016, Jarrett interviewed Mason Copp ("Copp"), a Delta Chi member. AR 63-64. Copp confirmed that he was present at the party on March 5, 2016. AR 64. He stated that "nothing out of the ordinary" occurred during the evening, but he heard rumors of the incident involving Doe and Roe. Id. Copp reported that Roe wanted to "take a shot" and Doe responded: "No, you had too much. Not a good idea." Id. Copp reported that Roe did not seem drunk around 11:40-ish. To the contrary, she appeared "totally normal" and was sitting up. Id.

(iii). Garrett Braun

On March 17, 2016, Jarrett interviewed Braun, a Delta Chi member present at the party on March 5, 2016. AR 64. Braun and Doe were at the party together. Id. Braun confirmed that he saw Roe dancing with Doe during the party. Id. Later on, Braun went to his room to retrieve a jacket, where he saw Doe and Roe making out on his bed fully clothed. Id. Braun named "Roe" as the victim. Id.

(iv). Alana Billik

On an unstated date, Jarrett interviewed Alana Billik ("Billik"), Roe's roommate. AR 84. Billik was not present at the party. Id. According to Billik, Roe did not want to take legal action but did want some form of internal action taken at the fraternity so she authorized Billik to talk to Exton (Delta Chi member). Id. Exton was "incredibly upset" and shocked upon learning about the incident. Id. Billik and Exton exchanged texts and met for coffee to discuss the incident. Id.

Exton prepared a report and showed it to Billik for review before sending it to the fraternity. Id.

Exton's report states that Roe rolled her ankle and someone offered her ice. AR 84. She went into a room occupied by males, who left to give her privacy. Id. Doe asked Roe for her phone number. Id.

Roe returned to the party. Id. Roe then asked Doe if she could use a restroom, and Doe took Roe to a bathroom adjoining a bedroom. Id. After exiting the bathroom, Doe pinned Roe down and tried to aggressively kiss her. Id. In so doing, he bit her lip "split down the middle." Id. Roe hit him and, in response, he laughed and hit her in the face. Id. He then proceeded to rip her shirt off. Id. She freed her arm and punched him in the back of the head. Id. Roe then left. Id. Post-incident, Roe looked in the mirror and saw a hand print on her face where Doe had hit her. Id. Further, her ankle was "gigantic and black for weeks" rendering her unable to walk on it because Doe had pinned her ankle down with his leg. Id.

(v). Anna Lorentzen

On March 23, 2016, Anna Lorentzen ("Lorentzen") was interviewed. She stated that roe received texts from an unknown number after the incident. AR 67. The texts were bizarre, like they were trying to get Roe to reply. Id. The texts were like: "Hope you had fun last night." Id. Roe blocked the number the next day. Id. When asked if she knew a Delta Chi member by the name of Doe, Lorentzen made a notable pause. Id.

(vi). Larry Antiporda

On April 27, 2017, Gnandt, another Title IX Coordinator, and Bisbee interviewed witness Larry Antiporda ("Antiporda"). AR 80. Antiporda personally witnessed nothing. Id. He learned about the incident because Roe told her boyfriend about the incident, the boyfriend related the incident to his coworker, and the co-worker is Antiporda's friend and told him. AR 80. Roe's boyfriend had been away in Monterey Bay the weekend the incident occurred. Id.

Antiporda recounted a text received by Andia Yekan from a coworker setting out what Doe told her boyfriend. Id. The text stated that stated that Roe hurt her knee outside and entered the Delta Chi house to tend to the injury. Id. Doe entered the room that Roe was in, and "aggressive talking and [a] physical confrontation" ensued. Id. Doe tried to take his shirt off and make physical contact with her but she was pushing him off. AR 80-81. Although Doe got more aggressive, Roe managed to escape. AR 81.

(vii). Andia Yekan

Andia Yekan ("Yekan") learned about the incident because Roe told a friend named Josh who shared this information with Elisa Wendell, who is not a SLO student, who then texted the details to Yekan. AR 85. Wendell informed Yekan that Roe hurt her ankle and went inside where Doe "tried to come onto" Roe and grabbed her. Id. Doe grabbed Roe and got physical with her in the process. Id. In response, Roe punched Doe and managed to get away. Id.

(viii). Doe

On April 1, 2016, Bisbee sent Doe a Notice of Investigation informing him that he had been named as a potential respondent in a report of sexual misconduct. AR 74-75. The Notice informed Doe that Bisbee was issuing a "No Contact" order between him and Roe as an interim

remedy. AR 75.

