Case No. D068901

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

The Regents of the University of California

Respondent and Appellant,

vs.

John Doe

Petitioner and Appellee.

Appeal from the Superior Court of California, County of San Diego,
Case No. 37-2015-00010549-CU-WM-CTL
The Honorable Joel M. Pressman

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Pursuant to Rules 8.208 and 8.488 of the California Rules of Court, Petitioner The Regents of the University of California certifies that it knows of no person or entity that must be disclosed under Rule 8.208(e)(1) or (2) of the California Rules of Court.

DATED: February 1, 2016 MUNGER, TOLLES & OLSON LLP

By: _____
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THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case arises from a sexual misconduct proceeding at the University of California San Diego ("UCSD") in which a Student Conduct Review Panel ("Panel") found the testimony of Jane Roe, the complainant, to be credible. Roe testified that, on the morning of February 1, 2014, UCSD student John Doe repeatedly ignored her instructions that Doe "[s]top" trying to digitally penetrate her. (Administrative Record [hereafter "AR"] 290.) Doe summarily denied that this occurred, but selectively invoked his Fifth Amendment privilege to avoid providing any details about his version of what happened that morning. The Panel credited Roe's testimony and found that Doe committed sexual misconduct—a finding upheld by UCSD's six-member Council of Provosts. The Provosts imposed a sanction that included a suspension of one year and one quarter, which exceeded the *minimum* recommended sanction for this type of violation by just one quarter.

Doe filed a writ petition challenging UCSD's sexual-misconduct finding and its sanction. The trial court granted Doe's writ petition based on: (1) its disagreement with the Panel's assessment of Roe's credibility, directly contrary to the applicable substantial evidence standard of review; (2) its conclusion that Doe's suspension for one year and one quarter was an abuse of discretion—i.e., a determination no reasonable decisionmaker could reach—even though six Provosts found that suspension warranted; and (3) its view that student disciplinary proceedings require trial-like cross-examination and discovery procedures, notwithstanding well-established case law to the contrary.

Each aspect of the trial court's decision was erroneous.

First, the trial court erred by substituting its view of the credibility of the witnesses for the judgments of university officials, including the three

Panel members who, unlike the trial court, had the opportunity to observe the witnesses' demeanor. Although the trial court acknowledged the applicability of the substantial evidence standard—under which it could overturn UCSD's decision only if no reasonable person could reach the same conclusion—its analysis of the facts was in fact *de novo*. Ignoring Roe's testimony that she repeatedly told Doe that his digital penetration of her "hurt" and that he should "stop," the court characterized the record as showing that Roe "did not object to sexual contact per se, and only explained that it was not pleasurable for her at that time." (Appellant's Appendix [hereafter "AA"] 721; AR 290.) The court then held that, because Roe had engaged in consensual sexual activity with Doe after the February 1 incident, the evidence did "not demonstrate non-consensual behavior" but rather "Ms. Roe's personal regret for engaging in sexual activity beyond her boundaries." (AA 721.) Aware that it had to fit its reasoning within the substantial evidence standard of review, the trial court claimed it was "not weighing Ms. Roe's credibility." (*Ibid*.) There is, however, no way the trial court could have reached the conclusion it did without discounting Roe's testimony, which the UCSD panel had expressly found "credible." (AR 621.) The trial court substituted its judgment of credibility for the judgment of the UCSD panel, which is disallowed under the substantial evidence test.

Second, the trial court erred by vacating the University sanction of a one year and one quarter suspension. The court improperly substituted its own judgment for the discretion of the University and erroneously deemed the decision of the six UCSD provosts to suspend Doe for one year and one quarter a "punishment" for Doe's decision to appeal the Panel's decision. The University's sanction of Doe exceeded UCSD guidelines' *minimum* one-year sanction for "forced groping/kissing" by just one quarter. Doe's callous statements to Roe about the pain he was causing her, the trauma

Doe had caused Roe, and Doe's prior history of student misconduct more than justified the Council of Provosts' modest, one-quarter upward adjustment to the minimum suspension. The Provosts' sanction easily survives review under the abuse-of-discretion standard.

Third, the trial court erred in determining that Doe was not given a fair hearing. The court's ruling focused primarily on a perceived violation of Doe's right to confront and cross examine witnesses. That perspective ignored that, for nearly 50 years, the courts of this state have held that in student disciplinary hearings "a full dress judicial hearing with the right to cross-examine witnesses [is] not required." (*Goldberg v. Regents of University of Cal*. (1967) 248 Cal.App.2d 867, 881-82.) Instead, a student facing disciplinary proceedings is entitled to notice of the charges and the evidence to be used against him or her, as well as a hearing, the scope and nature of which varies "according to the circumstances of the particular case." (*Id*. at p. 881.) Consistent with this case law and with the University's obligations under Title IX and the Violence Against Women Act, the University has carefully crafted a set of hearing procedures for sexual misconduct proceedings that both protects the due process rights of the accused and mitigates the potential for victims of sexual misconduct to suffer further trauma. No dispute exists that Doe had notice of the charges and the evidence and that Doe was afforded a hearing at which he had the opportunity to testify, present witnesses, and have questions asked of other witnesses. Under long-standing authority, this was more than sufficient. (See *ibid*.)

The trial court erred in determining that, notwithstanding the fact that UCSD gave Doe notice of the charges and their grounds and an opportunity to present his defenses, Doe was deprived of a fair hearing because he had to pose his questions to Roe through the Panel Chair and because the Panel Chair exercised her discretion to not ask questions that

were irrelevant or repetitive. UCSD's questioning procedures provided Doe with ample opportunity to question Roe while also mitigating the risk that Roe would suffer further trauma by being subjected to direct cross-examination by Doe or repetitive and irrelevant questioning by the Panel Chair.

The trial court also erred in finding that the Panel gave improper weight to Doe's selective invocation of his Fifth Amendment privilege. Even in criminal matters, "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." (*People v. Williams* (2008) 43 Cal.4th 584, 615, quoting *Mitchell v. United States* (1999) 526 U.S. 314, 321, internal quotation marks omitted.)

The trial court's other due process determinations similarly suffer from the court's attempt to impose full dress judicial hearing requirements on the University's procedures. The trial court then compounded its erroneous due process ruling by vacating the University's findings rather than remanding back to the University for a new hearing.

In sum, the trial court's order reveals a fundamental disregard for the substantial-evidence standard, the abuse-of-discretion standard, and well established case law holding that student misconduct proceedings do not require courtroom-style processes. The trial court's order must be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Events Of January 31, 2014 And February 1, 2014

Jane Roe was a virgin when she met Doe in January of 2014. (AR 291.) She and Doe began a romantic relationship. She told him from the start, and many times thereafter, that she planned to wait to have sexual intercourse until marriage. (*Ibid*.) On the night of January 31, 2014, Doe and Jane Roe attended a social event together. (AR 293-94.) That evening

Jane Roe drank for the third time in her life and, with Doe pouring her drinks, drank heavily. (AR 294.) At the end of the evening, Jane Roe and Doe returned to Doe's apartment. (AR 296.) At that point, Jane Roe "blacked out" due to the amount of alcohol consumed, and her memory of the evening ends then. (AR 290; 296; 298.)

The next morning, February 1, Jane Roe awoke in Doe's bed. (AR 289; 296.) Although she could not remember what happened the night before, her vagina felt sore. (AR 290; 296.) She suspected the soreness meant she had lost her virginity the night before, but she could not remember giving consent or engaging in sexual intercourse. (AR 296; 298.) Doe does not dispute that they had sexual intercourse the night before but contends it was consensual. (AR 007.)

Jane Roe has consistently stated that, on the morning of February 1, over her objections, Doe repeatedly tried to penetrate her vagina with his fingers. (AR 289-90.) Each time, Jane Roe pushed his hand away, saying, "Stop, it hurts," and "I am sore. Don't." (AR 290.) Nevertheless, John Doe "kept going back and doing it regardless of whether or not [she] said stop or not." (*Ibid*.) After her many objections, Doe said, "Well, if it hurts then I guess I did my job right." (*Ibid.*)

Doe denies that he and Jane Roe were "amorous" on the morning of February 1. (AR 313.) He refused, however, to answer further questions or provide any specifics regarding his conversation with Jane Roe that morning or how he may have sought consent to digitally penetrate Jane Roe. (*Ibid*.)

On the evening of February 1, Doe and Roe were scheduled to attend a sorority formal. (AR 299.) Although Jane Roe was very upset that afternoon, she "didn't want to uninvite him because [she] didn't want people to ask [her] why" and "didn't want to explain what happened." (*Ibid*.) At the formal, John Doe "kept asking" whether Jane Roe would

have sex with him that night and saying, "You are already not a virgin ... you might as well do it again." (AR 300.) Jane Roe said no multiple times, but eventually, they had sex after Jane Roe "gave up on [herself]" and "didn't try and resist." (*Ibid.*)

After February 1, Jane Roe and John Doe interacted occasionally both socially and academically. Jane Roe testified that they "weren't friends" and she "didn't want to be around him." (AR 308-09.) Roe stated that she nearly failed the class she had with John Doe because she did not want to see him. (AR 624.)

