MARK M. HATHAWAY, ESQ.
(CA 151332; NY 2431682; DC 437335)
WERKSMAN JACKSON
HATHAWAY & QUINN LLP
888 West Sixth Street, Fourth Floor
Los Angeles, California 90017
Telephone: (213) 688-0460
Facsimile: (213) 624-1942
E-Mail: mhathaway@werksmanlaw.com

MATTHEW H. HABERKORN, ESQ.
(CA SBN 152424)
HABERKORN & ASSOCIATES
P.O. Box 7474
Menlo Park, CA 94025
Tel: 650-268-8378
Fax: 650-332-1528
E-mail: matthewhaberkorn@mac.com

Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

JOHN DOE, an individual Petitioner, v. UNIVERSITY OF CALIFORNIA, SAN DIEGO, PAUL YU, Phd, DANIEL J. DONOGHUE, Phd, IVAN EVANS, Phd, ALLAN HAVIS, MFA, RICHARD MADSEN, Phd, JOHN C. MOORE, all individuals in their capacity as Provosts, , Respondents.	Case No. 37-2015-00010549-CU-WM-CTL AMENDED PETITION FOR WRIT OF ADMINISTRATIVE MANDATE; VERIFICATION; EXHIBITS

Petitioner, a 20-year-old college student, seeks redress for his *de facto* expulsion from UC San Diego for an alleged instance of unwanted heavy petting that occurred between two sessions of consensual sexual intercourse with an adult

female student on the weekend of January 31, 2014, and petitions this Honorable Court for a writ of mandate under Code of Civ. Proc. § 1094.5 or alternatively, writ of mandate under Code Civ. Proc. § 1085, directed to Respondents, the Provosts of the University of California, San Diego.

By this verified Petition, Petitioner further alleges as follows:

THE PARTIES

1. Petitioner JOHN DOE, age 20, is an undergraduate student at the University of California, San Diego at all times relevant, and is now a junior.

2. Respondent UNIVERSITY OF CALIFORNIA, SAN DIEGO ("UCSD") is a public university within the University of California system, which is a part of the state's three system public higher education plan that also includes the California State University system and the California Community Colleges System.

3. Individual Respondents are named in their capacity as the Provosts of Respondent UCSD. Respondent PAUL YU, PhD is a Professor of Electrical and Computer Engineering and the Provost of Revelle College at the University of California, San Diego ("UCSD"); Respondent DANIEL J. DONOGHUE, PhD is a Professor of Chemistry and Biochemistry and Provost of Sixth College, UCSD; Respondent IVAN EVANS, PhD is Acting Provost and Professor of Sociology at Warren College, UCSD; Respondent ALLAN HAVIS, MFA is Provost and a Professor of Theater at Thurgood Marshall College, UCSD; Respondent RICHARD MADSEN, PhD is Acting Provost and Distinguish Professor of Sociology at Eleanor Roosevelt College, UCSD; and Respondent JOHN C. MOORE is Provost and Professor of Linguistics, at John Muir College, UCSD.

4. Non-party JANE ROE, age 19, was an undergraduate student at UCSD at all times relevant and is the complainant in the underlying UCSD Title IX sexual misconduct complaint at issue in this writ proceeding. Based on information and

belief, Jane Roe no longer attends UCSD.

5. Petitioner uses the pseudonyms of "John Doe" and "Jane Roe" in his Petition in order to preserve privacy in a matter of sensitive and highly personal nature, which outweighs the public's interest in knowing the parties' identity. Use of the pseudonyms does not prejudice Respondents because the identities of Petitioner and the Jane Roe are known to Respondents. See, *Starbucks Corp. v. Superior Court* (2008) 68 Cal.App.4th 1436 ("The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web"); see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531; *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050; *Roe v. Wade* (1973) 410 U.S. 113; *Doe v. Bolton* (1973) 410 U.S. 179; *Poe v. Ullman* (1961) 367 U.S. 497; *In Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058.

6. On March 27, 2015, the Hon. Timothy B. Taylor, Judge of the San Diego Superior Court, granted Petitioner's Application for an order for permission to file his writ petition using the fictitious names of "John Doe" and "Jane Roe."

JURISDICTION AND VENUE

7. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus directed to any inferior tribunal, corporation, board, or person. Cal. Const., art. VI, § 10; see Code Civ. Proc. § 1084 ("mandamus" synonymous with "mandate"); Code Civ. Proc. § 1085; Code Civ. Proc., § 1094.5

8. Petitioner, an aggrieved college student, must exhaust judicial remedies through this petition for writ of mandate following UCSD's administrative appeal process, which is now final (Exhibit 27), before bringing an action in state court for damages and other relief for denial of rights by UCSD in violation of the Unruh Civil Rights Act, Civ. Code § 52, for breach of contract, breach of good faith

and fair dealing, and other torts:

> "The doctrine of exhaustion of judicial remedies precludes an action that challenges the result of a quasi-judicial proceeding unless the plaintiff first challenges the decision though a petition for writ of mandamus. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) Administrative mandamus is available for review of "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer … ." (Code Civ. Proc., § 1094.5, subd. (a).)

9. The Superior Court for the County of San Diego, the county where the Respondents are located, is the proper court for the hearing of this action. Code Civ. Proc. § 395.

PROCEDURAL HISTORY AND BACKGROUND

10. This case arises amidst a growing national controversy about the responses of colleges and universities to alleged sexual violence on college and university campuses.

11. The Federal Government, through the U.S. Department of Education, has been pressuring colleges and universities to aggressively pursue investigations of sexual violence on campuses under Title IX, the federal civil rights law that prohibits discrimination in education on the basis of gender, and for violations of the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. Compliance with reporting sexual violence is monitored by the U.S. Department of Education, which can impose civil penalties up to $35,000 per violation against institutions for each infraction and can suspend institutions from participating in federal student financial aid programs. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act is a federal statute codified at 20 U.S.C. § 1092(f), with implementing

regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46.

12. On April 4, 2011, the U.S. Education Department's Office of Civil Rights sent a "Dear Colleague" to colleges and universities. See Appeal Exhibit 13, pp. 147-165. The Dear Colleague Letter indicated that, in order to comply with Title IX, colleges and Universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Most notably, the Dear Colleague Letter required schools to adopt a relatively low burden of proof — "more likely than not"— in cases involving sexual misconduct, including assault, and suggested that schools should focus more on victim advocacy. However, the letter states:

> "Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing."

13. In February 2014, Catherine E. Lhamon, the Assistant Secretary of Education who heads the department's Office for Civil Rights, told college officials attending a conference at the University of Virginia that schools need to make "radical" change. According to the Chronicle of Higher Education, college presidents suggested afterward that there were "crisp marching orders from Washington."[1]

14. The Federal government has created a significant amount of pressure on colleges and universities to treat all those accused of sexual misconduct with a presumption of guilt.[2] The Chronicle of Higher Education noted that "Colleges face increasing pressure from "survivors" and the federal government to improve the

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[1] *Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases*, Chronicle of Higher Education, February 11, 2014.

[2] *Occidental Justice*, Esquire magazine, April 2015.

campus climate."[3] In the same article, the Chronicle noted that different standards were applied to men and women: "Under current interpretations of colleges' legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman's consent."

15. After years of criticism for being too lax on campus sexual violence, colleges and universities are relying on Title IX to crack down on alleged perpetrators of sexual violence and sexual misconduct. The pendulum has now swung too far in the other direction against accused male students.

16. The UCSD Title IX investigation and hearing process [4] against John Doe clearly illustrates this point.

FACTUAL BACKGROUND

17. The underlying sexual misconduct complaint has nothing at all to do with sexual violence against women; the male student is being effectively expelled from UCSD for allegedly trying to touch Jane Roe in a manner that was unwanted in the morning of February 1, 2014[5], but was wanted later that same day when Jane

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[3] *Presumed Guilty: College men accused of rape say the scales are tipped against them*, Chronicle of Higher Education, September 1, 2014.

[4] On October 15, 2014, UCSD Chancellor Pradeep K. Khosla shared a proposed campus "Policy for Reporting and Responding to Sex Offenses" in an email to university affiliates. If the new policy proposal were implemented, it would bring UCSD's protocol for handling sexual violence cases to par with the University of California's system wide Sexual Harassment and Sexual Violence Policy. In light of the Chancellor's proposal, it appears that UCSD's handling of reported sexual violence is not in line with the current University of California policy nor current federal law.

[5] Petitioner has consistently denied the incident on the morning of February 1, 2014 occurred, and had acknowledged his actions both before and after.

Roe had consensual sexual intercourse with Petitioner in her apartment. See Appeal, at BS0002-03. Jane Roe waited over three months to make a report, and only after Jane Roe and Petitioner John Doe has a falling out.

18. UCSD's Title IX disciplinary process in this case falls far short of what is required by Title IX and due process, is more opaque than transparent, relying on secret evidence that is concealed from the accused male student. For instance, the December 12, 2014 Title IX Student Conduct Review Panel Hearing was a mere pretense of "due process" evidentiary hearing because the panel's determination was made on evidence not presented at the hearing and not made available to the accused male student. See Appeal Exhibits 4, 5, 8, 10 and 17.

19. Likewise, evidence never presented to Petitioner was shared with Respondents during the Title IX appeal process. Appeal Exhibits 4, 5, 8, 10 and 17, Exhibit 25. UCSD's Title IX appeal process is not an independent appeal in any sense and is inconsistent with the guidance of the U.S. Department of Education's Office of Civil Rights.[6]

20. The fact that a women's and victims' rights advocate[7] is responsible for

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[6] The Office of Civil Rights, U.S. Department of Education significant guidance document on appeals states, "If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties. The specific design of the appeals process is up to the school, as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process. Any individual or body handling appeals should be trained in the dynamics of and trauma associated with sexual violence."

[7] See Supplemental Information in Support of Appeal and Exhibits 22 to 24. While reviewing this case, Ms. Sherry L. Mallory, Dean of Student Affairs at UCSD's Revelle College, tweeted: "I've pledged my commitment to help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle" See Appeal Exhibit 12, Exhibit 22, p. 1. Ms. Mallory is co-chair of the NASPA Western Regional Conference, which advocates against rights for accused male students, including against the right to counsel, against the right to challenge adverse findings in court, and against the right to obtain monetary damages for false accusations. Exhibit 23.

the Title IX sexual misconduct disciplinary process from beginning to end does not bode well for accused male students, who are entitled to fairness and impartiality in order to reach sound and supportable decisions. See Dear Colleague Letter, Office of Civil Rights, U.S. Department of Education. Appeal Exhibit 13, pp. 147-165.

21. Faced with criminal allegations,[8] Petitioner followed his attorney's advice to remain silent. Since UCSD Office of Student Conduct refused to disclose all of Jane Roe's statements (as well as 14 other witnesses' statements),[9] John Doe and his counsel were unable to gauge the risk of a criminal investigation. John Doe continued to exercise his constitutional right to remain silent, which clearly prejudiced Petitioner during the Title IX investigation and hearing process, and in Petitioner's appeal to Respondents.

22. The UCSD Office of Student Conduct provides an advocate for the female student, to speak and argue on her behalf during the Title IX hearing, but denies the accused male student that same right, prohibiting the male student's counsel from speaking or participating. Appeal Exhibit 15.

23. Petitioner was found responsible for violating Section VII, subs. AA. of the UCSD Student Sex Offense Policy[10] which states, "'Sexual misconduct' occurs when non-consensual sexual activity is 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." Appeal Exhibit 1, p. 3. Nowhere does the UCSD Student Sex Offense Policy[11] define the term "sexual activity" to mean

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[8] Four and half months after the February 1, 2014 incident Jane Roe referred to her encounter with Petitioner that weekend as "rape." Appeal Exhibit 13, at p. 60, BS00143.

[9] See Appeal Exhibits 4, 5, 8 and 10.

[10] Appeal Exhibit 17, p. 2 BS00329.

[11] The section defines "sexual misconduct" to include electronically recording, photographing, or transmitting intimate or sexual utterances, sounds or images of another person; allowing third parties to observe sexual acts; engaging in voyeurism; or distributing

anything other than sexual intercourse, its plain meaning. Since it is agreed that Jane Roe and John Doe did not engage in sexual intercourse on the morning of February 1, 2014, though they did later that evening in her apartment, Petitioner is factually innocent of "sexual misconduct" on the morning of February 1, 2014.

24. At each step where Petitioner disagreed with UCSD and exercised his right of appeal, UCSD substantially increased his sanctions, as if in retaliation and so as to discourage Petitioner and other similarly situated students from exercising their legal rights to appeal.[12]

RESPONDENT'S ACTIONS AND DECISION ARE INVALID

25. On information and belief, Respondents' actions, sanctions, and decision are invalid under Code Civ. Proc. § 1094.5, and alternatively Code Civ. Proc. § 1085, for the following reasons:

i. Respondents failed to grant Petitioner a fair hearing;

ii. Respondents committed a prejudicial abuse of discretion, in that Respondents failed to proceed in the manner required by law;

iii. Respondents' decision is not supported by the findings; and

iv. Respondents' findings are not supported by the evidence.

26. Respondents actions and decision deprive Petitioner of fundamental vested rights, therefore, the reviewing court must exercise it's independent judgment to reweigh the evidence pursuant to Code Civ. Proc. § 1094.5(c). Under the independent judgment standard, the trial court may weigh the credibility of witnesses. *San Diego Unified School Dist. v. Commission on Professional*

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intimate or sexual information about another person.

[12] Ms. Mallory substantially increased the one quarter suspension recommended by the UCSD Student Conduct Review Panel and imposed a one year suspension, requiring John Doe to reapply for admission, a *de facto* expulsion. Exhibit 19. On March 20, 2015, Respondents added another quarter suspension, referring the matter to Ms. Mallory. Exhibit 27.

Competence (2011) 194 Cal.App.4th 1454, 1461.

27. The doctrine of judicial nonintervention into the academic affairs of schools does not apply in instances of non-academic affairs, such as this Title IX investigation and hearing process for alleged violation of the UCSD sexual misconduct policy. See *Banks v. Dominican College* (Cal. App. 1st Dist. 1995) 35 Cal. App. 4th 1545; *Paulsen v. Golden Gate University* (1979) 25 Cal. 3d 803.

28. On information and belief, relevant evidence is available which was improperly excluded or unavailable at the hearing. Petitioner will seek leave to offer said evidence before the reviewing court at the hearing on this Petition.

29. Petitioner has exhausted all administrative remedies.

30. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law.

31. Petitioner is obligated to pay an attorney for legal services to prosecute this action. Petitioner is entitled to recover attorney's fees as provided in Gov. Code § 800 if Petitioner prevails in the within action, on the ground that, on information and belief, Respondent's decision was the result of arbitrary and capricious conduct.

32. Petitioner will suffer irreparable harm if this matter is not stayed pending judicial review, because even if the Court subsequently rules in his favor, will have irreparably lost over a year of his education, lost financial aid, lost his employment, and will have suffered public humiliation and disgrace from a false determination of sexual misconduct.

33. Each of the attachments and exhibits identified in the following paragraphs are true and correct copies of the documents described, however, the attached copies have been redacted where necessary to protect the privacy of Jane Roe and John Doe.

34. A true and correct copy of the Appeal from UC San Diego Office of Student Conduct Review Report to Respondents, the UCSD Council of Provosts, together with Exhibits 1 through 21, is attached to this Petition and made a part

hereof.

35. A true and correct copy of the Supplemental Information in Support of Appeal, together with Exhibits 22 through 24, is attached to this Petition and made a part hereof.

36. A true and correct copy of the statement to the Council of Provosts by Jane Roe, in the form provided to Petitioner, is attached hereto as Exhibit 25 and made a part of this petition.

37. A true and correct copy John Doe's Certificate of Completion of Preventing Sexual Harassment, dated March 3, 2015, is attached as Exhibit 26 and made a part of this petition.

38. A true and correct copy of the letter of determination of the appeal to the Council of Provosts, dated March 20, 2015, is attached hereto as Exhibit 27 and made a part of this petition.

39. The administrative record of Respondent's Title IX disciplinary process against Petitioner will be submitted and made a part of this petition as soon as Respondent provides the administrative record.

WHEREFORE, Petitioner prays the court for judgment as follows:

1. For an alternative writ of mandate directing Respondent to set aside the findings and sanctions, or to show cause why a peremptory writ of mandate to the same effect should not be issued;

2. For a peremptory writ of mandate directing Respondent to set aside its findings and sanctions;

3. For a stay of Respondent's administrative finding and sanctions under Code Civ. Pro. § 1094.5(g);

4. For reasonable attorney's fees and litigation expenses, in addition to any other relief granted or costs awarded;

5. For all costs of suit incurred in this proceeding; and

6. For such other and further relief as the court deems proper.

WERKSMAN JACKSON
HATHAWAY & QUINN LLP

Dated: March 30, 2015 By: _____
MARK M. HATHAWAY
Attorneys for Petitioner

VERIFICATION

I, John Doe, am the petitioner in this action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct. Signed on the date below at San Diego, California.

Date: March 30, 2015

John Doe

Appeal

APPEAL TO THE COUNCIL OF PROVOSTS
OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO

In re, John Doe , Respondent.	CASE NO.: 01401-001-2014 APPEAL FROM UC SAN DIEGO OFFICE OF STUDENT CONDUCT REVIEW REPORT Date of Report: December 17, 2014

TO THE HONORABLE COUNCIL OF PROVOSTS:

Daniel J. Donoghue, PhD, Provost, Professor of Chemistry and Biochemistry,
Sixth College, University of California, San Diego
Ivan Evans, PhD, Acting Provost and Professor of Sociology
Warren College, University of California, San Diego
Allan Havis, MFA, Provost. Professor of Theater
Thurgood Marshall College, University of California, San Diego
Richard Madsen, PhD, Acting Provost and Distinguish Professor of Sociology
Eleanor Roosevelt College, University of California, San Diego
John C. Moore, Provost and Professor of Linguistics,
John Muir College, University of California, San Diego
Paul Yu, PhD, Provost, Professor, Electrical and Computer Engineering
Revelle College, University of California, San Diego

Respondent John Doe appeals improper findings and sanctions for an alleged incident of sexual misconduct under the UC San Diego Student Sex Offense Policy and respectfully asks the Council of Provosts to dismiss the case in its entirety, as authorized by UC San Diego Review Procedures, section V, subd. E.2.c.[1]

[1] UC San Diego Review Procedures for Alleged Sex Offense, Harassment or Discrimination Violations Interim Procedures, as updated July 22, 2014. Exhibit 21.

FACTUAL AND PROCEDURAL BACKGROUND

The Incident on the Morning of February 1, 2014

Petitioner Mr. John Doe, 20, and complainant Ms. Jane Roe , 20, are both undergraduate students at University of California, San Diego ("UCSD").

On Friday, January 24, 2014, Ms. Roe spent the night with Mr. Doe in his apartment following UCSD Spirit Night celebrations, but did not engage in sexual intercourse. Exhibit 11, p. 2. Over the next week, Ms. Roe and Mr. Doe "hooked up" several times engaging in consensual oral sex, but not sexual intercourse. Exhibit 2; Exhibit 15, Hearing Transcript 12:19-20; 22:11-12.

On Friday, January 31, 2014, Ms. Roe again spent the night with Mr. Doe in his apartment and engaged in consensual sexual intercourse.[2] According to Mr. Doe, there was no further sexual activity until the following evening, Saturday, February 1, 2014, when Ms. Roe invited Mr. Doe to spend the night in her apartment after attending her sorority formal together and the couple again engaged in consensual oral sex and sexual intercourse.

In her testimony to the UCSD Student Conduct Review Panel, Ms. Roe testified about an alleged incident on the morning of February 1, 2014 when she awoke in Mr. Doe's bedroom:

> The next morning [Feb 1, 2014] there wasn't any sexual activity other than him putting his hands down my pants and trying to finger me and touch me down there, and me telling him directly to stop, and pushing his hand away and saying, "No, it hurts," like "Stop." Like, "I am sorry, I am really sore, it just hurts. Can you just stop?" Multiple times. I was very, very clear about that. (Exhibit 15, Hearing Transcript 19:16-22.)

[2] OPDH Office Dalcourt did not find Ms. Roe 's claim of non-consensual sexual activity on the evening of January 31, 2014, which was contradicted by other witnesses and text messages, to be credible. Exhibit 11, pp. 4-7. OPDH Office Dalcourt found insufficient evidence to proceed on Ms. Roe 's January 31, 2014 allegation. Exhibit 11, p. 1.

Ms. Roe admits that she continued her intimate relationship with Mr. Doe later that same day. Exhibit 15, Hearing Transcript 26:24-27:2 On the afternoon of February 1, 2014, Mr. Doe texted to Ms. Roe , "And Zach hooks up with Kendall. . . and I've been hooking up with u. Pretty funny how that works out." Ms. Roe responded, "My fams hot I guess haha." Ms. Roe also texted about events planned for that evening with Mr. Doe, "Okay as long as I don't get in trouble you can do what you want haha." Exhibit 3. Ms. Roe did not complain or indicate any displeasure regarding that morning.

On the evening February 1, 2014, Ms. Roe asked Mr. Doe to spend the night at her apartment and Ms. Roe again engaged in consensual sexual intercourse with Mr. Doe. Exhibit 15, Hearing Transcript 21:11-13.

After February 2, 2014, Ms. Roe and Mr. Doe remained cordial, meeting up to do homework together privately in the library on several occasions, and staying in contact at social events and through social media and text messages, but they had no further intimate physical contact.

On May 14, 2014, Mr. Doe and Ms. Roe argued after Mr. Doe was invited to a formal at Ms. Roe 's sorority by another "sister." Mr. Doe later confronted Ms. Roe and texted to her:

> "I have no reason to ever talk to you again nor do I want anything to do with you but I'm asking that u stop going around telling people I raped u because first off it's far from the truth and secondly it's starting a lot of unnecessary drama. That's a serious accusation to make and it's not okay. This should have ended a long time ago." Exhibit 11, p.11.

The OPDH Title IX Investigation

On June 5, 2014, four months after the alleged February 1, 2014 incident, Ms. Roe reported Mr. Doe to the UCSD Office for the Prevention of Discrimination and Harassment (OPDH) for his conduct on the night of January 31, 2014 , the *morning* of February 1, 2014, (but not the consensual oral sex and sexual intercourse on the *evening* of February 1, 2014), and the confrontation on May 14, 2014. Exhibit 4; Exhibit 11, p. 1.

On June 12, 2014, OPDH Complaint Resolution Officer Elena Acevedo Dalcourt interviewed Ms. Roe . Exhibit 5. Four days later on June 16, 2014, Ms. Roe filed her Request for a Formal Investigation against Mr. Doe. Exhibit 6.

On July 18, 2014, Officer Dalcourt sent an email to Mr. Doe to advise him that Ms. Roe had filed a complaint, but Ms. Dalcourt did not mention the alleged incident on the morning of February 1, 2014. Exhibit 7.

On July 29, 2014, OPDH Complaint Resolution Officer Elena Acevedo Dalcourt interviewed Ms. Roe a second time. Exhibit 8.

On August 26, 2014, Mr. Doe first learned of the alleged incident on the morning of February 1, 2014 in an email from OPDH Complaint Resolution Officer Elena Acevedo Dalcourt to Mr. Doe's attorney, Mr. Matthew Haberkorn. Exhibit 9.

On September 10, 2014, after interviewing Ms. Roe twice, interviewing 14 other witnesses (Exhibit 10), and reviewing numerous text messages, OPDH Complaint Resolution Officer Elena Acevedo Dalcourt determined that there was insufficient evidence to proceed with two of Ms. Roe 's allegations, the January 31, 2014 consensual sexual intercourse and the May 14, 2014 confrontation. Exhibit 11, p. 1.

Ms. Dalcourt did find reasonable cause to believe the UCSD Student Sex Offense Policy had been violated with respect to the alleged incident on the morning of Saturday, February 1, 2014 , "Specifically [Mr. Doe] is alleged to have digitally penetrated the student's vagina after she repeatedly stated that she did not want to engage in sexual activity with him." Exhibit 15, Hearing Transcript 9:21-24.

On October 13, 2014, Dean Sherry L. Mallory conducted an Administrative Resolution meeting with Mr. Doe, which lasted 15 minutes. Mr. Doe denied that the alleged incident on the morning of Saturday, February 1, 2014 occurred. Mr. Matthew Haberkorn, Mr. Doe's attorney, was present at the meeting, but was not permitted to speak. Mr. Haberkorn sent correspondence to Dean Mallory shortly after the meeting. (Exhibit 20), however, Dean Mallory had already forwarded the matter to the Student Conduct Review Panel for a formal hearing immediately after meeting with Mr. Doe and Mr. Haberkorn for 15 minutes.

The December 12, 2014 Title IX Student Conduct Review Panel Hearing

On December 9, 2014, Mr. Doe submitted a Respondent's Pre-Hearing Submissions and Other Information in Support of His Defense. Exhibit 13.

On December 12, 2014 the single remaining complaint proceeded to a hearing before three Student Conduct Review Panel members, Ms. Rebecca Otten, Director of Strategic Partnerships/Housing Allocations, Mr. Jeffrey Hill, Assistant Director (The Village) of Residence life, and Mr. Kris Nelson, Representative of the Graduate Student Association. Exhibit 15; Exhibit 17.

During the hearing, Ms. Roe testified from behind a screen and was not visible to the hearing panel members nor visible to Mr. Doe while she testified.[3]

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[3] During the hearing, University Representative Anthony P. Jakubisin served as the "prosecutor", making an opening statement, posing prepared questions to Ms. Roe, and giving closing arguments against Mr. Doe. Exhibit 15, Hearing Transcript pp. 9-10, 35-38. Mr. Jakubisin said, "Where there are conflicting reports from the parties, weighing credibility is essential. Observations, actions, consistency, and detail, bias, and demeanor may be taken into consideration when deciding credibility, and the standard to be used is more likely than not." Exhibit 15, Hearing Transcript 10:7-10. The hearing panel, however, was unable to observe Ms. Roe's demeanor. Ms. Roe was assisted by advocate Nancy Wahlig, Director of Sexual Assault and Violence Prevention Resource Center; Ms. Roe's case was argued by the University's Representative, Mr. Jakubisin. Mr. Doe's counsel was not permitted to speak. Exhibit 15, Hearing Transcript 26:2-8.

OPHD hearing participants are permitted to submit questions for the witnesses. Of the 32 questions Mr. Doe submitted to Ms. Roe , questions crucial to his defense, the Panel Chairperson improperly refused to pose 23 of the questions and posed just nine questions, which the chairperson improperly altered. Exhibit 14, Exhibit 17.

At the hearing, Mr. Doe denied that he digitally penetrated Ms. Roe 's vagina on the morning of February 1, 2014. Exhibit 15, Hearing Transcript 34:6-16. Ms. Roe admitted that she engaged in consensual sexual intercourse with Mr. Doe later on February 1, 2014, and testified that, as to the early morning of February 1, 2014, "there wasn't any sexual activity other than him putting his hands down my pants and trying to finger me and touch me down there, and me telling him directly to stop, and pushing his hand away…" Exhibit 15, Hearing Transcript 19:16-20. In her June 16, 2014, written statement in support of her Request for Formal Investigation, Ms. Roe had also stated, "He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop." Exhibit 6, p. 2. When Ms. Otten asked Ms. Roe to clarify her written statement, "Could you just clarify in the statement, what 'touch me' was referring to," Ms. Roe responded that, "I didn't really want to get too super graphic in the report, but insert his fingers in my vagina." Exhibit 15, Hearing Transcript 28:7-11.

Ms. Roe never testified that Mr. Doe actually penetrated her vagina with his fingers, only that he was "*trying*", -- "trying to finger me and touch me down there" and "trying to move my underwear and touch me."

At the close of the hearing, Mr. Doe submitted a Respondent's Supplemental Submissions and Other Information in Support of His Defense. Exhibit 16.

On December 17, 2014, the Student Conduct Review panel issued a determination that Mr. Doe was responsible for "sexual misconduct" under the UCSD Sexual Conduct Policy for digital penetration of Ms. Roe 's vagina on the morning of February 1, 2014. Exhibit 17.

Under UC San Diego Student Sex Offense Policy, "'Sexual misconduct' occurs when non-consensual sexual activity is 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." Exhibit 1, p. 3. However, nowhere does the UC San Diego Student Sex Offense Policy define the term "sexual activity." Nor does the Policy state whether "sexual activity engaged in without the intent to harm another" refers to more than sexual intercourse, the plain meaning of sexual activity.

The Student Conduct Review Panel, after reviewing the University's Sanctioning Guidelines and Mr. Doe's student conduct record, recommend the following sanctions:

1. Suspension for one quarter.
2. Permanent No Contact Order, due to the potential for ongoing harm to the Complaining Witness.
3. A two hour sex offense/sexual harassment training with OPHD.
4. Counseling assessment with CAPS.

On December 23, 2014, Mr. Doe[4] submitted his Impact Statement to Dean Sherry L. Mallory. Exhibit 18.

On January 13, 2015, Dean Sherry L. Mallory substantially increased the sanctions to a one year suspension, requiring Mr. Doe to reapply for admission to UCSD in December 2015, and she imposed significant additional sanctions. Exhibit 19.

Mr. John Doe respectfully appeals both the finding and the sanctions and asks the Council of Provosts to dismiss the case entirely.

[4] Mr. Doe came to UC San Diego with a 4.3 high school GPA, works 15 hours a week as an intern with the Office of the San Diego County District Attorney, maintains a college 3.3 GPA, and plans to enter law school after graduation from UC San Diego. Any finding of a violation of the UC San Diego Student Conduct Code will result in the loss of the District Attorney internship and delay or prevent Mr. Doe's admission to law school or other graduate program.

APPEAL OF FINDINGS AND SANCTIONS

An appeal may be based upon one or more of the following grounds:

1. The findings are not supported by the evidence;
2. The decision of responsibility is not supported by the findings;
3. There was unfairness in the proceedings that prejudiced the result (e.g. the denial of due process) ;
4. The sanction(s) imposed was grossly disproportionate to the violation committed.

I.

FINDING ARE NOT SUPPORTED BY THE EVIDENCE

On September 10, 2014, after interviewing Ms. Roe twice, interviewing 14 other witnesses, and reviewing numerous text messages, OPDH Complaint Resolution Officer Elena Acevedo Dalcourt had determined that there was sufficient evidence to proceed on only one of three of Ms. Roe 's allegations against Mr. Doe, alleged non-consensual digital penetration on the morning of February 1, 2014.

At the hearing on December 12, 2014, Mr. Doe testified that the February 1, 2014 digital penetration did not occur: Ms. Roe never testified that it did.

Even when questioned by the panel, Ms. Roe did not state that digital penetration occurred on the morning of February 1, 2014, only that Mr. Doe kept "trying to finger me and touch me down there." Ms. Roe did not object to sexual contact *per se*, only that it was not pleasurable for her at that time. Ms. Roe admitted that she voluntarily continued consensual sexual activity with Mr. Doe later that same day, apparently when the sexual contact was again pleasurable and did not hurt.

Ms. Roe waited over four months to make her allegations against Mr. Doe and only after the confrontation on May 14, 2014.

Given Mr. Doe's direct denial, the lack of any testimony that digital penetration did occur, and Ms. Roe 's admission that she continued to have consensual sexual intercourse with Mr. Doe later that same day, there is insufficient evidence to support a finding by a preponderance of the evidence presented at the hearing that Mr. Doe violated UCSD Sexual Conduct Policy by engaging in non-consensual sexual activity, i.e. sexual activity without the intent to harm, on the morning of February 1, 2014.

II.

THE DECISION IS NOT SUPPORTED BY THE FINDINGS

The Student Conduct Review Report lists Findings 1 through 7. Exhibit 17.

Mr. Doe maintains that alleged digital vaginal penetration never occurred on the morning of February 1, 2014. Exhibit 17, Findings 2 and 4.

When asked to clarify at the hearing, the credible assertion was only "that John *tried* to digitally penetrate Jane's vagina and he ignored her objections." Exhibit 17, Finding 5 *(emphasis added).* Finding 7 repeats Ms. Roe 's prior consistent statement on June 16, 2014, that Mr. Doe "kept *trying* to move my underwear and touch me." (*emphasis added*).

The conflicting Findings 3 and 6 are based on hearsay statements that Ms. Roe purportedly made to Ms. Dalcourt, statements that have never been provided to Mr. Doe nor his counsel and that are inconsistent with the testimony presented at the hearing.

The findings show that Mr. Doe testified that the February 1, 2014 digital vaginal penetration did not occur and that Ms. Roe never testified that it did.

Conflicting findings as to whether digital vaginal penetration occurred, or was even attempted, especially in light of Mr. Doe's denial and Ms. Roe 's admission that she continued to have consensual oral sex and sexual intercourse, i.e. penile vaginal penetration, with Mr. Doe later that same day, do not support the decision that Mr. Doe

violated UCSD Sexual Conduct Policy by engaging in non-consensual sexual activity, i.e. sexual activity without the intent to harm, on the morning of February 1, 2014.

III.

UNFAIRNESS IN THE PROCEEDINGS

This case arises amidst a growing national controversy about the responses of colleges and universities to alleged sexual violence on college and university campuses.

The Federal Government, through the U.S. Department of Education, has been pressuring colleges and universities to aggressively pursue investigations of sexual violence on campuses under Title IX, the federal civil rights law that prohibits discrimination in education on the basis of gender, and for violations of the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. Compliance with reporting sexual violence is monitored by the U.S. Department of Education, which can impose civil penalties up to $35,000 per violation against institutions for each infraction and can suspend institutions from participating in federal student financial aid programs. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act is a federal statute codified at 20 U.S.C. § 1092(f), with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46.

On April 4, 2011, the U.S. Education Department's Office of Civil Rights sent a "Dear Colleague" to colleges and universities. Exhibit 13, pp. 147-165. The Dear Colleague Letter indicated that, in order to comply with Title IX, colleges and Universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Most notably, the Dear Colleague Letter required schools to adopt a relatively low burden of proof "more likely than not" in cases

involving sexual misconduct, including assault, and suggested that schools should focus more on victim advocacy. However, the letter states:

> "Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing."

In February 2014, Catherine E. Lhamon, the Assistant Secretary of Education who heads the department's Office for Civil Rights, told college officials attending a conference at the University of Virginia that schools need to make "radical" change. According to the Chronicle of Higher Education, college presidents suggested afterward that there were "crisp marching orders from Washington."[5]

The Federal government has created a significant amount of pressure on colleges and universities to treat all those accused of sexual misconduct with a presumption of guilt. The Chronicle of Higher Education noted that "Colleges face increasing pressure from survivors and the federal government to improve the campus climate."[6] In the same article, the Chronicle noted that different standards were applied to men and women: "Under current interpretations of colleges' legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman's consent."

After years of criticism for being too lax on campus sexual violence, colleges and universities are relying on Title IX to crack down on alleged perpetrators of sexual

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[5] *Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases*, Chronicle of Higher Education, February 11, 2014.

[6] *Presumed Guilty: College men accused of rape say the scales are tipped against them*, Chronicle of Higher Education, September 1, 2014.

violence and sexual misconduct. The pendulum has now swung too far in the other direction.

The UCSD OPDH Title IX investigation and hearing process [7] against Mr. Doe clearly illustrates this point.

The complaint of the female student has nothing at all to do with sexual violence against women; the male student is being effectively expelled from the UC San Diego for allegedly trying to touch his sexual partner in a manner that was not pleasurable for her on Saturday morning, February 1, 2014, but was later that same day when she continued consensual sexual activity at her apartment.

Unfairness against the accused male student in the OPDH investigation and hearing process include the following:

1. OPDH improperly refused to provide Ms. Roe 's statements contained in her initial June 5, 2014 complaint against Mr. Doe. Exhibit 5.

2. OPDH improperly redacted significant portions of Ms. Roe 's statement in support of her Request for Formal Complaint and refused to produce the unredacted statement to Mr. Doe. Exhibit 6.

3. OPDH interviewed Ms. Roe on at least two occasions, June 12, 2014 and July 29, 2014, however, OPDH improperly refused to provide Ms. Roe 's statements to Mr. Doe. Exhibits 5, 8.

4. OPDH interviewed 14 other witnesses, yet improperly refused to provide those witness statements to Mr. Doe. Exhibit 10.

5. On September 23, 2014, while considering OPDH's report against Mr. Doe, Dean Sherry L. Mallory tweeted: **"**I've pledged my commitment to

[7] On October 15, 2014, UCSD Chancellor Pradeep K. Khosla shared a proposed campus "Policy for Reporting and Responding to Sex Offenses" in an email to university affiliates. If the new policy proposal were implemented, it would bring UCSD's protocol for handling sexual violence cases to par with the University of California's system wide Sexual Harassment and Sexual Violence Policy. In light of the Chancellor's proposal, it appears that UCSD's handling of reported sexual violence is not in line with the current University of California policy nor current federal law.

help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle" Exhibit 12.

6. OPDH failed to disclose that OPDH Officer Elena Dalcourt is an attorney licensed to practice in California, State Bar No. #253598. Communicating with a represented party without the consent of the party's attorney may be a violation of California Rules of Professional Conduct Rule 2-100 and American Bar Association Model Rules of Professional Conduct, Rule 4.2.

7. The OPHD report states incorrectly that Mr. Doe "did not recall" any touching between the two parties on the morning of February 1, 2014. In fact, Mr. Doe's attorney had objected to the question and no response was provided at that time. Mr. Doe has consistently and repeatedly denied the allegation.

8. OPHD hearing participants are permitted to submit questions for the witnesses. Of the 32 questions Mr. Doe submitted to Ms. Roe, questions crucial to his defense, the Panel Chairperson improperly refused to pose 23 of the questions and posed just nine questions, which the chairperson improperly altered. See Exhibit 14; Exhibit 15; Exhibit 17, Findings 1.

9. The Student Conduct Student Conduct Review Report, Section B, Findings 3 and 6 are based on hearsay statements that Ms. Roe purportedly made to Ms. Dalcourt, statements that have never been provided to Mr. Doe nor his counsel and that are inconsistent with Ms. Roe's testimony presented at the hearing. Exhibit 17.

10. Although OPDH determined there was insufficient evidence to proceed on Ms. Roe's other allegations at the hearing, the university's representative Mr. Jakubinsin argued, "We also hope to show prior sexual misconduct that seriously undermines John Doe's credibility with regard to denying that he sexually assaulted the complainant on the morning of February 1st." Exhibit 15; Hearing Transcript 10:15-19.

IV.
THE SANCTIONS IMPOSED ARE GROSSLY DISPROPORTIONATE

Mr. John Doe is effectively being expelled from UC San Diego, having to apply for re-admission after a one year suspension, because he allegedly tried to touch his sexual partner in a manner that was not pleasurable for her on Saturday morning, February 1, 2014, even though sexual activity continued in Ms. Roe 's apartment, at her request, later that same day. The sanctions imposed by UCSD OPDH and Office of Student Conduct trivializes and demeans efforts to address sexual violence on campus and is grossly disproportionate to the alleged conduct.

V.
CONCLUSION

In light of the foregoing, Respondent Mr. John Doe respectfully requests that the Council of Provosts determine that he was improperly found responsible for violating the UC San Diego Student Conduct Code and dismiss this case in its entirety.

Respectfully Submitted,

John Doe

MATTHEW H. HABERKORN, ESQ., State Bar No. 152424
HABERKORN & ASSOCIATES
P.O. Box 7474
Menlo Park, CA 94025
Tel: 650-268-8378
Fax: 650-332-1528
E-mail: matthewhaberkorn@mac.com
ATTORNEY FOR RESPONDENT

MARK M. HATHAWAY, ESQ.
(California Bar No. 151332;
New York Bar No. 2431682
Washington DC Bar No. 437335)
WERKSMAN JACKSON
HATHAWAY & QUINN LLP
888 West Sixth Street, Fourth Floor
Los Angeles, California 90017
Telephone: (213) 688-0460
Facsimile: (213) 624-1942
E-Mail: mhathaway@werksmanjackson.com
ATTORNEYS FOR RESPONDENT

EXHIBITS

Exhibit No.	Date	Description
1	01/30/2014	UC San Diego Student Sex Offense Policy and Reporting Procedures
2	01/30/2014	Ms. Jane Roe texts to Mr. Doe requesting he perform oral sex, prior to January 31, 2014
3	02/01/2014	Text Conversation between Mr. Doe and Ms. Roe on the afternoon of February 1, 2014, following the alleged incident on the morning of February 1, 2014.
4	06/05/2014	Ms. Jane Roe written report to the UCSD Office for the Prevention of Discrimination and Harassment containing ionitial statement of allegations against Mr. John Doe
5	06/12/2014	Ms. Jane Roe 's interview statements to OPDH Complaint Resolution Officer Elena Acevedo Dalcourt concerning her allegations against Mr. John Doe
6	06/16/2014	Student Sex Offense Policy Request Form, for Formal Investigation submitted by Ms. Jane Roe
7	06/18/2014	Email from OPDH Officer Elena Dalcourt to Mr. John Doe regarding report received.
8	07/29/2014	Ms. Jane Roe interview statements to OPDH Complaint Resolution Officer Elena Acevedo Dalcourt concerning her allegation against Mr. John Doe
9	08/26/2014	Correspondence from Officer Elena Dalcourt to Mr. Matthew Haberkorn confirming receipt of Mr. Doe 's response and outline of allegations
10	09/10/2014	14 Witness Statements for interviews conducted by OPDH Complaint Resolution Officer Elena Acevedo Dalcourt
11	09/10/2014	Report of investigation from Officer Elena Dalcourt to Mr. Benjamin White, Director, Office of Student Conduct
12	10/27/2014	Follow up Correspondence from Mr. Matthew Haberkorn regarding tweets from Dean Mallory related to on campus sexual assault

Exhibit No.	Date	Description
13	12/09/2014	Respondent's Pre-Hearing Submissions and Other Information in Support of Defense
14	12/12/2014	Respondent's Questions to be Asked of Complainant
15	12/12/2014	Hearing Transcript of the Formal Hearing before UCSD Student Conduct Review Panel
16	12/12/2014	Respondent's Supplemental Submissions and Other Information in Support of His Defense
17	12/17/2014	UC San Diego Office of Student Conduct Review Report
18	12/23/2014	Mr. Doe's Impact Statement Addressed to Dean Mallory
19	01/13/2015	Correspondence from UC San Diego Student Conduct reflecting substantial increase in recommended sanctions by Dean Mallory
20	10/17/2015	Correspondence between Mr. Matthew Haberkorn and Dean Mallory regarding process and Administrative Review Hearing
21	7/22/2014	UC San Diego Review Procedures for Alleged Sex Offense, Harassment or Discrimination Violations Interim Procedures, as updated July 22, 2014.

Exhibit 1

UC SAN DIEGO STUDENT SEX OFFENSE POLICY AND REPORTING PROCEDURES

Effective Date: 11/17/09
Updated: 12/3/09, 1/30/13

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I. POLICY STATEMENT

The University of California, San Diego is committed to creating and maintaining an environment in which all persons who participate in University programs and activities can work together in an atmosphere free of all forms of sexual assault and sexual misconduct, harassment, exploitation, or intimidation. Every member of the University community should be aware that such behavior is prohibited by law and by University policy and that the University will not tolerate sex offenses in any form.

As a recipient of Federal funds, the University is required to comply with Title IX of the Higher Education Amendments of 1972, 20 U.S.C. §1681 *et seq* ("Title IX"), which prohibits discrimination on the basis of sex in education programs or activities. Sex offenses, as defined in this *Policy*, are a form of sex discrimination prohibited by Title IX. Sex Offenses may occur regardless of an individual's sex or gender, perceived or actual sexual orientation, gender identity and/or gender expression. The University will take appropriate action to prevent, correct, and address behavior that is found to violate this *Policy* or other regulations involving sex offenses.

The University encourages the timely reporting of all sex offenses. The University's first responsibility in responding to such reports is attending to the needs of the individuals involved (e.g., the complainant, the student accused, and potential witnesses). All reports of sex offenses are taken with the utmost seriousness, and students involved will be referred to the appropriate persons for assistance. The University is also dedicated to ensuring that students accused of violating this *Policy* are treated fairly by the University. The student accused will be presumed not responsible, provided a fair process and referred to appropriate services for assistance.

The University recognizes the concern for privacy inherent in allegations of sex offenses and will maintain confidentiality regarding all dealings related to allegations of sex offenses to the extent possible, and as permitted by law or University policy.[1]

II. APPLICABLE STANDARDS

This *Policy* addresses sex offenses as they affect UC San Diego students, both those who report being the subject of a sex offense and those accused of committing such an offense. Other policies may also apply to non-students who report being the subject of a sex offense or who have been accused of committing a sex offense.

Many sex offenses can be addressed both through University administrative procedures and through the criminal justice system. This *Policy* defines the sex offenses prohibited by the UC San Diego *Student Conduct Code*, provides guidance about what students should do if they believe they have been the subject of a sex offense or have been accused of a sex offense and describes what the University will do if a sex offense is reported. Students found responsible for violating this *Policy* may be sanctioned under the *Student Conduct Code* and may also be separately prosecuted under California criminal statutes. The determination whether a matter will be criminally prosecuted is made by the applicable prosecutor's office, not by officials at UC San Diego. Any criminal process is entirely separate from administrative proceedings at the University.

This *Policy* applies to sex offenses as defined below. Reports of sexual harassment should be brought under the University of California *Policy on Sexual Harassment*, which addresses unwelcome conduct of a sexual nature. Some types of conduct may be addressed under either or both this *Policy* and the *Policy on Sexual Harassment*. Consensual romantic relationships between members of the University community may be subject to other University policies; for example, those governing faculty-student relationships are detailed in the *Faculty Code of Conduct*.[2]

A. Prohibited Acts

It is a violation of the UC San Diego *Student Conduct Code* for students to commit or attempt to commit any sex offense defined or addressed in this *Policy*.

"Effective consent" referenced throughout this *Policy* means:

- Consent that is **informed**. Both parties demonstrate a clear and mutual understanding of exactly what they are consenting to. Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity.
- Consent that is **voluntary**. There is no coercion, force, threats, or intimidation.
- Consent that is given when the person is **not incapacitated**. One who is incapacitated cannot provide effective consent. Incapacitation is the physical and/or mental inability to make informed, rational judgments. States of incapacitation include, but are not limited to, unconsciousness, sleep and blackouts. Where alcohol or drugs are involved, incapacitation is distinct from drunkenness or intoxication, and is defined with respect to how the alcohol consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments. The factors to be considered include whether the accused student knew, or a reasonable person in the position of the accused student should have known, that the complainant was incapacitated.

It is the responsibility of the person wanting to engage in the specific sexual activity to make sure that he or she has consent and the following will be taken into consideration:

- Silence does not equal consent;

[1] University administrators are required to report to the police any information they receive of any sex offense involving an individual under the age of 18 years. Students who have questions about this mandatory reporting obligation may wish to seek confidential counseling from Student Legal Services before discussing any incident of a sex offense involving individuals under 18 years of age.
[2] The Faculty Code of Conduct may be found in *Academic Personnel Manual* (APM) Section 015.

- Consent is not indefinite and may be withdrawn at any time. At that time, all sexual activity must cease unless and until additional effective consent is given;
- Having previously consented to an act does not necessarily imply continued effective consent;
- A current or previous romantic or sexual relationship does not imply continued consent; and
- Because incapacitation may be difficult to discern, students are strongly encouraged to err on the side of caution, (i.e., when in doubt, assume that another person is incapacitated and therefore unable to give effective consent).

"Sexual assault" occurs when sexual activity is engaged in without the effective consent of the other person and is intentional. It includes circumstances involving:

- Physical force, violence, threat, or intimidation;
- Ignoring the objections of the other person;
- Causing the other person's intoxication or impairment through the use of drugs or alcohol;
- Taking advantage of the other person's incapacitation (including voluntary intoxication), state of intimidation, or other inability to consent;
- Causing the prostitution of another person; or
- Knowingly transmitting a sexually transmitted infection, including HIV, to another person.

"Sexual misconduct" occurs when non-consensual sexual activity is 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. It also includes:

- Electronically recording, photographing, or transmitting intimate or sexual utterances, sounds or images of another person;
- Allowing third parties to observe sexual acts;
- Engaging in voyeurism; or
- Distributing intimate or sexual information about another person.

An **"attempt"** occurs when anyone attempts to commit an act defined above but fails, or is prevented or intercepted in its perpetration.

B. The Role of Alcohol or Drugs

It is a violation of this *Policy* and a criminal offense to engage in sexual acts with someone who has been using alcohol, drugs, or other intoxicants to the degree that he or she is unable to provide effective consent. This is true whether or not the person reporting the sex offense voluntarily consumed the alcohol, drug, or intoxicant.

Intentionally causing someone to become intoxicated in order to facilitate the sex offense will be considered as a factor when determining responsibility and, where responsibility has been found, imposing appropriate sanctions.

Given that alcohol and/or other intoxicants are often involved in sex offense matters, a complainant may be afraid to report to authorities if he or she had also been engaged in an activity which violated University policy or state law, such as a person under age 21 drinking alcohol. UC San Diego encourages the reporting of sex offenses and therefore generally does not hold complainants and/or witnesses accountable for alcohol-related *Student Conduct Code* violations that may have occurred at the time of the sex offense.

The use of intoxicants by a student accused of a sex offense does not excuse the offense.

C. University Responsibility

Whether or not the criminal justice authorities choose to prosecute, the University may commence student conduct proceedings with a student alleged to have violated this *Policy*. Responsibility for

commencing student conduct proceedings rests with the Office of Student Conduct and the relevant Dean(s).

D. Jurisdiction

The University has jurisdiction over alleged violations of this *Policy* by students that occur on University Grounds and Facilities (such as classrooms and residence halls), and at official University-Supported Activities. In addition, although the University will not routinely invoke its disciplinary processes over student conduct that occurs off-campus, the University has discretion under this *Policy* to exercise jurisdiction over conduct that occurs off-campus.

All requests to exercise off-campus jurisdiction will be submitted by the Director of Student Conduct to the Vice Chancellor – Student Affairs, who will have the exclusive authority to extend jurisdiction under this *Policy.* The decision by the Vice Chancellor – Student Affairs is final and not subject to appeal.

In determining whether or not to exercise off-campus jurisdiction, the Vice Chancellor – Student Affairs will consider the totality of the circumstances, including, but not limited to, the following factors:

1. The seriousness of the alleged misconduct;
2. The impact of the conduct on any member of the University community or the campus as a whole and whether it contributes to a hostile environment on campus;
3. Whether the alleged victim is a member of the University community;
4. The ability of the University to gather information, including the testimony of witnesses; and
5. Whether the off-campus conduct is part of a continuing course of conduct that occurred either on or off campus.

E. Other Related Alleged Violations

In accordance with this *Policy*, Hearing Panels and Hearing Officers are empowered to hear allegations of, and to recommend sanctions for, sex offense violations and any other violations of the *Student Conduct Code* related to the alleged violations of this *Policy*.

F. Timing of Reports and Availability of Procedures

Reports of sex offenses should be brought forward as soon as possible after the alleged conduct occurs. While there is no stated timeframe for reporting, prompt reporting will better enable the University to investigate the facts, determine the issues, and provide an appropriate remedy or student conduct action. All incidents should be reported even if a significant amount of time has passed. However, delay in reporting may impede the University's ability to conduct an investigation and/or effect appropriate remedial actions. The University will respond to sex offense reports to the greatest extent possible, taking into account the amount of time that has passed since the alleged conduct occurred.

G. Retaliation

This *Policy* prohibits retaliation as a result of a person making a report under this *Policy*, assisting someone with a report of a sex offense, or participating in any manner in an investigation or resolution of a report of a sex offense. Retaliation includes, but is not limited to, harassment, threats, intimidation, reprisals, and/or adverse actions committed or instigated by the person accused or persons acting on behalf of that person.

H. Lack of Evidence

Because reports of sex offenses may involve interactions between persons that are not witnessed by others, reports of sex offenses cannot always be substantiated by additional evidence other than the accounts by the persons involved. Lack of corroborating evidence or "proof" should not discourage individuals from reporting sex offenses.

I. Intentionally False Reports

Individuals who make reports that are later found to have been intentionally false or made maliciously without regard for truth may be in violation of the *Student Conduct Code* or other applicable University

policies. This provision does not apply to reports made in good faith, even if the facts alleged in the report cannot be substantiated by an investigation.

J. Privacy

The University will protect the privacy of individuals involved in a report of a sex offense except as otherwise required by law or University policy. A report of a sex offense may result in the gathering of extremely sensitive information about individuals in the University community. While such information is considered confidential, University policy regarding access to public records and disclosure of personal information may require disclosure of certain information concerning a report of a sex offense. In such cases, efforts will be made to redact the records, as appropriate, in order to protect the privacy of individuals.

K. Confidentiality of Sex Offense Reports

There are three offices on campus that can provide information on a confidential basis to individuals interested in making a report of a sex offense. Professional staff at the Sexual Assault and Violence Prevention Resource Center (SARC), Counseling and Psychological Services (CAPS), and the Office of the Ombuds provide safe places where individuals who may be interested in bringing a report of a sex offense can discuss their concerns and learn about the procedures and potential outcomes. Individuals consulting with these confidential resources will be advised that their discussions in these settings are not considered an official notice or report to UC San Diego about a sex offense. Without additional action by the individual, such as reporting the incident to Office for the Prevention of Harassment & Discrimination (OPHD), the Police or other University Official, the discussions will not result in any action by the University to resolve their concerns, except as otherwise required by law.

III. INFORMATION AND RESOURCES RELATED TO SEX OFFENSES

There are many options, resources, and information available both on-campus and in the San Diego community to provide response, medical services, counseling, and support services to victims of sex offenses. Appendix A lists campus resources for persons who have experienced a sexual assault, persons who have been accused of a sex offense, witnesses, and support persons. Information regarding resources both on campus and in the community is also available from SARC.

IV. OPTIONS FOR STUDENTS REPORTING SEX OFFENSES

UC San Diego encourages all persons who have experienced a sex offense to report an offense as soon as possible after its occurrence, in order for appropriate and timely action to be taken. All University officials will refer reports of sex offenses to OPHD as soon as possible after receipt of the report or knowledge of the incident, unless rules regarding privacy or confidentiality prevent this disclosure.

A. Overview

An individual reporting a sex offense will be provided information about options for addressing such reports, including formal resolution processes (see Section IV(D) below) as well as alternative resolution options (see Section IV(C) below). In addition, complainants will be informed about confidentiality of reports (see Section II(K) above). Complainants will also be informed about possible outcomes of the report, including interim remedies, and student conduct actions that may be taken against the student accused.

When an administrative investigation is requested, OPHD will perform fact-finding and, when appropriate, complete a fact-finding report that will be submitted to the appropriate University officials. In addition, OPHD may propose interim remedies for both parties, such as adjustments to on-campus housing assignments or class schedules.