On April 8, Bisbee and Jarrett met with Doe and Doe's counsel Guy Galambos ("Galambos"). AR 77, 96. On April 12, 2016, they attempted to interview Doe with Galambos present. AR 96. Doe declined to provide any information during these two meetings. AR 99.

On May 10, 2016, Jarrett notified Doe that Bisbee and Jarrett wanted to schedule a meeting with him in order to (1) advise him of the evidence upon which they would base their findings and (2) give him an opportunity to respond to the evidence, including presenting his own. AR 82.

On May 16, 2016, the investigators prepared summaries of the Yekan, Copp, Pollock, Braun, and Billik interviews. *See* AR 85-86.[2]

On May 17, 2016, SLO's investigators had a predetermination meeting with Doe and Galambos. AR 96. At the meeting, SLO orally informed Doe of the evidence collected to date and the university's tentative findings, apparently using the May 16 summaries to do so. AR 101. At the meeting, Doe gave his account of the events that night. AR 99.

According to Doe, he went to the Delta Chi house around 10 p.m. AR 99. He was hanging out in Braun's room, where he had stashed some of his belongings for the evening. Id. After spending 20-30 minutes on the dance floor, he went into Copp's room and observed Roe sitting on a couch with her ankle up and a bag of ice resting on it. Id. She was choking back tears because she had rolled her ankle on the basketball court and muddied her new shoes. Id. He offered to help her find a ride home and she declined. Id.

Doe left Roe in Copp's room and went to hang out in Braun's room with Braun and a few other friends. Id. After about 20 minutes, he returned to Copp's room to check on Roe and see how she was doing. Id. She reported that she was feeling better and was walking around to some extent. Id. She then "came on to" Doe by giving him a hug and asking him to dance. Id. (It is unclear where they were dancing, whether in Copp's room or on the fraternity party dance floor.) They danced for approximately 10 to 20 minutes and she placed his hands on her stomach and hips. Id. After 20 minutes, they consensually kissed while dancing. Id.

Doe and Roe went back to Copp's room, where Copp saw them. Id. They were holding hands and kissing. Id. Around 11:40-45 p.m., Roe's friends came to check on her as they were ready to leave. Id. Roe said she wanted to stay and they danced for another 15 minutes or so. Id.

Because Roe wanted to use the restroom, they went upstairs to Braun's bathroom. AR 99. When Roe exited the restroom, they began kissing again. They fell onto Braun's bed, both fully clothed, and were "rolling around kissing" for about five to seven minutes. Id. Braun entered the room and was confused to see them there and left. Id. Doe was on top of Roe and she rolled him over. Id. Suddenly, she became flustered and confused, grabbed her stuff, and insisted that she needed to go home. Id. Doe was confused about her abrupt change of mind. Id. She left, and Doe texted her about 20 minutes afterwards, saying that he hoped her ankle feels better. Id.

Doe also provided the investigators with copies of text messages between Roe and himself. AR 99, 118-19. A text message from Doe to Roe at 11:54 p.m. stated: "I have shoe cleaner. Come see me on the morning and we'll clean your adidas." AR 118. Roe responded: "Haha for sure I need shoe cleaner and you're fun. I'll definitely text you back." Id.

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[2] These summaries did not indicate, *inter alia*, Roe's lack of cooperation with the investigation, the statements of Lorentzen or Antiporda, or the follow-up interviews with Pollock and Braun. AR 85-86, 169.

At 1:17 a.m., about 20 minutes after Roe left Delta Chi house, Doe texted: "I [h]ope your ankle feels better!" AR 118. Apparently, Roe's roommate Billik responded: "Honest[l]y Fuck you –Anna." Id. Doe responded: "Lol Anna has jokes!" Id. Anna replied: "Yeah no go fuck yourself don't text this number again." Id. Doe replied: "Hahaha. Sleep tight [Roe] and company. Nice to meet you all." AR 119.

On June 7, 2016, Gnandt notified Doe that the investigators were still finalizing a report that would substantiate Doe's violation of EO 1097R. AR 87. As an ongoing interim measure, Doe was barred from participating in commencement activities until the administrative hold on his academic record was lifted. AR 87-88.

(ix). Spencer Hankey

On June 27, 2016, Deputy Title IX Coordinator Bisbee wrote a memorandum to Gnandt and Kathleen McMahon, CSU Dean of Students, regarding reports from Delta Chi members Spencer Hankey ("Hankey") and Exton. AR 91-92.

