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FILED
Superior Court of California
County of Los Angeles
APR 12 2018
Sherri R. Carter, Executive Officer/Clerk
By _____, Deputy
Jennifer De Luna

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

JOHN DOE, an individual,

Petitioner,

v.

THE TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, a California corporation; TIMOTHY P. WHITE, an individual; and DOES 1 to 20 inclusive,

Respondents.

Case No.: BS167261

[Hon. James C. Chalfant, Department 85]

PETITIONER'S NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATE

Date: April 12, 2018
Time: 9:30 a.m.
Place: Department 85

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Court grants Petitioner's Petition for Writ of Mandate, pursuant to the attached statement of decision, which is now final.

WERKSMAN JACKSON
HATHAWAY & QUINN LLP

Dated: April 12, 2018

By: _____
MARK M. HATHAWAY
JENNA E. EYRICH
Attorneys for Petitioner

ATTACHMENT

5.

John Doe v. The Trustees of the California State University, BS 167261

Tentative decision on petition for writ of mandate: granted

Petitioner John Doe ("Doe") seeks a writ of mandate to compel Respondent the Trustees of the California State University ("CSU") to set aside its decision to expel Doe.

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

A. Statement of the Case

1. Petition

Petitioner Doe commenced this proceeding on December 30, 2016. The operative pleading is the First Amended Petition ("FAP") filed on March 6, 2017. The verified FAP alleges in pertinent part as follows.

In February 2015, Jane Roe ("Roe") was a freshman athlete and undergraduate student at California State University, Chico ("Chico State," sometimes "University"). Doe was an athletics trainer and graduate student at Chico State.

On February 1, 2015, Doe and Roe separately attended an off-campus house party near Chico State hosted by members of Chico State's basketball team. Around 200 individuals attended the party. Doe and Roe engaged in sexual activity during the party. After the sexual activity, Roe gave Doe her cell phone number and remained at the party with her friends.

Around the same time, Roe entered a relationship with fellow track team member, Geoffrey Brown ("Brown"). Seven months later, Brown heard a rumor that Roe and Doe engaged in sexual activity at the party. Brown confronted Roe about the incident. Roe told him, "I was raped by [Doe]." Brown became upset upon hearing this news and "threw a hissy fit."

On August 24, 2015, Brown initiated the Title IX investigation of Doe. Roe met with Chico State Athletic Director, Anita Barker ("Barker"), to discuss the incident. Barker then accompanied Roe to the Title IX Office to speak with Title IX Investigator Michael Polsan ("Polsan"). During the meeting with Polsan, Roe informed him that she had recorded the sexual activity with Doe on her cell phone. Roe described to Polsan what was allegedly contained on the recording. Polsan subsequently requested a copy of the recording, and Roe informed him that she had deleted it. Roe told Polsan that two witnesses heard what was on the recording: Emily Denton and Melanie O'Brien, two of Roe's friends.

After the meeting with Roe, Barker notified Title IX Coordinator Dylan Saake ("Saake") of Roe's allegations. On August 27, 2015, following a second interview with Polsan, Roe filed a formal Title IX complaint against Doe.

In a letter dated September 3, 2015, Polsan informed Doe that a Title IX investigation had been initiated against him. The letter did not disclose the identity of Roe or set forth allegations about the incident. On September 15 and October 2, 2015, Doe met with Investigator Polsan. At these meetings, Polsan did not provide Doe with any evidence or witness statements.

On October 13, 2015, Investigator Polsan issued his "Level I Investigation Report" to Saake. Polsan concluded that Doe "violated EO 1097 by engaging in sexual intercourse and oral

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sex with [Roe] while she was incapacitated and/or had withdrawn any consent given for sex with [Doe]. The finding is that [Doe] engaged in nonconsensual sex with [Roe]." Polsan incorrectly relied upon EO 1097 Revised June 23, 2015 and not EO 1097 Effective June 3, 2014. The former was not in effect at the time of the February 1, 2015 incident.

On October 23, 2015, Doe received a Notice of Investigation Outcome from Saake. Saake advised Doe that if he was not satisfied with the investigation, he could file an appeal with the Chancellor's Office ("Chancellor") within ten days. On November 6, 2015, Doe timely submitted his Notice of Appeal. On November 19, 2015, Doe received a letter from the Chancellor denying his request for review because the request was untimely.

Thereafter, Chico State notified Doe that the recommended sanction was suspension from Chico State for two years and denial of campus access during that time. Unwilling to accept this sanction, Doe sought and was granted a discipline hearing. Because appeal of the investigative findings was deemed untimely, Doe's discipline hearing was limited to determining appropriate sanctions.

On January 21, 2016, a hearing on the sanctions was conducted. Chico State appointed Tahj E. Gomes ("Gomes") to serve as the sanctions hearing officer. On February 4, 2016, Hearing Officer Gomes increased the sanction substantially and ordered Doe expelled. Doe subsequently received a final decision on discipline from Chico State's President upholding Hearing Officer Gomes's recommendation and increasing the sanction from suspension to expulsion from the CSU system, effective immediately.

On February 23, 2016, Doe filed a timely appeal of the sanction to the Chancellor. On March 1, 2016, Pamela Thomason ("Thomason"), System-wide Title IX Officer for the Chancellor, notified Doe that at the request of Chico State, the Chancellor's Appeals Unit would consider his previous appeal request submitted on November 6, 2015, concurrently with his appeal of the sanctions.

On April 21, 2016, Thomason issued a decision for the Chancellor's Appeals Unit, finding that Chico State "applied the newly revised EO, containing new policies and related definitions, retroactively to conduct that predated its adoption. As a result it is possible that [Doe] could have been held to a standard of conduct ... that was not in effect at the time of the incident." The matter was subsequently remanded back to Chico State to allow it to evaluate whether the evidence was sufficient to establish a violation of EO 1097.

On May 24, 2016, Doe received a revised Notice of Investigation Outcome from Saake. The Notice contained Investigator Polsan's opinion that Doe violated the policies set forth in the pre-revised EO 1097. Doe submitted a timely appeal of Saake's opinion. On June 17, 2016, the Chancellor denied Doe's appeal of the investigation findings.

