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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DIVISION

JOHN DOE, an individual,

Petitioner,

v.

CLAREMONT MCKENNA COLLEGE,

Respondent.

Case No. BS158692

[~~PROPOSED~~] JUDGMENT

Petition Filed: October 30, 2015
Dept: 82
Judge: Mary H. Strobel

12/16/2016

The Petition of John Doe for Writ of Administrative Mandate came on regularly for hearing on November 15, 2016, in Department 82, before Mary H. Strobel, Judge of the Los Angeles County Superior Court, presiding, with proof of service on all necessary parties being shown to the satisfaction of the Court. Mark M. Hathaway and Jenna E. Eyrich, of Werksman Jackson Hathaway & Quinn LLP, appeared for Petitioner, and Apalla U. Chopra, of O'Melveny & Myers LLP, appeared for Respondent Claremont McKenna College.

The Court considered the entire Administrative Record of the underlying disciplinary proceedings before Respondent. The Court considered the points and authorities and briefs submitted by all parties, and heard oral argument. On November 15, 2016, during hearing on this Petition, this Court directed that Petitioner's Petition for Writ of Administrative Mandate should be denied, finding Petitioner had not shown Respondent denied him a fair trial and that substantial evidence supported Respondent's final administrative decision. This Court hereby adopts its tentative decision, attached as Exhibit A, in its entirety, except to add that Respondent's decision is supported by substantial evidence regardless of whether a presumption of correctness, as described in *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817, applies. In accordance with this Court's decision on the Petitioner for Writ of Administrative Mandate:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that:

1. The Petition for Writ of Administrative Mandamus is denied; and

2. Judgment is hereby entered in favor of Respondent and against Petitioner.

IT IS SO ORDERED.

Dated: 12/15/16

Mary Strobel

Hon. Mary H. Strobel
Judge of the Superior Court

#1

John Doe,

v.

Claremont McKenna College,

BS158692

Judge Mary Strobel
Hearing: November 15, 2016

Tentative Decision on Petition for Writ of Mandate: DENIED

Petitioner John Doe ("Petitioner") seeks an administrative writ of mandate compelling Respondent Claremont McKenna College ("Respondent") to set aside its decision imposing a one-year suspension and other discipline on Petitioner in connection with an alleged sexual assault.

Respondent's Objection to Administrative Record

Petitioner has included with the administrative record nine pages of material marked "DISPUTED; MAY NEED TO AUGMENT." (AR 490-498.) The pages are excerpts of documents in the administrative record over which Petitioner has placed a text box contained a "Reading Ease" metric. Extra-record evidence may be admitted if, in the exercise of reasonable diligence, the relevant evidence could not have been produced or was improperly excluded at the hearing. (CCP § 1094.5(e); *Pomona Valley Hosp. Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 100.) Petitioner has not moved to augment the record and has not argued that the requirements of section 1094.5(e) are satisfied. Respondent's objection to pages 490-498 of the record is SUSTAINED.

Statement of the Case

The College's Sexual Misconduct Policy and Process

The policies and procedures at issue are the College's Discrimination, Harassment, Sexual Harassment, and Sexual Misconduct Policy ("Policy") and its Civil Rights Grievance Process ("Process"). The Policy prohibits "sexual assault," that is, "any sexual intercourse, however slight ... that is without consent or by force." (AR 457.) "Consent" requires "an affirmative, conscious decision by each participant to engage in mutually agreed-upon (and the conditions of) sexual activity." (AR 459.) Sexual activity is not consensual unless there is "a clear and mutual understanding of ... a willingness to do the same thing, at the same time, in the same way." (Ibid.) "Consent may be withdrawn by any party at any time. Recognizing the dynamic nature of sexual activity, individuals choosing to engage in sexual activity must evaluate Consent in an ongoing manner...." (AR 459-460.)

EXA

When the College receives a report of conduct by a Claremont student that, if true, violates the Policy, it uses its Process to respond to the report. (AR 470-479; see summary at Oppo. 3-4.)