Hankey, a Delta Chi pledge member, was tasked with providing transportation on the night of March 5, 2016. AR 91. At about 1 a.m., he arrived at the Delta Chi house to pick someone up. Id. As he sat waiting in the car with his window down, he saw a man and woman – not suggested to be Doe and Roe -- yelling extremely loudly at one another. Id. The woman was yelling: "Let me get the fuck out of here" and "I can't imagine anything being worse than being here right now." Id. Hankey could not clearly hear the man's response but heard something along the lines of "No" and "Stop." Id. The man was stretching out his arm and physically blocking her access to the stairs. Id. To Hankey, they both appeared drunk. Id. When she could not go down the stairs because the man was blocking it, she turned in another direction to head down a second flight of stairs. Id. At that point, she disappeared from sight. Id.

(x). Andrew Exton

Jarrett and Bisbee made numerous attempts to speak with Exton, as several witnesses reported that he may know significant information about the investigation. AR 91. Exton ignored many of these requests. Id. On May 13, 2016, Exton agreed to meet with them with his father serving as his advisor. Id.

During the meeting, Exton would not look at the investigators, speak to them, or sit at the conference table with them. Id. His father reported that Exton had social anxiety. Id. Before any information was provided, Exton began shaking and breathing heavily and appeared to have a panic attack. Id. He then "exploded" and became extremely volatile — he clawed at cabinets, shoved tables, and huddled into a fetal position. AR 91-92. University police responded to the emergency and were forced to handcuff him to contain him. AR 92. Following this outburst, he was issued an immediate interim suspension from campus. Id.

A witness told the university that Exton wrote a report for the fraternity based on Billik's account of the incident. AR 92. Pollock had the report in his possession for about a week but did not report it to the university. Id. He informed the Delta Chi Executive Board about the report, and Copp, a member of this Board, did not notify the university about the report either. Id. Pollock eventually returned the report to Exton, who destroyed it. Id. Pollack said that it was Exton's story to tell, and he told Exton it was his right to give whatever he needed to investigators. Id.

In her June 27 memorandum, Bisbee commented on these events: "Therefore, Stephanie

and I concluded that the executive leadership of Delta Chi was not forthcoming about information they would have had and purposefully omitted relevant and important information during meetings with the University, specifically, concealing the existence of the report Pollock had received from Exton." AR 92.

3. The Investigation Report

On July 27, 2016, Investigators Bisbee and Jarrett submitted their investigation report to Title IX Coordinator Gnandt. AR 93-119.

In the report, Bisbee and Jarrett noted that credibility determinations were necessary in order to reach a conclusion as to the particulars of the incident and the existence of affirmative consent. AR 102. They reasoned that Doe's account of the incident – which was that Roe "changed her mind" and abruptly left the room after Braun saw them on his bed kissing -- was undermined by the fact that he could not furnish a credible motive why Roe would completely fabricate a story. Id. On the other hand, Doe had a powerful motive to cast doubt on a version of events framing him as the responsible party. Id. The investigators found that Roe was probably telling the truth because (1) she promptly reported the incident to University Housing, (2) her split lip corroborated her story, and (3) her roommates confirmed Roe's condition. Id.

Bisbee and Jarrett specifically cited the following in formulating their findings: (1) Roe's account of the incident, (2) Yekan's identification of Doe as the accused in her text message, and (3) Braun's first-hand observation "of seeing [Doe] on Mr. Braun's bed with [Roe], engaged in sexual activity after forcibly pinning her down." AR 102. The investigators concluded: "Had [Roe] not defended herself and left, it is unclear what further sexual activity would have been attempted or have occurred. Even if the kissing and 'rolling around' began with [Roe's] consent, the rest of the forcible sexual misconduct by [Doe] was without [Roe's] affirmative consent at the Delta Chi party on March 5, 2016, including pinning her down by her injured ankle while lying on top of her, slapping her, forcefully trying to remove her shirt, ripping it in the process, and causing her lip to split and bleed." Id. They concluded that this misconduct violated EO 1097R. Id.

On July 28, 2016, after the report's preparation, Bisbee emailed Coordinator of Student Development Rounds and asked whether she observed a split or bloody lip on Roe, a ripped shirt, or a slap mark on Roe's face. AR 120. Rounds responded that she could only recall Roe having a split lip. Id. She saw Roe mid-morning/afternoon, so she had already changed and "her slap mark went away." Id.

On the same day, Title IX Coordinator Gnandt issued a Notice of Investigation Outcome finding that Roe was subjected to sexual activity without affirmative consent and stating: "[B]ased upon the preponderance of the evidence, the University has found sufficient evidence of a violation of the Executive Order 1097." AR 121.

4. Doe's Appeal of the Investigation Outcome

On August 8, 2016, Doe submitted an appeal of the investigation outcome to SLO Title IX Coordinator Gnandt, alleging that the outcome was not supported by the evidence, procedural errors violated EO 1097R, and new evidence was available. AR 123.

