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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JOHN DOE,

Petitioner,

vs.

UNIVERSITY OF CALIFORNIA, SAN DIEGO, PAUL YU, PHD, DANIEL J. DONOGHUE, PHD, IVAN EVANS, PHD, ALLAN HAVIS, MFA, RICHARD MADSEN PHD, JOHN C. MOORE, PhD all individuals in their capacity as Provosts,

Respondents.

Case No. 37-2015-00010549-CU-WM-CTL

**OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

Judge: Hon. Joel M. Pressman
Date: July 10, 2015
Time: 1:30 p.m.
Dept.: C-66

FEE EXEMPT -- GOV'T CODE § 6103

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**FEDERAL CASES**



**STATE CASES**

## TABLE OF AUTHORITIES
**(continued)**



**STATE STATUTES**

## TABLE OF AUTHORITIES
**(continued)**

**STATE RULES**



**OTHER AUTHORITIES**

## I. INTRODUCTION

Petitioner seeks to overturn the University of California San Diego's ("UCSD's") finding that he violated the Student Sex Offense Policy (the "Policy") and its imposition of a one-year-and-one-quarter suspension. Petitioner received this sanction after a female student ("Complainant" or "Jane Roe") testified that Petitioner repeatedly digitally penetrated her contrary to her multiple requests that he cease this abuse and her statements that he was causing her pain.

For four reasons, the Petition should be denied.

*First*, there is no merit to Petitioners' evidentiary challenge to UCSD's findings, which are subject to deference under the substantial evidence standard of review. A three-person panel (the "Panel") heard detailed testimony from Jane Roe about Petitioner's sexual misconduct on the morning of February 1, 2014. The Panel also heard testimony from Petitioner, who summarily denied violating UCSD Policy that morning, but who, when questioned about the digital penetration, selectively invoked his Fifth Amendment right against self-incrimination. Petitioner failed through his own testimony or otherwise to provide any detailed evidence refuting Jane Roe's testimony, and the Panel found her version of events credible. Petitioner attempts to show a lack of substantial evidence by rehashing arguments about Jane Roe's veracity that he made to the Panel and that the Panel reasonably (and indeed appropriately) rejected after due consideration. Petitioner has no right to a trial *de novo* on the credibility of Jane Roe's statements or to a reweighing of the evidence. In light of Roe's testimony that Petitioner digitally penetrated her vagina over her requests that he not do so, substantial evidence supports UCSD's findings.

*Second*, Petitioner received an abundance of process, and certainly due process, in his student misconduct proceeding. Petitioner received ample notice of the charges against him and had the opportunity to present arguments to a UCSD investigator, the Panel, and the Council of Deans, and again in his formal appeal to the Council of Provosts. Without citing a single due process case (or indeed any caselaw at all), Petitioner alleges a laundry list of "shortfalls" in the administrative process. But Petitioner errs in basing his due process challenge on "contentions [that] refer to rights of persons being tried for crimes, [which] are not rights [that] apply in an administrative hearing." *Andersen v. Regents of University of California* (1972) 22 Cal.App.3d

763, 770.) And Petitioner has made no showing that any addition to the already substantial procedural safeguards would have diminished any risk of error in the process.

Petitioner also posits a false choice between compliance with Title IX and the due process rights of accused students. As the generous process afforded to Petitioner demonstrates, this is simply not true. Petitioner had multiple opportunities to present his side of the story. At each stage, UCSD considered the limited information Petitioner provided, but ultimately determined that Jane Roe credibly recounted Petitioner's act of sexual misconduct.

*Third*, the suspension imposed was entirely consistent with the nature of the misconduct and UCSD's Sanctioning Guidelines[1] and thus cannot be deemed an abuse of discretion.

*Fourth,* the Court should deny the Petition as to the provost Respondents for an independent reason: such officials are not proper parties to an action for administrative mandamus.