The October 4, 2014 Incident

On October 4, 2014, Petitioner and Jane Roe separately planned to attend the "Rage in the Cage" party on Claremont McKenna's campus. Petitioner and Roe had briefly met through a mutual friend prior to October 4, 2014, but did not know each other well. (AR 27; see AR 60, 73.) Roe told the investigator that she and several friends met at a friend's dorm room in Beckett Hall before the party at 9:30 p.m., but Roe did not drink any alcohol. (AR 28, 73.) Roe and her friends left Beckett Hall around 10:30 p.m., but stopped at a lounge party at Phillips Hall, where Petitioner lived, on their way to the "Rage in the Cage" party. (AR 28, 73.) According to Roe, Petitioner, who had "clearly been drinking," invited Roe back to his room and encouraged her to take shots. (AR 74.) Roe told investigators she took eight shots while she was in Petitioner's room before leaving again for the "Rage in the Cage" party. (AR 74.) Her friend, Tara Smith, told the investigator she saw Roe in Petitioner's room sometime after 10 p.m., and that Roe was "definitely intoxicated." (AR 98.) Petitioner denies inviting Roe back to his room before the "Rage in the Cage" party. (AR 64, 71-72.)

After arriving at the "Rage in the Cage" party, Roe called Petitioner from the cell phone of a mutual friend, Isaac Jackson and asked Petitioner to meet her at a fountain on campus. (AR 46, 74.) Petitioner did not know Roe was the caller, and believed he was meeting Isaac Jackson; however, when he arrived to the fountain he saw Roe. (AR 60.) Roe and Petitioner consensually kissed by the fountain for several minutes, and both agreed to go back to Petitioner's room. (Ibid.)

Petitioner and Roe engaged in protected vaginal sex approximately 10 times from approximately 11:30 pm to 1:00 am. (AR 72, 75, 147.) It is undisputed that the protected vaginal sex was consensual. Petitioner had difficulty maintaining an erection; Petitioner later attributed this to "whiskey dick." (AR 60, 69; see also AR 108.) After some of the attempts at protected sex, Roe would perform oral sex on Petitioner to aid in his erection. (AR 60, 91.) Both Petitioner and Roe recall that Petitioner did not have condoms on hand and needed to obtain them from his roommate's desk and from the RA's room. (AR 69, 75.)

After the eleventh (or so) attempt at protected sex, Petitioner had vaginal sex with Roe without a condom. According to Petitioner, Petitioner and Roe made a mutual decision to not use a condom. At his interviews, he initially did not recall the specific words, but also recalled that Roe "asked him not to ejaculate inside of her and he agreed." (AR 60.) Petitioner was only able to penetrate Roe in missionary style. Roe did not say no or physically attempt to remove him. (AR 60.) According to Roe,

Petitioner started getting rough. Petitioner took off the condom and started intercourse again. Roe told him to stop, but he would not. He said it will be okay. He held her down and did not let her move while continuing to have sex. (AR 75.) Roe stated that she laid there and endured until Petitioner passed out on top of her, at which point she left. (AR 75.)

Immediately after leaving Petitioner's dorm room, Jane Roe reached out to four friends, who reported she was "'distraught," "panicked," and "freaking out." (AR 30, 75, 39, 103.) Roe told her friends she was worried she was pregnant. She did not say then that she was sexually assaulted. (AR 39, 103, 108.) Roe then purchased a Plan B pill from a vending machine at Pomona College, around 1:17 a.m. (AR 75, 173.)

Petitioner's and Jane Roe's Post-Sexual Intercourse Conduct

The next morning, October 5, 2014, Petitioner sent Roe text messages stating that he did not remember what happened the night before and asked if he had sexually "assault[ed]" her. (AR 146.) Roe replied "No haha you did not," and that "we really should talk about it considering you didn't use a condom." (Ibid.) Roe stated: "you were extremely drunk ... [b]ut I can tell you what happened later if you want." (Ibid.) Roe and Petitioner discussed meeting up later that day after Petitioner offered to purchase the Plan B pill and pregnancy tests for her. (Ibid.) Petitioner met with Roe in his car near Scripps College and handed Roe the pregnancy tests. Roe gave Petitioner a special Marvel comic book as a gift. (AR 117.) Roe sent Petitioner text messages later that day about how "comics aren't as fun if you don't have someone to share/talk about them :p." (AR 147.) Roe asked Petitioner to text her soon to hang out. (Ibid.)