On September 13, 2016, Doe supplied the CSU Chancellor's decision-maker with additional information and argument regarding Braun's statements. AR 132-35. In pertinent part, Doe disputed the investigators' finding that Braun witnessed Doe pinning down Roe on his bed.

AR 132. Doe produced a two-page summary of an interview with Braun prepared by a private investigator. AR 134-35. This interview indicated that Braun saw consensual activity between Doe and Roe. Id.

On September 20, 2016, Gardner, Special Consultant for Chancellor's Office Investigations, Appeals, and Compliance, issued her appeal response. AR 139-44. Gardner denied the appeal, finding that a preponderance of the evidence established that Doe engaged in sexual activity without affirmative consent and that the investigators did not commit a prejudicial procedural error. AR 142-43. Gardner noted that Roe did not tell her RA that she had danced and kissed the person who ultimately assaulted her, but she did say that she kissed the man who led her to the bathroom. AR 142. She also said that she slapped him after he ignored her request to stop, and he slapped her back and bit her lip. AR 142. He pinned her shoulders and feet down and forcefully removed her shirt. AR 142. She punched him, he got off her, and she ran to the bathroom and locked herself in. AR 142.

The investigation uncovered information corroborating Roe's report to her RA. AR 142. Consistent with Roe's story, the investigators learned that (1) according to a Delta Chi student, Roe's shirt was ripped, (2) according to Doe, Roe "all of a sudden" decided to go home, (3) Roe sent Doe angry text messages, and (4) according to Rounds, Roe had a split lip. AR 142.

5. The Expulsion

On September 22, 2016, David Groom ("Groom"), SLO Associate Dean of Students and Director for Student Rights and Responsibilities, notified Doe that the proposed sanction for his misconduct was expulsion from SLO with no possibility of readmission. AR 154-55.

A sanction hearing was held on November 29, 2016 with hearing officer Joy Pederson ("Pederson"). AR 162. Groom presented the University's case. Id. Neither party presented witnesses. AR 187. Doe submitted a written statement denying the allegations and outlining the alleged unfairness in SLO's Title IX investigation process. AR 183-86.

On December 9, 2016, Pederson submitted her decision to Keith Humphrey ("Humphrey"), SLO Vice President of Student Affairs, recommending expulsion. AR 187, 192. Humphrey reviewed the decision and imposed the sanction of expulsion from SLO and CSU. AR 231.

6. Doe's Appeal of the Expulsion

Doe appealed the sanction decision to the CSU Chancellor, arguing that the evidence was not disclosed to him and that he was not offered a fair opportunity to be heard. AR 232, 236.

On January 18, 2017, Thomason, CSU's Systemwide Title IX Compliance Officer, found that no prejudicial procedural errors occurred and that the sanctions imposed were reasonable. AR 241-42. Thomason denied Doe's appeal. AR 242.

F. Analysis

Petitioner Doe contends that SLO's Title IX proceedings lack due process and its findings of facts in the investigation were unsupported by the evidence.

1. Notice

Generally, a fair procedure requires "notice reasonably calculated to apprise interested parties of the pendency of the action... and an opportunity to present their objections." USC,

supra, 246 Cal.App.4th at 240. The notice required in a student disciplinary action must identify the specific rules that the student is alleged to have violated and must also provide the factual basis for the accusation. Id. at 243-44. "[I]n being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation is." Id. at 240 (quoting Goss, *supra*, 419 U.S. at 582).

Fair procedure requires that the accused be afforded an opportunity to present his objections after he or she is provided with notice of the charges. This opportunity to rebut does not have to take place in the initial interview. A school is not precluded from interviewing the accused prior to providing adequate notice of the charge, and then affording him an opportunity to present objections. Goss was sensibly concerned that an accused cannot reasonably respond to allegations without adequate notice of what those allegations are. Notice withheld until the end of an initial interview satisfies these principles so long as there is an opportunity for objection. The reasonably practical and well-accepted investigative technique of interviewing a subject before notifying him or her of the accusation is not inconsistent with fair procedure.

The notice in the instant matter was too cursory to furnish Doe with an inadequate opportunity to respond. The Notice of Investigation ("Notice") states in pertinent part: "You have been named as a potential respondent in a report of sexual misconduct that has been brought to my attention. This letter constitutes a notice of investigation that will be conducted pursuant to" EO 1097R. AR 75. The Notice provided Roe's name in issuing a no-contact order. Id. The Notice failed to identify any specific portion of EO 1097 violated, the nature of sexual misconduct of which Doe was accused, the definitions of sexual assault, sexual battery, acquaintance rape, consent, that consent may be withdrawn, that an inebriated person cannot consent, and SLO's theories of responsibility for him. The Notice does not pass muster from a due process perspective.

