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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JUN 08 2017

E. OLIVAS

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE, HISTORIC COURTHOUSE

JOHN DOE, an individual,

Petitioner,

v.

LA SIERRA UNIVERSITY, a California
corporation,

Respondent.

Case No.: RIC1606115

[Hon. Irma P. Asberry]

NOTICE OF RULING GRANTING
PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE

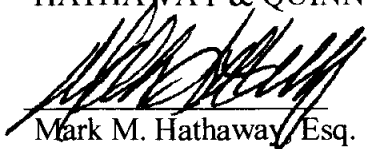
TO LA SIERRA UNIVERSITY AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE THAT the ruling of Hon. Irma Poole Asberry on a submitted matter, attached hereto, has now been entered by the Court. The Court has granted the petition and ordered a writ of mandate is issued commanding La Sierra University to set aside its decision against Petitioner on the grounds that 1) Petitioner was denied a fair hearing and 2) Respondent's findings regarding the hostile environment claim is not supported by substantial evidence such that there is a prejudicial abuse of discretion.

WERKSMAN JACKSON
HATHAWAY & QUINN LLP

DATED: June 8, 2017

By:


Mark M. Hathaway Esq.
Attorneys for Petitioner JOHN DOE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE**

JUN 02 2017

K. Rahlwes

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|---|--------------------------------|-----------------------|
| PETITIONER: JOHN DOE VS. RESPONDENT: MARNI STRAINE, LA SIERRA UNIVERSITY | DATE & DEPT. 6-2-17 DEPT. 3 | NUMBER RIC 1606115 |
| COUNSEL: WERKSMAN JACKSON HATHAWAY & QUINN, Attorneys for Petitioner and CLAYSON, BAINER & SAUNDERS, Attorneys for Respondent | REPORTER none | |

PROCEEDING

RULING ON SUBMITTED MATTER

The Court having considered the Administrative Record (AR), the pleadings, briefs, and orders issued in this case and applicable case law, and the oral arguments of counsel tendered at the hearing of 6-2-17, hereby orders that the petition is granted and a writ of mandate is issued commanding Respondent to set aside its decision against Petitioner on the grounds that 1) Petitioner was denied a fair hearing and 2) Respondent's findings regarding the hostile environment claim is not supported by substantial evidence such that there is a prejudicial abuse of discretion.

FACTUAL AND PROCEDURAL CONTEXT:

By the present petition for writ of administrative mandate, petitioner student John Doe ("Petitioner" or "John") challenges the decision by Respondent La Sierra University ("Respondent" or "LSU") to impose sanctions of immediate expulsion based on findings that Petitioner sexually assaulted and harassed another student Jane Roe ("Jane"). The alleged sexual assault occurred at an off-campus party. Jane had invited John to attend the party to occur on April 11, 2015. On that day, they arrived at the party at 8:00pm, where upon they consumed alcohol and smoked marijuana along with the other attendees. At the party were 5 males and 2 females total, all LSU students. By the end of the evening, the attendees decided to sleep over at the apartment. (AR 217, Tab 32; AR 360, Tab 62). The facts as to what happened next between John and Jane are disputed. Jane claims she "blacked out" and has no memory of what happened. (AR 360, Tab 62).

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(kdr), Clerk

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Witnesses claim they saw John perform oral sex on Jane and attempt to insert his penis into her vagina when Jane started crying. (AR 119-125, Tab 12; AR 377-375, Tab 62). John claims that, by her actions and words, Jane consented to oral sex and fingering her vagina, and that he stopped all sexual advances when Jane started to cry. (AR 217, Tab 32). It is undisputed that Jane, John and all of the other party attendees were inebriated. The next day, Jane learned what happened from the other party attendees. Jane claims she was anxious and fearful in a shared Biology Laboratory class with John, and experienced depression and lack of appetite in the months following the incident. (AR 360-361, Tab 62).

On September 10, 2015, Jane reported the incident to the LSU Title IX office. LSU then initiated its Title IX investigation against Petitioner. (AR 108, Tab 6). On October 1, 2015, LSU notified Petitioner that he was being investigated for engaging in sexual misconduct and sexual harassment. (AR 111-112, Tab 7). LSU interviewed Jane, John and Witnesses A and B. Witness C answered interview questions via email. The investigators prepared a report dated October 29, 2015 concluding that Petitioner was responsible for sexual assault and creating a hostile environment in class against Jane Roe. (AR 138-143, Tab 15). On November 25, 2015, LSU notified Petitioner that the investigation stage of the Title IX case had been completed and was reviewed for final resolution. (AR 113, Tab 8). On December 14, 2015 and April 21, 2016, the Judicial Committee, consisting of Marjorie Robinson and four staff representatives convened to discuss Jane's accusations against Petitioner. (AR 152-153, Tab 18; AR 195-197, Tab 26). On May 10, 2016, LSU Interim Title IX Coordinator Marni Straine informed Petitioner that, as a result of the investigation, LSU imposed the sanction of immediate expulsion. (AR 208-241, Tab 31). Petitioner was provided a copy of a report entitled "Outcome Report of Title IX Investigation Report Regarding [Jane Roe] and [John Doe]" dated May 9, 2016. (Id.; AR 205-207, Tab 30). In the report, LSU concluded there was sufficient evidence that Petitioner committed sexual assault against Jane Roe and created a hostile environment in her Biology Lab class. (AR 205-207, Tab 30).