## II. STATEMENT OF FACTS

### A. EVENTS OF JANUARY 31, 2014 AND FEBRUARY 1, 2014

Jane Roe, a former UCSD student of the Mormon faith, was a virgin when she met Petitioner in January of 2014. (AR 291; 393; 396.) Although she and Petitioner began a romantic relationship, she told him that she planned to wait to have sexual intercourse until marriage. (AR 291.) On the night of January 31, 2014, Petitioner and Jane Roe attended a social event together. (AR 294.) That evening Jane Roe drank for the third time in her life, and with Petitioner, drank heavily. (AR 294.) At the end of the evening, Jane Roe and Petitioner returned to Petitioner's apartment. (AR 296.) At that point, Jane Roe's memory of the evening ends. (AR 296; 298.) Petitioner contends that they had "consensual sexual intercourse" later that evening. (AR 007.)

The next morning, February 1, Jane Roe awoke in Petitioner's bed. (AR 289; 296.) Although she could not recall what happened the night before, her vagina felt sore. (AR 290.) 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.)

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[1] "Sanctioning Guidelines" refers to publicly available guidelines created by the Office of Student Conduct to improve consistency in sanctions. (See Request for Judicial Notice ("RJN") Exh. B.)

Jane Roe has consistently stated that on the morning of February 1, Petitioner repeatedly penetrated 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.) Jane Roe testified that, at one point, Petitioner said, "Well, if it hurts then I guess I did my job right." (*Ibid.*) Petitioner denied that he and Jane Roe were "amorous" on the morning of February 1 but refused 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. (AR 313.)

On the evening of February 1, Petitioner and Jane Roe were scheduled to attend a sorority formal, and Jane Roe "didn't want to uninvite him because [she] didn't want people to ask [her] why." (AR 299.) Afterward, although she did not want to have sex with Petitioner, he "kept asking" and saying "You are already not a virgin . . . you might as well do it again." (AR 300.) Eventually, they had sex after Jane Roe "gave up" and "didn't try and resist." (*Ibid.*)

**B. STUDENT CONDUCT PROCEEDINGS**

Jane Roe submitted a complaint to the Office of Student Conduct ("OSC") on June 5, 2014 and then a Request for Formal Investigation (the "Request") to the Office for the Prevention of Harassment and Discrimination ("OPHD") on June 16, 2014. (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 Petitioner on May 14, 2014. (AR 395.) During the investigation, Ms. Dalcourt submitted questions to Petitioner through his counsel (AR 453), received an "offer of proof" from Petitioner's counsel (AR 447), reviewed text messages, and conducted interviews of Jane Roe and others (AR 395). As early as August 26, 2014, Ms. Dalcourt outlined for Petitioner each allegation of misconduct that was being investigated, and explained that Petitioner could provide any information on his behalf while the investigation was pending. (AR 060.) Petitioner did not submit any additional information to Ms. Dalcourt subsequent to August 26, 2014.

On September 10, 2014, Ms. Dalcourt submitted the results of her investigation to OSC. Although she found Ms. Roe "credible in her assertion that she was in a blackout during sexual intercourse," she concluded that there was insufficient evidence to show that "Mr. Doe knew or

should have known that Ms. Roe was incapacitated" on the night of January 31, 2014. (AR 077.) Ms. Dalcourt also found that there was insufficient evidence of retaliation. (AR 080.)

But Ms. Dalcourt found reasonable cause to believe that Petitioner violated the Policy when he ignored the objections of Jane Roe with respect to the February 1 digital penetration. (AR 078-79.) 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 those objections, despite Ms. Roe's telling him that his touching was painful." (AR 078.)

On September 25, 2014, the Dean of Petitioner's college offered Petitioner an opportunity for an Administrative Resolution Meeting for the alleged February 1 violation, which Petitioner accepted. (AR 414-15; 411; 352.) The meeting took place on October 13, 2014, during which Petitioner was accompanied by his counsel and his father. (AR 411; 352.) Petitioner did not accept responsibility; and, in compliance with UCSD policy, the Dean referred the matter to a Student Conduct Review. (AR 351; 416.) On October 21, 2014, Petitioner had a Student Conduct Review Pre-Meeting, in which the review process was explained. (AR 417.)