On September 8, 2016, Doe submitted a letter to Hearing Officer Gomes for consideration of the recommended sanctions. Hearing Officer Gomes decided that no additional hearing or evidence was reasonably necessary and recommended expulsion. On September 30, 2016, the Chico State President accepted Gomes' recommended sanction.

Doe again appealed his sanctions to the Chancellor. On November 1, 2016, Thomason issued a decision for the Chancellor's Appeals Unit informing Doe that his sanctions appeal was denied.

Doe alleges that CSU committed procedural errors by failing to (1) accord due process to Doe, (2) provide Doe with an adequate, reliable and impartial investigation, (3) provide him with

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an equal opportunity to present relevant witnesses and other evidence, (4) ensure that the factfinder and decision maker have adequate training and knowledge regarding sexual violence, and (4) require documentation of all proceedings, such as written findings of facts and transcripts.

CSU's actions are invalid under Code of Civil Procedure ("CCP") 1094.5 because (1) CSU failed to grant Doe a fair hearing, or any hearing at all, (2) CSU committed a prejudicial abuse of discretion by failing to proceed in the manner required by law, (3) CSU's decision is not supported by the findings, and (4) CSU's findings are not supported by the evidence.

2. Course of Proceedings

On July 20, 2017, the court was informed that there was a lawsuit between Doe and Roe. As a result, the court determined that the parties, including Roe, should be identified in this action. Although there is no need for privacy, the parties continue to refer to themselves as Doe and Roe and the court continues that practice for convenience only.

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). There is no fundamental vested right to a private college education. Gurfinkel v. Los Angeles Community College Dist., (1981) 121 Cal.App.3d 1, 6. 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 CSU is not. While the issue is not free from doubt, both parties assume that the substantial evidence standard governs the court's review of CSU's decision. Pet. Op. Br. at 14-15; Opp. at 8-9. Therefore, the court will apply the substantial evidence standard.

"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 petitioner 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

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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 petitioner 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. University Student Discipline

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." Goss, *supra*, 419 U.S. at 582.

Even where constitutional due process does not apply, common law requirements for a fair hearing under CCP section1094.5 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

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to provide the accused student with only a list of rules that may have been violated. Ibid.

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. UCSD, *supra,* 5 Cal.App.5th at 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. Id. 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. USC, *supra*, 246 Cal.App.4th 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. University Executive Orders

1. Revised EO 1097[1]

[1] EO 1097, effective June 2, 2014 ("2014 EO 1097"), sets forth the CSU policies and procedure for addressing student complaints of sexual misconduct in effect at the time of the Doe's alleged misconduct. EO 1097 was and was revised on June 23, 2015 ("Revised EO 1097"). CSU

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a. Title IX Investigation

To report alleged violations of Chico State's sexual discrimination, harassment, or misconduct policies, a student may submit a formal written complaint to the Title IX Coordinator. AR 31. The Title IX Coordinator shall meet with the complainant as soon as possible, but no later than ten working days after the complaint has been received. AR 35. At this intake interview, the Coordinator must (1) explain to the complainant the investigation procedure and timelines and answers questions about them, (2) inform the complainant of his/her rights, including the right to have an advisor, (3) provide the complainant with an opportunity to complete and sign a complaint form, and (4) discuss any interim remedies. Id.

Prior to or during the Title IX Coordinator's interview with the respondent, the Coordinator must (1) explain the investigation procedure and timelines and answer any questions about them; (2) inform the respondent of his/her rights, including the right to have an advisor throughout the process; (3) provide the respondent with a copy of Revised EO 1097, (4) provide the respondent with a description of the complainant's allegations against the respondent, (5) provide the respondent a full opportunity to respond to the allegations, including scheduling other meetings, accepting documentary evidence, and accepting respondent's list of potential witnesses, and (6) discuss any interim remedies. AR 36.

The Title IX Coordinator shall promptly investigate the Complaint or assign the task to another Investigator. AR 37. Investigations must be "sufficient, appropriate, impartial, and in compliance with [Revised EO 1097]." AR 37. The complainant and respondent must have equal opportunities to present relevant witnesses and evidence in connection with the investigation. AR 37. The University decides what evidence is relevant and significant to the issues raised. AR 41.

Upon inquiry, the parties shall be advised of the status of the investigation. AR 37. Before reaching a final conclusion or issuing a final investigation report, the Investigator shall advise the parties, orally or in writing, of any evidence on which the findings will be based, and give them an opportunity to respond to the evidence. AR 37-38. The Investigator shall give careful consideration to any further relevant evidence, information, or argument provided by the parties. AR 38.

Within 60 working days of the intake interview, the investigation must be completed unless extended by agreement of the parties or other legitimate reason. AR 38, 41. The Investigator must prepare an investigation report which shall include a summary of the allegations, the investigation process, the preponderance of the evidence standard, a detailed description of the evidence considered, and appropriate findings. AR 38. Relevant exhibits and documents, if any, shall be attached to the written report. Id.

The Investigator shall provide the report to the Title IX Coordinator, who shall review it for compliance with Revised EO 1097. AR 38. Within ten working days of the investigation report's issuance, the Title IX Coordinator shall notify the complainant and respondent in writing of the outcome of the investigation. AR 38. The notice must include a summary of the allegations, the investigation process, the preponderance of the evidence standard, the evidence considered, the findings of fact, a determination as to whether Revised EO 1097 was violated, and any remedies to be afforded to the complainant. Id. The notice must also advise the complainant and respondent

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ultimately applied the procedures from the Revised EO 1097 and the policies from the 2014 EO 1097 to Doe's student discipline. AR 902-03.

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of their right to file an appeal to the Chancellor under EO 1097 and to request a copy of the final investigation report with exhibits/attachments. Id.

b. Appeal of Investigation

The appeal must be filed with the Chancellor no later than ten working days after the date of the Notice of Investigation Outcome. AR 39. 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 Revised EO 1097; or (3) new evidence has come to light that was not available at the time of the investigation. Id. The issues and evidence raised on appeal shall be limited to those raised and identified during the investigation, unless new evidence becomes available after the investigation process. Id. The Chancellor's review does not involve a new investigation by the Chancellor. AR 40.

If the Chancellor determines that the investigation should be reopened to cure any defects in the investigation, the investigation will be remanded to the campus and reopened at the campus level. AR 40. The campus then will complete the reopened investigation and provides the Chancellor with an amended investigation report. Id. Upon receipt of the amended investigation report, the Chancellor then will contact the appealing party to determine whether that party wishes to continue with the appeal. Id.