II. Investigation And Student Conduct Proceedings

On June 5, 2014, Jane Roe submitted a complaint to the Office of Student Conduct ("OSC"), and, on June 16, 2014, she submitted a Request for Formal Investigation (the "Request") to the Office for the Prevention of Harassment and Discrimination ("OPHD"). (AR 392-96.) After receiving the Request and meeting with Jane Roe, OPHD Complaint Resolution Officer Elena Dalcourt began an investigation into the events of January 31 and February 1, 2014, as well as a potential act of retaliation by Doe on May 14, 2014. (AR 395.) As part of her investigation, Ms. Dalcourt interviewed Jane Doe and witnesses to the events of January 31, 2014 and reviewed text messages exchanged between the parties. (*Ibid.*) Doe refused to be interviewed in person or to submit a written statement regarding the events in question. (AR 395; 447; 453.) Instead, Doe's counsel invoked the Fifth Amendment and, in the same document, provided an "offer of proof" that consisted of Doe's partial account of the events. (AR 447-50.) Ms. Dalcourt then provided questions to Doe's counsel regarding the events in question, and he responded with another "offer of proof," which consisted of objections, including on Fifth Amendment

grounds, and selective answers regarding Doe's version of the events in question. (AR 453-58.)

On September 10, 2014, Ms. Dalcourt submitted the results of her investigation to OSC in a formal report (the "OPHD Report"). (AR 395-409.) Although she found Ms. Roe "credible in her assertion that she was in a blackout during sexual intercourse" on January 31, 2014, she concluded that there was insufficient evidence to show that "Mr. Doe knew or should have known that Ms. Roe was incapacitated" that evening. (AR 406-407.) Ms. Dalcourt also found that there was insufficient evidence of retaliation on May 14, 2014. (AR 409.)

As to the morning of February 1, Ms. Dalcourt found reasonable cause to believe that Doe violated the Policy when he ignored the objections of Jane Roe with respect to the digital penetration. (AR 407-408.) Ms. Dalcourt found "Ms. Roe credible in her assertion that she objected to physical activity during the morning in a clear and unambiguous manner, and that Mr. Doe repeatedly ignored these objections, despite Ms. Roe's telling him that his touching was painful." (AR 407.)

On September 25, 2014, Dean Sherry Mallory, the Dean of Student Affairs for Revelle College (the "Dean") offered Doe an opportunity for an Administrative Resolution Meeting for the alleged February 1 violation, which Doe accepted. (AR 414-15; 352.) At that meeting, Doe, who was accompanied by his counsel and father, did not accept responsibility; and, in compliance with UCSD policy, the Dean referred the matter to a Student Conduct Review. (AR 351-52; 416.)

On November 10, 2014, Doe was notified that his Student Conduct Review Hearing would be held on December 12, 2014, and was provided a copy of the OPHD Report and Jane Roe's June 16, 2014 Request. (AR

419; 438.) These same materials were provided to the Panel that heard Doe's Student Conduct Review.

On December 9, 2014, Doe made a pre-hearing written submission to the Panel. (AR 423.) Doe noted that he would likely abstain from testifying at the hearing and invoked the Fifth Amendment. (AR 423-24.) He also repeated his prior offers of proof, made various objections to the OPHD investigation and procedures, and summarily denied digitally penetrating Jane Roe without providing his version of what happened on the morning of February 1, 2014. (AR 423-41.)

Doe's Student Conduct Review hearing was held on December 12, 2014, during which Doe had counsel present. (AR 281.) At the hearing, the Panel considered whether Doe violated UCSD's Student Conduct Policy by committing sexual misconduct. (AR 287.). Under UCSD's policies, sexual misconduct is defined as "non-consensual activity engaged in without the intent to harm another, such as when a person believes unreasonably that effective consent was given, when, in fact, it was not." (AR 026.)

UCSD's Review Procedures for Alleged Sex Offense, Harassment or Discrimination Violations sets forth specific policies for student conduct hearings regarding sex offenses, including that the Panel will "hear and receive information and witnesses presented by the University Representative, including information directly from the complainant, which support the alleged violations." (AR 363.) Following the University Representative's presentation, the Panel then hears the Respondent's "information and witnesses." (*Ibid.*) The Policy further specifies that the Respondent "may provide questions in writing to the Review Panel Chair to be asked of the other party," and the Chair "may exclude any unduly repetitious or irrelevant questions." (AR 364.)

Following opening statements by the Panel Chair, Mr. Anthony Jakubisin, the University Representative, presented information supporting the alleged violations of the Student Conduct Code. (AR 288.) Mr. Jakubisin called Jane Roe as a witness, and she testified in detail as to the events on the morning of February 1, 2014. (AR 289-91.) Roe also testified as to her prior relationship with Doe and their actions after the morning of February 1, 2014. (AR 291-97.)

John Doe then submitted questions to be asked of Roe to the Panel Chair. (AR 303.) The Panel Chair asked Roe questions that Doe had submitted, excluding those deemed irrelevant or repetitive. (AR 303-311.) Doe was then given the opportunity to present information and witnesses supporting his perspective on the incident. (AR 311.) Doe selectively asserted his Fifth Amendment rights, while summarily denying that he had digitally penetrated Jane Roe on the morning of February 1. (AR 311-14.) Doe did not call any witnesses. After the hearing, Doe made a supplemental submission, in which he noted alleged deficiencies in the procedure provided and the evidence offered in support of the charge. (AR 612-17.)

On December 17, 2014, the Panel released its Review Report. (AR 619-21.) The Panel found Jane Roe "credible in her assertion that [Doe] tried to digitally penetrate [Roe's] vagina and he ignored her objections." (AR 621.) The Panel concluded that Doe had committed "Sexual Misconduct." (*Ibid.*) The Panel's non-binding recommended sanction included a suspension of one quarter. (*Ibid*.)

Both Doe and Jane Roe then submitted impact statements for consideration by the Council of Deans (the "Deans"). (AR 623-25; 626-631.) Doe did not take responsibility for any misconduct, instead blaming Jane Roe's "twisted psyche" and "suspect motives." (AR 627.) Jane Roe outlined the considerable trauma she had experienced since February 1,

2014, including being diagnosed with PTSD and almost failing a class in which Doe was also enrolled. (AR 623-25.) On January 13, 2015, after reviewing the Review Report, UCSD's Sanctioning Guidelines, Doe's student conduct record, and the statements submitted by Doe and Jane Roe, the Deans assigned sanctions, including a suspension of one year. (AR 635-38.)

On January 28, 2015, Doe submitted an appeal to the Council of Provosts (the "Council"), a body made up of six UCSD college provosts. (AR 006-19.) Doe's appeal challenged the Panel's process, its findings, and the sanctions imposed. (*Ibid*.) After Doe submitted supplemental information in support of his appeal, the Council upheld the decision of responsibility and, consistent with its authority, determined that a suspension of one year and one quarter should be imposed. (AR 649; AA 630.)

III. Procedural History

Doe filed a petition for administrative mandamus in the trial court on March 25, 2015. Doe then filed an Amended Petition (hereafter ["Petition"]) on April 2, 2015. (AA 033-61.) On July 10, 2015, after briefing and a hearing on the Petition, the trial court granted Doe's Petition as to the Regents of the University of California (the "Regents" or the "University") and ordered the Regents to set aside its findings and sanctions against Doe. (AA 717-22.)

The trial court based its order on its conclusions that there was not substantial evidence to support UCSD's findings; that UCSD's sanctions were unfair; and that Doe was not provided a fair hearing. (AA 718-22.) Notice of the order granting the Petition (the "Order") was served on July 13, 2015 (AA 715), and the Regents appealed the Order on September 11, 2015 (AA 743). After judgment against the Regents was entered on

October 15, 2015, the Regents filed an amended appeal as to both the judgment and the Order. (AA 754.)

ARGUMENT

I. The Trial Court Erred In Finding That The University's Factual Determination Was Unsupported By Substantial Evidence

A. The Substantial Evidence Standard, Which Applies To The Factual Findings, Requires Upholding UCSD's Decision Unless No Reasonable Person Could Reach The Determination Made By At Least Nine University Personnel.

The University's factual determinations underlying its disciplinary decisions must be upheld if supported by substantial evidence. (*Do v. Regents of the University of California* (2013) 216 Cal.App.4th 1474, 1489.) In performing substantial-evidence review, the reviewing court must "examine all relevant evidence in the administrative record and view that evidence in the light most favorable to the judgment, resolving all conflicts in the evidence and drawing all inferences in support of the judgment." (*Id*. at p. 1490.) The reviewing court does not "weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it." (*Id.* at p. 1492, quoting *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293-94, internal quotation marks omitted.) The burden is on the party challenging the administrative agency's decision to show "there was an abuse of discretion through the issuance of a decision that was unsupported by substantial evidence." (*Do*, at p. 1490.) "Only if no reasonable person could reach the conclusion reached by the administrative agency, based on the entire record before it, will a court conclude that the agency's findings are not supported by substantial evidence." (*Ibid.*)

Applied to the circumstances of this case, the substantial evidence standard presented a particularly high bar for Doe to overcome. The decision of the three-member panel was affirmed by six provosts. Doe therefore had to show that these nine University personnel all arrived at a conclusion that no reasonable person could reach. This Doe fell well short of doing.