By at least November 10, 2014, Petitioner 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.) These same materials were provided to the Panel, which heard his Student Conduct Review. Indeed, UCSD gave Petitioner every document that the Panel received and considered.

Petitioner made two pre-hearing written submissions to the Panel. (AR 423; 612.) In his December 9, 2014 submission, Petitioner offered only conclusory statements oddly lacking in detail as to the events of the morning of February 1. (See, e.g., AR 428 ["The next morning, Respondent drove Complainant to her home."]; 437 [noting in passing that Respondent "vehemently denied" digital penetration].) Petitioner's supplemental submission of December 12, 2014 similarly failed to address the morning of February 1 in any detail. (AR 612-17.)

Petitioner's Student Conduct Review hearing was held on December 12, 2014, during which Petitioner had counsel present. (AR 281.) At the hearing, Jane Roe testified and answered

questions posed by Petitioner through the Panel. (AR 289-311.)[2] During his testimony, Petitioner 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.)

On December 17, 2014, the Panel released its Review Report. The Panel found Jane Roe credible in her assertion that Petitioner tried to digitally penetrate Jane Roe's vagina over her objections. It thus concluded Petitioner had committed "Sexual Misconduct." The Panel recommended a suspension of one quarter as well as other sanctions. (AR 619-21.)

Both Petitioner and Jane Roe then submitted impact statements for consideration by the Council of Deans (the "Deans"). (AR 623; 626.)[3] Petitioner 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. (AR 623-25.) On January 13, 2015, after reviewing the Review Report, UCSD's Sanctioning Guidelines, Petitioner's student conduct record, and the statements submitted by Petitioner and Jane Roe, the Deans assigned sanctions, including a suspension of one year. (AR 636.)

On January 28, 2015, Petitioner submitted an appeal to the Council of Provosts (the "Council"), a body made up of six UCSD college provosts. (AR 006.) Petitioner's sanctions were deferred pending the outcome of the appeal. (AR 647.) After Petitioner 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.)

## III. ARGUMENT

In seeking to reverse UCSD's findings and sanctions, Petitioner bears a heavy burden. "[I]t is presumed that the agency regularly performed its official duty." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) The court "must resolve any reasonable doubts in

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[2] Petitioner asserts that Jane Roe was not visible to the Panel (Pet. Br. at 5), but in fact members of the Panel could see her face and expression throughout her testimony.

[3] These statements were submitted only after the Panel found a violation and only for potential consideration in determining sanctions. (AR 365). Per UCSD policy, Complainant's impact statement was not provided to Petitioner, nor was Petitioner's provided to Complainant. (*Ibid.*)

favor of the agency findings and decision" and "may not substitute [its] own judgment for that of the agency." (*McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 181, fn. 6.)

**A. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS OF THE PANEL**

It is well-established that the California Constitution has granted the University of California "quasi-judicial administrative authority to resolve disciplinary disputes" (*Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1272) and that the Regents, "to be effective, must have considerable discretion to determine how best to carry out the University's educational mission." (*Smith v. Regents of University of California* (1993) 4 Cal.4th 843, 852.) Accordingly, UCSD's factual determinations are to be granted deference and upheld by a reviewing court if they are supported by substantial evidence. (*Apte v. Regents of University of California* (1988) 198 Cal.App.3d 1084, 1090-91; see also *Ishimatsu v. Regents of University of California* (1968) 266 Cal.App.2d 854, 862.) Under the substantial evidence standard, the reviewing court "must resolve all conflicts in favor of" the administrative decision and give that decision "the benefit of every reasonable inference in support of the judgment." (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52.) "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." (*Do v. Regents of University of California* (2013) 216 Cal.App.4th 1474, 1490.)