The Chancellor's appeal decision is final and concludes the Complaint and Chancellor review process. AR 40.

2. EO 1098[2]

a. Sanctions Hearing

The findings and conclusions of the investigations conducted in accordance with Revised EO 1097, once any appeals are exhausted, are final and binding. AR 68.

Following exhaustion of appeal rights from the investigation, the University's Student Conduct Administrator must notify the charged student in writing to schedule a conference.[3] AR 64. The purpose of the conference is to determine if a proposed agreement on sanctions can be reached. AR 65. The notice shall inform the student of the proposed sanctions or range of sanctions. AR 64. If no agreement can be reached at the conference, the Student Conduct Administrator shall issue a Notice of Hearing to the student and the matter will proceed to a sanctions hearing. AR 66.

The hearing is limited to determining appropriate sanctions because the findings of the investigation are binding and no longer under review. AR 68. A notice to appear at the hearing must be sent to any University-related witnesses and to the complainant. AR 67. The Student Conduct Administrator and the respondent may present evidence and ask questions of their witnesses. AR 68. The hearing officer may ask questions of the parties, witnesses, Student Conduct Administrator, or Title IX Coordinator. Id. The hearing officer shall ask any questions

[2] EO 1098, revised June 23, 2015, is the operative CSU policy and procedure for student sanctions hearings. AR 62-85.

[3] The Student Conduct Administrators are trained on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability. AR 54.

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of the complainant and other witnesses on behalf of the charged student, unless the complainant or witness waives this requirement and agrees to direct question from the charged student. AR 69. The investigation report prepared pursuant to Revised EO 1097 shall be entered into evidence at the hearing. Id. Formal rules of evidence applied in courtroom proceedings do not apply to the sanctions hearing. Id.

Following the hearing, the hearing officer shall submit a written report to the president recommending sanctions, if any, or additional remedies. AR 70. The president shall review the hearing officer's report and issue a decision adopting, altering, or rejecting the sanctions. Id. The president shall send notice of the decision to the respondent. Id.

The parties may file an appeal of the president's decision of appropriate sanctions to the Chancellor no later than ten working days after the date of the president's decision letter. AR 71. The Chancellor's appeal is limited in scope 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 72. The Chancellor's decision is the final sanction. Id.

E. Statement of Facts[4]

1. Incident

Roe's handwritten statement recounts how, after accepting a drink from someone at a party on February 1, 2015, "things went black until I 'woke up' from that unconscious stage to [Doe] having sex with me in the laundry room." AR 952. She had just met Doe and was "mortified":

> [W]hen I woke up to him having sex with me I told him to stop. I pushed him off of me and instead of stopping and going away, [Doe] picked me up and brought me out of the back door to the side of the house which was an ally-like place. He then put my back against the wall and pulled down my pants. He tried to continue having sex with me but I closed my legs tight.".
>
> [I] ... wanted to get the heck away from him and so I tried and he wouldn't let me leave until he pushed my head down and made me give him oral sex. When he took his hand off my head I stood up and told him my friends needed me [and] to

[4] CSU objects to a portion of the administrative record lodged by Doe. While most or all of the additional documents (AR 1304-1417) should properly be included in the record, CSU points out that Doe failed to make a motion to augment to add them. LASC 3.231(g). The court agrees. Doe cannot simply add documents to the record at his choosing; he must make a motion to augment. Because of this procedural failure, most of AR 1304-1417 has not been considered. The only exception is Investigator Polsan's handwritten notes. AR 1325-38, and 1340-52. These notes are included because they are both at issue and could potentially aid CSU on the issue of notice. All other portions of AR 1304-1417 have not been considered.

CSU asks the court to judicially notice the complaint, cross-complaint, and dismissal of a lawsuit between Doe and Roe. These documents are subject to judicial notice, if relevant. Evid. Code §452(d). Other than demonstrating that the parties' identities need not be protected, the lawsuit serves no relevance. The request is denied.

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let me go. AR 952-53.

Roe stated that, while against the wall, she "started to record their conversation on her cell phone," where Doe "admitted to being her trainer and that 'he had been wanting this for a long time.'" AR 953.

The next day, Roe told her friend, Melanie O'Brien ("O'Brien"), what had happened and played the recording for her. She later played the recording for her friend Emily Denton ("Denton"). AR 939, 940, 942. O'Brien recalled hearing on the recording:

> Doe: "You come into the training room every day. I see you all the time."
> Roe: "Stop. Please stop."
> Doe: "I've been waiting for this for a long time."
> Roe: "No, no, stop, stop." AR 942.

O'Brien "reiterated that she could hear [Roe] saying 'no' a number of times." AR 942. Denton recalled hearing Roe on the recording saying "This isn't right, you're my trainer," and Doe replying: "No, it's fine." AR 940. She also heard Roe protest "I don't want to be here," "I need to find my friends," and "I want to leave." AR 940. According to Denton, Roe told Doe "over and over that she wanted to leave." AR 940.

Doe professed that the sexual intercourse and oral sex with Roe "all seemed consensual to him and she seemed to be participating in the activity." AR 939. When asked about relationships with students, Doe denied having had sex with any other students and that it is frowned upon but not official policy. AR 940. When confronted with evidence of a prior sexual encounter with another athlete, Doe admitted it and said that he'd forgotten about it when he provided his initial statement that he had never had sexual encounters with other athletes. AR 940. At the hearing on sanctions, Doe testified: "I don't know, like, how are you supposed to really recall every sexual relationship you've ever had." AR 477.

2. Title IX Process

a. The Complaint

On August 24, 2015, CSU Chico student Brown reported to the track coach that his girlfriend, Roe (a freshman track athlete), told him: "I was raped by [Doe]." AR 937, 941.

On August 25, 2015, Roe was asked to speak with Title IX Investigator Polsan about Brown's report. AR 86. The next day, the track coach walked Roe to the Athletic Director Barker who reported the alleged misconduct to Title IX Coordinator Saake. AR 937. Roe informed Saake about the February 2015 incident and said she had a recording of the sexual activity on her cell phone, made without Doe's consent. AR 1315. Later that day, when asked to produce the recording, Roe claimed she had deleted it but "there were witnesses who heard it." AR 1315. Roe provided the names of two witnesses who heard the recording. AR 1315.