On May 13, 2016, Petitioner filed his first level administrative appeal with the LSU Student Life Committee, arguing that LSU failed to provide him with an opportunity to address or review the evidence prior to being expelled. Petitioner also argued that the investigative report did not accurately portray his statements during the interview. Petitioner explained what happened from his perspective on the night in question. (AR 215-220, Tab 32). On May 26, 2016, LSU denied Petitioner's first level administrative appeal based on "new evidence" submitted by Petitioner and upheld the Judicial Committee sanction of expulsion. (AR 251, Tab 45). On May 31, 2016, Petitioner filed his second level appeal to LSU Provost Dr. Steve Pawluk. (AR 295-298, Tab 61). After meeting with Ms. Straine to review documentation, Dr. Pawluk upheld the sanctions imposed by LSU. (AR 353-355, Tab 61).

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On May 16, 2016, while the first level appeal was pending, Petitioner filed the instant Petition for Writ of Mandate in this court, challenging the expulsion. Because he is a foreign student residing in the United States pursuant to a student visa, his visa eligibility was terminated once he was expelled meaning he would have to leave the United States in 15 days. On May 19, 2016, Petitioner filed an Ex Parte Application for Stay of Administrative Action in this action, which was continued by stipulation. On July 15, 2016, this court granted Petitioner's application and ordered the stay of the LSU's disciplinary action against Petitioner pending further order of the court so that Petitioner may remain a student and enroll in classes for the fall term beginning September 26, 2016. The court indicated that Petitioner may go on campus for the purpose of enrollment only.

On July 19, 2016, Straine was dismissed from the action. LSU filed a demurrer on the grounds that Petitioner failed to exhaust his administrative remedies prior to filing this action. On October 17, 2016, Petitioner filed a First Amended Petition for Writ of Mandamus ("FAP" or "Petition") following the demurrer. On December 20, 2016, this court overruled LSU's demurrer to the FAP.

Petitioner's position: Petitioner argues that he was denied a fair hearing because LSU's investigation was not thorough and Respondent deprived Petitioner of access to crucial evidence, including witness statements and identity of the witnesses. Petitioner also argues that there is insufficient evidence supporting Respondent's findings that he sexually assaulted Jane and created a hostile environment in their shared biology class.

Respondent's position: Respondent argues that substantial evidence supports its findings and conclusions, that Petitioner received a fair hearing process required of a private university because he was given the opportunity to challenge the witness statements during the appeal process, the disciplinary process and sanctions of expulsion were consistent with the LSU student handbook and policy on sexual misconduct, and the Petition was filed before he exhausted his administrative remedies.

ANALYSIS:

I. Standard of Review

An administrative writ may be issued for inquiring "into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (CCP § 1094.5(a)) An agency's decision can be only challenged on the grounds that: (1) the agency proceeded without or in excess of its jurisdiction; (2) the agency did not conduct a fair trial; and (3) there was prejudicial abuse of discretion. Abuse of discretion is established if the agency proceeded in the manner not required by law, the order or

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decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b)). Section 1094.5 applies to the adjudicatory decisions of a private university. (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722).

II. Fair Hearing

Courts have consistently held that a private university is required to provide an accused student with a fair hearing. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 247; *Andersen v. Regents of University of Cal.* (1972) 22 Cal.App.3d 763, 763; *Goldberg v. Regents of University of Cal.* (1967) 248 Cal.App.867, 882). “The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial.” (*Pinsker v. Pacific Coast Society of Orthodontics* (1974) 12 Cal.3d 541, 555). The scope and nature of the hearing should vary according to the circumstances of the particular case. (*Andersen v. Regents of University of California*, supra, 22 Cal.App.3d at 771).

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. Regents of the University of California* (2016) 5 Cal.App.5th 1055; see also *Andersen v. Regents of University of California*, supra, 22 Cal.App.3d at 771 (“The hearing need not be a full dress judicial hearing but one giving the student a full opportunity to present his defenses.”). Although no particular form of student disciplinary hearing is required under California law, a university is bound by its own policies and procedures. (*Doe v. Regent of the University of California*) (2016) 5 Cal.App.5th 1055, 1078). To comport with due process, the university’s procedures must “be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.” (*Id.*).