B. Reporting Sex Offenses to University Officials

Persons who have been the subject of a sex offense may exercise **any or all** of the following options:

1. **Seek** immediate support services through SARC (http://sarc.ucsd.edu).

   SARC staff is on-call 24 hours a day and on weekends throughout the year. They provide students with counseling, advocacy, and court escorts.

2. **Request** a Non-Investigative Report

   A sexual assault victim has the option to have a Sexual Assault Forensic Exam (commonly referred to as "rape kit" or "rape exam") conducted. No police report is required. The exam is conducted at only one facility in San Diego County. This option is available for up to 96 hours after the sexual assault occurred.

   The Sexual Assault Nurse Examiner (SANE) interviews the victim, collects any physical evidence from the sexual assault, and stores evidence in a secure location using a case number without victim's name or contact information. Physical evidence will be held for a period of 18 months, then it will be destroyed.

   The Non-Investigative Report will not trigger an investigation; therefore, no action will be taken against the alleged party as the result of this report. If the victim changes his/her mind and wants to make an investigative report to law enforcement, the victim will sign a release allowing the SANE to release evidence to the police. SARC staff is available to assist students with this process.

3. **Report** the sex offense to the UC San Diego Police

   Although it is never too late to file a police report, it is highly recommended to report a sex offense as soon as possible in order to allow for the collection of evidence. When the UC San Diego Police Department is contacted, an investigating officer trained in sex offense cases will be dispatched to the scene and will explain the police procedures. If it is determined that a Sexual Assault Forensic Exam is necessary, the police will assist with transportation and contacting the SANE, who will conduct the exam. The officer will inform the complainant that he/she has the right to have a support person present during the investigative interview. Detectives will assist with the investigation and proper evidence collection. SARC staff is available to accompany the student.

   At the conclusion of the police investigation, the case may be forwarded to the prosecutor's office for review. The final decision whether a case will be criminally prosecuted is determined by the prosecutor's office. If the prosecutor does not move forward with the complaint, the complainant may request that a representative from SARC accompany him or her to the prosecutor's office for a meeting to discuss its decision.

   No one at the University will force the complainant to make a police report or be a witness in the court proceedings.

   If a complainant chooses to file a police report, the Victim/Witness Assistance Program, funded by the State of California, is available free of charge. Their services include counseling, court escort, advocacy and financial assistance.

   If the sex offense occurred off-campus, the complainant may file a report with the appropriate police department.

4. **Seek** medical attention at Student Health Services

   Student Health Services provides medical care for all registered students. Health providers can examine and treat physical injuries and provide pregnancy tests and testing for sexually transmitted diseases. Student Health Services and Thornton Hospital do not conduct Sexual

Assault Forensic Exams. Only one facility in San Diego County, operated by Independent Forensic Services, performs the Sexual Assault Forensic Exams. (See Appendix A for contact information)

5. **Request** an administrative investigation from the Office for the Prevention of Harassment & Discrimination (http://ophd.ucsd.edu), whether or not a report has been filed with the Police.

C. Alternatives to Formal University Resolution

Alternatives to formal University resolution are intended to provide a forum for resolution of reports of sex offenses outside of a formal resolution process, where the complainant prefers to pursue such options and where such options are reasonable under the circumstances. The options attempt to balance the interests of the parties while reaching resolutions that are fair and that protect the interests of the complainant, the student accused, and the University community. These options will only be used when all parties agree to participate.

1. **Options**
   Alternatives to formal University resolution are intended to be flexible and encompass a full range of possible appropriate outcomes. Alternatives may include an inquiry into the facts, but typically do not include a full investigation. Options may include opportunities for third party assistance in facilitating discussions or meetings, or a voluntary negotiated agreement reached with the assistance of the relevant Dean. However, formal mediation is typically not appropriate for sex offense cases, especially incidents involving sexual assault. A complainant can explore these options in a number of venues (e.g. SARC, the Office of the Ombuds, etc.). All options for resolution must be discussed with OPHD before implementation.

2. **Resolutions and Records**
   If a resolution is reached using an alternative to formal University resolution and agreed upon by both the complainant and the student accused, the matter is considered closed. Any resolution reached using these options excludes suspension or dismissal from the University and would not result in a student conduct record. At any time prior to reaching such a resolution, either party may request that the matter be handled through the procedures for formal resolution outlined below.

D. Procedures for Administrative Investigation

The formal resolution process begins with an investigation of the facts by OPHD. The formal investigation is typically initiated when an individual reporting a sex offense files a written request for formal investigation. In cases where there is no written request, the University may initiate an investigation with the approval of the Vice Chancellor - Student Affairs. The investigation will be conducted in a way to protect the privacy of those involved to the extent possible.

Based on the facts, OPHD determines whether there is reasonable cause to believe this *Policy* was violated. OPHD's report is forwarded to the Director of Student Conduct and the relevant Dean(s), who together determine whether the alleged violations will be resolved through the student conduct process. The formal investigation includes the following:

1. The student accused will be provided a copy of the written request for formal investigation or a full and complete written statement of the alleged violations along with a copy of this *Policy* within a reasonable period of time following the initiation of the formal investigation, typically within seven business days.

2. The individual(s) conducting the investigation will be familiar with this *Policy* and have training or experience in conducting sex offense investigations.

3. The investigation generally includes interviews with the parties, interviews with other witnesses as needed, and a review of relevant documents as appropriate. Disclosure of facts to parties and witnesses is limited to what is reasonably necessary to conduct a fair and thorough investigation.

4. Upon request, the complainant and the student accused may each have a support person present when he or she is interviewed. Other witnesses may have a support person present at the discretion of the investigator or as required by applicable University policy. In addition, resources such as SARC or Student Legal Services may be consulted.

5. At any time during the investigation, OPHD or the investigator may recommend that interim protections or remedies be implemented by the appropriate UC San Diego official. These protections or remedies may include separating the parties, placing limitations on contact between the parties, or making alternative academic, working or student housing arrangements, regardless of the outcome of the student conduct process. Failure to comply with the terms of interim protections or remedies may be considered a separate violation of the *Student Conduct Code*.

6. The investigation will be completed as promptly as possible and in most cases within 60 business days of the date the request for formal investigation was filed. The Director of Student Conduct and relevant Dean will be informed about investigations not completed within this timeframe.

7. Generally, an investigation results in a written report that includes a statement of the allegations, a summary of the evidence, findings of fact, and a determination by the investigator as to whether there is reasonable cause to believe that University policy has been violated. The standard of proof for the purposes of the investigation is preponderance of the evidence (whether it is more likely than not that the facts occurred as alleged). The report will be submitted to the Director of Student Conduct and relevant Dean. The report may be used as evidence in other related proceedings, such as subsequent complaints, grievances and/or student conduct actions.

8. The complainant and the student accused will be informed promptly in writing when the investigation is complete. They may each request a copy of the investigative report. However, in accordance with University policy, the report will be redacted to protect, to the extent possible, the privacy of personal and confidential information regarding all individuals other than the individual requesting the report.

9. Disciplinary action involving a student, following a finding that there is reasonable cause to believe University policy has been violated, is governed by the *Hearing Procedures for Alleged Sex Offense, Harassment, and Discrimination Violations.*

V. OPTIONS OUTSIDE THE UNIVERSITY FOR RESOLUTION OF REPORTS OF SEX OFFENSES, HARASSMENT OR DISCRIMINATION

Students may file complaints under Title IX of the Educational Amendments of 1972 with the Office for Civil Rights, U.S. Department of Education. Contact OPHD for more information.

Appendix A

UC San Diego Police provides a timely response for staff, students, faculty, and members of the community experiencing a sex offense on campus. (For sex offenses off campus, local police should be contacted.) In addition, the police can arrange for medical evidentiary examinations in order to provide admissible evidence when the person reporting the sex offense desires prosecution through the criminal justice system.

The UC San Diego Police Department encourages the University community, including students, to immediately contact them by dialing 911 or 858/534-HELP (534-4357) to report a sex offense. The preservation of evidence is essential to the successful prosecution of a sex offense. UC San Diego Police Department personnel have been specially trained in the proper handling, identification, collection and preservation of such evidence.

The Sexual Assault & Violence Prevention Resource Center (SARC) is a primary, confidential source for information, crisis intervention and follow-up support regarding sexual assault, dating violence and stalking on the UC San Diego campus. SARC provides accompaniment services for student victims to the police, evidentiary exams and the court system. In addition, individual and group counseling is also available to students who are crime victims. After hours and on weekends, SARC staff are available by contacting the UC San Diego Police at (858) 534-HELP.

Office for the Prevention of Harassment & Discrimination (OPHD) is responsible for receiving and conducting the administrative investigation of all reports of sex offenses filed on campus and is available to discuss options, provide support, explain University policies and procedures, and provide education on relevant issues. OPHD is available only during normal business hours. The OPHD investigation is not a criminal procedure.

Student Health Services can provide medical attention to students experiencing a sex offense on campus. It is important to note that any health center or physician treating the victim of a violent crime is obligated by law to report the crime to the police.

Counseling and Psychological Services (CAPS) offers free and confidential short-term and crisis counseling by licensed mental health providers to all UC San Diego students on an urgent basis, or by appointment. CAPS also offers certain free and confidential psychiatric services. Referrals to off-campus psychotherapeutic and psychiatric providers are also available through CAPS.

Student Legal Services (SLS) offers confidential counseling and education on legal topics to currently-registered students. SLS can assist directly as well as make referrals to appropriate resources.

The Office of the Ombuds provides confidential, neutral and informal dispute resolution services to everyone in the University community and provides information about University policies and procedures and makes referrals.

The Office of Student Conduct provides leadership for UCSD's campus-wide non-academic student conduct process and manages the formal hearing process for sex offense cases. The Office of Student Conduct also provides assistance, information, and referrals for students involved in sex offense cases.

Colleges and Residential Staff, specifically the individual College Deans, Resident Deans, and Assistant Resident Deans, are all knowledgeable about this Policy and the resources available at UC San Diego and can provide assistance, information and support for the person filing the report of a Sex Offense and the person accused.

The Office of Graduate Studies provides information for graduate students on a broad array of topics relevant to graduate education. The Assistant Dean of Graduate Studies works to resolve student conduct issues and advises students about resource options for conflict resolution.

The School of Medicine Deans and Program Directors are available to support, and refer medical students, residents and fellows should the need arise. Help with arranging treatment and confidential counseling is available.

The A.S. Office of Student Advocacy informs, advises and represents individual students involved with academic and non-academic student conduct incidents.

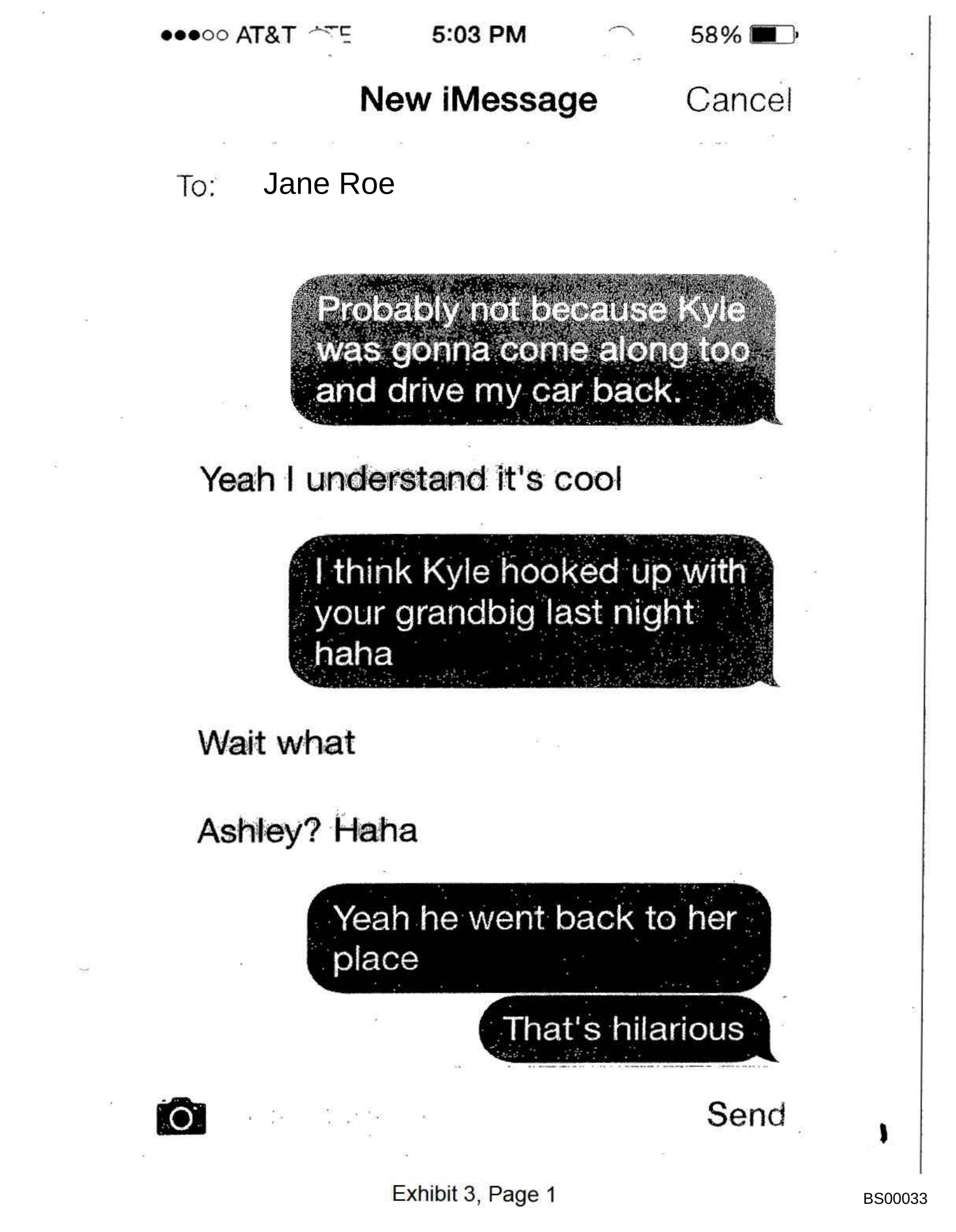
The Campus Community Centers are available to provide support and assistance in locating campus and community referral services.

Exhibit 2


●●○○○ AT&T 4G
2:35 AM
17%
Messages
Jane
Contact
I have a question, like are you ever down to like reciprocate a little
Like....go down on u?
Or did I misunderstand what u just asked
I mean that's really weird to say but kind of
Yeah just ask me
I have nothin against doing that
Okay haha sorry this is all a little weird for me I'm really not this kind of girl
iMessage
Send


●●●○○ AT&T 4G
2:35 AM
17%
Messages
Jane
Contact
Okay haha sorry this is all a little weird for me I'm really not this kind of girl
No your chill. I just assumed since your a virgin and what not that it probably wasn't smart to just do somethin like that on my own
Yeah i get that haha I just felt weird asking
No don't worry it's not a big deal
Next time u got it ;)
Haha thanks (;
iMessage
Send

Exhibit 3


●●●○○ AT&T
5:03 PM
58%
New iMessage
Cancel
To: Jane Roe
Probably not because Kyle was gonna come along too and drive my car back.
Yeah I understand it's cool
I think Kyle hooked up with your grandbig last night haha
Wait what
Ashley? Haha
Yeah he went back to her place
That's hilarious
Send

●●●○○ AT&T 5:04 PM 58%

New iMessage Cancel

To: Jane Roe

[redacted]

That's so funny haha

And Zach hooks up with Kendall...and I've been hooking up with u. Pretty funny how that works out

My fams hot I guess haha

Guess so

Can we take just Miranda to regents

Sure

Thank you (:

Send

2


●●●○○ AT&T
5:04 PM
58%
New iMessage
Cancel
To: Jane Roe
Do u have anymore chaser?
A little yeah
Leavin in like 10
Perect
Perfect* haha
Are you guys close?
Just left
Okay
Bring whatever chaser u
Send

3


●●●○○ AT&T
5:03 PM
58%
New iMessage
Cancel
To: Jane Roe
haha
Okay as long as I don't get in trouble you can do what you want haha
I know I know haha
I'm being serious though, don't fuck up haha
It'll be chill don't worry
Okay if you say so
Holy shit this play is 2 and a half hours
Wait that sucks
Send

4

●●●○○ AT&T 5:03 PM 58%

New iMessage Cancel

To: Jane Roe

Wait that sucks

Yeah so I'm Gonna leave at intermission haha

That sounds like a plan haha I'm still in bed

Lucky you. Is it okay if I drive Gunnar and Johnny over too

Yeah of course

Ill just drive us all to regents since the shuttle doesn't run on weekends

Sat, Feb 1, 3:22 PM

Send

5

●●●○○ AT&T 12:46 PM 30%

New iMessage Cancel

To: Jane Roe

Fri, Apr 25, 8:07 PM

Hey when should we head over to your place to pregame?

Like soon if u guys wanna come. Were gonna then head to another pregame but well have rides

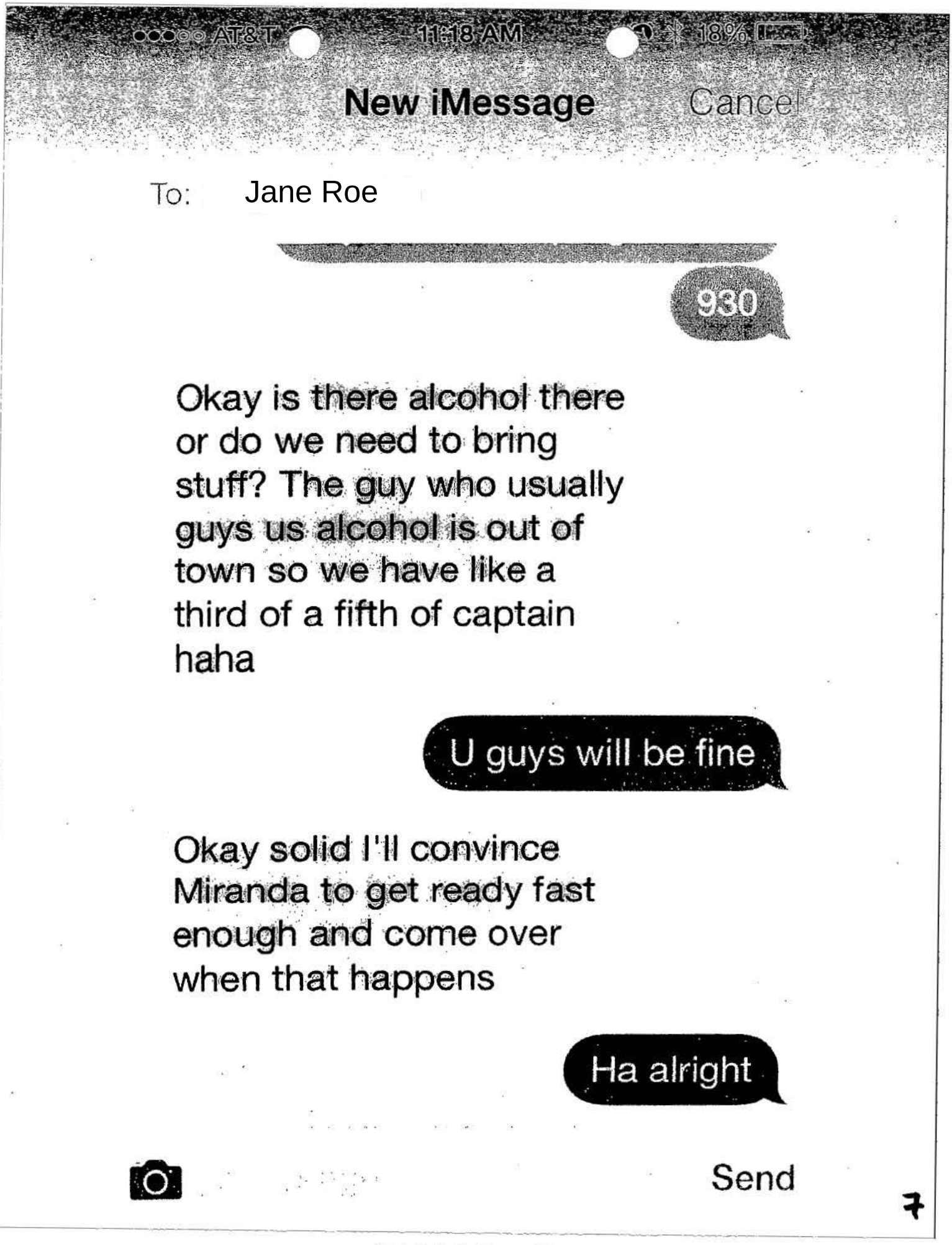
okay let me talk to miranda, what time are you guys leaving?

Probably 9. If not just head to john moons pregame

930

Send

6


AT&T
11:18 AM
18%
New iMessage
Cancel
To: Jane Roe
930
Okay is there alcohol there or do we need to bring stuff? The guy who usually guys us alcohol is out of town so we have like a third of a fifth of captain haha
U guys will be fine
Okay solid I'll convince Miranda to get ready fast enough and come over when that happens
Ha alright
Send
7

●●●○○ AT&T 11:17 AM 18%

New iMessage Cancel

To: Jane Roe

Mon, Apr 28, 10:05 PM

did you get #13 on chapter 5 for the homework?

104000

how?

26000/.25

okay i got that but just a different way

Oh

yeah just spent an hour on Skype with my dad figuring out chapter 5 question

Send

8

Exhibit 4

MISSING EXHIBIT

Document Description

June 5, 2014, Ms. Jane Roe 's written report to the UCSD Office for the Prevention of Discrimination and Harassment (OPDH) containing statement of allegations against Mr. John Doe.

UC San Diego, Office for the Prevention of Harassment & Discrimination and Office of Student Conduct refused to produce this document to Mr. John Doe.

Respondent will provide this Exhibit as soon as the document is available.

Exhibit 5

MISSING EXHIBIT

Document Description

June 12, 2014, Ms. Jane Roe interview statements to OPDH Complaint Resolution Officer Elena Acevedo Dalcourt concerning her allegations against Mr. John Doe.

UC San Diego, Office for the Prevention of Harassment & Discrimination and Office of Student Conduct refused to produce this document to Mr. John Doe.

Respondent will provide this Exhibit as soon as the document is available.

Exhibit 6

STUDENT SEX OFFENSE POLICY
REQUEST FOR FORMAL INVESTIGATION

Date June 16, 2014

Name: Jane Roe

Name of Respondent: John Doe

Telephone (if known): (619) 240-0022

Email (if known)

Complainant
- Gender: Female
- ○ Undergraduate student
- ○ Graduate student
- ○ Other

Respondent
- ○ Gender: Male
- ○ Undergraduate student
- ○ Graduate student
- ○ Other

Summary of incident(s) (use additional pages if necessary)
PLEASE NOTE THAT THE RESPONDENT IS ENTITLED TO A COPY OF THIS FORM.

See attached

Office for the Prevention of Harassment & Discrimination (OPHD)
201 University Center
(858) 534-8298
http://ophd.ucsd.edu
(rev. 12/2013)

On January 31, John Doe's fraternity and my sorority had an exchange planned and John invited some of my friends and me to pregame at his place. I brought a change of clothes to his place to sleep in in case I decided to spend the night after the party, but was not planning on having sex with him. At the pregame, there weren't any shot glasses, and this being the second or third time I had drank, I was very inexperienced and was unsure of what to do. John poured me amounts of vodka into red solo cups and then I would periodically drink them alternating with a chaser. He didn't force the drinks on me, but he did encourage me to drink what he gave me and I wasn't really sure of what I was doing and how much I should be drinking. After this the night gets blurry. I remember going to the party and walking around talking to my friends and having John follow me and wrap his arms around me and try to feel me up in front of other people. I remember half-heartedly pushing his hands away but I wasn't fully aware of what was going on. I then remember after what seemed like a short time later, John grabbed my hand and told me that a pledge was there to drive us home. I went outside and I vaguely remember the ride back to campus and I remember being disoriented and not feeling in control of my body. I then remember taking the elevator up to his apartment and going into his room and after that I really don't remember very much. I remember starting to kiss him and that's pretty much it. When I woke up in the morning, I had the idea that we had had sex but I didn't remember any details such as whether he used a condom or what it felt like or anything like that. He later told me that he did not use a condom [redacted] That morning, I remember telling him that I felt weird about what happened and him telling me that it was fine and that I wanted it. He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop. He then told me "Well I guess that means I did my job right" and smiled. I then excused myself because I felt like I was going to throw up and went into his common room with a bottle of water to breathe and try to collect my thoughts. I went back in and asked him to take me home to which he responded that he had a headache and would in a little bit. I then spent the next hour or two waiting for him to take me home because I didn't want to walk across campus. When I got home, I sat in my room and cried for 2-3 hours because at this point I was so upset with myself for letting something like this happen and for not waiting like I had wanted to. I called my friend Miranda and was telling her how upset I was and she comforted me but didn't say anything about this not being my fault.

That night, February 1st, was the night of my sorority formal and John was my date. I didn't want to have to tell anyone why he was no longer my date so I went with him. Throughout the night he asked me if we were going to have sex again and I told him that I didn't want to, to which he responded, "What's twice?" I told him that I wasn't counting last night as my first time and he got offended and said that hurt his feelings. I told him that I had spent most of the day crying about what happened and he got upset and began yelling at me asking me why I would say that to him and if I was trying to make him feel bad or guilty and that I couldn't blame him for what happened because I wanted it. I remember feeling so small and insignificant and I had given up on myself and given up on fighting with him. He then asked to come

over after the dance and I agreed and we went back to my place. We began hooking up and ended up having sex again and I felt so disgusted with myself and so upset with the whole situation and in the morning I just wanted him to leave and pretend none of this had ever happened but he kept asking me to perform oral sex on him and I kept saying I was tired and I didn't want to and he would argue with me a little bit and try to guilt me into it by saying that he had "blue-balls" and that if he had to do a walk of shame back to Revelle he might as well have something to be ashamed of. I refused and ultimately one of his friends came to pick him up and I sat in my room feeling pathetic and worthless and I just wanted to forget everything and move on.

Within the next week I told two of my friends, Kendall and Maggie, what had happened and they both assured me that what happened wasn't my fault and that John had taken advantage of me. I then took to the internet to research rape and consent and their definitions and implications. It was then that I realized that what happened to me was rape, I was in no condition to be able to give consent and with John having had prior knowledge of the fact that I didn't want to have sex and he took advantage of me when I was highly intoxicated. [redacted] I have been working to heal and find a new normal, and I am finally ready to report John as I don't want what happened to me to happen to other girls, and I don't believe that he thinks he did anything wrong in reference to sleeping with me and I want him to know that he broke the law and he has to pay the consequences for it.

Exhibit 7

Begin forwarded message:

From: John Doe <John Doe Y@gmail.com>
Date: July 18, 2014 at 9:30:38 AM PDT
To: [redacted]

Hello John,

I would like to meet with you to discuss a report our office has received. I left you a voicemail message as well. Are you still in the San Diego area? If so I would like to meet with you in our offices. If you are away for the summer, we can set up a Skype meeting if you have access. Kindly let me know when you are available on Monday or Tuesday of next week. Also, we ask that you please keep this and all future communications confidential.

Best Regards,

Elena

Elena Acevedo Dalcourt
Office for the Prevention of Harassment and Discrimination
University of California, San Diego
9500 Gilman Drive, Mail Code 0024
La Jolla, California 92093-0024
Direct Dial: (858) 534-9104
edalcourt@ucsd.edu
Be The Voice—Report Bias

Exhibit 8

MISSING EXHIBIT

Document Description

July 29, 2014, Ms. Jane Roe interview statements to OPDH Complaint Resolution Officer Elena Acevedo Dalcourt concerning her allegations against Mr. John Doe.

UC San Diego, Office for the Prevention of Harassment & Discrimination and Office of Student Conduct refused to produce this document to Mr. John Doe.

Respondent will provide this Exhibit as soon as the document is available.

Exhibit 9

From: **Dalcourt, Elena** edalcourt@ucsd.edu
Subject: RE: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe
Date: August 26, 2014 at 2:57 PM
To: **matthew haberkorn** matthewhaberkorn@mac.com

Dear Mr. Haberkorn,

Thank you for sending your client's response. As you are aware, we typically conduct interviews in person, and the nature of the questions posed to your client are the type of questions we ask in in-person interviews. As you have declined on your client's behalf an in-person interview, we are attempting to provide your client an opportunity to supply relevant information, the same opportunity provided to the complainant. As we discussed previously, this is not a criminal proceeding; it is an administrative investigation. If you have additional information to provide on behalf of your client, you can do so at any time while the investigation is pending. You may also suggest any witnesses you believe can supply relevant information.

For clarity and in addition to the June 16, 2014 Request for Formal Investigation submitted by complainant Jane Roe , I would like to outline the specific allegations our office is investigating, as details have emerged from interviews with the complainant and relevant witnesses. We are investigating the following allegations:

1) An alleged violation of the UC San Diego Student Sex Offense Policy (the "Sex Offense Policy", link provided previously on 7/22) on the night of January 31st, 2014 involving sexual intercourse while the complainant was allegedly incapacitated and unable to provide effective consent under the Sex Offense Policy;

2) An alleged violation of the Sex Offense Policy on the morning of February 1st, 2014 involving digital penetration without consent; and

3) An alleged violation of the Sex Offense Policy with respect to retaliation, including harassment, threats and intimidation on the night of May 14, 2014 at an off-campus party.

Please let me know if you have any questions regarding the above or our process.

Best Regards,

Elena Acevedo Dalcourt
UC San Diego - Office for the Prevention of Harassment & Discrimination
(858) 534-9104

-----Original Message-----
From: matthew haberkorn [mailto:matthewhaberkorn@mac.com]
Sent: Tuesday, August 26, 2014 8:58 AM
To: Dalcourt, Elena
Subject: Re: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe

Ms. Dalcourt.

Thank you for the confirming email.

I'm hopeful that with the information provided thus far by way of an offer of proof, and your ongoing investigation, this matter will be resolved shortly and John Doe will be exonerated of any and all complaints submitted by Jane Roe .

Sincerely,

Matthew H. Haberkorn, Esq.
Haberkorn & Associates, a Professional Corporation
Mail: PO Box 7474 Menlo Park, CA 94025
e: matthewhaberkorn@mac.com
t: 650-268-8378
f: 650-332-1528

695 Oak Grove Avenue, Suite 210
Menlo Park, CA 94025
****
*

On Aug 26, 2014, at 8:36 AM, Dalcourt, Elena <edalcourt@ucsd.edu> wrote:

> Dear Mr. Haberkorn,
>
> I wanted to confirm I received this. I am at an offsite meeting and will respond further shortly.
>
> Best Regards,
>
> Elena Acevedo Dalcourt
> UC San Diego - Office for the Prevention of Harassment & Discrimination
> (858) 534-9104
>
>
>
> -----Original Message-----
> From: matthew haberkorn [mailto:matthewhaberkorn@mac.com]

> Sent: Monday, August 25, 2014 3:30 PM
> To: Dalcourt, Elena
> Subject: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe
>
>
> Matthew H. Haberkorn, Esq.
> Haberkorn & Associates, a Professional Corporation
> Mail: PO Box 7474 Menlo Park, CA 94025
> e: matthewhaberkorn@mac.com
> t: 650-268-8378
> f: 650-332-1528
>
> 695 Oak Grove Avenue, Suite 210
> Menlo Park, CA 94025
>

>
>
>
>
>
>

Exhibit 10

MISSING EXHIBIT

Document Description

14 Witness Statements for interviews conducted by OPDH Complaint Resolution Officer Elena Acevedo Dalcourt between June 5, 2014 and September 10, 2014 concerning Ms. Jane Roe 's allegations against Mr. John Doe.

UC San Diego, Office for the Prevention of Harassment & Discrimination and Office of Student Conduct refused to produce these witness statements to Mr. John Doe.

Respondent will provide the Exhibit as soon as the documents are available.

Exhibit 11

SAN DIEGO: OFFICE FOR THE PREVENTION OF
HARASSMENT & DISCRIMINATION, 0024
LA JOLLA, CALIFORNIA 92093-0024
(858) 534-8298 OR (858) 534-8297

September 10, 2014

BENJAMIN T. WHITE, Director, Office of Student Conduct
Mail Code: 0067

Re: Investigation of allegations against John Doe

Dear Mr. White:

The Office for the Prevention of Harassment and Discrimination (OPHD) was asked to investigate whether John Doe 's conduct on the night of January 31, 2014 and into the morning of February 1, 2014, as well as on May 14, 2014, violated the UC San Diego Student Sex Offense Policy (the "Student Sex Offense Policy"). I interviewed the complainant, 14 witnesses, and reviewed text messages. The respondent, through his attorney, declined to be interviewed, but his attorney submitted on his behalf an "Offer of Proof" on July 29, 2014 in response to the complainant's Request for Formal Investigation (described below). The respondent also answered or submitted "objections" to written questions provided by OPHD through a second "Offer of Proof," submitted by his attorney on August 25, 2014. Based upon the evidence, I find that there is insufficient evidence to determine whether a policy violation has occurred with respect to two of the allegations detailed below; however I find reasonable cause to believe the Student Sex Offense Policy has been violated with respect to one allegation.

Complaint

Jane Roe submitted a written report to the UC San Diego Office of Student Conduct on June 5, 2014 stating that following an exchange between her sorority and Mr. Doe 's fraternity, Mr. Doe engaged in sexual intercourse with her while she was incapacitated due to alcohol. The report was then forwarded to OPHD for investigation. During the first interview with OPHD, Ms. Roe expanded upon her original complaint, alleging that on the morning of February 1, 2014, Mr. digitally penetrated her more than once after ignoring her objections. Ms. Roe also alleged that on May 14, 2014, Mr. Doe retaliated against her by intimidating, harassing and

threatening her at an off-campus party. Ms. Roe 's Request for Formal Investigation ("RFI," attached) was submitted to OPHD on June 16, 2014.[1]

Investigation

In this section, the background interactions of Ms. Roe and Mr. Doe will be discussed first, then each of the above-mentioned allegations are discussed in turn, with details as described by the parties and by witnesses.

Background

I first met with Ms. Roe on June 12, 2014, and conducted a follow-up interview on July 29, 2014. Ms. Roe reported that after seeing Mr. Doe at social events, she spent time alone with him for the first time at UCSD Spirit Night on January 24, 2014. She stated that after exchanging kisses later in the night, the two had a conversation about going back to Mr. Doe 's residence at Revelle College. Ms. Roe said that Mr. Doe told her that he preferred she spend the night at his place if she was coming back with him, because her own apartment was at the other end of campus. Ms. Roe said she told Mr. Doe that she did not intend to have sex with him because she was of the Mormon faith and was intending to abstain from intercourse until marriage. She said she told Mr. Doe that if this was a problem for him, she could go home. Ms. Roe said that Mr. Doe indicated that this was fine, and so they went to his residence.

Ms. Roe stated that while they were "making out" at Mr. Doe 's residence that night, Mr. Doe told her that he really wished they could have sex, and she told him that she had been drinking, and that if she were to make a different decision regarding sex, it was not a decision she would make drunk. Ms. Roe explained in the interview that the only way she would make a different decision would be if she was in a committed relationship for a long time. Ms. Roe said that Mr. Doe told her that she shouldn't make the decision drunk, and that he would never sleep with her if she was drunk. Ms. Roe stated that after she apologized for declining to have sex, Mr. Doe said, "I won't make you," which made her uncomfortable. She stated that this put her on edge and made her feel like "he could make [her] have sex if he wanted, but that he was doing [her] a favor by not."

Ms. Roe reported that during the week following Spirit Night, she and Mr. Doe got together two or three more times and "hung out." During these visits, she said the two "made out" and that she performed consensual oral sex on Mr. Doe , but that they

[1] Due to the summer break, OPHD experienced difficulties reaching several of the student witnesses via phone and email, as most were away from the San Diego area until the fall. OPHD conducted interviews in person and via Skype and telephone, and interviewed some witnesses more than once to ask follow-up questions.

never engaged in sexual intercourse. Ms. Roe stated that each time they were "hooking up," Mr. Doe would ask repeatedly to have sexual intercourse, and that she would reply that she wished she could, but that it was something very special to her that she was saving until marriage. She reported that each time he would reply, "Well I won't make you," which continued to make her feel uncomfortable. Ms. Roe said that at times Mr. Doe would say things like, "This sucks," indicating his frustration that they could not have intercourse.

In the "Offer of Proof" dated July 29, 2014 (the "First Offer of Proof"), Mr. Doe 's attorney confirmed what he had stated in a previous email, that Mr. Doe was not agreeing to be interviewed or to provide a written or recorded statement, citing his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The First Offer of Proof confirmed on behalf of Mr. Doe that the two had begun "hanging out" prior to the night of January 31, 2014 and had had a conversation about Ms. Roe wishing to abstain from sex before marriage. The First Offer of Proof stated that Mr. Doe "made it clear that he had no problem with [Ms. Roe 's] request." The First Offer of Proof stated that on several occasions prior to the party on January 31, Ms. Roe would go to Mr. Doe 's residence or he would go to her room, and that during these "encounters," "they both expressed an interest in having intercourse." The First Offer of Proof further stated that "Ms. Roe eventually communicated to Mr. Doe that she was now becoming a bit more ambivalent in respect to her abstinence," and that Mr. Doe communicated to her that he would be willing to engage in intercourse if she ever decided she wanted to.

The First Offer of Proof provided that in the week leading up to the exchange and sorority formal, "Ms. Roe would send numerous text messages 'non-stop' throughout the days and nights" and also that Ms. Roe indicated that she "liked [Mr. Doe] a lot." The First Offer of Proof stated that although Mr. Doe liked Ms. Roe , "he tried to keep their relationship less serious." The First Offer of Proof also stated that Ms. Roe expressed through text messages leading up to the weekend of the events that she was excited to "get intoxicated and spend the night with Mr. Doe on the upcoming Friday," and that she desired Mr. Doe to "spend the night at her apartment after her sorority formal on Saturday night." The First Offer of Proof stated that Mr. Doe replied that "he did not have any interest in having her become intoxicated, for Mr. Doe knew Ms. Roe was somewhat new to drinking and he did not want her to do anything 'stupid.'"

Through his attorney, Mr. Doe provided screen shots of text messages in the days leading up to the weekend. The text exchanges appear to show that both parties intended to get drunk during the weekend, and that Mr. Doe asked Ms. Roe if she was "down to come back here" to his apartment after the party on Friday night. He added that he was sure it would be "interesting like last time haha." The texts also

appear to show that Ms. Roe told Mr. Doe her room was "open for Saturday if we decide to do that," because her roommate was going home.

Friday, January 31, 2014

On Friday, January 31 2014, Mr. Doe 's fraternity (Pi Kappa Alpha) hosted an exchange with Ms. Roe 's sorority (Pi Beta Phi) at Regents Park condominiums in La Jolla, near the UC San Diego campus. Ms. Roe stated that Mr. Doe invited her and some of her friends to his apartment to "pregame" before the exchange on Friday. Ms. Roe stated she arrived at Mr. Doe 's apartment around 9:30 or 10 pm, and brought a change of clothes with her in case she decided to stay the night, though she was still not planning on having sexual intercourse with him. Ms. Roe said that this event was only the second or third time she had ever drank alcohol, and that she was very inexperienced and did not know her limits. She said she accepted vodka that Mr. Doe poured for her into a red Solo cup, and that she drank the vodka followed by a chaser.

Ms. Roe estimated that Mr. Doe refilled her cup twice. She did not know how many total shots of vodka this constituted, but that the amount in the cup was definitely more than one shot.[2] Ms. Roe said that Mr. Doe was not forcing her to drink, but that he was encouraging her to drink what he poured. Ms. Roe could not remember what she had eaten prior to coming to the pre-party, but remembered that no food was served there. Ms. Roe reported that friends were telling her she was being very loud. Ms. Roe said Mr. Doe told her not to "throw up" in their bathroom because another girl had done so recently.

Before leaving Mr. Doe 's apartment, Ms. Roe said she took one more "shot" from her cup. She stated that she and Mr. Doe briefly went into his room and kissed. She said she was "really drunk by then" and did not know how long they had been at the pre-party, but estimated it was an hour or less.

Ms. Roe stated that after the pre-party, her memory of the night became very blurry. She recalled going to the party and walking around, talking to friends. She remembered Mr. Doe coming up behind her and putting his arms around her. She said he would at times try to "feel [her] up" in front of other people and that she pushed his arms down and said, "Stop- we are in public." Ms. Roe remembered taking "a big swig" from a

[2] Text messages from later in the weekend appear to show that Ms. Roe and a friend "pieced together" that she likely had around 7.5 shots during the night. The exact time period in which this occurred could not be confirmed after interviews and the Offer of Proof documents; however based on the evidence, it was likely over a period of two to three hours from Ms. Roe 's first drink until the time the parties returned to Mr. Doe 's apartment and no more than four hours, as confirmed by witnesses who stayed at the party longer than Ms. Roe and Mr. Doe .

"handle" of some kind of alcohol, and telling a sorority sister repeatedly how drunk she was.[3]

Ms. Roe estimated that after being at the party for what seemed like a short time--around 30 to 40 minutes-- Mr. Doe grabbed her hand and told her that a "pledge" from his fraternity was there to drive them back to his apartment. Ms. Roe said she did not remember much about the drive back, except that the driver was a fraternity pledge with whom she had previously had a disagreement. She said she talked to him and apologized for what had gone on before. Ms. Roe stated that after they had arrived at Mr. Doe's residence, she realized she did not have her phone. She said she vaguely remembered waiting for the driver to come back so that she could retrieve her phone.

After this point, Ms. Roe said she does not remember much of the rest of the night. She stated that she was "disoriented" and "not in control of her body." She stated that her last memory was of going up to Mr. Doe's apartment and going into his room. She said she remembered starting to kiss but that was her last memory from the night of the party. During my second interview with Ms. Roe, she stated that she had recently experienced a "flashback" of Mr. Doe on top of her, then getting off of her, and that she rolled to her side and began to cry. She said that Mr. Doe did nothing when she cried and turned the other direction.

Mr. Doe's First Offer of Proof affirms that Ms. Roe and her friends came to "pre-game" at his residence, and that Ms. Roe left a change of clothes in Mr. Doe's room. The First Offer of Proof stated that because they knew they "had a long night ahead of them," those present at the pre-party "consciously made an effort to 'take it easy' on the beverages during the pregame." The First Offer of Proof stated that Mr. Doe and Ms. Roe "shared some peach vodka upon [Ms. Roe's] request that Mr. Doe pour [Ms. Roe] some," and that Mr. Doe recalled personally finishing "some of Ms. Roe's drinks" so that Ms. Roe "did not overdo her consumption." The First Offer of Proof stated that "at no point during this pregame did Mr. Doe force or encourage Ms. Roe to drink any more than she desired herself."

Mr. Doe's "Offer of Proof" dated August 25, 2014 (the "Second Offer of Proof") answered, in response to a written question asking how many shots of vodka each of the parties consumed, as estimated by Mr. Doe, that Ms. Roe consumed "4 or 5 shots of peach vodka but no more," and that "no other alcohol was consumed at the pre-party."[4]

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[3] A "handle" is a bottle containing 1.75 liters of liquor/alcohol or one half gallon.

[4] Mr. Doe's Second Offer of Proof contained "objections" to most of the questions asked, describing the questions as vague, ambiguous and overly broad. Some "objections" were made as assertions of privilege under the Fifth Amendment to the U.S. Constitution. The Second Offer of Proof offered limited responses to certain questions asked "without waiving the foregoing objection."

The First Offer of Proof stated that "in the car on the way to the party, Mr. Doe and Ms. Roe physically felt each other, but there was nothing beyond this willing and mutual touching engaged in by both parties." The First Offer of Proof stated that once at the party, Mr. Doe and Ms. Roe "each talked with friends and 'hung out' a little together for about an hour or two." The First Offer of Proof stated that "at no time during the party did Mr. Doe grab Ms. Roe , 'feel her up,' or make attempts at acts of public affection." The First Offer of Proof stated that neither party consumed any alcoholic beverages at the party.

Witnesses interviewed estimated that they were with Ms. Roe at the pre-party for about an hour before leaving for the exchange. None of the witnesses knew how much alcohol Ms. Roe consumed at the pre-party. Witnesses differed in their accounts as to the levels of intoxication of Ms. Roe at the pre-party and at the exchange. One witness said Ms. Roe was "pretty gone," another said she was "pretty messed up," and another said she was "definitely intoxicated." These witnesses described Ms. Roe as talking loudly and excessively, and as having a "glassy" or "dragging" look in her eyes. One witness said Ms. Roe was "falling" into people at the party. Text messages reviewed appeared to show that following the weekend, one of Ms. Roe 's sorority sisters asked her if she received a citation from the sorority for her conduct Friday night. Other witnesses, however, described Ms. Roe as "talky," and appearing to have "had a few drinks" but "not super drunk" and said she was not slurring words or having trouble standing. A sorority sister of Ms. Roe 's stated that it is a sorority policy to help members home if they are "out of control" and that they would have taken Ms. Roe home if she had appeared "not ok." Other text messages appeared to show that a sorority member told her she was "not all over the place" but that Ms. Roe just kept saying how drunk she was. Witnesses reported that many in Ms. Roe 's social circle were aware that she was inexperienced with alcohol, and that she had only ever consumed alcohol a few times. They reported that Ms. Roe did not know her limits with alcohol.

None of the witnesses reported having spent much time with Ms. Roe and Mr. Doe at the party, but rather that they saw the two in passing. Witnesses report that the party was very crowded, and that at any given time there could have been 30 to 40 or more people in the large Regents Park condominium. Two witnesses recalled seeing Ms. Roe take at least one "swig" from a "handle" of alcohol at the party. One witness stated that Ms. Roe and Mr. Doe were taking turns drinking from the same bottle.

The First Offer of Proof stated that when Mr. Doe and Ms. Roe returned to Mr. Doe 's apartment with Mr. Doe 's roommate, "Ms. Roe was talkative and alert," and that the two talked with Mr. Doe 's roommate before going into his room. The First

Offer of Proof stated that "after talking some more in the bedroom, the pair started kissing."

On behalf of Mr. Doe , Mr. Doe 's attorney stated in email exchanges and in the First Offer of Proof that Mr. Doe was asserting his Fifth Amendment privileges against self-incrimination with respect to all inquiry specifically relating to sexual activity. Accordingly, the First Offer of Proof did not refer to any physical activity in Mr. Doe 's bedroom other than kissing. The First Offer of Proof stated that "later," "Ms. Roe went out into the common room to drink some water and relax, and that Mr. Doe stayed in his bedroom." The First Offer of Proof also stated that Mr. Doe 's roommate told him later that morning that he could hear Mr. Doe and Ms. Roe "talking all night" and that he thought it was "'pretty funny.'" In response to written questions about the parties visitation with Mr. Doe 's roommate prior to going to his bedroom, and about the circumstances in the bedroom before intimate activity, the Second Offer of Proof stated, after "objections," that "Responding party does not recall."

A roommate of Mr. Doe 's reported talking with Mr. Doe and Ms. Roe when the pair returned to the apartment, and that neither seemed overly intoxicated. The driver who took the parties to Mr. Doe 's apartment acknowledged the previous argument and apology by Ms. Roe , and also stated that the parties were not "out of control." The driver stated that Mr. Doe 's roommate, who he also drove home, was very intoxicated, and also offered his opinion of Ms. Roe 's character after their previous altercation. A different roommate of Mr. Doe 's reported hearing the two laughing and talking in Mr. Doe 's room at some point during the night after he returned home.

Saturday, February 1, 2014

Ms. Roe reported that when she woke up on the morning of February 1, she "had the idea" that she and Mr. Doe had sex but could not remember any detail about what had happened. She remembered Mr. Doe saying something about being hung over and asking if she was as well. She said she replied that she didn't feel well. Ms. Roe said she told Mr. Doe that she was uncomfortable with what happened, and he said something like, "That's what happens your first time," and "you asked for it." Ms. Roe said Mr. Doe then put his hands down her underwear and entered her vagina with his finger, and that she told him, "Stop, it hurts really bad." She said her body felt very sore inside. Ms. Roe said Mr. entered her with his fingers a total of three times, though she told him she was not in the mood, and repeated that it hurt and pushed his hand away. She said Mr. Doe replied, after one of the times she said it hurt, "Well I guess that means I did my job right," and smiled. Ms. Roe said she then excused herself because she felt like she was going to be sick, dressed and went into the common room with a bottle of water. She said that Mr. Doe again told her not to throw up in their bathroom. She stated that this was at 7 am, which appeared to be confirmed

by a text message sent to one of her sorority sisters stating that she was not feeling well.[5] She said that after a short time she went back into Mr. Doe 's room to ask him to take her home. She said that Mr. Doe replied that he had a headache and would take her home later. Ms. Roe said she stayed in the common room waiting for Mr. Doe to take her home for about an hour or two.

Ms. Roe said that when she got home, she spent the next two to three hours crying in her room. She said she was upset with herself "for letting something like this happen,"and "not waiting like [she] wanted to." Ms. Roe said she called a friend and asked her to come over. The friend reported that Ms. Roe was very upset and could not recall details from the night.

The First Offer of Proof stated that on the morning of February 1, "Mr. Doe drove Ms. Roe to her home," and that "the pair planned to meet up later for Ms. Roe 's formal."

Ms. Roe stated she "did not want to have to tell anyone" that Mr. Doe was no longer her date so she went with Mr. Doe to the sorority formal. She stated that she did not want to drink again with Mr. Doe and also did not feel good. She reported that throughout the night, Mr. Doe asked her if they were going to have sex again and that she told him she did not want to, to which he replied, "What's twice?" Ms. Roe said she told Mr. Doe that she "wasn't counting last night as [her] first time" and that he got offended and said that this hurt his feelings. She said she told him she had spent most of the day crying about what happened, and that he got upset, "freaked out" and began yelling at her and asking her why she would say this, and if she was trying to make him feel bad or guilty. Ms. Roe said she felt "so small" and that she had "given up on [herself]" and had "given up on fighting [Mr.]." When the sorority formal had ended, she stated that she and Mr. Doe went back to her room and had sexual intercourse again. She said she felt resigned and tired and thought, "If it's going to happen, let's just get it over with." Ms. Roe said that "it kept hurting" and that she would ask him to stop. She said that Mr. Doe would stop and then after some time would try with his finger, then ask to "do it with [his] penis." Ms. Roe said that Mr. Doe used a condom, but it fell off and he tried to put it back on. Ms. Roe said Mr. Doe asked to have sex without a condom and that she stated she would not have sex without one. Ms. Roe said that Mr. Doe then stopped.

The following morning (Sunday, February 2), Ms. Roe said that she "just wanted [Mr. Doe] to leave" and to forget that anything had happened. She stated that Mr. Doe

[5] Ms. Roe explained that she did not tell her friend about what happened because at the time she was really confused and "trying to figure it all out." She also stated that this was not something she wanted to discuss over text, but rather wanted to wait until she could talk to her friend in person.

wanted to have sex again and asked her to perform oral sex but that she did not want to. She said she told him she was tired and that she would not. Ms. Roe said Mr. Doe argued with her and tried to "guilt [her] into it by saying that he had 'blue balls," and also that "if he had to do the walk of shame back to Revelle he might as well have something to be ashamed of." Texts appear to show that Ms. Roe told her sorority sister that she wanted Mr. Doe to leave. Ms. Roe said Mr. Doe read the text over her shoulder and was offended, so she wrote back to her friend that she was joking and wanted him to stay. Ms. Roe said that after Mr. Doe 's friend came to pick him up, she sat in her room feeling "pathetic and worthless" and that she "just wanted to forget everything and move on."

Regarding Saturday, February 1, the First Offer of Proof stated that Mr. Doe and Ms. Roe "drank minimally" at the sorority formal and walked to Ms. Roe 's residence following the party. The First Offer of Proof stated that the two started kissing in Ms. Roe 's room. It then stated that the following morning, a friend of Mr. Doe 's picked him up.

In response to questions about any touching between the parties on February 1, the Second Offer of Proof either did not answer specific questions, or stated after "objections," that "Responding party does not recall."

Text messages provided by Ms. Roe and another friend appear to show that on Sunday, February 2, Mr. Doe and Ms. Roe engaged in text exchanges about what had occurred Friday night. Ms. Roe appeared to have texted her friend that Mr. Doe said he was sorry that he made her feel bad and that he had made sure everything was what she wanted at the time. She appeared to relay that he said he was really drunk too and did not realize she was "that bad." Ms. Roe appeared to have told her friend that she told Mr. Doe she had been "too drunk to make important decisions" and that she shouldn't have gone home with him, but that he "shouldn't have tried anything." Ms. Roe told her friend that Mr. Doe said, "How can you blame me you agreed to do it so we did it." Ms. Roe then told her friend she replied, "I also said I never wanted to before and I wouldn't want to make the decision drunk and you said you wouldn't if I was drunk and I think you took advantage of the fact that I was drunk to do things I wouldn't have agreed to otherwise." Ms. Roe texted her friend that Mr. Doe replied that he "wasn't the kind of guy to take advantage of someone when they're drunk" and that he said "I know you wouldn't have done it sober and I'm sorry you regret it..."[6]

[6] Ms. Roe said that she was in part paraphrasing Mr. Doe 's texts in these exchanges, and also cutting and pasting some of the texts.

Ms. Roe appeared to text her friend that Mr. Doe drove over to her apartment and talked to her in his car. She stated that he kept apologizing and that the conversation ended with her saying "thank you for taking the time to apologize but it really doesn't change much I'm still upset..."

Ms. Roe said that a few days later she asked Mr. Doe whether he had used a condom on Friday January 31 and that he replied he did not. She said she also asked whether he pulled out before ejaculating and he said he did not.

Ms. Roe said she later went to the Sexual Assault and Violence Prevention Resource Center (SARC) [redacted]

May 14, 2014 – Retaliation

Following the weekend of January 31, Ms. Roe said she tried be cordial to Mr. Doe and talked to him when he talked to her, but that she was very uncomfortable when he would sit near her in the class they shared. She appeared to text friends that she did not want to "cause a scene." She said that at times Mr. Doe would try to convince her it was not a big deal and that she would go along with what he said, sometimes to "placate" him. She said she was occasionally at the same party as Mr. Doe and if he had been drinking he would come up to her and wrap his arms around her, touch her bottom or pull her towards him or push her into a corner to talk. She said that when Mr. Doe gets drunk he gets "handsy." She stated that one such occasion was around Week 2 of Spring Quarter. Ms. Roe said she was at a party where Mr. Doe was and that he invited her and a friend to do cocaine with him. Ms. Roe said Mr. Doe pulled her towards him and she said "John stop. I've been so nice." Ms. Roe said that on February 18, after she declined an invitation from Mr. Doe to hang out, Mr. Doe said "I feel bad about what happened but it happened and it's over." Ms. Roe said she responded that it was not over for her and that him saying that was not going to make things better.

