SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JOHN DOE, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al, Defendants.	No. RG16-843940 ORDER GRANTING PETITION FOR WRIT OF MANDATE Date: 11/15/17 Time: 9:00 a.m. Dept.: 514

The Petition of petitioner Doe for a writ of mandate came on for hearing on 10/12/17 and again on 11/15/17, in Department 514 of this Court, the Honorable Thomas Rogers presiding. Counsel appeared on behalf of Petitioner Doe and on behalf of Respondent The Regents of the University of California ("The Regents"). After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The Petition of petitioner Doe for a writ of mandate directing the Regents to set aside and vacate the decision of the University of California, Santa Barbara's Interpersonal Violence Appeal Review Committee ("IPVARC") decision in Doe v. Roe (Title IX Case # 2016-0036) is GRANTED.

ADMINISTRATIVE RECORD

The administrative record submitted to the court was not indexed and was difficult to use. After this was brought to its attention, the Regents submitted an index.

In the briefing, the parties frequently did not provide useful citations to the record. Doe cites to his own information and downplayed contradictory info. The Regents frequently cited to the investigator's report at AR 175-222 as evidence instead of citing to the underlying evidence. A citation to the factual summary in a report is not particularly useful in establishing that there is substantial evidence for the factual summary in the report. The only exception is where the investigator's report contains a summary of an unrecorded and unwritten witness statement.

FACTS

Doe and Roe were both students at the University of California, Santa Barbara. Doe and Roe were friends. Roe was in a long term same sex relationship with R. (AR178)

In November 2015, Roe expressed interest in a heterosexual encounter with Doe. (AR 179, 189)

On 11/5/15, Doe and Roe had the sexual encounter that is the subject of this case. Roe invited Doe to her residence to "make out." (AR 27:16-18, 29:8-10; 179.) The went to Roe's room and had some wine. Other than Roe and Doe, there were no witnesses to the encounter. (AR 30:15-20, 65:25-66:2.)

On 11/6/15, the following day, Roe has a text conversation with another student (A.S.):

> Roe – Let's say this is my first business of hands. …
> A.S. – and did you enjoy. How was it.
> Roe – he was going to come. But someone was coming. / But it was a false alarm / But then we continued / But I'm not sure if I enjoyed the hand job, because I was nervous, because I never done one to anybody
> A.S. – Ha Ha Ha. But very very good
> Roe – Yes / Finally, I killed my curiosity." (AR 260)
> …

Roe - The truth is, if I had been waxed, and more prepared, it would have gone further, but I would have felt bad for R.
A.S. – Waxed, you mean drugs?
Roe – You mutt, waxed means shaved, you idiot
...
A.S. – I'm glad it was what you were expecting.
Roe – Wide grin emoticon
A.S. – Solidarity emoticon
Roe – And then he asked me if I wanted a blow job. I said Nope.
(AR 261-262)

On or about 11/7/15 (2-3 days after the encounter), Doe and Roe had another sexual encounter in which Roe again gave Doe a hand job. Roe said that this was consensual, but that this second event was part of her denial. (AR 29, 67, 180, 187.) This second event is not at issue in this case. (AR 67.)

On 11/8/15 (3 days after the encounter), Roe and Doe had the following text conversation[1]:

Roe - "I know ive asked you many times no but are you sure youre not just trying to fuck me."
Doe - "No I turned down a hand job last night, I'm clearly not in it solely for the sex."
Roe - "oooh that's why you did that / I was confused."
Doe – Also this is happening too fast for me rn lets talk later today I'm gonna do my work today
Roe - I was gonna say that too / glad we're on the same page.
(AR 324-325.)

On 11/10/15 (5 days after the encounter), Roe has a text conversation with another student (A.S.):

Roe – And to be honest, I like Mr. Doe. I also like his company, but it is like you've been here over x time, please leave / I should've fucking made out with you and not him. (AR 271.)

[1] Many of the text conversations were originally in Spanish and Roe states that the translations were incorrect. (AR 189) The court relies on the translations in the administrative record.

...

Roe – He's an asshole. I'll call whatever this is off / But I fucking like him / But he is an asshole / I'll stop my rant now. (AR 272)

...

Roe – Mr. A.S., I'm impatient / And compulsive / I'm going to call whatever this fling is off. (AR 274)

Roe wrote in her journal "yes I liked it." (AR 189, 216.)

On 11/13/15, Roe texted A.S. "well, ive been going through hell in many ways .. and not because of him ... my life was already difficult ... ive been through a lot ... not only my dad." (AR 407-408)

Roe stated in the investigation that after the 11/5/15 incident she went into denial and convinced herself she enjoyed what happened. (AR 180.)

A.S. said that after the incident Roe frequently stayed near Doe's residence and it appeared that Roe wanted a romantic relationship with Doe. (AR 200.) There is evidence that Roe broke off her three year relationship with R from 11/5 through about 11/15/15. Roe elsewhere states she never broke up with R, but rather "took a break to explore." (AR 31-32, 190.)

On or about 11/17/15, Roe told Doe that she had not consented to the sexual activity on 11/5/15. (AR 288.)

Around Thanksgiving 2015, Roe posted letters on campus regarding sexual assault. (AR 180, 280-282.)

On 2/22/16, Roe filed a complaint against Doe. (AR 16, 175) The Regents appointed Quillen as investigator.

On 3/2/16, Quillen sent a letter to Doe that notified Doe of the investigation. (AR 503-504.) Doe requested a copy of the complaint. Quillen stated that consistent with policy he would provide only the information in the letter and that he would provide the allegations at a meeting. (AR 354-355.) Quillen thereafter interviewed witnesses. (AR 19)

Roe told Quillen that she she withdrew consent during the encounter and it became non-consensual. Roe said that she said "no" when Doe touched her breasts and "no" when Doe placed her hand on his penis. She said that she said "no" eight times. (AR 28, 179.) Roe told Quillen that about five days after the encounter she realized it was sexual assault. (AR180.)