B. Roe's Testimony Was Substantial Evidence That Supported The Panel's Finding That Doe Committed Sexual Misconduct.

Substantial evidence supported the Panel's finding that Doe committed sexual misconduct—i.e., "non-consensual sexual activity engaged in without the intent to harm another, such as when a person believes unreasonably that effective consent was given when, in fact, it was not." (AR 621.) Roe testified that, on the morning of February 1, Doe "kept trying to put his hands down my pants, and I kept telling him that it hurt, because he had had sex with me while I was blacked out drunk the night before, and I had never had sex prior, so I was very sore." (AR 289-90.) Roe continued, stating that Doe "kept trying to touch me, and I kept pushing his hand away and telling him that it hurt." (AR 290.) Roe explained that Doe "would take his hands away, and then like two minutes later he would go and try again." (*Ibid.*) According to Roe, that morning she told Doe "multiple times" that he should "stop" and Roe insisted she "was very, very clear about that." (AR 298.) Despite Roe's objections, Doe "kept going back and doing it regardless of whether or not I said stop or not." (AR 290.) At one point when Roe told Doe that his attempts to penetrate her vagina hurt, Doe responded, "Well, if it hurts then I guess I did my job right." (*Ibid.*)

After Roe's testimony, the Panel asked Roe a series of questions related to the events in question (AR 297-303), including questions

submitted by Doe (AR 304-11.) Doe also had an opportunity to state his version of the events and to respond to the Panel's testimony. (AR 311.) After considering each side's testimony, Ms. Dalcourt's investigative report that included past consistent statements by Roe (AR 401 [stating that Doe entered her with his fingers three times, despite her objections]), and other briefing submitted by the parties, the Panel found it more likely than not that Doe committed sexual misconduct on the morning of February 1, 2014. The Panel specifically found Ms. Roe "credible in her assertion that [Doe] tried to digitally penetrate [Roe's] vagina and he ignored her objections." (AR 621.)

Roe's testimony constitutes substantial evidence. It is well established that "[t]he evidence of one credible witness may constitute substantial evidence." (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052; see also *Lone Star Sec. & Video, Inc. v. Bureau of Sec. and Investigative Services* (2012) 209 Cal.App.4th 445, 458, citing *Estate of Odian* (2006) 145 Cal.App.4th 152, 168 ["[T]he testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible."].) Thus, because Roe testified to conduct that constitutes sexual misconduct and because the Panel credited that testimony, it is clear that substantial evidence supports the University's decision finding Doe responsible for sexual misconduct on the morning of February 1, 2014.

In finding a lack of substantial evidence, the court below misread the record, impermissibly substituted its own judgment of the credibility of Roe's testimony for that of the panel, and reweighed evidence. The trial court's error is most evident in its statement that "Ms. Roe did not object to sexual contact per se, and only explained that it was not pleasurable for her at that time." (AA 721.) To the contrary, Roe unequivocally testified that

she told Doe to cease his sexual advances. Roe testified "[t]his happened several times with me just pushing his hand and saying, 'Stop, it hurts,' like 'I am sore. Don't.' And he kept going back and doing it regardless of whether or not I said stop or not." (AR 290.) Later in her testimony, Roe stated that "multiple times" she told Doe "directly to stop." (AR 298.) Thus, it is incorrect that the Panel lacked evidence of Roe's objecting to sexual contact. Roe consistently stated that she told Doe that his attempts to digitally penetrate her were painful and to stop doing so. Even if Roe's statements of "Don't" and "Stop" were somehow susceptible to multiple meanings—which they are not—under substantial-evidence review, the trial court had to resolve all ambiguities in favor of upholding the agency's decision, which it clearly did not do. (See *Do v. Regents of the University of California, supra*, 216 Cal.App.4th at p. 1490.)

The lower court compounded its error by impermissibly substituting its own judgment for the Panel's when it determined that the "sequence of events do not demonstrate non-consensual behavior." (AA 721.) Instead, the trial court declared that "[w]hat the evidence *does* show is Ms. Roe's personal regret for engaging in sexual activity beyond her boundaries." (*Ibid.*)

The trial court's determination is improper for multiple reasons. First, the trial court improperly assessed the credibility of Roe's testimony regarding the morning of February 1, 2014. Despite stating that it was not "weighing Ms. Roe's credibility," the trial court necessarily discredited Roe's testimony about what happened on the morning of February 1, 2014, when she stated that Doe continued to digitally penetrate her over her objections.

The evidence cited by the trial court for its contrary conclusion—that the parties had consensual sex on the night of February 1, 2014, and that Ms. Roe had, on previous nights, told Doe that she physically wanted

to have sex with Doe but mentally could not—does not concern the morning of February 1, 2014. (AA 721.) As such, it could not possibly contradict Roe's testimony that on that morning Doe repeatedly digitally penetrated her over objections.

Rather, the evidence relied on by the trial court—to the extent it is relevant at all—could only go to providing context to Doe and Roe's relationship and thus to whether Roe's statements about the morning of February 1, 2014 were credible. But assessing the credibility of Roe's testimony about the morning of February 1, 2014 in light of other evidence is manifestly improper under substantial-evidence review. (*Do*, *supra*, 216 Cal.App.4th at p. 1492.) It was the Panel's job, as fact finders, to assess the credibility of Roe's testimony in relation to the other evidence, and the Panel expressly did so. The Panel questioned Roe about her past history with Doe and about what happened the night of February 1, 2014. Despite what the trial court considered contrary evidence, the Panel found Roe credible in her statements that on the morning of February 1, 2014, Doe tried to digitally penetrate Roe's vagina and ignored Roe's objections. It was error for the trial court, which of course never had the opportunity to personally observe Roe's testimony, to overrule that determination.

Moreover, even taking into account what the trial court considered to be contrary evidence, it is clear that a reasonable fact finder could find—and indeed, did find—that Doe committed sexual misconduct on the morning of February 1, 2014. The trial court relied on the fact that on the evening of February 1, 2014, Roe engaged in consensual sex with Doe. (AA 721.) But that oversimplifies the context of that sexual encounter. Roe testified that the evening of February 1, 2014, she and Doe were previously scheduled to attend her sorority formal, and that she did not uninvite him despite the events of the morning because she "didn't want people to ask me why at the last second I wasn't going with him, because I

didn't want to explain what happened." (AR 299.) Roe explained that she was upset with herself for losing her virginity the night before—for "getting that drunk" and "letting it happen." (*Ibid.*) The night of the formal Doe "kept asking if [they] were going to have sex that night." (AR 300.) Roe stated that although she initially said, "No, I am not going to. I am just not," as the evening wore on, she "just kind of gave up on [her]self" after Doe persisted in trying to persuade her that since she had already lost her virginity, she "might as well do it again." (*Ibid.*) Eventually, Roe testified, she "just didn't try and resist," she "just stopped caring," and she adopted an attitude of "[l]et's just get it over with." (*Ibid.*)

A reasonable fact finder easily could find that Roe's testimony about the morning of February 1 was consistent with her behavior on the evening of February 1. Various factors may have led Roe to have sexual intercourse with the man who digitally penetrated her against her will earlier in the day, including Doe's persistent efforts to persuade Roe to have sexual intercourse a second time, Roe's disappointment with herself, and the trauma of the events of that morning. A reasonable factfinder could conclude that Roe's reluctant consent to sexual intercourse on the evening of February 1 did not discredit her testimony about what happened that morning. (See *People v. Adair* (Mich. 1996) 550 N.W.2d 505, 510 [remanding case to the trial court to consider whether evidence of consensual sexual relations after an alleged assault should be admitted and noting that "the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault"].)

To the extent that the trial court intended to adopt a rule that, as a matter of law, subsequent consensual sexual relations necessarily disproves that a prior alleged sexual assault occurred, such a rule would have

extremely troubling implications for cases involving spousal or acquaintance rape. Subsequent consensual sexual relations would immunize the attacker from prosecution, discipline, or civil liability for a prior assault regardless of how egregious or apparent the previous sexual misconduct had been or the trauma that the victim was suffering from at the time of his or her consent.

The trial court's approach also contrasts starkly with UCSD's Student Sex Offense Policy and Reporting Procedures, which state that:

- Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity.
- Consent is not indefinite and may be withdrawn at any time.
- A current or previous romantic or sexual relationship does not imply continued consent ....