Ms. Roe said that on February 24, she ignored Mr. Doe on campus, and that after this encounter, he texted her "U could at least be cordial... I mean c'mon really." She stated that on March 3, Mr. Doe got upset with her for "making him out to be the bad guy" when what happened was "largely [her] fault."

Ms. Roe said that on the night of May 14, Mr. Doe had been coming up to her at an off-campus party and that she had already asked him nicely to leave her alone. Ms. Roe said that when she was talking to one of Mr. Doe's roommates about their parents having worked for the same company, Mr. Doe came up to her and started

mocking her, saying "Wow, Jane ," and "Cool story, Jane ." At this time Ms. Roe said she asked him firmly to leave her alone again and told him not to talk to her again, and that by this time she was upset. Ms. Roe said that Mr. Doe began yelling at her saying, "I could ruin your life," "I could say things that would make you drop out of UCSD," and "I could get you kicked out." Ms. Roe said that Mr. Doe 's roommate intervened and took Mr. Doe away, and apologized to Ms. Roe , telling her that they (Mr. Doe 's friends) would keep Mr. Doe away from her. Following this event Ms. Roe said that she told her friends she never wanted to have contact with Mr. Doe again. The following day, however, Ms. Roe said (and screen shots of texts appeared to show) that Mr. Doe sent a text saying: "I have no reason to ever talk to you again nor do I want anything to do with you but I'm asking that u stop going around telling people I raped u because first off it's far from the truth and secondly it's starting a lot of unnecessary drama. That's a serious accusation to make and it's not okay. This should have ended a long time ago."

Two witnesses confirmed being present when Mr. Doe made the above-mentioned comments. Mr. Doe 's roommate stated he had limited memory of the event but that he did speak with Ms. Roe directly following this incident and that he told her she did not have to talk to Mr. Doe after this encounter. The roommate stated that he heard rumors that Ms. Roe might be reporting an offense to the University. He stated that he was not sure what Mr. Doe had heard regarding these rumors. Ms. Roe said she believed it was extremely likely that Mr. Doe knew of her contact with SARC, since a friend that accompanied her to SARC was talking to his friends about her allegations.

The Second Offer of Proof stated, in response to a question about contact between the parties following the weekend of January 31, "Yes. The pair sat next to each other and studied." In response to a question regarding when Mr. Doe learned of Ms. Roe 's contact with the University regarding this complaint, the Second Offer of Proof stated an "objection," then stated that due to the broad nature of the question, "John Doe is unable to respond at this time."

Discussion and Findings

Section III (A) of the Student Sex Offense Policy states, in part:

> "Sexual assault" occurs when physical sexual activity is deliberately engaged in without the consent of the other person. Such conduct may include... Taking advantage of the other person's incapacitation (including voluntary intoxication)...

Section III (E) of the Student Sex Offense Policy defines "incapacitation" as follows:

> [T]he physical and/or mental inability to make informed, rational judgments. States of incapacitation include, but are not limited to unconsciousness, sleep and blackouts. Where alcohol or drugs are involved, incapacitation is defined with respect to how the alcohol or other drug consumed affects a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments.

The following is also included in the definition of "incapacitation":

> Being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent. The factors to be considered when determining whether consent was given include whether the person accused knew, or whether a reasonable person should have known, that the complainant was incapacitated.

The Student Sex Offense Policy further states in Section III (D) that it is the responsibility of the person wanting to engage in the specific sexual activity to make sure that he or she has effective consent. "Effective consent" is defined as consent that is "informed" meaning that "both parties demonstrate clear and mutual understanding of exactly what they are consenting to." A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Consent must be ongoing throughout a sexual encounter and can be revoked at any time. Once consent is withdrawn, the sexual activity must stop immediately.

Often the only witnesses present during alleged incidents of sexual assault are the complainant and the respondent. When there are conflicting reports from the parties, weighing credibility is essential. Observations, actions, consistency in detail, bias and demeanor may be taken into consideration when deciding credibility of a witness. The standard to be used in weighing evidence is the "preponderance of the evidence" standard, or "more likely than not."

Friday, January 31, 2014 – Re: Lack of Consent due to Incapacitation

With respect to the allegation that on Friday, January 31 Mr. Doe took advantage of Ms. Roe 's incapacitation to have sex with her, I find that while Ms. Roe is credible in her assertion that she was in a blackout during sexual intercourse, there is insufficient evidence to show that based on Ms. Roe 's behavior, Mr. Doe knew or should have known that Ms. Roe was incapacitated. Based upon the evidence, it seems Ms. Roe consumed a significant amount of alcohol in a relatively short period of time; however it is unclear as to how Ms. Roe exhibited intoxication and if Mr. Doe knew or should have known that Ms. Roe was incapacitated and was therefore unable to provide effective consent. Witnesses differed in their accounts as to how Ms. Roe was behaving. Some witnesses reported observing that Ms. Roe was very

intoxicated; others reported observing that she had clearly been drinking, but that she was not to the point of incapacitation.[7] While it is possible, due to the short time frame in which Ms. Roe consumed this amount of alcohol, that she did not experience its full effect for some time (and thus could not have been observed by third parties in a state of incapacitation), there is insufficient evidence of the alcohol's full effect.

The witnesses who saw Ms. Roe at the latest point in the night before she went to Mr. Doe 's room were Mr. Doe 's roommate and the person who drove the parties back to Mr. Doe 's apartment. I did not deem Mr. Doe 's roommate, who rode home with the parties, credible. He first said that a fraternity pledge drove all of them home, and then when I followed up for the full name of the pledge (which he could not remember when first interviewed) he told me that he had called an Uber taxi but did not have the receipt. He also said that he did not have much to drink on the night of January 31 and was sober when he returned with the parties, though another witness reported he was very drunk upon arriving home. Similarly, I questioned the possible bias of the driver in relating Ms. Roe 's level of intoxication, as he demonstrated a clear animosity for her resulting from an earlier disagreement and may not have wanted to corroborate her story, which he recounted in the interview and stated he knew from rumor.

Without an opportunity to interview Mr. Doe , I was unable to assess his credibility in his apparent assertion (as evident through text messages) that he obtained consent for sexual activity. Additionally, another of Mr. Doe 's roommates, who I deemed credible, reported that he heard the parties laughing and talking at some point during the night, suggesting that Ms. Roe was not, at least at some point, passed out or unconscious. Based upon the evidence, it is not clear whether Mr. Doe knew or should have known that Ms. Roe was not merely intoxicated; but rather incapacitated and therefore unable to provide effective consent.

Saturday, February 1, 2014 – Re: Ignoring Objections

With respect to the morning of February 1, I find reasonable cause to believe University policy was violated. I find 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. I find Ms. Roe did not intend to engage in any sexual activity during the morning, and that Mr. Doe ignored Ms. Roe 's wishes that he refrain from touching her and entering her. I find Ms. Roe credible in stating that Mr. Doe said that he must have done "[his] job right" due to the fact that Ms. Roe was in

[7] It is possible some of the witnesses stating Ms. Roe was not incapacitated had reason to underplay her intoxication (such as the fact that they are close friends of Mr. Doe 's); however the only clear issues with credibility were with Mr. Doe 's roommate and the driver, as discussed in this section.

pain, which shows he did not see her communication of pain as a reason to stop, as would a reasonable person in the respondent's position.

In interviews, I found Ms. Roe to have been genuinely traumatized by the events in connection with Mr. Doe. I find that Ms. Roe exhibited signs of a trauma victim [redacted] I find that her actions, though at times counter-intuitive, are consistent with young college students in the first months away from parents and restrictive environments, and consistent with the actions of trauma victims who attempt to cope with trauma by normalizing what has occurred.

Based upon the totality of the circumstances and the evidence presented, I find it more likely than not that on February 1, Mr. Doe ignored Ms. Roe 's objections to sexual activity in violation of the Student Sex Offense Policy.

May 14, 2014 – Re: Retaliation

Section VIII (C) of the Student Sex Offense Policy prohibits retaliation against persons making a report under the Policy. Section VIII (C) states that "[r]etaliation includes, but is not limited to, harassment, threats, intimidation, reprisals, and/or adverse actions. Such actions could be physical, verbal, written or electronic."

The basis for a claim of retaliation includes: (1) the claimant engaged in a protected activity (such as being a complainant or witness in an investigation); (2) the one accused of retaliation knew about the claimant's protected activity; (3) the claimant suffered an adverse action as described above and (4) there is a causal link between the protected activity and the adverse action.

It is clear that Ms. Roe engaged in a protected activity by filing a complaint with the University regarding a sex offense. Additionally, I find that it is likely, based upon the evidence that on May 14, 2014, Mr. Doe made statements that were intimidating, harassing and threatening in nature, which may be deemed as retaliatory acts as prohibited by the Student Sex Offense Policy. However, while I deem Ms. Roe credible in her belief that Mr. Doe likely knew that she had visited SARC to report that she had been assaulted, there is insufficient evidence to determine by a preponderance of the evidence that Mr. Doe knew of this contact with University, and deemed it a "report" to the University.

At the time of the alleged retaliatory acts, Ms. Roe had not yet filed a report with the Office of Student Conduct or with OPHD, but she had been receiving services at SARC. It is possible a student could deem contact with SARC as a report to the University, and thus a protected activity. Based upon the evidence it is likely that Mr. Doe knew that

Ms. Roe deemed their sexual encounter on January 31 as "rape" (based upon his text sent May 15) given that he asked her to "stop going around telling people I raped u." It is indeed possible that Mr. Doe learned of Ms. Roe 's contact with the University through SARC via Ms. Roe 's friends who were close with Mr. Doe and his circle of friends, but we cannot determine with sufficient certainty Mr. Doe 's knowledge of this contact. Mr. Doe 's attorney commented in a phone conversation on August 27, 2014 that his client "could not recall" when he first learned of Ms. Roe 's contact with the University in connection with her complaint, and there are no witnesses that can confirm Mr. Doe 's knowledge of this contact. Thus, there is insufficient evidence to find that the Student Sex Offense Policy was violated due to retaliation.

Conclusion

This matter is referred to you for appropriate corrective or disciplinary action. I will inform Ms. Roe and Mr. Doe (through his attorney) that this investigation is complete. Each is entitled to a copy of this report, which may be redacted in accordance with University policy.

Please let me know if I can provide any further assistance on this matter.

Respectfully Submitted,

Elena Acevedo Dalcourt
Complaint Resolution Officer

cc: Sherry Mallory, Dean of Student Affairs, Revelle College

STUDENT SEX OFFENSE POLICY
REQUEST FOR FORMAL INVESTIGATION

Date June 16, 2014

Name Jane Roe

Name of Respondent John Doe

Telephone (if known) (415) 290-0922

Email (if known) _____

Complainant
- Gender Female
- (Undergraduate student)
- Graduate student
- Other _____

Respondent
- Gender Male
- (Undergraduate student)
- Graduate student
- Other _____

Summary of incident(s) (use additional pages if necessary)
PLEASE NOTE THAT THE RESPONDENT IS ENTITLED TO A COPY OF THIS FORM.

see attached

Office for the Prevention of Harassment & Discrimination (OPHD)
201 University Center
(858) 534-8298
http://ophd.ucsd.edu
(rev. 12/2013)

On January 31, John Doe's fraternity and my sorority had an exchange planned and John invited some of my friends and me to pregame at his place. I brought a change of clothes to his place to sleep in in case I decided to spend the night after the party, but was not planning on having sex with him. At the pregame, there weren't any shot glasses, and this being the second or third time I had drank, I was very inexperienced and was unsure of what to do. John poured me amounts of vodka into red solo cups and then I would periodically drink them alternating with a chaser. He didn't force the drinks on me, but he did encourage me to drink what he gave me and I wasn't really sure of what I was doing and how much I should be drinking. After this the night gets blurry. I remember going to the party and walking around talking to my friends and having John follow me and wrap his arms around me and try to feel me up in front of other people. I remember half-heartedly pushing his hands away but I wasn't fully aware of what was going on. I then remember after what seemed like a short time later, John grabbed my hand and told me that a pledge was there to drive us home. I went outside and I vaguely remember the ride back to campus and I remember being disoriented and not feeling in control of my body. I then remember taking the elevator up to his apartment and going into his room and after that I really don't remember very much. I remember starting to kiss him and that's pretty much it. When I woke up in the morning, I had the idea that we had had sex but I didn't remember any details such as whether he used a condom or what it felt like or anything like that. He later told me that he did not use a condom [redacted] That morning, I remember telling him that I felt weird about what happened and him telling me that it was fine and that I wanted it. He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop. He then told me "Well I guess that means I did my job right" and smiled. I then excused myself because I felt like I was going to throw up and went into his common room with a bottle of water to breathe and try to collect my thoughts. I went back in and asked him to take me home to which he responded that he had a headache and would in a little bit. I then spent the next hour or two waiting for him to take me home because I didn't want to walk across campus. When I got home, I sat in my room and cried for 2-3 hours because at this point I was so upset with myself for letting something like this happen and for not waiting like I had wanted to. I called my friend Miranda and was telling her how upset I was and she comforted me but didn't say anything about this not being my fault.

That night, February 1st, was the night of my sorority formal and John was my date. I didn't want to have to tell anyone why he was no longer my date so I went with him. Throughout the night he asked me if we were going to have sex again and I told him that I didn't want to, to which he responded, "What's twice?" I told him that I wasn't counting last night as my first time and he got offended and said that hurt his feelings. I told him that I had spent most of the day crying about what happened and he got upset and began yelling at me asking me why I would say that to him and if I was trying to make him feel bad or guilty and that I couldn't blame him for what happened because I wanted it. I remember feeling so small and insignificant and I had given up on myself and given up on fighting with him. He then asked to come

over after the dance and I agreed and we went back to my place. We began hooking up and ended up having sex again and I felt so disgusted with myself and so upset with the whole situation and in the morning I just wanted him to leave and pretend none of this had ever happened but he kept asking me to perform oral sex on him and I kept saying I was tired and I didn't want to and he would argue with me a little bit and try to guilt me into it by saying that he had "blue-balls" and that if he had to do a walk of shame back to Revelle he might as well have something to be ashamed of. I refused and ultimately one of his friends came to pick him up and I sat in my room feeling pathetic and worthless and I just wanted to forget everything and move on.

Within the next week I told two of my friends, Kendall and Maggie, what had happened and they both assured me that what happened wasn't my fault and that John had taken advantage of me. I then took to the internet to research rape and consent and their definitions and implications. It was then that I realized that what happened to me was rape, I was in no condition to be able to give consent and with John having had prior knowledge of the fact that I didn't want to have sex and he took advantage of me when I was highly intoxicated. [redacted] I have been working to heal and find a new normal, and I am finally ready to report John as I don't want what happened to me to happen to other girls, and I don't believe that he thinks he did anything wrong in reference to sleeping with me and I want him to know that he broke the law and he has to pay the consequences for it.

Exhibit 12

HABERKORN & ASSOCIATES

MATTHEW H. HABERKORN, ESQ.
ATTORNEY AT LAW

PO Box 7474
Menlo Park, CA 94025
e-mail: matthewhaberkorn@mac.com

TELEPHONE (650) 268-8378 FACSIMILE (650) 332-1528

October 27, 2014

Via Fax and E-mail Only
Fax: (510) 987-9757
charles.robinson@ucop.edu
Charles F. Robinson, Esq.
General Counsel and Vice President - Legal Affairs
Office of the General Counsel
University of California
Office of the President
1111 Franklin Street, 8th Floor
Oakland, CA 94607

Via E-mail Only
dpark@ucsd.edu
Daniel W. Park, Esq.
Chief Campus Counsel
Office of the Chancellor
UC San Diego
9500 Gilman Dr.
La Jolla, CA 92093

Re: UCSD IR Number: 01401-001-2014
June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Dear Messrs. Robinson and Park:

Further to my letter sent earlier today, my October 20, 2014 letter addressed Dean Mallory's tweet of September 23, 2014 at 7:35 am, wherein she stated to her almost 600 followers:

"I've pledged my commitment to help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle"

On October 20, I demanded the tweet be removed from Dean Mallory's twitter feed immediately. Not only has this not been done, but Dean Mallory continues to take a biased stance by tweeting the following yesterday, Sunday, at 9:41 am:

"Good stuff! RT "@nytimes: Students are learning how to hook up on campuses where "yes means yes" is the new rule http://uyti.ms/1DIUqoK "

October 27, 2014
Charles F. Robinson, Esq.
General Counsel and Vice President - Legal Affairs
Office of the General Counsel
University of California

Daniel W. Park, Esq.
Chief Campus Counsel
Office of the Chancellor
UC San Diego

Re: UCSD IR Number: 01401-001-20
June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Once again, I am demanding that both tweets be removed from Dean Mallory's twitter feed immediately. I am enclosing the two tweets for your review. Please understand that I will not hesitate to take any and all necessary legal action on behalf of Mr. Doe for damages that have been caused to Mr. Doe by this public display of Dean Mallory's biased position regarding this very sensitive allegation of sexual misconduct.

Dean Mallory is still actively involved in the Formal Hearing process regarding this matter. According to the *Hearing Procedures for Alleged Sex Offense Harassment or Discrimination Violations* at Section III paragraph A: "If the student accused does not accept responsibility at the Administrative Resolution meeting for all alleged violations, the Director of Student Conduct, **in consultation with the relevant Dean**, will appoint a panel of three Hearing Officers or a single staff or faculty Hearing Officer." In other words, this biased Dean now has the ability to pick and choose the panel to hear this matter. This public display of the Dean's "position" on these types of cases is outrageous given the fact that Mr. Doe 's case is still pending. The twitter feed is tantamount to our position that the process thus far has been, and is obviously continuing to be, somewhat unfair and not being played on a level field.

I look forward to hearing from you in this regard as soon as possible.

Sincerely,

Matthew H. Haberkorn, Esq.

/MHH

Enclosures

cc: Robert Shibley, Senior Vice President (w/enclosures)
Foundation for Individual Rights in Education (FIRE)
John Doe (w/enclosures)

Search Twitter

Sherry Mallory
@SherryMallory

Follow

I've pledged my commitment to help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle

RETWEET 1

FAVORITES 3

7:35 AM - 23 Sep 2014

Don't miss any updates from **Sherry Mallory**

Full name Email Password

Sign up for Twitter

Search Twitter

Sherry Mallory
@SherryMallory

Follow

Good stuff! RT "@nytimes: Students are learning how to hook up on campuses where "yes means yes" is the new rule nyti.ms/1DIUqoK"

The New York Times

Hooking Up at an Affirmative-Consent Campus? It's Complicated

"Yes means yes" means checking in with your partner during sex, but many young men say they don't know how to have that conversation.

View on web

9:41 AM - 26 Oct 2014

Exhibit 13

FORMAL HEARING BEFORE THE SEX OFFENSE HEARING PANEL

IN AND FOR THE UNIVERSITY OF CALIFORNIA, SAN DIEGO

Jane Roe Complainant, vs. John Doe Respondent.	**CASE NO.: 01401-001-2014** RESPONDENT'S PRE-HEARING SUBMISSIONS AND OTHER INFORMATION IN SUPPORT OF HIS DEFENSE DATE: December 12, 2014 TIME: 1:00 P.M. LOCATION: Student Services Center Conf. Room 554A

TO THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, THE SEX OFFENSE HEARING PANEL AND THE UNIVERSITY REPRESENTATIVE:

Respondent, John Doe (hereafter "Respondent"), respectfully submits the following Pre-Hearing Submissions and Other Information In Support of His Defense. Upon the advice of legal counsel, Respondent will likely abstain from testifying at the hearing of this matter.

The *Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination Violations*, updated August 21, 2013, at section III, subparagraphs (H) and (P), states as follows in pertinent part: "[t]he accused may remain silent throughout the hearing process and his or her silence will not be taken as an inference of responsibility for the alleged violations"

and "[f]ormal hearing participants are not required to provide information that would incriminate him or her."

In addition to the foregoing portions of the *Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination Violations*, Respondent asserts his rights afforded to him pursuant to the Fifth Amendment to the United States Constitution wherein it provides that "[n]o person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing *Bryson v. United States* (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685. In its origin at common law, the privilege was aimed at the abuse of arbitrary inquisition without charge, and meant that one should not be compelled to accuse oneself. As subsequently developed and almost universally applied today, the privilege protects an accused. Thus, despite the narrow constitutional language, which did not create but merely confirmed the common law protections, there are two privileges:

(a) *Defendant's (or accused's) privilege.* The defendant in a criminal case need not testify at all.

(b) *Witness's privilege.* A witness in any proceeding, civil, criminal, or ***administrative***, need not answer any question that would tend to subject the witness to a criminal prosecution.

The scope of the privilege is as follows: (a) It ***protects natural persons***, not corporations or unincorporated associations; (b) It ***protects against compulsory oral testimony*** and also against compulsory production of documents or personal property. (See *People v. Trujillo* (2006) 40 C.4th 165, 178); and (c) ***It precludes any comment on or inference from its claim.***

Accordingly, this brief is being submitted, along with attached exhibits and several offers of proof that were previously provided to Elena Acevedo Dalcourt (hereafter "Ms. Dalcourt"), the Complaint Resolution Officer for the Office for the Prevention of Harassment & Discrimination (hereafter "OPHD") with the University of California, San Diego (hereafter "UCSD"), during the investigation of the initial Request for Formal Investigation submitted by Complainant Jane Roe (hereafter "Complainant") on June 16, 2014.

I. STATEMENT OF FACTS

On June 16, 2014, Complainant submitted a Request for Formal Investigation (hereafter "Request") setting forth in detail factual allegations against Respondent. This Hearing Panel has been given a severely redacted Request resulting in a document that is incomplete, prejudicial and *unfair* as submitted. Therefore, Respondent has attached hereto as **Exhibit A** a true and correct copy of the Request as originally provided to him by Ms. Dalcourt. In response to the Request, Respondent's counsel drafted a letter to Ms. Dalcourt dated July 29, 2014. Attached hereto as **Exhibit B** is a true and correct copy of the July 29, 2014 letter.

In Respondent's counsel's letter of July 29, 2014, Respondent made the following "Offers of Proof" regarding the scope of his testimony if he were called as a witness and required to testify pursuant to the investigation on behalf of UCSD as well as in any subsequent criminal investigation and/or prosecution. These items have been modified to represent what Respondent's scope of testimony would be if he were called as a witness and required to testify at the present hearing and in an effort to make more sense of the offers of proof given the fact that almost four-and-one-half months have passed since this submission.

Respondent was born on May 27, 1994, in Greenbrae, California and is currently in his junior year at UCSD. Respondent [was] . . . afforded the opportunity to review the June 16,

2014 Request submitted by Complainant. After reading the "complaint" against him, Respondent noticed several inconsistencies and flaws in Complainant's Request. Accordingly, Respondent offered a truthful account of the events mentioned by Complainant.

A few weeks prior to the two nights mentioned in Complainant's Request, the two individuals met at a party. After initially meeting, the two parties decided to try "hanging out" on their own. A few days later, Complainant went to Respondent's residence after a party. Complainant told Respondent ahead of time that she was of the Mormon faith and that she did not want to have sex, but she would gladly spend the night. Respondent then communicated to Complainant that he liked her and made it clear that he had no problem with her request.

Over the next few days and on several occasions, Respondent would pick Complainant up and bring her to his apartment where the two of them would visit by themselves and among Respondent's roommates. In the same week, Complainant invited Respondent to her room, and as had happened before, the couple did not engage in sexual intercourse. Over the course of these encounters, while they both expressed an interest in having intercourse, Complainant eventually communicated to Respondent that she was now becoming a bit more ambivalent in respect to her abstinence. During this discussion, Respondent contemporaneously communicated to Complainant that if she ever decided she wanted to engage in intercourse, he would be willing to do the same.

On a subsequent Friday and Saturday, exchanges between their respective fraternity and sorority houses were scheduled. Friday was an exchange at Respondent's fraternity, and Saturday was Complainant's sorority house formal to which Respondent was invited as Complainant's date. Throughout the week leading up to these events, Complainant would stop by Respondent's residence, the two would visit briefly, Complainant would send numerous

text messages "non-stop" throughout the days and nights, and she communicated to Respondent that "she liked [him] a lot." Though Respondent liked Complainant, he tried to keep their relationship less serious.

Through some of her texts leading up to the exchanges, Complainant communicated and expressed her excitement to get intoxicated and spend the night with Respondent on the upcoming Friday. She also expressed an interest and desire that Respondent spend the night at her apartment after the sorority formal on Saturday night. Respondent replied that he did not have any interest in having her become intoxicated, for Respondent knew Complainant was somewhat new to drinking and he did not want her to do anything "stupid."

When the Friday night of the first exchange arrived, Complainant went to Respondent's residence along with some of her friends to drink or "pregame" as some students commonly refer to drinking before a party. Again, Complainant intended to spend the night and left her change of clothes in Respondent's room. Knowing that they had a long night ahead of them, all of these young adults consciously made an effort to "take it easy" on the beverages during the pregame. Respondent and Complainant shared some peach vodka upon her request that Respondent pour her some. Respondent recalls personally finishing some of Complainant's drinks so that Complainant did not overdo her consumption. At no point in time during this pregame did Respondent force or encourage Complainant to drink any more than she desired herself. Before a driver arrived, the two of them exchanged kisses in Respondent's bedroom.

Then, in the car on the way to the party, Respondent and Complainant physically felt each other, but there was nothing beyond this willing and mutual touching engaged in by both parties. Once they arrived at the party, they each talked with friends and "hung out" a little together for about an hour or two. At no time during the party did Respondent grab

Complainant, "feel her up," or make attempts at acts of public affection. When their driver came to pick them up following the party, Respondent's roommate, Gunnar, joined the pair for the ride back to Respondent's residence. Upon arrival at Respondent's residence, the three individuals visited in the residence's common room. Respondent and Complainant did not consume any alcoholic beverages at the party, and being that they were both a few hours removed from their last alcoholic beverage, they both seemed to be no longer under the influence of alcohol. Complainant was talkative and alert. Then, the three individuals left the common area, and Respondent and Complainant went to Respondent's bedroom.

After talking some more in the bedroom, the pair started kissing. Later, Complainant went out into the common room to drink some water and relax, and Respondent stayed in his bedroom. The next morning, Respondent drove Complainant to her home. The pair planned to meet up later for Complainant's formal. Later that morning, Respondent's other roommate, Johnny, told him he could hear the pair talking all night and thought it was "pretty funny."

Then, on Saturday night, February 1, 2014, the pair both drank minimally at the sorority formal, and by the end of the evening, both seemed to be completely sober. The pair then walked back to Complainant's residence. Once they we were in Complainant's bedroom, they started kissing. The next morning, a friend of Respondent picked him up, for Complainant had church to attend.

After submitting the above offers of proof to Ms. Dalcourt, she continued her investigation and on August 22, 2014, she emailed Respondent and his counsel a list of 21 questions. On August 25, 2014, objections and responses were provided to Ms. Dalcourt. Attached hereto as **Exhibit C** is a true and correct copy of the August 25, 2014 letter from Respondent's counsel to Ms. Dalcourt. So as to not burden this Hearing Panel with a complete

recitation of the letter, for many of the questions posed have nothing to do with the alleged incident occurring the morning of February 1, 2014 - the subject of this hearing, the following questions are set forth:

Question No. 18

What did the pair talk about the morning of February 1st?

Response to No. 18:

Responding party does not recall.

Question No. 19

Was there any touching between the parties the morning of February 1st?

Response to No. 19:

Objection. This question is vague, ambiguous, unintelligible and overly broad in its use of the terms "touching between the parties."

Question No. 20

Did Mr. Doe see Ms. Roe in person after the weekend of the alleged incident? If so, what was the nature of this contact?

Response to No. 20:

Yes. The pair sat next to each other and studied.

On August 26, 2014, Ms. Dalcourt emailed Respondent's counsel and set forth the following in pertinent part:

". . . Thank you for sending your client's response. As you are aware, we typically conduct interviews in person, and the nature of the questions posed to your client are the type of questions we ask in in-person interviews. As you have declined on your client's behalf an in-person interview, we are attempting to provide your client an opportunity to supply relevant

information, the same opportunity provided to the [C]omplainant. As we discussed previously, this is not a criminal proceeding; it is an administrative investigation. If you have additional information to provide on behalf of your client, you can do so at any time while the investigation is pending. You may also suggest any witnesses you believe can supply relevant information.

For clarity and in addition to the June 16, 2014 Request for Formal Investigation submitted by [Complainant], I would like to outline the specific allegations our office is investigating, as details have emerged from interviews with the [C]omplainant and relevant witnesses. We are investigating the following allegations:

1) An alleged violation of the UC San Diego Student Sex Offense Policy (the "Sex Offense Policy", link provided previously on 7/22) on the night of January 31st, 2014 involving sexual intercourse while the complainant was allegedly incapacitated and unable to provide effective consent under the Sex Offense Policy;

2) **An alleged violation of the Sex Offense Policy on the morning of February 1st, 2014 involving digital penetration without consent**; and

3) An alleged violation of the Sex Offense Policy with respect to retaliation, including harassment, threats and intimidation on the night of May 14, 2014 at an off-campus party. . . ." (emphasis added). Attached hereto as **Exhibit D** is a true and correct copy of the August 26, 2014 email from Ms. Dalcourt to Respondent's counsel.

This August 26, 2014 email was the *first time Respondent was made aware of the allegations being investigated* by OPHD, and all three of these allegations supposedly arose from the two-page typewritten Request of Complainant dated June 16, 2014. See, **Exhibit A**.

Attached hereto as **Exhibit H** are relevant text message screenshots between Respondent and Complainant. Respondent is identified in the darker fields on the right, and Complainant on the left in light fields. Of interest, text messages exchanged on the afternoon of the alleged nonconsensual digital penetration, February 1, 2014, in the afternoon hours, never mention any complaints about anything happening the morning of February 1, 2014. Additionally, as evidenced by these text messages, plans for that evening were being arranged wherein Complainant later allegedly engaged in a second act of consensual intercourse with Respondent. See, **Exhibit H at pps. 1-5.** Of interest are the following excerpts from these texts:

From Respondent to Complainant: "**And Zach hooks up with Kendall. . . and I've been hooking up with u. Pretty funny how that works out.**" In response to the foregoing text, Complainant texts to Respondent: "**My fams hot I guess haha**." See, **Exhibit H at p. 2.**

Another significant and telling text from Complainant to Respondent on this date after he allegedly digitally penetrated her without her consent, wherein she states regarding the events planned for later that evening: "**Okay as long as I don't get in trouble you can do what you want haha**." See, **Exhibit H at p. 4.** *These words would not typically be communicated from a young woman who was allegedly digitally penetrated that morning by the person receiving the text and said digital penetration, if it even happened, was nonconsensual.*

Then, text message exchanges on April 25, 2014 (***albeit sent almost three months after the alleged nonconsensual digital penetration***) confirm that Complainant and Respondent had been planning to "pregame" that evening. See, **Exhibit H at pp. 6-7.** A few days later, on April 28, 2014, the two parties texted each other about homework. See, **Exhibit H at p. 8.**

Taking into account the foregoing excerpted text messages between Complainant and Respondent, one must find the allegations of nonconsensual digital penetration suspect at the very least. Not only is nothing mentioned in their exchanges during the afternoon of February 1, 2014 leading up to the second alleged act of consensual intercourse between the two parties, but the texts also indicate both parties were getting along just fine - at least up until April 28, 2014.

Respondent contends that the initial complaint submitted on June 5, 2014 to the UCSD Office of Student Conduct was in retaliation for a May 14, 2014, incident wherein the two parties engaged in a verbal argument. Said argument is referenced in Ms. Dalcourt's investigative report. See, **Exhibit E at p. 14, ¶5**. By way of an additional offer of proof, Respondent contends that the nature of the dispute was his being invited to a formal at Complainant's sorority by another "sister" and Complainant, after hearing about his plan to attend with another woman, was not the least bit pleased.

II. RESULTS OF THE INVESTIGATION BY OPHD

On September 10, 2014, Ms. Dalcourt, on behalf of OPHD, issued a 15-page letter setting forth various aspects of her investigation that resulted in this hearing whereby Respondent is alleged to have violated the following sections of the UC San Diego Student Conduct Code:

Section VII, Letter **AA** (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Assault - "Sexual assault" means sexual activity that is engaged in without the effective consent of the other person and is intentional.

Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct - "Sexual misconduct" means 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.

Attached hereto as **Exhibit E** is a true and correct copy of OPHD's September 10, 2014 results of the investigation addressed to Benjamin T. White, Director, Office of Student Conduct. You will note that Respondent is submitting this entire report as presented to him and his counsel, for the copy forwarded to the Hearing Panel has been redacted to such an extent that it leaves out information crucial to Respondent's defense *and* the credibility of Complainant and other witnesses who were interviewed during the investigation.

At this hearing, the two alleged violations being ruled upon apparently arise from a single alleged violation of the Sex Offense Policy on the *morning of February 1st, 2014* involving digital penetration without consent as mentioned hereinabove. Of interest, and to be discussed hereafter in further detail, Complainant never mentioned an alleged digital penetration without consent in her June 16, 2014 Request (See, **Exhibit A**). Of importance to this so-called *prior inconsistent statement* of June 16, 2014, Complainant had already submitted a written report to the UCSD Office of Student Conduct on June 5, 2014[1] and met with Ms. Dalcourt of OPHD on June 12, 2014. **In other words, something allegedly happened on February 1, 2014, yet Complainant did not report anything whatsoever until June 5, 2014.** Then, she met with Ms. Dalcourt on June 12, 2014. Complainant's Request submitted on June 16, 2014 (not to belabor the point, but at a time after a written report was submitted to the UCSD Office of Student Conduct on June 5, 2014 and *after*

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[1] Complainant's first report to UCSD of any alleged wrongdoing by Respondent was over four months after the alleged February 1, 2014 incident before this Hearing Panel.

meeting with Ms. Dalcourt on June 12, 2014), and therein she states with regard to this alleged incident: "[h]e then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop." **Complainant's Request absolutely and unequivocally fails to reference the alleged digital penetration without consent.** Again, the first time Respondent became aware of such allegation was in the August 26, 2014, email from Ms. Dalcourt to Respondent's counsel.

As noted in **Exhibit E**, OPHD's September 10, 2014 results of its investigation, two of the alleged violations referenced hereinabove investigated by OPHD were found to be lacking sufficient evidence to determine whether a policy violation had occurred based upon the low level of requisite proof - a preponderance of the evidence standard. *First*, an alleged violation of the UC San Diego Student Sex Offense Policy on the night of January 31st, 2014 involving sexual intercourse while the complainant was allegedly incapacitated and unable to provide effective consent under the Sex Offense Policy was found *not* to have occurred based a preponderance of the evidence. After interviewing 14 witnesses and Complainant, reviewing text messages and upon consideration of the offer of proof presented by counsel for Respondent, Ms. Dalcourt determined "[b]ased upon the evidence, it is not clear whether [Respondent] knew or should have known that [Complainant] was not merely intoxicated, but rather incapacitated and therefore unable to provide effective consent." See, **Exhibit E at p. 13, ¶3**. *Second*, an alleged violation of the Sex Offense Policy with respect to retaliation, including harassment, threats and intimidation on the night of May 14, 2014 at an off-campus party was also found not to have occurred based upon a preponderance of the evidence. Again, after interviewing witnesses and Complainant as well as upon consideration of the offer of proof presented by counsel for Respondent, Ms. Dalcourt determined ". . . there is insufficient

evidence to find that the Student Sex Offense Policy was violated due to retaliation." See, **Exhibit E at p. 15, ¶1**.

As this Hearing Panel might well be aware, there have been many cases where a campus atmosphere condemning an alleged offense makes it difficult for students accused of that offense to get a fair hearing. That being said, Respondent shares UCSD's general sentiment about the heinousness of the crime charged, and he reminds you of your duty to focus only on the facts of this specific case. Respondent is neither a symbol nor a scapegoat, but an individual ***presumed to be innocent***. There is no crime so heinous that innocence is an insufficient defense.

That being said, Respondent is left to defend himself on a charge of digital penetration without consent on the morning of February 1, 2014.

What's crucial to this issue are facts set forth in Ms. Dalcourt's September 10, 2014 letter to Mr. White, including the fact that the Complainant admits to having sexual intercourse on the evenings of January 31, 2014 and February 1, 2014 – before and after the alleged digital penetration that she failed to mention in her Request submitted on June 16, 2014 (again after meeting with Ms. Dalcourt of OPHD just four days prior).

OPHD's September 10, 2014 results of the investigation addressed to Mr. White, reveals the following pertinent facts in support of Respondent's defense:

1.) During the first interview with OPHD, Complainant expanded upon her original complaint, alleging that on the morning of February 1, 2014, Respondent digitally penetrated her more than once after ignoring her objections. See, **Exhibit E at p. 1, ¶2**. This first interview occurred on June 12, 2014, four days prior to Complainant's Request dated June 16, 2014.

2.) During the week following Spirit Night, on two or three times, Complainant performed consensual oral sex on Respondent. See, **Exhibit E at p. 2, ¶4.**

3.) On the morning of February 1, 2014, Complainant allegedly told Ms. Dalcourt in her June 16, 2014, interview, that Respondent put his hands down her underwear and entered her vagina with his finger, and that she told him to stop, "Stop it hurts really bad." Complainant further alleged that Respondent entered her with his fingers a total of three times, though she told him "*she was not in the mood,*" and repeated that it hurt and pushed his hand away. See, **Exhibit E at p. 7, ¶3**. Again, this information was apparently only alleged in the interview that occurred on June 12, 2014, four days prior to Complainant's Request dated June 16, 2014. Here, nowhere is it mentioned that Respondent's alleged digital penetration was engaged in without the effective consent of Complainant and was intentional. Further, it is not alleged factually that this alleged act of digital penetration was tantamount to 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.

4.) When the sorority formal occurred on the evening of February 1, 2014 (the evening following the morning of the alleged nonconsensual digital penetration), the Complainant, according to notes of her interview, alleges that she and Respondent engaged in a second act of consensual intercourse. See, **Exhibit E at p. 8, ¶3**.

5.) Ms. Dalcourt states in her investigative report that Respondent, by way of an offer of proof, did not recall any touching between the two parties on the morning of February 1, 2014. See, **Exhibit E at p. 9, ¶2**. *This appears to be in intentional and unfair misstatement of the offer of proof by Ms. Dalcourt.* See, **Exhibit C at p. 6, Response to Number 19**, wherein Respondent's counsel asserted an objection to the question and no response was provided. As

mentioned herein below, it is also contrary to the fact that at the Administrative meeting with Dean Mallory, **Respondent *unequivocally* told Dean Mallory the incident and actions now set forth in the letter from Attorney Dalcourt to the Director of the Office of Student Conduct did *not* occur. In other words, Respondent denied the digital penetration ever occurred and communicated the same to Dean Mallory.**

In light of the foregoing, based upon a preponderance of the evidence, the alleged nonconsensual digital penetration on February 1, 2014, if it even occurred (it is vehemently denied by this Respondent), took place in between two consensual acts of intercourse between the parties. Further, Complainant's interviews summarized by OPHD in its investigative report, is lacking in credibility, for Complainant never mentioned the alleged acts of digital penetration – even after she had four days to think about what she eventually drafted and included in her Request dated June 16, 2014. Here, again, based upon a preponderance of the evidence, Respondent cannot be found responsible for nonconsensual digital penetration on the morning of February 1, 2014.

III. *UNFAIRNESS* OF THE PROCEEDINGS TO DATE

Respondent contends that he has been subjected to many instances of *unfairness* in the proceedings to date. Additionally, Respondent contends that the failure on the part of UCSD to comply with its contractual obligations with him, namely the *failure to comply with the Hearing Procedures for Alleged Sex Offense Harassment or Discrimination Violations,* have denied him and continue to deny him his due process rights.

As soon as this hearing was scheduled, Respondent requested OPHD's entire investigation file including any and all documents, memos, interview notes, statements (recorded, transcribed or otherwise documented), photographs, handwritten notes and anything

else, whether it be in electronic format, handwritten or typewritten, that was created by Ms. Dalcourt, witnesses or anyone at her direction, including other people within OPHD or at UCSD, that resulted in Ms. Dalcourt's September 10, 2014 allegations forwarded to the Director of the Office of Student Conduct. In response to this request, Ms. Dalcourt responded with the following:

"Thank you for the message. OPHD does not release investigation files to any party prior to a hearing, including internal offices such as the Office of Student Conduct. If you have questions regarding the hearing process and preparation, please contact the Office of Student Conduct at (858) 534-6225."

The files provided to Respondent and the Hearing Panel, on November 10, 2014, fail to contain the investigative files as referenced hereinabove. All that has been provided is the almost-fully redacted investigative report and an almost-fully redacted June 16, 2014 Request submitted by Complaint. This complete lack of full disclosure of the investigative files of OPHD smacks of an *uneven playing field and complete and total disregard for a fair and impartial* hearing.

First, and according to the *Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination Violations*, Respondent will have an opportunity to suggest witnesses attend the hearing and perhaps even suggest certain questions be asked of these witnesses by the Hearing Panel. How can Respondent and his counsel prepare a defense without access to the entire file that resulted in Ms. Dalcourt's findings of September 10, 2014? Second, and of greater importance, is that this denial of access to the same records available to UCSD in preparing for and holding this hearing smacks of a clear and intentional violation of the United States Department of Education Office of Civil Rights recommendations for the handling of

allegations of sexual misconduct pursuant to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106. After discussing this matter with the Foundation for Individual Rights in Education (FIRE)[2], Respondent and his counsel are of the confirmed belief that they are entitled to the entire investigation file compiled by Ms. Dalcourt from the date of the alleged victim's first contact with the UCSD Office of Student Conduct on June 5, 2014 up to the present. **Nothing has been provided to Respondent or his counsel other than the November 10, 2014, package this Hearing Panel also received.**

Second, the United States Department of Education Office of Civil Rights April 4, 2011 letter states as follows: "Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. *The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.*" (emphasis added). "Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the

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[2] Attached hereto as **Exhibit I** is a true and correct copy of FIRE's February 28, 2014 letter addressed to the White House Task Force to Protect Students from Sexual Assault. Of interest, FIRE states "…when a college expels an accused student after a hearing that includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well. When a student is suspended or expelled from college without due process protections, the consequences can be profound. In many of those instances, expulsions—particularly for one of society's most heinous crimes—have the effect of ending educations and permanently altering career prospects " See, **Exhibit I at pp. 1-2.**

complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history." See, **Exhibit J**, a true and correct copy of the United States Department Of Education Office for Civil Rights April 4, 2011 Dear Colleague letter at p. 11, and footnote 29.

Clearly, Ms. Dalcourt and OPHD have access to information that led to the September 10, 2014 allegations forwarded to the Director of the Office of Student Conduct. OPHD's failure to provide full disclosure and production of the requested documentation prior this hearing has created an *unfair* advantage to UCSD and will result in an administrative adjudication *lacking in fairness* to Respondent.

Of interest is the fact that on October 15, 2014, UCSD Chancellor Pradeep K. Khosla shared a proposed campus "Policy for Reporting and Responding to Sex Offenses" in an email to university affiliates. If the new policy proposal were implemented, it would bring UCSD's protocol for handling sexual violence cases to par with the University of California's system wide Sexual Harassment and Sexual Violence Policy. In light of the foregoing, it appears that UCSD's handling of these matters has not yet been compliant with the latest legislation and supports Respondent's contention of the *unfairness* of the handling of this matter to date.

Of interest and in addition to UCSD Chancellor Pradeep K. Khosla proposed campus "Policy for Reporting and Responding to Sex Offenses", 28 Harvard Law School Faculty members and a professor at Yale Law School have taken positions regarding the mishandling of sexual misconduct cases by Universities. Attached hereto as **Exhibit F** is a true and correct copy of the opinion article from the Boston Globe dated October 15, 2014. Attached hereto as

Exhibit G is a true and correct copy of the opinion article from the New York Times dated November 15, 2014. Both articles are timely and relevant to the matter at hand and Respondent requests that this Hearing Panel review the same and be mindful of the arguments presented by two of the most well respected legal authorities on the issue at hand.

IV. CONCLUSION

In light of the foregoing, Respondent respectfully requests that the Hearing Panel, basing its determination of responsibility on the preponderance of the evidence standard[3], and taking into account the fact that UCSD bears the burden of proof, determine that Respondent is not responsible for the alleged violations.

Respectfully Submitted,

Dated: December 9, 2014

John Doe , Respondent

[3] As FIRE indicated in its February 28, 2014 letter to the White House Task Force to Protect Students from Sexual Assault, "FIRE believes that [Office for Civil Rights] should drop its mandate that these tribunals decide cases under the preponderance of the evidence standard. *The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect*, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. See attachments D, E, and F. Instead, *OCR should encourage institutions to use the "clear and convincing" standard of evidence, which requires more than just a "50%-plus-a-feather" level of confidence that the evidence supports one side over the other*. OCR should also encourage institutions using the preponderance standard to set forth substantive protections for the accused to balance out the low evidentiary threshold. For example, institutions should ensure that there is some mechanism for the accused to cross-examine his or her accuser." (Emphasis added) See, **Exhibit I at p. 3.**

EXHIBIT A

STUDENT SEX OFFENSE POLICY
REQUEST FOR FORMAL INVESTIGATION

Date June 16, 2014

Name Jane Roe

Name of Respondent John Doe

Telephone (if known) (415) 290-0922

Email (if known) _____

Complainant
- Gender female
- Undergraduate student
- Graduate student
- Other _____

Respondent
- Gender Male
- Undergraduate student
- Graduate student
- Other _____

Summary of incident(s) (use additional pages if necessary)
PLEASE NOTE THAT THE RESPONDENT IS ENTITLED TO A COPY OF THIS FORM.

See attached

Office for the Prevention of Harassment & Discrimination (OPHD)
201 University Center
(858) 534-8298
http://ophd.ucsd.edu
(rev. 12/2013)

On January 31, John Doe 's fraternity and my sorority had an exchange planned and John invited some of my friends and me to pregame at his place. I brought a change of clothes to his place to sleep in in case I decided to spend the night after the party, but was not planning on having sex with him. At the pregame, there weren't any shot glasses, and this being the second or third time I had drank, I was very inexperienced and was unsure of what to do. John poured me amounts of vodka into red solo cups and then I would periodically drink them alternating with a chaser. He didn't force the drinks on me, but he did encourage me to drink what he gave me and I wasn't really sure of what I was doing and how much I should be drinking. After this the night gets blurry. I remember going to the party and walking around talking to my friends and having John follow me and wrap his arms around me and try to feel me up in front of other people. I remember half-heartedly pushing his hands away but I wasn't fully aware of what was going on. I then remember after what seemed like a short time later, John grabbed my hand and told me that a pledge was there to drive us home. I went outside and I vaguely remember the ride back to campus and I remember being disoriented and not feeling in control of my body. I then remember taking the elevator up to his apartment and going into his room and after that I really don't remember very much. I remember starting to kiss him and that's pretty much it. When I woke up in the morning, I had the idea that we had had sex but I didn't remember any details such as whether he used a condom or what it felt like or anything like that. He later told me that he did not use a condom [redacted] That morning, I remember telling him that I felt weird about what happened and him telling me that it was fine and that I wanted it. He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop. He then told me "Well I guess that means I did my job right" and smiled. I then excused myself because I felt like I was going to throw up and went into his common room with a bottle of water to breathe and try to collect my thoughts. I went back in and asked him to take me home to which he responded that he had a headache and would in a little bit. I then spent the next hour or two waiting for him to take me home because I didn't want to walk across campus. When I got home, I sat in my room and cried for 2-3 hours because at this point I was so upset with myself for letting something like this happen and for not waiting like I had wanted to. I called my friend Miranda and was telling her how upset I was and she comforted me but didn't say anything about this not being my fault.

That night, February 1st, was the night of my sorority formal and John was my date. I didn't want to have to tell anyone why he was no longer my date so I went with him. Throughout the night he asked me if we were going to have sex again and I told him that I didn't want to, to which he responded, "What's twice?" I told him that I wasn't counting last night as my first time and he got offended and said that hurt his feelings. I told him that I had spent most of the day crying about what happened and he got upset and began yelling at me asking me why I would say that to him and if I was trying to make him feel bad or guilty and that I couldn't blame him for what happened because I wanted it. I remember feeling so small and insignificant and I had given up on myself and given up on fighting with him. He then asked to come

over after the dance and I agreed and we went back to my place. We began hooking up and ended up having sex again and I felt so disgusted with myself and so upset with the whole situation and in the morning I just wanted him to leave and pretend none of this had ever happened but he kept asking me to perform oral sex on him and I kept saying I was tired and I didn't want to and he would argue with me a little bit and try to guilt me into it by saying that he had "blue-balls" and that if he had to do a walk of shame back to Revelle he might as well have something to be ashamed of. I refused and ultimately one of his friends came to pick him up and I sat in my room feeling pathetic and worthless and I just wanted to forget everything and move on.

Within the next week I told two of my friends, Kendall and Maggie, what had happened and they both assured me that what happened wasn't my fault and that John had taken advantage of me. I then took to the internet to research rape and consent and their definitions and implications. It was then that I realized that what happened to me was rape, I was in no condition to be able to give consent and with John having had prior knowledge of the fact that I didn't want to have sex and he took advantage of me when I was highly intoxicated. [redacted] I have been working to heal and find a new normal, and I am finally ready to report John as I don't want what happened to me to happen to other girls, and I don't believe that he thinks he did anything wrong in reference to sleeping with me and I want him to know that he broke the law and he has to pay the consequences for it.

EXHIBIT B

HABERKORN & ASSOCIATES

MATTHEW H. HABERKORN, ESQ.
ATTORNEY AT LAW

PO Box 7474
Menlo Park, CA 94025
e-mail: matthewhaberkorn@mac.com

TELEPHONE (650) 268-8378 FACSIMILE (650) 332-1528

July 29, 2104

Via Fax and Email Only
Fax: (858) 534-0393
Email: edalcourt@ucsd.edu
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
9500 Gilman Drive Mail Code 0024
La Jolla, CA 92093-0024

Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Dear Ms. Dalcourt:

As you have previously been advised, the undersigned represents John Doe in regard to the aforementioned matter. As you have also been advised, Mr. Doe will not agree at this time to be interviewed and/or provide a written or recorded statement based upon his Constitutional rights afforded to him.

The Fifth Amendment to the United States Constitution provides that "No person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing *Bryson v. United States* (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685. In its origin at common law, the privilege was aimed at the abuse of arbitrary inquisition without charge, and meant that one should not be compelled to accuse oneself. As subsequently developed and almost universally applied today, the privilege protects an accused. Thus, despite the narrow constitutional language, which did not create but merely confirmed the common law protections, there are two privileges:

(a) *Defendant's (or accused's) privilege.* The defendant in a criminal case need not testify at all.

(b) *Witness's privilege.* A witness in any proceeding, civil, criminal, or

administrative, need not answer any question that would tend to subject the witness to a criminal prosecution.

The scope of the privilege is as follows: (a) It protects natural persons, not corporations or unincorporated associations; (b) It protects against compulsory oral testimony and also against compulsory production of documents or personal property. (See *People v. Trujillo* (2006) 40 C.4th 165, 178); and (c) It precludes any comment on or inference from its claim.

In light of the foregoing, and as legal counsel for Mr. Doe , I make the following offer of proof regarding the scope of Mr. Doe 's testimony if he were called as a witness and required to testify pursuant to your investigation on behalf of the University as well as in any subsequent criminal investigation and/or prosecution.

John Doe was born on May 27, 1994, in Geenbrae, California and is currently entering his junior year at UCSD. Mr. Doe has recently been afforded the opportunity to review the June 16, 2014 Request for Formal Investigation submitted by Jane Roe . After reading the "complaint" against him, Mr. Doe has noticed several inconsistencies and flaws in her claim. Accordingly, he has offered up a truthful account of the events mentioned by Ms. Roe .

A few weeks prior to the two nights mentioned in Ms. Roe 's "complaint," the two individuals met at a party. After initially meeting, the two parties decided to try "hanging out" on their own. A few days later, Ms. Roe went to Mr. Doe 's residence after a party. Ms. Roe told Mr. Doe ahead of time that she was of the Mormon faith and that she did not want to have sex, but she would gladly spend the night. Mr. Doe then communicated to Ms. Roe that he liked her and made it clear that he had no problem with her request.

Over the next few days and on several occasions, Mr. Doe would pick Mr. Roe up and bring her to his apartment where the two of them would visit by themselves and among Mr. Doe 's roommates. In the same week, Ms. Roe invited Mr. Doe to her room, and as had happened before, the couple did not engage in sexual intercourse. Over the course of these encounters, while they both expressed an interest in having intercourse, Ms. Roe eventually communicated to Mr. Doe that she was now becoming a bit more ambivalent in respect to her abstinence. During this discussion, Mr. Doe contemporaneously communicated to Ms. Roe that if she ever decided she wanted to engage in intercourse, he would be willing to do the same.

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Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

On a subsequent Friday and then Saturday, exchanges between their respective fraternity and sorority houses were scheduled. Friday was an exchange at Mr. Doe 's fraternity and Saturday was Ms. Roe 's sorority house formal to which Mr. Doe was invited as Ms. Roe 's date. Throughout the upcoming week leading up to these events, Ms. Roe would stop by Mr. Doe 's residence, the two would visit briefly, Ms. Roe would send numerous text messages "non-stop" throughout the days and nights, and she communicated to Mr. Doe that "she liked [him] a lot." Though Mr. Doe liked Ms. Roe , he tried to keep their relationship less serious.

Through some of her texts leading up to the exchanges, Ms. Roe communicated and expressed her excitement to get intoxicated and spend the night with Mr. Doe on the upcoming Friday. She also expressed an interest and desire that Mr. Doe spend the night at her apartment after the sorority formal on Saturday night. Mr. Doe replied that he did not have any interest in having her become intoxicated, for Mr. Doe knew Ms. Roe was somewhat new to drinking and he did not want her to do anything "stupid."

When the Friday night of the first exchange arrived, Ms. Roe went to Mr. Doe's residence along with some of her friends to drink or "pregame" as some students commonly refer to drinking before a party. Again, Ms. Roe intended to spend the night and left her change of clothes in Mr. Doe 's room. Knowing that they had a long night ahead of them, all of these young adults consciously made an effort to "take it easy" on the beverages during the pregame. Mr. Doe and Ms. Roe shared some peach vodka upon her request that Mr. Doe pour her some. Mr. Doe recalls personally finishing some of Ms. Roe 's drinks so that Ms. Roe did not overdo her consumption. At no point in time during this pregame did Mr. Doe force or encourage Ms. Roe to drink any more than she desired herself. Before a driver arrived, the two of them exchanged kisses in Mr. Doe 's bedroom.