On 3/18/16, Quillen met with Doe. Quillen did not provide Doe with the written allegations against him. (AR 356-358.) Quillen asked Doe questions about the incident. Quillen later stated that the questions effectively disclosed the charges because the witness statements and the complainants report were embedded in the questions. (AR 19.)

Doe told Quillen that the encounter was consensual. Doe said he asked permission before he touched Roe's buttocks and breasts and asked her what she wanted to do. Doe said that Roe asked him what he wanted to do, he suggested a "hand job," and then Doe put his hands around hers to perform the sexual act. (AR 29-30, 183.)

On 4/1/16, Quillen sent a letter to Doe that confirmed that Quillen did not provide Doe with the written allegations against him. (AR 356-358) Quillen explained that under the UCSB procedure he provided Doe only with the general information in the initial letter so that Doe had "an open ended, unrestricted opportunity to present any and all information you believe is relevant, rather than being constricted by your considerations of what my office has indicated as relevant." (AR 356)

On 4/13/16 Doe submitted a lengthy written statement. (AR 365, 368) The written statement is dated 3/31/16, but Doe's email of 4/13/16 states the report was ready on 3/31/17 and Doe delayed the submission in the hopes of getting assistance from the Office of Respondent Services. (AR 365.)

Between 4/13/17 and 4/26/17, Doe and Quillen exchanged email regarding Doe's concerns with the process and disappointment that UCSB provided no support in preparing his statement.

On 4/29/16, Quillen again interviewed Doe. (AR 21-22, 40.) Quillen asked Doe about the incident. Doe objected to the suggestive lines of questioning, but Quillen stated it was the normal method of eliciting information. (AR unknown [Cited in Doe's brief as Prelim AR 344-345). Doe emailed Quillen Doe's notes from the interview, but Quillen stated that his notes and pre-prepared questions were the official record and that he would use those in his analysis. (AR 23:1-5.) Quillen later stated that the questions in some measure disclosed the nature of the charges because the charges were embedded in the questions. (AR 45.) Quillen's subsequent report states his summary of the interview. (AR 181-186.)

On 4/29/16, Doe reported to Quillen evidence of possible stalking by Roe. Quillen evaluated the information, decided that it was not sexual harassment and that it was not a matter for his office. (AR 22.) Quillen did not pursue the stalking allegations as part of his investigation and stated he would close his file. (AR 387-388.) Doe and Quillen exchanged a series of lengthy emails on the subject. (AR 375-388.)

On 5/8/17, Doe submitted information that Roe was reporting him to the Office of Judicial Affairs because she saw him on campus. (AR 370-371.)

On 5/11/17, Doe submitted additional information regarding Roe's interest in Doe dating back to May 2015. (AR 372-374.)

On 5/17/16, Doe sought assistance from the UCSB Office of the Dean of Students regarding an extension on a paper and Doe's frustration with Quillen and what Doe perceived as a lack of due process in the investigation process. The Dean's Office redirected Doe to Quillen. (AR 390-396.)

On 5/23/16, Quillen asked for a final debriefing interview with Roe and with Doe. Roe accepted. Doe deferred the interview until after final exams. (AR 24-25.)

On 5/25 and 5/27/16, Quillen provided Doe with information about how to file a complaint if Doe felt that he was being treated unfairly in the investigation process. (AR 22.)

On 6/28/16, Quillen presented Doe with the summary of evidence at a "final debrief interview.". (24-25, 177.) Doe presented Quillen with statements by students AS and SM. Quillen stated that his notes and pre-prepared questions regarding Quillen's interviews with AS and SM were the official record and that he would use those in his analysis. (AR 25-26)

On 6/30/16, Doe submitted an additional written statement. (397-399.)

On 8/1/16, Quillen submitted his report to the Office of Judicial Affairs (OJA). (AR 175-222.) The report has an extensive recitation of the contentions and responses. (AR 178-207.) The report then has an extensive summary of the evidence that suggests either consent or lack of consent, including acknowledgment of inconsistent statements, analysis of motives, and similar matters. (AR 207-220) Quillen's report credits Roe's assertion that her post-encounter actions, texts, and journal entry were her way of trying to normalize the encounter. (AR 214-216.) (See also AR 33:14-35:3.) The report concluded that Doe committed sexual assault in violation of the then applicable policy. (AR221-222.) The initial report recommended a two year suspension. (AR 175-222)

On 8/1/16, Quillen sent a letter to Doe stating that Quillen was forwarding the report to the OJA. (AR 506.) The letter informed Doe that he could meet with the OJA or he could submit a responsive written statement within 10 days. (AR 506.)

On, 8/15/16, Doe sent additional information to the Office of Judicial Affairs ("OJA") before the OJA was to make its decision. (AR 327-328)

On 8/19/16, the OJA issued its decision. (AR 327-329) The OJA considered Quillen's report and Doe's 8/15/16 submission of additional information.

On, 8/29/16, Doe filed an appeal to the Interpersonal Violence Appeal Review Committee ("IPVARC"). (AR 331-340.) On 9/30/16, the IPVARC sent Doe notice of the appeal hearing. (AR 342-351.)

The IPVARC set out the issues to be considered at the hearing. (AR 348-351.) The IPVARC procedures state that "You may not directly question the Complainant and the

Complainant may not directly question you. Instead, you may submit questions for the Panel to ask the other party." (AR 346.)