(AR 025-26.) Thus, per the Policy, Roe's consent to sexual activity the night of February 1, 2014, does not imply that she consented to sexual activity on the morning of the February 1, 2014, and the fact finders were free to credit her testimony that she did not consent.

Because a reasonable fact finder could determine that Roe's consent to sex on the night of February 1, 2014 did not undermine the credibility of her testimony that she was assaulted the morning of February 1, 2014, it was error for the trial court to conclude that there was not substantial evidence to support the University's findings.

The trial court also pointed to the statement that Roe "physically wanted to have sex with [Doe] but mentally wouldn't" in support of its conclusion that there was not substantial evidence to support the sexual misconduct finding. (AA 721.) From this statement the trial court concludes that "[t]he record reflects this ambivalence on the part of Ms. Roe. But Ms. Roe's own mental reservations alone cannot be imputed to

petitioner, particularly if she is indicating she physically wants to have sex." (*Ibid.*)

The trial court's use of this statement to determine that there was not substantial evidence that Doe digitally penetrated Roe over her objections on the morning of February 1, 2014, is flawed and improper. The discussion of mental versus physical desire did not concern the morning of February 1, 2014, but rather was in response to a question about her relationship with Doe prior to February 1, 2014. At the hearing, Mr. Jakubisin asked Roe what she told Doe about her unwillingness to engage in sexual activity *before* February 1, 2014. (AR 291.) Roe responded that she told Doe "several times" that she was a virgin and that she was not going to have sex. (*Ibid.*) Roe stated that she was waiting until either marriage or something that was special to her. (*Ibid.*) In this context, Roe stated that multiple times, while they were making out or engaging in oral sex, Doe would ask if she wanted to have sex, and she would reply that while physically she wanted to, mentally she did not. (*Ibid.*) The only testimony by Roe regarding the morning of February 1, 2014—the morning in question—is that she repeatedly told Doe to stop trying to digitally penetrate her vagina and that he ignored her objections.

But even if this statement was found to somehow concern or implicate the morning of February 1, 2014, the trial court's conclusion that Roe's mental state cannot be imputed to Petitioner is incorrect. Roe unequivocally testified that she *told Doe* that mentally she was not ready for sex because she was a virgin. (AR 291.) Any physical attraction to Doe of course does not negate Roe's ability and right to decline Doe's sexual advances.

In sum, to find that substantial evidence did not support the University's determination, the trial court misstated Roe's testimony, reweighed the evidence, improperly made credibility determinations

regarding Roe's testimony, and resolved ambiguities against upholding the agency's decision. This approach is irreconcilable with the substantial-evidence standard and the deference that California courts have afforded the Regents. (See *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1272.) Because it is clear that substantial evidence—namely the credited testimony of Roe—supports the Panel's conclusion that Doe committed sexual misconduct on the morning of February 1, 2014, this Court should reverse the trial court's vacature of the University's findings.

II. The Trial Court Erred In Finding That The University's Sanction Was An Abuse Of Discretion.

A. The Abuse-Of-Discretion Standard Applies To Review Of The University's Sanction.

An appellate court, like a trial court, reviews the penalty imposed by an administrative body for abuse of discretion. (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218.) A reviewing court may not "substitute its discretion for that of the administrative agency concerning the degree of punishment imposed." (*Ibid.*, italics omitted.) The abuse of discretion standard "requires [a court] to uphold a ruling which a reasonable [decision-maker] might have made, even though [the reviewing court] would not have ruled the same and a contrary ruling would also be sustainable." (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 427-28, quoting *People v. Woods* (1993) 12 Cal.App.4th 1139, 1153.)

The abuse-of-discretion standard is particularly important in the context of student disciplinary decisions made by the Regents. As the Court of Appeal has long recognized, the Regents has "the power to formulate and enforce rules of student conduct ... to further the University's

educational goals." (*Goldberg v. Regents of University of Cal*, *supra*, 248 Cal.App.2d 867, 879-80.) Because "the subtle fixing of … limits should, in a large measure, be left to the educational institution itself" (*ibid.*), the courts should not second-guess reasonable judgment calls made by university officials about the appropriate discipline to be imposed. (See *Charles S. v. Board of Education* (1971) 20 Cal.App.3d 83, 90, quoting *Knight v. State Bd. of Ed.* (M.D.Tenn. 1961) 200 F.Supp. 174, 179 ["[A] state college or university must necessarily possess a very wide latitude in disciplining its students" and "interference should not occur in the absence of the most compelling reasons."].)

It is well settled that UCSD officials have the authority to adjust sanctions recommended by Student Review panels and thereby promote "consistency and fairness across student disciplinary proceedings throughout the university." (*Berman v. Regents of University of California, supra*, 229 Cal.App.4th at pp. 1274-75.)

B. The University Did Not Abuse Its Discretion By Imposing A Sanction That Was Just One Quarter Longer Than The Minimum Sanction.

The trial court erred when it held that Dean Mallory and the Council of Provosts' intent in increasing Doe's sanction was to punish Doe for appealing the Panel's decision. (AA 721-22.) The trial court attributed this improper motive to University officials because the trial court believed that the Deans' and Council's notifications of sanctions did not sufficiently detail their reasons for increasing the suspension. (*Ibid.*)

This leap in logic was clear error. In *Berman*, a UCSD student who had hit another student in the head challenged the authority of a UCSD dean to impose a two-quarter suspension after the panel had recommended no suspension. This Court held that under the University's student conduct code, "it is apparent a board [i.e., the Panel] does not have final authority to

impose sanctions. [Citation.] Sanction recommendations by a board must be reviewed either by the student conduct officer or by the Council of Deans before a final determination of sanctions is made." (*Berman, supra*, 229 Cal.App.4th at pp. 1274-75 [upholding imposition of a suspension by a UCSD Dean after the review panel recommended only probation where Dean "concluded suspension was warranted under the circumstances."].) In *Berman*, the dean's letter informing the student of the sanctions imposed did not include a detailed explanation of why the two-quarter suspension had been adopted, other than to say that it had been imposed "after reviewing the student conduct review report, the recommended sanctions, your student conduct record, and the [UCSD] Sanctioning Guidelines." (*Id.* at p. 1270, original brackets.) Notably, this Court did not fault the Dean for withholding more details about the reasoning behind her sanction, much less assume that the Dean must have had some improper intent because she did not provide more specifics.

The letter informing Doe of the sanction here included language that was virtually identical to the letter in *Berman*: "Dean Mallory reviewed the Hearing Report, applicable statements submitted by both parties, your student conduct record, and the University's Sanctioning Guidelines …." (AR 636.) At a minimum, the similarity between the two notifications shows that this is not language that the University employs in order to hide an intent to punish a student for appealing a panel's decision. The trial court's willingness to assume that this language revealed that a group of at least seven University officials must have conspired to punish Doe for exercising his right to appeal the Panel's decision reveals, once again, its profound lack of deference towards the University in this case.

Finally, the University acted well within its discretion in imposing a suspension of one year and one quarter and other sanctions against Doe. The UCSD Sanctioning Guidelines (the "Sanctioning Guidelines")

recommend that sexual misconduct violations involving "forced groping/kissing" should include a suspension of a "minimum [of] one year" in addition to probation and other sanctions. (AA 491.) The Sanctioning Guidelines also provide that "increased sanctions may be imposed to take into consideration the Student's overall record of violations of all types." (AA 489.) Here, Doe had previously been cited for violations of the Student Conduct Code relating to consumption of alcohol under the age of 21. (AR 640-46.) In light of Doe's prior violations of the Student Conduct Code, his callous dismissal of Jane Roe's pain on the morning of February 1, and the trauma he caused Jane Roe, the Provosts were well within their discretion to impose a suspension that exceeded the *minimum* sanction by just one quarter, in addition to probation and other lesser sanctions. This modest upward departure from the minimum sanction simply cannot qualify as an "arbitrary, capricious or patently abusive exercise of discretion," which must exist in order for the University's sanction to be overturned. (See *Cassidy v. California Board of Accountancy* (2013) 220 Cal.App.4th 620, 627-28, quoting *Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966.)

III. The University Provided Doe With A Fair Hearing

A. The Trial Court's Fairness Findings Are Reviewed De Novo, Giving Substantial Deference To The Regents' Assessment Of The Process That Is Due.

An appellate court "exercise[s] independent review on the question of whether [an administrative agency] provided … a fair hearing." (*TWC Storage, LLC v. State Water Resources Control Bd.* (2010) 185 Cal.App.4th 291, 296.) Accordingly, an appellate court reviews de novo the *trial court's* decision regarding the fairness of the administrative proceeding.

(*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285; *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107-08.)

Although the trial court's fairness findings are subject to de novo review, the *Regents'* determination of what process is due to students in disciplinary matters is subject to significant weight by appellate and trial courts alike. "In assessing what due process is due, [the court] must give substantial deference to the good faith judgment of the agency that its procedures afford fair consideration of a party's claims." (*California Consumer Health Care Council, Inc. v. California Dept. of Managed Health Care* (2008) 161 Cal.App.4th 684, 692.)