This defect was not cured by the Investigators' pre-determination meeting with Doe on May 17, 2016. At that time, Doe was orally informed of the evidence collected and SLO's tentative findings. AR 101. Apparently, the Investigators referred to their May 16, 2016 tentative findings in doing so. Respondents rely on Evidence Code section 664's presumption of an official duty properly performed to conclude that the allegations and factual basis were given to Doe at this interview and prior to completion of the investigation report. Opp. at 12. Without citation, Doe argues that SLO's Title IX Investigators are not public officials (Reply at 6), but surely they are public employees.

Nonetheless, the Evidence Code section 664 presumption merely requires some evidence to the contrary. It is undisputed that the Investigators used the tentative findings prepared the day before for their oral disclosure to Doe. AR 85-86. The tentative findings included summaries of witness interviews for Yekan, Copp, Pollock, Braun, and Billik. Id. Assuming *arguendo* that they reveal most of the factual basis for the accusation, they do not show the specific rules that Doe was alleged to have violated. USC, *supra*, at 243-44.

2. Opportunity to Respond to Evidence

At a minimum, students facing academic discipline such as suspension or expulsion must be given notice and afforded a hearing. Id. at 579. The hearing need not be formal, but the student must first be told what he is accused of doing and the basis of the accusation and then "given an opportunity to explain his version of the facts at this discussion." Goss, *supra*, 419 U.S. at 582. The accused student is entitled to the names of witnesses who provided relevant information and

a summary of their witness interviews. USC, *supra I,* 246 Cal.App.4th at 246. The student is also entitled to all evidence presented to or considered by the decision-maker. Id. The requirement of a fair hearing under CCP section1094.5 does not allow an administrative decision-maker to rely on evidence not revealed to the accused. USC, *supra*, 246 Cal.App.4th at 247.

This principle is embodied in CSU's rules: "Before reaching a final conclusion or issuing a final investigation report, the Investigator shall have a) advised the parties...of any evidence upon which the findings will be based; and b) given the Parties an opportunity to respond to the evidence, including presenting further relevant evidence, information or arguments that could affect the outcome." AR 11.

SLO did not advise Doe of all of the evidence upon which its decision-maker would rely before making a decision of guilt. As Doe argues (Pet. Op. Br. at 9-10), during SLO's May 17, 2016 pre-determination meeting, Investigators made an oral disclosure to Doe of their tentative findings based on witness statements of Yekan, Copp, Pollock, Braun, and Billik. AR 85-86. However, Doe was not informed of Lee's report of his conversation with Roe, that Roe declined to participate in the investigation, the witness statements of Lorentzen and Antiporda, or the email from Rounds indicating "that the Complainant did indeed have a split lip the next morning after the incident." AR 96-97.[3]

Doe argues that this failure was aggravated by the fact that the information disclosed was clearly inaccurate. The tentative findings indicate that Pollock learned from Exton "that the complainant had hurt her ankle and went into a room and Doe attempted to assault the complainant, and she was left with a mark on her face." AR 85. This information is not in Pollock's statement. AR 63. The tentative findings also indicate that Copp "[h]eard the victim's shirt may have been ripped (via Andrew Exton) and she went to checked [sic] herself in the mirror before she left." AR 85. Copp's statement does not state that Roe checked herself in a mirror, and Copp "[d]oes not believe that Doe did it", referring to Roe 's ripped shirt. AR 64. Pet. Op. Br. at 10.

The Investigators submitted the investigation report containing this information to Title IX Coordinator Gnandt on July 27, 2016. AR 93-119. Gnandt issued his decision and the report to the parties, including Doe, the next day. Thus, Doe was given no opportunity to respond to evidence in the report that he had not seen and upon which Gnandt relied for his decision. Moreover, the investigation report did not include Rounds' email that she had observed a split in Roe's lip, an important fact relied upon by Gnandt and never disclosed.[4]

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[3] Doe points out that no documentation exists of the follow-up interviews conducted by the Investigators with Pollock on May 16 and 24, 2016 (*see* AR 96), and with Braun on May 6, 2016. Pet. Op. Br. at 9. Doe consequently implies that this information was not disclosed. Id. Doe further argues that he was not given Bisbee's memo regarding her meeting with Exton (AR 91-92), and the accusation of Delta Chil's cover-up (AR 85-86). Id. The court need not decide whether any of this information was relevant to a material issue.