Then, in the car on the way to the party, Mr. Doe and Ms. Roe physically felt each other, but there was nothing beyond this willing and mutual touching engaged in by both parties. Once they arrived at the party, they each talked with friends and "hung out" a little together for about an hour or two. At no time during the party did Mr. Doe grab Ms. Roe , "feel her up," or make attempts at acts of public affection. When their driver came to pick them up following the party, Mr. Doe 's roommate, Gunnar, joined the pair for the ride back to Mr. Doe 's residence. Upon arrival at Mr. Doe 's residence, the three individuals visited in the residence's common room. Mr. Doe and Ms. Roe did not consume any alcoholic beverages at the party, and being that they were both a few hours removed from their last alcoholic beverage, they both seemed to be no longer under the

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influence of alcohol. Ms. Roe was talkative and alert. Then, the three individuals left the common area, and Mr. Doe and Ms. Roe went to Mr. Doe 's bedroom.

After talking some more in the bedroom, the pair started kissing. Later, Ms. Roe went out into the common room to drink some water and relax, and Mr. Doe stayed in his bedroom. The next morning, Mr. Doe drove Ms. Roe to her home. The pair planned to meet up later for Ms. Roe 's formal. Later that morning, Mr. Doe 's other roommate, Johnny, told him he could hear the pair talking all night and thought it was "pretty funny."

Then, on Saturday night, the pair both drank minimally at the sorority formal, and by the end of the evening, both seemed to be completely sober. The pair then walked back to Ms. Roe 's residence. Once they we were in Ms. Roe 's bedroom, they started kissing. The next morning, a friend of Mr. Doe picked him up, for Ms. Roe had church to attend.

The above represents our offer of proof regarding Mr. Doe 's account and response to the complaint submitted by Ms. Roe . Should you have any further questions or comments regarding this matter concerning Mr. Doe , please do not hesitate to call or email me. I would appreciate receiving the results of your office's investigation when complete.

Sincerely,

Matthew H. Haberkorn, Esq.

HP LaserJet *M2727nf MFP*

Fax Confirmation Report

HABERKORN & ASSOCIATES
16503321528
Jul-29-2014 10:13AM

Job	Date	Time	Type	Identification	Duration	Pages	Result
10	7/29/2014	10:11:30AM	Send	18585340393	1:57	4	OK

HABERKORN & ASSOCIATES

MATTHEW H. HABERKORN, ESQ.
ATTORNEY AT LAW

PO Box 7474
Menlo Park, CA 94025
e-mail: matthewhaberkorn@mac.com

TELEPHONE (650) 268-8378 FACSIMILE (650) 332-1528

July 29, 2104

Via Fax and Email Only
Fax: (858) 534-0393
Email: edalcourt@ucsd.edu
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
9500 Gilman Drive Mail Code 0024
La Jolla, CA 92093-0024

Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Doe

Dear Ms. Dalcourt:

As you have previously been advised, the undersigned represents John Levy in regard to the aforementioned matter. As you have also been advised, Mr. Doe will not agree at this time to be interviewed and/or provide a written or recorded statement based upon his Constitutional rights afforded to him.

The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Manchjano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing *Bryson v United States* (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685. In its origin at common law, the privilege was aimed at the abuse of arbitrary inquisition without charge, and meant that one should not be compelled to accuse oneself. As subsequently developed and almost universally applied today, the privilege protects an accused. Thus, despite the narrow constitutional language, which did not create but merely confirmed the common law protections, there are two privileges:

(a) *Defendant's (or accused's) privilege.* The defendant in a criminal case need not testify at all.

(b) *Witness's privilege.* A witness in any proceeding, civil, criminal, or

EXHIBIT C

HABERKORN & ASSOCIATES

MATTHEW H. HABERKORN, ESQ.
ATTORNEY AT LAW

PO Box 7474
Menlo Park, CA 94025
e-mail: matthewhaberkorn@mac.com

TELEPHONE (650) 268-8378 FACSIMILE (650) 332-1528

August 25, 2014

Via Fax and Email Only
Fax: (858) 534-0393
Email: edalcourt@ucsd.edu
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
9500 Gilman Drive Mail Code 0024
La Jolla, CA 92093-0024

Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Dear Ms. Dalcourt:

As you have previously been advised, the undersigned represents John Doe in regard to the aforementioned matter. As you have also been advised, Mr. Doe will still not agree at this time to be interviewed and/or provide a written or recorded statement based upon his Constitutional rights afforded to him.

On August 22, 2014, you forwarded an email containing a list of 21 questions your office would like answered by John Doe . In light of the foregoing, and as legal counsel for Mr. Doe , I make the following offer of proof regarding these questions.

1. Can Mr. Doe provide copies of the text exchange referenced in the "offer of proof" whereby he said something to the effect that he did not want Ms. Roe to become too intoxicated and "did not want her to do anything 'stupid.'"

   Response to No. 1:

   Objection. Responding party asserts the Fifth Amendment to the United States Constitution that provides that "No person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing

August 25, 2014
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
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Bryson v. United States (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685.

Without waiving the foregoing objection, John Doe responds as follows:

No.

2. Can Mr. Doe provide text exchanges occurring after the alleged incident?

Response to No. 2:

Objection. This request is vague, ambiguous and overly broad in its failure to be limited in time and scope and in its failure to define "alleged incident."

Without waiving the foregoing objection, John Doe responds as follows:

Responding party will produce screen shots of text messages once the propounding party sets forth with more particularity in terms of time and scope of the text messages sought.

3. Approximately how many shots of peach vodka (measured in a standard 1.25–1.5 fl. oz shot glass) does Mr. Doe estimate each of the pair had at the pre-party? Was this the only type of alcohol consumed?

Response to No. 3:

Objection. Responding party asserts the Fifth Amendment to the United States Constitution that provides that "No person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing *Bryson v. United States* (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685.

Without waiving the foregoing objection, John Doe responds as follows:

Jane Roe consumed 4 or 5 shots of peach vodka but no more. No other alcohol was consumed at the pre-party.

4. What did Mr. Doe eat prior to starting the pre-party? Was there any food at the pre-party?

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Elena Acevedo Dalcourt
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Response to No. 4:

Objection. This request is vague, ambiguous and overly broad in its failure to be limited in time and scope.

Without waiving the foregoing objection, John Doe responds as follows:

Responding party does not recall what he ate at anytime from the time he woke up that morning to the time of the pre-party, but he does know it was his usual custom and practice to eat breakfast and lunch on a daily basis. No food was served at the pre-party.

5. To Mr. Doe 's knowledge, did Ms. Roe have anything to eat directly before or at the pre-party?

Response to No. 5:

Unknown at this time.

6. What is meant by Mr. Doe and Ms. Roe "physically felt each other" in the car on the way to the party?

Response to No. 6:

Objection. Responding party asserts the Fifth Amendment to the United States Constitution that provides that "No person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, [infringement of grand jury witness's privilege does not excuse perjury; citing *Bryson v. United States* (1969) 396 U.S. 64]; *Black v. State Bar* (1972) 7 C.3d 676, 685.

7. Was Mr. Doe with Ms. Roe the entire time at the party?

Response to No. 7:

Objection. This question is vague, ambiguous, unintelligible and overly broad in its failure to be limited in time and scope and in its use of the term "with."

Without waiving the foregoing objection, John Doe responds as follows:

August 25, 2014
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Responding party does not recall if the pair were next to and immediately adjacent to each other the entire time at the party, but responding party does not recall either leaving the party's confines until the end of the evening.

8. Did either of the pair eat anything at the party?

Response to No. 8:
No.

9. Did Mr. Doe feel intoxicated at the party?

Response to No. 9:
Objection, this question is vague, ambiguous, unintelligible and overly broad in its use of the term "intoxicated" and also calls for expert testimony.

10. What did Ms. Roe and Mr. Doe do together at the party when they "hung out"? What did they talk about?

Response to No. 10:
Objection. This question is vague, ambiguous, unintelligible and overly broad in its use of the terms "hung out."

Without waiving the foregoing objection, John Doe responds as follows:

Responding party does not recall.

11. Did Ms. Roe appear intoxicated at the party?

Response to No. 11:
Objection, this question is vague, ambiguous, unintelligible and overly broad in its use of the term "intoxicated" and also calls for expert testimony.

12. Who suggested the pair go back to Mr. Doe 's apartment?

Response to No. 12:
Objection. This question is vague, ambiguous, unintelligible and overly broad in its use of the terms "suggested."

Without waiving the foregoing objection, John Doe responds as follows:

August 25, 2014
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Jane Roe planned to stay over that evening at John Doe 's apartment as she had brought clothing over prior to the pre-party so that she could have a change of clothes in the morning.

13. Did they go straight from the party to Mr. Doe 's residence?

Response to No. 13:
Yes.

14. How long did the parties and Mr. Doe 's roommate visit in the common room when they returned from the party? What did they talk about?

Response to No. 14:
Responding party does not recall.

15. Who suggested the parties go back to Mr. Doe 's room?

Response to No. 15:
Objection. This question is vague, ambiguous, unintelligible and overly broad in its use of the term "suggested."

Without waiving the foregoing objection, John Doe responds as follows:

Responding party does not recall.

16. What did the parties talk about in the bedroom and for how long did they talk before kissing?

Response to No. 16:
Responding party does not recall.

17. During the night of January 31, 2014 and into the morning of February 1, 2014, what were the pair talking and laughing about?

Response to No. 17:
Responding party does not recall.

August 25, 2014
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

18. What did the pair talk about the morning of February 1st?

Response to No. 18:
Responding party does not recall.

19. Was there any touching between the parties the morning of February 1st?

Response to No. 19:
Objection. This question is vague, ambiguous, unintelligible and overly broad in its use of the terms "touching between the parties."

20. Did Mr. Doe see Ms. Roe in person after the weekend of the alleged incident? If so, what was the nature of this contact?

Response to No. 20:
Yes. The pair sat next to each other and studied.

21. When did Mr. Doe learn of Ms. Roe 's contact with the University regarding the alleged incident (either a formal report or any other University contact) and how did he learn of it?

Response to No. 21:
Objection. This question is vague, ambiguous and overly broad in its failure to be limited in time and scope and in its use of the terms "learn of" and in its failure to define "alleged incident." As such, John Doe is unable to respond at this time.

The above represents our offer of proof regarding your questions. Should you have any further questions or comments regarding this matter concerning Mr. Doe , please do not hesitate to call or email me. I would appreciate receiving the results of your office's investigation when complete.

Sincerely,

Matthew H. Haberkorn, Esq.

cc: John Doe

HP LaserJet *M2727nf MFP*

Fax Confirmation Report

HABERKORN & ASSOCIATES
16503321528
Aug-25-2014 3:27PM

Job	Date	Time	Type	Identification	Duration	Pages	Result
32	8/25/2014	3:24:51PM	Send	18585340393	2:10	6	OK

HABERKORN & ASSOCIATES

MATTHEW H. HABERKORN, ESQ.
ATTORNEY AT LAW

PO Box 7474
Menlo Park, CA 94025
e-mail: matthewhaberkorn@mac.com

TELEPHONE (650) 268-8378 FACSIMILE (650) 332-1528

August 25, 2014

Via Fax and Email Only
Fax: (858) 534-0393
Email: edalcourt@ucsd.edu
Elena Acevedo Dalcourt
Complaint Resolution Officer
Office for the Prevention of Harassment & Discrimination
University of California, San Diego
9500 Gilman Drive Mail Code 0024
La Jolla, CA 92093-0024

Re: June 16, 2014 Request for Formal Investigation
Submitting Party: Jane Roe

Dear Ms. Dalcourt:

As you have previously been advised, the undersigned represents Ryan Levy in regard to the aforementioned matter. As you have also been advised, Mr. Levy will still not agree at this time to be interviewed and/or provide a written or recorded statement based upon his Constitutional rights afforded to him.

On August 22, 2014, you forwarded an email containing a list of 21 questions your office would like answered by John Doe. In light of the foregoing, and as legal counsel for Mr. Doe, I make the following offer of proof regarding these questions.

1. Can Mr. Doe provide copies of the text exchange referenced in the "offer of proof" whereby he said something to the effect that he did not want Ms. Roe to become too intoxicated and "did not want her to do anything 'stupid.'"

   Response to No. 1:
   Objection. Responding party asserts the Fifth Amendment to the United States Constitution that provides that "No person … shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (See *United States v. Mandujano* (1976) 425 U.S. 564, (infringement of grand jury witness's privilege does not excuse perjury; citing

EXHIBIT D

From: **Dalcourt, Elena** edalcourt@ucsd.edu
Subject: RE: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe
Date: August 26, 2014 at 2:57 PM
To: **matthew haberkorn** matthewhaberkorn@mac.com

Dear Mr. Haberkorn,

Thank you for sending your client's response. As you are aware, we typically conduct interviews in person, and the nature of the questions posed to your client are the type of questions we ask in in-person interviews. As you have declined on your client's behalf an in-person interview, we are attempting to provide your client an opportunity to supply relevant information, the same opportunity provided to the complainant. As we discussed previously, this is not a criminal proceeding; it is an administrative investigation. If you have additional information to provide on behalf of your client, you can do so at any time while the investigation is pending. You may also suggest any witnesses you believe can supply relevant information.

For clarity and in addition to the June 16, 2014 Request for Formal Investigation submitted by complainant Jane Roe , I would like to outline the specific allegations our office is investigating, as details have emerged from interviews with the complainant and relevant witnesses. We are investigating the following allegations:

1) An alleged violation of the UC San Diego Student Sex Offense Policy (the "Sex Offense Policy", link provided previously on 7/22) on the night of January 31st, 2014 involving sexual intercourse while the complainant was allegedly incapacitated and unable to provide effective consent under the Sex Offense Policy;

2) An alleged violation of the Sex Offense Policy on the morning of February 1st, 2014 involving digital penetration without consent; and

3) An alleged violation of the Sex Offense Policy with respect to retaliation, including harassment, threats and intimidation on the night of May 14, 2014 at an off-campus party.

Please let me know if you have any questions regarding the above or our process.

Best Regards,

Elena Acevedo Dalcourt
UC San Diego - Office for the Prevention of Harassment & Discrimination
(858) 534-9104

-----Original Message-----
From: matthew haberkorn [mailto:matthewhaberkorn@mac.com]
Sent: Tuesday, August 26, 2014 8:58 AM
To: Dalcourt, Elena
Subject: Re: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe

Ms. Dalcourt.

Thank you for the confirming email.

I'm hopeful that with the information provided thus far by way of an offer of proof, and your ongoing investigation, this matter will be resolved shortly and John Doe will be exonerated of any and all complaints submitted by Jane Roe .

Sincerely,

Matthew H. Haberkorn, Esq.
Haberkorn & Associates, a Professional Corporation
Mail: PO Box 7474 Menlo Park, CA 94025
e: matthewhaberkorn@mac.com
t: 650-268-8378
f: 650-332-1528

695 Oak Grove Avenue, Suite 210
Menlo Park, CA 94025
****
*

On Aug 26, 2014, at 8:36 AM, Dalcourt, Elena <edalcourt@ucsd.edu> wrote:

> Dear Mr. Haberkorn,
>
> I wanted to confirm I received this. I am at an offsite meeting and will respond further shortly.
>
> Best Regards,
>
> Elena Acevedo Dalcourt
> UC San Diego - Office for the Prevention of Harassment & Discrimination
> (858) 534-9104
>
>
>
> -----Original Message-----
> From: matthew haberkorn [mailto:matthewhaberkorn@mac.com]

> Sent: Monday, August 25, 2014 3:30 PM
> To: Dalcourt, Elena
> Subject: June 16, 2014 Request for Formal Investigation Submitting Party: Jane Roe
>
>
> Matthew H. Haberkorn, Esq.
> Haberkorn & Associates, a Professional Corporation
> Mail: PO Box 7474 Menlo Park, CA 94025
> e: matthewhaberkorn@mac.com
> t: 650-268-8378
> f: 650-332-1528
>
> 695 Oak Grove Avenue, Suite 210
> Menlo Park, CA 94025
>

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EXHIBIT E

SAN DIEGO: OFFICE FOR THE PREVENTION OF
HARASSMENT & DISCRIMINATION, 0024
LA JOLLA, CALIFORNIA 92093-0024
(858) 534-8298 OR (858) 534-8297

September 10, 2014

BENJAMIN T. WHITE, Director, Office of Student Conduct
Mail Code: 0067

Re: Investigation of allegations against John Doe

Dear Mr. White:

The Office for the Prevention of Harassment and Discrimination (OPHD) was asked to investigate whether John Doe 's conduct on the night of January 31, 2014 and into the morning of February 1, 2014, as well as on May 14, 2014, violated the UC San Diego Student Sex Offense Policy (the "Student Sex Offense Policy"). I interviewed the complainant, 14 witnesses, and reviewed text messages. The respondent, through his attorney, declined to be interviewed, but his attorney submitted on his behalf an "Offer of Proof" on July 29, 2014 in response to the complainant's Request for Formal Investigation (described below). The respondent also answered or submitted "objections" to written questions provided by OPHD through a second "Offer of Proof," submitted by his attorney on August 25, 2014. Based upon the evidence, I find that there is insufficient evidence to determine whether a policy violation has occurred with respect to two of the allegations detailed below; however I find reasonable cause to believe the Student Sex Offense Policy has been violated with respect to one allegation.

Complaint

Jane Roe submitted a written report to the UC San Diego Office of Student Conduct on June 5, 2014 stating that following an exchange between her sorority and Mr. Doe 's fraternity, Mr. Doe engaged in sexual intercourse with her while she was incapacitated due to alcohol. The report was then forwarded to OPHD for investigation. During the first interview with OPHD, Ms. Roe expanded upon her original complaint, alleging that on the morning of February 1, 2014, Mr. Doe digitally penetrated her more than once after ignoring her objections. Ms. Roe also alleged that on May 14, 2014, Mr. Doe retaliated against her by intimidating, harassing and

threatening her at an off-campus party. Ms. Parrish's Request for Formal Investigation ("RFI," attached) was submitted to OPHD on June 16, 2014.[1]

Investigation

In this section, the background interactions of Ms. Roe and Mr. Doe will be discussed first, then each of the above-mentioned allegations are discussed in turn, with details as described by the parties and by witnesses.

Background

I first met with Ms. Parrish on June 12, 2014, and conducted a follow-up interview on July 29, 2014. Ms. Roe reported that after seeing Mr. Doe at social events, she spent time alone with him for the first time at UCSD Spirit Night on January 24, 2014. She stated that after exchanging kisses later in the night, the two had a conversation about going back to Mr. Doe's residence at Revelle College. Ms. Roe said that Mr. Doe told her that he preferred she spend the night at his place if she was coming back with him, because her own apartment was at the other end of campus. Ms. Roe said she told Mr. Doe that she did not intend to have sex with him because she was of the Mormon faith and was intending to abstain from intercourse until marriage. She said she told Mr. Doe that if this was a problem for him, she could go home. Ms. Roe said that Mr. Doe indicated that this was fine, and so they went to his residence.

Ms. Roe stated that while they were "making out" at Mr. Doe's residence that night, Mr. Doe told her that he really wished they could have sex, and she told him that she had been drinking, and that if she were to make a different decision regarding sex, it was not a decision she would make drunk. Ms. Roe explained in the interview that the only way she would make a different decision would be if she was in a committed relationship for a long time. Ms. Roe said that Mr. Doe told her that she shouldn't make the decision drunk, and that he would never sleep with her if she was drunk. Ms. Roe stated that after she apologized for declining to have sex, Mr. Doe said, "I won't make you," which made her uncomfortable. She stated that this put her on edge and made her feel like "he could make [her] have sex if he wanted, but that he was doing [her] a favor by not."

Ms. Roe reported that during the week following Spirit Night, she and Mr. Doe got together two or three more times and "hung out." During these visits, she said the two "made out" and that she performed consensual oral sex on Mr. Doe, but that they

[1] Due to the summer break, OPHD experienced difficulties reaching several of the student witnesses via phone and email, as most were away from the San Diego area until the fall. OPHD conducted interviews in person and via Skype and telephone, and interviewed some witnesses more than once to ask follow-up questions.

never engaged in sexual intercourse. Ms. Roe stated that each time they were "hooking up," Mr. Doe would ask repeatedly to have sexual intercourse, and that she would reply that she wished she could, but that it was something very special to her that she was saving until marriage. She reported that each time he would reply, "Well I won't make you," which continued to make her feel uncomfortable. Ms. Roe said that at times Mr. Doe would say things like, "This sucks," indicating his frustration that they could not have intercourse.

In the "Offer of Proof" dated July 29, 2014 (the "First Offer of Proof"), Mr. Doe 's attorney confirmed what he had stated in a previous email, that Mr. Doe was not agreeing to be interviewed or to provide a written or recorded statement, citing his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The First Offer of Proof confirmed on behalf of Mr. Doe that the two had begun "hanging out" prior to the night of January 31, 2014 and had had a conversation about Ms. Roe wishing to abstain from sex before marriage. The First Offer of Proof stated that Mr. Doe "made it clear that he had no problem with [Ms. Roe 's] request." The First Offer of Proof stated that on several occasions prior to the party on January 31, Ms. Roe would go to Mr. Doe 's residence or he would go to her room, and that during these "encounters," "they both expressed an interest in having intercourse." The First Offer of Proof further stated that "Ms. Roe eventually communicated to Mr. Doe that she was now becoming a bit more ambivalent in respect to her abstinence," and that Mr. Doe communicated to her that he would be willing to engage in intercourse if she ever decided she wanted to.

The First Offer of Proof provided that in the week leading up to the exchange and sorority formal, "Ms. Roe would send numerous text messages 'non-stop' throughout the days and nights" and also that Ms. Roe indicated that she "liked [Mr. Doe] a lot." The First Offer of Proof stated that although Mr. Doe liked Ms. Roe , "he tried to keep their relationship less serious." The First Offer of Proof also stated that Ms. Roe expressed through text messages leading up to the weekend of the events that she was excited to "get intoxicated and spend the night with Mr. Doe on the upcoming Friday," and that she desired Mr. Doe to "spend the night at her apartment after her sorority formal on Saturday night." The First Offer of Proof stated that Mr. Doe replied that "he did not have any interest in having her become intoxicated, for Mr. Doe knew Ms. Roe was somewhat new to drinking and he did not want her to do anything 'stupid.'"

Through his attorney, Mr. Doe provided screen shots of text messages in the days leading up to the weekend. The text exchanges appear to show that both parties intended to get drunk during the weekend, and that Mr. Doe asked Ms. Roe if she was "down to come back here" to his apartment after the party on Friday night. He added that he was sure it would be "interesting like last time haha." The texts also

appear to show that Ms. Roe told Mr. Doe her room was "open for Saturday if we decide to do that," because her roommate was going home.

Friday, January 31, 2014

On Friday, January 31 2014, Mr. Doe 's fraternity (Pi Kappa Alpha) hosted an exchange with Ms. Roe 's sorority (Pi Beta Phi) at Regents Park condominiums in La Jolla, near the UC San Diego campus. Ms. Roe stated that Mr. Doe invited her and some of her friends to his apartment to "pregame" before the exchange on Friday. Ms. Roe stated she arrived at Mr. Doe 's apartment around 9:30 or 10 pm, and brought a change of clothes with her in case she decided to stay the night, though she was still not planning on having sexual intercourse with him. Ms. Roe said that this event was only the second or third time she had ever drank alcohol, and that she was very inexperienced and did not know her limits. She said she accepted vodka that Mr. Doe poured for her into a red Solo cup, and that she drank the vodka followed by a chaser.

Ms. Roe estimated that Mr. Doe refilled her cup twice. She did not know how many total shots of vodka this constituted, but that the amount in the cup was definitely more than one shot.[2] Ms. Roe said that Mr. Doe was not forcing her to drink, but that he was encouraging her to drink what he poured. Ms. Roe could not remember what she had eaten prior to coming to the pre-party, but remembered that no food was served there. Ms. Roe reported that friends were telling her she was being very loud. Ms. Roe said Mr. Doe told her not to "throw up" in their bathroom because another girl had done so recently.

Before leaving Mr. Doe 's apartment, Ms. Roe said she took one more "shot" from her cup. She stated that she and Mr. Doe briefly went into his room and kissed. She said she was "really drunk by then" and did not know how long they had been at the pre-party, but estimated it was an hour or less.

Ms. Roe stated that after the pre-party, her memory of the night became very blurry. She recalled going to the party and walking around, talking to friends. She remembered Mr. Doe coming up behind her and putting his arms around her. She said he would at times try to "feel [her] up" in front of other people and that she pushed his arms down and said, "Stop- we are in public." Ms. Roe remembered taking "a big swig" from a

[2] Text messages from later in the weekend appear to show that Ms. Roe and a friend "pieced together" that she likely had around 7.5 shots during the night. The exact time period in which this occurred could not be confirmed after interviews and the Offer of Proof documents; however based on the evidence, it was likely over a period of two to three hours from Ms. Roe 's first drink until the time the parties returned to Mr. Doe 's apartment and no more than four hours, as confirmed by witnesses who stayed at the party longer than Ms. Roe and Mr. Doe .

"handle" of some kind of alcohol, and telling a sorority sister repeatedly how drunk she was.[3]

Ms. Roe estimated that after being at the party for what seemed like a short time--around 30 to 40 minutes-- Mr. Doe grabbed her hand and told her that a "pledge" from his fraternity was there to drive them back to his apartment. Ms. Roe said she did not remember much about the drive back, except that the driver was a fraternity pledge with whom she had previously had a disagreement. She said she talked to him and apologized for what had gone on before. Ms. Roe stated that after they had arrived at Mr. Doe's residence, she realized she did not have her phone. She said she vaguely remembered waiting for the driver to come back so that she could retrieve her phone.

After this point, Ms. Roe said she does not remember much of the rest of the night. She stated that she was "disoriented" and "not in control of her body." She stated that her last memory was of going up to Mr. Doe's apartment and going into his room. She said she remembered starting to kiss but that was her last memory from the night of the party. During my second interview with Ms. Roe, she stated that she had recently experienced a "flashback" of Mr. Doe on top of her, then getting off of her, and that she rolled to her side and began to cry. She said that Mr. Doe did nothing when she cried and turned the other direction.

Mr. Doe's First Offer of Proof affirms that Ms. Roe and her friends came to "pre-game" at his residence, and that Ms. Roe left a change of clothes in Mr. Doe's room. The First Offer of Proof stated that because they knew they "had a long night ahead of them," those present at the pre-party "consciously made an effort to 'take it easy' on the beverages during the pregame." The First Offer of Proof stated that Mr. Doe and Ms. Roe "shared some peach vodka upon [Ms. Roe's] request that Mr. Doe pour [Ms. Roe] some," and that Mr. Doe recalled personally finishing "some of Ms. Roe's drinks" so that Ms. Roe "did not overdo her consumption." The First Offer of Proof stated that "at no point during this pregame did Mr. Doe force or encourage Ms. Roe to drink any more than she desired herself."

Mr. Doe's "Offer of Proof" dated August 25, 2014 (the "Second Offer of Proof") answered, in response to a written question asking how many shots of vodka each of the parties consumed, as estimated by Mr. Doe, that Ms. Roe consumed "4 or 5 shots of peach vodka but no more," and that "no other alcohol was consumed at the pre-party."[4]

---

[3] A "handle" is a bottle containing 1.75 liters of liquor/alcohol or one half gallon.

[4] Mr. Doe's Second Offer of Proof contained "objections" to most of the questions asked, describing the questions as vague, ambiguous and overly broad. Some "objections" were made as assertions of privilege under the Fifth Amendment to the U.S. Constitution. The Second Offer of Proof offered limited responses to certain questions asked "without waiving the foregoing objection."

The First Offer of Proof stated that "in the car on the way to the party, Mr. Doe and Ms. Roe physically felt each other, but there was nothing beyond this willing and mutual touching engaged in by both parties." The First Offer of Proof stated that once at the party, Mr. Doe and Ms. Roe "each talked with friends and 'hung out' a little together for about an hour or two." The First Offer of Proof stated that "at no time during the party did Mr. Doe grab Ms. Roe , 'feel her up,' or make attempts at acts of public affection." The First Offer of Proof stated that neither party consumed any alcoholic beverages at the party.

Witnesses interviewed estimated that they were with Ms. Roe at the pre-party for about an hour before leaving for the exchange. None of the witnesses knew how much alcohol Ms. Roe consumed at the pre-party. Witnesses differed in their accounts as to the levels of intoxication of Ms. Roe at the pre-party and at the exchange. One witness said Ms. Roe was "pretty gone," another said she was "pretty messed up," and another said she was "definitely intoxicated." These witnesses described Ms. Roe as talking loudly and excessively, and as having a "glassy" or "dragging" look in her eyes. One witness said Ms. Roe was "falling" into people at the party. Text messages reviewed appeared to show that following the weekend, one of Ms. Roe 's sorority sisters asked her if she received a citation from the sorority for her conduct Friday night. Other witnesses, however, described Ms. Roe as "talky," and appearing to have "had a few drinks" but "not super drunk" and said she was not slurring words or having trouble standing. A sorority sister of Ms. Roe 's stated that it is a sorority policy to help members home if they are "out of control" and that they would have taken Ms. Roe home if she had appeared "not ok." Other text messages appeared to show that a sorority member told her she was "not all over the place" but that Ms. Roe just kept saying how drunk she was. Witnesses reported that many in Ms. Roe 's social circle were aware that she was inexperienced with alcohol, and that she had only ever consumed alcohol a few times. They reported that Ms. Roe did not know her limits with alcohol.

None of the witnesses reported having spent much time with Ms. Roe and Mr. Doe at the party, but rather that they saw the two in passing. Witnesses report that the party was very crowded, and that at any given time there could have been 30 to 40 or more people in the large Regents Park condominium. Two witnesses recalled seeing Ms. Roe take at least one "swig" from a "handle" of alcohol at the party. One witness stated that Ms. Roe and Mr. Doe were taking turns drinking from the same bottle.

The First Offer of Proof stated that when Mr. Doe and Ms. Roe returned to Mr. Doe 's apartment with Mr. Doe 's roommate, "Ms. Roe was talkative and alert," and that the two talked with Mr. Doe 's roommate before going into his room. The First

Offer of Proof stated that "after talking some more in the bedroom, the pair started kissing."

On behalf of Mr. Doe , Mr. Doe 's attorney stated in email exchanges and in the First Offer of Proof that Mr. Doe was asserting his Fifth Amendment privileges against self-incrimination with respect to all inquiry specifically relating to sexual activity. Accordingly, the First Offer of Proof did not refer to any physical activity in Mr. Doe 's bedroom other than kissing. The First Offer of Proof stated that "later," "Ms. Roe went out into the common room to drink some water and relax, and that Mr. Doe stayed in his bedroom." The First Offer of Proof also stated that Mr. Doe 's roommate told him later that morning that he could hear Mr. Doe and Ms. Roe "talking all night" and that he thought it was "'pretty funny.'" In response to written questions about the parties visitation with Mr. Doe 's roommate prior to going to his bedroom, and about the circumstances in the bedroom before intimate activity, the Second Offer of Proof stated, after "objections," that "Responding party does not recall."

A roommate of Mr. Doe 's reported talking with Mr. Doe and Ms. Roe when the pair returned to the apartment, and that neither seemed overly intoxicated. The driver who took the parties to Mr. Doe 's apartment acknowledged the previous argument and apology by Ms. Roe , and also stated that the parties were not "out of control." The driver stated that Mr. Doe 's roommate, who he also drove home, was very intoxicated, and also offered his opinion of Ms. Roe 's character after their previous altercation. A different roommate of Mr. Doe 's reported hearing the two laughing and talking in Mr. Doe 's room at some point during the night after he returned home.

Saturday, February 1, 2014

Ms. Roe reported that when she woke up on the morning of February 1, she "had the idea" that she and Mr. Doe had sex but could not remember any detail about what had happened. She remembered Mr. Doe saying something about being hung over and asking if she was as well. She said she replied that she didn't feel well. Ms. Roe said she told Mr. Doe that she was uncomfortable with what happened, and he said something like, "That's what happens your first time," and "you asked for it." Ms. RiRoe said Mr. Doe then put his hands down her underwear and entered her vagina with his finger, and that she told him, "Stop, it hurts really bad." She said her body felt very sore inside. Ms. Roe said Mr. Doe entered her with his fingers a total of three times, though she told him she was not in the mood, and repeated that it hurt and pushed his hand away. She said Mr. Doe replied, after one of the times she said it hurt, "Well I guess that means I did my job right," and smiled. Ms. Roe said she then excused herself because she felt like she was going to be sick, dressed and went into the common room with a bottle of water. She said that Mr. Doe again told her not to throw up in their bathroom. She stated that this was at 7 am, which appeared to be confirmed

by a text message sent to one of her sorority sisters stating that she was not feeling well.[5] She said that after a short time she went back into Mr. Doe 's room to ask him to take her home. She said that Mr. Doe replied that he had a headache and would take her home later. Ms. Roe said she stayed in the common room waiting for Mr. Doe to take her home for about an hour or two.

Ms. Roe said that when she got home, she spent the next two to three hours crying in her room. She said she was upset with herself "for letting something like this happen,"and "not waiting like [she] wanted to." Ms. Roe said she called a friend and asked her to come over. The friend reported that Ms. Roe was very upset and could not recall details from the night.

The First Offer of Proof stated that on the morning of February 1, "Mr. Doe drove Ms. Roe to her home," and that "the pair planned to meet up later for Ms. Roe 's formal."

Ms. Roe stated she "did not want to have to tell anyone" that Mr. Doe was no longer her date so she went with Mr. Doe to the sorority formal. She stated that she did not want to drink again with Mr. Doe and also did not feel good. She reported that throughout the night, Mr. Doe asked her if they were going to have sex again and that she told him she did not want to, to which he replied, "What's twice?" Ms. Roe said she told Mr. Doe that she "wasn't counting last night as [her] first time" and that he got offended and said that this hurt his feelings. She said she told him she had spent most of the day crying about what happened, and that he got upset, "freaked out" and began yelling at her and asking her why she would say this, and if she was trying to make him feel bad or guilty. Ms. Roe said she felt "so small" and that she had "given up on [herself]" and had "given up on fighting [Mr. Doe]." When the sorority formal had ended, she stated that she and Mr. Doe went back to her room and had sexual intercourse again. She said she felt resigned and tired and thought, "If it's going to happen, let's just get it over with." Ms. Roe said that "it kept hurting" and that she would ask him to stop. She said that Mr. Doe would stop and then after some time would try with his finger, then ask to "do it with [his] penis." Ms. Roe said that Mr. Doe used a condom, but it fell off and he tried to put it back on. Ms. Roe said Mr. Doe asked to have sex without a condom and that she stated she would not have sex without one. Ms. Roe said that Mr. Doe then stopped.

The following morning (Sunday, February 2), Ms. Roe said that she "just wanted [Mr. Doe] to leave" and to forget that anything had happened. She stated that Mr. Doe

[5] Ms. Roe explained that she did not tell her friend about what happened because at the time she was really confused and "trying to figure it all out." She also stated that this was not something she wanted to discuss over text, but rather wanted to wait until she could talk to her friend in person.

wanted to have sex again and asked her to perform oral sex but that she did not want to. She said she told him she was tired and that she would not. Ms. Roe said Mr. Doe argued with her and tried to "guilt [her] into it by saying that he had 'blue balls," and also that "if he had to do the walk of shame back to Revelle he might as well have something to be ashamed of." Texts appear to show that Ms. Roe told her sorority sister that she wanted Mr. Doe to leave. Ms. Roe said Mr. Doe read the text over her shoulder and was offended, so she wrote back to her friend that she was joking and wanted him to stay. Ms. Roe said that after Mr. Doe 's friend came to pick him up, she sat in her room feeling "pathetic and worthless" and that she "just wanted to forget everything and move on."

Regarding Saturday, February 1, the First Offer of Proof stated that Mr. Doe and Ms. Roe "drank minimally" at the sorority formal and walked to Ms. Roe 's residence following the party. The First Offer of Proof stated that the two started kissing in Ms. Roe 's room. It then stated that the following morning, a friend of Mr. Doe 's picked him up.

In response to questions about any touching between the parties on February 1, the Second Offer of Proof either did not answer specific questions, or stated after "objections," that "Responding party does not recall."

Text messages provided by Ms. Roe and another friend appear to show that on Sunday, February 2, Mr. Doe and Ms. Roe engaged in text exchanges about what had occurred Friday night. Ms. Roe appeared to have texted her friend that Mr. Doe said he was sorry that he made her feel bad and that he had made sure everything was what she wanted at the time. She appeared to relay that he said he was really drunk too and did not realize she was "that bad." Ms. Roe appeared to have told her friend that she told Mr. Doe she had been "too drunk to make important decisions" and that she shouldn't have gone home with him, but that he "shouldn't have tried anything." Ms. Roe told her friend that Mr. Doe said, "How can you blame me you agreed to do it so we did it." Ms. Roe then told her friend she replied, "I also said I never wanted to before and I wouldn't want to make the decision drunk and you said you wouldn't if I was drunk and I think you took advantage of the fact that I was drunk to do things I wouldn't have agreed to otherwise." Ms. Roe texted her friend that Mr. Doe replied that he "wasn't the kind of guy to take advantage of someone when they're drunk" and that he said "I know you wouldn't have done it sober and I'm sorry you regret it..."[6]

[6] Ms. Roe said that she was in part paraphrasing Mr. Doe 's texts in these exchanges, and also cutting and pasting some of the texts.

Ms. Roe appeared to text her friend that Mr. Doe drove over to her apartment and talked to her in his car. She stated that he kept apologizing and that the conversation ended with her saying "thank you for taking the time to apologize but it really doesn't change much I'm still upset…"

Ms. Roe said that a few days later she asked Mr. Doe whether he had used a condom on Friday January 31 and that he replied he did not. She said she also asked whether he pulled out before ejaculating and he said he did not.

Ms. Roe said she later went to the Sexual Assault and Violence Prevention Resource Center (SARC) [redacted]

May 14, 2014 – Retaliation

Following the weekend of January 31, Ms. Roe said she tried be cordial to Mr. Doe and talked to him when he talked to her, but that she was very uncomfortable when he would sit near her in the class they shared. She appeared to text friends that she did not want to "cause a scene." She said that at times Mr. Doe would try to convince her it was not a big deal and that she would go along with what he said, sometimes to "placate" him. She said she was occasionally at the same party as Mr. Doe and if he had been drinking he would come up to her and wrap his arms around her, touch her bottom or pull her towards him or push her into a corner to talk. She said that when Mr. Doe gets drunk he gets "handsy." She stated that one such occasion was around Week 2 of Spring Quarter. Ms. Roe said she was at a party where Mr. Doe was and that he invited her and a friend to do cocaine with him. Ms. Roe said Mr. Doe pulled her towards him and she said "John stop. I've been so nice." Ms. Roe said that on February 18, after she declined an invitation from Mr. Doe to hang out, Mr. Doe said "I feel bad about what happened but it happened and it's over." Ms. Roe said she responded that it was not over for her and that him saying that was not going to make things better.

Ms. Roe said that on February 24, she ignored Mr. Doe on campus, and that after this encounter, he texted her "U could at least be cordial… I mean c'mon really." She stated that on March 3, Mr. Doe got upset with her for "making him out to be the bad guy" when what happened was "largely [her] fault."

Ms. Roe said that on the night of May 14, Mr. Doe had been coming up to her at an off-campus party and that she had already asked him nicely to leave her alone. Ms. Roe said that when she was talking to one of Mr. Doe's roommates about their parents having worked for the same company, Mr. Doe came up to her and started

mocking her, saying "Wow, Jane ," and "Cool story, Jane ." At this time Ms. Roe said she asked him firmly to leave her alone again and told him not to talk to her again, and that by this time she was upset. Ms. Roe said that Mr. Doe began yelling at her saying, "I could ruin your life," "I could say things that would make you drop out of UCSD," and "I could get you kicked out." Ms. Roe said that Mr. Doe 's roommate intervened and took Mr. Doe away, and apologized to Ms. Roe , telling her that they (Mr. Doe 's friends) would keep Mr. Doe away from her. Following this event Ms. Roe said that she told her friends she never wanted to have contact with Mr. Doe again. The following day, however, Ms. Roe said (and screen shots of texts appeared to show) that Mr. Doe sent a text saying: "I have no reason to ever talk to you again nor do I want anything to do with you but I'm asking that u stop going around telling people I raped u because first off it's far from the truth and secondly it's starting a lot of unnecessary drama. That's a serious accusation to make and it's not okay. This should have ended a long time ago."

Two witnesses confirmed being present when Mr. Doe made the above-mentioned comments. Mr. Doe 's roommate stated he had limited memory of the event but that he did speak with Ms. Roe directly following this incident and that he told her she did not have to talk to Mr. Doe after this encounter. The roommate stated that he heard rumors that Ms. Roe might be reporting an offense to the University. He stated that he was not sure what Mr. Doe had heard regarding these rumors. Ms. Roe said she believed it was extremely likely that Mr. Doe knew of her contact with SARC, since a friend that accompanied her to SARC was talking to his friends about her allegations.

The Second Offer of Proof stated, in response to a question about contact between the parties following the weekend of January 31, "Yes. The pair sat next to each other and studied." In response to a question regarding when Mr. Doe learned of Ms. Roe 's contact with the University regarding this complaint, the Second Offer of Proof stated an "objection," then stated that due to the broad nature of the question, "John Doe is unable to respond at this time."

Discussion and Findings

Section III (A) of the Student Sex Offense Policy states, in part:

> "Sexual assault" occurs when physical sexual activity is deliberately engaged in without the consent of the other person. Such conduct may include... Taking advantage of the other person's incapacitation (including voluntary intoxication)...

Section III (E) of the Student Sex Offense Policy defines "incapacitation" as follows:

> [T]he physical and/or mental inability to make informed, rational judgments. States of incapacitation include, but are not limited to unconsciousness, sleep and blackouts. Where alcohol or drugs are involved, incapacitation is defined with respect to how the alcohol or other drug consumed affects a person's decision-making capacity, awareness of consequences, and ability to make fully informed judgments.

The following is also included in the definition of "incapacitation":

> Being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent. The factors to be considered when determining whether consent was given include whether the person accused knew, or whether a reasonable person should have known, that the complainant was incapacitated.

The Student Sex Offense Policy further states in Section III (D) that it is the responsibility of the person wanting to engage in the specific sexual activity to make sure that he or she has effective consent. "Effective consent" is defined as consent that is "informed" meaning that "both parties demonstrate clear and mutual understanding of exactly what they are consenting to." A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Consent must be ongoing throughout a sexual encounter and can be revoked at any time. Once consent is withdrawn, the sexual activity must stop immediately.

Often the only witnesses present during alleged incidents of sexual assault are the complainant and the respondent. When there are conflicting reports from the parties, weighing credibility is essential. Observations, actions, consistency in detail, bias and demeanor may be taken into consideration when deciding credibility of a witness. The standard to be used in weighing evidence is the "preponderance of the evidence" standard, or "more likely than not."

Friday, January 31, 2014 – Re: Lack of Consent due to Incapacitation

With respect to the allegation that on Friday, January 31 Mr. Doe took advantage of Ms. Roe 's incapacitation to have sex with her, I find that while Ms. Roe is credible in her assertion that she was in a blackout during sexual intercourse, there is insufficient evidence to show that based on Ms. Roe 's behavior, Mr. Doe knew or should have known that Ms. Roe was incapacitated. Based upon the evidence, it seems Ms. Roe consumed a significant amount of alcohol in a relatively short period of time; however it is unclear as to how Ms. Roe exhibited intoxication and if Mr. Doe knew or should have known that Ms. Roe was incapacitated and was therefore unable to provide effective consent. Witnesses differed in their accounts as to how Ms. Roe was behaving. Some witnesses reported observing that Ms. Roe was very

intoxicated; others reported observing that she had clearly been drinking, but that she was not to the point of incapacitation.[7] While it is possible, due to the short time frame in which Ms. Roe consumed this amount of alcohol, that she did not experience its full effect for some time (and thus could not have been observed by third parties in a state of incapacitation), there is insufficient evidence of the alcohol's full effect.

The witnesses who saw Ms. Roe at the latest point in the night before she went to Mr. Doe 's room were Mr. Doe 's roommate and the person who drove the parties back to Mr. Doe 's apartment. I did not deem Mr. Doe 's roommate, who rode home with the parties, credible. He first said that a fraternity pledge drove all of them home, and then when I followed up for the full name of the pledge (which he could not remember when first interviewed) he told me that he had called an Uber taxi but did not have the receipt. He also said that he did not have much to drink on the night of January 31 and was sober when he returned with the parties, though another witness reported he was very drunk upon arriving home. Similarly, I questioned the possible bias of the driver in relating Ms. Roe 's level of intoxication, as he demonstrated a clear animosity for her resulting from an earlier disagreement and may not have wanted to corroborate her story, which he recounted in the interview and stated he knew from rumor.

Without an opportunity to interview Mr. Doe , I was unable to assess his credibility in his apparent assertion (as evident through text messages) that he obtained consent for sexual activity. Additionally, another of Mr. Doe 's roommates, who I deemed credible, reported that he heard the parties laughing and talking at some point during the night, suggesting that Ms. Roe was not, at least at some point, passed out or unconscious. Based upon the evidence, it is not clear whether Mr. knew or should have known that Ms. Roe was not merely intoxicated; but rather incapacitated and therefore unable to provide effective consent.

Saturday, February 1, 2014 – Re: Ignoring Objections

With respect to the morning of February 1, I find reasonable cause to believe University policy was violated. I find 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. I find Ms. Roe did not intend to engage in any sexual activity during the morning, and that Mr. Doe ignored Ms. Roe 's wishes that he refrain from touching her and entering her. I find Ms. Roe credible in stating that Mr. Doe said that he must have done "[his] job right" due to the fact that Ms. Roe was in

[7] It is possible some of the witnesses stating Ms. Roe was not incapacitated had reason to underplay her intoxication (such as the fact that they are close friends of Mr. Doe 's); however the only clear issues with credibility were with Mr. Doe 's roommate and the driver, as discussed in this section.

pain, which shows he did not see her communication of pain as a reason to stop, as would a reasonable person in the respondent's position.

In interviews, I found Ms. Roe to have been genuinely traumatized by the events in connection with Mr. Doe. I find that Ms. Roe exhibited signs of a trauma victim [redacted] I find that her actions, though at times counter-intuitive, are consistent with young college students in the first months away from parents and restrictive environments, and consistent with the actions of trauma victims who attempt to cope with trauma by normalizing what has occurred.

Based upon the totality of the circumstances and the evidence presented, I find it more likely than not that on February 1, Mr. Doe ignored Ms. Roe 's objections to sexual activity in violation of the Student Sex Offense Policy.

May 14, 2014 – Re: Retaliation

Section VIII (C) of the Student Sex Offense Policy prohibits retaliation against persons making a report under the Policy. Section VIII (C) states that "[r]etaliation includes, but is not limited to, harassment, threats, intimidation, reprisals, and/or adverse actions. Such actions could be physical, verbal, written or electronic."

The basis for a claim of retaliation includes: (1) the claimant engaged in a protected activity (such as being a complainant or witness in an investigation); (2) the one accused of retaliation knew about the claimant's protected activity; (3) the claimant suffered an adverse action as described above and (4) there is a causal link between the protected activity and the adverse action.

It is clear that Ms. Roe engaged in a protected activity by filing a complaint with the University regarding a sex offense. Additionally, I find that it is likely, based upon the evidence that on May 14, 2014, Mr. Levy made statements that were intimidating, harassing and threatening in nature, which may be deemed as retaliatory acts as prohibited by the Student Sex Offense Policy. However, while I deem Ms. Roe credible in her belief that Mr. Doe likely knew that she had visited SARC to report that she had been assaulted, there is insufficient evidence to determine by a preponderance of the evidence that Mr. Doe knew of this contact with University, and deemed it a "report" to the University.

At the time of the alleged retaliatory acts, Ms. Roe had not yet filed a report with the Office of Student Conduct or with OPHD, but she had been receiving services at SARC. It is possible a student could deem contact with SARC as a report to the University, and thus a protected activity. Based upon the evidence it is likely that Mr. Doe knew that

Ms. Roe deemed their sexual encounter on January 31 as "rape" (based upon his text sent May 15) given that he asked her to "stop going around telling people I raped u." It is indeed possible that Mr. Doe learned of Ms. Roe 's contact with the University through SARC via Ms. Roe 's friends who were close with Mr. Doe and his circle of friends, but we cannot determine with sufficient certainty Mr. Doe 's knowledge of this contact. Mr. Doe 's attorney commented in a phone conversation on August 27, 2014 that his client "could not recall" when he first learned of Ms. Roe 's contact with the University in connection with her complaint, and there are no witnesses that can confirm Mr. Doe 's knowledge of this contact. Thus, there is insufficient evidence to find that the Student Sex Offense Policy was violated due to retaliation.

Conclusion

This matter is referred to you for appropriate corrective or disciplinary action. I will inform Ms. Roe and Mr. Doe (through his attorney) that this investigation is complete. Each is entitled to a copy of this report, which may be redacted in accordance with University policy.

Please let me know if I can provide any further assistance on this matter.

Respectfully Submitted,

Elena Acevedo Dalcourt
Complaint Resolution Officer

cc: Sherry Mallory, Dean of Student Affairs, Revelle College

STUDENT SEX OFFENSE POLICY
REQUEST FOR FORMAL INVESTIGATION

Date June 16, 2014

Name Jane Roe

Name of Respondent JohnDoe

Telephone (if known) (415) 290-0922

Email (if known) _____

Complainant
- Gender Female
- (Undergraduate student)
- Graduate student
- Other _____

Respondent
- Gender Male
- (Undergraduate student)
- Graduate student
- Other _____

Summary of incident(s) (use additional pages if necessary)
PLEASE NOTE THAT THE RESPONDENT IS ENTITLED TO A COPY OF THIS FORM.

see attached

Office for the Prevention of Harassment & Discrimination (OPHD)
201 University Center
(858) 534-8298
http://ophd.ucsd.edu
(rev. 12/2013)

On January 31, John Doe's fraternity and my sorority had an exchange planned and John invited some of my friends and me to pregame at his place. I brought a change of clothes to his place to sleep in in case I decided to spend the night after the party, but was not planning on having sex with him. At the pregame, there weren't any shot glasses, and this being the second or third time I had drank, I was very inexperienced and was unsure of what to do. John poured me amounts of vodka into red solo cups and then I would periodically drink them alternating with a chaser. He didn't force the drinks on me, but he did encourage me to drink what he gave me and I wasn't really sure of what I was doing and how much I should be drinking. After this the night gets blurry. I remember going to the party and walking around talking to my friends and having John follow me and wrap his arms around me and try to feel me up in front of other people. I remember half-heartedly pushing his hands away but I wasn't fully aware of what was going on. I then remember after what seemed like a short time later, John grabbed my hand and told me that a pledge was there to drive us home. I went outside and I vaguely remember the ride back to campus and I remember being disoriented and not feeling in control of my body. I then remember taking the elevator up to his apartment and going into his room and after that I really don't remember very much. I remember starting to kiss him and that's pretty much it. When I woke up in the morning, I had the idea that we had had sex but I didn't remember any details such as whether he used a condom or what it felt like or anything like that. He later told me that he did not use a condom [redacted] That morning, I remember telling him that I felt weird about what happened and him telling me that it was fine and that I wanted it. He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop. He then told me "Well I guess that means I did my job right" and smiled. I then excused myself because I felt like I was going to throw up and went into his common room with a bottle of water to breathe and try to collect my thoughts. I went back in and asked him to take me home to which he responded that he had a headache and would in a little bit. I then spent the next hour or two waiting for him to take me home because I didn't want to walk across campus. When I got home, I sat in my room and cried for 2-3 hours because at this point I was so upset with myself for letting something like this happen and for not waiting like I had wanted to. I called my friend Miranda and was telling her how upset I was and she comforted me but didn't say anything about this not being my fault.

That night, February 1st, was the night of my sorority formal and John was my date. I didn't want to have to tell anyone why he was no longer my date so I went with him. Throughout the night he asked me if we were going to have sex again and I told him that I didn't want to, to which he responded, "What's twice?" I told him that I wasn't counting last night as my first time and he got offended and said that hurt his feelings. I told him that I had spent most of the day crying about what happened and he got upset and began yelling at me asking me why I would say that to him and if I was trying to make him feel bad or guilty and that I couldn't blame him for what happened because I wanted it. I remember feeling so small and insignificant and I had given up on myself and given up on fighting with him. He then asked to come

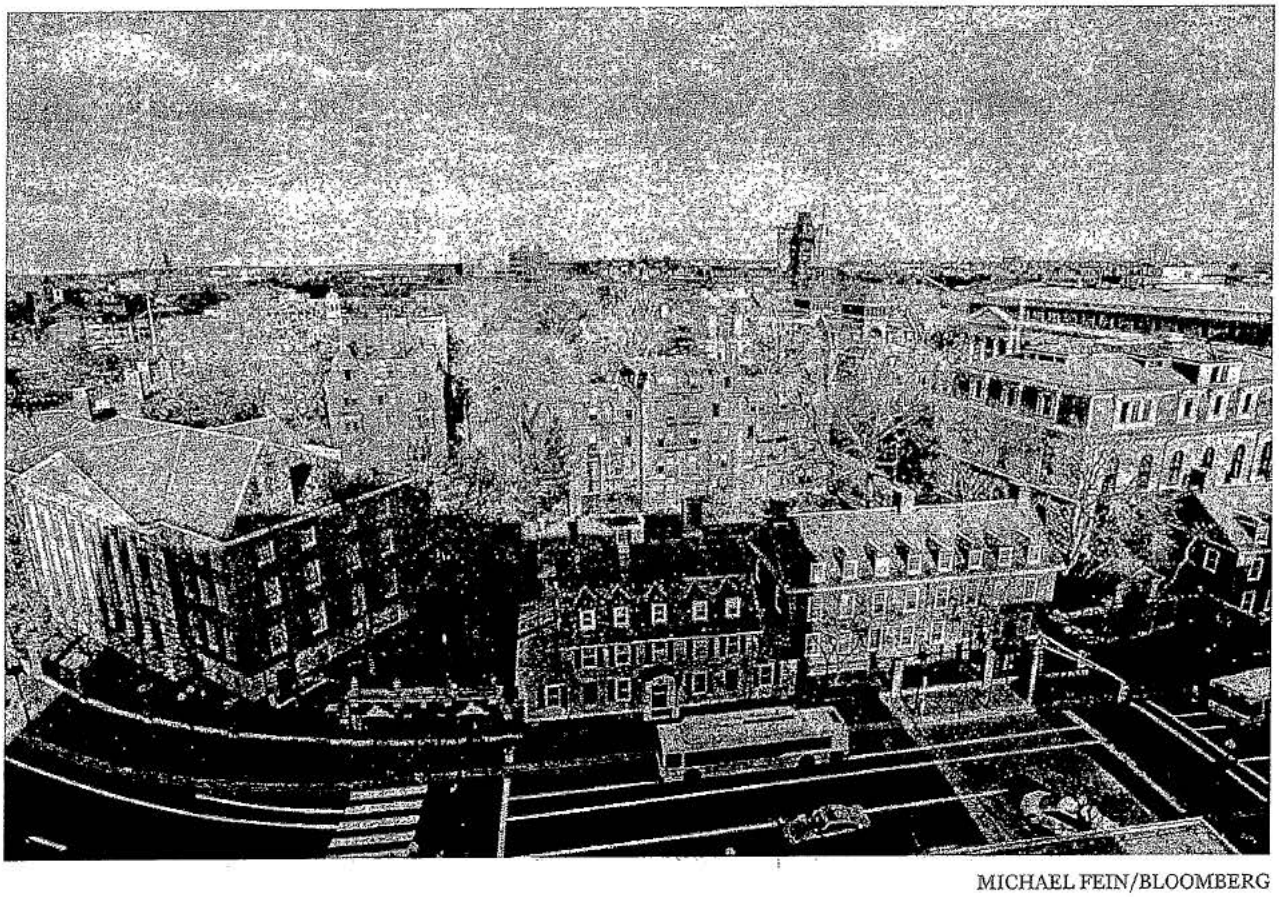
over after the dance and I agreed and we went back to my place. We began hooking up and ended up having sex again and I felt so disgusted with myself and so upset with the whole situation and in the morning I just wanted him to leave and pretend none of this had ever happened but he kept asking me to perform oral sex on him and I kept saying I was tired and I didn't want to and he would argue with me a little bit and try to guilt me into it by saying that he had "blue-balls" and that if he had to do a walk of shame back to Revelle he might as well have something to be ashamed of. I refused and ultimately one of his friends came to pick him up and I sat in my room feeling pathetic and worthless and I just wanted to forget everything and move on.