California courts have repeatedly recognized that there are additional reasons to afford the Regents deference, in addition to those that normally support respect for an administrative agency's determinations. (See *Berman, supra*, 229 Cal.App.4th at p. 1272; see also *Goldbaum v. Regents of University of California* (2011) 191 Cal.App.4th 703, 709.) California courts have distinguished between the ordinary authority of a state agency and the unique autonomy granted to the Regents by our Constitution. (*Ibid*, quoting *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135, internal quotation marks omitted ["the Regents as a constitutionally created arm of the state have virtual autonomy in self-governance"].)

This special constitutional authority "grants the Regents broad powers to organize and govern the university" (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788), and that constitutional grant of power "includes the grant of quasi-judicial powers." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) Of particular significance here, "[t]his power necessarily includes quasi-judicial administrative authority to resolve disciplinary

disputes by applying university policies to particular cases." (*Berman, supra*, 229 Cal.App.4th at p. 1272.)

In order for the Regents to carry out its constitutional powers, the courts have accorded the Regents significant discretion. "Our Supreme Court has held 'that the Regents, to be effective, must have considerable discretion to determine how best to carry out the University's educational mission." (*Ibid.*, quoting *Smith v. Regents of University of California* (1993) 4 Cal.4th 843, 852.)

As detailed below, the trial court did not exhibit any of the deference normally accorded administrative agencies or the University. To the contrary, the trial court chose to disregard decades of case law on which colleges and universities have relied in designing their student disciplinary proceedings.

B. Due Process In Student Disciplinary Hearings Does Not Require Criminal Trial Procedures, But Rather Notice And A Hearing At Which The Student Can Present Defenses.

It is well settled California law that "procedures for dismissing college students [are] not analogous to criminal proceedings and could not be so without at the same time being both impractical and detrimental to the educational atmosphere and functions of a university." (*Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 770, citing *Goldberg, supra*, 248 Cal.App.2d at p. 881; cf *Granowitz v. Redlands Unified School Dist.* (2003) 105 Cal.App.4th 349, 355 [noting that "courts have consistently refused to impose stricter, adversarial, 'trial-like procedures and proof' on public school suspension proceedings"].)

Indeed, courts have prudently guarded against the dangers of "usurp[ing] this function" of student discipline from "educational systems" that would arise if university disciplinary proceedings were turned "into criminal adversary proceedings - which they definitely are not." (*Charles*

S. v. Board of Education, supra, 20 Cal.App.3d at p. 90.) As the First Circuit has explained:

> [T]he courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process.

(*Gorman v. University of Rhode Island* (1st Cir. 1988) 837 F.2d 7, 16; see also *Murakowski v. University of Delaware* (D.Del. 2008) 575 F.Supp.2d 571, 585-86, original brackets, internal citation and quotation marks omitted ["A university's primary purpose is to educate students; [a] school is an academic institution, not a courtroom or administrative hearing room. A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms."].)

California courts have held that, in student disciplinary proceedings, the essential elements of due process are:

> (1) a notice containing a statement of the specific charges and grounds which, if proven, would justify [discipline] under the applicable regulations of the University; [and] (2) a hearing whose scope and nature should vary according to the circumstances of the particular case.

(*Goldberg, supra*, 248 Cal.App.2d at p. 881; see also *Andersen v. Regents of University of California, supra*, 22 Cal.App.3d at p. 771.) The hearing referred to in *Goldberg* "need not be a full dress judicial hearing but one giving the student a full opportunity to present his defenses." (*Andersen*, 22 Cal.App.3d at p. 771.)

C. The University Provided Doe With Plentiful Notice And An Ample Opportunity To Present His Defenses At A Hearing.

Under these criteria, it is clear that Doe received the process he was due, including repeated notice of the charges and grounds, copies of all documents provided to the panel, and a hearing at which he had a full opportunity to set forth his defenses.

First, Doe received ample notice of the charges against him. On August 26, 2014, more than three months before Doe's hearing, Ms. Dalcourt sent an email to Doe's lawyer that listed three potential Student Conduct Code violations that she was investigating in regard to Roe's allegations, which included "[a]n alleged violation of the Sex Offense Policy on the morning of February 1st, 2014 involving digital penetration without consent." (AR 461.) On September 25, 2014, still over two months before Doe's hearing, Doe received an email from the Dean stating that Doe had been charged under the Student Conduct Code for sexual misconduct and specifying the nature of the charge. (AR 414.) On November 10, 2014, Doe was notified that his Student Conduct Review Hearing would be held on December 12, 2014, and was provided a copy of the OPHD's investigative report and Jane Roe's June 16, 2014 Request. (AR 419; 438.) Thus, the University repeatedly informed Doe of the charges and grounds that he needed to defend against at the hearing.

Doe also had ample opportunity to present his defenses. At the hearing Doe was given the chance to tell his side of the story by providing relevant documents and witnesses. (AR 283.) Doe instead selectively invoked his Fifth Amendment right not to testify (while summarily denying that the February 1 digital penetration occurred), did not call any witnesses, and did not present any documents. (AR 311.) Doe also had the opportunity to submit to the Panel questions to be asked of Roe. (AR 303.)

In addition to the opportunities he was afforded at the hearing, Doe submitted a 19-page pre-hearing statement, in which he summarily denied digitally penetrating Roe, as well as a post-hearing written submission. (AR 423-41; 612-17.) Doe provided a 362-page (including exhibits) appeal to the six-member Council of Provosts. After Doe submitted supplemental information in support of his appeal, the Council upheld the decision of responsibility and determined that a suspension of one year and one quarter should be imposed. (AR 390.)

At every stage of proceedings before the University, from investigation to appeal, Doe was provided an opportunity to be heard and present a defense. All told, Doe submitted more than 550 pages to the University regarding the alleged incident. Doe also had the opportunity to present his side of the story in person at the hearing. Such robust procedures more than satisfied the due process requirements applicable to student disciplinary proceedings—i.e., notice of the charges and grounds and a hearing at which the student has a full opportunity to present his defenses. (*Goldberg, supra*, 248 Cal.App.2d at p. 881.)

D. The Trial Court Erred In Finding That Doe's "Right To Cross-Examination" Was Improperly Restricted.

The trial court incorrectly found that the University had violated due process by depriving Doe of his right to confront and cross-examine witnesses. In so holding, the trial court failed to acknowledge that because "[d]ue process is a flexible concept," California courts have instructed that "[n]ot every situation [to which the right to procedural due process applies] requires a formal hearing with full rights of confrontation and cross-examination." (*Rodriguez v. Department of Real Estate* (1996) 51 Cal.App.4th 1289, 1296.)

In particular, both California and federal courts have consistently held that "a full dress judicial hearing with the right to cross-examine

witnesses [is] not required" in student disciplinary proceedings. (*Goldberg, supra*, 248 Cal.App.2d at pp. 881-82 [affirming dismissal and suspension of university students]; *Nash v. Auburn University* (11th Cir. 1987) 812 F.2d 655, 664 [stating in a case involving a one-year suspension that "[w]here basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding"]; *Gorman v. University of Rhode Island, supra*, 837 F.2d at p. 16 [stating in a matter involving harassment, campus location restrictions, and a suspension that "the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases"]; *Sterrett v. Cowan* (E.D.Mich. 2015) 85 F.Supp.3d 916, 929, appeal docketed, No. 15-1121 (6th Cir. Feb. 6, 2015) [in a matter involving suspension for sexual misconduct stating that "confronting the Complainant, let alone other witnesses, is not an absolute right and is generally not part of the due process requirement in a school disciplinary setting"].)

Although not required by due process, the University provided Doe with the opportunity to cross-examine Roe by submitting questions to the Panel. The Panel Chair then posed Doe's questions—other than those she found duplicative or irrelevant—to Roe. Even though the University gave Doe more than an opportunity to present his defenses—all that due process requires of student disciplinary hearings—the trial court found that Doe was denied a right to confrontation. Each of the trial court's rationales was flawed.

1. The Panel Chair's Exercise Of Discretion Not To Ask Duplicative Or Irrelevant Questions Was Reasonable And Did Not Make The Hearing Unfair.

The trial court first found that it was "unfair to [Doe] that his questions were reviewed by the Panel Chair for her alone to determine whether or not the question would be asked and then answered by the

witness." (AA 718.) The trial court then pointed to certain questions that it believed should have been asked or should not have been paraphrased. Regardless whether the trial court was suggesting it is never appropriate for a Panel Chair to determine if questions are relevant and non-repetitive or instead was holding that in this particular case the questions not posed were necessary to a fair trial, the trial court's determination was wrong.