On August 27, 2015, Roe made a formal Title IX complaint. AR 87-89. Roe also participated in an intake interview with a Deputy Title IX Coordinator. AR 937. At this same time, Chico State issued an interim remedy, temporarily relieving Doe from his position as an athletic trainer pending the results of its investigation. Id.

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b. The Investigation

From August 27 to September 3, 2015, Investigator Polsan interviewed Roe and three witnesses (Denton, Brown, and Bekka Bahra ("Bahra")). AR 937. On September 1, 2015, Roe gave her handwritten account of the February 1, 2015 incident. AR 90-92. In her account, Roe reported the incident and also accused Doe of sexually assaulting another student. AR 92.

On September 3, 2015, Doe was notified of a complaint filed on August 27, 2015, but was provided no details about the allegations. AR 98-99.

On September 15, 2015, Doe attended his initial investigation interview with Investigator Polsan. AR 938. Between September 21 and 30, 2015, Polsan interviewed three more witnesses (O'Brien (again), Robert Duncan ("Duncan"), and Chris Magalotti ("Magalotti"). AR 938.

On October 13, 2015, Investigator Polsan issued his investigation report to Title IX Coordinator Saake, finding that Doe "violated [Revised] EO 1097 by engaging in sexual intercourse and oral sex with the Complainant while she was incapacitated and/or had withdrawn any consent given for sex with the Respondent." *See* AR 119.

On October 23, 2015, Title IX Coordinator Saake sent Doe via email a Notice of Investigative Outcome. AR 121-31. This notice summarized the evidence considered by Saake, including summaries of the accounts of Roe, Doe, Denton, Brown, Bakra, O'Brien, Duncan, and Magalotti (AR 123-27), an analysis of the evidence (127-30), including Denton's and O'Brien's persuasive recollections concerning the phone recording evidence (AR 128) and Doe's lack of credibility in initially denying a previous sexual relationship with a student athlete (AR 129), and Investigator Polsan's conclusion that Doe was guilty of sexual misconduct against Roe on the night of February 1, 2015 pursuant to Revised EO 1097. AR 122. Doe was notified that he could appeal the decision to the Chancellor within ten working days. AR 130.

On November 6, 2015, student representative Jeremiah Sanders sent a letter to the Chancellor providing formal notice of Doe's intent to appeal on all grounds. AR 210. On November 17, 2015, attorney Cynthia Convey from the Chancellor incorrectly concluded that since the Chancellor had not received Sanders' letter until November 10, 2015, the appeal was untimely and she rejected Doe's appeal. AR 212. Doe appealed the finding of untimeliness, but Chico State moved forward with a sanctions hearing.

c. The Sanctions Hearing

On January 6, 2016, Doe was notified that the proposed sanction was suspension from the University for two years. AR 216. Doe did not accept the sanction agreement and chose to move forward with a sanctions hearing. AR 213.

The sanctions hearing was held on January 21, 2016 before Hearing Officer Gomes. AR 350. Roe did not appear at the hearing. She was told prior to the hearing that she had the right to attend, but did not have to do so. AR 510. The only witnesses at the hearing were Doe and Title IX Coordinator Saake. AR 491. None of the witnesses included in the investigation report attended the hearing, and there is no indication that they were contacted to attend. *See* AR 346-482.

At the sanctions hearing, Hearing Officer Gomes stated that he would not address whether Doe did or did not commit the misconduct of non-consensual sex with Roe; that fact was established. AR 352. The underlying conduct was relevant only to the extent that it affected the appropriate sanction. AR 352.

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Investigator Polsan explained that the proposed two-year suspension was intended to keep "potential victims" safe, as well as to "send a message to the respondent as well as other people who may or may not be engaged in sexual misconduct on campus." AR 376. Doe repeatedly informed Hearing Officer Gomes that he had completed all but three online units of his master's degree program and would only need to return to campus for two days to take his exit exam. AR 415, 461, 477.

On February 4, 2016, Hearing Officer Gomes issued a report recommending the sanction of expulsion from Chico State. AR 491-95. Gomes cited specific factors, including the "expressly unconsented sexual conduct (forced/coerced oral copulation), intoxication, age/experience/power balance differential and the existence of a prior sexual relationship with another female athlete," and that Doe "provided no evidence whatsoever regarding any remorse, or other mitigation." AR 494-95. Despite Doe's repeated testimony that he only needed three online units to graduate and would not be on campus, Gomes misstated that Doe had one and a half years left to complete his education at the University, and that it was "within the realm of possibility, and perhaps probability" that Doe and Roe would encounter each other if Doe was allowed to continue his education. AR 494.

d. The Expulsion

On February 9, 2016, Chico State's president, Paul Zingg, upheld the expulsion. AR 497-98. Doe was informed of his right to appeal the sanction to the Chancellor within ten working days. AR 500.

Doe's expulsion from Chico State was processed before he exhausted his appeal rights. AR 514. The University ultimately conceded that the withdrawal should be reversed pending Doe's appeal. AR 513.

On February 12, 2016, while preparing his sanctions appeal, Doe noticed the factual errors in Hearing Officer Gomes' report. AR 515. Gomes had apparently confused Doe's case with another student assisted by Doe's student advisor. AR 515. Doe contacted Investigator Polsan to correct Hearing Officer Gomes' mistakes, and also objected to the Hearing Officer's reliance on hearsay evidence of an unlawful recording in violation of Penal Code section 632, which states that "no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." AR 515.

After consultation with President Zingg, Title IX Coordinator Saake responded that the alleged errors "would not have changed the President's decision" and counseled that "these matters are best included as part of your appeal to the Chancellor's Office." AR 517.

e. The Appeal of the Investigation Findings and Sanctions

On February 23, 2016, Doe submitted his appeal of the sanctions to the Chancellor. AR 520.

On March 1, 2016, Attorney Thomason, the Chancellor's System-wide Title IX Compliance Officer, notified Doe that, at the request of Chico State, the Chancellor would consider his appeal for both the sanctions and the findings because his appeal of the findings[5] had been

[5] For ease of reference, the court will refer to the investigation findings as the finding of

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timely post-marked. AR 704. Doe was given five additional days to submit his appeal of the findings. AR 705.