The following day, October 6, 2014, Roe went to urgent care to obtain treatment for vaginal bleeding and bruising. (AR 76-77, 175.) In response to doctor inquiries, Roe denied being sexually assaulted. (AR 75-76.) A medical report dated October 6, 2014 stated, "Exam is unremarkable. Recommend pelvic rest until symptoms resolve. Recommend STD testing in 2 weeks." (AR 175.) As a result of her injuries, Roe "could only hobble" and had to skip classes. She "brought a tempurpedic [sic] donut to sit on" when she returned to class. (AR 77.)

On October 6, Roe texted Petitioner to come by so they could talk and she could explain everything. (AR 147-149.) Roe did not tell Petitioner in this conversation that he assaulted her. (AR 77.) On October 7, Roe texted Petitioner and they engaged in a discussion about comic books. (AR 77.) On October 9, Roe texted Petitioner about meeting the next day, but he asked for a rain check. (AR 31.) On October 11, a mutual friend told Petitioner that Roe was not pregnant. (AR 31.)

Petitioner later told people "he literally fucked [Roe] so hard that he put her in the hospital." (AR 65.) He gave himself the nicknames "bonehammer" and "dickhammer" in conversations with friends. (AR 65.)

On January 4, 2015, Petitioner texted Roe asking Roe to send him a picture of the intake form from her visit to urgent care because his friends did not believe that Roe had to go to the hospital after having sex with him. (AR 129-130, AR 150.) Roe had written on the intake form that the cause of her injuries was "excessive sex over a prolonged period of [time]." (AR 135.) Roe sent Petitioner a photo of her intake form and added, "It is hilarious. I couldn't even keep a straight face when telling the doctors. I had to tell my teachers I fell off my skateboard as an excuse for skipping class." (AR 132.)

In February 2015, Petitioner's friends sent him a fake Valentine's Day gram purporting to be from Roe. (AR 118, 138, 236.) The poem on the card read, "Roses are red, Violets are blue, You broke my vagina, So FUCK YOU. Love, [Jane Roe]." (AR 137-138.) Petitioner took a photo of the card and sent it to Roe to thank her for the Valentine's gram. (AR 118.)

After Petitioner sent Roe a picture of the card, Roe requested to speak with Petitioner in person. In response, Petitioner stated he could only meet at 6:30 a.m. (AR 32, 151.) Roe decided to file a Title IX complaint. (AR 81-82.) Roe reported Petitioner to Sally Steffen, Deputy Title IX Coordinator at Scripps College, on March 5, 2015. (AR 26.)

Disciplinary Proceedings

On March 10, 2015, Claremont and Scripps College jointly initiated an investigation. Claremont retained Katherine J. Edwards as an investigator. (AR 26.) Petitioner was notified on March 16, 2015 that Claremont "received a complaint regarding an allegation of sexual assault against [Petitioner] from [Jane Roe.]" (AR 488.) The March 16, 2015 notice provided Petitioner links to the Policy, which defined "sexual assault" and "consent," as well as the Process. (Ibid.)

The Investigator interviewed Petitioner a week later, on March 23, 2015, regarding the sexual assault. (AR 60.) This interview lasted approximately two hours, during which time Petitioner was accompanied by his Support Person, attorney Michael Flanagan. (Ibid.) He participated in follow-up interviews on April 8, 2015, and April 15, 2015. (AR 67, 69.) During these interviews, Petitioner was asked about, and provided lengthy responses to, whether his sexual encounter with Roe was consensual -- including, specifically, whether Roe consented to unprotected sex. (E.g., AR 60 ["[Unprotected sex] was mutual because he said this is not going to work and they came to a mutual decision."].) Petitioner also submitted documentary evidence, including text messages and a time line of events. (AR 113.)

In addition to interviewing Petitioner, the Investigator interviewed Jane Roe and 14 other witnesses. The Investigator also gathered approximately 90 pages of

documents, including text messages. She then completed the Preliminary Report and posted it to a secure web portal for the parties to review on May 2, 2015. (AR 27.)

Petitioner submitted a five-page response to the Preliminary Report and underlying evidence, including by requesting specific additional investigatory steps in response to the witness interview statements. (AR 9-13.) The Investigator reviewed the request and decided to (1) interview an additional witness on May 11, 2015, and (2) clarify the statement of a witness who had already been interviewed, as Petitioner requested. (AR 27.) The Investigator and Title IX Coordinator thereafter concluded that the investigation was complete. (Ibid.)