On 10/19/16, the IPVARC held a hearing. (AR 3-171.) The IPVARC did not conduct a de novo review. (AR 8:10-13.) The IPVARC considered only evidence that was submitted before 8/19/16. (AR 9:15-23.) The IPVARC reviewed the OJA's decision for procedural error and substantial evidence. (9:24-10:5, 348-352.)

The IPVARC stated that the Complainant and the Complainant may submit questions for the Panel Chair to ask the other party but that "Neither party is obligated to answer." (AR 13.)

At the IPVARC hearing, Quillen stated his procedure and conclusions. (AR 13-54.) Doe (through the Board) asked questions to Quillen. (AR 55-81.) Doe chose to incorporate his appeal summary with his closing statement. (AR 84) The Board asked questions to Doe, largely related to his late identification of witnesses. (AR 86-89.) Roe, through the Board, asked questions to Doe. (AR 89-93.) The IPVARC then heard from witnesses A.S., S.M., and N.N. (91-130.)

Doe then noted that it was 4:55, that he understood that the IPVARC had the room until 5:00, and requested that the IPVARC reconvene at another time. (AR 130.) The IPVARC stated the process needed to be completed that day, and that it would find a new room if necessary. (AR 131.)

Roe gave her statement. (AR 132-134.) The record does not reflect that Doe was permitted (through the Board) asked questions to Roe. Doe gave his statement. (AR 134-142.)

On 11/2/16, the IPVARC issued its decision. (AR 508-510.)

EVIDENCE

The request of the Regents for judicial notice filed 8/28/17 is GRANTED. (Evid Code 452(h).) Exhibit A, the former policy and guidance of the Department of Education is relevant because the Regents adopted the policies at issue in part in response to that policy and guidance.

Exhibit B, the United States Office of Victims of Crime website on "Using a Trauma Informed Approach" is relevant because Quillen stated that he used that approach. (AR 57, 61, 68, 214-215.)

The request of Doe for judicial notice filed 9/26/17 is GRANTED. (Evid Code 452(h).) The current policy and guidance of the Department of Education is relevant because the Regents adopted the policies at issue in part in response to the former policy and guidance. The court ultimately does not give any effect to the current policy and guidance because Roe's conduct was governed by the UCSB policies in effect at the time of the incident and the conduct of the academic proceedings was governed by the UCSB policies in effect at the time of the academic proceedings.

CLAIMS

Petitioner asserts that the Regents denied Doe a fair hearing because (1) Doe did not have adequate notice of the charge and a meaningful opportunity to respond to the charge; (2) the trauma informed approach to Roe's testimony shifted the burden, (3) there was structural error in the Regents' process, (4) Doe did not have an opportunity to question Roe, and (5) the Investigator altered and omitted evidence. The court identified, and the parties briefed (6) whether the IPVARC erred in reviewing the proposed decision for substantial evidence rather than undertaking an independent review of the evidence. Petitioner also (7) asserts that the final decision is not supported by the evidence.

DUE PROCESS GENERALLY.

The court considers due process issues using the court's independent judgment. (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073; *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 896.) The Regents must follow its own procedures and those procedures must provide a level of due process appropriate for the interest at stake.

(*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212-214; *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1077-1078.)

Under the UCSB Adjudication Framework, the investigator interviews witnesses and prepares a report. (AR 593-597.) There is no provision for providing information to the accused in the investigatory process.

On completion of the investigation, the investigator and the Student Conduct Office provide the complainant and respondent with a copy of the report. (AR 597.) The respondent may then schedule a meeting or submit additional information. (AR 597-598 [Adjudication Framework V.B.6].)

The complainant and respondent may appeal the Student Conduct Office's decision to an appeal body (the IPVARC). The UCSB Policy on Sexual Violence and Sexual Harassment states "The IPVARC shall serve as the decision-making body on the appeal." (AR 524.) The Adjudication Framework states there are four potential grounds for appeal. (AR 524 [Adjudication Framework, VI.A].) The Adjudication Framework also states that without regard to grounds of appeal that before the hearing the parties "will" submit the names of witnesses and a summary of the expected testimony (AR 600 [VI.F.1.b]) and that in the hearing the parties "will have the opportunity" to to present that information and "have the right " to hear all individuals who testify at the hearing and to propose questions to be asked of all individuals who testify at the hearing" (AR 601-602 [Adjudication Framework, VI.F.2.c and d].) The IPVARC is required to "reach a decision based on a preponderance of the evidence standard," and in doing so "shall take into account the record developed by the investigator and the evidence presented at the hearing, and may make its own findings and credibility determinations based o all the evidence before it." (AR 602 [VI.G.1 and 2].)

This procedure is adequate if the IPVARC conducts a de novo hearing and makes its decision based on the preponderance of the evidence presented at the hearing. (*Doe v. Regents*, 5 Cal.App.5th at 1077-1078.) As discussed below, this procedure is inadequate if the IPVARC sits

as an appeal body and reviews the investigator's report to determine whether it is supported by substantial evidence.

NOTICE OF AND OPPORTUNITY TO RESPOND TO THE CHARGE IN THIS CASE

Doe asserts he was not given notice of the charges or an opportunity to respond. This is legal and due process issue that the court reviews using the court's independent judgment.

On 3/2/16, Quillen sent a letter to Doe and on 3/18/16 met with Doe. On 4/13/16 Doe submitted a lengthy written statement. (AR 365, 368) On 4/29/16, Quillen interviewed Doe. (AR 21-22, 40.) On 5/11/17, Doe submitted additional information regarding Roe's interest in Doe dating back to May 2015. (AR 372-374.) On 6/28/16, Quillen presented Doe with the summary of evidence. (24-25, 177.) Doe presented Quillen with statements by students AS and SM. On 6/30/16, Doe submitted an additional written statement. (397-399.) The court finds that Doe was aware of the nature of the charge and that he had the opportunity to respond before Quillen prepared his report.