[4] Doe points to other information he never received: an Exton and Jarret email string (AR 72-73), Bisbee's memo of her Exton interview (AR 91-92), and the full interview summaries for several witnesses (AR 63-64, 67, 84). Pet. Op. Br. at 10. With respect to the full interview summaries, Doe argues that this was a case in which the "investigator notes" should have been disclosed. By this he means the full interview summaries for Pollock, Copp, Graun, Billik, Lorentzen, and Antiporda. Reply at 8 (citing UCSD, *supra*, 5 Cal.App.5th at 1096).

SLO failed to disclose all evidence on which it relied for its finding of guilt.

3. Opportunity to Question Key Witnesses

There is no requirement under California law that an accused student be entitled to cross-examine witnesses, particularly the alleged victim. UCSD, *supra*, 5 Cal.App.5th at 1084 Goldberg v. Regents of University of California, (1967) 248 Cal.App.2d 867, 881. Fair procedure in a student discipline matter requires a process by which the accused student may indirectly question the complaining student, particularly if the findings are likely to turn on the credibility of the complainant. Ibid.

Doe notes that SLO's findings turned on credibility: "Because there were no direct witnesses to the alleged forcible sexual misconduct, it is necessary to make a determination of the Complainant's, [Doe's] and witnesses' credibility in order to reach a conclusion...." AR 102. Doe argues that SLO's procedure provides no process by which the accused student may question the complainant before the investigators make factual findings and responsibility determinations (AR 1-23), and that Roe chose not to participate in SLO's proceeding anyway. AR 70. Therefore, he had no opportunity to question her, and he was prejudiced by this denial of an opportunity to challenge Roe's perceived credibility. Pet. Op. Br. at 7-8.

Despite the fact that the Investigators never met with or interviewed Roe, her allegations were deemed credible because she made a "prompt report to University Housing," her "split lip" was corroborated, and both roommates confirmed "the Complainant's condition." AR 102. According to Doe, these findings are flawed. Roe did not make a report to University Housing; Lorentzen (Roe's roommate) made a report to RA Lee, who submitted an incident report. AR 57. Rounds is the only person who "corroborated" Roe's split lip, and she did so nearly five months after the alleged misconduct occurred. AR 120. And Roe's roommates were not questioned about Roe's split lip, hurt ankle, or her "condition" at all. *See* AR 67, 84. Pet. Op. Br. at 7-8.

Doe further argues that since he was determined to lack credibility because he was unable to "give a credible motive for why [Roe] would completely fabricate this story," he should have been able to question Roe to discover such a motive. Antiporda indicated that Roe's boyfriend was out of town when Roe was discovered consensually kissing Petitioner. AR 80. Petitioner should have had an opportunity to question Roe about whether she had made up a story for her friends, but then refused to participate in the Title IX investigation out of concern that her boyfriend may learn of her infidelity. SLO violated its policy and deprived Petitioner of "a full opportunity to present his defense." Andersen v. Regents of Univ. of Cal. (1972) 22 Cal.App.3d 763, 771. Pet. Op. Br. at 7-8.

Respondents respond that the law does not require that an accused student receive an opportunity in an administrative hearing to cross-examine witnesses. UCSD, *supra*, 5 Cal.App.5th at 1084. Rather, in situations where the case turns on credibility and the accused faces severe consequences if found to have violated school rules, fair procedure requires a process by which the accused student may question the complainant, even if indirectly. Id. Respondents contend that Doe was given the opportunity to indirectly question witnesses because he was given the evidence, and had an opportunity to respond by presenting further evidence. Opp. at 14.

Respondents' argument is untenable. Roe declined to participate in the process and Doe had no opportunity to question her. The court agrees with CSU policy that the school does not have to end an investigation simply because the alleged victim does not cooperate. AR 8. But that

makes the other witnesses all that more important in a credibility case. The victim's version of events relayed to another person (Lee, Lorentzen, and Billik) and presented as evidence must be developed in detail and corroborated by other evidence. The accused must be able to attack that version -- both by developing other evidence and by questioning those who have percipient information. Doe had little prospect of interviewing and presenting evidence from witnesses Lee, Lorentzen, and Billik, all of whom appeared hostile to him. The court also cannot conclude that Rounds would have submitted to an interview by Doe even if he knew about her email. It was incumbent upon SLO to enable Doe to question these witnesses directly or indirectly in this credibility case where Roe was unwilling to participate.

4. Impartiality

The right to a fair procedure includes the right to impartial adjudicators. Rosenblit v. Superior Court, (1991) 231 Cal.App.3d 1434, 1448. Bias and prejudice on the part of an administrative decision-maker must be proven with concrete facts. Breakzone Billiards v. City of Torrance, (2000) 81 Cal.App.4th 1205, 1237. Bias and prejudice are never implied. Id.