There is more than substantial evidence to support the conclusion of the Panel. Jane Roe offered detailed testimony regarding the morning of February 1, including specific facts regarding her physical discomfort, her demands that Petititoner stop the conduct, and the Petitioner's callous response. (AR 289-90; 298-99; 301-02.) Petitioner's contention that Jane Roe "never testified" that digital penetration occurred on February 1, 2014 and that her testimony merely demonstrated that it was "not pleasurable for her at that time" (Pet. Br. at 8) is incorrect. Jane Roe testified:

> [H]e kept trying to touch me, and I kept pushing his hand away and telling him that it hurt. . . . And this 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 whether or not I said stop or not.

(AR 290; see also AR 298; 307.) Her testimony was consistent with Officer Dalcourt's investigative report, which explains that, during an interview with Officer Dalcourt, Jane Roe stated that Petitioner entered her with his fingers three times, despite her objections. (AR 072.) Jane Roe's detailed testimony is "relevant evidence"—indeed, compelling evidence—"that a reasonable mind might accept as adequate to support [the] conclusion" that Petitioner engaged in sexual misconduct. (*Apte, supra,* 198 Cal.App.3d 1084, 1091.) It is well-established that the testimony of a single witness is sufficient to satisfy the substantial evidence test. (*Mickelson Concrete Co. v. Contractors' State License Bd.* (1979) 95 Cal.App.3d 631, 634.)

Petitioner's attempts to call Jane Roe's credibility into question should be rejected. Under the substantial evidence standard, a reviewing court "will not reweigh evidence, reappraise the credibility of witnesses, or resolve factual conflicts contrary to" the decision below. (*Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195.) Moreover, in attempting to cast doubt on Jane Roe's veracity by pointing out the sexual encounter on the evening of February 1 and the time that elapsed between the incident and her formal request for investigation, Petitioner distorts the facts and reargues a point that the Panel considered and appropriately rejected. Jane Roe explained that on the evening of February 1 she was upset, traumatized, and facing pressure from Petitioner. (AR 300.) Indeed, Jane Roe's frank admission that she consented to sex on the evening of February 1 only bolsters her credibility. Officer Dalcourt found Roe's actions were "consistent with the actions of trauma victims who attempt to cope with trauma by normalizing what has occurred." (AR 408.) The Panel was well within its discretion to assess the credibility of Jane Roe, to believe that her post-incident behavior was consistent with the behavior to be expected of a traumatized victim, and to find that Petitioner digitally penetrated Jane Roe without her consent.[4]

[4] Further, Petitioner's story that Jane Roe made her complaint in response to Petitioner inviting Jane Roe's sorority sister to an event in May 2014 simply does not add up. Jane Roe testified that she expressed discomfort about the events of January 31 and February 1 long before May 2014. (AR 302). Officer Dalcourt's investigative report supports this testimony. (AR 074; 076). Further, no evidence or testimony was presented to support Petitioner's contention at the hearing.

Even if the Court were to reweigh the evidence, which the substantial evidence standard does not permit, Petitioner's conclusory denial is insufficient to outweigh Jane Roe's detailed testimony.[5] Petitioner has not shown a lack of substantial evidence to support the findings.

**B. THE DECISION OF THE PANEL IS SUPPORTED BY THE FINDINGS**

A reviewing court, in determining whether an agency's findings support the agency's decision, "must resolve reasonable doubts in favor of the administrative findings and decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) Further, even if there are defects in certain findings, only one is required to uphold the decision. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1214-16.)

Here, several findings—3, 5, 6, and 7—support the decision that Petitioner engaged in sexual misconduct. Petitioner focuses on other findings that he claims individually do not support UCSD's decision, such as Findings 2 and 4. But Findings 2 and 4 merely summarized Petitioner's pre-hearing submissions relating to the morning of February 1 and described Petitioner's limited testimony, respectively; these findings demonstrate the Panel's awareness of Petitioner's denial of the incident. Findings 3, 5, 6, and 7 confirm that the Panel weighed the evidence and determined, based on Jane Roe's testimony and the investigative report, that Jane Roe credibly alleged that Petitioner digitally penetrated her without her consent.