INVESTIGATOR QUILLEN'S USE OF THE TRAUMA INFORMED APPROACH

Doe asserts that Quillen's use of the trauma informed approach to Roe's testimony was both improper and shifted the burden to the accused. (AR 31-33) This is legal and due process issue that the court reviews using the court's independent judgment.

Quillen stated that he used a "trauma informed approach" when evaluating whether certain of Roe's post incident actions were consistent with consent or were consistent with post-traumatic behavior. (AR 46.) Quillen stated that the trauma informed approach is an understanding that persons who have suffered trauma can react in many different ways and that "a traumatic event can cause a complainant to act in counterintuitive ways contrary to expectations while processing in order to cope with a traumatic event." (AR 33:6-35:16.) Quillen stated his understanding that trauma can impact the way the brain processes and encodes

information and that it therefore affects memory. (AR 68:25-69:7.) Quillen referenced Roe's asserted trauma and the trauma informed approach repeatedly in his report and in his statements to the IPVARC. (AR 28:15-29:5; 33:14-35:16, 36:9-19, 45:15-46:23, 58:22-62:3, 64;19-21, 68:21-70:2, 214-218.)

When Doe asked Quillen if he had any background in psychology or neurology, Quillen stated, "So neither party is entitled to that information. So my office will not provide that information and they re not entitled to it." (AR 69:24-70:1.) When Doe asked Quillen to explain if Quillen relied on any peer reviewed studies that support the use of the trauma informed approach in investigations, Quillen stated, "I would say that strays into the information that I've received during the course of my trainings and preparation for this job. So neither party is entitled to that information and they will not receive it." (AR 77:8-19.) The IPVARC explained that the Title IX office decides what information is appropriate in IPVARC hearings and Quillen stated he was "100% confident that this is private employment information that neither party is entitled to, nor will they receive access to it." (AR 78:2-23.)

Doe asserts that the "trauma informed approach" is not well established. (Reply at 4:14-24.) The court finds the information on the approach in the United States Office of Victims of Crime ("USOVC") website is an adequate indication that it is an established approach. (Regents RJN, Exh B.) The USOVC website is concerned with how to work with complainants so that the interaction with law enforcement and participation in the prosecutorial process does not trigger re-traumatization. Quillen's description of, and use of, the trauma informed approach is not the same as the approach described in the USOVC website.

Doe asserts that Quillen's reliance on what he called the "trauma informed approach" was improper because Quillen never presented any evidence that this was an accepted theory. Quillen relied on the "trauma informed approach" as he understood it based on his training as an investigator. (AR 69:5-7.) Quillen can rely on training in neurology, psychology, and social science suggesting that persons who have suffered trauma can act in counterintuitive ways. This

would be similar to a trier of fact relying on expert testimony to explain psychological factors involved in the accuracy of eyewitness identifications, to address the perception that a battered woman is free to leave an abusive relationship, or to explain that confessions following the use of certain police interrogation techniques can be unreliable. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205.) (See also *People v. Page* (1991) 2 Cal.App.4th 161, 189.) In those situations, however, there is expert testimony to explain that what many people might think to be true is not true and the parties to the case can question the experts on the basis for their testimony.

In the IPVARC hearing, in contrast, Quillen stated that his evaluation of witness credibility relied on what he called the "trauma informed approach," but he did not provide any evidence that the approach was generally accepted and he refused to answer questions about the approach. This was very problematic given that Quillen's training regarding witness credibility was "beyond common experience." (Evid Code 801(a).) To the non-expert eye, Roe's texts in the days following the incident, Roe's second hand job, and Roe's journal entry that "yes I liked it" suggest that the incident was consensual or, at the least, that Roe would have a very difficult time proving by a preponderance of the evidence that it was not consensual. If an investigator relies on training that is "beyond common experience" then either the investigator must explain that training to both the parties and the IPVARC and answer questions about that training, or the IPVARC may draw an adverse inference from the lack of such an explanation. (AR 14:5-12.)

Doe asserts that Quillen's reliance on what he called the "trauma informed approach" created a very difficult situation for Doe. (Opening at 11:3-15; Reply 5:12-20.) Doe observes that this understanding can be used to excuse any statements or actions that are consistent with consent and therefore inconsistent with the charges. Quillen's report identifies evidence consistent with consent (AR 214-215), but Quillen stated that it was "limited in value in light of the Trauma–Informed Approach" (AR 35:9-11). As noted above, if the investigator relies on training that is "beyond common experience" then the investigator must explain more fully the

basis for his conclusion that actions that on their face suggest consent are actually the result of trauma.

Doe asserts that Quillen's reliance on what he called the "trauma informed approach" was improper because it implicitly assumed both a trauma and that the trauma was the 11/5/15 incident. There is evidence that Roe's stress predated the 11/5/15 incident. Student S.M. stated "Jane herself had shown signs of panic and distress before the incident." (AR 424.) Roe also texted on 11/13/15, a few days after the incident, "well, ive been going through hell in many ways .. and not because of him." (AR 408) There is also substantial evidence that Roe ended a three year term relationship at or about the time of the incident and had other stressors in her life. (AR 186 [Doe references end of Roe's three year relationship], 285 [same], AR 407-408 [Roe comment on difficulties with her dad]), 420 [AS comment on Roe's problems with [parents].) These are potential alternate sources of stress or trauma. That said, Roe stated that she suffered trauma on 11/5/15. Quillen could infer that that incident was the trauma and that the trauma affected her subsequent actions.