On May 19, 2015, the College issued the eight-page Final Report, along with the witness statements and documentary evidence. (AR 26.) The College also convened the Investigation and Review Committee, which was composed of two appointed, trained faculty member "Community Representatives" alongside the Investigator. (AR 19.) On May 21, 2015, Petitioner submitted a lengthy Final Statement to the Committee. (AR 224.) Petitioner also gave a verbal statement at the beginning of the Committee's May 22, 2015 meeting. (AR 208.)

The three-person Committee unanimously determined, by a preponderance of the evidence, that Petitioner sexually assaulted Roe in violation of the Policy by having unprotected sex with her without affirmative consent and over her objections. (AR 221-22.) The College notified Petitioner of the findings and his right to appeal on June 2, 2015. (AR 223.) On June 9, 2015, Petitioner submitted a 22-page written appeal. (AR 290.) The College appointed an Appeals Officer, who reviewed and considered Petitioner's appeal, but ultimately denied it on June 30, 2015. (AR 415.)

Petitioner submitted a 25-page Consideration of Sanctions statement on July 8, 2015. (AR 312.) On August 11, 2015, Jefferson Huang, Vice President for Student Affairs, issued the following sanctions: a one-year suspension; eight sessions of counseling on the topic of alcohol and sexual relationships; one year of Conduct Probation upon Petitioner's return to Claremont McKenna College; a "no contact order" prohibiting contact with Jane Roe; an order preventing Petitioner from drinking alcohol on Claremont's campus until his 21st birthday; and an order prohibiting Petitioner from visiting Scripps' campus for as long as Roe is a student. (AR 421-422.)

Procedural History

On October 30, 2015, Petitioner filed a verified petition for writ of administrative mandate.

On December 15, 2015, Respondent filed its verified answer to the petition.

On May 27, 2016, Respondent filed its motion to redact the administrative record, or, in the alternative, to seal the administrative record. The court received an opposition and reply to the motion. The court took the matter under submission and allowed Respondent to make an offer of proof as to whether the names of certain witnesses in the administrative record should be granted. On September 6, 2016, the court ordered that the names of eight witnesses should be redacted.[1]

On September 20, 2016, Petitioner filed his opening brief in support of the petition. The court has received Respondent's opposition, Petitioner's reply, and the administrative record.[2]

On November 3, 2016, without leave of court, Respondent filed a sur-reply. On November 9, 2016, also without leave of court, Petitioner filed a response to the sur-reply. As the court has received additional briefing from both parties, the court exercises its discretion to consider it.[3] The court admonishes counsel for both parties to request leave of court to file additional legal briefs.

Standard of Review

Fair Hearing

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

"The use of the words 'fair trial' [in section 1094.5] does not mean that [the employee] was entitled to a formal hearing under the due process clause." (*Pomona College v. Sup. Ct.* (1996) 45 Cal.App.4th 1716, 1730.) "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.'" (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 240.)

Independent Judgment or Substantive Evidence Standard

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[1] The parties have used pseudonyms for some student witnesses.

[2] Contrary to Respondent's assertion, the reply was timely filed and served on November 2, 2016, pursuant to the court's minute order dated March 22, 2016. (See CCP § 1005(b).)

[3] Some of the arguments made in reply were not fully developed in the moving brief and were expanded on in reply. (See Sur-Reply 1-5.) However, as the court has considered the sur-reply and response, there is no prejudice to Respondent.

Petitioner seeks a writ of mandate under California Code of Civil Procedure section 1094.5. CCP section 1094.5 does not 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.) In all other cases, the Court determines whether the findings are supported by substantial evidence in light of the whole record. (See CCP § 1094.5(c).)

In his opening brief, Petitioner asserts that the court should exercise its independent judgment on the evidence because Respondent is a private entity.[4] (OB 10.) The cases cited by Petitioner do not support the proposition that the independent judgment test applies simply because Respondent is a private entity. Rather, the independent judgment test applies if the case involves a fundamental vested right. Petitioner has made no argument that his one-year suspension from Claremont, a private university, involves a fundamental vested right.[5] The cases cited by Respondent suggest that there is no fundamental vested right in a private college education. (See Oppo. 13 and fn. 14-15.) (See e.g. *Gurfinkel v. Los Angeles Community College Dist.* (1981) 121 Cal.App.3d 1, 6 [no fundamental right to higher education under California constitution]; *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 238, 239, 248-249 [applying substantial evidence test to private university's finding of sexual misconduct; citing rule that "An appellate court in a case ***not involving a fundamental vested right*** reviews the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court."].)