Within the next week I told two of my friends, Kendall and Maggie, what had happened and they both assured me that what happened wasn't my fault and that John had taken advantage of me. I then took to the internet to research rape and consent and their definitions and implications. It was then that I realized that what happened to me was rape, I was in no condition to be able to give consent and with John having had prior knowledge of the fact that I didn't want to have sex and he took advantage of me when I was highly intoxicated. [redacted] I have been working to heal and find a new normal, and I am finally ready to report John as I don't want what happened to me to happen to other girls, and I don't believe that he thinks he did anything wrong in reference to sleeping with me and I want him to know that he broke the law and he has to pay the consequences for it.

EXHIBIT F

OPINION

Rethink Harvard's sexual harassment policy



MICHAEL FEIN/BLOOMBERG

| OCTOBER 15, 2014

In July, Harvard University announced a new university-wide policy aimed at preventing sexual harassment and sexual violence based on gender, sexual orientation, and gender identity.

The new policy, which applies to all schools within the university and to all Harvard faculty, administrators, and students, sets up the Office for Sexual and Gender-Based Dispute Resolution to process complaints against students. Both the definition of sexual harassment and the procedures for disciplining students are new, with the policy taking effect this academic year. Like many universities across the nation, Harvard acted under pressure imposed by the federal government, which has threatened to withhold funds for universities not complying with its idea of appropriate sexual harassment policy.

CONTINUE READING BELOW ▼

In response, 28 members of the Harvard Law School Faculty have issued the following statement:

AS MEMBERS of the faculty of Harvard Law School, we write to voice our strong objections to the Sexual Harassment Policy and Procedures imposed by the central university administration and the Corporation on all parts of the university, including the law school.

We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity. But we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good.

CONTINUE READING IT BELOW ▼

Teachers decry Harvard's shift on sex assaults

Current and retired professors want different guidelines for investigating allegations, asserting that new rules violate the rights of the accused.

5/9 | Vennochi: Harvard is more focused on its own brand

8/11: On campus, a fresh urgency to probe sexual assaults

As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom.

Among our many concerns are the following:

Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation. Here our concerns include but are not limited to the following:

■ The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.

■ The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.

■ The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.

Harvard has inappropriately expanded the scope of forbidden conduct, including by:

■ Adopting a definition of sexual harassment that goes significantly beyond Title IX and Title VII law.

■ Adopting rules governing sexual conduct between students both of whom are impaired or incapacitated, rules which are starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students.

Harvard has pursued a process in arriving at its new sexual harassment policy which violates its own finest traditions of academic freedom and faculty governance, including by the following:

■ Harvard apparently decided simply to defer to the demands of certain federal administrative officials, rather than exercise independent judgment about the kind of sexual harassment policy that would be consistent witb law and with the needs of our students and the larger university community.

■ Harvard failed to engage a broad group of faculty from its different schools, including the law school, in the development of the new sexual harassment policy. And Harvard imposed its new sexual harassment policy on all the schools by fiat without any adequate opportunity for consultation by the relevant faculties.

■ Harvard undermined and effectively destroyed the individual schools' traditional authority to decide discipline for their own students. The sexual harassment policy's provision purporting to leave the schools with decision-making authority over discipline is negated by the university's insistence that its Title IX compliance office's report be totally binding with respect to fact findings and violation decisions.

We call on the university to withdraw this sexual harassment policy and begin the challenging project of carefully thinking through what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and

misconduct in our community.

The goal must not be simply to go as far as possible in the direction of preventing anything that some might characterize as sexual harassment. The goal must instead be to fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom. The law that the Supreme Court and lower federal courts have developed under Title IX and Title VII attempts to balance all these important interests. The university's sexual harassment policy departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials.

We recognize that large amounts of federal funding may ultimately be at stake. But Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats. The issues at stake are vitally important to our students, faculties, and entire community.

Elizabeth Bartholet

Scott Brewer

Robert Clark

Alan Dershowitz, Emeritus

Christine Desan

Charles Donahue

Einer Elhauge

Allen Ferrell

Martha Field

Jesse Fried

Nancy Gertner

Janet Halley

Bruce Hay

Philip Heymann

David Kennedy

Duncan Kennedy

Robert Mnookin

Charles Nesson

Charles Ogletree

Richard Parker

Mark Ramseyer

David Rosenberg

Lewis Sargentich

David Shapiro, Emeritus

Henry Steiner, Emeritus

Jeannie Suk

Lucie White

David Wilkins

More coverage:

- **Harvard professors urge school to rethink sexual harassment policy**

- **Opinion: Harvard's sexual assault policy highlights the need for clarity**
- **White House campaign to combat sexual assault comes to Mass.**
- **State to review campus policies on sex assaults**
- **List of universities, colleges facing US sex assault probe**
- **6/27: Students fight sexual assault accusations**
- **2/3: Sex assault reports up at Boston-area campuses**

SHOW 31 COMMENTS

EXHIBIT G

The New York Times | http://nyti.ms/119MFK7

Mishandling Rape

By JED RUBENFELD NOV. 15, 2014

OUR strategy for dealing with rape on college campuses has failed abysmally. Female students are raped in appalling numbers, and their rapists almost invariably go free. Forced by the federal government, colleges have now gotten into the business of conducting rape trials, but they are not competent to handle this job. They are simultaneously failing to punish rapists adequately and branding students sexual assailants when no sexual assault occurred.

We have to transform our approach to campus rape to get at the root problems, which the new college processes ignore and arguably even exacerbate.

How many rapes occur on our campuses is disputed. The best, most carefully controlled study was conducted for the Department of Justice in 2007; it found that about one in 10 undergraduate women had been raped at college.

But because of low arrest and conviction rates, lack of confidentiality, and fear they won't be believed, only a minuscule percentage of college women who are raped — perhaps only 5 percent or less — report the assault to the police. Research suggests that more than 90 percent of campus rapes are committed by a relatively small percentage of college men — possibly as few as 4 percent — who rape repeatedly, averaging six victims each. Yet these serial rapists overwhelmingly remain at large, escaping serious punishment.

Against this background, the federal government in 2011 mandated a ramped-up sexual assault adjudication process at American colleges, presumably believing that campuses could respond more aggressively than the criminal justice system. So now colleges are conducting trials, often presided over by professors and administrators who know little about law or criminal investigations. At one college last year, the director of a campus bookstore served

as a panelist. The process is inherently unreliable and error-prone.

At Columbia University and Barnard College, more than 20 students have filed complaints against the school for mishandling and rejecting their sexual assault claims. But at Vassar College, Duke University, The University of Michigan and elsewhere, male students who claim innocence have sued because they were found guilty. Mistaken findings of guilt are a real possibility because the federal government is forcing schools to use a lowered evidentiary standard — the "more likely than not" standard, which is much less exacting than criminal law's "proof beyond a reasonable doubt" requirement — at their rape trials. At Harvard, 28 law professors recently condemned the university's new sexual assault procedures for lacking "the most basic elements of fairness and due process" and for being "overwhelmingly stacked against the accused."

Is the answer, then, as conservatives argue, deregulation — getting the government off the universities' backs? Is it, as the Harvard law professors suggest, strengthening procedural protections for the accused?

Neither strategy would get to the true problems: rapists going unpunished, the heady mixture of sex and alcohol on college campuses, and the ways in which colleges are expanding the concept of sexual assault to change its basic meaning.

Consider the illogical message many schools are sending their students about drinking and having sex: that intercourse with someone "under the influence" of alcohol is always rape. Typical is this warning on a joint Hampshire, Mount Holyoke and Smith website: "Agreement given while under the influence of alcohol or other drugs is not considered consent"; "if you have not consented to sexual intercourse, it is rape."

Now consider that one large survey showed that around 40 percent of undergraduates, both men and women, had sex while under the influence of alcohol. Are all these students rape victims? And what if both parties were under the influence? Asked this question, a Duke University dean answered, "Assuming it is a male and female, it is the responsibility in the case of the male to gain consent." This answer shows more ideology than logic.

In fact, sex with someone under the influence is not automatically rape. That misleading statement misrepresents both the law and universities' official

policies. The general rule is that sex with someone incapacitated by alcohol or other drugs is rape. There is — or at least used to be — a big difference. Incapacitation typically means you no longer know what's happening around you or can't manage basic physical activity like walking or standing.

So where is this misleading statement coming from? It's part of the revolution in sexual attitudes and college sex codes that has taken place over the last 50 years. Not long ago, nonmarital sex on college campuses was flatly suppressed. Sex could be punished with suspension or expulsion. This regime kept universities out of the business of adjudicating rape charges. Rape was a matter for the police, not the university.

Beginning in the late 1960s however, sex on campus increasingly came to be permitted. Only nonconsensual sex was prohibited. The problem then became how to define consent.

According to an idealized concept of sexual autonomy, which has substantial traction on college campuses today, sex is truly and freely chosen only when an individual unambiguously desires it under conditions free of coercive pressures, intoxication and power imbalances. In the most extreme version of this view, many acts of seemingly consensual sex are actually rape. Catherine A. MacKinnon took this position in 1983 when she argued that rape and ordinary sexual intercourse were "difficult to distinguish" under conditions of "male dominance."

Today's college sex policies are nowhere near so extreme, but they are motivated by a similar ideal of sexual autonomy. You see this ideal in play when universities tell their female students that if they say yes under the influence of alcohol, it's still rape. You see it in Duke's 2009 regulations, under which sex could be deemed coercive if there were "power differentials" between the students, "real or perceived." You also see it in the new "affirmative" sexual consent standards, like the one recently mandated in California, or in Yale's new policy, according to which sexual assault includes any sexual contact to which someone has not given "positive," "specific" and "unambiguous" consent.

Under this definition, a person who voluntarily gets undressed, gets into bed and has sex with someone, without clearly communicating either yes or no, can

later say — correctly — that he or she was raped. This is not a law school hypothetical. The unambiguous consent standard requires this conclusion.

Sexual assault may not be perfectly defined even in the law, but that term has always implied involuntary sexual activity. The redefinition of consent changes that. It encourages people to think of themselves as sexual assault victims when there was no assault. People can and frequently do have fully voluntary sex without communicating unambiguously; under the new consent standards, that can be deemed rape if one party later feels aggrieved. It will take only one such case to make the news, with a sympathetic defendant, and years of hard work building sexual assault protections for women on campus will he undermined.

Understanding this effort to redefine sexual assault is crucial from a policy standpoint. The new affirmative consent standards are in part an effort to change the culture of sexual relations on campus. "Talking with sexual partners about desires and limits may seem awkward," counsels Yale's official sexual misconduct policy, "but serves as the basis for positive sexual experiences shaped by mutual willingness and respect." If positive sexual experiences are the goal, perhaps schools should continue what they're doing. An unambiguous consent standard will be unenforceable, but enforceability need not be the criterion when the goal is cultural change. Sending the right message may be more important. Nor should schools raise the burden of proof or adopt other due process protections. Those apply when people are accused of crimes — and the new definitions of consent are divorced from criminality.

But if schools are genuinely interested in preventing sexual assault, they need to overhaul how they think about assault and what they do about it. Prevention, rather than adjudication, should be a college's priority.

That means, first of all, we need to stop being so foolish about alcohol on campus. A vast majority of college women's rape claims involve alcohol. Not loug ago, 18-year-olds in many states could drink legally. College-sponsored events could openly involve a keg, with security officers on hand to ensure that things didn't get out of hand. Since 1984, when the federal government compelled states to adopt a drinking age of 21, college alcohol policies have been a mockery.

Prohibition has driven alcohol into private spaces and house parties, with schools largely turning a blind eye. When those spaces and parties are male-dominated, it's a recipe for sexual predation. Such predation has been documented: Attending fraternity parties makes women measurably more likely to be sexually assaulted.

If colleges are serious about reducing rapes, they need to break the links among alcohol, all-male clubs and campus party life. Ideally, we should lower the drinking age so that staff or security personnel could be present at parties.

In any event, schools need to forcibly channel the alcohol party scene out of all-male clubs and teach students "bystander" prevention — how to intervene when one person appears to be taking sexual advantage of another's extreme intoxication. At the same time, students need to be told clearly that if they are voluntarily under the influence (but not incapacitated), they remain responsible for their sexual choices.

Moreover, sexual assault on campus should mean what it means in the outside world and in courts of law. Otherwise, the concept of sexual assault is trivialized, casting doubt on students courageous enough to report an assault.

The college hearing process could then be integrated with law enforcement. The new university procedures offer college rape victims an appealing alternative to filing a complaint with the police. According to a recent New York Times article, a "great majority" of college students now choose to report incidents of assault to their school, not the police, because of anonymity and other perceived advantages.

But the danger is obvious. University proceedings may be exacerbating the fundamental problem: the fact that almost no college rapists are criminally punished — which they will never be if the crimes are never reported to the police. Nationwide, the Department of Justice states that about 35 percent of rapes and sexual assaults were reported to the police in 2013. That's not enough, but it's a lot better than the 5 percent reported by college women.

Rape on campus is substantially enabled by the fact that rapists almost always get away with their crimes. College punishments — sensitivity training, a one-semester suspension — are slaps on the wrist. Even expulsion is radically

deficient. It leaves serial rapists free to rape elsewhere, while their crimes are kept private under confidentiality rules. If college rape trials become a substitute for criminal prosecution, they will paradoxically help rapists avoid the punishment they deserve and require in order for rape to be deterred.

But colleges can't just leave sexual assault victims to the criminal justice system, in part because most victims are so reluctant to report assaults to the police. That is why integrating college rape hearings with law enforcement is critical. New training for the police and prosecutors is essential, too. Special law enforcement liaison officers who know how to respectfully receive and vigorously act on sexual assault complaints should be present in every college town. They should be at every college sexual assault hearing. The rights of the accused have to be protected, but whenever there is evidence of a rape on a college campus, the police need to know.

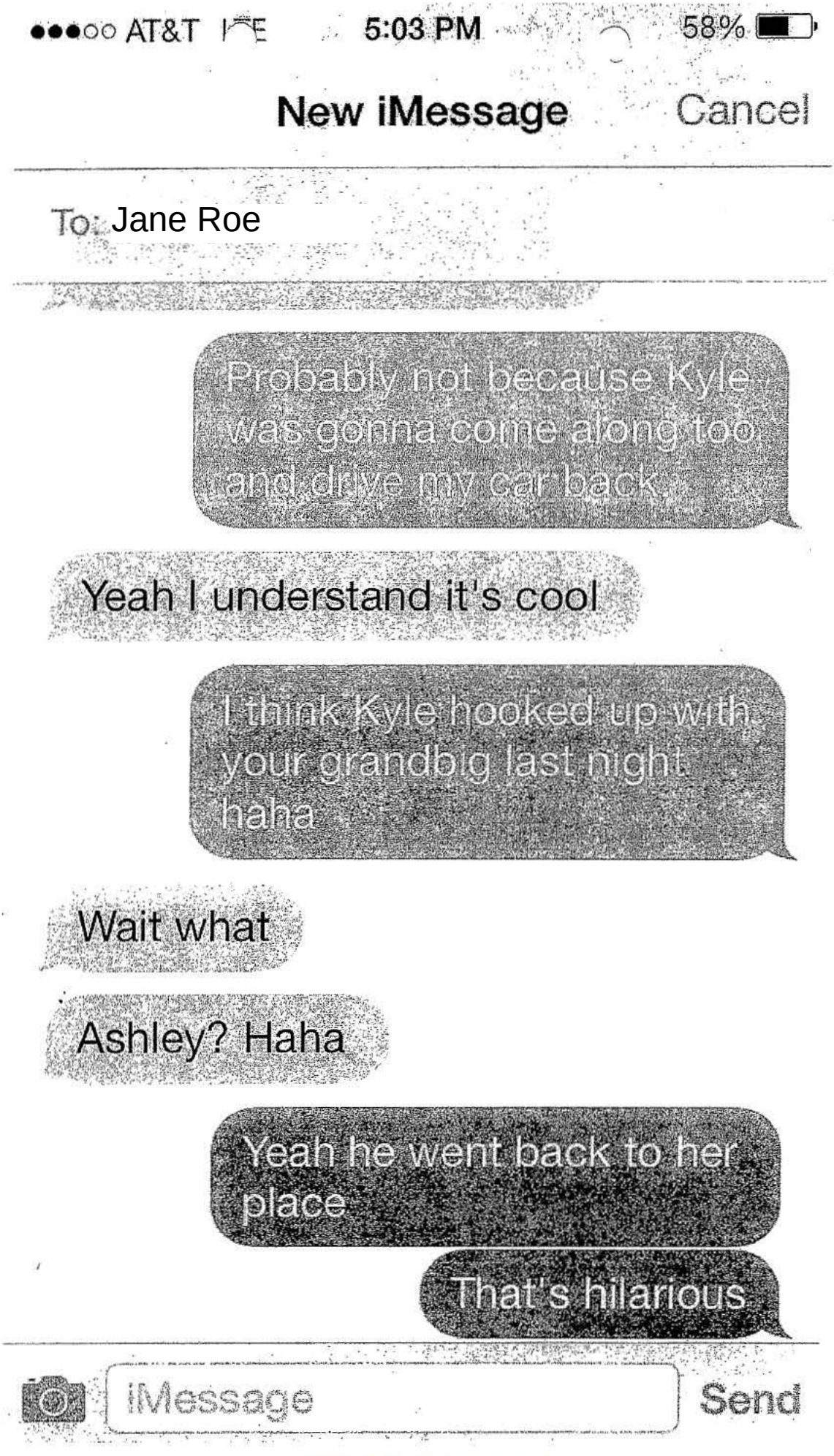
Everything possible should be done to encourage victims to participate in a criminal investigation; if students make a formal complaint of rape to their school, the college should provide them with a lawyer to go with them to the police, help them report the crime and ensure they are treated properly. Meanwhile, the hearing process should be put in the hands of trained investigatory personnel and people with criminal law experience.

Along with returning the definition of sexual assault on campus to its legal meaning, these changes could better protect the accused and help identify and punish rapists.

Jed Rubenfeld is a professor of criminal law at Yale Law School and co-author of "The Triple Package: How Three Unlikely Traits Explain the Rise and Fall of Cultural Groups in America."

A version of this op-ed appears in print on November 16, 2014, on page SR1 of the New York edition with the headline: Mishandling Rape.

EXHIBIT H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To: Jane Roe
Probably not because Kyle was gonna come along too and drive my car back
Yeah I understand it's cool
I think Kyle hooked up with your grandbig last night haha
Wait what
Ashley? Haha
Yeah he went back to her place
That's hilarious
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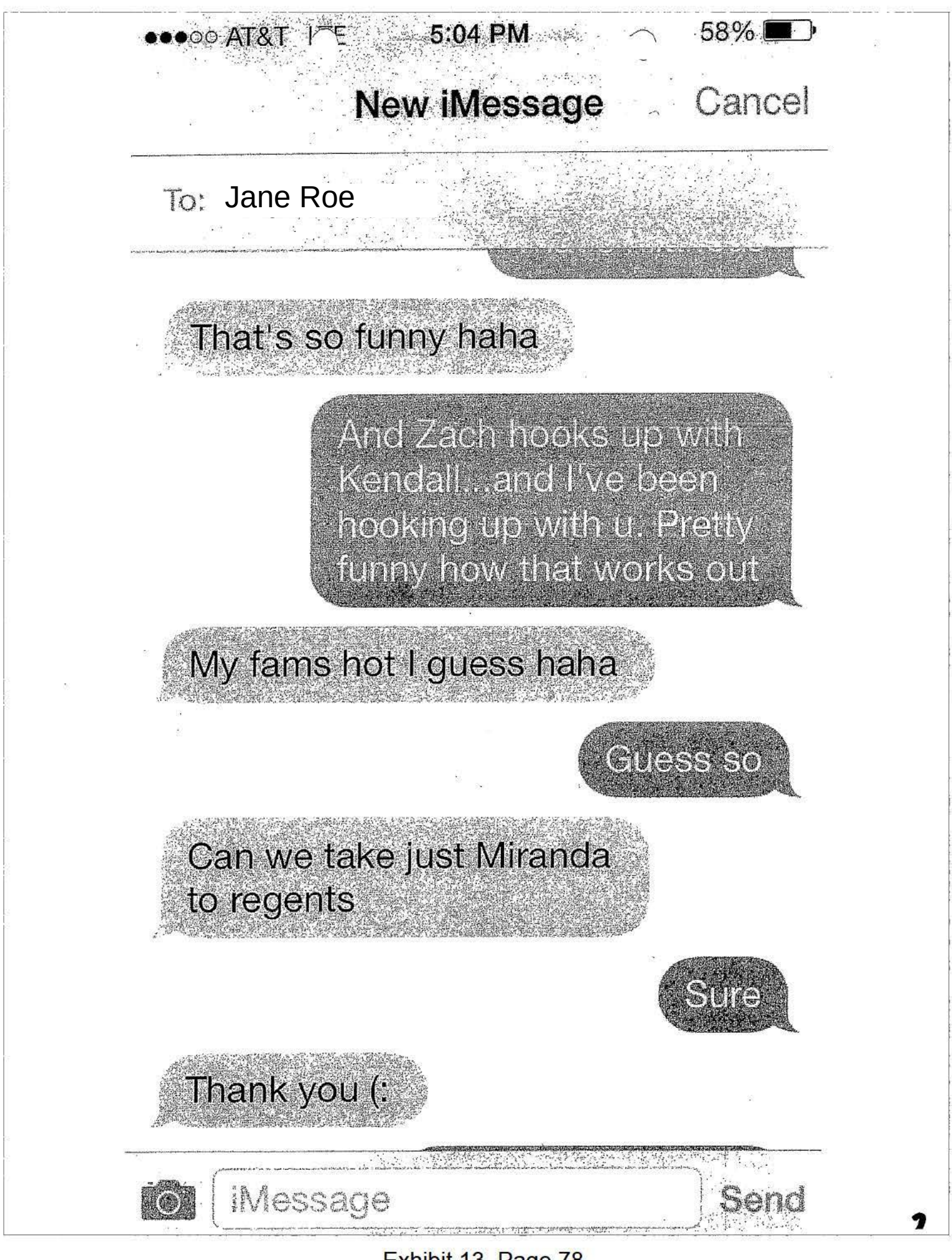
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To: Jane Roe
That's so funny haha
And Zach hooks up with Kendall...and I've been hooking up with u. Pretty funny how that works out
My fams hot I guess haha
Guess so
Can we take just Miranda to regents
Sure
Thank you (:
iMessage
Send


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New iMessage
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To: Jane Roe
Do u have anymore chaser?
A little yeah
Leavin in like 10
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Perfect* haha
Are you guys close?
Just left
Okay
Bring whatever chaser u
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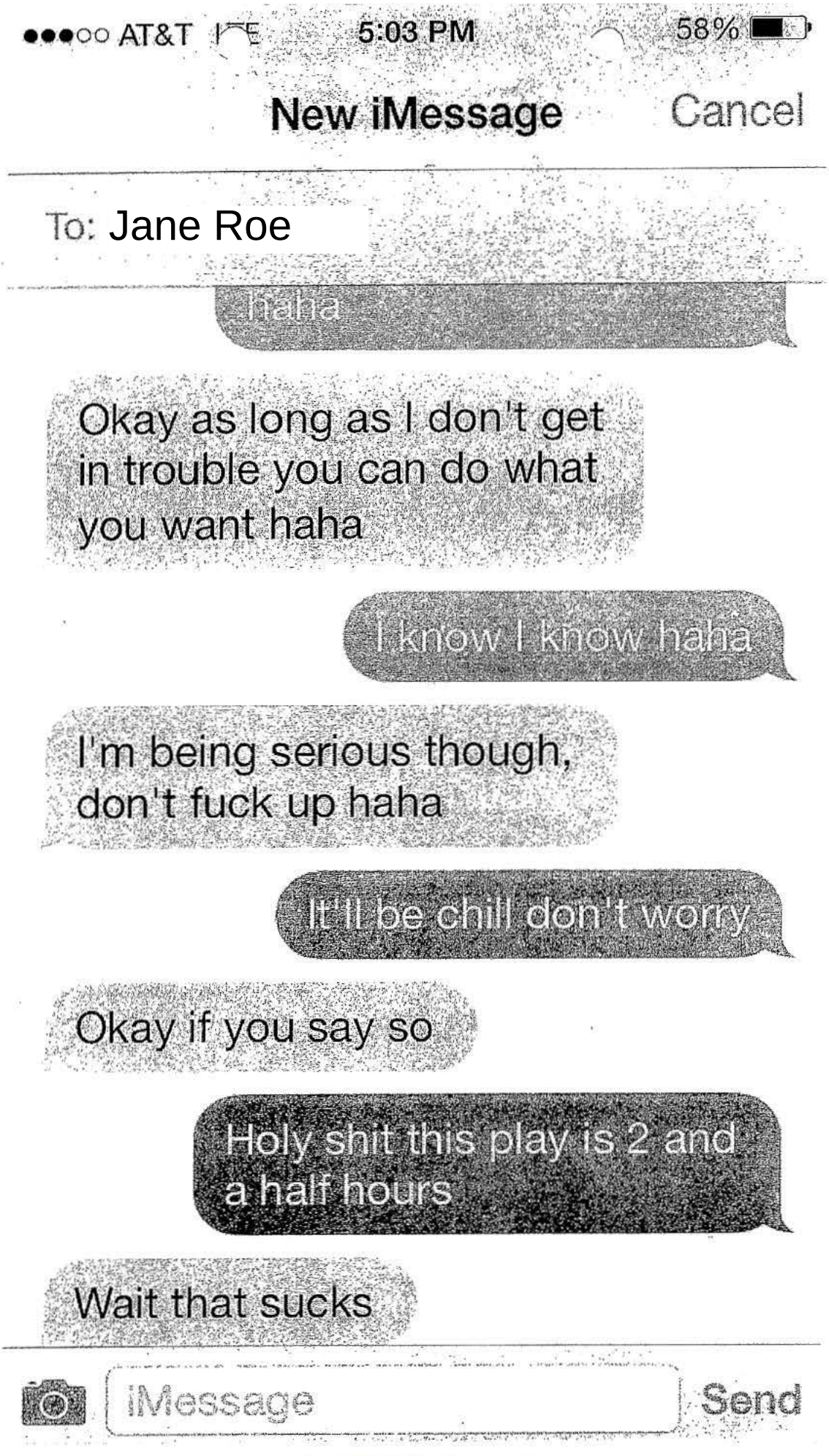
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To: Jane Roe
haha
Okay as long as I don't get in trouble you can do what you want haha
I know I know haha
I'm being serious though, don't fuck up haha
It'll be chill don't worry
Okay if you say so
Holy shit this play is 2 and a half hours
Wait that sucks
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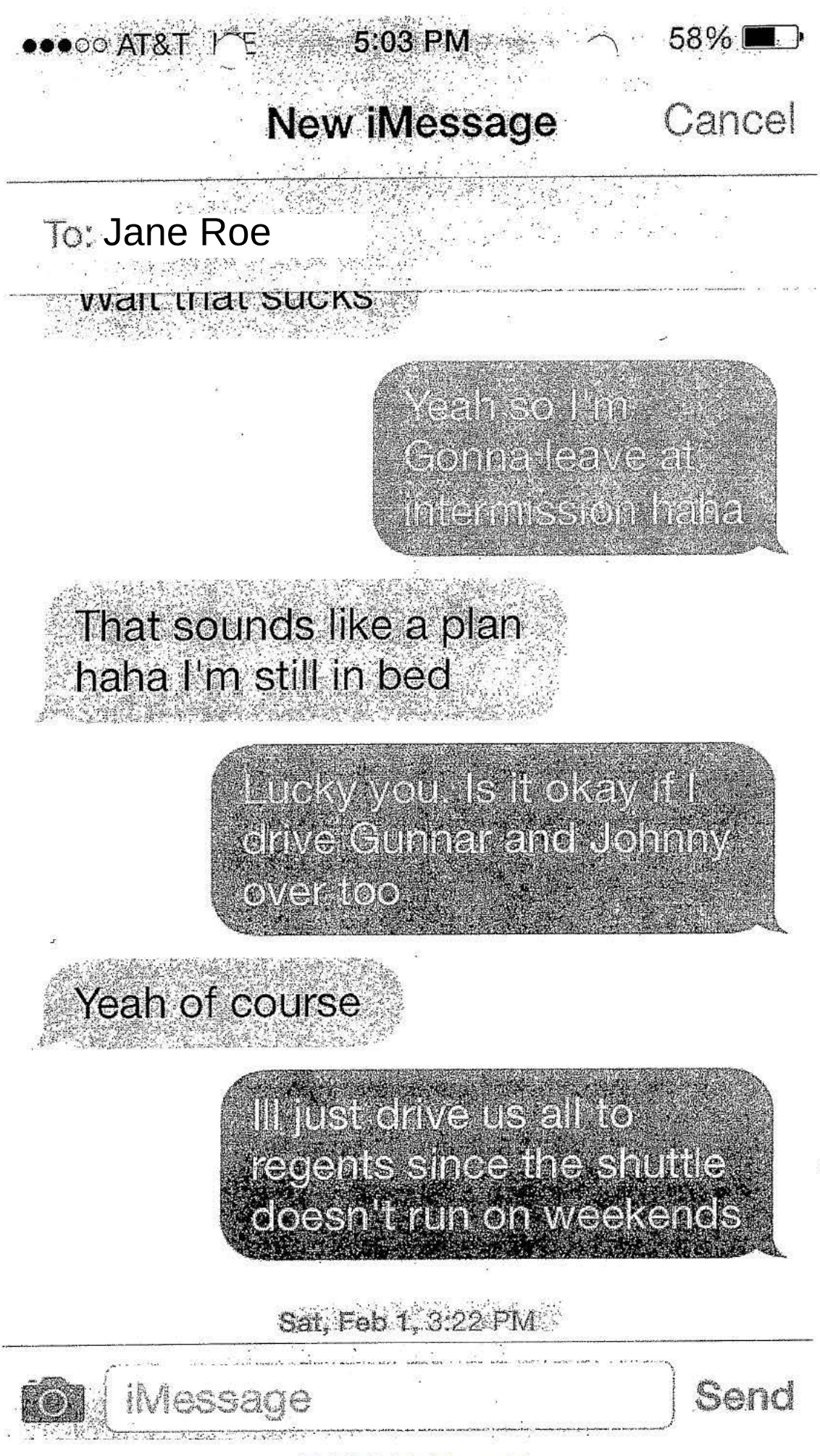
Send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To: Jane Roe
Wait that sucks
Yeah so I'm Gonna leave at intermission haha
That sounds like a plan haha I'm still in bed
Lucky you. Is it okay if I drive Gunnar and Johnny over too
Yeah of course
Ill just drive us all to regents since the shuttle doesn't run on weekends
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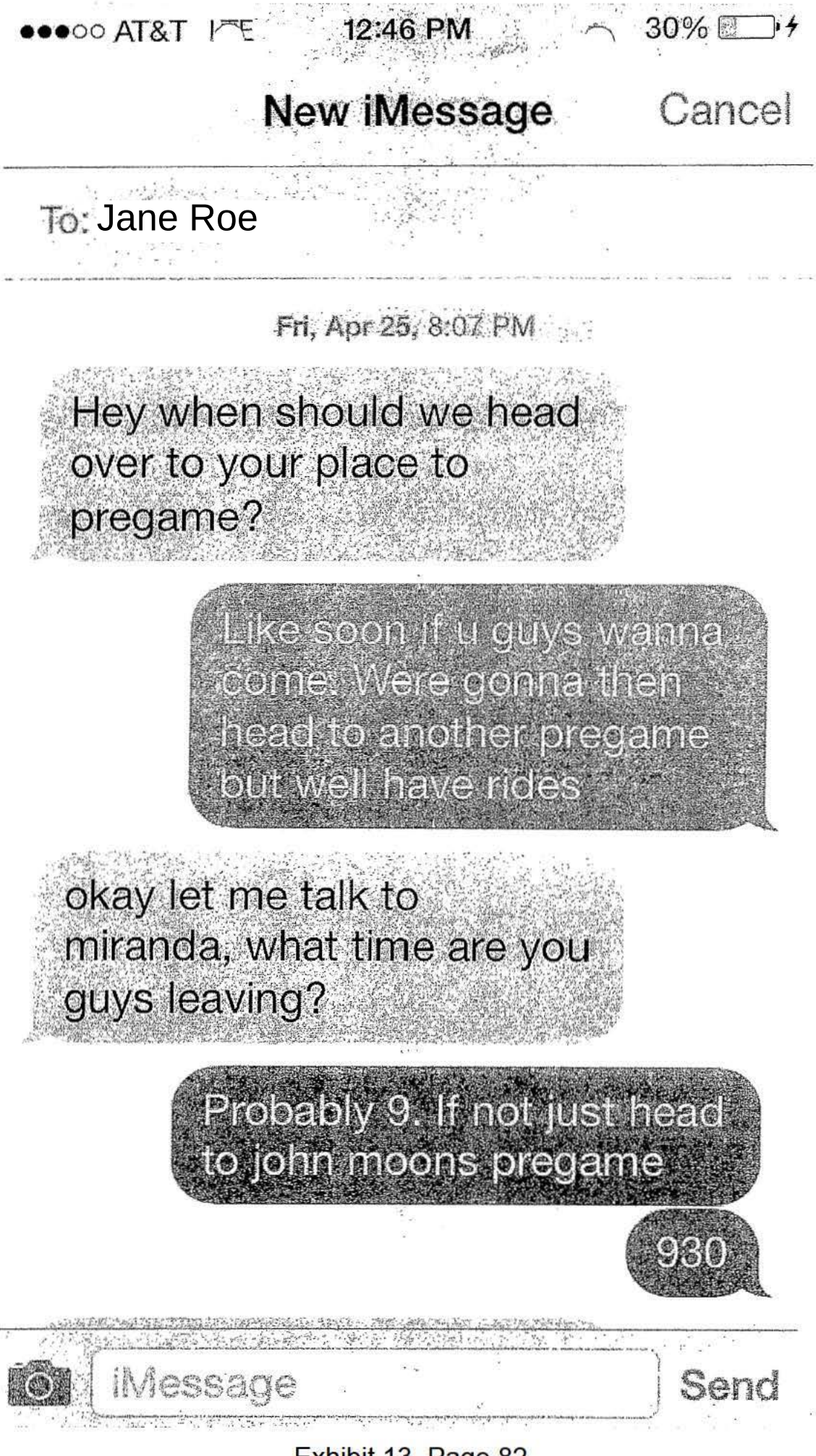
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To: Jane Roe
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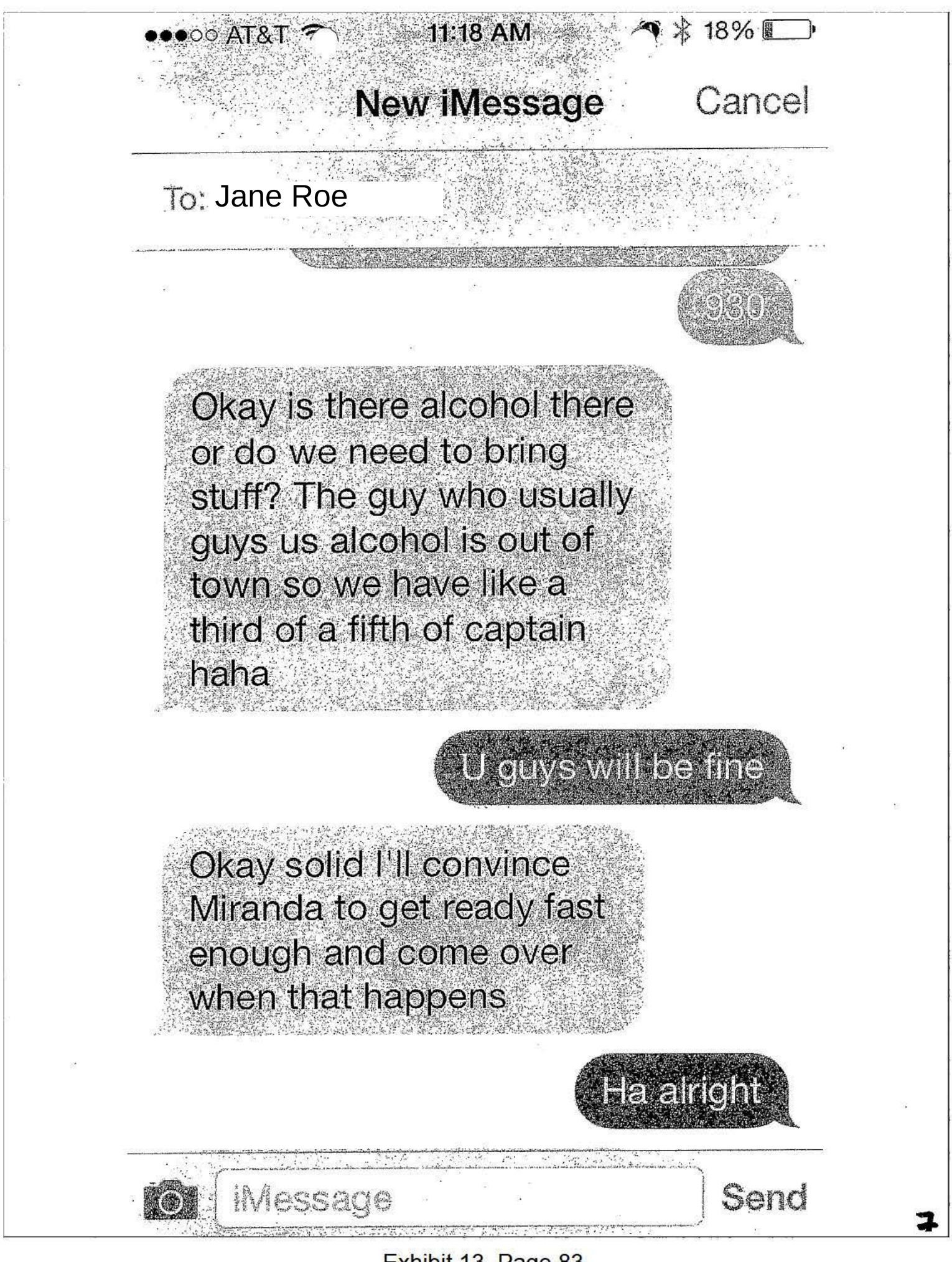
Hey when should we head over to your place to pregame?
Like soon if u guys wanna come. Were gonna then head to another pregame but well have rides
okay let me talk to miranda, what time are you guys leaving?
Probably 9. If not just head to john moons pregame
930
iMessage
Send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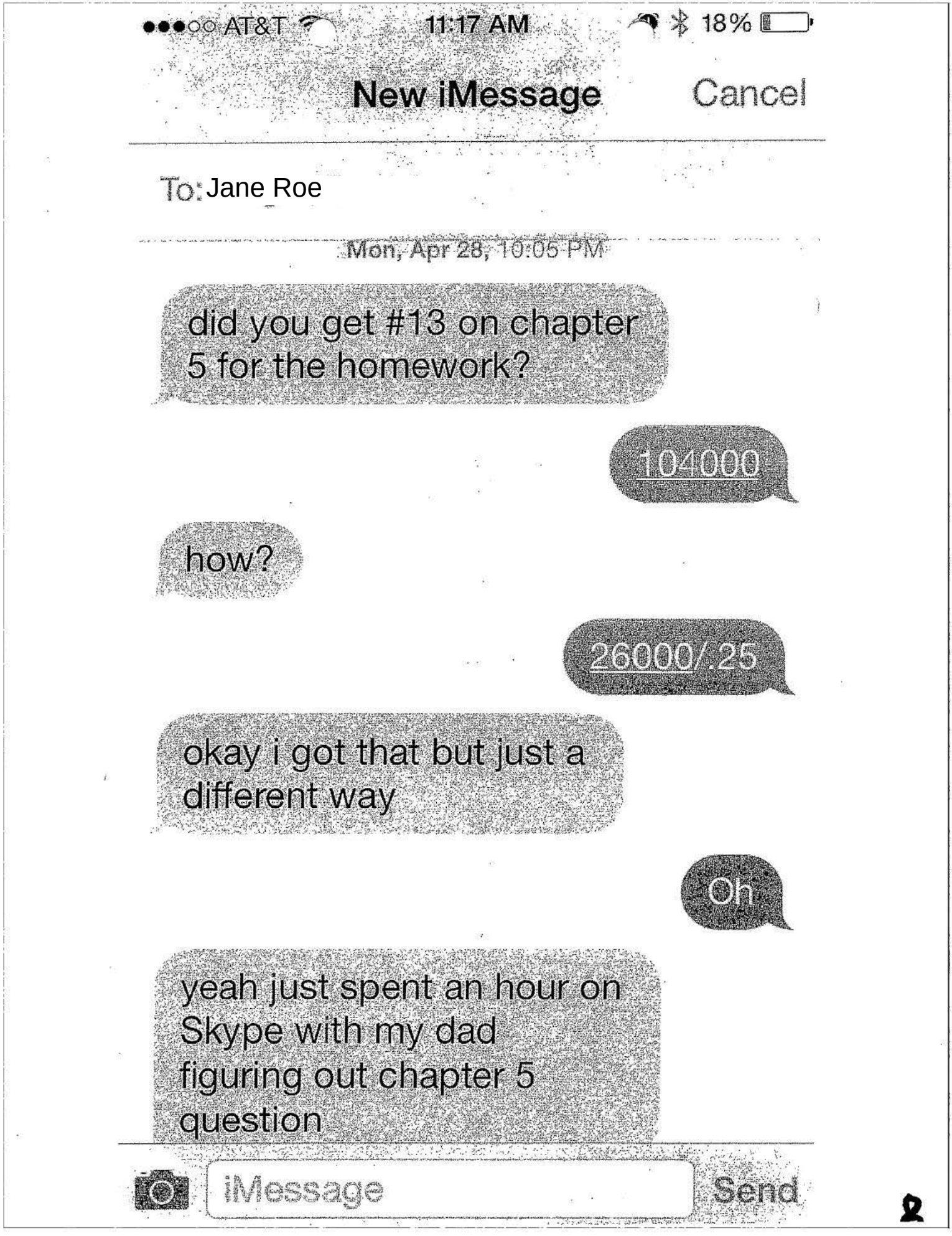
11:18 AM
18%
New iMessage
Cancel
To: Jane Roe
930
Okay is there alcohol there or do we need to bring stuff? The guy who usually guys us alcohol is out of town so we have like a third of a fifth of captain haha
U guys will be fine
Okay solid I'll convince Miranda to get ready fast enough and come over when that happens
Ha alright
iMessage
Send

7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To: Jane Roe
Mon, Apr 28, 10:05 PM
did you get #13 on chapter 5 for the homework?
104000
how?
26000/.25
okay i got that but just a different way
Oh
yeah just spent an hour on Skype with my dad figuring out chapter 5 question
iMessage
Send

EXHIBIT I

FIRE
Foundation for Individual Rights in Education

February 28, 2014

White House Task Force to Protect Students from Sexual Assault
VIA email to OVW.SATaskForce@usdoj.gov

Dear White House Task Force to Protect Students from Sexual Assault:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending core constitutional rights on our nation's university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. Every day, FIRE receives requests for assistance from students and professors who have found themselves victims of administrative censorship or unjust punishments.

We thank you for soliciting public input on how the federal government can best assist institutions of higher education in meeting their obligations under Title IX and the Jeanne Clery Act and for allowing us the opportunity to supplement the spoken comments we provided on February 19, 2014.

One of the core constitutional rights that FIRE defends is due process. There is no doubt that universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence. Public universities are also bound by the Constitution to provide meaningful due process to accused students. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These obligations need not be in tension.

Today, access to higher education is critical for Americans. Indeed, the White House website calls it "a prerequisite for the growing jobs of the new economy." The White House, *Higher Education, available at* http://www.whitehouse.gov/issues/education/higher-education (last visited Feb. 28, 2014). The stakes are therefore extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student's ability to receive an education is curtailed unjustly. When a university dismisses an accusation of a sexual assault without adequate investigation, it has both broken the law and failed to fulfill its moral duty. Recent headlines indicate that far too many schools have taken this path. Similarly, when a college expels an accused student after a hearing that

170 S. Independence Mall W. Suite 510 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440

includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well.

When a student is suspended or expelled from college without due process protections, the consequences can be profound. In many of those instances, expulsions—particularly for one of society's most heinous crimes—have the effect of ending educations and permanently altering career prospects. See attachment A.

When an expulsion follows a hearing that includes meaningful due process, there is no problem; justice has been served. But an objective look at the disciplinary procedures maintained by colleges nationwide demonstrates that most institutions fall woefully short of that standard. See attachment B. Sexual assault hearings are complex adjudications of allegations of behavior that constitutes a felony, and the campus judiciary is simply ill-equipped to handle these matters. Without access to the resources, technology, and experience that law enforcement and criminal courts possess, institutions are being asked to determine who is guilty and who is not in these very challenging cases. If there is one thing that people on all sides of this issue agree on, it is this: Few if any schools are capably responding to the problem of sexual assault on campus. Even the best-intentioned campus administrators, of which there are certainly many, simply lack the necessary expertise.

While the law properly forbids institutions from merely referring these cases to law enforcement and washing their hands of them, institutions can and should do many things that stop short of determining innocence or guilt, but which will still go a long way towards ensuring that campuses are safe. Regardless of whether an accusation is later proven true or false, a college can advise students about where to turn to ensure that evidence is preserved. It can help them report accusations properly to law enforcement. It can provide counseling services. It can separate students by changing course schedules and dorm assignments. All of these options, and many more, help ensure that the campus remains a safe place for all students to learn without leaving ultimate decisions of guilt or innocence to campus tribunals, which have proven to be inadequate, ill-prepared forums for adjudicating these cases.

Unfortunately, the federal government, and the Department of Education's Office for Civil Rights (OCR) in particular, has placed the emphasis on advancing the rights of the complainant, while it has paid insufficient attention to the rights of the accused. OCR has demanded that institutions utilize the judiciary's lowest burden of proof, the "preponderance of the evidence" standard. So long as campus tribunals have few, if any, of the fundamental procedural safeguards found in civil courts, using this low standard diminishes the reliability of the outcomes of these hearings. Instead of utilizing a low evidentiary standard that diminishes the accuracy of the on-campus findings, colleges should take meaningful measures to ensure that their tribunals are more fair and more reliable for all parties.

Fair, impartial tribunals should be a self-evident necessity. In OCR's April 4, 2011 "Dear

Colleague" letter, the agency acknowledged that "a school's investigation and hearing processes cannot be equitable unless they are impartial." While FIRE wholeheartedly agrees with this sentiment, we have yet to see a single instance in which the Department has taken action against an institution for lack of impartiality against the accused. This is true despite numerous examples in which colleges punished accused students with scant if any evidence, using embarrassingly minimal procedural safeguards. We have even seen repeated instances in which colleges expel students despite the fact that juries have found those students not guilty in real criminal trials covering the same accusations. In some cases, the evidence not only was insufficient to support guilty verdicts under criminal law evidentiary standards but also dispositively proved the innocence of the accused. Caleb Warner's case from the University of North Dakota is illustrative. See attachment C. We point this case out not to argue that false accusations are the norm, but rather to emphasize that justice requires that individualized determinations are based upon the known facts of each case, not upon statistical assumptions.

In FIRE's view, colleges and universities can take a number of steps to improve access to campus tribunals and increase their reliability and fundamental fairness. To start, universities should ensure that all students know where to register their complaints. Universities should publicize this information clearly, and make sure that all campus personnel are familiar with this information as well.

As for ensuring that campus tribunals operate fairly, it is first necessary to recognize that the *status quo* is unacceptable. Again, we emphasize that FIRE and others are growing increasingly skeptical of the campus judiciary's ability to fairly analyze and adjudicate cases of serious felonies like sexual assault, but we offer the following suggestions which we believe will make the process fairer than it is today.

First and foremost, FIRE believes that OCR should drop its mandate that these tribunals decide cases under the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. See attachments D, E, and F. Instead, OCR should encourage institutions to use the "clear and convincing" standard of evidence, which requires more than just a "50%-plus-a-feather" level of confidence that the evidence supports one side over the other. OCR should also encourage institutions using the preponderance standard to set forth substantive protections for the accused to balance out the low evidentiary threshold. For example, institutions should ensure that there is some mechanism for the accused to cross-examine his or her accuser.

One of the most important things that the federal government can do to improve the reliability and fairness of campus disciplinary hearings is to require schools to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant's interests by bringing and

prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function. Providing student complainants with a matching right to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner rather than giving into the temptation to act in a manner that protects its own interest in avoiding liability.

It is also important to keep in mind that anything a student says during an on-campus proceeding is admissible against him or her in criminal court. Without a lawyer, accused students are effectively waiving their Fifth Amendment rights. Some are forced to choose between defending themselves on campus or defending themselves in criminal courts. One such example is Ben Casper, a former student at The College of William and Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him in court, but has been refused the opportunity to return to school. Allowing legal advocacy in the campus tribunal will go a long way towards solving this problem. At the same time, it will likely help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the Framers of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Throughout the listening sessions, participants offered two suggestions in particular that FIRE would like to address. One suggestion that was offered repeatedly was that institutions should be required to subject their students to mandatory surveys to gauge campus climate and obtain more detailed information about sexual assault on campus. While FIRE appreciates this desire to have better information, we nevertheless believe there are serious civil liberties implications to compelling students—or anyone for that matter—to answer sensitive questions about their sexual activities. This information is very personal, and compelling individuals to share this information with the government is deeply troubling. Surveys, if they are conducted, should be voluntary, and appropriate measures should be taken to ensure that the anonymity of the participants is protected.

Another suggestion offered during the listening sessions was that the government should use the "affirmative consent" standard when collecting data about sexual assault and require institutions to use that standard in their disciplinary hearings. The affirmative consent standard is a confusing and legally unworkable standard for consent to sexual activity.

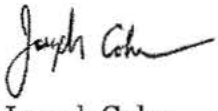
Affirmative consent posits that sexual activity is sexual assault unless the non-initiating party's consent is "expressed either by words or clear, unambiguous actions." Should proving "affirmative consent" become law, there will be no practical, fair, or consistent way for colleges to ensure that these newly mandated prerequisites for sexual intercourse are

followed. It is impracticable for the government to require students to obtain affirmative consent at each stage of a physical encounter and to later prove that attainment in a campus hearing. Under this mandate, a student could be found guilty of sexual assault and deemed a rapist simply by being unable to prove she or he obtained explicit verbal consent to every sexual activity throughout a sexual encounter. In reality, requiring students prove they obtained affirmative consent would render a great deal of legal sexual activity "sexual assault" and imperil the futures of all students across the country.

We note that the concept of affirmative consent was first brought to national attention when it was adopted by Ohio's historic Antioch College in the early 1990s. When news of the college's policy became public in 1993, the practical difficulty of adhering to the policy prompted national ridicule so widespread that it was lampooned on *Saturday Night Live.* Indeed, the fallout from the policy's adoption has been cited as a factor in the college's decline and eventual closing in 2007. See attachment G. It has since reopened. The awkwardness of enforcing "affirmative consent" rules upon the reality of human sexual behavior has continued to be a popular subject for comedy by television shows such as *Chappelle's Show* and *New Girl.* The humor found in the profound disconnect between the policy's bureaucratic requirements for sexual interaction and human sexuality as a lived and varied experience underscores the serious difficulty that requiring the standard would present to campus administrators across the nation.

Thank you very much for addressing this important issue and for considering FIRE's input. We are deeply appreciative of this opportunity to share our perspective, and offer our assistance to you as you move forward. Please do not hesitate to contact us if we can be of any assistance.

Respectfully submitted,



Joseph Cohn
Legislative and Policy Director

Attachment A

On College Campuses, a Presumption of Guilt

By Peter Berkowitz - February 28, 2014

SWARTHMORE, Pa. -- On Feb. 22, in celebration of its sesquicentennial, Swarthmore College proudly hosted "The Liberal Arts in Action: A Symposium on the Future of Liberal Arts."

In what seemed an unrelated event, a month before, a former Swarthmore student expelled by the college in the summer of 2013 filed a lawsuit in federal court of the eastern district of Pennsylvania. The student, identified as "John Doe," was found guilty under campus disciplinary procedures of sexual misconduct. (Pseudonyms were used to protect both the accused and the accuser.) His legal complaint alleges that Swarthmore "failed to follow its own policies and procedural safeguards" and violated his "basic due process and equal protection rights."

The litigation was not mentioned at the high-minded, if self-congratulatory, afternoon symposium. Yet the future of liberal education is closely connected to John Doe's assertion that in the course of expelling him Swarthmore trampled on fair process—and to the willingness of the federal judiciary to examine it.

Liberal education is the culmination of an education for freedom. Among its crucial components are the offering of a solid core curriculum, the promotion of liberty of thought and discussion, and the cultivation of intellectual diversity.

Another vital feature of liberal education consists of fostering an appreciation of the principles of due process. They are principles free societies have developed over the centuries to adjudicate controversies, establish guilt, and mete out punishment in ways that justly balance the rights of those who claim they have been wronged with the rights of those who have been accused of wrongdoing.

In cases involving serious accusations, due process requires a presumption of innocence, settled rules and laws, timely notice of charges, adequate opportunity to prepare a defense, the chance for the accused to question the accuser, and an impartial judge and jury.