On March 8, 2016, Doe submitted his revised appeal of the finding of guilt. AR 712-899. On April 21, 2016, the Chancellor issued its order. AR 904. Because Chico State had improperly applied the Revised EO 1097 policies to conduct that occurred in February 2015, the CO remanded the matter to Chico State to "evaluate whether the evidence is sufficient to establish a violation of [the 2014] EO 1097...." AR 905. Chico State was directed to apply the policies and applicable definitions in EO 1097 (2014). AR 905. The Chancellor further instructed: "In making that evaluation, the campus may also consider, as appropriate, respondent's arguments concerning the adequacy of the evidence and of the investigation, including those arguments raised on appeal." AR 905-06.

The Chancellor noted that Penal Code section 632 bars consideration of unconsented to recordings, except a complainant's own rape. AR 906. Therefore, it was not error to consider such evidence. AR 907. The Chancellor stated that evidence of Doe's consensual sex with another student athlete was properly considered for his credibility as well as for his disregard of expectations from trainers. AR 907. The Chancellor concluded that the Revised EO 1097 provides adequate due process because "the respondent has notice of the charges against him and has an opportunity to respond to any evidence upon which any finding of responsibility will be based." AR 908. The right to appeal provides further due process by assuring that one person does not control the decision. AR 908.

The Chancellor also stated that new evidence need not be considered in the remanded matter. AR 908. "Depending upon the nature of any revised findings, the campus may determine that the same hearing officer can reevaluate the sanction in light of the reevaluated findings. Alternatively, depending on the nature of the revised findings, the campus could determine to reopen the hearing for supplemental evidence or to conduct a full rehearing." AR 909.

e. Remanded Investigation

On April 27, 2016, Doe's attorney-advisor informed Chico State that Doe had completed his degree requirements, including successfully passing his master's examination, and had petitioned and paid for graduation. AR 926. Doe was residing out-of-state and would not be returning to campus, precluding any possibility of a hostile or harmful campus environment for Roe or Chico State students. Id. Doe requested that Chico State issue his master's degree. AR 926. Doe also called for the recusal of Investigator Polsan and Hearing Officer Gomes from any further involvement in Chico State's proceedings, as their improper actions had given rise to his successful appeal. AR 926. Chico State denied Doe's objections and remanded the case to Investigator Polsan, who conducted no further investigation. AR 932-35.

On May 19, 2016, Investigator Polsan submitted an amended investigation report finding that the 2014 EO 1097 policies were violated "by [Doe] engaging in sexual intercourse and oral sex with [Roe] while she was incapacitated and/or had withdrawn any consent given for sex with [Doe]." AR 948. Chico State provided a Notice of Investigative Outcome to Doe and Roe. AR 955-81. The results were forwarded to the Chancellor for further action on Doe's appeal. AR 980.

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f. Appeal from Remanded Investigation Finding of Guilt

On June 8, 2016, Doe appealed the amended investigation report's finding of guilt. AR 984. The Chancellor upheld the investigator's finding. AR 999-1001. The Chancellor held that (1) the outcome was supported by the evidence, (2) no procedural errors required reversal, and (3) new evidence had not been offered. AR 999-1001.

g. Remanded Sanctions Decision

The matter was remanded to Chico State to re-evaluate its decision regarding appropriate sanctions. AR 1000. No re-hearing was held on sanctions. Doe's advisor, and later Doe, submitted letters reiterating that Doe had completed his master's degree requirements and would not return to campus. AR 1075. Doe pointed out that he had lost his employment at the University, as well as many chances for advancement, and further discipline served only a punitive purpose. AR 1075. Doe attested that he had received numerous job offers from prominent sports teams, and a decision to continue to withhold his degree would result in the potential loss of opportunities and income. AR 1075. Finally, Doe emphasized that he had already served a *de facto* one-year suspension due to the ongoing nature of the Title IX administrative proceedings. AR 1075.

The University asked the Hearing Officer not to consider this information, and that it "be stricken from what is currently under submission." AR 1073.

On September 27, 2016, Hearing Officer Gomes completed his amended report, incorporating his earlier report by reference. AR 1079-80. Gomes chose not to consider the post-remand information Doe provided to mitigate the sanction. AR 1079. Gomes concluded that Doe's completion of his degree requirements did not mitigate the sanctions imposed. AR 1080.

On September 30, 2016, after being forwarded the report, President Hutchinson expelled Doe. AR 1258.

h. Appeal from the Remanded Sanctions

Doe submitted an appeal of the remanded sanctions decision. AR 1292-99. On November 1, 2016, the Chancellor upheld the expulsion. AR 1303.

F. Analysis

Petitioner Doe seeks a writ of mandate to compel Respondent CSU to set aside its decision to expel him.

As a preliminary matter, Chico State and the Chancellor committed a series of mistakes in this disciplinary case. First, Chico State improperly applied disciplinary policies from Revised EO 1097 to Doe's conduct occurring in February 2015 when it should have applied the 2014 EO 1097 policies. AR 905. Second, Hearing Officer Gomes' February 4, 2016 report recommending expulsion mistakenly stated that Doe had one and a half years left to complete his education at the University, and that it was "within the realm of possibility, and perhaps probability" that Doe and Roe would encounter each other if Doe was allowed to continue his education. AR 494. In fact, Doe had only three credit units left and a master's exam to take. AR 515. Gomes apparently confused Doe's case with another student assisted by Doe's student advisor. AR 515. Third, Doe's expulsion from Chico State was processed before he exhausted his appeal rights (AR 514), and the University had to reverse the expulsion pending Doe's appeal. AR 513. Fourth, as the Chancellor acknowledged, Doe submitted a timely appeal on the issue of his guilt which was

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improperly rejected. AR 705.

These mistakes ultimately were corrected, but they made the disciplinary hearing process more complicated. They do not show any lack of good faith on the part of the CSU disciplinary system, however.

1. Unfair Hearing

a. Proper Notice

Petitioner Doe contends that Chico State provided him with insufficient notice in two discrete ways. Pet. Op. Br. at 9.