Petitioner makes much of the use of the words "tried" and "trying" and points to minor variations in verbiage in Findings 5 and 7. However, Jane Roe explained any supposed "inconsistencies" between her statements that he "tri[ed] to move my underwear and touch me" and that she was digitally penetrated: she testified that she "didn't really want to get too super graphic," in the June 16, 2014 Request and that the words "touch me" meant "insert his fingers in my vagina." (AR 307.) In Finding 7, the Panel found Jane Roe's response as to this issue credible. And, Petitioner's focus on whether penetration occurred is misplaced. Penetration is

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[5] Petitioner argues in passing that the Panel improperly punished Petitioner for exercising his Fifth Amendment right. The point is meritless. The Panel commented on the lack of evidence supporting Petitioner's conclusory denial of the events of February 1; it did not draw any adverse inference as to his culpability from the fact that he remained silent.

clearly not required for a finding of sexual misconduct. (See AR 026 ["Sexual misconduct" includes "voyeurism," recording sexual utterances of another person, etc.]; RJN Exh. B [sanctioning guidelines for sexual misconduct involving "forced groping/kissing"].)[6] Accordingly, the Panel's findings more than support its ultimate decision of sexual misconduct.

### C. PETITIONER RECEIVED A FAIR HEARING

Due process is "flexible and calls for such procedural protections as a particular situation demands," based on a balancing of the private and governmental interests involved. (*Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807; see also *Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) In evaluating procedural due process challenges to student disciplinary proceedings, courts recognize that a student's rights "are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial." (*Nash v. Auburn University* (11th Cir. 1987) 812 F.2d 655, 664; see also *Goldberg v. Regents of University of California* (1967) 248 Cal.App.2d 867, 881.) "[E]ach disciplinary proceeding is *sui generis*, and if under all the circumstances the student was given a fair hearing and opportunity to meet any charges brought against him, the court will not interfere." (*Andersen, supra*, 22 Cal.App.3d 763, 770-71.)

#### 1. Petitioner Had Fair Notice Of The Charges And The Evidence Against Him

Petitioner claims that UCSD "improperly refused" to produce to him: (i) Jane Roe's initial June 5, 2014 complaint; (ii) an unredacted version of Jane Roe's June 16, 2014 Request; and (iii) the "statements" of Jane Roe and other witnesses made to Officer Dalcourt. (Pet. Br. at 13-14.)

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[6] Even if penetration were required, the colloquial use of the word "tried" is insufficient to show that the findings did not support the decision. "Tried" does not necessarily connote lack of success, and "administrative findings need not be as precise or formal as would be required of a court." (*McMillan, supra*, 60 Cal.App.3d 175, 183.) And, it is also violation of UCSD policy to "attempt to commit" sexual misconduct. (AR 025.) Petitioner's argument that the term "sexual activity" does not encompass anything more than sexual intercourse (Pet. Br. at 6) is also patently absurd. It does not take much to think of other forms of unwanted sexual contact (i.e., penetration with an object, forced oral sex), and the Policy makes it clear that sexual activity is to be construed more broadly. (See AR 025 ["Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity."].)

At the outset, Petitioner's claim fails because "[t]here is no basic constitutional right to pretrial discovery in administrative proceedings." (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302.) As the court in *Gomes v. University of Maine System* explained:

> The Defendants contend there is no due process requirement in a university disciplinary hearing to provide the responding student with exculpatory or impeachment evidence. [¶] The Defendants are correct about discovery in university disciplinary proceedings. 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. . . . 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.

(*Gomes v. University of Maine System* (D.Me. 2005) 365 F.Supp.2d 6, 18.)

Here, UCSD's production of documents "did not result in an unfair hearing, nor . . . prejudice the [Petitioner's] case." (*Mohilef, supra,* 51 Cal.App.4th 267, 302-03.) Petitioner received the exact same materials that were provided to the Panel—the OPHD report and the June 16, 2014 Request—over a month before the hearing. (AR 438.) That more than complied with UCSD policy, which requires such evidence to be produced just ten business days prior to the hearing (AR 360), and with due process, as these materials fairly apprised Petitioner of the allegations and the nature of the evidence. None of the documents about which Petitioner complains were provided to or considered by the Panel, nor was the Panel required to consider these materials. (See *Goldberg, supra,* 248 Cal.App.2d 867, 884 [Committee's failure to consider tape-recording of riot did not violate due process where other evidence was sufficient to provide context of events].)