Although college disciplinary procedures have been roiling campuses for decades, none of this was discussed at the Swarthmore symposium. Instead, the keynote address, "The Role of the Arts in Liberal Arts Education"—delivered by Mary Schmidt Campbell, Swarthmore class of '69 and dean of the Tisch School of the Arts at New York University—as well as the subsequent panel discussion on "The Future of Knowledge" and the concluding panel on "Fostering a Democratic Society Through Education," were of a piece.

The speakers—Swarthmore graduates who have risen to prominence in the world of college and university administration—properly praised the importance to liberal education of certain skills: questioning effectively;

thinking critically; weighing evidence and analyzing arguments; solving problems; seeing things from a multiplicity of perspectives; taking the initiative; innovating and creating; collaborating; and working across interdisciplinary boundaries.

Yet with the notable exception of Tori Haring-Smith, president of Washington & Jefferson College, who spoke compellingly about the vigorous measures adopted by her institution to teach students the importance of listening to opinions different from their own and of learning to live with the people who hold them, the panelists spoke as if our liberal arts colleges are doing a bang-up job. The only question they raised was how to extend to broader segments of the nation the lessons of freedom and democracy that Swarthmore is purportedly already teaching so well to its own students.

John Doe's lawsuit gives a different impression of the school's commitment to the principles of freedom. He contends that 19 months after three separate consensual sexual encounters—a kiss, sexual conduct not including sexual intercourse, and sexual intercourse—a fellow student reported to Swarthmore the first two and claimed she had been coerced. The accuser, according to the complaint, "offered no physical or medical evidence, and no police or campus safety reports." After a two-month long investigation, Swarthmore appeared to conclude the matter without taking disciplinary action.

Approximately four months later, according to John Doe, Swarthmore suddenly re-opened the case against him. The college did this, he maintains, in response to public accusations—including a complaint filed with the U.S. Department of Education by two Swarthmore female undergraduates—that the school mishandled a number of sexual misconduct cases. And John Doe asserts that in the second round of hearings, which culminated with his expulsion based on a finding that he had merely "more likely than not" committed sexual misconduct, Swarthmore repeatedly and egregiously violated its own rules for disciplinary procedures explicitly set forth in the official student handbook.

John Doe's lawsuit presents one of the nation's finest small liberal arts colleges acting in haste and panic, railroading a young man in order to convince the public and the federal government that it had, in the words of Swarthmore President Rebecca Chopp, "zero tolerance for sexual assault, abuse and violence on our campus."

Swarthmore, for its part, has filed a motion to have the John Doe complaint dismissed. "The College believes that the suit is without merit and will vigorously defend the litigation," Swarthmore's attorney Michael Baughman said in a written statement. "The College is committed, and always has been committed, to providing all students with a fair process of adjudication in student conduct proceedings."

A trial court will determine the merits of John Doe's allegations, but in light of the sorry condition of due process at our colleges and universities, the charges against Swarthmore are plausible.

For example, in 2006, the Duke faculty and administration were quick to treat as guilty three lacrosse players accused of rape by a black woman whom their fraternity had hired as an exotic dancer. After a year-long investigation, the North Carolina attorney general dropped all charges and took the remarkable step of pronouncing the accused players innocent.

In 2010, a campus tribunal found University of North Dakota student Caleb Warner guilty of sexual assault. The Grand Forks police department investigated the case and not only declined to charge Warner but charged his accuser with making a false report. Nevertheless, the university refused to reconsider its verdict. Only when the Foundation for Individual Rights in Education stepped in a year and half later was the school impelled to revisit the case and eventually overturn the judgment.

Just a few weeks ago, Dartmouth Sexual Abuse Awareness coordinator Amanda Childress asked at a University of Virginia conference on campus sexual misconduct, "Why could we not expel a student based

on an allegation? To clarify where she stood on the question, Childress went on to say, "It seems to me that we value fair and equitable proce. s more than we value the safety of ou tudents. And higher education is not a right. Safety is a right. Higher education is a privilege."

Safety, however, is not a right. It is a goal. Due process is a right. Moreover, history has shown that honoring it is the best way over the long run to achieve the greatest amount of safety and security for all.

John Doe's account of his encounter with Swarthmore disciplinary procedures suggests the invidious effects of Ms. Childress's reasoning—and of allowing the verdicts of pseudo-judicial proceedings to stand without legal review. An honors student in high school (with an excellent record in college) who chose Swarthmore over other elite schools because his parents met and married there, Doe is now effectively blackballed from higher education. He had completed his junior year when the school abruptly ordered the second investigation. After being expelled, he inquired about admission to some 300 colleges, all of which told him that Swarthmore's verdict rendered him ineligible for transfer to their school. Of the 19 colleges that didn't have such bright-line rules, 18 required disclosure. Only one of those accepted him—and required him to enroll as a junior.

This case occurs in a context in which our colleges and universities have aggressively eroded due process protections for those accused of sexual harassment and sexual assault. Over and over, colleges and universities have transformed disciplinary procedures into kangaroo courts that appear to operate on the assumption that an accusation creates a presumption of guilt and the burden is on the accused to prove his innocence. Due process is equally offended, it should not be necessary to add, when universities cover up for star athletes accused of sexual misconduct.

For the sake of genuinely liberal education, faculty and administrators must get out of the business of investigating the most serious forms of sexual misconduct, particularly sexual assault. Professors and university officials must be educated to recognize their woeful lack of the expertise necessary to properly gather and analyze evidence, establish guilt, and ensure fairness for the accuser and the accused. And they should be taught to promptly advise all students who believe they have been sexually assaulted to report their allegations to the police.

And as an indispensable element of their obligation to teach the principles of freedom, colleges and universities must be persuaded to restore to disciplinary procedures that they rightly conduct the presumption of innocence—a cornerstone of justice—and all the ancillary protections that follow from it.

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Peter Berkowitz, a graduate of Swarthmore College with a major in English literature, is a senior fellow at the Hoover Institution, Stanford University. His writings are posted at www.PeterBerkowitz.com.

Attachment B

THE CHRONICLE OF HIGHER EDUCATION

Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges

By Joseph Cohn
October 1, 2012

As student-conduct administrators nationwide know all too well, the Department of Education's Office for Civil Rights required in a letter issued last April that institutions adopt our judiciary's lowest standard of proof—the "preponderance of evidence" standard—for use in campus sexual-misconduct hearings, which handle allegations ranging from sexual harassment to sexual assault and rape.

Under the new standard, if it is determined that an accuser's claims are a fraction of a percent more likely to be true than false, the accused may be subjected to discipline, including expulsion.

Gwenda Kaczor for The Chronicle

Unfortunately for students' rights, a long line of institutions have adopted this low standard under federal pressure. In fact, a review of policies at 198 of the colleges ranked this year by U.S. News & World Report reveals that 30 institutions—including Yale University, Stanford University, and the University of Virginia—have changed their standards of proof following OCR's mandate.

That's too bad, because colleges should be free to grant their students more robust due-process rights—and the federal government should not stand in their way.

Previous instructions from the Office for Civil Rights granted universities far greater flexibility. Indeed, OCR's 2001 Revised Sexual Harassment Guidance noted that "procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in

audiences, school sizes and administrative structures, state or local legal requirements, and past experience."

Now OCR and its defenders are arguing that the preponderance-of-evidence standard is appropriate for adjudicating campus sexual-assault and sexual-harassment claims because it is the same standard that federal courts use when deciding civil lawsuits, including civil-rights lawsuits. Comparing college disciplinary hearings to civil lawsuits may be an attractive analogy, but is it accurate?

While it is true that most civil cases in federal court are decided under the preponderance standard, due process requires that this low burden of proof be offset by procedural safeguards—lots of them.

For example, to ensure fairness, reliability, and constitutionality, civil trials are presided over by experienced, impartial, and legally educated judges. At either party's request, facts are determined by a jury of one's peers. The parties have the right to representation by counsel, and a mandatory process of "discovery" ensures that all relevant evidence will be made available if the opposing party asks for it.

And speaking of evidence, strict rules apply that exclude hearsay, evidence of prior bad acts or crimes, and other information that is either irrelevant or unreliable. Moreover, all depositions and testimonies are given under oath or affirmation, with witnesses subject to perjury charges if they intentionally lie about material issues. The list goes on and on.

So which of those procedural protections are guaranteed in college disciplinary hearings? None. The procedural safeguards used at most colleges are embarrassingly minimal.

Colleges decide for themselves who will preside over these hearings and serve as fact finders. In some instances it's a panel of faculty, students, and/or administrators, the last of whom may have a powerful incentive to come to the conclusion that is most convenient for the institution. (In the real court system, we are very careful to avoid any hint of this bias from our judges and juries.) Even worse, some colleges have a single administrator designated to serve as both judge and jury.

Similarly, the parties to these hearings frequently have no right to counsel—even if they are able to pay for representation. Neither party has the benefit of discovery, and the rules of evidence don't

apply. Hearsay and even irrelevant "evidence" are regularly considered. Parties are usually not placed under oath and may not be subject to discipline if they lie.

Without any of the safeguards designed to increase the reliability and fairness of civil trials, the risk of erroneous findings of guilt increases substantially, especially when a fact finder is asked to decide only if it is merely 50.01 percent more likely that a sexual assault occurred. The absence of the protections listed above makes the preponderance standard inappropriate and renders the comparison of campus sexual-misconduct hearings to civil suits in federal court inexact.

If anything, because there are so few procedural protections in place during sexual-misconduct hearings on campuses, the burden of proof should be higher, to offset the increased risk of error. After all, a guilty finding for sexual misconduct on campus may result in life- and career-altering punishment. And mistakes have been made. In one case, the University of North Dakota banned a student from the institution for sexual assault despite the fact that the Grand Forks police refused to charge him with a crime and in fact charged his accuser with making a false claim. The university eventually reversed its ruling, but only after it was faced with significant public pressure.

One other important feature distinguishes civil lawsuits from campus proceedings: Civil suits can be settled for money and kept confidential. Yet students accused of sexual misconduct cannot simply settle the case for money and stay in school. Preponderance advocates should ask themselves why this is so. If the answer is that campus sexual misconduct is more like a crime (with a victim and alleged perpetrator) than a civil dispute (with a plaintiff and defendant)—as is certainly the case—then why is the preponderance standard sufficient for charges of sexual misconduct on campus?

Given the laundry list of procedural safeguards present in civil trials but absent in college sexual misconduct hearings, and the difference between civil disputes and sexual misconduct, is it fair to argue that simply because the preponderance standard is used by federal courts deciding civil-rights cases, it must therefore be fair to use in college sexual-misconduct hearings? Only if you think it's fair to compare apples to oranges—and only if you are untroubled by expulsions of innocent students.

Joseph Cohn is the legislative and policy director at the Foundation for Individual Rights in Education.

Attachment C

THE WALL STREET JOURNAL.

Yes Means Yes—Except on Campus

The feds tip the scales against due process in sexual misconduct cases.

By HARVEY A. SILVERGLATE

For a glimpse into the treacherous territory of sexual relationships on college campuses, consider the case of Caleb Warner.

On Jan. 27, 2010, Mr. Warner learned he was accused of sexual assault by another student at the University of North Dakota. Mr. Warner insisted that the episode, which occurred the month prior, was entirely consensual. No matter to the university: He was charged with violating the student code and suspended for three years. Three months later, state police lodged criminal charges against his accuser for filing a false police report. A warrant for her arrest remains outstanding.

Among several reasons the police gave for crediting Mr. Warner's claim of innocence was evidence of a text message sent to him by the woman indicating that she wanted to have intercourse with him. This invitation, combined with other evidence that police believe indicates her untruthfulness, has obvious implications for her charge of rape.

Nevertheless, university officials have refused to allow Mr. Warner a re-hearing—much less a reversal of their guilty verdict. When the Foundation for Individual Rights in Education (FIRE), a civil liberties group of which I am board chairman, wrote to University President Robert O. Kelley to protest, the school's counsel, Julie Ann Evans, responded. She wrote that the university didn't believe that the fact that Mr. Warner's accuser was charged with lying to police, and has not answered her arrest warrant, represented "substantial new information." In any event, she argued, the campus proceeding "was not a legal process but an educational one."

Six weeks before FIRE received this letter, Russlynn Ali, assistant secretary for the Office for Civil Rights in the Department of Education, sent her own letter to every college and university in the country that accepts federal money (virtually all of them). In it, she essentially ordered them to scrap fundamental fairness in campus disciplinary procedures for adjudicating claims of sexual assault or harassment.

Ms. Ali's April 4 letter states that "in order for a school's grievance procedures to be consistent with the standards in Title IX [which prohibit discrimination on the basis of sex in any educational institution receiving federal funds], the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)." This institutionalizes a low standard previously eschewed by most of the nation's top schools. It also sends the message that results—not facts—matter most. Such a standard would never hold up in a criminal trial.

Associated Press
Caleb Warner

Following this outrageous diktat, Cornell University lowered its evidentiary burden in sexual assault cases. Now, determining whether an incident constitutes sexual violence is based on the "preponderance of the evidence" standard, instead of the school's prior "clear and convincing evidence" test. Stanford followed suit—in the middle of one student's sexual misconduct hearing. He was promptly found guilty and suspended for two years.

When Yale administrators received the government's letter, the university was under federal investigation for permitting gender discrimination on campus. The next month, on May 17, Yale announced that it would institute a five-year suspension of a fraternity that had engaged in a puerile but harmless initiation. Parading around campus, blindfolded pledges were told to shout tasteless slogans like "No means yes, yes means anal."

The university deemed this a sufficiently serious species of gender-based discrimination to justify official censorship. This, despite its "paramount obligation"—Yale's words—to uphold freedom of expression. And Yale, too, lowered its previous, higher evidentiary standard in sexual assault cases to the bottom rung.

Codes banning "offensive" speech in the name of protecting the sensibilities of what are commonly designated historically disadvantaged groups—and the campus kangaroo courts that enforce them—have long threatened free expression and academic freedom. While real-world courts have invalidated many of these codes, the federal government has now put its thumb decisively on the scale against fairness on issues of sexual harassment and assault.

Caleb Warner now goes without a diploma and carries with him the stigma of a sexual predator. Unfortunately, the government's policy ensures that his will not be a unique case.

Mr. Silverglate, a lawyer, is the author of "Three Felonies a Day: How the Feds Target the Innocent" (Encounter Books, 2009). He is also the chairman of the board of directors of the Foundation for Individual Rights in Education.

Attachment D

FIRE
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

May 5, 2011

Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Sent by U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of freedom of speech, due process, freedom of assembly, legal equality, freedom of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our mission and activities.

FIRE writes to voice our deep concerns regarding the Office for Civil Rights' (OCR's) "Dear Colleague" letter of April 4, 2011, and the deleterious impact the letter's guidance to colleges and universities will have on student rights. Specifically, FIRE is troubled by the letter's failure to explicitly instruct administrators that public universities may not violate the First Amendment rights of students and that private universities must honor their promises of freedom of expression to students. Given OCR's past sensitivity to the unequivocal importance of freedom of expression to higher education, this is a disappointing development.

FIRE is still more worried about the impact of OCR's guidance on students' right to due process. Indeed, the letter has already prompted several institutions to curtail the procedural due process rights afforded students accused of sexual harassment or sexual violence; given OCR's regulatory authority and influence, all institutions of higher education accepting federal funding are likely to follow. While it is of course necessary for colleges and universities to address allegations of sexual harassment and sexual violence with all requisite purpose, seriousness, and speed, the rights of those accused cannot be sacrificed simply as a function of the accusation itself.

I will detail each of FIRE's concerns in turn.

I. Freedom of Expression

In discussing the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students, OCR fails to explicitly recognize that public universities may not violate the First Amendment rights of their students and that private universities must honor their promises of freedom of expression to students. The April 4 letter fails to include any discussion of the free expression considerations involved when evaluating or investigating allegedly harassing behavior. Nor does the letter reference or cite for further guidance OCR's 2003 "Dear Colleague" letter regarding the intersection of freedom of expression and harassment policies.[1] The 2003 letter was necessitated by a steady stream of lawsuits and controversies regarding the punishment of offensive, unpopular, or "politically incorrect" (but protected) speech on campus as instances of harassment. In the letter, former Assistant Secretary Gerald A. Reynolds addressed confusion regarding the role of OCR regulation with regard to campus speech, noting that "some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications." Assistant Secretary Reynolds made clear that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." Assistant Secretary Reynolds further noted that "OCR is committed to the full, fair and effective enforcement of these statutes *consistent with the requirements of the First Amendment*." (Emphasis added.)

Worryingly, by failing to recognize the freedom of expression concerns implicated in investigating and punishing protected speech, the April 4 letter does not replicate the speech-protective understandings of hostile environment sexual harassment contained in previous OCR guidance letters, including both OCR's 2001 *Revised Sexual Harassment Guidance* (*2001 Guidance*) and the 2003 "Dear Colleague" letter. In the *2001 Guidance*, OCR emphasized that in determining whether a hostile environment has been created, the severity, pervasiveness, and both objective and subjective impact of the behavior in question must be considered.[2] OCR explicitly noted that its understanding of hostile

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[1] The 2003 letter is available on OCR's website at http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

[2] The *2001 Guidance* noted:

> OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.[] OCR considers the conduct from both a *subjective* and *objective* perspective. In evaluating the *severity* and *pervasiveness* of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships." (Emphasis added; internal citations omitted.)

Among other factors, the *2001 Guidance* highlighted the importance of the "type, frequency, and duration of the conduct"; whether the conduct was welcome; the age and sex of both the accuser and the accused; and the "degree to which the conduct affected one or more students[']education." In sum, the *2001*

environment harassment was informed by and consistent with the Supreme Court of the United States' decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).[3] In *Davis*, the Court found that behavior constitutes hostile environment sexual harassment when it is "so severe, pervasive, and objectively offensive, and . . . so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities," and that institutions displaying deliberate indifference to actual knowledge of such behavior could be found liable for monetary damages.[4] This exacting, speech-protective definition ensures an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment free from harassment. Illustrating this balance, Assistant Secretary Reynolds made clear in the 2003 "Dear Colleague" letter that "OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."

Given this well-established recognition of speech-related concerns, it is thus deeply troubling that the April 4 letter does not acknowledge OCR's previous statements on freedom of expression. While referring recipients to the *2001 Guidance* generally, the new letter does not itself reiterate or reaffirm these more speech-protective conceptions of hostile environment sexual harassment. As a result of this deficiency, FIRE worries that schools seeking to comply with OCR's increased emphasis on sexual harassment education and prevention will fail to promulgate and disseminate sexual harassment policies that provide sufficient protection for student speech. This result would contradict previous OCR guidance, longstanding legal precedent,[5] and the normative conception of the primacy of freedom of expression in higher education.

Guidance asked recipient institutions to consider "the totality of the circumstances in which the behavior occurs," noting that it is "always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created."

[3] Specifically, the *2001 Guidance* stated:

> [T]he definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance. Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"), the definitions are consistent.

[4] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

[5] That the First Amendment's protections fully extend to public universities is settled law. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *see also Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (citation omitted).

While concerns about free speech may seem unrelated to the thorough discussion of sexual violence emphasized in the April 4 letter, overly broad or vaguely constructed definitions of sexual harassment have served as a consistent justification for abuses of student free speech rights for more than two decades. FIRE's experience over the past dozen years shows that unless hostile environment harassment is properly defined, overly broad or vague regulations are all too often used to justify the punishment of protected speech. For example, a Muslim student at William Paterson University in New Jersey was charged with sexual harassment for privately replying to an email from a professor that promoted a film about a lesbian relationship.[6] In another case, a student-employee at Indiana University–Purdue University Indianapolis was found guilty of harassment merely for publicly reading the book *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan*, an account of the Klan's defeat in a 1924 street fight with University of Notre Dame students.[7] Elsewhere, a student at the University of New Hampshire was found guilty of "harassment" for posting flyers in his dormitory jokingly suggesting that women could lose the "freshman 15" by taking the stairs instead of the elevators when going only one or two floors.[8] Further, overbroad and vague harassment policies have consistently been invalidated by federal courts on constitutional grounds;[9] indeed, the United States Court of Appeals for the Third Circuit has twice in the span of three years found university harassment policies to be in violation of students' First Amendment rights.

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[6] *See* "William Paterson University: Punishment on Harassment Charges for Response to Mass E-Mail," http://thefire.org/case/682.html; *see also* Wayne Parry, *'Harassment' reprimand dropped against college worker*, ASSOC. PRESS, Dec. 7, 2005, *available at* http://thefire.org/article/6555.html.

[7] *See* "Indiana University - Purdue University Indianapolis: Student Employee Found Guilty of 'Racial Harassment' for Reading a Book," http://thefire.org/case/760; *see also* Deanna Martin, *IUPUI says sorry to janitor scolded over KKK book*, ASSOC. PRESS, July 14, 2008, *available at* http://www.huffingtonpost.com/huff-wires/20080714/kkk-book-apology.

[8] *See* "University of New Hampshire: Eviction of Student for Posting Flier," http://thefire.org/case/651.html; *see also* Scot Lehigh, *Humor vs. Free Speech at UNH*, BOSTON GLOBE, Nov. 17, 2004, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/11/17/humor_vs_free_speech_at_unh; *UNH Student Back – in New Dorm*, UNION LEADER, Nov. 16, 2004, at B1.

[9] *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court's invalidation of university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down former sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

Colleges and universities are both legally and morally obligated to address sexual harassment and sexual violence on campus. The vast majority are also legally and morally obligated to protect freedom of expression. As OCR's previous guidance has made clear, these responsibilities need not be in tension. FIRE asks that OCR again make clear to college and university administrators that their obligation to respond to student-on-student sexual harassment does not obviate or lessen their obligation to respect freedom of expression. We further ask that OCR clarify that while sexual harassment may include "sexual advances, requests for sexual factors, and other verbal, nonverbal, or physical conduct of a sexual nature," expression protected by the First Amendment becomes actionable sexual harassment only if it is (1) unwelcome; (2) of a sexual nature or (3) discriminatory on the basis of gender; (4) directed at an individual; and (5) "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[10] Were OCR to mandate that colleges and universities implement no more and no less than the above standard, OCR would considerably lessen confusion with regard to the applicable legal standard as well as with regard to recipient institutions' obligations both to address hostile environment harassment and to protect student speech. The resulting clarity and certainty would allow institutions to comply with OCR regulations intended to protect students from sexual assault and harassment while protecting student speech and insulating themselves against the possibility of First Amendment litigation.

II. Right to Due Process

OCR's April 4 letter mandates that recipient institutions implement certain procedures governing responses to allegations of sexual harassment and sexual violence. While some of these newly announced requirements are beyond the scope of FIRE's mission, others implicate due process rights and call into question the basic fairness of disciplinary proceedings against those students accused of sexual harassment and sexual violence. Given the extreme gravity of such accusations and the potential impact of a guilty finding, FIRE is deeply concerned that OCR's new requirements erode necessary due process protections.

A. Standard of Proof

OCR's April 4 letter mandates that colleges and universities receiving federal assistance must employ a "preponderance of the evidence" standard within their grievance procedures governing sexual harassment and sexual violence in order to satisfy their legal obligations under Title IX. Specifically, the April 4 letter dictates:

> [I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred),

[10] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

The letter makes clear that schools maintaining a higher evidentiary standard—such as the "clear and convincing" standard—for disciplinary procedures involving allegations of sexual harassment and sexual violence will be subject to OCR review. As the letter states: "In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints."

In mandating that schools adopt a preponderance of the evidence standard in their grievance procedures governing sexual harassment and sexual violence allegations, OCR has broken significant—and troubling—new ground. In contrast to the April 4 mandate, the *2001 Guidance* is silent with regard to the standard of proof required of schools' grievance procedures. While the *2001 Guidance* stated that recipient institutions must maintain "grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex," it did not specify that a specific burden of proof must be employed in university grievance procedures. Indeed, the *2001 Guidance* granted schools considerable autonomy in determining the particular protocols to be utilized on their campuses, noting that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience." However, the April 4 letter's mandate revokes this discretion—and with it, schools' ability to grant students due process protections that are appropriate for the gravity of the offenses of which they are accused.

In support of lessening the burden of proof required during grievance procedures addressing sexual harassment and sexual violence, OCR invokes several arguments. None is convincing, and none supports OCR's dramatic new erosion of due process protections for those students accused of committing sexual harassment or sexual violence.

First, OCR argues that the lower evidentiary standard is not just permissible, but in fact required because "[t]he Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX, Title VII prohibits discrimination on the basis of sex." Of course, much civil litigation (including civil litigation concerning allegations of discrimination on the basis of protected class status) incorporates a preponderance of the evidence standard. As the Supreme Court has observed, however, the reliance on the preponderance of the evidence standard in civil litigation is due in significant part to the fact that "[t]he typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the

outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion."[11]

Indeed, the Supreme Court has recognized that "adopting a 'standard of proof is more than an empty semantic exercise.'"[12] That is, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[13] "[M]indful that the function of legal process is to minimize the risk of erroneous decisions," the Court has noted that an intermediate standard of proof (*e.g.*, the "clear and convincing" standard) may be employed "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant," because the "interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[14] In cases where "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight," the Court has held that use of the preponderance of the evidence standard is "inconsistent with due process."[15] The Court itself has utilized the "'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases."[16]

In the educational context, the Supreme Court has further held that when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."[17] The Court made these observations about due process protections at the elementary and secondary school level, finding at least minimal requirements of due process necessary because disciplinary action "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[18] Given the increased likelihood of much further-reaching negative consequences for a college student found guilty of sexual harassment or sexual violence in a campus judicial proceeding, greater protections are required, not lesser.[19]

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[11] *Addington* v. *Texas*, 441 U.S. 418, 423 (1979).
[12] *Id.* at 425 (*quoting Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Balt. City Criminal Court*, 407 U.S. 355 (1972)).
[13] *Id.* at 423 (*quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).
[14] *Id.* at 424, 425.
[15] *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).
[16] *Addington*, 441 U.S. at 424.
[17] *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).
[18] *Id.* at 575.
[19] Even if the preponderance of the evidence standard is appropriate in some instances for the campus judiciary, accusations of sexual violence should be treated differently than sexual harassment when determining the appropriate standard of proof, at the very least, given the implication of criminal activity.

Further, OCR contends that the use of the preponderance of the evidence standard by schools adjudicating complaints of sexual harassment or sexual violence is required because of the standard's use by courts in adjudicating workplace sexual discrimination cases arising under Title VII. To support this argument, OCR cites the Supreme Court's approval of the preponderance of the evidence standard in the context of Title VII litigation in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989). However, both *Desert Palace* and *Price Waterhouse* involve claims for monetary damages brought by employees against their employers as a result of workplace sexual discrimination. As such, these cases concern precisely the type of "monetary dispute between private parties" that the Supreme Court has identified as properly the province of the preponderance of the evidence standard.[20] In contrast, OCR's April 4 letter mandates that this lesser standard of proof be used in hearings that will dictate a student's guilt or innocence with regard to allegations of potentially criminal misconduct.[21]

In an attempt to add further support to the claim that the use of the preponderance of the evidence standard in Title VII case law mandates its use by recipient institutions under Title IX, OCR also cites its *2001 Guidance*. In the *2001 Guidance*, OCR correctly noted that "the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." But while Title VII caselaw aided the *Davis* Court in identifying the contours of hostile environment sexual harassment in the educational context, the *Davis* Court was entirely silent as to whether evidentiary standards used to adjudicate claims for monetary damages arising under Title VII are thus mandated by Title IX for schools adjudicating claims of sexual harassment and sexual violence, as

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[20] *See Addington* v. *Texas*, 441 U.S. 418, 423 (1979).

[21] Moreover, in citing the use of the lower burden of proof approved by the Court in *Desert Palace* and *Price Waterhouse*, OCR disregards a fundamental difference between workplaces governed by Title VII and colleges and universities governed by Title IX: While a private employer is subject to Title VII liability for a private action for damages when a plaintiff proves that "discrimination based on sex has created a hostile or abusive work environment," *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986), a college or university is only subject to a private action for damages under Title IX liability when its "deliberate indifference 'subjects' its students to harassment." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (noting that Title IX's "plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."). In other words, while an employee suing for damages under Title VII must demonstrate only that Title VII's protections were violated, a student seeking similar relief under Title IX must prove that Title IX's protections were violated *and* that the institution was "deliberately indifferent" to such violations. But, even given the more stringent liability attached to private employers with regard to hostile environment harassment, courts have held that employer investigations into harassing conduct need not be "perfect" to avoid liability, only that the employer response be "reasonably calculated to prevent further harassment." *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997) (internal citations omitted); *see also Harris v. L & L Wings*, 132 F.3d 978, 984 (4th Cir. 1998) ("the legal standard of 'prompt and adequate remedial action' in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser."). Further, courts have noted that in the context of private actions for damages under Title IX, the "deliberate indifference standard is a high one." *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (holding that even an "ineffective" investigation did not constitute "deliberate indifference"). Given these holdings and OCR's reliance on Title VII case law, OCR's contention that Title IX demands a lower standard of proof for all judicial hearings in order to be sufficiently "prompt and equitable" is without merit.

OCR now claims. Nor does OCR's citation of the United States Court of Appeals for the Fourth Circuit's observation in *Jennings v. University of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) that the Fourth Circuit "look[s] to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX" provide significant support for OCR's new mandate. Simply put, the fact that courts have reviewed Title VII caselaw to inform their analysis of Title IX claims does not justify—far less necessitate—OCR's new determination that "equitable grievance procedures" under Title IX require colleges and universities to institute a lower burden of proof in hearings adjudicating allegations of sexual harassment and sexual violence.

Finally, OCR argues that the preponderance of the evidence standard is warranted because OCR itself "also uses a preponderance of the evidence standard when it resolves complaints against recipients." The April 4 letter explains:

> For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings. Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).

But the comparison between the standard OCR uses in determining whether recipient institutions are in compliance with Title IX requirements and the standard the recipient institution itself uses when determining whether a student has committed sexual harassment or sexual assault is inapposite. In determining compliance, OCR is engaged in a matter of administrative review; at stake is federal funding, not an individual's continued matriculation, reputation, and employment prospects. As such, OCR's own use of a lower standard of evidence may be justified. In contrast, when determining whether a student has in fact committed sexual harassment or sexual violence against another student, the college or university judicial body conducting the proceeding is engaged in precisely the "quasi-criminal" adjudication[22] for which the Supreme Court has deemed the "clear and convincing" standard to be appropriate.[23] The stakes for the accused are extremely high; the permanent, severely negative consequences of a guilty finding will follow the student for the rest of his or her life. As a result, a campus judicial hearing charged with deciding between guilt or innocence much more closely resembles a criminal proceeding than OCR's determinations of institutional compliance. Given the substantial differences between OCR's own noncompliance and fund termination hearings and the campus judicial proceedings against a student accused of sexual harassment or sexual violence, the fact that OCR itself employs the preponderance of the

[22] As described in the April 4 letter, schools "generally conduct investigations and hearings to determine whether sexual harassment or violence occurred."

[23] *Addington*, 441 U.S. at 424 (discussing use of intermediate "clear and convincing" standard of proof in civil cases involving "quasi-criminal wrongdoing by the defendant").

evidence standard in no way supports the conclusion that schools must also employ this standard in their own grievance procedures as a necessary condition of providing prompt and equitable resolutions as required by Title IX.

In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused's rights and is thus inadequate and inappropriate. Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, OCR's insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large[24] in ensuring a correct and just result is therefore far greater than that implicated by a simple "monetary dispute," and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question.[25]

Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and

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[24] The Supreme Court has recognized the crucial importance of higher education to the functioning of our modern liberal democracy. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (*quoting Plyler v. Doe*, 457 U.S. 202, 221 (1982)) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

[25] The problems presented by mandating a lower standard of proof for complaints involving sexual harassment are further exacerbated by the fact that many recipient institutions maintain expansive definitions of sexual harassment, prohibiting protected speech that does not rise to the level of actionable sexual harassment. *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2011: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at* http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf (report detailing that of 286 public institutions of higher education surveyed, more than two-thirds maintain policies explicitly prohibiting protected speech). Additionally, some universities maintain inexact definitions of sexual assault, further compounding the problems introduced by requiring a lower standard of proof. *See, e.g.*, Robert Shibley, *Unwitting rapists and their oblivious victims*, WASHINGTON TIMES, Apr. 15, 2010, *available at* http://www.washingtontimes.com/news/2010/apr/15/unwitting-rapists-and-their-oblivious-victims; Cathy Young, *Duke's sexist sexual misconduct policy*, BOSTON GLOBE, Apr. 14, 2010, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/04/14/dukes_sexist_sexual_misconduct_policy.

the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.

B. Due Process More Generally

The April 4 letter provides useful clarity regarding several aspects of the hearing process OCR expects recipient institutions to administer. FIRE welcomes OCR's specific and explicit emphasis on the necessity of equal treatment for both the complainant and the accused student with regard to many aspects of the hearing process, including but not limited to access to information to be used in the hearing, access to counsel and participation of counsel, the ability to review the other party's statements, access to pre-hearing meetings, and equal opportunities to present witnesses and evidence.

Additionally, FIRE is pleased that OCR recommends that recipient institutions provide accused students with a procedure for appeal and instructs recipient institutions to "maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings." These recommendations will help ensure that decisions unsupported by available evidence will not stand. FIRE is concerned, however, by OCR's insistence that "[i]f a school provides for appeal of the findings or remedy, it must do so for both parties." Given that accused students will now face an inappropriately low standard of proof, FIRE fears that allowing the accusing student to appeal a finding or remedy in favor of the accused tilts the scale still further toward the accusing student. We worry that because of the publicity that often surrounds claims of this nature and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.

Further, despite the welcome clarity OCR has provided with regard to several aspects of the hearing process, FIRE is concerned that OCR's letter nevertheless may leave recipient institutions uncertain as to their obligation to provide due process protections more generally. Specifically, OCR's April 4 letter states:

> Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

This language is unnecessarily opaque and deeply troubling. By failing to make clear that all recipient institutions, both public and private, have both a legal and a moral duty to ensure that those students accused of sexual harassment and sexual violence be accorded at least a minimum level of due process protection, OCR invites the potential for abuse. FIRE's experience defending student rights for more than a decade demonstrates that colleges and universities will quickly dispense with due process protections for those

students accused of misconduct if they believe they may do so with impunity, or if they believe that OCR has sanctioned them to do so.[26]

Affording ample due process protections to those students accused of sexual harassment and sexual violence is of paramount importance and may not be sacrificed for purposes of expediency or compliance with OCR's administrative interpretations of Title IX requirements. As other commentators have noted, "OCR knows—and should state clearly—that no court will allow any set of administrative regulations to trump the United States Constitution."[27]

III. Conclusion

OCR's "Dear Colleague" letter of April 4 raises serious concerns about OCR's continuing recognition of the central importance of freedom of expression on campus, as it fails to replicate or reference OCR's previous statements regarding freedom of expression. Even more worryingly, OCR's letter mandates a dramatic reduction of due process protections for students accused of sexual harassment or sexual violence—particularly, by requiring a lower standard of proof in grievance procedures. OCR's justifications for this new mandate are unsatisfactory, and its effects are likely to be far-reaching. Further, given OCR's overwhelming influence on college and university policies nationwide, it is important that OCR recognize that some recipient institutions will inevitably push too far in attempts to comply. FIRE's experience shows that colleges and universities will cite OCR's most recent guidance, in ways both genuine and disingenuous, as justification for curtailing student rights to freedom of expression and due process.

Indeed, OCR's April 4 letter has already begun to erode due process protections previously afforded those students accused of misconduct. As colleges and universities across the country scramble to comply with OCR's new requirements, FIRE has received reports from accused students who have found grievance procedures changed despite the fact that their hearings are already in progress. Further, parties entirely unconnected with a given institution have nevertheless filed OCR complaints alleging non-compliance,[28] and colleges and universities have rushed hastily written policies into effect in an

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[26] One ready example is Valdosta State University's treatment of former student Thomas Hayden Barnes. Barnes was unilaterally expelled without being accorded a hearing following posts made on Facebook.com. The expulsion is now the subject of a federal civil rights lawsuit. *Barnes v. Zaccari*, No. 1:08-CV-0077-CAP (N.D. Ga. Sept. 3, 2010) (finding former Valdosta State University president liable for violating student's right to due process), *appeal docketed*, No. 10–14622 (11th Cir. Oct. 5, 2010).

[27] Gary Pavela & John Wesley Lowery, *The April 4, 2011 OCR "Dear Colleague" letter on sexual violence*, ASSOCIATION OF STUDENT CONDUCT ADMINISTRATION LAW AND POLICY REPORT, Apr. 14, 2011.

[28] Caroline M. McKay, *Law School Challenged Under Title IX*, HARVARD CRIMSON, Apr. 22, 2011, *available at* http://www.thecrimson.com/article/2011/4/22/harvard-law-school-title-ix-wendy-murphy (detailing current OCR investigation of Harvard Law School following complaint filed by New England School of Law professor; the complaint focused in part on Harvard Law School's "clear and convincing" standard).

apparent effort to avoid OCR investigation.[29] It is certain that more will follow, at a very high cost to due process protections on campus.

Many commentators have voiced concerns about OCR's April 4 letter.[30] FIRE shares these concerns. We ask that OCR address the issues we have outlined above, reaffirm the importance of freedom of expression on campus, rescind its imposition of a preponderance of the evidence standard, and make clear to recipient institutions that the due process rights of all students must be respected.

We appreciate your attention to our concerns, and we look forward to hearing from you.

Sincerely,

Will Creeley
Director of Legal and Public Advocacy

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[29] *See, e.g.*, Allie Grasgreen, *Rules Shifts After Federal Push*, INSIDE HIGHER ED, May 2, 2011, *available at* http://www.insidehighered.com/news/2011/05/02/ocr_title_ix_letter_prompts_universities_to_change_sexual_assault_procedures (discussing universities putting policy revisions on "the fast track" following OCR letter); Samantha Harris, *Student Rights in Jeopardy as University of Massachusetts Considers New Speech Codes*, THE TORCH, Apr. 26, 2011, *available at* http://thefire.org/article/13123.html (discussing constitutional problems with new "relationship violence" policy); Jon Ostrowsky, *New federal guidance on univ sexual assault: Brandeis follows Biden lead on Title IX*, BRANDEIS HOOT, Apr. 8, 2011, *available at* http://thebrandeishoot.com/articles/10159 (discussing changes in Brandeis University's standard of proof for internal hearings); Elizabeth Titus, *Stanford Lowers Standard of Proof for Sexual Assault*, STANFORD DAILY, Apr. 12, 2011, *available at* http://www.stanforddaily.com/2011/04/12/stanford-lowers-standard-of-proof-for-sexual-assault (discussing changes in Stanford University's standard of proof for sexual assault cases).

[30] *See, e.g.*, Mike Armstrong and Daniel Barton, *A Thumb on the Scales of Justice*, STANFORD DAILY, Apr. 2011, *available at* http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice (criticizing Stanford's change in evidentiary standards); Peter Berkowitz, *Is Yale University Sexist?*, WALL STREET JOURNAL, Apr. 16, 2011, *available at* http://online.wsj.com/article/SB10001424052748704529204576257121944716258.html (detailing concerns about OCR investigation of Yale University); Wendy Kaminer, *The SaVE Act: Trading Liberty for Security on Campus*, THE ATLANTIC, Apr. 25, 2011, *available at* http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833 (discussing "disregard for the rights of students accused of misconduct" contained in April 4, 2011, OCR "Dear Colleague" letter); Harvey Silverglate, *Liability Reigns Supreme at the Corporate University*, FORBES, Apr. 22, 2011, *available at* http://blogs.forbes.com/harveysilverglate/2011/04/22/liability-reigns-supreme-at-the-corporate-university (detailing concerns about April 4, 2011, OCR "Dear Colleague" letter); Cathy Young, *Sexual Assault on Campus—Is It Exaggerated?*, MINDING THE CAMPUS, Apr. 18, 2011, *available at* http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html (criticizing new OCR requirements and questioning statistics cited by OCR in support of new guidance).

Attachment E

FIRE
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

May 7, 2012

Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Sent by U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

In the year since the Office for Civil Rights (OCR) issued its April 4, 2011, "Dear Colleague" letter (DCL), FIRE and others have written to you to express deep concerns about the DCL's impact on freedom of expression and due process on campus. We write again now, a full year since FIRE's May 5, 2011, letter, to reiterate our concerns and to ask you to promptly remedy these problems.

First, the DCL fails to provide a clear, controlling, and constitutional definition of discriminatory harassment in the educational context. Given the sweeping scope, depth, and specificity of the new mandates announced in the DCL's 19 pages, this omission is glaring. The DCL's silence on this crucial aspect of an institution's dual obligations under Title IX and the First Amendment confuses an issue that previously had some clarity and perpetuates the persistence of unconstitutional restrictions on student speech in the guise of overbroad or vague harassment policies.

Indeed, the April 2011 DCL's lack of concern for freedom of expression stands in disappointing contrast to OCR's 2003 "Dear Colleague" letter, which more accurately reflects the state of the law then, and now. In that letter, former Assistant Secretary Gerald A. Reynolds made clear that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." To provide much-needed definitional clarity, while simultaneously recognizing an institution's twin obligations to protect free speech and prevent harassment, we once again urge OCR to make clear that institutions satisfy Title IX by adopting no more and no less than the definition of prohibited harassment in the educational context set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

Second, the DCL requires that institutions must provide the accuser a right to appeal if the accused is provided that right. This permits an accuser to appeal the outcome of a school hearing that has cleared the accused of wrongdoing, forcing the accused to defend himself or herself repeatedly and thus violating the basic constitutional principles of fairness underlying our justice system's prohibition of "double jeopardy." For a student, the consequences of being found guilty of sexual harassment or sexual assault are devastating. With so much at stake, it is simply unfair to force a student to defend himself or herself multiple times against the same accusation of sexual misconduct.

Third, the DCL damages student due process rights by mandating that institutions employ our judiciary's lowest standard of proof, the "preponderance of the evidence" standard, when hearing sexual harassment and sexual assault cases. The Supreme Court has unequivocally held that when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). Adjudicating accusations of serious sexual misconduct requires equally serious procedural protections. By mandating that institutions use the weak preponderance of the evidence standard, OCR has undermined the reliability, integrity, and basic fairness of disciplinary proceedings and invited error. Given the divergence in quality and competency of school disciplinary hearings and the potential for life-altering punishment, it is unconscionable to require that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question. If OCR is to mandate an evidentiary standard for the adjudication of allegations of sexual harassment and sexual assault, it must be no less protective of the rights of the accused than the "clear and convincing" standard.

OCR's leadership in encouraging colleges and universities to take meaningful action to combat sexual misconduct is laudable. However, in pursuit of this goal, the DCL has failed to protect fundamental constitutional principles. In the year that has passed since FIRE first wrote you about the erosions of student rights mandated by the DCL, we have waited patiently for you to address our concerns. We ask again that you take prompt, affirmative steps to preserve core civil liberties on campus.

Sincerely,

Joseph Cohn
Legislative & Policy Director
Foundation for Individual Rights in Education

Professor Cynthia Bowman*
Dorothea S. Clarke Professor of Law
Cornell University Law School

Professor Kevin Clermont*
Robert D. Ziff Professor of Law
Cornell University Law School

David A. Cortman
Vice-President, Religious Liberty
Senior Counsel
The Alliance Defense Fund, Center for Academic Freedom

Suzanne A. Delaney
Managing Director
Feminists for Free Expression

Christopher Finan
President
American Booksellers Foundation for Free Expression

Professor Roy Gutterman
Director
The Tully Center for Free Speech at Syracuse University's
S.I. Newhouse School of Public Communications

David Horowitz
President
The David Horowitz Freedom Center

Professor KC Johnson*
Professor of History
Brooklyn College and the City University of New York Graduate Center

Malcolm Kline
Executive Director
Accuracy in Academia

Eli Lehrer
National Director and Vice President
The Heartland Institute

John Leo*
Senior Fellow
Center for the American University at the Manhattan Institute

Professor Michael McConnell*
Richard and Frances Mallery Professor of Law and Director of the Constitutional Law Center
Stanford Law School

Anne D. Neal
President
American Council for Trustees and Alumni

Professor Cary Nelson*
Professor of English
University of Illinois at Urbana-Champaign
President
American Association of University Professors

Glenn Ricketts
Public Affairs Director
National Association of Scholars

Jane S. Shaw
President
John William Pope Center for Higher Education Policy

Christina Hoff Sommers*
Resident Scholar
American Enterprise Institute

Professor Nadine Strossen*
New York Law School
Former President, American Civil Liberties Union (1991 – 2008)

Sue Udry
Director
Defending Dissent Foundation

*The following individuals have signed on in their individual capacities. Accordingly, affiliations are for identification purposes only.

Attachment F

FIRE
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

September 12, 2013

Catherine Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, D.C. 20202

Sent via U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Lhamon:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a non-partisan, non-profit organization dedicated to defending students' and faculty members' civil liberties. FIRE unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on our nation's campuses.

I am very pleased to write you today to congratulate you on your new position and to discuss FIRE's concerns regarding the threat to campus freedom of expression and due process rights presented by certain recent statements from the Department of Education's Office for Civil Rights.

Given your extensive experience defending civil liberties in several capacities, I very much look forward to working with you and your office in the interest of protecting student and faculty rights. Like OCR, FIRE strongly believes that our nation's colleges and universities must meet their moral and legal obligation to respond promptly, fairly, and effectively to allegations of sexual misconduct. As we have repeatedly stated, however, this important and necessary commitment does not require colleges and universities to violate student and faculty rights. In the hope of continuing our dialogue and correcting the problems raised by OCR's recent policy decisions, FIRE's concerns are explained below.

EXECUTIVE SUMMARY

FIRE and allied signatories wrote to OCR on July 16, 2013; February 25, 2013; and December 6, 2012 to express serious concern for campus civil liberties in light of recent pronouncements from OCR. Specifically, our letters discussed the threats to freedom of expression and due process presented by OCR's April 4, 2011 "Dear Colleague" letter and the May 9, 2013 findings letter and resolution agreement signed by OCR, the Educational Opportunities Section of the Department of Justice's Civil Rights Division, and the University of Montana.

OCR Acting Assistant Secretary Seth Galanter sent two responses to these letters on July 29, 2013, and August 23, 2013. Galanter's two replies focused in turn on our concerns regarding the impact of OCR's recent proclamations on freedom of expression and due process protections. As you know, the Supreme Court has long affirmed that the protection of free speech at our nation's colleges and universities is essential for the health of our democracy.[1] Accordingly, we were very pleased to receive Galanter's assurance in his letter of July 29 that OCR is committed to respecting First Amendment rights on campus.

However, while we appreciated Galanter's recognition of the primacy of freedom of expression in higher education, his letters did not fully allay our concerns. His July 29 response argued that the University of Montana "blueprint" is consistent with the First Amendment and past OCR guidance, but the legal analysis supporting the blueprint cannot be squared with either. Similarly, we disagree with Galanter's August 23 defense of OCR's decision to mandate use of the "preponderance of the evidence" standard of proof in campus adjudications of sexual misconduct, and we remain deeply concerned about the impact of OCR's 2011 "Dear Colleague" letter on campus due process rights.

I. Freedom of Expression

A. OCR's Broad Definition Establishes a New Form of "Sexual Harassment"

Acting Assistant Secretary Galanter's response failed to correct OCR's deeply problematic requirement that recipient institutions recognize a new form of "sexual harassment," as set forth in the May 9 findings letter to the University of Montana. In that letter, OCR and DOJ state:

> Sexual harassment is a form of sex discrimination prohibited by Title IX and Title IV. **Sexual harassment is unwelcome conduct of a sexual nature** and can include unwelcome sexual advances, requests for sexual favors, **and other verbal, nonverbal, or physical conduct of a sexual nature,** such as sexual assault or acts of sexual violence.[2]

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[1] *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

[2] Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Civil Rights Division, and Gary Jackson, Regional Director, U.S. Dep't of Educ., Office for Civil Rights, to Royce Engstrom, President, Univ. of

The May 9 findings letter makes clear that this sweeping conception of sexual harassment—which implicates a vast amount of expressive conduct protected by the First Amendment—is not simply a general description. Rather, the letter specifically requires the University of Montana to adopt this exact language as the institution's operative, actionable definition of sexual harassment. Indeed, the letter rejects existing University of Montana sexual harassment policies as "inadequate" for failing to "accurately define[] 'sexual harassment'" as specified.[3]

Further, the May 9 findings letter explicitly draws a distinction between "sexual harassment" and "hostile environment harassment," stating:

> The confusion about when and to whom to report sexual harassment is attributable in part to inconsistent and inadequate definitions of "sexual harassment" in the University's policies. First, the University's policies conflate the definitions of "sexual harassment" and "hostile environment." Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex, it creates a hostile environment. The University's Sexual Harassment Policy, however, defines "sexual harassment" as conduct that "is sufficiently severe or pervasive as to disrupt or undermine a person's ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person's work or educational performance." Sexual Harassment Policy 406.5.1. While this limited definition is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as "any unwelcome conduct of a sexual nature."[4]

This new and previously unidentified distinction threatens student and faculty rights in serious ways and cannot be justified as a means of encouraging students to report potentially harassing conduct.

1. OCR's newly mandated definition of "sexual harassment" breaks with legal precedent and contradicts prior OCR guidance.

Prior to the Findings Letter, sexual harassment under Title IX has been understood as encompassing either "*quid pro quo*" harassment or "hostile environment" harassment. This conception has been shared by federal courts and the Office for Civil Rights. In *Klemencic v. Ohio State University*, for example, the United States Court of Appeals for the Sixth Circuit stated:

> For a plaintiff to proceed on a claim against an educational institution under Title IX, a plaintiff must establish a prima facie case showing that: [a)] she was

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Montana, and Lucy France, Univ. Counsel, Univ. of Montana 4 (May 9, 2013), *available at* http://www.justice.gov/opa/documents/um-ltr-findings.pdf (emphases added) [hereinafter Findings Letter].

[3] *Id.* at 8–9.

[4] *Id.* at 8.

> **subjected to quid pro quo sexual harassment or a sexually hostile environment**; b) she provided actual notice of the situation to an "appropriate person," who was, at a minimum, an official of the educational entity with authority to take corrective action and to end discrimination; and c) the institution's response to the harassment amounted to "deliberate indifference."[5]

Similarly, OCR has stated in previous guidance that under Title IX, sexually harassing conduct in the educational context takes the form of either *quid pro quo* harassment or hostile environment harassment. For example, in OCR's 2001 *Revised Sexual Harassment Guidance* (2001 *Guidance*), OCR characterized *quid pro quo* and hostile environment harassment as solely constituting "the different types of harassment":

> In each case, the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex. **However, an understanding of the different types of sexual harassment can help schools determine whether or not harassment has occurred that triggers a school's responsibilities under, or violates, Title IX or its regulations.**
>
> The type of harassment traditionally referred to as quid pro quo harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct. Whether the student resists and suffers the threatened harm or submits and avoids the threatened harm, the student has been treated differently, or the student's ability to participate in or benefit from the school's program has been denied or limited, on the basis of sex in violation of the Title IX regulations.
>
> By contrast, sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct. **Harassment of this type is generally referred to as hostile environment harassment.** This type of harassing conduct requires a further assessment of whether or not the conduct is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program based on sex.
>
> Teachers and other employees can engage in either type of harassment. **Students and third parties are not generally given responsibility over other students and, thus, generally can only engage in hostile environment harassment.**[6]

Among students, the 2001 *Guidance* makes no appreciable distinction between "sexual harassment" and "hostile environment" harassment. Rather, the 2001 *Guidance* states that with regard to student-on-student conduct, sexual harassment *is* hostile environment

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[5] *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001) (citations omitted) (emphasis added).
[6] U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance* (Jan. 19, 2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (emphases added).

harassment. If the University of Montana's policy conflated "sexual harassment" and hostile environment harassment, so too did the 2001 *Guidance*.

The findings letter also criticizes a University of Montana sexual harassment policy for "improperly suggest[ing] that the conduct does not constitute sexual harassment unless it is objectively offensive."[7] But this sharp rebuke cannot be reconciled with OCR's 2003 "Dear Colleague" letter regarding anti-harassment policies and the First Amendment. In that letter, OCR stated that "OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age."[8]

Galanter's July 29 letter tacitly deemphasizes the blueprint's newly operational, broad definition of "sexual harassment," instead focusing specifically on hostile environment harassment and OCR's understanding of the elements of such harassment. As Galanter writes, "to constitute unlawful harassment ... conduct must create a hostile environment." While this formulation is correct and consistent with previous OCR guidance, it cannot be reconciled with the blueprint's insistence that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature.'"

Nevertheless, Galanter confusingly claims that the blueprint is "consistent with the principles articulated in prior OCR guidance," and argues that both the 2001 *Guidance* and the 2003 "Dear Colleague" letter remain "fully in effect." But by mandating that the University of Montana recognize a new, broad category of sexual harassment, distinct from either *quid pro quo* or hostile environment harassment, OCR has contradicted both federal courts and its own statements, breaking troubling new ground.

Finally, OCR's creation of a separate category of sexual harassment is wholly unsupported by the agency's previous Title IX guidance. As FIRE wrote in our open letter to OCR on July 16:

> OCR's response insists that previous agency statements, including its 2001 *Revised Sexual Harassment Guidance* and its 2003 "Dear Colleague" letter, "remain fully in effect." But the blueprint contradicts both. For example, the blueprint rejected a University of Montana sexual harassment policy because it included an objectivity component, stating that the policy "improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive." In sharp contrast, the 2003 "Dear Colleague" letter makes clear that an objective evaluation of the allegedly harassing conduct is *required*:
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> > Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in

[7] Findings Letter at 9.
[8] Letter from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, to Colleagues (July 28, 2003), *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

> or benefit from the educational program. Thus, **OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position,** considering all the circumstances, including the alleged victim's age. [Emphasis added.]
>
> The 2001 *Guidance* similarly instructed institutions to use a number of factors, including an objectivity component, "to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level." Tellingly, both the 2001 *Guidance* and the 2003 "Dear Colleague" letter explicitly recognize the First Amendment and emphasize the importance of expressive rights, whereas the First Amendment and freedom of expression are not once mentioned in the blueprint's forty-seven pages. And of course, the blueprint's broad definition of sexual harassment is not constitutional simply because OCR declares it so in an email response to concerned citizens.

Unfortunately, OCR's July 29 response to FIRE fails to adequately address these issues or to point to any other past guidance from the agency that would support the creation of a third category of sexual harassment under Title IX. Therefore, FIRE remains concerned about the implications of OCR's agreement with the University of Montana for student and faculty free speech rights at universities across the country.

2. OCR's definition renders protected expression "sexual harassment" and is therefore an impermissible means of encouraging reporting.

By requiring the University of Montana to adopt a broad, new definition of "sexual harassment," unmoored to previous guidance or legal precedent, and by labeling the resolution agreement a "blueprint" for colleges and universities nationwide, OCR has endangered freedom of expression and academic freedom on campus. Deeming any and all speech of a sexual nature "sexual harassment" because a single student unreasonably finds it unwelcome subjects a vast swath of constitutionally protected speech to mandatory investigation and potential discipline. This result is plainly unconstitutional.