As to whether such procedures are generally permissible, courts have recognized that universities may require questions to be directed to an accuser through a hearing panel (*Nash v. Auburn University, supra*, 812 F.2d at p. 664), and may place limitations on the questions posed, (*Smith v. Miller* (1973) 213 Kan. 1 [in student misconduct proceedings, "the school's interest can be protected by ... limiting the scope of cross-examination to prevent the student or his lawyer from badgering witnesses"])—holdings consistent with the California rule that "a full dress judicial hearing with the right to cross-examine witnesses [is] not required" in student disciplinary proceedings. (*Goldberg, supra*, 248 Cal.App.2d at pp. 881-82.)

In sexual misconduct proceedings, not only do such procedures prevent the unnecessary consumption of time and resources but they also serve the critical objective of mitigating the risk that victims of sexual assault become re-traumatized by the hearing process.[1] Consistent with

[1] Recent state and federal regulations have recognized the importance of conducting hearings in a manner that is sensitive to the safety of, and potential trauma to, victims. (See Ed. Code, § 67386, subd. (b)(12) [requiring "comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases"]; 34 C.F.R. § 668.46(k)(2)(ii) [requiring officials be trained to conduct hearing process in a manner "that protects the safety of victims"].) Universities may also face tort liability if they fail to protect students against known acts of harassment. (See *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 643.)

federal guidance, the University has tailored its hearing procedures to reduce the risk that a victim of sexual misconduct suffers further trauma and to protect against creating a hostile environment that may deprive a student of an equal opportunity to pursue an education. (See AA 276 [Department of Education Office for Civil Rights April 4, 2011 letter to universities ("OCR Letter")].) UCSD's decision to have respondents present their questions to a complainant through the Panel in order to mitigate the risk of trauma was certainly a reasonable one. (See AA 287 [OCR Letter stating that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment"].) Indeed, faced with the possibility of harsh questioning by his or her assailant, many sexual assault victims may simply decide to keep their attacks secret and thereby increase the risk that other students will be victimized by the perpetrator.

Similar considerations support giving a Panel Chair the ability to not ask certain questions offered by the respondent. The threat of intimidation and re-traumatization would be only slightly lessened if the respondent could pose irrelevant, repetitive, or otherwise improper questions to the complainant through the Panel Chair. If panels lacked the ability to weed out inappropriate questions, lengthy inquiries into a complainant's sexual history with other individuals or her attire on the date of the alleged assault would become fair game. Moreover, the Regents has an interest in ensuring that cross-examinations do not convert a student disciplinary hearing into a multi-day trial with all the attendant costs and drain on the University's limited resources.

Questioning can be regulated without depriving a respondent of a fair hearing. Even in the context of a criminal or civil trial in court, a trial judge has substantial discretion to limit repetitive or irrelevant questioning. (Evid. Code, § 352; *Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419,

438, quoting *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 281 ["Generally, 'the trial court has the power to … exclude proffered evidence that is deemed to be irrelevant, prejudicial or cumulative and expedite proceedings which, in the court's view, are dragging on too long without significantly aiding the trier of fact.'"].)

UCSD's process of having a respondent's questions be posed by a Panel Chair and of giving the Panel Chair the ability to exclude repetitive or irrelevant questions is not novel, but rather fully consistent with federal guidance, which provides:

> A school may choose, instead [of permitting direct questioning], to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.

(Department of Education Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence at p. 31, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("OCR Q&A's").)

In short, the University acted well within the requirements of due process in having the Panel Chair pose Doe's questions to Roe and in allowing the Chair to exclude repetitious or irrelevant questions.

The trial court's disagreement with the Panel Chair's decision to exclude certain questions and evidence also constituted error. Evidentiary rulings can be a basis for reversal only if the Panel Chair abused her discretion. (See *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 376 [applying abuse of discretion standard to agency's evidentiary rulings]; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 663 ["We review for abuse of discretion a trial court's ruling to exclude proffered relevant evidence under Evidence Code section

352.”].) Moreover, “[t]he admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice”—i.e., “it must be reasonably probable a more favorable result would have been reached absent the error.” (*Lone Star Sec. & Video, Inc. v. Bureau of Sec. and Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-55.)

Here, the Panel Chair appropriately excluded questions that were irrelevant or repetitive. Although the lower court noted that the Panel Chair asked only nine of the thirty-two submitted questions (AA 718), that fraction reflects the large number of irrelevant or repetitive questions submitted by Doe, not an abuse of discretion that prejudiced the outcome of the hearing. An examination of the specific questions excluded by the Panel Chair demonstrates the reasonableness of her decisions.

The trial court specifically faulted the Panel Chair for excluding questions 13 through 19. Each of these questions went to the authenticity of text messages. For example, question 13 read:

> Mr. Doe submitted screenshots of text messages that he asserts consist of exchanges between the two of you on February 1, 2014. Is it true that Mr. Doe texted you sometime in the afternoon of February 1, 2014, the following: “I think [student name] hooked up with your grandbig last night haha” to which you responded, “Wait what . . .[student name]? Haha”?

(AR 260; see also AR 261-63 [demonstrating that questions 14-19 and 21 were similarly phrased].) The Panel Chair declined to ask those authenticity questions because the Panel had already read the text messages that Doe was seeking to authenticate. (AR 307 [“I am not asking 13. We have a copy of the texts, so we have read them. Same with No. 14 and 15,

it looks like, through 19."].)[2] There was, in other words, no issue as to the admissibility of the text messages; thus, questions going to their authenticity were irrelevant, cumulative, and unnecessary. The Panel Chair did not abuse her discretion in deciding not to ask questions that sought to authenticate exhibits of undisputed authenticity. Likewise, asking those questions would not have changed the outcome of the hearing and thus could not have provided a basis for overturning the University's decision. (See *Lone Star Sec. & Video, Inc. v. Bureau of Sec. and Investigative Services*, *supra*, 176 Cal.App.4th at pp. 1254-55.)

The trial court also based its decision on the manner in which questions 10, 20 and 22 were posed or answered. Doe's question 10 read:

> Would you agree with the fact that your first complaint wherein you allege that on January 31, 2014 and February 1, 2014, Mr. Doe did somethings that you felt were wrong was when you presented a written report to the University's Office of Student Conduct on June 5, 2014?

(AR 259-60.) In response to a paraphrased version of this question, Jane Roe asked, "To the school or to anyone?" but then confirmed that June 5 was the first time she had reported Doe to the University. (AR 306.) Doe was not prejudiced by—and indeed did not even object to—this responsive answer, which confirmed the fact that he was seeking to establish. The trial court's conclusion that the Panel Chair "permitted Ms. Roe to give an

[2] Other questions that the Panel declined to ask had already been answered by Jane Roe earlier in the hearing (questions 4, 9, 23-25), were simply irrelevant to the issues before the Panel and arguably prejudicial to Roe (question 2, asking where Jane Roe was enrolled in school; questions 6 and 12, asking whether Jane Roe understood the potential consequences to Doe of her allegations) or sought information concerning whether Jane Roe had met with the University representative prior to the hearing (questions 28 through 31). (AR 257-66.)

incomplete answer to question 10" (AA 719) was wrong, and it certainly provided no basis for an abuse-of-discretion or prejudice finding.

Doe's question 20 stated:

> **No. 20:** [¶] So, approximately three months after the alleged incident of February 1, 2014, you two were texting each other on the evening of April 25, 2014 for purposes of planning to together to pregame before some outing?

(AR 263.)

After Roe stated that she could not recall what happened on April 25, the Panel stated:

> [Panel Chair]: Okay. I will just go ahead and read and see if this triggers your memory. If not, I will move on to the next question. Let's see. "Hey, when should we head over to your place to pregame?" This was at 8:07 p.m. on Friday, April 25th. The response, "Like soon, if you guys want to come or if you want to head to another pregame, but we'll have rides." Next response, "Okay, let me talk to (student). What time are you guys leaving" Response, "Probably 9:00. If not just head to (student's) pregame." "9:30. Okay, is there alcohol there or do we need to bring stuff? The guy who usually buys –" I think it says guys, but "Buys us alcohol is out of town, so we have like a third of a fifth of Captain. Ha, ha."
>
> Are you remembering? Yes? Okay. Would you like me to continue reading the texts, or are you able to provide context to that?
>
> Ms. Roe: Yeah. We had another exchange where my friend (student), wanted to pregame for free alcohol, so she asked me to text them. And we ultimately decided not to go to the pregame because I didn't want to be around him, and be in that kind of atmosphere again.
>
> [Panel Chair]: So just to make sure I understand, you were trying to get somebody to provide alcohol? That was the intent of the text?
>
> Ms. Roe: Yes.

> [Panel Chair]: Okay. And was there any other reason or relationship you were establishing in this text?
>
> Ms. Roe: We weren't friends.
>
> [Panel Chair]: Okay.
>
> Ms. Roe: And I didn't go over there.

(AR 308-09.) In short, the Panel inquired into the purposes of the text exchange on April 25, 2014, exactly what Doe's Question 20 had sought. It was no abuse of discretion to ask the question using different words than Doe had chosen, and the Panel Chair's approach to phrasing the question had no conceivable impact on the outcome of the hearing.