Doe asserts that the Quillen's reliance on what he called the "trauma informed approach" was improper because Quillen was not a trained psychologist. (Doe brief at 14:26-15:9.) Quillen was not diagnosing Roe - he was simply evaluating her testimony. Quillen could consider human experience and social science information and did not need to have professional psychoanalytic credentials to evaluate testimony and credibility.

The court finds that the IPVARC improperly relied on Quillen's evaluation of witness credibility under Quillen's understanding of what he called the "trauma informed approach" without requiring Quillen to present evidence that the approach had validity and permitting the parties to question Quillen on the validity of the approach.

It is unclear whether the members of the IPVARC were trained in what Quillen called the "trauma informed approach." If that were the case, then it would raise a different, and more serious, set of issues because then both the investigator and the trier of fact would be relying on

an unexamined approach to evaluating witness credibility without providing the parties information about that approach or an opportunity to question the validity of the approach.

INVESTIGATOR AS FACT FINDER AND RECOMMENDER OF SANCTIONS

Doe asserts that Quillen was improperly responsible for investigation, fact-finding, adjudication, prosecution, and recommendation of sanctions. This is legal and due process issue that the court reviews using the court's independent judgment.

"[A] legislature may adopt an administrative procedure in which the same individual or entity is charged both with developing the facts and rendering a final decision, and separate adversarial advocates are dispensed with." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 220.) (See also *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 93 ["There is no due process violation inherent in the fact that the chief of police imposes the initial discipline and renders the final decision whether to uphold the decision."'.) (See also *Doe v. Brandeis* (2016) 177 F.Supp.3d 561, 606 [noting danger of combining powers in a single individual].)

Under the California standard, it was appropriate for Quillen to investigate the claims, evaluate the claims, make recommend factual findings, and recommend discipline.

OPPORTUNITY TO QUESTION ROE

Doe asserts the procedure denied him the opportunity to question Roe. This is legal and due process issue that the court reviews using the court's independent judgment.

"There is no requirement under California law that, in an administrative hearing, an accused is entitled to cross-examine witnesses." (*Doe v. Regents*, 5 Cal.App.5th at 1084.) Under the Adjudication Framework, the investigator interviews witnesses and then submits a report to the Student Conduct Office (OJA), which then issues a decision. (AR 595-596.) There is no provision for cross-examination in the investigation phase.

If the respondent appeals the Student Conduct Office's (OJA's) decision to the appeal body (the IPVARC), then there is a formal hearing at which the accused can submit questions to the panel to ask of witnesses. (AR 602 [Adjudication Framework, VI.F.2.d].)

Doe did not have the opportunity at the IPVARC hearing to cross-examine Roe directly. This was consistent with both California law and the UCSB procedures. "There is no requirement under California law that, in an administrative hearing, an accused is entitled to cross-examine witnesses." (*Doe v. Regents*, 5 Cal.App.5th at 1084.) (AR 602 [Adjudication Framework, VI.F.2.d].)

Doe did have the opportunity at the IPVARC hearing to submit questions to the IPVARC that the IPVARC would then ask Roe. The IPVARC procedures state that "You may not directly question the Complainant and the Complainant may not directly question you. Instead, you may submit questions for the Panel to ask the other party." (AR 346.) At the hearing, the IPVARC stated that the Complainant and the Complainant could submit questions for the Panel Chair to ask the other party but that "Neither party is obligated to answer." (AR 13.) The IPVARC informed Roe and Doe that the IPVARC might take an adverse inference if they selectively decided not to answer questions. (AR 14:5-12.) Third party witnesses were not compelled to appear at the IPVARC hearing, so if they chose to not appear then there was no means to ask them questions. This is consistent with the IPVARC procedure. Furthermore, this is consistent with the due process required by California law in administrative proceedings regarding academic discipline.

The Regents argues that at the IPVARC hearing "Roe stated, through her questions, that there was no consent." (Opposition brief, 9:18.) Roe's submission of a question is not testimony. (CACI 105 ["The attorneys' questions are not evidence. Only the witnesses' answers are evidence."].) Roe's submission of a written question to the IPVARC did not give the IPVARC the opportunity to consider her demeanor. Roe's submission of written questions to

Doe is not equivalent to either Roe testifying or Roe answering questions that Doe submitted to the IPVARC.

The Regents argues that even if the limited ability to cross-examine Roe was a denial of due process that there was no prejudice because Doe did not list Roe as a witness in his pre-hearing filing (AR 489-497) and never submitted questions to be asked to Roe. In this regard, *Doe v. Regents*, 5 Cal.App.5th at 1093, states, "the record suggests that John was given the opportunity to submit questions for Jane in response to her testimony at the hearing, but he declined to do so. As such, we find no merit to his claim that he was not permitted to question Jane in response to her hearing testimony."

The court assumes, without deciding, that Doe was given due process because he was given an opportunity to submit questions to be asked of Roe. The court has concerns whether that is meaningful due process given that Roe was not required to answer the questions. The court has concerns with the IPVARC instruction that the IPVARC will draw no inference if a witness remains silent throughout a hearing but may draw an adverse inference if a witness chooses to participate selectively in the process. (AR 14:5-12.) That instruction would appear to discourage a complainant or witness from participating in the IPVARC hearing if the investigator had already found the complainant or witness to be credible. The court nevertheless finds that Doe suffered no prejudice because Doe did not take advantage of the opportunities provided.

IPVARC DID NOT FOLLOW THE WRITTEN PROCESS

The court finds that IPVARC did not follow the written process. This is legal and due process issue that the court reviews using the court's independent judgment.