Attempting to explain this sharp break with both prior practice and common sense, OCR has repeatedly argued that the adoption of the broad definition is necessary to encourage students to report potentially harassing conduct.[9] For example, Galanter's July 29 letter states that "it is important that students are not discouraged from reporting harassment because they believe it is not significant enough to constitute a hostile environment." To solve this problem, Galanter explains that "[t]herefore, under the Agreement, students will be allowed to bring complaints when they have been subjected to unwelcome sexual conduct."

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[9] *See, e.g.*, Letter from Seth Galanter, Acting Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights, and Jocelyn Samuels, Principal Deputy Assistant Attorney Gen., Dep't of Justice, to Professor Ann Green and Professor Donna Potts, American Ass'n of Univ. Professors (July 12, 2013), *available at* http://www.aaup.org/file/DoE_Respons_%20to_6-6-13_letter.pdf.

However well-intentioned such a motivation may be, it cannot and does not justify the broad definition's blatant encroachment upon student and faculty First Amendment rights. As we explained in our letter of July 16, classifying protected speech as "harassment" for the purpose of encouraging reporting will have punitive consequences:

> Students and faculty accused of sexual harassment must be immediately subjected to a "thorough" mandatory investigation, even if the accusation solely concerns speech protected by the First Amendment. The names of the accused must be recorded indefinitely in a university database as a result of the accusation alone, even if no wrongdoing is found.

Even if those accused never receive formal discipline, labeling protected expression "sexual harassment" is deeply problematic. There can be no doubt that students and faculty will be deterred from expressing themselves on matters pertaining to sex and gender if doing so in a manner protected by the First Amendment may nevertheless result in an accusation of "sexual harassment" and mandatory investigation.

To encourage reporting of potentially harassing behavior, OCR should simply encourage students to report potentially harassing behavior. Rather than defining "sexual harassment" so broadly as to prohibit protected speech—a result that conflicts with the First Amendment and oversteps OCR's legal authority under Title IX—OCR should encourage colleges and universities to increase student awareness of their sexual harassment policies. A well-known and clearly stated sexual harassment policy that complies with the First Amendment will prove at least as effective in prompting student reporting as an obscure but overly broad policy.

3. OCR's new category of lawful "sexual harassment" will sow confusion and invite administrative overreaction.

Unfortunately, OCR's insupportable distinction between reportable "sexual harassment" and punishable hostile environment harassment will not survive contact with reality. The blueprint places recipient institutions in the untenable position of either being viewed as tolerating milder, non-actionable forms of alleged "sexual harassment," or taking disciplinary action against protected speech that falls well short of the legal standard for hostile environment harassment in the educational setting. Moreover, given the confusion that OCR's guidance will engender among university administrators—and the public pressure that recipient institutions face to adequately address and punish alleged harassment—there is a great likelihood that OCR's distinction will be ignored and abused on campus.

FIRE makes this argument from experience. We have spent over a decade fighting against the misuse and abuse of overbroad sexual harassment policies at colleges and universities. Despite clarity in the law with respect to student-on-student harassment in the educational setting—both in the form of the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and in lower federal courts' uniform rejection of

overbroad and vague campus sexual harassment policies[10]—we have seen one institution after another apply such policies to restrict and punish protected speech.

For example, the University of Denver found a tenured professor guilty of sexual harassment in 2011 for teaching about sexual topics in a graduate-level course on "The Domestic and International Consequences of the Drug War," one of the themes of which was "Drugs and Sin in American Life: From Masturbation and Prostitution to Alcohol and Drugs."[11] In 2012, a professor at Appalachian State University was placed on administrative leave after students alleged that she had created a hostile environment in her sociology class by, among other things, showing a documentary that critically examines the adult film industry.[12] Likewise, East Georgia College ordered a professor to resign his position or be fired simply for criticizing the institution's sexual harassment policy during a faculty training session.[13] Perhaps most shockingly, the University of New Hampshire once evicted a student from his dormitory for posting satirical fliers joking that female students could lose the "Freshman 15" by taking the dormitory stairs instead of the elevator.[14]

Nor is restriction of protected speech likely to be limited to the enforcement of sexual harassment policies; FIRE is sadly confident that other discriminatory harassment policies will be similarly applied to censor or punish protected student and faculty expression. Indeed, OCR's own letter of July 29 draws little distinction between racial and sexual harassment, citing the agency's 1994 guidance regarding harassment on the basis of race, color, or national origin for the proposition that OCR's analyses regarding the creation of a racially hostile environments "have direct corollaries in the area of sexual harassment."

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[10] *See McCauley v. Univ. of the V. I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy, on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down unconstitutional sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *The UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional).

[11] Letter from Adam Kissel, Vice President of Programs, Foundation for Individual Rights in Education, to Robert Coombe, Chancellor, Univ. of Denver (Nov. 4, 2011), *available at* http://thefire.org/article/13833.html.

[12] Letter from Adam Kissel, Vice President of Programs, Foundation for Individual Rights in Education, to Kenneth E. Peacock, Chancellor, Appalachian State Univ. (May 8, 2012), *available at* http://thefire.org/article/14498.html.

[13] Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Erroll B. Davis Jr., Chancellor, Univ. System of Georgia (Aug. 27, 2009), *available at* http://thefire.org/article/11071.html.

[14] Letter from Greg Lukianoff, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Ann Weaver Hart, President, Univ. of New Hampshire (Oct. 22, 2004), *available at* http://thefire.org/article/5006.html.

Based on FIRE's experience, colleges and universities are likely to seize upon this opening and to continue to label protected speech as harassment. We have seen this occur in cases such as one involving a student-employee at Indiana University-Purdue University Indianapolis who was found guilty of racial harassment for silently reading during work breaks a book that a co-worker found to be offensive.[15] Brandeis University, similarly, labeled a veteran professor a racial harasser after he used the word "wetbacks" in his Latin American Politics course in order to criticize its use.[16] Just last fall, a student at the State University of New York at Oswego who emailed hockey coaches at rival schools as part of his research for a class assignment about the university's men's hockey coach was charged with violating a prohibition against "defam[ing], harass[ing], intimidat[ing], or threaten[ing] another individual."[17]

The problem almost certainly will not remain cabined to allegations of sexual harassment and sexual misconduct. Rather, under the terms of OCR's Findings Letter, institutions across the country will erroneously label and punish protected student and faculty expression as "harassment," whether it be sexual harassment, racial harassment, or harassment based on another protected category. OCR's July 29 response to FIRE fails to adequately address this problem.

B. Conflating Sexual Harassment and Sexual Assault

FIRE strongly believes that universities are better positioned to create fair and accurate sexual harassment policies and procedures when they address the issue of sexual harassment separately from the issue of sexual assault. While both sexual harassment and sexual assault constitute gender-based discrimination under Title IX, they present substantially different issues and challenges for a responding institution. Sexual assault is violent criminal behavior and often involves complex and fact-intensive allegations—challenges that colleges and universities typically struggle to deal with, and that, in the eyes of FIRE and other commentators, may be better left to law enforcement possessing the requisite expertise and experience. Sexual harassment, on the other hand, presents its own complications and concerns, including the issue of potentially protected speech. At minimum, institutions should maintain separate standards for each offense.

OCR's Findings Letter notes at the onset that the federal investigations of the University of Montana date back to the fall of 2011, when "the University received reports that two female students had been sexually assaulted on campus by male students."[18] The university then "received seven additional reports of student-on-student sexual assault that had occurred

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[15] Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Charles R. Bantz, Chancellor, Indiana Univ.-Purdue Univ. Indianapolis (Mar. 28, 2008), *available at* http://thefire.org/article/9191.html.
[16] Letter from Adam Kissel, Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Jehuda Reinharz, President, Brandeis Univ. (July 9, 2008), *available at* http://thefire.org/article/9503.html.
[17] Letter from Peter Bonilla, Associate Director, Individual Rights Defense Program, Foundation for Individual Rights in Education, to Deborah F. Stanley, President, State Univ. of New York at Oswego (Oct. 26, 2012), *available at* http://thefire.org/article/15094.html.
[18] Findings Letter at 2.

between September 2010 and December 2011."[19] Former Montana Supreme Court Justice Diane Barz—hired by the university to conduct an independent investigation—"concluded that the University 'has a problem with sexual assault on and off campus and needs to take steps to address it to ensure the safety of all students as well as faculty, staff and guests.'"[20]

While sexual harassment is indeed a serious matter, this factual background suggests that the University of Montana's most critical problems concerned sexual assault—a crime that does not implicate expressive rights. OCR would have been better served by addressing the issues of sexual assault and sexual harassment separately. Doing so would have allowed the agency to more carefully consider the First Amendment implications of its definition of sexual harassment and to ensure that constitutionally protected speech and expression do not get swept into that definition. By instead defining sexual harassment as any "unwelcome conduct of a sexual nature," including "verbal conduct," OCR has left student speech rights in jeopardy—both at the University of Montana and at colleges and universities throughout the country, the overwhelming majority of which currently receive federal funding.

II. Solution: Require Adoption of the Supreme Court's *Davis* Definition

Given the myriad problems with the Findings Letter's definition of sexual harassment, FIRE reiterates our support for the controlling legal standard for student-on-student hostile environment harassment in the educational context, as set forth by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). FIRE has repeatedly emphasized the utility and clarity of the harassment standard *Davis* establishes. In our May 5, 2011, letter to OCR in response to the 2011 "Dear Colleague" letter, for example, we stated:

> In *Davis,* the Court found that behavior constitutes hostile environment sexual harassment when it is "so severe, pervasive, and objectively offensive, and … so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities," and that institutions displaying deliberate indifference to actual knowledge of such behavior could be found liable for monetary damages. This exacting, speech-protective definition ensures an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment free from harassment. [Citation omitted.]

Similarly, in our May 7, 2012, open letter, we wrote:

> [T]he April 2011 DCL's lack of concern for freedom of expression stands in disappointing contrast to OCR's 2003 "Dear Colleague" letter, which more accurately reflects the state of the law then, and now. In that letter, former Assistant Secretary Gerald A. Reynolds made clear that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." To provide much-needed definitional clarity, while simultaneously recognizing an institution's twin obligations to protect free

[19] *Id.*
[20] *Id.*

speech and prevent harassment, we once again urge OCR to make clear that institutions satisfy Title IX by adopting no more and no less than the definition of prohibited harassment in the educational context set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

We again emphasize now that the Supreme Court's *Davis* standard, including each of its operative elements, is the controlling standard for hostile environment peer harassment in the educational setting. To be consistent with both harassment law and the First Amendment, therefore, OCR must make clear to recipient institutions that peer harassment on campus should always be defined as no more and no less than the *Davis* standard.

A. Elements of the *Davis* Standard

The Supreme Court's *Davis* standard properly balances universities' dual obligations to prevent true harassment and protect freedom of speech, and is thus far preferable to the definition of hostile environment sexual harassment provided in OCR's July 29 letter to FIRE—*i.e.*, conduct that is "sufficiently serious as to limit or deny a student's ability to participate in or benefit from an educational program."

1. Harassment should be targeted.

First, *Davis* suggests that to properly constitute harassment, the conduct in question should be targeted. *Davis*' plaintiff student was subjected to a months-long, "prolonged pattern of sexual harassment" by one of her classmates.[21] While Galanter's July 29 letter argues that harassment "does not have to … be directed at a specific target," requiring that the allegedly harassing conduct be targeted is necessary to avoid harassment allegations arising from speech that the complaining individual simply happens to overhear or witness. For example, a student should not be charged with hostile environment sexual harassment simply because he or she wrote an op-ed in the campus newspaper about a sexually related issue such as reproductive choice or gay marriage. Such a result would have a harmful chilling effect on campus discourse.

It is true that in the employment context, some federal courts have held that speech or conduct that someone overhears, even though not directed or targeted at that person, can create a hostile environment.[22] However, federal courts have held in other cases that it is insufficient to allege that one is disparately impacted, as a male or female, by speech or conduct in the workplace, and that someone must allege that he or she was actually the target of such speech or conduct.[23] Additionally, legal commentators including Professor Eugene Volokh of the

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[21] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (internal quotation marks omitted).
[22] *See, e.g., Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010); *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007); *Huff v. Sheahan*, 493 F.3d 893, 903 (7th Cir. 2007).
[23] *See, e.g., Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1312 (10th Cir. 2005); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 965 (8th Cir. 1999). *See also Lyle v. Warner Bros. Television Prod.*, 132 P.3d 211, 229 (Cal. 2006).

University of California, Los Angeles School of Law[24] and former American Civil Liberties Union President Nadine Strossen[25] have argued in favor of the requirement of targeted conduct even in the employment setting.

More importantly, there are reasons to require that allegedly harassing behavior be targeted in the context of student-on-student harassment that are not present in the employment setting. Courts and commentators alike have recognized the paramount importance of freedom of speech on college campuses, providing students with a level of protection that is inapposite in the workplace setting.[26] Simply importing workplace precedent fails to recognize the unique considerations present on campus, chief among them the Supreme Court's consistent recognition of the importance of First Amendment rights in the university setting and the qualitative difference in the relationships between students and their peers and employees and their employers.

In the Title IX context, hostile environment harassment is properly understood as the creation of a discriminatory atmosphere so antagonistic towards a student on the basis of his or her gender that he or she cannot receive an education. It cannot be understood as simply an all-purpose civility code, unmoored from the specific requirements of both the First Amendment and Title IX itself. Indeed, such an understanding would be incompatible with *Davis* and the Court's holding in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"

It is difficult to imagine what would constitute *untargeted* student-on-student harassment. If speech is untargeted, how might it be discriminatory on the basis of sex? If OCR regards Title IX as allowing for untargeted student-on-student harassment, what conduct may be prohibited? A newspaper column? A controversial question in class? An online posting? Sadly, FIRE has seen far too many instances of administrators abusing harassment codes to silence speech they find offensive, inconvenient, or simply disagreeable to be comfortable with a broad ban on untargeted "harassment."

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[24] Professor Volokh has proposed drawing a line in the employment context "between *directed* speech—speech that is aimed at a particular employee because of her race, sex, religion, or national origin—and *undirected* speech, speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee." Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992) (emphasis in original). "The state interest in assuring equality in the workplace would justify restricting directed speech, but not undirected speech." *Id.*

[25] Strossen has argued that harassment, properly construed, is "a type of conduct which is legally proscribed in many jurisdictions when *directed at a specific individual or individuals* and when intended to frighten, coerce, or unreasonably harry or intrude upon its *target*." Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 706 (1995) (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added). She therefore advocates distinguishing "generalized statements of opinion—which should enjoy absolute protection no matter how sexist—from gender-based verbal abuse that … is targeted on a particular employee." *Id.* at 717 (quoting Kingsley R. Browne, *Stifling Sexually Hostile Speech: To What Extent Does the First Amendment Limit the Reach of Sexual Harassment Law When the Hostile Environment is Created by Speech?*, CONN. L. TRIB., Nov. 29, 1993, at 19).

[26] *See* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

2. **Harassment must be unwelcome.**

Second, *Davis* requires that the conduct at issue be unwelcome. This requirement ensures that the allegedly harassing conduct is subjectively unwanted and offensive to the target. It is not enough, for example, that the alleged harasser have the intent to create a hostile environment or directly target an individual. The conduct must be subjectively unwelcome from the perspective of the target. In *Davis*, the victim-student made the unwelcome nature of the conduct in question clear by reporting the incidents to her mother and to various teachers.[27] In contrast, OCR's proffered definition of hostile environment harassment as conduct that is "sufficiently serious as to limit or deny a student's ability to participate in or benefit from an educational program" fails to specify that the conduct must be unwelcome.

3. **Harassment must be severe.**

Third, *Davis* requires that truly harassing conduct be "severe." OCR's July 29 response to FIRE worryingly states that "harassing conduct can take many forms, including verbal acts and name-calling, and graphic and written statements." Yet the Supreme Court took the opposite position in *Davis*:

> [I]n the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.** Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.[28]

OCR's broad classification encompasses a wide swath of constitutionally protected expression. Under *Davis*, the vast majority of "verbal acts" and "graphic and written statements"—whether or not they involve "name-calling"—are not severe enough to create a hostile environment unless they are part of a larger pattern of harassing conduct. Here, the distinction between *conduct* and pure *speech* is key. To ensure a proper balance of the interests involved and to protect students' First Amendment rights, peer harassment law requires an extreme and usually repetitive pattern of conduct, as illustrated by the factual background of *Davis* itself.[29] Indeed, one federal court after another has struck down university harassment policies for restricting speech protected by the First Amendment.[30]

Again, the special nature of student interaction on campus requires this exacting standard. Students are engaged in the search for truth, not the production of widgets, and thus policing student dialogue involves substantially different considerations than those faced by employers

[27] *Davis*, 526 U.S. at 633–34.
[28] *Id.* at 651–52 (emphasis added).
[29] *Id.* at 633–34.
[30] *See supra* note 10.

overseeing a workplace. The campus standard for severity must accordingly be higher to provide students the breathing room they need to engage with one another and to prevent colleges from feeling forced to monitor student dialogue to an unreasonable and counterproductive degree.

4. Harassment must be pervasive.

Fourth, *Davis* requires that harassing conduct be "pervasive." This element establishes the need to demonstrate a pattern of repetitive behavior and, crucially, ensures that isolated instances of protected speech will not, standing alone, be incorrectly labeled as "harassment." Indeed, the U.S. Court of Appeals for the Third Circuit invalidated an overbroad sexual harassment policy at Temple University in large part on these grounds.[31] The appellate court declared that "[a]bsent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech."[32] Thus, the Third Circuit found that the terms of Temple's sexual harassment policy were "sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone,'" including "'core' political and religious speech, such as gender politics and sexual morality."[33]

5. Harassment must be objectively offensive.

Fifth, *Davis* requires that the conduct in question be "objectively offensive." This requirement ensures that speech or conduct is not erroneously labeled as harassment because it offends the subjective sensibilities of a complaining individual, no matter how unreasonable or hypersensitive he or she may be. As FIRE wrote in our open letter to OCR on January 6, 2012:

> If merely "offensive" expression constituted harassment, then a student might be punished for telling a sensitive student a joke, reading a poem aloud, or simply voicing a dissenting political opinion. Instead, *Davis* requires the harassment not only to seem offensive, but to be *objectively* so. By incorporating this "reasonable person" element, the *Davis* standard frees campus discourse from the tyranny of the student body's most sensitive ears, as well as those feigning outrage to silence viewpoints they dislike.

Once again, this component of the *Davis* standard is missing from the standard set forth in OCR's July 29 response letter to FIRE: conduct that is "sufficiently serious as to limit or deny a student's ability to participate in or benefit from an educational program." While Galanter's letter adds that "[i]n determining whether harassment has created a hostile environment, OCR considers the conduct in question from both a subjective and objective perspective," this explanation does not set forth the requirement of objective offense as clearly as *Davis*, which

[31] *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).
[32] *Id.* at 317–18.
[33] *Id.* at 317 (citation omitted).

reduces its efficacy. OCR would avoid unnecessary confusion among recipient institutions if it made the crucial requirement of objective offense an express element of its standard for hostile environment sexual harassment.

6. Harassment must deny victims equal access to resources and opportunities.

Sixth, *Davis* requires that harassing conduct "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[34] This threshold differs significantly from OCR's requirement, as stated in Galanter's July 29 letter to FIRE, that the alleged conduct "limit or deny a student's ability to participate in or benefit from an educational program." The chief benefit of the *Davis* standard is that it affords certainty and precision to an institution's determination of whether hostile environment sexual harassment took place by requiring that the conduct in question must "undermine[] and detract[]" from the alleged victim's educational experience to such a degree that he or she is "effectively denied equal access" to educational resources and opportunities. Comparatively, OCR's language is vague, giving institutions unchecked discretion to determine whether given conduct "limit[s]" the alleged victim's "ability to participate in or benefit from an educational program." The term "limit" in this context could mean virtually anything, affording institutions a less precise standard to apply and leaving accused students with less certainty in the protection of their First Amendment rights.

B. Certainty and Precision

For these reasons, we ask that OCR make clear to recipient institutions that the Supreme Court's *Davis* standard, including each of its crucial elements, is the controlling standard for hostile environment peer harassment in the educational setting, and that, to be consistent with both harassment law and the First Amendment, peer harassment on campus should always be defined as no more and no less than the *Davis* standard. Doing so would afford both students and the institutions they attend the certainty and precision they require with respect to this issue.

As FIRE observed in our letter to OCR of January 6, 2012:

> [T]he *Davis* standard is still the Supreme Court's only guidance regarding student-on-student harassment—and it remains the best definition of harassment for both students and colleges. *Davis'* central benefit is its precise balance between a school's dual responsibilities to prohibit harassment that denies a student equal access to an education and to honor freedom of expression. … *Davis* protects the dialogue we expect universities to foster in the search for truth. Under the *Davis* standard, heated discussion is acceptable, but the truly harassing behavior that federal anti-discrimination laws are intended to prohibit is not.

We reiterate the request we made to OCR in that letter:

[34] *Davis*, 526 U.S. at 651.

> **We ask that OCR recognize *Davis* as the controlling standard for student-on-student harassment in the educational context. Further, in order to protect free speech and prevent harassment, we ask that OCR require that institutions adopt no more and no less than the *Davis* standard if they are to be deemed fully compliant with federal anti-discrimination laws.** "No more and no less" is necessary because many colleges maintain conflicting harassment policies; a constitutional policy in the student handbook may be contradicted by an unconstitutional one posted online. Using the Supreme Court's definition would prohibit harassing behavior, safeguard student speech rights, and provide institutions with legal certainty. No court will find the *Davis* standard to be insufficiently protective of First Amendment rights or a student's ability to receive an education free from harassment. By insisting on *Davis*, OCR would not only eliminate a vast swath of campus speech restrictions, but would also confirm that the American campus remains what Supreme Court Justice William Brennan deemed "peculiarly the 'marketplace of ideas.'" [Emphasis in original.]

These points remain as true today as they did then, and we again call on OCR to secure recipient institutions the certainty and precision provided by *Davis*.

III. Due Process

FIRE has repeatedly raised due process concerns with OCR, both in our July 16 open letter and in response to OCR's April 4, 2011 "Dear Colleague" letter (DCL).

In our open letter, we objected to the provisions in the University of Montana agreement allowing for university disciplinary action, prior to the completion of an investigation and hearing, against a student or faculty member accused of sexual harassment. However, Galanter's responses to FIRE of July 29 (concerning freedom of expression) and August 23 (concerning due process protections) fail to address this issue. This is deeply disappointing, as such a serious concern warrants an answer. We therefore restate our concern at this time.

Further, Galanter's August 23 response to our worries regarding the DCL's reduction of due process protections for students and professors accused of sexual harassment or sexual assault fails to allay our concerns. In our May 5, 2011, letter to OCR, FIRE argued against the DCL's imposition of the "preponderance of the evidence" standard of proof in all such adjudications on college campuses, writing:

> In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused's rights and is thus inadequate and inappropriate. Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, OCR's insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students

> found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large in ensuring a correct and just result is therefore far greater than that implicated by a simple "monetary dispute," and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question. [Citations omitted.]

FIRE wrote in the same letter that the DCL's requirement that "[i]f a school provides for appeal of the findings or remedy, it must do so for both parties" threatens the due process rights of accused individuals. In pertinent part, we wrote:

> Given that accused students will now face an inappropriately low standard of proof, FIRE fears that allowing the accusing student to appeal a finding or remedy in favor of the accused tilts the scale still further toward the accusing student. We worry that because of the publicity that often surrounds claims of this nature and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.

We repeated many of these same arguments in an open letter sent to OCR a year later, on May 7, 2012, in which we were joined by a coalition of 19 other signatories. We wrote, for example:

> Adjudicating accusations of serious sexual misconduct requires equally serious procedural protections. By mandating that institutions use the weak preponderance of the evidence standard, OCR has undermined the reliability, integrity, and basic fairness of disciplinary proceedings and invited error. Given the divergence in quality and competency of school disciplinary hearings and the potential for life-altering punishment, it is unconscionable to require that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question. If OCR is to mandate an evidentiary standard for the adjudication of allegations of sexual harassment and sexual assault, it must be no less protective of the rights of the accused than the "clear and convincing" standard.

Responding to these letters, Galanter's reply of August 23 makes three arguments. None is convincing.

First, Galanter argues that because the preponderance of the evidence standard is used in certain civil cases, including those adjudicating "issues involving sexual violence" and those where penalties may involve expatriation, OCR is justified in interpreting Title IX to mandate its use in campus sexual misconduct hearings. But as FIRE has repeatedly pointed out, campus hearings are simply not comparable to civil proceedings in terms of the protections afforded to both parties, the governing legal doctrines, and the professional expertise of presiding authorities. As FIRE Legislative and Policy Director Joseph Cohn wrote for *The Chronicle of Higher Education*:

While it is true that most civil cases in federal court are decided under the preponderance standard, due process requires that this low burden of proof be offset by procedural safeguards—lots of them.

For example, to ensure fairness, reliability, and constitutionality, civil trials are presided over by experienced, impartial, and legally educated judges. At either party's request, facts are determined by a jury of one's peers. The parties have the right to representation by counsel, and a mandatory process of "discovery" ensures that all relevant evidence will be made available if the opposing party asks for it.

And speaking of evidence, strict rules apply that exclude hearsay, evidence of prior bad acts or crimes, and other information that is either irrelevant or unreliable. Moreover, all depositions and testimonies are given under oath or affirmation, with witnesses subject to perjury charges if they intentionally lie about material issues. The list goes on and on.

So which of those procedural protections are guaranteed in college disciplinary hearings? None. The procedural safeguards used at most colleges are embarrassingly minimal.

Colleges decide for themselves who will preside over these hearings and serve as fact finders. In some instances it's a panel of faculty, students, and/or administrators, the last of whom may have a powerful incentive to come to the conclusion that is most convenient for the institution. (In the real court system, we are very careful to avoid any hint of this bias from our judges and juries.) Even worse, some colleges have a single administrator designated to serve as both judge and jury.

Similarly, the parties to these hearings frequently have no right to counsel—even if they are able to pay for representation. Neither party has the benefit of discovery, and the rules of evidence don't apply. Hearsay and even irrelevant "evidence" are regularly considered. Parties are usually not placed under oath and may not be subject to discipline if they lie.

Without any of the safeguards designed to increase the reliability and fairness of civil trials, the risk of erroneous findings of guilt increases substantially, especially when a fact finder is asked to decide only if it is merely 50.01 percent more likely that a sexual assault occurred. The absence of the protections listed above makes the preponderance standard inappropriate and renders the comparison of campus sexual-misconduct hearings to civil suits in federal court inexact.

If anything, because there are so few procedural protections in place during sexual-misconduct hearings on campuses, the burden of proof should be

> higher, to offset the increased risk of error. After all, a guilty finding for sexual misconduct on campus may result in life- and career-altering punishment.[35]

Galanter justifies his dismissal of these concerns by arguing that he is "not aware of any case that has held the Due Process Clause requires a higher standard be used" when adjudicating sexual misconduct in campus courts. But FIRE is unaware of any case that has held that Title IX *requires* use of the preponderance of the evidence standard in adjudicating campus claims of sexual misconduct, as OCR has mandated.

Citing *Herman & Maclean v. Huddleston et al.*, 459 U.S. 375, 389–90 (1983), Galanter acknowledges that the Supreme Court has found that due process requires use of the clear and convincing standard in cases "where particularly important individual interests or rights are at stake." But, again citing *Herman & Maclean*, Galanter notes that the Court has allowed the "imposition of even severe civil sanctions that do not implicate such interests" in hearings using the preponderance of the evidence standard. Galanter's reliance on *Herman & Maclean* for this proposition is telling, as that case concerned a civil action involving allegations of securities misconduct—"a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence."[36] In cases involving "quasi-criminal wrongdoing by the defendant"—such as campus sexual misconduct—the Court has allowed use of the clear and convincing standard because the "interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[37] Galanter's easy dismissal of the "particularly important individual interests" so obviously at stake for students accused of sexual misconduct is deeply disappointing and cannot be reconciled with our national commitment to fundamental fairness.

Second, Galanter argues that OCR's interpretation of Title IX to require use of the preponderance of the evidence standard is necessary because of the "significant interests for a victim" of sexual misconduct. But until the hearing has been held, whether the accusing student is indeed a "victim" has not been determined; shockingly, Galanter's justification presumes guilt as a function of the accusation. Galanter contends that use of the standard "represents an appropriate balancing of the important interests of both complainant and the accused" and is thus "equitable to both parties," again citing *Herman & Maclean* for the proposition that "use of any other standard expresses a preference for one side's interests." But again, when more than monetary damages are at stake, fundamental fairness and the presumption of innocence demand protection for the interests of the accused. As we wrote in our May 5, 2011, letter to OCR:

> Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual

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[35] Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. OF HIGHER EDUC., Oct. 1, 2012, *available at* http://chronicle.com/article/Campus-Is-a-Poor-Court-for/134770.
[36] *Addington v. Texas*, 441 U.S. 418, 423 (1979).
[37] *Id.* at 424, 425.

> violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack nf faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.

Finally, Galanter argues that OCR's decision to mandate the use of the preponderance of the evidence standard is permissible because many colleges and universities employed the preponderance standard prior to the DCL, citing FIRE's research. But Galanter ignores that FIRE's research indicated that many of the nation's most prestigious institutions—including nine of the top 10 colleges as ranked that year by *U.S. News & World Report*—did not use the "preponderance of the evidence" standard. Further, an institution's decision to adopt our judiciary's lowest standard of proof voluntarily, following careful consideration of its unique campus circumstances and needs, is qualitatively different than an institution's being forced to do so by a federal agency's new interpretation of a federal statute. This difference is particularly acute when the agency's new interpretation breaks with prior practice and is announced unilaterally, without being subjected to the notice-and-comment requirements of the Administrative Procedure Act, as was the case with this new mandate. As we wrote in our May 5, 2011, letter:

> In mandating that schools adopt a preponderance of the evidence standard in their grievance procedures governing sexual harassment and sexual violence allegations, OCR has broken significant—and troubling—new ground. In contrast to the April 4 mandate, the *2001 Guidance* is silent with regard to the standard of proof required of schools' grievance procedures. While the *2001 Guidance* stated that recipient institutions must maintain "grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex," it did not specify that a specific burden of proof must be employed in university grievance procedures. Indeed, the *2001 Guidance* granted schools considerable autonomy in determining the particular protocols to be utilized on their campuses, noting that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience." However, the April 4 letter's mandate revokes this discretion—and with it, schools' ability to grant students due process protections that are appropriate for the gravity of the offenses of which they are accused.

Given the May 9 blueprint's problematic definition of sexual harassment and the threat it poses to campus free speech rights nationwide, the lack of due process protections afforded to

students and professors accused of sexual misconduct under the DCL is that much more troubling. By combining the blueprint's expansion of the definition of sexual harassment with the DCL's lowering of the certainty with which an institution finds an accused individual guilty of sexual misconduct—in other words, coupling the broadest imaginable definition of sexual harassment with our judiciary's lowest standard of proof—OCR has created the perfect storm for labeling innocent students and professors as sexual harassers.

IV. Conclusion

In the months since the blueprint's issuance, colleges and universities have begun taking steps to ensure that their policies are compliant with its requirements. Given OCR's recent emphasis on enforcement and the failures of colleges and universities like the University of Montana to effectively address sexual assault, this proactive response is unsurprising. Indeed, such a prompt response should be encouraging, but the blueprint's lack of clarity with regard to core student and faculty rights makes the mobilization to comply with its highly publicized interpretation of Title IX deeply problematic.

Despite OCR's subsequent clarifications in the form of private letters sent to concerned citizens and to groups like FIRE and the American Association of University Professors' Committee on Women in the Academic Profession, OCR must recognize that the confusion engendered by the blueprint's statements requires clarification. The blueprint should be retracted and new guidance should be issued, clarifying the issues discussed above for college administrators and establishing bright-line rules that align with Supreme Court precedent. In so doing, OCR can create a safer, freer environment at colleges nationwide.

FIRE deeply appreciates OCR's attention to our concerns about students' and faculty members' civil liberties. We hope that under your leadership, OCR and FIRE can work together to achieve our shared goals of preventing and addressing sexual misconduct on campus while preserving the civil rights of all members of the college community. To that end, I would be very grateful for a chance to meet with you and further discuss our concerns so that together we may find a solution that will best serve the interests of all students and faculty. I thank you again for your time and attention, and I very much look forward to hearing from you.

Sincerely,

Greg Lukianoff
President

Attachment G

latimes.com

MEGHAN DAUM

Who killed Antioch? Womyn

The college went from liberal bastion to PC laughingstock with its sex and dating policy.

Meghan Daum

June 30, 2007

ON JUNE 12, the board of trustees of Antioch College, the famously countercultural institution in Yellow Springs, Ohio, announced that the campus would shut down next year. The decision is a result of declining enrollment, insufficient alumni support and facilities so neglected that, according to several reports, some buildings don't have hot water. Earlier this year, a number of faculty members were laid off. Meanwhile, student enrollment, which had been about 2,000 in the college's 1960s heyday, has dwindled to about 400.

Like a handful of other unconventional colleges, Antioch offers "areas of concentration" instead of majors, and issues "narrative evaluations" instead of letter grades. But even in an era when the most common question in a high school classroom is "Are we being graded on this?", it's not all that shocking that many prospective students have opted to spend their $35K-a-year tuition and fees at places that have hot water. There's a difference, after all, between getting back to the garden and actually living in one.

And then there's the matter of alumni contributions. Even though it was founded in 1852 and has a number of distinguished alumni, Antioch College, the flagship institution of a larger system called Antioch University (there are campuses in Los Angeles and Santa Barbara, among other locations) has an endowment of just $40 million. That's appallingly low — neighboring Ohio colleges Oberlin and Kenyon have endowments of $700 million and $165 million, respectively.

There's no lack of speculation as to how this happened. Many have suggested that the career choices of typical Antioch alums (think public servant or activist rather than CEO or law partner) do not lend themselves to generous contributions. Others see a more general problem with liberal philanthropy. In a podcast interview for InsideHigherEd.com, Bard College President Leon Botstein (who in the 1970s was president of the seriously far-out and short-lived Franconia College) came down hard on what he sees as a failure of liberals to support their institutions.

"One of the tragedies of the progressive liberal movement," Botstein said, "is that unlike at a conservative institution — such as Princeton or Dartmouth, where the alumni are deeply loyal and give it support and money — for liberals, higher education is not a strong enough cause. Their causes are social causes, and higher education is left for the conservatives to fund."

Whether or not contemporary Princeton or Dartmouth can fairly be characterized as conservative (though,

admittedly, you have to declare a major at these places, and it can't be in roach-clip design), Botstein makes a good point. He also conjectured that Antioch, which he called "the founding college of the American progressive movement," had been "killed" by, among other things, its own liberalism.

Botstein's not totally wrong, but as members of his baby boom generation are apt to do, he equates "liberalism" and liberals with the demonstrations of the 1960s and 1970s, including a six-week campus strike in 1973 during which students firebombed buildings to protest racial inequality at the school. But it was the next iteration of liberal excess that really did the place in. To later generations, Antioch is famous for one thing: its Sexual Offense Prevention Policy.

In 1993, it suddenly became national news that Antioch required anyone engaging in sexual activity on campus to ask for and grant permission throughout every step of the encounter. Conceived by a group called Womyn of Antioch, the policy stipulated that consent could not be granted through body movements, nonverbal responses or silence. Furthermore, it stated that "consent is required each and every time there is sexual activity" and that "each new level of sexual activity requires consent." Translation: dorm room make-out sessions were being punctuated by steamy questions like, "May I kiss you now?", "May I remove your (Che Guevara) T-shirt now?" and "May I … " (you get the idea).

Admittedly, this was the early '90s, a time when many liberal arts campuses were so awash in the hysteria of political correctness that it seemed entirely possible a lamppost could commit date rape. But the attention to the Antioch policy, which got as far as a "Saturday Night Live" sketch, not only came to symbolize the infantilizing dogma of the new left, it turned an already obscure college into a laughingstock.

Obviously, no single factor can be blamed for Antioch's demise. There appear to be management issues as well as public relations issues at play (and, for the record, the board of trustees is calling the closing a "suspension of operations" with the intention of opening a redeveloped campus in 2012).

Some baby boomers seem inclined to connect the college's closing with what they view as the career obsession and political apathy of the generations that followed them (as if 40 years of college students can be lumped into one generation). They see their successors as not activist enough or not activist in the right way (or, at least, possessed of unfortunate musical tastes). But, when deciding who's really "progressive," it's worth remembering just how profoundly the college (and, to a lesser extent, others like it) recast its notions of liberalism. It's not independent thinking that most people associate with Antioch, but an utter lack of it.

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mdaum@latimescolumnists.com

EXHIBIT J

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter[1] explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.[2] Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

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[1] The Department has determined that this Dear Colleague Letter is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at:* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf. OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

[2] Use of the term "sexual harassment" throughout this document includes sexual violence unless otherwise noted. Sexual harassment also may violate Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c), which prohibits public school districts and colleges from discriminating against students on the basis of sex, among other bases. The U.S. Department of Justice enforces Title IV.

sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.[3] The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.[4] According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.[5] This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.[6] Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.[7] The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's *Revised Sexual Harassment Guidance* issued in 2001 (*2001 Guidance*).[8] This letter supplements the *2001 Guidance* by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual

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[3] CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT xiii (Nat'l Criminal Justice Reference Serv., Oct. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. This study also found that the majority of campus sexual assaults occur when women are incapacitated, primarily by alcohol. *Id.* at xviii.

[4] *Id.* at 5-5.

[5] U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), *available at* http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf. Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person, forcibly and/or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. 34 C.F.R. Part 668, Subpt. D, App. A.

[6] SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 at 104 (U.S. Dep't of Educ. & U.S. Dep't of Justice, Nov. 2010), *available at* http://nces.ed.gov/pubs2011/2011002.pdf.

[7] ERIKA HARRELL & MICHAEL R. RAND, CRIME AGAINST PEOPLE WITH DISABILITIES, 2008 (Bureau of Justice Statistics, U.S. Dep't of Justice, Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/capd08.pdf.

[8] The *2001 Guidance* is available on the Department's Web site at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This letter focuses on peer sexual harassment and violence. Schools' obligations and the appropriate response to sexual harassment and violence committed by employees may be different from those described in this letter. Recipients should refer to the *2001 Guidance* for further information about employee harassment of students.

harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.[9]

As explained in OCR's *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.[10]

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program

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[9] Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the *2001 Guidance,* and in the 2010 Dear Colleague letter on Harassment and Bullying, which is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[10] *See, e.g., Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that while not an issue in this case, a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) ("'[w]ithin the context of Title IX, a student's claim of hostile environment can arise from a single incident'" (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualif[y] as...severe, pervasive, and objectively offensive sexual harassment"); *see also Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that "'[o]ne instance of conduct that is sufficiently severe may be enough,'" which is "especially true when the touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007))); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "'the deliberate and unwanted touching of [a plaintiff's] intimate body parts can constitute severe sexual harassment'" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005))).

sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.[11]

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.[12] Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's

[11] Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment. For further information about harassment of employees, see *2001 Guidance* at n.1.

[12] This is the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief. *See 2001 Guidance* at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999).

investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.[13]

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.[14] The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the *2001 Guidance*, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.[15] The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the

[13] In states with mandatory reporting laws, schools may be required to report certain incidents to local law enforcement or child protection agencies.

[14] Schools should refer to the *2001 Guidance* for additional information on confidentiality and the alleged perpetrator's due process rights.

[15] For example, the alleged harasser may have a right under FERPA to inspect and review portions of the complaint that directly relate to him or her. In that case, the school must redact the complainant's name and other identifying information before allowing the alleged harasser to inspect and review the sections of the complaint that relate to him or her. In some cases, such as those where the school is required to report the incident to local law enforcement or other officials, the school may not be able to maintain the complainant's confidentiality.

nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;[16]

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;[17] and

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[18]

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed.

(A) *Notice of Nondiscrimination*

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner.[19] The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various

[16] 34 C.F.R. § 106.9.
[17] *Id.* § 106.8(a).
[18] *Id.* § 106.8(b).
[19] *Id.* § 106.9(a).

locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the *2001 Guidance*, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) *Title IX Coordinator*

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX.[20] The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (*e.g.*, who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes

[20] *Id.* § 106.8(a).

and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) *Grievance Procedures*

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.[21] The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.[22] These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.[23]

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

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[21] *Id.* § 106.8(b). Title IX also requires recipients to adopt and publish grievance procedures for employee complaints of sex discrimination.

[22] These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures. Additionally, if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act (at 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500-300.519, 300.530-300.537) as well as the requirements of Section 504 of the Rehabilitation Act of 1973 (at 34 C.F.R. §§ 104.35-104.36) when conducting the investigation and hearing.

[23] A school may not absolve itself of its Title IX obligations to investigate and resolve complaints of sexual harassment or violence by delegating, whether through express contractual agreement or other less formal arrangement, the responsibility to administer school discipline to school resource officers or "contract" law enforcement officers. *See* 34 C.F.R. § 106.4.

Prompt and Equitable Requirements

As stated in the *2001 Guidance*, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Notice to parties of the outcome of the complaint;[24] and
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted in the *2001 Guidance*, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) *Notice of the grievance procedures*

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) *Adequate, Reliable, and Impartial Investigation of Complaints*

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct

[24] "Outcome" does not refer to information about disciplinary sanctions unless otherwise noted. Notice of the outcome is discussed in greater detail in Section D below.

may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.[25] Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX,

[25] In one recent OCR sexual violence case, the prosecutor's office informed OCR that the police department's evidence gathering stage typically takes three to ten calendar days, although the delay in the school's investigation may be longer in certain instances.

Title VII prohibits discrimination on the basis of sex.[26] OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.[27] OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.[28] Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.[29] For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's

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[26] *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The *2001 Guidance* noted (on page vi) that "[w]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[27] OCR's Case Processing Manual is available on the Department's Web site, at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.

[28] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71 ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."). The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of Federal financial assistance and require that termination decisions be "supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has interpreted "reliable, probative and substantial evidence" as a direction to use the preponderance standard. *See Steadman v. SEC*, 450 U.S. 91, 98-102 (1981).

[29] Access to this information must be provided consistent with FERPA. For example, if a school introduces an alleged perpetrator's prior disciplinary records to support a tougher disciplinary penalty, the complainant would not be allowed access to those records. Additionally, access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history.

statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence.[30] Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) *Designated and Reasonably Prompt Time Frames*

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that

[30] For instance, if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner.

occurred in a classroom during school hours with a single complainant.

(D) *Notice of Outcome*

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal,[31] *i.e.*, whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.[32] FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the *2001 Guidance*, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall.[33] Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,[34] FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a

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[31] As noted previously, "outcome" does not refer to information about disciplinary sanctions unless otherwise noted.

[32] In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state that nothing in GEPA "shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See 2001 Guidance* at vii.

[33] This information directly relates to the complainant and is particularly important in sexual harassment cases because it affects whether a hostile environment has been eliminated. Because seeing the perpetrator may be traumatic, a complainant in a sexual harassment case may continue to be subject to a hostile environment if he or she does not know when the perpetrator will return to school or whether he or she will continue to share classes or a residence hall with the perpetrator. This information also directly affects a complainant's decision regarding how to work with the school to eliminate the hostile environment and prevent its recurrence. For instance, if a complainant knows that the perpetrator will not be at school or will be transferred to other classes or another residence hall for the rest of the year, the complainant may be less likely to want to transfer to another school or change classes, but if the perpetrator will be returning to school after a few days or weeks, or remaining in the complainant's classes or residence hall, the complainant may want to transfer schools or change classes to avoid contact. Thus, the complainant cannot make an informed decision about how best to respond without this information.

[34] Under the FERPA regulations, crimes of violence include arson; assault offenses (aggravated assault, simple assault, intimidation); burglary; criminal homicide (manslaughter by negligence); criminal homicide (murder and

disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed.[35] Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.[36]

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome[37] of any institutional disciplinary proceeding brought alleging a sex offense."[38] Compliance with this requirement does not constitute a violation of FERPA. Furthermore, the FERPA limitations on redisclosure of information do not apply to information that postsecondary institutions are required to disclose under the Clery Act.[39] Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights." These programs should include a

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non-negligent manslaughter); destruction, damage or vandalism of property; kidnapping/abduction; robbery; and forcible sex offenses. Forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the victim is incapable of giving consent. Forcible sex offenses include rape, sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses are incest and statutory rape. 34 C.F.R. Part 99, App. A.

[35] 34 C.F.R. § 99.31(a)(13). For purposes of 34 C.F.R. §§ 99.31(a)(13)-(14), disclosure of "final results" is limited to the name of the alleged perpetrator, any violation found to have been committed, and any sanction imposed against the perpetrator by the school. 34 C.F.R. § 99.39.

[36] 34 C.F.R. § 99.31(a)(14).

[37] For purposes of the Clery Act, "outcome" means the institution's final determination with respect to the alleged sex offense and any sanctions imposed against the accused. 34 C.F.R. § 668.46(b)(11)(vi)(B).

[38] 34 C.F.R. § 668.46(b)(11)(vi)(B). Under the Clery Act, forcible sex offenses are defined as any sexual act directed against another person forcibly or against that person's will, or not forcibly or against the person's will where the person is incapable of giving consent. Forcible sex offenses include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling. Non-forcible sex offenses include incest and statutory rape. 34 C.F.R. Part 668, Subpt. D, App. A.

[39] 34 C.F.R. § 99.33(c).

discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved.[40] As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

[40] The Department's Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention (HEC) helps campuses and communities address problems of alcohol, other drugs, and violence by identifying effective strategies and programs based upon the best prevention science. Information on HEC resources and technical assistance can be found at www.higheredcenter.org.

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.[41]

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:[42]

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;

[41] The Clery Act requires postsecondary institutions to develop and distribute a statement of policy that informs students of their options to notify proper law enforcement authorities, including campus and local police, and the option to be assisted by campus personnel in notifying such authorities. The policy also must notify students of existing counseling, mental health, or other student services for victims of sexual assault, both on campus and in the community. 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi).

[42] Some of these remedies also can be used as interim measures before the school's investigation is complete.

- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.[43]

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
    - the school's Title IX responsibilities to address allegations of sexual harassment or violence
    - how to conduct Title IX investigations
    - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
    - what constitutes sexual harassment or violence
    - what to do if a student has been the victim of sexual harassment or violence
    - contact information for counseling and victim services on and off school grounds
    - how to file a complaint with the school
    - how to contact the school's Title IX coordinator

[43] For example, if the complainant was disciplined for skipping a class in which the harasser was enrolled, the school should review the incident to determine if the complainant skipped the class to avoid contact with the harasser.

  - what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;[44]
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;[45]
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
  - know the school's prohibition against sex discrimination, including sexual harassment and violence
  - recognize sex discrimination, sexual harassment, and sexual violence when they occur
  - understand how and to whom to report any incidents
  - know the connection between alcohol and drug abuse and sexual harassment or violence
  - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;
- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

[44] Any personally identifiable information from a student's education record that the Title IX coordinator provides to the school's law enforcement unit is subject to FERPA's nondisclosure requirements.

[45] For example, the disciplinary committee may lack the power to implement changes to the complainant's class schedule or living situation so that he or she does not come in contact with the alleged perpetrator.

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/.[46]

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

[46] OVW also administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault, and Stalking on Campus Program. This Federal funding is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. Under this competitive grant program, campuses, in partnership with community-based nonprofit victim advocacy organizations and local criminal justice or civil legal agencies, must adopt protocols and policies to treat these crimes as serious offenses and develop victim service programs and campus policies that ensure victim safety, offender accountability, and the prevention of such crimes. OVW recently released the first solicitation for the Services, Training, Education, and Policies to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking in Secondary Schools Grant Program. This innovative grant program will support a broad range of activities, including training for school administrators, faculty, and staff; development of policies and procedures for responding to these crimes; holistic and appropriate victim services; development of effective prevention strategies; and collaborations with mentoring organizations to support middle and high school student victims.

Exhibit 14

FORMAL HEARING BEFORE THE SEX OFFENSE HEARING PANEL

IN AND FOR THE UNIVERSITY OF CALIFORNIA, SAN DIEGO

Jane Roe , Complainant, vs. John Doe , Respondent.	**CASE NO.: 01401-001-2014** RESPONDENT'S QUESTIONS TO BE ASKED OF COMPLAINANT DATE: December 12, 2014 TIME: 1:00 P.M. LOCATION: Student Services Center Conf. Room 554A

TO THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, THE SEX OFFENSE HEARING PANEL AND THE UNIVERSITY REPRESENTATIVE:

Respondent John Doe (hereafter "Respondent" or "Mr. Doe ") herein below respectfully submits questions to be asked of Jane Roe (hereafter "Complainant"). This list of questions is being provided to the Hearing Panel Chair or Hearing Officer in accordance with The *Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination,* updated August 21, 2013, at section III titled **Formal Hearing Process**, subparagraph P, which states in pertinent part: ". . . . Parties may provide questions in writing to the Hearing Panel Chair or Hearing Officer to be asked of the other party or witnesses at the Chair's or Hearing Officer's discretion. The Chair or Hearing Officer may exclude any unduly repetitious or irrelevant questions or information. . . ."

Respondent reminds the Hearing Panel Chair and Hearing Officer, in making their determination whether to exclude "any unduly repetitious or irrelevant questions or information," that Respondent has certain due process rights as an individual during the hearing process. Namely, on similar grounds of rules essential to basic *fairness*, Respondent has the right to fully and completely cross-examine Complainant, for such cross-examination is necessary to draw out the truth about the matter at issue.

RESPONDENT'S QUESTIONS TO BE ASKED OF COMPLAINANT

NO. 1:

Are you presently enrolled at UCSD?

RESPONSE TO NO. 1:

NO. 2:

Are you presently enrolled in another college or university, and if so where?

RESPONSE TO NO. 2:

NO. 3:

Your two-page typewritten Request for Formal Investigation dated June 16, 2014, was submitted to the Office for the Prevention of Harassment and Discrimination, sometimes referred to as OPHD, some 11 days after you first submitted a written report to the University's Office of Student Conduct on June 5, 2014, correct?

RESPONSE TO NO. 3:

NO. 4:

Your two-page typewritten Request for Formal Investigation dated June 16, 2014, was submitted to OPHD four days after you initially met with Elena Dalcourt of OPHD on June 12, 2014, correct?

RESPONSE TO NO. 4:

NO. 5:

Do you understand that Mr. Doe is alleged to have violated the following sections of the UCSD Student Conduct Code:

(1) Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Assault - "Sexual assault" means sexual activity that is engaged in without the effective consent of the other person and is intentional.

(2) Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct - "Sexual misconduct" means 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?

RESPONSE TO NO. 5:

NO. 6:

Do you understand that Mr. Doe allegedly violated the sections of the UCSD Student Conduct Code mentioned in the previous question because you have alleged that on the morning of February 1, 2014, Mr. Doe digitally penetrated your vagina without your consent?

RESPONSE TO NO. 6:

NO. 7:

Have you previously admitted during this investigation that you and Mr. Doe had sexual intercourse at Mr. Doe 's residence on the night of January 31, 2014, following an exchange between your sorority and his fraternity?

RESPONSE TO NO. 7:

NO. 8:

Have you previously admitted during this investigation that you and Mr. Doe had sexual intercourse at your residence on the night of February 1, 2014, following your sorority formal?

RESPONSE TO NO. 8:

NO. 9:

Have you previously admitted during this investigation that prior to the exchange between your sorority and Mr. Doe 's fraternity on the night of January 31, 2014, you brought a change of clothes to Mr. Doe 's residence with the intention of spending the night with him?

RESPONSE TO NO. 9:

NO. 10:

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 some things that you felt were wrong

was when you presented a written report to the University's Office of Student Conduct on June 5, 2014?

RESPONSE TO NO. 10:

NO. 11:

Taking a look at your two-page typewritten Request for Formal Investigation dated June 16, 2014, submitted by you to OPHD, 12 lines from the bottom of the first paragraph, isn't it true that the only thing you mentioned in your statement regarding physical contact or touching between you and Mr. Doe on the morning of February 1, 2014, was that "[h]e then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop"?

RESPONSE TO NO. 11:

NO. 12:

Do you understand that as a result of your allegations, Mr. Doe could possibly be excluded from campus, suffer a suspension, or even a dismissal from the University?

RESPONSE TO NO. 12:

NO. 13:

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 Kyle hooked up with your grandbig last night haha" to which you responded, "Wait what . . . Ashley? Haha"?

RESPONSE TO NO. 13:

NO. 14:

In further screenshots of text messages that Mr. Doe 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: "Yeah he went back to her place. That's hilarious" to which you responded, "That's so funny haha"?

RESPONSE TO NO. 14:

NO. 15:

In further screenshots of text messages that Mr. Doe 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: "And Zach hooks up with Kendall. . . and I've been hooking up with u. Pretty funny how that works out" to which you responded, "My fams hot I guess haha"?

RESPONSE TO NO. 15:

NO. 16:

In further screenshots of text messages that Mr. Doe asserts consist of exchanges between the two of you on February 1, 2014, is it true that you texted Mr. Doe sometime in the afternoon of February 1, 2014, the following: "Okay as long as I don't get in trouble you can do what you want haha" to which he responded, "I know I know haha"?

RESPONSE TO NO. 16:

NO. 17:

According to the screenshots of text messages that Mr. Doe asserts consist of exchanges between the two of you on February 1, 2014, isn't it true that all of these exchanges occurred after you left Mr. Doe 's residence on the morning of February 1, 2014 and prior to the two of you going to your sorority formal that evening?

RESPONSE TO NO. 17:

NO. 18:

In further screenshots of text messages that Mr. Doe asserts consist of exchanges between the two of you on April 25, 2014, is it true that you texted Mr. Doe at 8:07 P.M on the evening of April 25, 2014, the following: "Hey when should we head over to your place to pregame?" to which he responded, "Like soon if u guys wanna come. Were gonna then head to another pregame but well have rides"?

RESPONSE TO NO. 18:

NO. 19:

In another screenshot of text messages that Mr. Doe asserts consist of exchanges between the two of you on April 25, 2014, is it true that you texted Mr. Doe at 8:07 P.M on the evening of April 25, 2014, the following: "okay is there alcohol there or do we need to bring stuff? The guy who usually guys us alcohol is out of town so we have like a third of a fifth of captain haha" to which he responded, "U guys will be fine" and then you responded

"Okay solid I'll convince Miranda to get ready fast enough and come over when that happens"?

RESPONSE TO NO. 19:

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 get together to pregame before some outing?