Based on the foregoing, the court applies the substantial evidence test. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*California Youth Authority v. State Personnel Board* (2002) 104 Cal. App. 4th 575, 584-85), 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.) "Courts may reverse an [administrative] decision only if, based on the evidence ..., a reasonable person could not reach the conclusion reached by the agency." (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.)

"A trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the

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[4] Petitioner asserts that he is entitled to an independent judicial determination of whether a fair administrative hearing was conducted. (OB 9.) As stated above under the section "Fair Hearing," the court agrees.

[5] He also makes no argument that the other discipline imposed on him implicates a fundamental vested right. For instance, Petitioner has no fundamental vested right to drink alcohol on a college campus prior to his 21st birthday.

burden of convincing the court that the administrative findings are" not supported by the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817.)

Analysis

Fair Hearing

Petitioner contends that Respondent denied him a fair hearing because (1) he did not receive adequate notice of the charges and factual allegations against him; (2) he did not have a sufficient opportunity to respond to the evidence; and (3) the decision-makers were biased against him. (OB 11-13; Reply 2-6.)

Notice

Petitioner contends that he did not receive written notice of the allegations made by Roe until Respondent issued its Preliminary Investigation Report on May 2, 2015. (OB 11.)

In a student disciplinary proceeding, "the student is entitled to ... a notice containing a statement of the specific charges against him, the names of the witnesses and a statement of the gist of their proposed testimony." (*Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 771.) Depending on the circumstances, an oral report of the facts and allegations may be sufficient notice. (*Andersen, supra* at 771; *Dixon v. Alabama State Bd. of Ed.* (5th Cir. 1961) 294 F.2d 150, 159.)

In *Andersen, supra*, the court held that the student received adequate notice where he was told he had been "accused of cheating in Math 111" before his interview, and he received a copy of the Dean's written report at the beginning of the disciplinary hearing. (Id. at 771.)

Petitioner was notified on March 16, 2015 that Claremont "received a complaint regarding an allegation of sexual assault against [Petitioner] from [Jane Roe.]" (AR 488.) The Investigator interviewed Petitioner a week later, on March 23, 2015, and on April 8, 2015, and April 15, 2015. (AR 60, 67, 69.) During these interviews, Petitioner was asked about, and provided lengthy responses to, whether his sexual encounter with Roe on October 4 was consensual -- including, specifically, whether Roe consented to unprotected sex. (See e.g., AR 60.) Petitioner also submitted documentary evidence, including text messages and a time line of events. (AR 113.) It is clear from the interview summaries and Petitioner's subsequent responses that he understood he was being investigated for engaging in unprotected sex with Jane Roe on October 4 without her consent. This oral notice prior to issuance of a written report complied with Respondent's Policy. (AR 474-475.)

On May 2, 2015, Petitioner also received written notice of the allegation that he sexually assaulted Jane Roe on October 4, 2014 by continuing sex with her without her consent. (See AR 4.) The Final Report made the same allegation. (AR 32-33.) Petitioner responded to both, including in his lengthy written statement to the Committee and his oral statement on May 22, 2015. (See AR 9-13, 224-88, 219.) Petitioner concedes that the written reports disclosed the allegations and policy violation on which the discipline was based.

In reply, Petitioner argues that investigator Edwards did not communicate the allegations against him during the interviews. He argues that "when Doe asked Edwards for an explanation of the charges against him, she told him there was nothing to see." (Reply 3.) Petitioner provides no citation to the record to support these arguments. The court is not required to search the record to ascertain whether it supports an appellant's contentions. (*Inyo Citizens for Better Planning v. Inyo County Board of Supervisors* (2009) 180 Cal.App.4th 1, 14.) Moreover, the interview summaries with Petitioner show that the focus of the interviews was what occurred on October 4, 2014, including whether Roe's consent to engage in sexual intercourse was withdrawn. (See AR 60, and 61-70.)