The court raised this issue because the transcript of the hearing shows that the IPVARC stated both that it was not conducting a de novo review (AR 8:10-13) and not considering evidence submitted after 8/19/16 (AR 10:6-12) and that it was "solely responsible for determining the admissibility, relevance, and credibility of evidence" (AR 10:12-14.) (See also

143:4-11.) The IPVARC's pre-hearing notice also stated that it was reviewing the OJA's decision for procedural error and whether the decision was unreasonable based on the evidence submitted before 8/19/16 (AR 348-352) but also stated that the IPVARC was "solely responsible for determining the admissibility, relevance, and credibility of evidence." (AR 350.) The IPVARC's final decision stated that made its "decision independently based on a preponderance of the evidence" (AR 508) and then stated that it "evaluated whether the [OJA] decision as unreasonable based on the evidence using only the evidence in the Title IX investigative report" (AR 509). These statements conflict, as the IPVARC was either examining a fixed record under the substantial evidence standard or it was considering new testimony, evaluating credibility, and making an independent decision. The court's Order of 10/12/17 requested additional briefing.

The UCSB Policy on Sexual Violence and Sexual Harassment states "The IPVARC shall serve as the decision-making body on the appeal." (AR 524.) The Adjudication Framework states that the IPVARC is required to "reach a decision based on a preponderance of the evidence standard," and in doing so "shall take into account the record developed by the investigator and the evidence presented at the hearing, and may make its own findings and credibility determinations based o all the evidence before it." (AR 602 [VI.G.1 and 2].) The Adjudication Framework also states that without regard to grounds of appeal that before the hearing the parties "will" submit the names of witnesses and a summary of the expected testimony (AR 600 [VI.F.1.b]) and that in the hearing the parties "will have the opportunity" to to present that information and "have the right " to hear all individuals who testify at the hearing and to propose questions to be asked of all individuals who testify at the hearing" (AR 601-602 [Adjudication Framework, VI.F.2.c and d].)

The court reads the UCSB Policy and the Adjudication Framework as meaning that the IPVARC must make an independent determination based on the facts presented at the IPVARC hearing. The presentation of testimony at the IPVARC hearing also suggests the IPVARC is to conduct an independent review. If the IPVARC were limited to the evidence submitted to the

OJA, then the IPVARC could not consider demeanor, new facts, or inconsistent statements that were presented or observed at the IPVARC hearing.

The IPVARC's Appeal Decision states that it evaluated whether the OJA's decision "was unreasonable based on the evidence using only the evidence in the Title IX investigative report" and "The Committee found that the decision makers came to a sensible and replicable conclusion." (AR 509.) This is a review of the OJA's decision for substantial evidence. The court finds that the IPVARC erred by not following the UCSB Policy and the Adjudication Framework, undertaking an independent review of the evidence presented,[1] and making a decision based on a preponderance of the evidence standard.

The court also finds that the IPVARC's failure to make an independent review of the evidence and to consider the testimony at the IPVARC hearing was a denial of due process. The complainant and respondent do not get to ask each other questions (indirectly) until the IPVARC hearing. The right to (indirect) cross-examination is ineffective if it attaches only after the investigator and OJA have made the factual findings and the findings are reviewed for substantial evidence.

The Regents argues that there are three errors in this analysis. First, the Regents argues that Doe limited the grounds for his appeal and as a result was not permitted to present new evidence at the IPVARC hearing. The Adjudication Framework states there are four potential grounds for appeal. (AR 599 [Adjudication Framework, VI.A].) Doe appealed on the Ground 1 (procedural error in the investigation process), Ground 2 (OJA decision unreasonable based on the evidence), and Ground 4 (sanctions disproportionate to findings). Doe did not appeal on Ground 3 (new information). (AR 331-331.) The appeal was on an IPVARC form that identified only four grounds for an appeal.

[1] The IPVARC can consider the investigator's report as evidence at the IPVARC hearing. (*Doe v. Regents*, 5 Cal.App.4th at 1075-1076.)

The court finds that the UCSB procedures, the Adjudication Framework, and the appeal form are internally inconsistent and uncertain. The UCSB documents state that there can be only two substantive objections to an OJA decision. Under Ground 2 (OJA decision unreasonable based on the evidence), the student is limited to seeking review based on the evidence presented to the OJA. The appeal form section on Ground 2 expressly states, "Note: no new evidence will be considered in reviewing this ground for appeal." (AR331.) This presumably does not permit a student to testify at the IPVARC, to call witnesses, or to ask questions indirectly to witnesses, because all of that would be "new evidence." Under Ground 3 (new information), the student is limited to arguing that there is new, material, information that was unknown and/or unavailable when the OJA made its decision. This presumably does not permit any testimony by the investigator, by the complainant or respondent, or by any previously identified witness, as those persons were known and available in the investigative process.

Neither Ground 2 nor Ground 3 address Doe's ground for appeal – that in the credibility contest between Roe and Doe that the investigator and the OJA mistakenly concluded that Roe was more credible.[1] Asking the IPVARC to hear from the complainant and previously identified witnesses, to submit questions to those persons, to evaluate witness credibility, and to make a decision based on a preponderance of that evidence is neither Ground 2 (OJA decision unreasonable based on the evidence) nor Ground 3 (new information).