A. LSU’s Disciplinary Process

In this case, LSU’s investigation process is set forth in its Policy on Sexual Misconduct. When a complaint of sexual misconduct is received, it is referred to the Title IX Coordinator who appoints two investigators to determine findings of fact using the “preponderance of the evidence” standard. The responding party is given a notice of investigation. Both the reporting and responding parties are given the opportunity to respond to the allegations and request certain witnesses or documents to be reviewed. A student has the right to a support person to accompany the student throughout the process. The two investigators have broad discretion to determine what is relevant or helpful to a determining whether an offered witness or documentary evidence would be relevant or helpful to a determination. The investigators’ determination is reviewed by the Title IX Coordinator and Associate Provost. If a determination is made that the student respondent engaged in prohibited conduct, the final investigative report with recommended sanctions are delivered to the Judicial Committee for disciplinary action per the Student Handbook’s disciplinary process.

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(AR 94-98; Tab 3, pp. 13-16). LSU's disciplinary process then affords the student a two-level appeal, one to the Vice President of Student Life through the Student Life Committee, and lastly an appeal of the decision of the Student Life Committee to the Provost. The decision of the Provost is final. (AR 40, Tab 1).

B. Disciplinary Process As Applied to Petitioner

In this case, LSU did not follow its own policies and procedures set forth in its Policy on Sexual Misconduct with respect to Petitioner and did not afford Petitioner a fair hearing. The Policy provides, in relevant part:

Notice of Investigation. At the outset of an investigation, the investigator will advise the responding party of the allegations against him or her in writing (Notice of Investigation) and a copy of the Notice of the Investigation will be provided to the reporting party.

Opportunity to Participate. Both the Responding and the Reporting Parties will have an opportunity to respond to the Notice of Investigation in writing and in a meeting with the investigator or investigators. Both parties have the right to request that the investigators meet with relevant witnesses and evaluate relevant documentary or other evidence. (AR 94, Tab 3, p. 13, ¶¶ D., E.).

Here, LSU provided a Notice of Investigation dated October 1, 2015 to Petitioner informing him that he was being investigated, his rights during the investigation under LSU policy, and the confidentiality of the investigation. (AR 111-112, Tab 7). The Notice of Investigation is problematic for a number of reasons. First, LSU's policy allows the Petitioner to respond "in writing" to the allegations in the Notice of Investigation, but the Notice of the Investigation makes no mention of Petitioner's right to respond in writing. Even the November 25, 2015 letter informing Petitioner that the investigation had been completed does not invite or inform Petitioner of his right to respond to the allegations in writing. (AR 113, Tab 8)

More significantly, Petitioner was notified only of "an allegation that you have engaged in acts of serious misconduct," including "Sexual Misconduct" and "Sexual Harassment." (AR 111, Tab 7). These vague references without identifying the dates of the alleged infraction, the identity of the complainant or the factual basis of the charges against him are insufficient. (*Doe v. University of Southern California*, supra, 246 Cal.App.4th at 241 (notice was insufficient because the initial university letter did not apprise the student of the factual basis of the accusations against him despite being given a list of code sections allegedly violated, the incident date and accuser's name)).

After the investigation and upon recommendation by the Title IX Coordinator and the investigators, the Judicial Committee found that Petitioner sexually assaulted Jane Roe on April 11, 2015 and "created a hostile environment" for Jane Roe mid-April 2015 to mid-

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June 2015 in a shared Biology Laboratory class. (AR 138, Tab 15). But these basic factual allegations were not included in the Notice of Investigation and thus, did not give Petitioner a fair opportunity to defend himself. During the Petitioner's interview, the investigators apparently "asked in a point by point detail what occurred on the evening of April 11, 2015," (Opposition, p. 9:21-23), but how was Petitioner able to prepare for the interview and "bring all evidence, documents and items that [he] believe[s] will be helpful to the interviewers" if he was not notified of the factual basis of the accusations? (AR 112, Tab 7). Particularly troubling is the fact that there was no mention in the Notice of Investigation of the allegations of "hostile work environment" in the shared biology class. Also based on the interview notes, it appears not one question was asked during Petitioner's interview as to this allegation. (AR 363-369, Tab 62). It does not appear the witnesses were asked any questions at all about the alleged "hostile environment" as there are no facts supporting the infraction whatsoever in the investigative report. (AR 138-143, Tab 15). Petitioner received no notice whatsoever regarding these allegations until the Judicial Committee imposed the sanction of expulsion on May 10, 2016. Without notice of these allegations against Petitioner, he had no opportunity to defend himself prior to the Judicial Committee's decision.