Finally, Doe's question 22 asked: "So, would you agree with the fact that at least up until April 28, 2014, you and Mr. Doe had gotten along quite well together – socially and as classmates to do homework?" (AR 263.) That question related to a text message that Roe had sent to Doe on April 28 asking if he knew the answer to a homework problem. (AR 263; 278.) After the Panel Chair stated that the Panel had copies of this text message, Doe then interjected: "It's relevant because it shows that we were friends at the time, but it is all – it is also worth noting that we did meet up in the library to do homework on several occasions." (AR 309.) After requesting that Doe not interrupt, the Panel Chair asked Roe if she had anything to add to what she had already said about her relationship with Doe in March and April 2014. Roe responded: "I don't think any communication or whatever relationship, or the fact that we were in the same class or anything, is relevant to his sexually assaulting me on the 31st and on the 1st. I don't know how any after-relationship changes those facts." (AR 310.)

The issue is not whether a Panel Chair *could* have stricken Roe's answer in which she denied the relevance of her relationship, but whether

the Panel Chair abused her discretion and did so in a way that, "after an examination of the entire case," would leave this Court "of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Panel Chair's conduct in not striking the answer and re-asking the question was reasonable. The fact that Roe and Doe continued to interact through April 28 was not a subject of dispute. The April 28, 2014 text message established this fact. (See AR 278; 309.) That text message was already in the possession of the Panel, and its authenticity was not in question. As to whether she and Doe had "gotten along quite well together" through April 28, Roe had provided her position on that issue in response to a question about the April 25 text: "We weren't friends." (AR 309.) In light of Roe's prior answer and the existence of the April 28 text message in the record, the Panel Chair's decision not to strike Roe's answer and re-ask the question does not "fall[] outside the bounds of reason" (*People v. Osband* (1996) 13 Cal.4th 622, 666), or qualify as "an arbitrary, capricious, or patently absurd" exercise of discretion "that resulted in a manifest miscarriage of justice" (*People v. Carrington* (2009) 47 Cal.4th 145, 195)—in other words, it was not an abuse of discretion.

Nor is it reasonably probable that a different evidentiary ruling by the Panel Chair would have led the Panel to find that Doe had not committed sexual misconduct on the morning of February 1, 2014. The record contained abundant evidence that Doe and Roe continued to interact after the morning of February 1, 2014. (See AR 308 [Panel Chair reading from an April 25 text message exchange between Doe and Roe and Roe acknowledging that she did have such an exchange]; AR 038-42 [February 1, 2014 text exchange between Doe and Roe]; AR 043-45 [April 25, 2014

text exchange between Doe and Roe]; AR 046 [April 28, 2014 text exchange between Doe and Roe]; AR 431-32 [Doe's pre-hearing submission discussing the February 1, April 25, and April 28 text messages and arguing that "the texts … indicate both parties were getting along just fine"].) Additional evidence that the two had continued to communicate after the morning of February 1 would not have meaningfully augmented the evidence before the Panel. (See *Lone Star Sec. & Video, Inc. v. Bureau of Sec. and Investigative Services, supra*, 176 Cal.App.4th at p. 1255, internal citations and quotation marks omitted [the erroneous exclusion of evidence "is not prejudicial if the evidence was merely cumulative or corroborative of other evidence properly in the record"].) The issue for the Panel was not whether Doe and Roe's interactions persisted after the morning of the alleged assault, but rather what the significance of that fact was in terms of the credibility of Roe's claim that Doe had digitally penetrated her against her will on February 1. In short, any error with respect to Roe's testimony about her relationship with Doe in March and April 2014 was harmless and did not cause Doe prejudice.

2. The Placement Of A Screen Between Doe And Roe Did Not Make The Hearing Unfair.

Another aspect of the University's carefully-tailored effort to mitigate the risk of trauma to a sexual misconduct complainant is its rule permitting a complainant to be visually or physically separated from the respondent. (See AR 363.) This approach again is not unique to UCSD, but rather is consistent with case law upholding the practice and with federal guidance to colleges and universities. (*See Cloud v. Trustees of Boston University* (1st Cir. 1983) 720 F.2d 721, 725 [hearing examiner's decision to permit a student to testify out of Cloud's sight because of her frightened and nervous state did not render the hearing unfair]; cf. *Douglas v. State of Ala.* (1965) 380 U.S. 415, 418 ["an adequate opportunity for

cross-examination may satisfy the [sixth amendment confrontation] clause even in the absence of physical confrontation."]; OCR Q&A's at p. 30 [endorsing practice of physically separating complainants and respondents upon request through "closed circuit television or other means"].)

The trial court concluded that a screen between Jane Roe and John Doe was unfair because there was "no indication that [Doe] was hostile towards Ms. Roe" and because it believed that the screen interfered with the ability to evaluate Roe's credibility. (AA 719.) The trial court's reasoning was flawed on both counts.

First, open hostility need not exist for a victim of sexual assault to suffer additional trauma as a result of participating in a student misconduct proceeding where she must come face-to-face with her attacker. In fact, at the time of the hearing, Jane Roe had been diagnosed with PTSD and had withdrawn from UCSD. (AR 623-25.) A forced confrontation with Doe very well may have caused Roe to be re-traumatized.

Second, it was not Doe who needed to view Jane Roe's demeanor to assess her credibility; rather, Doe believed and maintained throughout the hearing that Jane Roe was not credible. To the extent Jane Roe's demeanor was important to evaluating credibility, it was the Panel, not Doe, who needed to be able to see her face and body language. As the trial court recognized, the Regents maintains that the Panel was able to view Jane Roe's face throughout the proceedings to assess her credibility, and the trial court did not make any finding to the contrary. (AA 719.)[3]

Finally, neither Doe nor the court below pointed to any evidence that allowing Doe to view Jane Roe's facial expression or demeanor would have made a material difference in the hearing, let alone led to a different result.

[3] Putting up a screen to separate only Complainant and Respondent is consistent with UCSD policy. (See AR 363.)

3. Consideration Of The OPHD Report By The Panel Did Not Violate UCSD Procedures Or Otherwise Result In An Unfair Hearing

The trial court also erroneously concluded that Doe was denied the right to confrontation because the Panel considered the OPHD Report although Ms. Dalcourt was not present at the hearing. This conclusion is erroneous for four reasons.

First, as the trial court recognized, neither due process nor UCSD's procedures require application of formal rules of evidence in student misconduct proceedings. (See *Goldberg, supra*, 248 Cal.App.2d at pp. 883-84 ["Clearly, there is no merit in the contention that plaintiffs were deprived of procedural due process because the Committee did not follow the rules of evidence usually applicable in judicial proceedings …."]; see also AR 363.) Indeed, courts in numerous other cases have concluded that cross-examination of a school official who investigated the alleged misconduct is not required in student disciplinary proceedings. (*Newsome v. Batavia Local School Dist.* (6th Cir. 1988) 842 F.2d 920, 925-26 [student threatened with expulsion based on statements as to drug-trafficking activities did not have due process right to cross-examine school administrators regarding their investigation of alleged drug-trafficking incident despite the fact that cross-examination "would have improved the fact-finding process"]; *Winnick v. Manning* (2d Cir. 1972) 460 F.2d 545, 549 [cross-examination of Dean regarding Dean's prior written statement about the alleged misconduct not required where the Dean's credibility was not at issue and "no useful purpose" for cross-examination was identified].) Accordingly, the Panel was permitted to consider the statements in the OPHD Report regardless of whether they would be considered hearsay under the California Rules of Evidence applicable in civil or criminal proceedings.

Second, there is no evidence that Doe, who had received Ms. Dalcourt's report in advance of the hearing, requested Dalcourt's appearance at the hearing. (See AR 435-36 [Doe's pre-hearing submission describing Ms. Dalcourt's investigation report].) Nor did Doe raise this issue in his administrative appeal. (AR 006-20.) As a result, Doe waived this argument and cannot now claim that any inability to question Ms. Dalcourt was a violation of his due process rights. (See *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787 ["We have repeatedly held that issues not presented at an administrative hearing cannot be raised on review."]; *Andersen*, *supra*, 22 Cal.App.3d at p. 773 [denying claim that students was deprived of right to cross-examination where most witness testimony was written because "at no time did he object to this mode of procedure nor did he request that the writers be called"].)