First, Doe contends that Roe's complaint was untimely filed. He argues that the 2014 EO 1097 required a complaining student to file a complaint within 60 days of the alleged act. AR 31. Chico State's application of the Revised EO 1097 eliminated the time deadline for a complaint altogether. This retroactive application of Revised EO 1097 denied Doe timely notice of Roe's complaint. Pet. Op. Br. at 9.

Doe misreads the 2014 EO 1097, which provides that in order for a Title IX complaint to be timely, the student must file the complaint within 60 calendars after the most recent incident or 30 calendar days after the end of the academic term in which the most recent incident occurred. AR 15. Notwithstanding this requirement for the complaining student, the campus may determine that circumstances warrant initiating an investigation even if a complaint has not been filed and independent of the intent or wishes of the student. AR 15. Chico State was entitled to accept Roe's Complaint filed six months after the incident pursuant to the 2014 EO 1097.

Second, Doe acknowledges that the 2014 EO 1097 permits notice of the charges to be given before or during the respondent's initial interview. AR 36. He received only a vague notice in the September 3, 2015 letter from Investigator Polsan that he may have violated University policies involving Sexual Harassment/Violence" without notification of the date and location of the misconduct, its nature, or the identity of his accuser. AR 98. Doe admits that Investigator Polsan complied with the 2014 EO 1097 at the end of his September 15, 2015 initial interview by giving him notice of the charge that he had sex with Roe at a party on February 1, 2015 without her consent. AR 1332. Doe argues, however, that this notice did not comply with fair procedure because it fails to afford him an opportunity to respond to the allegations. USC, *supra*, 246 Cal.App.4th at 241. Pet. Op. Br. at 10.

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. However, this opportunity to rebut does not have to take place in the initial interview. Chico State was not precluded from interviewing Doe 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

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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.

Nonetheless, Doe is correct that he received inadequate notice of the charge. In the September 3, 2015 letter from Polsan, Doe was not provided with notice of any specific provision he may have violated; he was told only that he may have violated Harassment/Violence policies in EO 1097. At the end of his September 15, 2015 interview, Investigator Polsan notified Doe: "[C]omplaint alleges you (*sic.*) sex that night, didn't fully consent (*sic.*) is reporting." AR 1332.[6] 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. USC, *supra*, 246 Cal.App.4th at 243-44. It is insufficient to provide the accused student with only a list of rules that may have been violated. Ibid. The notice given to Doe never identified any specific portion of EO 1097 violated, the definitions of sexual assault, sexual battery, acquaintance rape, and consent, that consent may be withdrawn, that an inebriated person cannot consent, and Chico State's theories of responsibility for him. *See* AR 7-8.

CSU responds that Doe received enough information to enable him "to explain his version of the facts" during the initial interview. Opp. at 11 (citing USC, *supra*, 246 Cal.App.4th at 242). But it did not. Doe would not necessarily have known, for example, that CSU policy is that an inebriated person cannot "consent" to sexual activity. AR 6-7. The notice was inadequate.

b. Opportunity to Defend

(i) The Evidence Against Doe

Petitioner Doe contends that he was denied a fair opportunity to defend himself because he did not receive any evidence before Investigator Polsan made his finding of guilt on October 13, 2015. Doe did not receive the names of witnesses, summaries of witness statements, or Investigator Polsan's witness interview notes before Polsan made his guilt finding. Pet. Op. Br. at 10-11.

CSU responds that it supplied Doe with (1) the names of the witnesses against him and oral reports of the witnesses' testimony before Polsan issued his investigative report and (2) written accounts of the witnesses' testimony before the Chancellor's appeal hearings. Opp. at 12.

Doe's argument implicates the hearing required by fair procedure. 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. Even where constitutional due process does not apply, common law requirements for a fair hearing under CCP section1094.5 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. This principle is embodied in CSU's rules: "Before reaching a final conclusion or issuing a final investigation report, the Investigator shall have ... given the

[6] Investigator Polsan conducted a follow-up interview of Doe on October 2, 2015, but there is no indication that Doe received any further information about the charge. AR 938, 1340-52.

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Parties an opportunity to respond to the evidence, including presenting further relevant evidence, information or arguments that could affect the outcome. Revised EO 1097; AR 37-38.

As Doe argues, his hearing on guilt can only have been conducted by Investigator Polsan, whose report that was approved by Title IX Coordinator Saake. This report was the only determination of guilt by any fact-finder. The appeal to the Chancellor from this guilt determination wass not a *de novo* hearing; it was limited to appellate issues of (1) the sufficiency of the evidence, (2) procedural error, and (3) whether new evidence requires remand. AR 39, 999-1001. Doe had no opportunity to present evidence on guilt for the Chancellor's fact-finding. Then at the sanctions hearing, guilt is established. AR 68. Doe's sanctions appeal was limited to the reasonableness of the sanction and procedural error. AR 1302.

Hence, Doe received, at best, a paper hearing before Investigator Polsan as reviewed by Title IX Coordinator Saake. Fair procedure may require some form of live evidentiary hearing on guilt at which Doe, the decision-maker, and witnesses are present, and where Doe could contest his guilt. A live hearing may particularly be necessary where the issue of guilt is principally a credibility contest between the accused and accuser. However, a student disciplinary hearing need not include all the safeguards of a criminal trial. *See* Andersen v. Regents of University of California, (1972) 22 Cal.App.3d 763, 770 ().

The court will assume without deciding that Chico State was entitled to conduct solely a paper hearing on the issue of Doe's guilt.[7] Administrative hearings are often informal, and may be based on written evidence only. Where an agency makes a decision based upon one party's unilateral submission of information and documents without considering evidence from opposing parties, no hearing occurs within the meaning of CCP section 1094.5. 300 DeHaro Street Investors v. Department of Housing and Community Development, ("300 DeHaro") (2008) 161 Cal.App.4th 1240, 1250. Purely documentary proceedings can satisfy the hearing requirement of CCP section 1094.5 so long as the agency is required by law to accept and consider evidence from both sides. Friends of the Old Trees v. Department of Forestry & Fire Protection, (1997) 52 Cal.App.4th 1383, 1391. In that circumstance, there still must be something in the nature of a hearing – "an adversarial process in which the agency resolves disputed facts after affording interested parties an opportunity to present evidence." 300 DeHaro, *supra*, 161 Cal.App.4th at 1251.