In reply, Petitioner provides no response to *Andersen*, which is factually analogous, and his arguments on notice are unconvincing. (Reply 4-5.) Under the circumstances of this case, the court finds that this combined oral and written notice satisfied Petitioner's right to notice of the charges and evidence. (*Andersen, supra* at 771; *Dixon v. Alabama State Bd. of Ed.* (5th Cir. 1961) 294 F.2d 150, 159; *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 240-244.)[6]

Opportunity to Respond

Petitioner contends that he did not have a sufficient opportunity to respond to the evidence against him. He contends that investigators rejected most of his proposed follow-up questions to witnesses; he was not allowed to cross-examine witnesses; he did not have sufficient time to respond to the Final Report; and the record contains investigative summaries and not transcripts. (OB 11-12; Reply 4-5.)

"[S]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved." (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 244-245.) "[I]n student disciplinary proceedings, due process requires 'an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity

[6] In *Doe*, notice was insufficient because the Appeals Panel disciplined the student based on a different theory than had been investigated and described in the investigative report. (*Doe* at 225.) *Doe* is therefore factually distinguishable, and its reasoning is supportive of the conclusion that Petitioner received adequate notice.

to characterize his conduct and put it in what he deems the proper context.'" (*Doe, supra* at 245-246.)

California courts have cited the Fifth Circuit's analysis in *Dixon v. Alabama State Bd. of Ed.* (5th Cir. 1961) 294 F.2d 150, 159 of a student's procedural rights in a disciplinary proceeding. (See *Doe, supra* at 246; *Andersen, supra* at 771.) The *Dixon* court stated: "the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board [of Education], or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection."

Petitioner has not shown he was entitled to cross-examine the student witnesses in the context of a student disciplinary proceeding for alleged sexual assault of another student. "[A]lthough [courts] recognize the value of cross-examination as a means of uncovering the truth [citation], [courts] reject the notion that as a matter of law every administrative appeal ... must afford the [accused] an opportunity to confront and cross-examine witnesses.'" (*Doe, supra* at 245.) "In administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross-examination is especially fraught with potential drawbacks." (Ibid.) The United States Department of Education Office for Civil Rights has discouraged schools from allowing the parties personally to question or cross-examine each other during the hearing. (Ibid.) None of the cases cited by Petitioner hold that a student disciplinary proceeding at a private college, involving a charge of sexual assault, must allow cross-examination.[7] (OB 11, fn. 14.)

In the instant case, Petitioner had the opportunity to review and respond to all of the student interview summaries. (See AR 9- 13, AR 224- 289.) The administrative decision is also based on other documentary evidence, including text messages. Petitioner was given a chance to respond to or supplement these documents prior to the adjudication. (AR 2, 27, 224-289) Under the factual circumstances of this case, and considering the sensitive nature of disciplinary proceedings involving sexual assault on a college campus, the court is unable to conclude that Petitioner had a right to confront and cross-examine student witnesses.

The court also rejects the argument that the use of interview summaries by the investigator, rather than transcripts, violated Petitioner's right to a fair procedure. Petitioner cites no authority in support of this argument. (OB 12, fn. 15; Response to

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[7] The *Goss* case cited by Petitioner at footnote 14 suggested that student suspensions longer than 10 days may require "more formal procedures," but it did not hold that cross-examination is required. (*Goss v. Lopez* (1975) 419 U.S. 565, 584.)

Sur-Reply 3.) Some case law suggests that interview summaries or notes satisfy the fair procedure standard. (*Andersen, supra*, 22 Cal.App.3d at 772-773 [approving of "4-page minutes of the hearing"]; see *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 249-250 [relying on interview notes to determine whether findings were supported by substantial evidence].) Respondent's Policy states that "the Investigator will prepare a written summary of each interview to review for accuracy with the interviewee." (AR 474.) The administrative record includes edits made by the witnesses after they reviewed their interview summaries. (See AR 27; see AR 58-68 [showing edits].) The Final Report states that other than those changes, "each witness confirmed the accuracy of their 'transcript.'" (Ibid.) Petitioner presents no evidence or argument that the witnesses did not confirm the accuracy of their summaries.