Third, the trial court was incorrect when it stated that "the hearing did not allow petitioner any opportunity to refute Ms. Dalcourt's findings." (AA 719.) Doe did attempt to refute Dalcourt's findings in his pre-hearing submission and at the hearing. (AR 311, 435-36.) During his testimony, Doe directly contradicted Dalcourt's finding by summarily denying digitally penetrating Roe against her will on the morning of February 1. (AR 313.) Although Doe failed to back up that denial with any details of what happened on the morning of February 1, that was the result of Doe's selective assertion of his Fifth Amendment privilege, not any due process violation by the Panel. (See *ibid.*)

Fourth, the trial court's determination that the Panel abdicated its fact finding responsibility to Ms. Dalcourt is incorrect. (AA 719.) The Panel made specific findings that Roe's testimony regarding Doe's digital penetration was credible, and that Roe's explanation regarding supposed inconsistent statements was also credible. (AR 621 [findings 5 and 7].) The Panel's sixth finding merely noted the corroborating determination of

the investigator. (*Ibid*.) At no point did the Panel expressly or implicitly delegate its fact-finding duty to Dalcourt. Moreover, even if finding 6, where the panel noted Ms. Dalcourt's conclusion, was improper, the sufficiency of the other findings demonstrates that Doe was not prejudiced. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215, as mod. (May 5, 1994) [holding that "if any one of the findings made by [administrative agency] is supported by substantial evidence …, defects in other findings by the [agency] will not prejudice [petitioner]."].)

E. Doe Was Not Entitled To Discovery Of Handwritten Notes Of Ms. Dalcourt's Interviews With 14 Witnesses Or Of Jane Roe On July 29 Or June 12

Although Doe received all of the materials that were provided to the Student Conduct Panel, the trial court erroneously concluded that Doe was not provided a fair hearing "because Doe was not given any of the underlying 14 witnesses interviewed by Ms. Dalcourt nor was [Doe] provided with Ms. Roe's interview statements on June 12 and July 29." (AA 719.)

Due process does not require civil or criminal-style discovery in student disciplinary matters. (See *Andersen, supra*, 22 Cal.App.3d at pp. 762, 771 [no due process violation for not providing Professor's letter describing misconduct where student was apprised orally of the charges set forth in the letter]; *Mohilef v. Janovici, supra*, 51 Cal.App.4th at p. 302 [there is no basic constitutional right to pretrial discovery in administrative proceedings].)

Instead, Doe was entitled to "a notice containing a statement of the specific charges and grounds," which he indisputably received. (*See Goldberg, supra*, 248 Cal.App.2d at p. 881 ["Other than the limited notice provisions ... requiring that the student be advised of the charges and the nature of the evidence—there is no formal right to discovery."]; *Gomes v.*

University of Maine System (D.Me. 2005) 365 F.Supp.2d 6, 18 ["It is likely the University could have given neither the Complainant nor the Plaintiffs any police documents at all and survived a due process challenge."].)

Moreover, none of the 14 witnesses referenced in the OPHD Report were relevant to the digital penetration on February 1, for which Jane Roe and Doe were the only witnesses. Rather, these witnesses spoke only of the evening of January 31 (AR 400-01; 407) and the alleged retaliation on May 14, 2014 (AR 405), neither of which were at issue at the hearing (AR 287). Indeed, because the Panel was considering only whether a violation of UCSD policy occurred on the morning of February 1, Doe does not and cannot show that he was prejudiced by his lack of access to the statements.

With respect to Ms. Roe's prior statements, Doe was provided with all to which he was entitled, i.e., the "gist" of her proposed testimony. (See *Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees* (1970) 9 Cal.App.3d 873, 879 [noting that due process requires accused be apprised only of gist of witness testimony].) Roe's interview statements, moreover, were not before the Panel. Nothing required UCSD to provide Roe's prior statements in these circumstances.

F. Questioning By The UCSD Representative Was Consistent With UCSD Policy And Due Process

Finally, the trial court concluded that UCSD improperly allowed Mr. Jakubisin, the UCSD representative, to ask questions without submitting them to the Panel. (AA 720.) Jakubisin was responsible for presenting "information and witnesses about the incident ... including information directly from the complainant, which support the alleged violations." (AR 363.)

The trial court failed to acknowledge that Jakubisin and John Doe were differently situated with respect to Roe. Because Jakubisin and Roe had no prior relationship, Jakubisin's questioning was no more likely to

cause trauma to Roe than was questioning by the Panel Chair. In contrast, questioning by Doe presented a significant risk of causing additional trauma to Roe in light of the alleged sexual misconduct that Doe committed on Roe. Importantly, if Doe had chosen to call his own witnesses, he too would have been able to question the witnesses directly.

Further, Doe did not suffer any prejudice as a result of Jakubisin being allowed to question Roe directly. He asked only five questions of Roe, asking her to recount the events of January 31 and February 1, to explain what she had told Doe prior to February 1 about her willingness to engage in sexual activity, and to describe Doe's reaction. (AR 289-93.) If Jakubisin had been required to pose these questions to Roe through the Panel Chair, there is no reason to believe that the result of the hearing would have been any different.

G. The Panel Did Not Give Improper Weight To Doe's Selective Invocation Of The Fifth Amendment Privilege Against Self-Incrimination

The trial court erred again in finding that the Panel gave improper weight to Doe's exercise of his Fifth Amendment privilege. What concerned the Panel was not Doe's invocation of the Fifth Amendment privilege, but his *selective* invocation of that privilege.

During the hearing, Doe initially invoked the Fifth Amendment privilege. (AR 311.) When the Panel asked him questions, however, he chose to provide answers to some questions but refused to provide details to support his account of events:

> [Panel Chair]: So we heard from the complaining witness that she does not recall having sex, but she felt sore and assumed, and then later confirmed with you, that you had sex.

> My question is, if you could please elaborate on that situation – on that incident at that time, and what consent did you acquire from her?
>
> Mr. Doe: Can you clarify if you are talking about the morning of February 1st or the night of January 31st?
>
> [Panel Chair]: You know what, for this incident let me talk directly to the incident when you had allegedly digitally penetrated her.
>
> Mr. Doe: Okay. No, we had not been amorous in the morning whatsoever. We had just woken up.
>
> [Panel Chair]: So clarify that for me. Are you saying –
>
> Mr. Doe: There was no touching –
>
> [Panel Chair]: – that it never occurred?
>
> Mr. Doe: No.
>
> [Panel Chair]: No touching? Okay.
>
> Do you remember – or would you like to elaborate on the conversation that you had at that time?
>
> Mr. Doe: I am asserting my 5th Amendment right and not responding.

(AR 312-13.) Reflecting Doe's selective assertion of the Fifth Amendment privilege, the Panel's decision stated in Finding No. 4: "While John stated during the hearing that he did not digitally penetrate Jane's vagina, he abstained from providing additional information regarding the incident and what occurred around the time of the incident and the panel would have liked to hear more information from him." (AR 621.)

Even in criminal cases, it is well settled that selective invocation of the Fifth Amendment is improper and undermines a witness's credibility. "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-

incrimination when questioned about the details." (*People v. Williams* (2008) 43 Cal.4th 584, 615, quoting *Mitchell v. United States* (1999) 526 U.S. 314, 321, internal quotation marks omitted.)

Here, Doe attempted to self-select the "stopping place in [his] testimony," which courts have recognized "open[s] the way to distortion of facts." (*Mitchell v. United States*, *supra*, 526 U.S. at p. 322, quoting *Rogers v. United States* (1951) 340 U.S. 367, 371.) Specifically, as the trial court itself recognized, "petitioner testified clearly that the allegation of touching on February 1, 2014 was false and did not occur." (AA 721.) Once Doe did so, because "[d]isclosure of a fact waives the privilege as to details," Doe forfeited the privilege as to the details of what occurred on the morning of February 1. (*Rogers*, 340 U.S. at p. 373.) The trial court erred in faulting the Panel for its comment on Doe's selective invocation of the Fifth Amendment privilege.

Notwithstanding the trial court's willingness to reevaluate the Panel's assessment of the credibility of *Roe's* detailed testimony, the trial court did not consider the impact that *Doe's* selective testimony had on his credibility. The trial court's acceptance of Doe's conclusory denial is problematic because it is well settled that a selective invocation of the Fifth Amendment "cast[s] doubt on the trustworthiness of the statements," "diminish[es] the integrity of the factual inquiry," and creates a "'positive invitation to mutilate the truth a party offers to tell.'" (*Mitchell*, 526 U.S. at p. 322, quoting *Brown v. United States* (1951) 356 U.S. 148, 156.)

H. The Proper Remedy For An Unfair Hearing is Remand For A New Hearing

Having erred in its due process analysis, the trial court then amplified its error by failing to remand the case back to the University for a new hearing. "It is clear … that the setting aside of a final administrative decision because of unfair hearing practices requires a remand for further

proceedings." (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1056 ["The rationale is that the agency ... because of error, did not fully exercise the discretion legally vested in it. By commencing further proceedings, this discretion is exercised."].)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the decision of the trial court, deny Doe's writ in its entirety, and allow UCSD to reinstate the finding of misconduct and sanctions against Petitioner.

DATED: February 1, 2016 MUNGER, TOLLES & OLSON LLP

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.486(a)(6) and 8.204(c) of the California Rules of Court, the enclosed "Appellant's Opening Brief" is produced using 13-point Roman type, and that, including footnotes, but excluding the tables, the certificate, the verification and any support documents, the brief contains approximately 13,793 words, which is less than the 14,000 words allowed by these rules. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: February 1, 2016 MUNGER, TOLLES & OLSON LLP

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