Petitioner cites no policy entitling him to the handwritten notes of Officer Dalcourt from interviews of Jane Roe or third party witnesses, nor was he entitled to these materials as a matter of due process. Weeks prior to the hearing, Petitioner received Officer Dalcourt's detailed report, which summarized the results of her interviews and informed Petitioner of the substance of these interviews. (See *Andersen, supra*, 22 Cal.App.3d 763, 771 [no due process violation for not providing student a Professor's letter describing misconduct where student was apprised orally of the charges set forth in the letter].) As Officer Dalcourt's report makes clear, her handwritten notes of 14 witness interviews were irrelevant to the digital penetration on February 1. Those

interviews related only to the night of January 31, 2014 and the alleged retaliation on May 14, 2014, not to the events of February 1, 2014. (AR 400-01; 405-06; 409.)

Petitioner also was not prejudiced by any lack of access to Jane Roe's June 5, 2014 statement to OSC or by the redactions to the June 16, 2014 Request. The Panel did not receive, and therefore could not rely on, the June 5 statement. Complainant's June 16, 2014 Request, which Petitioner did receive in advance of the hearing, was the pre-hearing written statement of Complainant on which the Panel relied. That UCSD did not also share with Petitioner the June 5, 2014 statement, which was virtually identical to the June 16, 2014 statement but for the latter not including certain sensitive details about the traumatic impact Jane Roe had experienced, had no impact whatsoever on the fairness or outcome of the proceedings. Neither did the redactions to the June 16, 2014 Request, which relate solely to the negative health impacts to Jane Roe as a result of the sexual misconduct. (Accord *Nash, supra,* 812 F.2d 655, 663 ("There is no constitutional requirement" that students in a university disciplinary proceeding "receive[] any more in the way of notice than a statement of the charge against them.")

**2. Petitioner Had A Fair Opportunity To Present His Defense**

Student disciplinary proceedings are "not analogous to criminal proceedings," (*Goldberg, supra*, 248 Cal.App.2d 867, 881) and "the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases." (*Gorman v. University of Rhode Island* (1st Cir. 1988) 837 F.2d 7, 16.) Indeed, the law in California for at least half a century has been that "a full dress judicial hearing with the right to cross-examine witnesses [is] not required" in student disciplinary proceedings "as such a hearing . . . might be detrimental to the educational atmosphere of the University and impractical to carry out." (*Goldberg, supra*, 248 Cal.App.2d 867, 881-82.)

Pursuant to UCSD policy, parties to the Student Conduct Review may provide questions in writing to be asked of the other party by the Review Panel Chair, and the Chair "may exclude any unduly repetitious or irrelevant questions or information." (AR 364.) Petitioner provided 32 questions to the Chair, many of which were posed to Jane Roe by the Panel. Although Petitioner asserts the process was unfair because some of his questions were not posed, he fails to describe

those questions or their importance to his defense. And for good reason. The questions that the Panel chose not to pose to Jane Roe were irrelevant, sought evidence already in the record, or had previously been asked and answered by Jane Roe. Questions 13-19 and 21, for example, asked Jane Roe to confirm that certain exchanges of text messages took place. But the Panel already had the text messages in its possession and there was no dispute as to their authenticity. (AR 307.) Certain questions regarding the events of January 31 and February 1, 2014 had been answered by Jane Roe earlier in the hearing. (AR 306 [question 9]; 310 [questions 23-25].) Other questions regarding Jane Roe's enrollment at another school (question 2) and her understanding of potential consequences to Petitioner of her allegations (questions 6 and 12) were simply irrelevant.