Petitioner contends that investigators rejected most of his proposed follow-up questions to witnesses. (OB 11-12; see AR 9-13 and 27.) The Policy states that the Investigator must review the parties' requests and "conduct such additional investigative steps as the Investigator determines are reasonable and appropriate to complete the investigation." (AR 475.) In reply, Petitioner identifies Jessica Baldwin, who was with Roe when she purchased Plan B and when she went to urgent care, as a witness who should have been interviewed and was not. (Reply 5, fn. 8.) It is not clear from the record why Respondent did not interview Baldwin. (See AR 15.) Respondent interviewed other witnesses who were with Roe when she purchased Plan B. It is also undisputed that Roe did not tell anyone on October 4-5 or when she saw urgent care on October 6 that she was sexually assaulted. Therefore, there is no persuasive evidence that the failure to interview Baldwin prejudiced Petitioner or was an abuse of the Investigator's discretion. Petitioner fails to provide any other examples or evidence of why he believes additional investigative steps should have been taken.

Petitioner contends that he did not have sufficient time to respond to the Final Report, because it was emailed to him on May 19, 2015 and the hearing was held on May 22, 2015. He contends that the Policy does not guarantee that the Committee reviews the accused student's written statement. (OB 12.) The Policy requires the Investigation Review and Findings meeting to occur within 5 business days. (AR 475.) On May 21, 2015, Petitioner submitted a lengthy Final Statement to the Committee. (AR 224.) Petitioner also gave a verbal statement at the beginning of the Committee's May 22, 2015 meeting. (AR 208.) These lengthy statements belie Petitioner's argument he did not have sufficient time to respond or that he was prejudiced. The record reflects that the Committee considered his statements. (AR 223.)

Petitioner argues that Roe was provided his witness statements when she was interviewed, but he was not provided hers. (OB 12, fn. 15.) Petitioner cites no evidence supporting this argument. Both Roe and Petitioner had the opportunity to respond in writing to the Investigation Report. (AR 9-13, 89-95.) Moreover, Petitioner submitted lengthy statements in response to all evidence at the final Committee hearing.

Petitioner had sufficient opportunity to respond to the charges and evidence against him.

Bias

In the opening brief, Petitioner tersely argues that Investigator Edwards was "hardly neutral." (OB 12.) In reply, Petitioner elaborates on this argument, suggesting that Edwards was biased because she played a role as both investigator and decision-maker. He also complains that the Committee's final decision does not state which committee member drafted the findings. (Reply 5-6, fn. 9.)

None of these arguments is persuasive. "Bias and prejudice are never implied and must be established by clear averments." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581-582.) Petitioner has cited no evidence in the record that Investigator Edwards was biased or unfair. Therefore, the "presumption that agency adjudicators are people of 'conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'" stands unrebutted. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 222.) Case law also holds that "[a]llowing a single decisionmaker to undertake both the investigative and the adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process." (*Burrell, supra*, 581-582.) Finally, the Committee's findings were made unanimously. (AR 219.)

Based on the foregoing, all of Petitioner's challenges to the fairness of the administrative procedure are unconvincing.

Substantial Evidence Review

The Committee made the following findings: Petitioner and Jane Roe engaged in consensual sexual intercourse initially using protection. Both parties had been drinking. Petitioner appeared to be more intoxicated than Jane Roe. Roe "stated she did not want to have sex without protection, ... and she disengaged in the sexual conduct once he removed the condom." "Unprotected sex occurred between the parties." Petitioner "continued to penetrate [Jane Roe] without protection in spite of her objection." (AR 220-221.) Petitioner does not directly respond to these findings, but rather focuses on the Committee's discussion of evidence corroborating these findings, which the court discusses further below. (See OB 13-14.)

Substantial evidence supports the key finding that Jane Roe did not consent to sex without a condom, and that Petitioner "continued to penetrate [Jane Roe] without protection in spite of her objection." (AR 220-221.) According to Roe, after consensual sex with a condom, Petitioner started getting rough. Petitioner took off the condom and started intercourse again. Roe told him to stop, she begged him, but he would not. He said it will be okay. He held her down and did not let her move while continuing to have

sex. (AR 75.) Roe stated that she laid there and endured until Petitioner passed out on top of her, at which point she left. (AR 75.) In reply, Petitioner contends that Jane Roe's interview statements do not constitute evidence. He argues that Roe's accusations are akin to "pleadings." (Reply 7-8.) As discussed above, Petitioner fails to show that the use of interview summaries, which were reviewed and corrected by each interviewee, was improper. He cites no authorities that the interview statements of the two persons involved in the incident – Petitioner and Roe – do not constitute substantial evidence.