Doe argues that the Investigators were biased. They labeled Roe as a victim, suggesting that they accepted Roe's version from the outset. Reply at 10. They repeatedly asked Doe: "Well if you didn't do it then we have to find out who did", and rolled their eyes when he denied the allegations. Id. The Investigators interviewed none of the 300 potential witnesses who attended the Delta Chi party, ignored Doe's request to interview fellow Delta Chi members, portrayed the evidence in a false light, and attempted to connect Doe with a cover-up by Delta Chi. Pet. Op. Br. at 11-12.

Doe's argument is unpersuasive. Doe has presented some evidence that the Investigators were guilty of unprofessionalism. But the Investigators only prepared the report; they did not make the decision on Doe's guilt. Gnandt made that decision, and Doe has shown no bias by Gnandt. It is true that Gnandt relied on the report prepared by the Investigators and conducted no investigation of his own. But the issue of investigator bias is often presented at a hearing, criminal civil, or administrative. Doe could have argued to Gnandt that the Investigators were biased and unprofessional. To the extent that he was unaware of their unprofessionalism because he did not have the report, this is a failure of disclosure and not a showing of bias by the decision-maker.

5. Substantial Evidence

Gardner, the Chancellor's Special Consultant for the appeal, found that Roe told Lee that she kissed Doe, she slapped him after he ignored her request to stop, he slapped her in response and bit her lip, he pinned her shoulders and feet down, and he forcefully removed her shirt. AR 142. Roe then punched Doe, he got off her, and she ran to the bathroom and locked herself in. AR 142.[5] Gardner found that Roe's version of events was corroborated by four pieces of evidence: (1) Roe's shirt was ripped before she left the house, (2) Roe's sudden change of mind, (3) Roe sent Doe an angry text messages, and (4) Roe had a split lip. AR 142-43.

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[5] Gardner acknowledged that Roe did not tell Lee that she danced and kissed Doe earlier in the evening at the Delta Chi party, but the Investigators developed other evidence which led them to conclude she was not lying. AR 142.

Gardner was wrong about two of the corroborating facts, and she was misleading about a third.

First, there is no evidence of a ripped shirt. The rumor of a ripped shirt started with Copp, who did not personally see Roe with a ripped shirt and heard from Exton that Roe's shirt may have been ripped. AR 64. But Billik, who was not at the Delta Chi party, told Exton: "Doe ripped [Roe's] shirt off." AR 84. By this comment, Billik apparently meant that Doe removed Roe's shirt rapidly. Billik never said Roe's shirt was ripped, and Roe never mentioned to Lee that her shirt was ripped. AR 57. Gardner's conclusion was simply false.

Second, Gardner found evidence of misconduct because Roe sent Petitioner angry texts: "Honesty (*sic.*), Fuck you – Anna" and "yeah no go fuck your self (sic.) don't text this number again." AR 142. Gardner is mistaken. Roe did not send these texts; Lorentzen did. AR 67, 118. This makes a difference because the texts do not show Roe's angry mental state shortly after the incident. Lorentzen may have been angry about what Roe had told her about the incident, but there is no evidence of that fact. Instead, the only evidence is Lorentzen's interview in which she refers to the texts merely as bizarre without any explanation why she was hostile. AR 67. Without additional evidence from Lorentzen as to her meaning, the texts show nothing.

Third, Gardner claimed: "[T]he Coordinator of Student Development observed and documented [Roe's] split lip on March 6, 2016." AR 142. As Doe contends, Rounds did not document her observation of a split lip on March 6, 2016, which was the day after the incident. Instead, Investigators did not contact Rounds about whether she observed a slap mark, torn shirt, or split lip until July 28, 2016, after the report had been prepared. At that time, Rounds could not say that she saw a torn shirt or slap mark, but did recall a split lip. AR 120. No one else mentioned a split lip. While Rounds statement has some value, Gardner put too much emphasis on her recollection by suggesting that it was documented the day after the incident and not five months later.

Gardner concluded from Doe's admission that Roe decided "all of a sudden" to go home after they were consensually kissing that a consensual kissing turned into sexual activity (forced kissing, removing her shirt, and pinning her on the bed) without affirmative consent. AR 142-43.

The court agrees that Doe's admission of Roe's sudden decision suggests that something happened. But the question is what? Braun stated that he saw Doe and Roe "making out" on Braun's bed fully clothed, and that they had been dancing earlier. AR 64. No one else personally observed what happened in Braun's room. Roe's roommates were not interviewed about what Roe told them. Lorentzen told Lee that she wanted to report an attempted rape (AR 57), but she was not interviewed about what Roe told her. Lorentzen's separate interview was only about the text messages. AR 67. Billik was not at the party, and her interview consisted only of what Exton reported to Delta Chi. AR 84. All the rest of the interviews were multiple levels of hearsay or rumors, and have little or no value.