In this case, Investigator Polsan was both the presenter of evidence for Chico State and its hearing decision-maker, as approved by Title IX Coordinator Saake. This procedure -- where the decision-maker also wears the hat of prosecutor -- is an acceptable administrative practice in some instances. *See* Veh. Code §14122(b) (DMV hearing officer also presents evidence for department). Again, the court will assume without deciding that Polsan could be both prosecutor and decision-maker for Doe's informal hearing.

For his hearing on guilt, Chico State was required to offer Doe the opportunity to explain his version of the events and present evidence with knowledge of the factual basis of the accusation against him. USC, *supra*, 246 Cal.App.4th at 240. Chico State clearly failed to provide Doe with this opportunity. Doe was not informed of the evidence and information on which Investigator Polsan relied until Title IX Coordinator Saake sent him the Notice of Investigative Outcome. AR 121-31. This notice summarized the evidence considered by Polsan, including summaries of the

[7] CSU requires an evidentiary hearing for sanctions, and it is odd that a similar hearing is not required for guilt.

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accounts of Roe, Doe, Denton, Brown, Bakra, O'Brien, Duncan, and Magalotti (AR 123-27), an analysis of the evidence (127-30), including Denton's and O'Brien's persuasive recollections concerning the phone recording evidence (AR 128) and Doe's lack of credibility in initially denying a previous sexual relationship with a student athlete (AR 129), and Investigator Polsan's conclusion that Doe was guilty of sexual misconduct against Roe on the night of February 1, 2015 pursuant to Revised EO 1097. AR 122. This disclosure of evidence for the first time as part of the decision on guilt clearly deprived Doe of an opportunity to knowledgeably respond to the accusation against him in violation of fair procedure and CSU's own policies.[8]

(ii) Investigator's Notes

Doe also contends that he did not receive Investigator Polsan's notes which would have assisted him in developing his defense. Pet. Op. Br. at 11-12. Doe argues that UCSD only tolerated the university's failure to produce the investigator's notes for two reasons: (1) the complainant testified at the hearing thereby providing the accused and hearing officer with sufficient opportunity to question her and probe the accuracy of the investigator's report, and (2) the student was not prejudiced by not receiving the investigator's notes from interviews with 14 witnesses because these 14 witnesses discussed claims which were eventually dropped. Id.

CSU argues that UCSD does not require that Doe be given Polsan's interview notes unless he could be prejudiced without them. UCSD, *supra*, 5 Cal.App.5th at 1096. Doe failed to show any difference between the interview notes and the interview summaries he received. Instead, he was well informed of the substance of the testimony against him through the Investigation Report and Roe's written statement, both of which Doe received as exhibits in his appeal to the Chancellor. AR 829-34, 844-62. Opp. at 13.

Admitting that disclosure of the investigator's notes could be critical in an accused student's ability to propose questions, the UCSD court declined to prescribe a bright line rule "especially when [the accused] has not shown that he was prejudiced by the absence of the interview notes." UCSD, *supra*, 5 Cal.App.5th at 1096. Finding the nondisclosure of investigator notes permissible, the UCSD court stated, "we cannot conclude the hearing was unfair based on [the university's] refusal to provide [the accused] with those notes." Id. at 1098. The UCSD court continued: "[The accused] has not shown he was prejudiced by [the university's] failure to provide him with [interview notes]. In other words, the lack of [interview notes] did not prohibit [the accused] from having a meaningful opportunity to present his defense." Id.

UCSD stands for the principles that disclosure of investigator notes to the accused student is a case-by-case determination based on the accused's need to propose questions, and that the accused must show prejudice from non-disclosure to his ability to present a defense. Doe shows neither in his opening brief, despite the fact that he now possesses Investigator Polsan's notes

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[8] Investigatory Polsan prepared an amended investigation report after the remand on May 19, 2016. AR 936-48. Doe had the witness interviews from Investigator Polsan's previous report by then, and the Chancellor's order, permitted, but did not require, new evidence to be taken on the issue of guilt. AR 908. However, Investigator Polsan conducted no further investigation and Doe had no additional opportunity to rebut the accusation of guilt. AR 937 ("The evidence gathered in the original Level I Investigative Report in this matter will be used to determine whether or not there was a policy violation of EO 1097 (2014).").

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pursuant to a California Public Records Act request.[9] In reply, Doe contends that significant discrepancies exist between the investigator's notes and Polsan's investigation report. Reply at 6-7. New evidence/issues raised for the first time in a reply brief are not properly presented to a trial court and may be disregarded. Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333. The alleged discrepancies should have been raised in Doe's opening brief and are deemed waived.

In sum, Chico State failed to follow fair procedure, and CSU policy in not providing Doe with the evidence against him, and an opportunity to rebut it, before making a decision on his guilt. Doe has not shown that Chico State failed to comply with that law and policy in not disclosing Investigator Polsan's notes.

c. Opportunity to Question Roe and Witnesses

Petitioner Doe contends that Chico State was obligated and failed to provide him with the opportunity to question Roe, even if indirectly, where the adjudicator's finding of guilt may turn on credibility. Pet. Op. Br. at 12.

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.

CSU argues that Doe was provided with the opportunity to indirectly question Roe and other witnesses. CSU contends that, pursuant to EO 1097, Polsan advised the parties of the evidence upon which the findings would be based and gave the parties an opportunity to respond to the evidence. Opp. at 14.

CSu is wrong. The record, including Polsan's investigative report cited by CSU, contains no indication that Doe was given the opportunity to pose questions to Roe or other witnesses. Indeed, this conclusion follows from the fact that Doe was never given a chance to respond to the evidence in Polsan's report and finding of guilt.

d. Impartiality

Petitioner Doe attacks Polsan's impartiality, contending that Polsan acted as a prosecutor, not a neutral adjudicator, in evaluating the evidence. Doe contends that not a single person supported Roe's account that she was incapacitated, and important witnesses were not sought for interview. Polsan also failed Id. Roe's recording is suspect because Doe did not see her recording their activity and it is unclear how O'Brien and Denton identified his (Doe's) voice on the recording. Id. Doe contends that no records were sought to determine whether there was any interruption in Roe's training to support his claim that she was not fearful of him. Id. Pet. Op. Br. at 14.

The right to a fair procedure includes the right to impartial adjudicators. Rosenblit v.