With regard to the investigation, Petitioner was not given the opportunity to access any of the evidence used to support the charges against him or rebut the evidence. Petitioner was given the investigative report which includes statements by Witnesses A, B and C on May 10, 2016, only after the investigation was completed and after the Judicial Committee made a determination finding Petitioner responsible for the alleged misconduct and imposed the disciplinary sanction of "Immediate Expulsion." (AR 206-214, Exs. 30, 31). It is true that Petitioner did not necessarily have the right to cross-examine the witnesses or even know their names. (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1058). However, Petitioner had the right to access the evidence and respond to or rebut the witness statements prior to the imposition of disciplinary action. (*Doe v. University of Southern California*, supra, 246 Cal.App.4th at 248). Petitioner was not timely provided this information and was therefore not given the opportunity to adequately defend himself.

LSU argues that Petitioner had the opportunity to respond to the witness statements in the investigative report during the appeal process. This is unpersuasive. First, Petitioner was not given the opportunity to respond to the evidence before the decision making panel and prior to the Judicial Committee's final action. Second, the investigative report provided to Petitioner contained the investigators' perception of events as described to them by the witnesses; they did not contain the raw interview notes or recorded statements of the witnesses so that Petitioner could adequately rebut the statements and defend himself. Third, Petitioner was given only five days to appeal the decision, hardly enough time to process the information and gather evidence to rebut the witness statements.

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As noted by the United States Supreme Court: With respect to student discipline, the “*student’s interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences . . . Disciplinary actions, 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.*” (*Goss v. Lopez* (1975) 419 U.S. 565, 579-580; *Doe v. University of Southern California*, *supra*, 246 Cal.App.4th at 240). The Judicial Committee, and in turn the Student Life Committee and Provost who considered Petitioner’s appeals, acted on the reports and advice of the investigators. Petitioner was denied a fair opportunity to defend himself when he was unable to respond to or rebut the witness statements to the fact-finders, i.e., the investigators or the Judicial Committee.

The circumstances of this case is similar to that of *Doe v. University of Southern California*, *supra* (“*Doe v. USC*”). *Doe v. USC* involved a sexual assault incident that occurred at an off-campus fraternity party at a private university. The accused student petitioned for writ of administrative mandamus challenging the university’s suspension of the student based on findings he violated the student conduct code. (*Doe v. University of Southern California*, *supra*, 246 Cal.App.4th 221). The court determined that the student was not provided a fair hearing under the standards of CCP § 1094.5 because the investigation committee relied on information never revealed to the student and the appeals panel suspended the student on a different theory than the investigation committee. The court reasoned that the student was not provided any information about the factual basis of the charges against him, he was not allowed to access any evidence used to support those accusations unless he actively sought it through a written request, and he was not provided with any opportunity to appear directly before the decision making panel to rebut the evidence presented against him. (*Id.* at 248). That is exactly what happened here.

LSU contends that *Doe v. USC* is distinguishable because USC “adopted the witness disclosure requirement found in constitutional due process student disciplinary cases.” (Opposition, p. 18:6-10). This is not true. Nowhere in *Doe v. USC* does it state the university adopted any witness disclosure requirement – it merely analyzed cases in which witness disclosure was required. Rather, the court in *Doe v. USC* applied “common law requirements for a fair hearing under section 1094.5” which forbid “an administrative board to rely on evidence that has never been revealed to the accused.” (*Doe v. USC*, *supra*, 246 Cal.App.4th at 247). The court did not find that the student was denied a fair hearing because the names of the witnesses were not disclosed, but because he was not allowed to access any evidence used to support charges against him and was not provided with an opportunity to appear directly before the decision making panel to rebut the evidence against him. (*Id.* at 248).

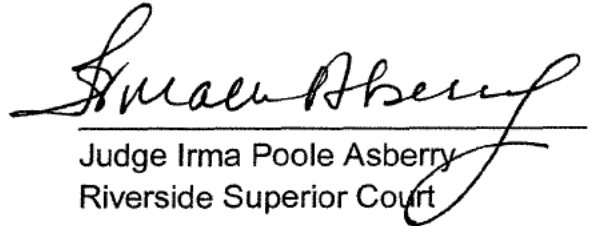
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Therefore, for the foregoing reasons, the writ of mandate is issued directing LSU to set aside the findings and sanctions issued against Petitioner because it did not conduct a fair hearing.

Date: 6-2-17


Judge Irma Poole Asberry
Riverside Superior Court

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(kdr), Clerk
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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 June 8, 2017, I served the foregoing document described NOTICE OF RULING GRANTING PETITION FOR WRIT OF ADMINISTRATIVE MANDATE on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Roland C. Bainer
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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 June 8, 2017 in Los Angeles, California


Yesenia N. Alvarado

TRANSMISSION VERIFICATION REPORT

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