The upshot is that (a) the Investigators had Lee's report in which Roe told Lee (in the presence of Lorentzen) about a sexual assault, (b) Doe admitted to consensually kissing Roe – corroborated by Braun -- where Roe suddenly decided to leave. There was no corroborating evidence as to why.[6] The Investigators did not interview Lee, and did not elicit any corroboration

[6] Doe argues that Roe could "all of a sudden" decide to go home because she felt guilty about being caught kissing someone while her boyfriend was out of town.

of Lee's report from Billik or Lorentzen.[7] As Doe contends, this is not evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority, *supra,* 104 Cal.App.4th at 585), or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28.

The decision that Doe committed sexual activity without affirmative consent is not supported by substantial evidence.

6. Remedy

In a notice of non-opposition to remand filed on July 9, 2018, Respondents assert that they are not opposed to a court order remanding the case to SLO. Doe objects to remand as a remedy in a July 10, 2018 filing.

There is a critical difference between failing to follow the law or properly apply the law to the evidence in the record and taking new evidence on an issue that was not presented in the earlier administrative hearing. CCP section 1094.5(e) provides for only two circumstances when an administrative matter may be remanded for the taking of additional evidence: (1) where such evidence was improperly excluded at the original hearing or (2) where the evidence could not, with reasonable diligence, have been produced at that hearing. Ashford v. Culver City Unified School Dist., (2005) 130 Cal.App.4th 344. CCP section1094.5(e) is a narrow, discretionary window for additional evidence newly discovered after the hearing or improperly excluded at it; it does not permit remand for the presentation of more evidence on issues already addressed. Ibid. (trial court erred in remanding for additional evidence to lay foundation for videotapes). *Compare* Sanchez v. Unemployment Insurance Appeals Board, (1977) 20 Cal.3d 55, 68-69 (permitting new evidence to be taken on issue not addressed at hearing).

In this case, SLO's failure to follow fair procedure is a matter that would support a remand. The errors could be rectified so that Doe receives proper notice, has the opportunity to respond to all evidence, and has the opportunity to question key witnesses. But SLO's failure to present substantial evidence of misconduct is not subject to remand. If the matter were remanded, SLO might be able to obtain better evidence by interviewing Lorentzen, Billik, and Lee in detail about what Roe said and how she appeared. Yet, CCP section 1094.5(e) and Ashford preclude SLO from doing so. Neither party may have repeated attempts to develop evidence on the material issues that were presented at the hearing.

This case is not subject to remand. Based on the failure to present substantial evidence, the decision must be set aside.[8]

G. Conclusion

The petition for writ of mandate is granted. Doe's expulsion and sanctions are ordered set aside, and CSU is directed to take such further action as is consistent with his status of a student

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[7] The opposition contends that Billik and Lorentzen corroborated Roe's injuries (Opp. at 15), but Billick only referred to Exton's report which stated that Roe rolled her ankle, had a split lip, and had a hand print on her face. AR 84. Billik provided no firsthand observation of injury, and Lorentzen provided no information about Roe's injuries at all. AR 67.

[8] The same would be true under an independent judgment standard of review.

at SLO.

Doe's counsel is ordered to prepare a proposed writ and judgment, serve them on CSU's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed writ and judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for August 23. 2108 at 9:30 a.m.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

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

On July 12, 2018, I served the foregoing document NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATEOTICE OF ORDER OVERRULING DEMURRER OF RESPONDENT TIMOTHY WHITE on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Maria A. Stam
The California State University
Office of the Chancellor and General Counsel
401 Golden Shore, Fourth Floor
Long Beach, CA 90802-4210
Telephone: (562) 951-4500
Facsimile: (562) 951-4956
E-mail: mstam@calstate.edu
ATTORNEYS FOR RESPONDENTS

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

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

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

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

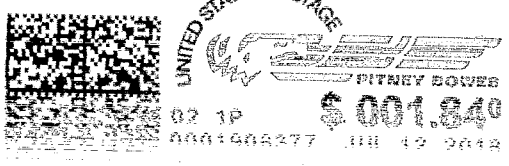
☐ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

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

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

Executed on July 12, 2018 in Los Angeles, California _____
Yesenia N. Alvarado

RKSMAN JACKSON
THAWAY & QUINN LLP
WEST SIXTH STREET, FOURTH FLOOR
NGELES, CALIFORNIA 90017



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