The Panel acted within its discretion and the requirements of due process in declining to ask these pointless questions. The Panel gave Petitioner the right to cross-examine Jane Roe, with appropriate limitations to reflect the non-criminal nature of the proceedings, protect Jane Roe from harassment and intimidation, and minimize cumulative questioning. Such limitations are appropriate where, as here, they have "no bearing on the outcome of the hearing" and are accompanied by robust procedures that protect the rights of the student. (*Winnick v. Manning* (2d Cir. 1972) 460 F.2d 545, 549; *Nash, supra,* 812 F.2d 655, 664; see also *Smith v. Miller* (1973) 213 Kan. 1, 14 ["the school's interest can be protected by . . . limiting the scope of cross-examination to prevent the student or his lawyer from badgering witnesses"].)

**3. The Other Claimed "Shortfalls" Do Not Show A Lack Of Fairness**

Petitioner's other fairness claims are without merit: *First*, Petitioner's claim that Dean Mallory's pledge to stop sexual assault demonstrates bias is spurious. It would be both unusual and disturbing to find a campus official who did not support measures to prevent sexual assault. The Dean or any other official's general statement of opposition to sexual assault on campus does not show that the official has prejudged the facts of a particular case. A school official's reaction to a "type of conduct" does not show bias. (*Goldberg, supra,* 248 Cal.App.2d 867, 884-85.) And the "right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." (*John A. v. San Bernardino City Unified School Dist.* (1982) 33 Cal.3d 301, 309.)

*Second*, the fact that Officer Dalcourt is a member of the State Bar is irrelevant. Ms. Dalcourt was acting as an employee of UCSD in a non-legal capacity and was not representing a client. Accordingly, she was not prohibited from communicating directly with Petitioner. (See Rules Prof. Conduct, rule 2-100(A) ["While representing a client" a member of the bar shall not communicate directly with a represented party]; 75 Ops.Cal.Atty.Gen. 223 (1992) [even in the context of criminal investigation by a prosecutor, Rule 2-100 does not apply to interrogation during investigation].) In any event, Petitioner has not pointed to any evidence that Ms. Dalcourt communicated directly with Petitioner after she learned that he was represented by counsel.

*Third*, Petitioner's claims that the Panel improperly considered hearsay and improper character evidence are wrong. UCSD policy and California decisional law provides that formal rules of evidence do not apply in Student Conduct Reviews. (AR 363; *Goldberg, supra,* 248 Cal.App.2d 867, 883-84.)

*Fourth*, Petitioner's claim that the OPHD report incorrectly states that Mr. Doe "did not recall" any touching between the two parties on February 1, 2014 is a factual, not procedural, argument and does not show unfairness in the proceedings. Petitioner has not pointed to any evidence in the record that the Panel relied on this portion of the OPHD report. In fact, the Panel found that John Doe denied the incident. (AR 620.)

### D. THE SANCTIONS IMPOSED ARE PROPORTIONATE TO THE SEXUAL MISCONDUCT

"The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated." (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218.) And a reviewing court cannot "substitute its discretion for that of the administrative agency concerning the degree of punishment imposed." (*Ibid.*)

Petitioner has not come close to demonstrating an abuse of discretion. His argument rests on the claims that he is "effectively being expelled" from UCSD and that "[t]here is no evidence that supports Ms. Roe's claim." (Pet. Br. at 15.) Not so. Petitioner's contention that he is "effectively being expelled" from UCSD is incorrect and misleading. Petitioner has not been expelled; he has been suspended for one year and one quarter and can return to UCSD upon

completion of his suspension.[7] And, as discussed at length above, substantial evidence supports the finding that Petitioner digitally penetrated Jane Roe without her consent and contrary to her stated instructions that he stop. This serious offense warranted a serious sanction.