[9] The parties debate whether the notes should be included in the record. Pet. Op. Br. at 12, n.7; Opp. at 8, n.5. Petitioner contends that they should be in the record because they were relied upon by the decision-maker (Polsan) on the issue of guilt. Reply at 6. The court agrees.

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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's arguments are unpersuasive for several reasons. First, the court has assumed without deciding that Polsan could act as both prosecutor and decision-maker. Doe has presented insufficient law on this issue for it to be decided. When a party asserts a point, but fails to support it with reasoned argument and citation to authority, the point may be treated as waived. Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784, 85; Solomont v. Polk Development Co., (1966) 245 Cal.App.2d 488 (point made which lacks supporting authority or argument may be deemed to be without foundation and rejected).

Second, Doe's arguments about additional investigation concern the competency and adequacy of the investigation, not the bias/prejudice of the investigator. As CSU points out (Opp. at 14), the Revised EO 1097 empowered Chico State to decide what evidence is relevant and significant to the issues raised. AR 41.

Third, Doe has not presented concrete facts that Investigator Polsan was actually biased in favor of Chico State or against Doe such that he forfeited his neutrality as an adjudicator.

e. Structural Error

Doe contends that CSU's Title IX sexual misconduct process is permeated with structural error because Chico State's and the Chancellor encouraged the withholding of evidence, provided Doe with no opportunity to view or test the veracity of evidence, held no hearing where he could test the accuracy and sufficiency of the evidence, unlawfully relied upon the purported surreptitious recording of the sexual encounter, and interpreted the evidence in the light most favorable to Roe. Pet. Op. Br. at 8-9.

Structural error is error that "permeate[s] the entire conduct of the trial from beginning to end, or affect[s] the framework within which the trial proceeds." U.S. v. Recio, (9th Cir. 2004) 371 F.3d 1093, 1101. Structural errors not susceptible to harmless error analysis are those that go to the very construction of the trial mechanism — a biased judge, total absence of counsel, the failure of a jury to reach any verdict on an essential element. People v. Anzalone, (2013) 56 Cal.4th 545, 554. A structural error requires *per se* reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred. Id.

There should be little doubt that Chico State's failure to (1) give notice "reasonably calculated to apprise" Doe of the specific rules that he was alleged to have violated and the factual basis for the accusation (USC, *supra*, 246 Cal.App.4th at 240), (2) follow fair procedure and CSU policy by not providing Doe with the evidence against him, and an opportunity to rebut it, before making a decision on his guilt, and (3) give Doe an opportunity to pose questions to Roe or other witnesses was structural error that permeated the entire disciplinary process. Even if it was not, Doe has adequately shown prejudice requiring reversal from the issues, questions, and witnesses that he would have presented. Pet. Op. Br. at 13, 14; Reply at 6-7.

As a result of CSU's failure to follow fair procedure, the Petition must be granted.

2. Substantial Evidence

The court will evaluate whether substantial evidence of Doe's guilt was presented in order to decide whether the writ will be to require a new hearing or to reinstate Doe without further

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hearing.

Petitioner Doe contends that the investigation's findings are not supported by substantial evidence, as the sexual activity with Roe was consensual. Pet. Op. Br. at 15. He argues that Roe's statements are not reliable because of her memory lapses which conveniently abated to the extent that she could remember Doe and the alleged misconduct. Id. Doe further contends that Roe is not reliable because her complaint was brought several months later after her boyfriend learned of the incident, and her operation of a cellphone after suddenly regaining awareness and while engaging in sexual activity stretches credulity. Id.

Substantial evidence supports Chico State's decision. Roe testified that the rape occurred and Doe testified that it did not. Investigator Polsan considered Doe less credible in light of his statements about a prior sexual incident with another athlete. Roe's credibility was strengthened by two witnesses who corroborated her account and the recording's sordid contents. By itself, Roes' evidence is substantial.

Even if the court were to apply its independent judgment to the credibility issue, Doe's attempts to undermine Roe's credibility on this record are unpersuasive. Doe insinuates that Roe told her boyfriend that she was raped because she wanted to preserve their relationship. To this end, Roe allegedly concocted a story about memory lapses and a recording. According to Doe, it is entirely plausible that the three friends — Roe, Denton, and O'Brien — colluded to fabricate an account of a fictitious surreptitious recording to support Roe. Pet. Op. Br. at 13.

Rather than trying to preserve her relationship with her boyfriend, the evidence suggests that Roe tried to keep the incident private until she could do so no longer and felt compelled to inform her boyfriend. Supporting this theory, Roe states that she became discrete in how and when she used the training room and she became increasingly uncomfortable in Doe's vicinity. AR 939 *see also* 940 (Denton's testimony that Roe stopped coming to the training room as much). Further, it appears that Roe's trauma/fear grew worse as she unintentionally relived the incident on two separate occasions: (1) when she attended a Title IX compliance meeting two weeks prior to contacting her coach to report the incident and (2) when she revisited the house where the incident occurred. AR 939, 941.

The audio recording also possesses evidentiary value.[10] Two witnesses corroborated that it depicted what sounded like nonconsensual sexual activity. Denton heard the recording and heard Roe utter statements such as "This isn't right, you're my trainer," "I don't want to be here," and "I want to leave." AR 940. In response, Doe gave unresponsive assurances. Id. O'Brien also heard the recording and recounted hearing Roe say "Stop. Please stop." AR 942. O'Brien stated that the male voice on the recording sounded like Doe. Id.

Sufficient evidence was presented for Chico State to reasonably conclude that Doe was guilty and for the sanction of expulsion.

G. Conclusion

The petition for writ of mandate is granted. A writ will issue directing CSU to set aside its findings and Doe's expulsion, and accord him a new hearing or take such other action in its discretion that is consistent with this decision.

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[10] Doe does not sufficiently challenge the admissibility of this recording to show that Roe was sexually assaulted, and this issue is waived. *See* Reply at 10.

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Doe's counsel is ordered to prepare a proposed writ and judgment, serve it 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 May 24, 2018 at 9:30 a.m.

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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 April 12, 2018, I served the foregoing document described PETITIONER'S NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATE all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Brian Villarreal, Esq.
University Counsel
The California State University Office of the Chancellor
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Long Beach, CA 90802-4210
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ATTORNEY 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 April 12, 2018 in Los Angeles, California

Yesenia N. Alvarado