That Petitioner denied Roe's account does not equate to a conclusion that the Committee's findings lacked substantial evidence. The Committee was entitled to weigh the parties' conflicting accounts. It is also significant that in many respects – including that they had protected sex about 10 times, the amount of time that elapsed, that Petitioner had trouble maintaining an erection, and how Petitioner obtained extra condoms from the RA's room – Roe's and Petitioner's accounts of the sexual activity were similar.

Roe's and Petitioner's interview statements are also supplemented by their text messages following October 4, as well as other documentary evidence. (See AR 146-151, 175 [medical report].) While some of Roe's text message statements conflict with her claim of sexual assault, other statements imply that something significant happened between Roe and Petitioner that they needed to discuss. (AR 146-150.) Petitioner also asked "Did I assault you?" A reasonable decision-maker could find that the text message exchanges weakened Petitioner's credibility, including with respect to his recall of the sexual encounter.

The Committee also found that (1) the parties' prolonged efforts at protected sex corroborated Roe's claim that she would not have unprotected sex; (2) Roe's decision to seek immediate medical care, coupled with Petitioner's statement that he "fucked [Roe] so hard that he put her in the hospital," corroborated Roe's claim that Petitioner, through sex caused Roe serious injury; and (3) Petitioner's inability to recall words or actions by Roe which caused him to believe Roe had affirmatively consented to unprotected sex, and his statement that she was not "super into it" undermined his claim that she affirmatively consented. (AR 221.)

Petitioner argues that the Committee erroneously assumed that just because two individuals try to engage in sex with a condom, they will never engage in unprotected sex. He argues that the Committee assumed that the only reason Roe performed oral sex on Petitioner was so they could engage in protected sex. (OB 13.) The Committee made reasonable inferences from the evidence, not assumptions. The parties' prolonged efforts at protected sex, including that Petitioner walked down the hallway nearly naked to obtain condoms (AR 69), is consistent with the finding that Roe only consented to sex with a condom. The Committee could also reasonably credit Roe's

statements that she performed oral sex to get Petitioner erect so they could use a condom. (See e.g. AR 91.)

Petitioner contends that the Committee gave too much weight to his initial inability to recall Roe's specific words granting consent to have sex without a condom. (OB 13; Reply 9.) The Committee did not treat Petitioner's statements and recollections as dispositive, but rather considered them in combination with other evidence. (AR 220-221.) The Committee did not shift the burden to Petitioner, but rather made a fact determination which is supported by substantial evidence.

Petitioner argues that "rough intercourse was not an issue before the Committee" and that "Roe did not exhibit any signs of sexual assault." (OB 14.) There is substantial evidence that Roe did visit urgent care, that doctors asked whether she had been sexually assaulted, that Roe had discomfort sitting and walking for some time, and that she skipped class. (See e.g. 29, 39, 62, 76-77, 92, 175.) While this evidence could be attributed simply to the parties engaging in prolonged sex, it could also corroborate Roe's testimony that Petitioner became rough when he removed the condom and did not stop when she objected. While rough intercourse was not a charge against Petitioner, the Committee could consider the evidence of rough sex as tending to support the credibility of Roe's version of events.

Petitioner challenges Roe's testimony based on her friendly demeanor toward Petitioner after the October 4 incident; her delay in reporting the sexual assault; and Roe's text messages and other statements that conflict with her claim of sexual assault. Petitioner contends that the more reasonable inference is that Roe's Title IV report was fabricated and made in retaliation to the offensive Valentine's Day gram. (OB 14-15; Reply 9-10.) The Committee considered similar arguments (see OB 221-222), and Petitioner shows no abuse of discretion. As noted by the Committee, both parties engaged in conduct that did not support their respective positions. The Committee found that Roe made continuous efforts to communicate with Petitioner, and that Petitioner avoided these efforts. Regarding the Valentine's Day prank, the Committee credited Roe's explanation that she did not initially understand what had happened or wish to report Petitioner. Substantial evidence supports these reasonable inferences. (See e.g. AR 146-151, 80-82.) In light of the whole record, a reasonable decision-maker could conclude that Roe's post-sex interactions and delay in reporting the alleged assault did not negate the evidence she withdrew consent and did not want to engage in unprotected sex.

Conclusion

The petition is DENIED.