Further, although the Review Panel recommended a one-quarter suspension, the Deans and Council were free to depart from that recommendation (*Berman, supra*, 229 Cal.App.4th 1265, 1275) and had ample grounds to impose a more substantial sanction. The UCSD Sanctioning Guidelines, which were considered by the Deans and Council (AR 347; 365-67), recommend that sexual misconduct violations involving "forced groping/kissing" should include a suspension of "minimum one year" in addition to probation and other sanctions. (RJN Exh. B, at p. 3.) The addition of one quarter to the recommended minimum sanction is justified for multiple reasons, including (i) Petitioner's prior violations of the Student Conduct Code;[8] (ii) his refusal to accept responsibility for the sexual misconduct; (iii) his callous statements on the morning of February 1; and (iv) the trauma he caused Jane Roe.[9]

### E. THE PROVOSTS ARE NOT PROPER PARTIES IN THIS PROCEEDING

An additional ground supports denial of the Petition as to the individual provosts. Petitioner seeks a writ under Code of Civil Procedure section 1094.5 or, in the alternative, a "writ

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[7] The Student Conduct Code clearly distinguishes a suspension from a dismissal (i.e., expulsion). Suspension is defined as "[t]he termination of student status for a specified period of time with a defined reinstatement thereafter certain, provided that the Respondent has complied with all conditions assigned as part of the suspension . . ." (RJN Exh. A, at p. 20.) The note of the suspension on the student's transcript is removed when the suspension ends. (*Id.* at pp. 20-21) By contrast, dismissal is defined as "[t]he termination of student status," at which point readmission to UCSD "shall require the specific approval of the Chancellor" and "may be granted only under exceptional circumstances." (*Id.* at p. 21.) A dismissal is noted permanently on the student's transcript. (*Ibid.*)

[8] Petitioner had twice been found responsible for violations of the Student Conduct Code relating to consumption of alcohol under the age of 21, once before and once after the evening of February 1. (AR 640-45). Per the Sanctioning Guidelines, "increased sanctions may be imposed to take into consideration the Student's overall record of violations of all types." (RJN Exh. B at p. 1.)

[9] Jane Roe's impact statement highlighted the substantial harm caused by Petitioner's actions on January 31 and February 1, 2014: she became depressed and began drinking to cope with her depression, struggled in school, was diagnosed with PTSD, and ultimately left UCSD. (AR 623-25). The Deans and Council were entitled to consider this in deciding the sanctions. (AR 365; RJN Exh. B at p. 1.)

of mandate under Code Civ. Proc. § 1085, directed to Respondents, the Provosts . . . ." (Pet. at 1-2.) A traditional writ of mandate under section 1085 is not the proper method for challenging an adjudicatory decision of an agency. Such a writ is available only when "the respondent has a clear, present and usually ministerial duty to perform." (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 752.) Petitioner has not pointed to any clear, present, and ministerial duty that the provosts failed to perform. Rather, his only contention with respect to the provosts is that the Council "committed a prejudicial abuse of discretion" as to the sanctions imposed. (Pet. Br. at 15.) By definition, a claim that the Council abused its discretion is not one to compel performance of a ministerial duty. (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 62 [traditional mandamus "will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner."]). Petitioner has not alleged that the provosts failed to perform any act required by law, and thus may only proceed by administrative mandamus rather than a traditional writ of mandate.

But an individual official without final decisionmaking authority is not a proper party in an administrative mandamus proceeding. Where "[o]fficial and not personal action is the gravamen of the complaint," it is the public entity "and not the individual members, that is the actual defendant." (*Sperry & Hutchinson Co. v. California State Bd. of Pharmacy* (1966) 241 Cal.App.2d 229, 236; see also *Pettie v. Superior Court In & For Los Angeles County* (1960) 178 Cal.App.2d 680, 682-83 [demurrer sustained where writ of mandate was directed individually to the judge of the respondent court]; *Beltone Electronics Corp. v. Superior Court* (1978) 87 Cal.App.3d 452, 454 [same].) Like the individual board members in *Sperry* and the judges in *Pettie* and *Beltone*, the provosts were simply performing their official duties as members of the Council for UCSD. Individual provosts do not have final decisionmaking authority, and are not appropriate respondents to a petition for writ of administrative mandamus.

## IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's writ in its entirety.

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DATED: June 25, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, CA 90071-1560.

On June 25, 2015, I served true copies of the following document(s) described as **OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** on the interested parties in this action as follows:

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**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY ELECTRONIC SERVICE:** I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 25, 2015, at Los Angeles, California.

Loren Rives