The Adjudication Framework informs students that they can testify at the IPVARC and can conduct indirect cross-examination. (AR 601-602 [Adjudication Framework, VI.F.2.c and d].) This suggests that they can present new information in the form of testimony without regard to the ground of the appeal. In the IVPARC hearing in this case, the IVPARC heard testimony on the substance of the incident even though the Regents now asserts that in a Ground 2 appeal

[1] The court surmises that many sexual misconduct cases are contests of credibility and that accused students appeal to the IPVARC because an IPVARC hearing is the only procedural venue for the accused to ask questions to the complainant.

the IVPARC is limited to reviewing the investigator's report and the OJA decision for substantial evidence. At the hearing, Quillen stated his procedure and conclusions (AR 13-54), Doe (through the Board) asked questions to Quillen (AR 55-81), the Board asked questions to Doe (AR 86-89), Roe, through the Board, asked questions to Doe (AR 89-93), and witnesses A.S. (AR 95-110), S.M. (AR 113-121), and N.N (AR 122-130) testified.

The Regents asserts that all of the testimony was limited to Grounds 1 and 2. For example, the IVPARC told witnesses S.M. and A.S. that their testimony was limited to the procedural issue of whether the investigator accurately and completely the statements they provided in the investigative process. (AR 96:14-20; 114:4-8.) There is a very fine line, if a line at all, between having a witness testify that the investigator did not accurately record the witness's statements (arguably a Ground 1 issue) and having a witness testify and provide "new evidence" that was not in the investigator's report (arguably a Ground 3 issue).

If, as the Regents now appears to argue, the right to indirect cross-examination on the substance of any given incident applies only to a Ground 3 appeal and even then applies only to witness who were not previously identified, then that must be stated more clearly. Furthermore, it would present due process concerns if an accused student could indirectly cross-examine the complainant at the IPVARC hearing only if the complainant was providing "new information." A reasonable reading of the right to indirect cross-examination is that it permits the questioning party to ask questions about "old information" that require the witness to show demeanor when answering. The demeanor, as well as the answers, would then be "new information."

Second, the Regents argues that the IPVARC did conduct a independent review of grounds 1 and 2. This confuses two issues. The IPVARC may very well have conducted an independent examination of the written record to determine whether the OJA's decision was supported by substantial evidence. The IPVARC did not, however, "reach a decision based on a preponderance of the evidence standard," and in doing so "take into account the record developed by the investigator and the evidence presented at the hearing." (AR 602 [VI.G.1 and

2].) The IPVARC's decision states clearly that it was reviewing the record before the OJA for reasonableness and was not making an independent de novo review of the written evidence and the evidence presented at the hearing. (AR 509.)

Third, the Regents argues that the Adjudication Framework, permits, but does not require, the IPVARC to make its own credibility determinations and factual findings. The Regents relies Adjudication Framework, VI.G.2, which states that the IPVARC "*shall* take into account the record developed by the investigator and the evidence presented at the hearing, and *may* make its own findings and credibility determinations based on all the evidence before it." (Emphasis added.) The distinction between "may" and "shall" is well established.

Applying the distinction between "shall" and "may" in Adjudication Framework, VI.G.2, would be inconsistent with the UCSB policies generally and raise due process concerns. The distinction would be inconsistent because UCSB policy and the Adjudication Framework state clearly elsewhere that "The IPVARC shall serve as the decision-making body on the appeal" (AR 524) and that the IPVARC makes the decision based on a preponderance of the evidence (AR 602 [VI.G.1].) If the IPVARC is making the decision based on a preponderance of the evidence, then it must "make its own findings and credibility determinations." As a matter of due process, it should be clear which person or body is responsible for making the decision. The IPVARC may give significant weight to the findings and determinations of the investigator/OJA while still conducting an independent review of the written record and the testimony at the hearing. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 818-819.) The IPVARC cannot, in its discretion, simply decide on a case by case basis whether to make its own findings and credibility determinations or review the investigator's findings and determinations for substantial evidence.

The court finds that the IPVARC's failure to make an independent review of the evidence and to consider the testimony at the IPVARC hearing was contrary to the UCSB policy and the Adjudication Framework.

The IPVARC's failure to make an independent review of the evidence resulted in prejudice to Doe. When, as here, the investigator has already considered inconsistent statements and made express or implied credibility findings, an independent (de novo) review of the evidence and a review of the OJA's findings for substantial evidence can lead to very different conclusions. Because the IPVARC used the substantial evidence standard, then it approved and adopted the investigator's and OJA's credibility determinations and findings even though the IPVARC might have reached a different conclusion based on the testimony presented at the IPVARC hearing. (*Doe v. Regents,* 5 Cal.App.5th at 1073-1074 [nature of substantial evidence review]. This means that the IPVARC reached its decision without independently evaluating the testimony of Roe and Doe at the hearing (or permitting indirect cross-examination). The court finds prejudice on the facts of this case.

IMPARTIALITY OF THE INVESTIGATOR

Doe asserts the Investigator altered and omitted evidence, which is an assertion that the Investigator was not impartial. This is legal and due process issue that the court reviews using the court's independent judgment.

Whenever "due process requires a hearing, the adjudicator must be impartial." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.) The Adjudication Framework states that the Investigator's obligation "to conduct a fair, thorough, and impartial investigation." (AR 596 [Framework, IV.D].)

"Absent a financial interest, adjudicators are presumed impartial." (*Today's* , 57 Cal.3d at 219.) "That party must lay a "specific foundation" for suspecting prejudice that would render an agency unable to consider fairly the evidence presented at the adjudicative hearing …; it must come forward with "specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Today's*, 57 Cal.3d at 221.)

The concerns about the impartiality of the investigator are intrinsically related to the role of the investigator in the process. If the IPVARC sat as a trier of fact, conducted a de novo hearing, and applied its independent judgment regarding the evidence, then the investigator was a witness at the IPVARC hearing and the IPVARC could consider whether the investigator's collection and evaluation of information was affected by bias, interest, or other motive. (Evid Code 780(f).) If, however, the IPVARC sat as an appeal body and reviewed the investigator's report and the OJA's resulting decision (AR 327-329) to determine whether they were supported by substantial evidence, then the investigator was, like a jury, primarily responsible for evaluating the credibility of the witnesses and making factual conclusions. As discussed above, the court finds that in this case the investigator was primarily responsible for evaluating the credibility of the witnesses and making factual conclusions. The court therefore considers whether there was an "unacceptable risk of bias" based on the investigator Quillen's role as the person responsible for collecting information, evaluating credibility, and making factual findings that the IPVARC then reviewed for substantial evidence.

Doe has not identified specific evidence demonstrating actual bias.

Doe has identified specific evidence demonstrating a particular combination of circumstances creating an unacceptable risk of bias. Doe's concerns go to Quillen's collection of and distillation of information. Before informing Doe of the charges against him, Quillen asked questions that had complainant's assertions embedded in them. (AR 19, 45.) This is the description of a leading question, but it is not improper in an investigation. Quillen on two occasions rejected witness statements submitted by Doe and stated that his interview notes were the official record and that he would use those in his analysis. (AR 23:1-5 [4/29/16]; 26:10-18 [6/28/16].) (See also AR 43-44 [Quillen decision to not interview witness A.S.].) This is problematic because it suggests that Quillen was reluctant to consider that his notes might not be complete and accurate. Quillen summarized some texts and omitted certain potentially exculpatory language. This is also problematic because it suggests that Quillen adopted a

prosecutorial approach and did not conduct the "fair, thorough, and impartial investigation" required by the Adjudication Framework. (AR 596.) At the IPVARC hearing, Quillen repeatedly responded to Doe's assertions with by stating that they were "demonstrably false." (AR 36:25, 45:2, 47:17, 49:2, 48:15, 51:14.) The tone of the phrase suggests that Quillen was a hostile witness rather than an impartial investigator, but it was in substance no different than Quillen's other repeated assertions that Doe's assertions were simply "false" or had "no basis in the University's policy."

The court applies its independent judgment and finds that the administrative record contains facts that overcome the presumption of impartiality and demonstrate an unacceptable risk of bias. The record suggests that in this case Quillen was unable to maintain the role of a neutral investigator and instead assumed the role of both prosecutor and fact finder. The court notes, by way of dicta, that it might have reached a different conclusion if the IPVARC had independently evaluated Quillen's report, testimony, and credibility.

EVIDENCE TO SUPPORT THE IPVARC DECISION

Doe asserts that the court should review the factual conclusions in the final decision under the independent judgment standard. The court applies the independent judgment standard in its review of the evidence if the matter at issue concerns a vested fundamental right. "A right may be deemed fundamental "on either or both of two bases: (1) the character and quality of its economic aspect; (2) the character and quality of its human aspect." (*Amerco Real Estate Company v. City of West Sacramento* (2014) 224 Cal.App.4th 778, 783.) (See also *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144-145.) Doe has a strong interest in his education (*Goldberg v. Regents of University of Cal.* (1967) 248 Cal.App.2d 867, 876), the claims of sexual assault have criminal overtones (Penal Code 243.4), and the finding of sexual assault may have a significant continuing effect of Doe's reputation and resume. These arguably could support a finding that Doe has a vested fundamental right.

The Court of Appeal has, however, resolved this issue and decided that in proceedings of this sort the trial court considers factual findings for substantial evidence. (*Doe v. Regents*, 5 Cal.App.5th at 1073-1074.) (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 [trial court must follow appellate authority].)

Doe asserts that IPVARC's final decision is not supported by the evidence. The record contains evidence that could support a variety of inferences. A hearing officer or other trier of fact may draw inferences from ambiguous facts. (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 170, 174.) A decision must, however, be based on substantial evidence, which is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Such evidence must be reasonable, credible, and of solid value." "In assessing whether substantial evidence exists, the court considers "all evidence presented, including that which fairly detracts from the evidence supporting the Board's determination." (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 585–586.) (See also *Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412.)

The court has found the errors in the administrative process. Therefore, the court does not reach the issue of whether on the evidence presented to the IPVARC the court might have found that the IPVARC's decision was supported by substantial evidence.

CONCLUSION

The court has found that the administrative process in this case failed to comply with the Adjudicative Framework and the law because (1) there is an unacceptable risk that the investigator was not unbiased, (2) the IPVARC improperly permitted Quillen to base his evaluation of credibility on what Quillen understood to be the "trauma informed approach," and (3) IPVARC conducted a substantial evidence review of the Quillen/OJA report instead of exercising its independent judgment in the review of the evidence.

The Petition of petitioner Doe for a writ of mandate directing the Regents to set aside and vacate the decision of the University of California, Santa Barbara's Interpersonal Violence Appeal Review Committee ("IPVARC") decision in Doe v. Roe (Title IX Case # 2016-0036) is GRANTED.

The court will prepare and enter a judgment. Doe is then responsible for preparing a proposed writ, submitting it to the clerk for signature, and serving it on the Regents. (Gov. Code 20626(a)(1); CCP 1096.)

Dated: November 15 2017

Thomas Rogers
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Doe vs. The Regents of the University of California
ACTION NO.: RG16843940

I certify that, I am not a party to the within action. I served the foregoing by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Mark M. Hathaway
Hathaway & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017

Alison Bernal
Nye, Peabody, Stirling, Hale & Miller
33 West Mission Street, Suite 201
Santa Barbara, CA 93101

I declare under penalty of perjury that the following is true and correct

Executed on November 16, 2017 at Oakland, California

Chad Finke,
Executive Officer/Clerk

by Shanika Monroe
Deputy Clerk