RESPONSE TO NO. 20:

NO. 21:

In further screenshots of text messages that Mr. Doe asserts consist of exchanges between the two of you on April 28, 2014, is it true that you texted Mr. Doe at 10:05 P.M. the following: "did you get #13 on chapter 5 for the homework" to which he responded, "10400" and then a few more exchanges occurred that evening regarding homework?

RESPONSE TO NO. 21:

NO. 22:

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?

RESPONSE TO NO. 22:

NO. 23:

On the morning of February 1st, 2014, the time when you allege Mr. Doe digitally penetrated your vagina without your consent, the only two people present were you two, correct?

RESPONSE TO NO. 23:

NO. 24:

You allege Mr. Doe digitally penetrated your vagina without your consent on the morning of February 1st, 2014, and yet the two of you, later that evening after your sorority formal, engaged in consensual sexual intercourse at your residence?

RESPONSE TO NO. 24:

NO. 25:

You allege today that Mr. Doe digitally penetrated your vagina without your consent on the morning of February 1, 2014, and you waited over four months to submit a written report to the University's Office of Student Conduct on June 5, 2014, correct?

RESPONSE TO NO. 25:

NO. 26:

During the investigation, including your interviews with Ms. Dalcourt and in any subsequent correspondence you had with her or someone at her office, did you turn over to Ms. Dalcourt all relevant text messages concerning your allegations first presented to the University's Office of Student Conduct on June 5, 2014?

RESPONSE TO NO. 26:

NO. 27:

Is it an accurate statement that other than your own verbal statements to the effect that you allege Mr. Doe digitally penetrated your vagina without your consent on the morning of February 1, 2014, you have no documents, text messages or screen shots regarding this alleged incident ever happening?

RESPONSE TO NO. 27:

NO. 28:

At any point in time prior to this hearing, did you have the opportunity to meet with, speak on the telephone, Skype, videoconference, e-mail or have any other form of communication with Anthony Jakubisin, the University Representative at this hearing?

RESPONSE TO NO. 28:

NO. 29:

If you did have the opportunity to meet with, speak on the telephone, Skype, videoconference, e-mail or have any other form of communication with Anthony Jakubisin, the University Representative at this hearing, please tell us the date and location of said meetings or communications.

RESPONSE TO NO. 29:

NO. 30:

If you did have the opportunity to meet with, speak on the telephone, Skype, videoconference, e-mail or have any other form of communication with Anthony Jaknbisin, the University Representative at this hearing, please describe all communications the two of you had in as much detail as you can recall.

RESPONSE TO NO. 30:

NO. 31:

If you did have the opportunity to meet with, speak on the telephone, Skype, videoconference, e-mail or have any other form of communication with Anthony Jakubisin, the University Representative at this hearing, was anyone else present during these communications? If yes, please identify the person(s) and what his/her/their involvement was.

RESPONSE TO NO. 31:

NO. 32:

Even though we are not in a Court of law, and you have not taken an oath typically given to people that testify before a judge or a jury, nor have you given any sworn statements during the course of the investigation, have you been honest and forthright at all times during the investigation from the date of your first submission of a written report to the University's Office of Student Conduct on June 5, 2014 up through and including today's hearing?

RESPONSE TO NO. 32:

Respectfully Submitted,

John Doe

Dated: December 12, 2014

STUDENT SEX OFFENSE POLICY
REQUEST FOR FORMAL INVESTIGATION

Date June 16, 2014

Name Jane Roe

Name of Respondent John Doe

Telephone (if known) (619) 240-0022

Email (if known)

Complainant
- Gender Female
- ○ Undergraduate student
- ○ Graduate student
- ○ Other

Respondent
- ○ Gender Male
- ○ Undergraduate student
- ○ Graduate student
- ○ Other

Summary of incident(s) (use additional pages if necessary)
PLEASE NOTE THAT THE RESPONDENT IS ENTITLED TO A COPY OF THIS FORM.

See attached

Office for the Prevention of Harassment & Discrimination (OPHD)
201 University Center
(858) 534-8298
http://ophd.ucsd.edu
(rev. 12/2013)

On January 31, John Doe's fraternity and my sorority had an exchange planned and John invited some of my friends and me to pregame at his place. I brought a change of clothes to his place to sleep in in case I decided to spend the night after the party, but was not planning on having sex with him. At the pregame, there weren't any shot glasses, and this being the second or third time I had drank, I was very inexperienced and was unsure of what to do. John poured me amounts of vodka into red solo cups and then I would periodically drink them alternating with a chaser. He didn't force the drinks on me, but he did encourage me to drink what he gave me and I wasn't really sure of what I was doing and how much I should be drinking. After this the night gets blurry. I remember going to the party and walking around talking to my friends and having John follow me and wrap his arms around me and try to feel me up in front of other people. I remember half-heartedly pushing his hands away but I wasn't fully aware of what was going on. I then remember after what seemed like a short time later, John grabbed my hand and told me that a pledge was there to drive us home. I went outside and I vaguely remember the ride back to campus and I remember being disoriented and not feeling in control of my body. I then remember taking the elevator up to his apartment and going into his room and after that I really don't remember very much. I remember starting to kiss him and that's pretty much it. When I woke up in the morning, I had the idea that we had had sex but I didn't remember any details such as whether he used a condom or what it felt like or anything like that. He later told me that he did not use a condom [redacted] That morning, I remember telling him that I felt weird about what happened and him telling me that it was fine and that I wanted it. He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop. He then told me "Well I guess that means I did my job right" and smiled. I then excused myself because I felt like I was going to throw up and went into his common room with a bottle of water to breathe and try to collect my thoughts. I went back in and asked him to take me home to which he responded that he had a headache and would in a little bit. I then spent the next hour or two waiting for him to take me home because I didn't want to walk across campus. When I got home, I sat in my room and cried for 2-3 hours because at this point I was so upset with myself for letting something like this happen and for not waiting like I had wanted to. I called my friend Miranda and was telling her how upset I was and she comforted me but didn't say anything about this not being my fault.

That night, February 1st, was the night of my sorority formal and John was my date. I didn't want to have to tell anyone why he was no longer my date so I went with him. Throughout the night he asked me if we were going to have sex again and I told him that I didn't want to, to which he responded, "What's twice?" I told him that I wasn't counting last night as my first time and he got offended and said that hurt his feelings. I told him that I had spent most of the day crying about what happened and he got upset and began yelling at me asking me why I would say that to him and if I was trying to make him feel bad or guilty and that I couldn't blame him for what happened because I wanted it. I remember feeling so small and insignificant and I had given up on myself and given up on fighting with him. He then asked to come

over after the dance and I agreed and we went back to my place. We began hooking up and ended up having sex again and I felt so disgusted with myself and so upset with the whole situation and in the morning I just wanted him to leave and pretend none of this had ever happened but he kept asking me to perform oral sex on him and I kept saying I was tired and I didn't want to and he would argue with me a little bit and try to guilt me into it by saying that he had "blue-balls" and that if he had to do a walk of shame back to Revelle he might as well have something to be ashamed of. I refused and ultimately one of his friends came to pick him up and I sat in my room feeling pathetic and worthless and I just wanted to forget everything and move on.

Within the next week I told two of my friends, Kendall and Maggie, what had happened and they both assured me that what happened wasn't my fault and that John had taken advantage of me. I then took to the internet to research rape and consent and their definitions and implications. It was then that I realized that what happened to me was rape, I was in no condition to be able to give consent and with John having had prior knowledge of the fact that I didn't want to have sex and he took advantage of me when I was highly intoxicated. [redacted] I have been working to heal and find a new normal, and I am finally ready to report John as I don't want what happened to me to happen to other girls, and I don't believe that he thinks he did anything wrong in reference to sleeping with me and I want him to know that he broke the law and he has to pay the consequences for it.

●●●○○ AT&T
5:03 PM
58%
New iMessage
Cancel
To: Jane Roe
Probably not because Kyle was gonna come along too and drive my car back.
Yeah I understand it's cool
I think Kyle hooked up with your grandbig last night haha
Wait what
Ashley? Haha
Yeah he went back to her place
That's hilarious
Send

●●●○○ AT&T 5:04 PM 58%

New iMessage Cancel

To: Jane Roe

[redacted]

That's so funny haha

And Zach hooks up with Kendall...and I've been hooking up with u. Pretty funny how that works out

My fams hot I guess haha

Guess so

Can we take just Miranda to regents

Sure

Thank you (:

Send

2

●●●○○ AT&T 5:04 PM 58%

New iMessage Cancel

To: Jane Roe

Do u have anymore chaser?

A little yeah

Leavin in like 10

Perect

Perfect* haha

Are you guys close?

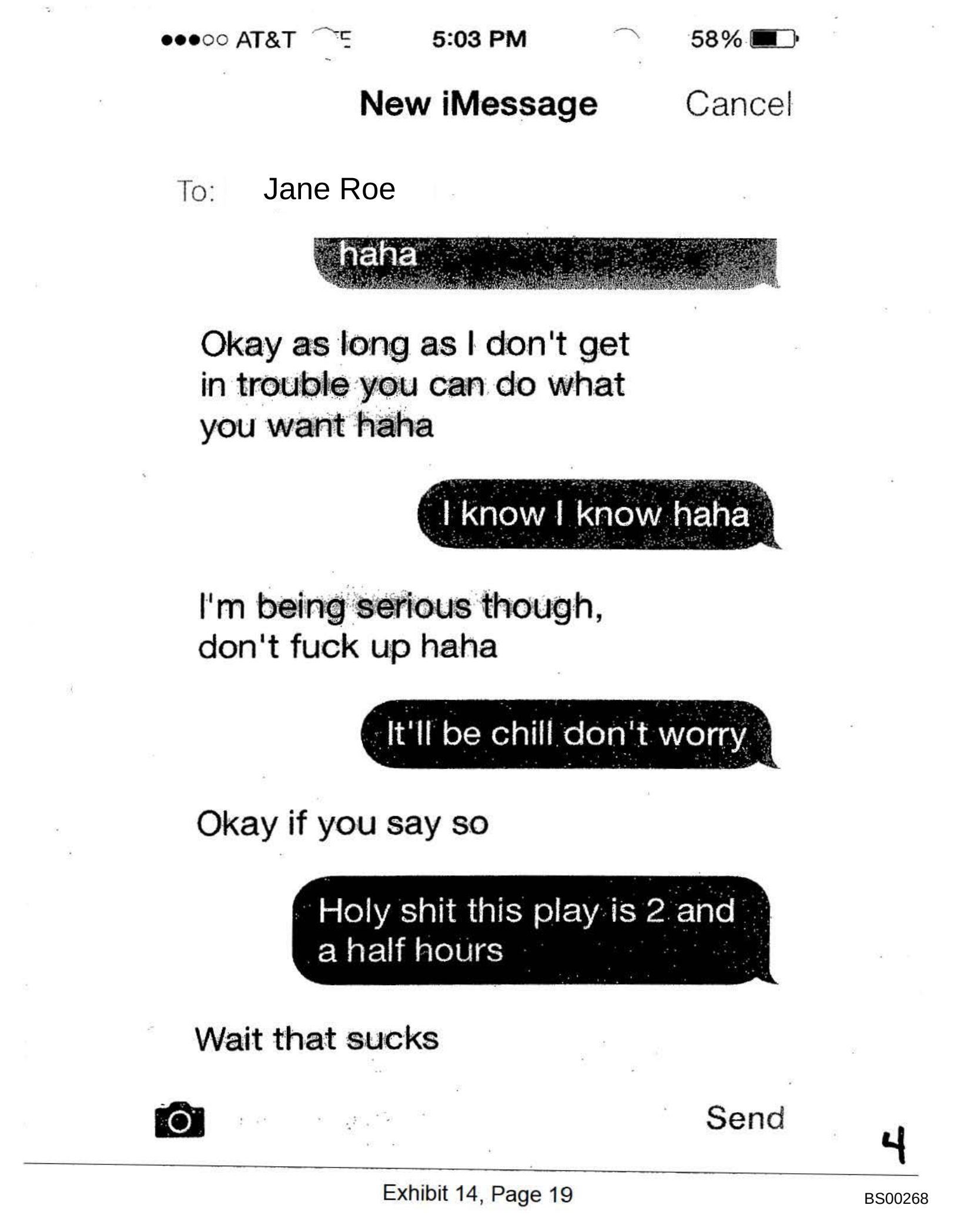
Just left

Okay

Bring whatever chaser u

Send

3


●●●○○ AT&T
5:03 PM
58%
New iMessage
Cancel
To: Jane Roe
haha
Okay as long as I don't get in trouble you can do what you want haha
I know I know haha
I'm being serious though, don't fuck up haha
It'll be chill don't worry
Okay if you say so
Holy shit this play is 2 and a half hours
Wait that sucks
Send

4

●●●○○ AT&T 5:03 PM 58%

New iMessage Cancel

To: Jane Roe

Wait that sucks

Yeah so I'm Gonna leave at intermission haha

That sounds like a plan haha I'm still in bed

Lucky you. Is it okay if I drive Gunnar and Johnny over too

Yeah of course

Ill just drive us all to regents since the shuttle doesn't run on weekends

Sat, Feb 1, 3:22 PM

Send

5

●●●○○ AT&T 12:46 PM 30%

New iMessage Cancel

To: Jane Roe

Fri, Apr 25, 8:07 PM

Hey when should we head over to your place to pregame?

Like soon if u guys wanna come. Were gonna then head to another pregame but well have rides

okay let me talk to miranda, what time are you guys leaving?

Probably 9. If not just head to john moons pregame

930

Send

6

AT&T 11:18 AM 18%

New iMessage Cancel

To: Jane Roe

930

Okay is there alcohol there or do we need to bring stuff? The guy who usually guys us alcohol is out of town so we have like a third of a fifth of captain haha

U guys will be fine

Okay solid I'll convince Miranda to get ready fast enough and come over when that happens

Ha alright

Send

7

●●●○○ AT&T 11:17 AM 18%

New iMessage Cancel

To: Jane Roe

Mon, Apr 28, 10:05 PM

did you get #13 on chapter 5 for the homework?

104000

how?

26000/.25

okay i got that but just a different way

Oh

yeah just spent an hour on Skype with my dad figuring out chapter 5 question

Send

8

Exhibit 15

FORMAL HEARING BEFORE THE SEX OFFENSE HEARING PANEL
IN AND FOR THE UNIVERSITY OF CALIFORNIA, SAN DIEGO
-oOo-

Jane Roe ,

Complainant,

vs.

John Doe ,

Respondent.
_____/

No. 01401-001-2014

COPY

TRANSCRIPTION Of PROCEEDINGS

Held on:

December 12, 2014 at 1:00 p.m.

Transcribed by:

ERIC L. JOHNSON,
RPR, CSR #9771

PROCEEDINGS

MS. OTTEN: All right. Good afternoon. It is Friday, December 12th, at approximately 1:05 p.m., and we will be discussing case 01401-001-2014.

My name is Rebecca Otten and I will be serving as the chair for today's review. My role will be to conduct the review and to make rulings on any procedural matters that are raised in connection with the review. The respondent and the University of California San Diego were unable to resolve the case informally, and per our student conduct process, the university has called together a formal review of the allegations.

Please be aware that today's review will be recorded. This recording will represent the sole official verbatim record of the review and that it is the property of the University of California San Diego. Please also note that this review is closed to the public. Before we get started, if you could please state your name and your role in this review for the audio recording. We will begin with the Respondent and then move counter-clockwise.

MR. Doe : John Doe , Respondent.

MR. HABERKORN: Matthew Haberkorn, counsel for John Doe .

MR. JAKUBISIN: Anthony Jakubisin, university

representative.

MS. Roe : Jane Roe , complainant.

MS. WAHLIG: Nancy Wahlig, advocate.

MS. OTTEN: Rebecca Otten, chair for the panel and the review.

MR. HILL: Jeff Hill, of the board.

MR. NELSON: Kris Nelson, student representative on the board.

MS. OTTEN: Thank you. So next I would like to provide an overview of the review process, and then discuss ground rules.

The UC San Diego Student Conduct Code sets forth the process and procedures for conducting a formal review for the alleged student misconduct. The purpose of today's review is to determine if Mr. John Doe is responsible for violating the UC San Diego Student Conduct Code. We start this review with the assumption that John is not responsible, unless we determine that he is responsible for the alleged violations after reviewing all of the information presented today.

Keep in mind that student conduct reviews are administrative and educational in nature and should not be compared to criminal or civil proceedings. The respondent, John, you have the following rights in this review: You have a right to be notified of the alleged

violations which occurred, with the letter that you received via e-mail. The letter provided a brief statement of the factual basis of the allegations, the alleged violations of the code and the date, time, and place of the review, and all within a reasonable time frame before this review.

You have the right to a proper and fair review. At today's review you will have the opportunity to present your perspective about what happened, along with any relevant documents and witnesses. You will also be able to suggest questions to be asked of any witnesses that have been invited to participate in today's review.

You have the right to a record of the review. At the conclusion of our deliberations, I will compile a student conduct review report detailing our findings and, if applicable, recommended sanctions. For you to be found responsible, we have to find that it is more likely than not that you committed the alleged violations.

Finally, you have the right to appeal our decision and/or the assigned sanctions. The appeals process is set forth in Section 17 of the Student Conduct Code. The Respondent also has the opportunity to have an advisor. As laid out in the code, the role of advisors is limited in a review. An associated

student's advocate may serve as an advisor and may speak on behalf of his or her advisee, so long as the procedural requirements are followed. Other students, faculty, staff, or attorneys serving as advisors may not directly participate in the review and may only confer quietly with the advisee.

All advisors will be required to abide by the rules and expectations of an advisor, as specified in this code. Advisors may be excluded by myself, the review panel chair, for failing to adhere to these rules.

As for the steps of this review process, after I finish the overview, the university representative will present information and witnesses supporting the alleged violations. The Respondent will provide his perspective about the incident. And throughout the review, we will ask questions and hear from any applicable witnesses.

Finally, the Respondent and the university representative may provide summary remarks. We will then conclude the review and the review panel will move into private deliberations. If we determine that the Respondent is responsible for one or more of the alleged violations, we will discuss sanction recommendations based on the university's sanctioning guidelines, this

incident, and the Respondent's student conduct record.

After deliberations, I will compile a report within ten academic days of the review summarizing our findings, and, if applicable, sanction recommendations, and submit it to the director of student conduct. Within five academic days after the receipt of the review panel's decision, when the Respondent is found not responsible the student will be given notice that the matter will be dismissed without any further consequence; otherwise this report will be forwarded to the student conduct officer, who will assign the final sanctions, unless suspension or dismissal is recommended. In that case, the Council of Deans of student affairs will determine the sanctions.

Upon a showing of good cause, time limits specified in these procedures may be altered by the director of student conduct. In the interest of justice, including but not limited to prejudice to the accused shall be considered. The review panel will only hear evidence and testimony that are directly relevant to the charges at hand, and that any point, as chair of the review, I may interrupt to ascertain relevance, and to refocus the review, if necessary. If any student witness provides false information, the student may be referred to the Office of Student Conduct for further

student conduct proceedings.

Finally, we expect that everyone will treat one another with respect and courtesy in this review and will be truthful in their responses.

So I have a few questions to ask, and if you could please provide a verbal response. So John, do you, the Respondent, understand the items just articulated?

MR. Doe: Yes.

MS. OTTEN: And then, Matt, do you, as the respondent's attorney, understand the items just articulated?

MR. HABERKORN: Yes. I just have one question. Can I get the student advocate's spelling of her last name?

MS. OTTEN: Sure. Let me see if I can get this.

MS. WAHLIG: W-A-H-L-I-G.

MR. HABERKORN: Thank you.

MS. OTTEN: And then, Tony, do you, as the university representative, understand the items just articulated?

MR. JAKUBISIN: Yes.

MS. OTTEN: And then Jane, do you, as the complaining witness, understand the items just

articulated?

MS. Roe : Yes.

MS. OTTEN: And then before we proceed, are there any additional questions?

Okay. So as it states in the letter e-mailed to you, John, on September 25th, 2014, it is alleged that you violated the following sections of the UC San Diego Student Conduct Code, Section VII, letter Z, "Other University Policies," which is UC San Diego sex offenses policy, sexual assault. With sexual assault being sexual activity that is engaged in without the effective consent of the other person, and is intentional.

Also Section VII, letter Z, sexual misconduct means nonconsensual activity engaged in without the intent to arm another, such as when a person believes unreasonably that effective consent was given when, in fact, it was not.

The letter dated November 10th, 2014, and e-mailed to you, John, references Section VII, letter AA of the 2014, 2015 Student Conduct Code, which went into effect on September 25th, 2014.

Tony, as the university rep, you may now present information and witnesses supporting the alleged violations.

MR. JAKUBISIN: Thank you. University of California San Diego Student Sex Offence policy states that it is the responsibility of the person wanting to engage in specific sexual activity to make sure that he or she has effective consent. Effective consent is defined as consent that is informed; meaning that both parties demonstrate a clear, mutual understanding of exactly what they are consenting to.

A current or previous dating or sexual relationship is not sufficient to constitute consent. Consent must be ongoing throughout a sexual encounter, and can be revoked at any time. Once consent is withdrawn, the sexual activity must stop immediately. Additionally, being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent.

University asserts that Revelle College student John Doe violated the University of California San Diego's sex offense policy on the morning of February 1st, 2014, by ignoring the objections of another student that she did not want to engage in sexual activity. Specifically, John is alleged to have digitally penetrated the student's vagina after she repeatedly stated that she did not want to engage in sexual activity with him. As is the case here, often only the witness present during the alleged incident of

sexual assault -- I'm sorry. As is the case here, often only the witnesses -- the only witnesses that are present during alleged incidents of sexual assault are the complainant and the respondent. Where there are conflicting reports from the parties, weighing credibility is essential.

Observations, actions, consistency, and detail, bias, and demeanor may be taken into consideration when deciding credibility, and the standard to be used is more likely than not. The University is intentionally limiting the scope of the allegations of sexual assault or sexual misconduct to the morning of February 1st, 2014, because it is an unambiguous instance of Mr. Doe ignoring the wishes of the complaining witness to engage in sexual activity. However, we also hope to show prior sexual misconduct that seriously undermines John Doe 's credibility with regard to denying that he sexually assaulted the complainant on the morning of February 1st. So I'd like to begin by calling my first witness, which is the complainant.

Would you please describe the events of the morning of February 1st in detail for me, please.

MS. Roe : I woke up in John 's apartment in his bed, and I was hung over and feeling kind of out of it and tired. And John, he 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. And he kept trying to touch me, and I kept pushing his hand away and telling him that it hurt. And he kept saying, "Okay, sorry," and he would take his hands away, and then like two minutes later he would go and try again. 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 of whether or not I said stop or not.

And then one of the times when I told him that it hurt, he said, "Well, if it hurts then I guess I did my job right," implying that the fact that I was in pain meant that he must have done something positive, that the end result was supposed to cause me pain.

And after that, I got up and I left and I went into the living room of their apartment, and I sat there for probably an hour or an hour and a half, two hours, because I didn't want to walk across campus, and he said that he would drive me home. But he said that he wanted to wait, because he had a headache. So I went and I sat in the living room with some water, and was just there for a while until he felt -- until he decided to drive

me home, and then I went home and, yeah, that's kind of the end of when he was involved that morning.

MR. JAKUBISIN: Okay. What did you tell John about your unwillingness or willingness to engage in sexual activity before February 1st, 2014?

MS. Roe : Well, I had told him several times -- I told him, actually, the first time that we ever had any sexual activity or, whatsoever, that he asked me if I wanted to spend the night at his place, and I told him right off the bat that I was a virgin and I wasn't going to have sex with him; and if that was a problem, then I could just go home, but that I wasn't going to have sex.

It was something that I was waiting either until marriage, you know, I was -- until marriage or until something that was very, very special to me, and that I wasn't going to change my mind. I wasn't going to have sex with him. And he said that that was fine. And multiple times, when we were either making out or engaging in oral sex, he would ask me to have sex with him, and I would say that physically I want to, but mentally I always said no. I never once implied that I was changing my mind, that I would have sex with him, that if circumstances were different, I would.

And there was one case where I especially -- I

don't exactly remember what we were talking about, but I remember saying that I would -- that this was a really big decision for me, and I had just decided to drink alcohol, which was something that I had never done before, and that I wasn't going to make all of these huge decisions in a row, and that I would never make the decision of whether or not I wanted to lose my virginity intoxicated. And he stated that he would never make me -- that he would never have sex with me when I was drunk.

And then some of the times when I would say like, "You know, I am -- I can't, like, I can't have sex," and he would say, "Well, I am not going to make you," implying that he had that power, but he wasn't going to at that particular moment.

MR. JAKUBISIN: And --

MS. Roe : And there's -- and actually, the night before, on the 31st, there was an instance where I went -- I had an alarm on my phone, because I had been on birth control for years to regulate periods, and things like that. And an alarm went off on my phone to tell me that I needed to take my birth control pill. So I went into his room to grab my pills, and he asked me, he said, "You are on birth control, but you won't have sex?" And I was like, "It's for other things. Like I

am not having sex, I am just on birth control." So I specified, even that night while we were drinking and getting ready to go, again, that I wasn't going to have sex.

MR. JAKUBISIN: In general, how would you characterize that John responded to you saying that you didn't want to have sexual activity with him? What was -- generally, how did he act? What did that seem like to you?

MS. Roe : Generally, he would try and pressure me and try and ask me again. And he would -- he would always say that "I am not going to make you," and it really -- looking back on it now, it really was -- it feels kind of like a threat, like "I could force you to, but I am not." You know, it was always -- it was never a gracious, "I understand that this is your decision. I am not going to argue with that. I respect your decision," and things like that. There was never that level of respect. It was always trying to get it to happen, asking, again, after I had said no. Continuing to ask, saying that he really wanted it, and different things like that.

MR. JAKUBISIN: What do you remember about the evening of January 31st, beginning with what you characterize as pregaming, and then ending with you

waking up on the morning of February 1st?

MS. Roe : I remember that me and some of my friends -- my sorority and his fraternity had an arranged exchange or party, and some of my friends were going over to his apartment to pregame, to drink before the party. And I had talked to him, and we -- and I said that like I was just going to like bring over pajamas and stuff, because I was going to spend the night, which is something that I had done before and not had sex.

And so I brought over my stuff. I remember getting dressed with my friends, going over, dropping my stuff off in his room. We started to drink. We had these red Solo cups, because we didn't -- there weren't very many shot glasses. I think someone said that they had like broken some that day, or something like that. So there weren't really shot glasses, so he was pouring Ciroc into just red cups. There wasn't really like a measurement of how much that was. And this was the third time that I had ever drank -- either the second or the third time I had never dranken alcohol whatsoever, so I didn't really know my limits. I didn't know how much was a lot, and different things like that.

So I would just take the cup and alternate between drinking the vodka and then drinking like a soda

or something as a chase. And he filled up my cup, I think, like we put more in, like two or three more times. And at one time I remember him drinking some of it, and he was just saying like, "Oh, don't throw up," you know. It wasn't -- I don't know, but it was just like, "Don't throw up." And then I remember taking pictures with people. I remember one of his roommates telling me that I was being really loud, that I was talking loudly, that I was like being out of control and that I needed to calm down.

I remember going to John's room on two different occasions and kissing him, and then going back to the party. I kind of remember -- I remember that everyone was like gone, and it was just me and John, and we were like how are we going to get a ride? And then we left and we walked out, and then we saw a group of other people that were going into this -- a girl in the sorority, Farrah's car, and then we were going to get in the car with them. And I remember kind of going to the party, and I remember at the party -- I don't think I was there for very long, but I remember kind of going around and seeing different people, and just kind of floating, where I was just talking to different people but not really holding conversations.

I remember someone handing me just a bottle of

alcohol and drinking like some sort of measurement from that. I remember telling my big in my sorority that I was really drunk. I remember John standing behind me a lot and putting his arms around me and putting his hands up my shirt. And I remember putting -- like pushing his hands down and being like, "There's everyone around, we are in the middle of a party, like stop." And I remember him doing that again on a different occasion, but -- and then I remember -- I remember he was saying that like a pledge was here to get us. And we went out -- and I remember who the pledge was, because I'd had a certain -- I had had an issue with him on a previous night.

And I remember getting out of his car at the apartment, and I remember like not having my phone or something like that; and I remember he came back and I got my phone, and then I remember walking a couple more steps, and then I don't remember anything for the rest of the night. And then I remember waking up the next morning and feeling -- I didn't remember anything from the night before, but I felt -- like I could tell that we had had sex because of the way that my body felt. I could feel like his semen still inside of me. I could feel sore. I knew what had happened.

And then months later, when I was driving one

day, I pulled over because I had had this random -- I had a flashback of just him on top of me, and then finishing inside of me, and then rolling over and just like rolling off of me. And I remember rolling against the wall and, like, I remember there were tears, but I don't remember very much before or after that. It was just a flashback of what had happened.

Q. Okay. So the report from the Office for the Prevention of Harassment and Discrimination, or OPHD, mentions that at some point after February 1st, you asked John if he had used a condom on January 31st, 2014.

Could you please tell me about that communication, what was asked and why you asked it?

MS. Roe : I don't remember if it was asked over text message or in person, but I asked, because I felt it inside of me. And because I was a virgin and I was just nervous about getting pregnant, about like STDs, about different things like that. So I remember asking him because I was nervous about wondering if I could be pregnant or not. And he said that he hadn't used one.

MR. JAKUBISIN: Okay. That's all the questions that I have.

MS. OTTEN: Does the panel have any questions?

We are going to funnel all of the questions through me, so if you have questions, please write them down and forward them.

Okay. So the question stems around like the evening of the 31st and the 1st, and your interim actions, and your relations with the respondent.

If you could provide us some information on what you do remember as far as, maybe, consent you gave to what actions and when you clearly stated no, you did not want to do that. If you could provide some of that information to us, please.

MS. Roe : On the night of the 31st, I don't remember either consenting or not to any activity. That's where my memory stops. I must have blacked out. I haven't -- I don't have any memory of any activity, of saying anything that night. The next morning there wasn't any sexual activity other than him putting his hands down my pants and trying to finger me and touch me down there, and me telling him directly to stop, and pushing his hand away and saying, "No, it hurts," like "Stop." Like, "I am sorry, I am really sore, it just hurts. Can you just stop?" Multiple times. I was very, very clear about that. But the night before I don't really remember -- I don't remember. I don't remember if I said yes or no or anything, but the next

morning I directly said no.

MS. OTTEN: I remember seeing in the materials we received also about relations happening later that day as well. If you could talk about that as well, please.

MS. Roe : That night was my sorority formal, and I had already asked him to be my date and -- previously. And I was -- I was talking to one of my friends, and I didn't want to uninvite him because I didn't want people to ask me why. I 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.

And at this point I was really upset with myself for having sex and for letting it happen, and for getting that drunk. I blamed myself for it, because I felt that this was something that was so special, and so -- it meant so much to me, and for me -- for it to just happen over that, I was very upset about it.

And then at the party, I remember him -- he asked me if we were going to have sex again that night, and I was like, "You know, I am pretending last night didn't happen." And he was like, "Well, I am kind of offended that you are like pretending like it didn't happen." And I was like, "You know what? Like I just -- I am just going to pretend like it didn't

happen. It didn't count. I am just going to move on."

Then he was like -- and he kept asking if we were going to have sex that night, and he was like, "Well, what's twice? You know, we have already done it once, what's twice?" Like "You are already not a virgin, it is already over, you might as well do it again." And me saying, "No, I am not going to. I am just not." Multiple.

But throughout the night, I just -- I described it as like I just kind of gave up on myself, and I figured it was -- it was over, you know. So we went back to my apartment and we ended up having sex, and it was -- I just kind of had given up on myself. I just didn't try and resist, I didn't try and do anything. I was just like, "Let's just get it over with, it is whatever." It is -- I don't know. I just stopped caring.

MS. OTTEN: Do you remember what you said to give consent, or if anything was said?

MS. Roe : That night, I remember saying something along the lines of, "Let's just do it," you know. "It is going to happen, let's just do it." Something like that.

MS. OTTEN: Do you have additional questions, Kris?

A couple of clarifying questions. So you had mentioned that you took your pajamas over to the Respondent's apartment and you were just spending the night. You had done that before. During those incidents, were there any sexual relations? And what we are looking at is what type of consent did you give at that time or did not give at that time?

MS. Roe : On previous nights?

MS. OTTEN: Yes.

MS. Roe : On previous nights I consented to just making out. I consented to -- I had consented to oral sex. I said yes when he asked if I wanted to do something. I did -- I agreed to it. I said yes, but -- then when he asked me to have sex, I said no. And so that's what had happened on previous nights is I -- I am always -- I was always clear with my consent of yes or no.

MS. OTTEN: And then on the morning of February 1st, you mentioned that you woke up and you felt very sore. At that point did you ask the respondent about what happened?

MS. Roe : Yeah, I think -- I remember asking him something like -- I remember saying something like, "I feel like really uncomfortable about what happened. " Or like, "What happened -- like what did

happen?" Like, "I don't know, I feel real uncomfortable about this whole situation." And I remember him saying something like, "Oh, well, you wanted it. You said yes, you wanted it." And I was like okay, but I remember kind of -- I don't know if I asked him directly, "Did we have sex?" or if I just asked him kind of like, "What happened?" You know, I feel uncomfortable, I didn't really know, like -- and then he just said, "Oh, well, you wanted it. I asked you, and you said yes, and you wanted it."

MS. OTTEN: Okay. If you could just clarify how much -- I know you talked a little bit about how much you were drinking, and that this was the first couple of times that you drank before. But if you can give us a better idea of maybe how much you were drinking, what you were drinking, and if you had any other friends or other witnesses who saw how much you were drinking.

I know you have talked a little bit about this, but the question is if you can just clarify it in greater detail, please.

MS. Roe : Okay. I think either the next morning or the day after that, I was just standing there waiting for my best friend at the time, Miranda, who was there. We were trying to figure out how much I had

drank, and we kind of -- I think if you go with the assumption that each drink he filled my cup, it was probably two and a half shots worth, so two and a half standard drinks. And if I had like two or three, then it was -- I think we figured out with those cups, we thought it was around six shots. And then I guess I had taken another shot before I left, and then I took a drink from another handle of vodka. And everything that I drank was vodka. And so I think we ended up deciding that I had like around eight or nine drinks. And if I weighed 120 pounds, it is -- I am not a big person.

MS. OTTEN: And one final clarifying question: Did John see you while you were drinking?

MS. Roe : Yes. He was the one who was offering me the drinks. He was pouring them for me and handing them to me.

MS. OTTEN: Okay. Any other questions from the panel? So does the Respondent have any questions?

So what are the questions, if --

MR. Doe : They are numbered. There's 32.

MS. OTTEN: Okay. So this is what you have already provided? Okay.

So if you could just give me a few minutes to go through these questions. What I will -- I will just take maybe a few minutes to read really quickly, and

then I will go one at a time.

So for the sake of time, I think I will just start reading the questions, and then I will skip any that I think have been asked or answered. So the first question is, "Are you presently enrolled in UCSD?

MS. Roe : I am still a UCSD student. I am currently -- I took the last quarter off to just --

MS. OTTEN: That's okay. You don't have to add -- it was just are you presently enrolled.

Are you presently enrolled in another college or university? If so, where? And actually, I am going to pull back that. I don't think that's relevant.

So your request for the formal investigation dated June 16th, 2014, was submitted to the Office for Prevention of Harassment and Discrimination 11 days after you submitted the written report to the university's student conduct office. I just wanted to clarify that those dates are correct.

MS. Roe : I remember -- I submitted it to the student conduct office. I have no idea how long it took them to deliver to the Office of Prevention of Harassment and Discrimination. I don't know how --

MS. OTTEN: Okay. So I should clarify then, you submitted it to student conduct, they took care of submitting it to OPHD. Okay. Thank you.

No. 4 has already been answered.

MR. HABERKORN: It hasn't been answered.

MS. OTTEN: You don't have the right to participate in this.

MR. Doe : I object. I think it needs to be asked. It is very important for subsequent questions.

MS. OTTEN: So noted. I will not ask that question, because it has been asked and answered.

Do you understand that Mr. Doe is alleged to have violated the following sections of the Student Conduct Code: Section VII, letter AA, for sexual assault and sexual misconduct?

MS. Roe : Yes.

MS. OTTEN: Six, asked and answered.

Have you previously mentioned to anyone during the investigation that you and Mr. Doe had sexual intercourse at Mr. Doe 's residence on the night of the 31st, following an exchange between your sorority and his fraternity? And when I ask this, I mean, that you remember having sex.

MS. Roe : Not that I remember having it.

MS. OTTEN: So that was that question for the night of the 31st.

How about for the night of the 1st? Have you previously admitted that you had sexual intercourse? I

mean, you admitted it here.

MS. Roe : Yeah.

MS. OTTEN: Were there other people that you admitted it to? And that's just a yes or no --

THE WITNESS: Yes.

MS. OTTEN: Thank you.

Okay. Nine is asked and answered. I am going to ask you some clarification on this question. I don't understand this --

MR. Doe : The timeline --

MS. OTTEN: So this question, basically: Is it correct that the first time you complained that Mr. Doe did some things that you felt were wrong on January 31st and February 1st, that the first time you complained about that was on June 5th? Or was there a previous time that you had complained about it?

MS. Roe : To the school or to anyone?

MS. OTTEN: However you would like to respond.

MS. Roe : To the school, no, that was the first time.

MS. OTTEN: Okay. I am going to look at formal report first.

MR. Doe : It is attached.

MS. OTTEN: Thank you. So this one is a clarifying question: You mentioned to us today that

during the incident when John was touching you, was trying to remove your underwear, and trying to insert his finger in your vagina, in your report, I will read from it, it says, "He then kept trying to move my underwear and touch me but I kept telling him that it hurt really bad and asked him to stop."

Could you just clarify in the statement, the written statement, what "touch me" was referring to.

MS. Roe : I didn't really want to get too super graphic in the report, but insert his fingers in my vagina.

MS. OTTEN: Thank you. I'm not asking No. 12.

Okay. 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. We have copies of all of these text messages, and I have read them.

Okay. So referring to the text messages, we have also read a text message from the evening on April 21st, and it was for purposes of planning to get together to pregame before an outing. Could you -- do you remember that? And if so, could you --

MR. Doe : It was April 25th.

MS. OTTEN: April 25th. I am sorry. That is what this states. I misspoke.

Do you remember those texts and could you

provide some context to us, please?

MS. Roe : I don't remember what happened on April 25th. I don't remember what date that was.

MS. OTTEN: 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 then head to another pregame, but we'll have rides." Next response, "Okay, let me talk to Miranda. What time are you guys leaving?" Response, "Probably 9:00. If not, just head to John Mean'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 Miranda 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.

MS. OTTEN: 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.

MS. OTTEN: Okay. And was there any other reason or relationship you were establishing in this text?

MS. Roe : We weren't friends.

MS. OTTEN: Okay.

MS. Roe : And I didn't go over there.

MS. OTTEN: Okay.

MS. Roe : I don't know if the texts show that, but I didn't want to go --

MS. OTTEN: No. 21, again, we already have copies of the texts.

MR. Doe : 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.

MS. OTTEN: Okay. You will have your opportunity later --

MR. Doe : Sorry.

MS. OTTEN: -- so I am right now deciding if we

are going to ask or not ask the questions.

MR. Doe : Okay, fine.

MS. OTTEN: Thank you.

Can you talk to us a little bit about your relationship with Mr. Doe between February 1st and then up until April 28th. And you have already addressed it. Is there anything else that you would like to add to your relationship in, let's say, the months of maybe March or April?

MS. Roe : 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.

MR. Doe : Objection; move to strike after --

MS. OTTEN: We are not in a court proceeding. Thank you.

No. 23, asked and answered. Answered. Same with 24, same with 25. We are skipping 26.

So you have shared with us about what happened. Is there any other -- is there any written information that you would like to provide us to document what happened, such as text messages --

MS. Roe : I provided a lot of text messages. I have provided a written report. There's

nothing else that I feel I need to add.

MS. OTTEN: Thank you. I am skipping 28, skipping 29, 30. 31, skipping. 32 has already been addressed, I am not asking this question either. Any additional questions? No?

Does the panel have any additional questions? Okay. Tony, do you have any further information to provide, as the university rep?

MR. JAKUBISIN: After we hear from the Respondent.

MS. OTTEN: Okay. John, you may present your information and the witnesses supporting your perspective of the incident.

MR. Doe: I am asserting my 5th Amendment right to not respond.

MS. OTTEN: Okay.

MR. Doe: Other than what I said in the brief.

MS. OTTEN: Okay. And so there was a time when you were interjecting. Would you like to elaborate on what you were going to say at that time?

MR. Doe: No.

MS. OTTEN: Okay. Does the panel have any questions for John?

I am going to ask the questions that we have. I understand that you may assert your 5th Amendment

right. The question is: Do you remember making the statement similar to the effect, "Well, then I won't make you. And if so, do you remember what your intent of the message was at that time?

MR. Doe: What I meant by, "I won't make you," is that it is your decision at the end of the day. I respected and, of course, I am not going to be bothering you, if that's what you want. It was -- I wasn't implying that I had power over her and I could make her if I wanted to, that ridiculous. I am not like that. Anyone who knows me knows that I would never mean such a thing by saying something as vague as, "I can't make you," or "I won't make you." It was just "It is up to you. Let me know if you ever want to do it." That's what was implied by it.

MS. OTTEN: So the question is, is there any particular part of your statement or the documents that you have provided that you would like us to focus on?

MR. Doe: Everything that I had submitted is relevant and should be considered.

MS. OTTEN: 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 could you 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?

MS. OTTEN: 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.

MS. OTTEN: So clarify that for me. Are you saying --

MR. Doe : There was no touching --

MS. OTTEN: -- that it never occurred?

MR. Doe : No.

MS. OTTEN: 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.

MS. OTTEN: So if you had intended to digitally penetrate her, what -- in what form would you seek consent? Or what would consent look like to you?

MR. Doe : I am asserting my 5th Amendment right and not responding.

MS. OTTEN: Tony, do you have any questions that you would like to ask?

MR. JAKUBISIN: No.

MS. OTTEN: Any questions from the panel? So John, do you have any further information you would like to provide us?

MR. Doe: Yeah, because I have limited my cross-examination -- (inaudible)

MS. OTTEN: All right. So we will take a moment to look at them. So is this -- let's see. Let's take a moment to look -- see if we have any questions to ask of you, otherwise we can read them thoroughly in deliberations.

So no questions from the panel? Okay.

So before we then talk about the next steps, Tony, do you have a closing summary statement?

MR. JAKUBISIN: I do. In closing, I'd like to refocus attention on the allegations and the role of the panel. Though we have been provided a tremendous amount of extraneous information by the Respondent, the panel is only charged with determining one thing, and that's if on the morning of February 1st, 2014, did John Doe violate the UC San Diego sex offense policy, and, therefore, the Student Conduct Code by forcibly digitally penetrating the vagina of the complaining

witness against her explicit wishes?

During our time together today, complaining witness has shared with us her recounting of the events of the morning of February 1st. The University of California San Diego's Student Sex Offense Policy states that, one, it is the responsibility of the person wanting to engage in the specific sexual activity to make sure that he or she has effective consent.

The complaining witness clearly stated several times that she did not want to engage in sexual activity with John on the morning of the 31st.

No. 2, the effective consent is defined as the consent -- as consent that is informed, meaning that both parties demonstrate clear and mutual understanding of exactly what they are consenting to. The complaining witness clearly understood what John wanted. The point is, she didn't want it.

Three, that a current or previous dating or sexual relationship is not sufficient to constitute consent. Much of the information presented by John tries to establish that there was some sort of implicit or explicit consent to digitally penetrate the vagina of the complaining witness on the morning of February 1st, because of past communication or activities between the two.

However, in fact, the sex offense policy specifically states that, four, consent must be ongoing throughout a sexual encounter and can be revoked at any time. And that once consent is withdrawn, that sexual activity must stop immediately. The complaining witness vehemently asserts that she rejected multiple times John's forcible digital penetration of her vagina on the morning of February 1st, 2014.

During their investigation, OPHD found the complaining witness to have been genuinely traumatized by the events in connection with Mr. Doe. Although John's legal counsel paints the complaining witness and her action around her relationship with John as inconsistent and capricious, OPHD found that Ms. Roe exhibited signs of a trauma victim, and specifically stated that they found Ms. Roe 's actions, though at times -- though at times counter-intuitive, are consistent with young college students in the first months away from parents and restrictive environments; and consistent also with the actions of trauma victims who attempt to cope with trauma by normalizing what's occurred.

Most importantly, OPHD determined that, quote, "Based upon the totality of the circumstances and the evidence presented, it is more likely than not that on

February 1st, Mr. Doe ignored Ms. Roe 's objections to sexual activity in violation of the Student Sex Offense Policy." The university believes that the information presented in today's review, coupled with the investigative reports submitted by OPHD not only provide a preponderance of the evidence that shows that John Doe violated the University of California San Diego's sex policy on the morning of February 1st, but suggests that he may have violated the policy at other times during his relationship with the complaining witness.

MS. OTTEN: Thank you. John, do you have a closing summary statement that you would like to provide?

MR. Doe: No.

MS. OTTEN: Are there any final questions?

MR. Doe: When will you guys be deliberating?

MS. OTTEN: Today, right after this.

MR. Doe: Okay. And when can I expect to receive a decision?

MS. OTTEN: I think I mentioned earlier within ten academic days.

Any other questions? Okay. Okay. So I have been asked just to reaffirm that this is -- this process is educational in nature and it is not a criminal

proceeding. So thank you everyone for participating in today's review. From here we will move into deliberations to determine whether you, John , are responsible for the alleged violations. As I mentioned at the start of the review, you will receive an e-mail from your student conduct officer with our report and, if applicable, the final sanctions. If you have any questions between now and then, please feel free to consult with the Office of Student Conduct, the AS Office of Student Advocacy or Student League of Services. So thank you for your participation.

If you will just hold off, I think we are going to exit to the left first. Okay. Thank you.

MR. Doe : Thank you.

MALE VOICE: Just take a brief pause, make sure the recorder is off.

MS. OTTEN: Thank you.

-oOo-

STATE OF CALIFORNIA)
(ss.
COUNTY OF STANISLAUS)

I, ERIC L. JOHNSON, do hereby certify that I am a licensed Certified Shorthand Reporter, duly qualified and certified as such by the State of California;

That the said proceeding was by me transcribed from a digital audio file at the time and place herein mentioned; and the foregoing pages constitute a full, true, complete and correct record of said proceedings, given audio quality of the source file available;

That I am a disinterested person, not being in any way interested in the outcome of said action, or connected with, nor related to any of the parties in said action, or to their respective counsel or representatives, in any manner whatsoever.

DATED: December 22, 2014

EJ

Eric L. Johnson, RPR, CSR 9771

Exhibit 16

FORMAL HEARING BEFORE THE SEX OFFENSE HEARING PANEL

IN AND FOR THE UNIVERSITY OF CALIFORNIA, SAN DIEGO

Jane Roe , Complainant, vs. John Doe , Respondent.	**CASE NO.: 01401-001-2014** RESPONDENT'S SUPPLEMENTAL SUBMISSIONS AND OTHER INFORMATION IN SUPPORT OF HIS DEFENSE DATE: December 12, 2014 TIME: 1:00 P.M. LOCATION: Student Services Center Conf. Room 554A

TO THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, THE SEX OFFENSE HEARING PANEL AND THE UNIVERSITY REPRESENTATIVE:

Respondent, John Doe (hereafter "Respondent"), respectfully submits the following **Supplemental** Submissions and Other Information In Support of His Defense.

The *Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination Violations* (hereafter "*Hearing Procedures*"), updated August 21, 2013, at section III titled **Formal Hearing Process**, subparagraph H, states in pertinent part: "Both the *complainant* and the student accused may be present at the entire hearing or *may elect not to appear at the hearing. . . . Failure to appear at the hearing will not be cause to cancel, postpone, or reschedule the hearing and the hearing will be conducted in accordance with these*

procedures." (Emphasis added).

The *Hearing Procedures* at section III titled **Formal Hearing Process**, subparagraph P, states: "The Hearing Panel or Hearing Officer will be responsible for asking questions to parties and witnesses during the hearing. *Parties may provide questions in writing to the Hearing Panel Chair or Hearing Officer to be asked of the other party or witnesses at the Chair's or Hearing Officer's discretion. The Chair or Hearing Officer may exclude any unduly repetitious or irrelevant questions or information.* Formal hearing participants are not required to provide information that would incriminate him or her." (Emphasis added).

Natania Trapp, the Student Conduct Coordinator of the UCSD Office of Student Conduct, notified Respondent (and the Hearing Panel and University Representative) in an email dated November 18, 2014, that Jane Roe *("Complainant"), as of that date, was scheduled to appear at this hearing.* **Although Complainant "appeared" at this hearing, Respondent's questions provided in writing to the Hearing Panel Chair or Hearing Officer to be asked of Complainant were unreasonably and indiscriminately limited to such an extent that Respondent was subjected to an *unfair* hearing and a denial of his due process rights.** Respondent respectfully requests that the Hearing Panel take notice that Respondent was not afforded the opportunity to fully and completely cross-examine Complainant.

The Foundation for Individual Rights in Education's (hereafter "FIRE") *Guide to Due Process and Fair Procedure on Campus* devotes an entire section to the due process rights of an individual during the hearing process. Namely, on similar grounds of rules essential to basic *fairness*, Respondent may have the right to cross-examine the witnesses against him at a college or university disciplinary hearing, if such cross-examination is necessary to draw out

the truth about the matter at issue.

The Sixth Amendment to the United States Constitution guarantees the right to cross-examine witnesses in criminal proceedings. It also gives criminal defendants a right to confront their accusers - that is, to look at them eye to eye when they testify. The Sixth Amendment, however, even as extended by the Fourteenth Amendment, only applies to federal and state criminal proceedings. Whether a right to cross-examination would apply in public college disciplinary hearings would depend upon whether it was essential to the "*fair*" hearing guaranteed by the due process clause. As mentioned hereinabove, Respondent had the opportunity to provide questions in writing to the Hearing Panel Chair or Hearing Officer to be asked of the Complainant at the Chair's or Hearing Officer's discretion. Although the Chair or Hearing Officer *may* exclude any unduly repetitious or irrelevant questions or information, Respondent contends that the questions he provided in writing to be asked of Complainant at the beginning of the hearing were *unreasonably* and *indiscriminately* limited to such an extent that the result is an *unfair* hearing and a denial of Respondent's due process rights. In other words, it is *unfair* that Respondent was not afforded the opportunity to perform a full and complete cross-examination of Complainant, albeit subject to the Chair's or Hearing Officer's discretion – discretion, which Respondent contends, was abused.

Cases where cross-examination is most clearly required are those built solely around factual claims and charges made orally by a witness – such as in the present case. For example, in *Donohue v. Baker*, 976 F. Supp. 136 (1997), a rape charge against a male student hinged on whether a female had consented to sexual intercourse that both agreed had taken place. The U.S. District Court for the Northern District of New York held that the accused student had the right to cross-examine the alleged victim, because the only evidence

that the act had not been consensual was her testimony, and the determination of guilt or innocence therefore rested on her credibility. This case is vitally important, because similar circumstances arise with some frequency – again such as in the present case. Respondent has been accused of a sexual assault, and taking into account the *Donohue* opinion, basic *fairness* gives Respondent the right to cross-examine the Complainant without the abusive discretion of the Chair or Hearing Officer. Although the *Hearing Procedures* provide that the Chair or Hearing Officer *may* exclude any unduly repetitious or irrelevant questions or information, Respondent contends that the questions he provided in writing to be asked of Complainant at the beginning of the hearing were *unreasonably* and *indiscriminately* limited to such an extent that the result is an *unfair* hearing and a denial of Respondent's due process rights.

The specific nature and scope of cross-examination required by due process also depends on the circumstances. In *Donohue*, the court found that it was permissible for the tribunal to allow the accused to question witnesses merely by posing his questions to the panel, which then directed them to the witness. Other courts have approved circumstances in which witnesses could refuse to answer a question in cross-examination. The logic of court decisions on this question is that limits on cross-examination that might be appropriate in one circumstance might be inappropriate in others, if it could be shown that such limits denied *fundamental fairness* to the accused.

Even though the law only requires cross-examination in a limited set of circumstances, many schools allow for cross-examination at disciplinary hearings in a far greater range of circumstances. Although the *Hearing Procedures* provide an avenue for Respondent to submit questions to the Hearing Panel Chair or Hearing Officer for purposes of a complying with the due process right and fundamental fairness of cross-examination, which he did, UCSD and this

Hearing Panel are legally, and contractually, obliged to live up to that promise. Again, Respondent contends that the questions he provided in writing to be asked of Complainant at the beginning of the hearing were *unreasonably* and *indiscriminately* limited to such an extent that the result is an *unfair* hearing and a denial of Respondent's due process rights, for Respondent was not given the opportunity to fully and completely cross-examine his accuser.

Due process, as indicated by *Donohue*, does not generally require face-to-face confrontation in campus disciplinary proceedings. However, if a compelling case could be made that such actual confrontation is necessary to a fair judgment (for example, when someone's defense is based on mistaken identity), it might well be required by due process. As in the case of so many other protections, the extent of the "process that is due" depends largely upon the facts and circumstances of the situation.

The alleged violation of the Sex Offense Policy on the morning of February 1st, 2014 involving digital penetration without consent is built solely around factual claims and charges made orally by Complainant. Crucial to this issue, as set forth in Elena Acevedo Dalcourt's (hereafter "Ms. Dalcourt") September 10, 2014 letter to Mr. White, is the fact that the Complainant admits to having sexual intercourse on the evenings of January 31, 2014 and February 1, 2014 – before and after the alleged digital penetration that she failed to mention in her Request submitted on June 16, 2014 (after meeting with Ms. Dalcourt of OPHD just four days prior). In light of the foregoing and based upon a preponderance of the evidence, the alleged digital penetration on February 1, 2014, if it even occurred (a fact vehemently denied by Respondent), took place *in between* two consensual acts of intercourse between the parties. Further, Complainant's interviews summarized by OPHD in its investigative report, is lacking in credibility, for Complainant never mentioned the alleged acts of digital penetration –

even after she had four days to think about what she eventually drafted and included in her Request dated June 16, 2014. Here again, based upon a preponderance of the evidence, Respondent cannot be found responsible for nonconsensual digital penetration on the morning of February 1, 2014.

Based upon the foregoing, Respondent's Pre-Hearing Submissions and all of the evidence presented at the hearing of this matter by the University Representative and Respondent, including the limited so-called "cross-examination" at the abusive discretion of the Hearing Panel Chair or Hearing Officer, Respondent respectfully requests that the Hearing Panel, basing its determination of responsibility on the preponderance of the evidence standard, and taking into account that UCSD bears the burden of proof, determine that Respondent is not responsible for the alleged violations.

Respectfully Submitted,

John Doe

Dated: December 12, 2014

Exhibit 17

UC SAN DIEGO OFFICE OF STUDENT CONDUCT STUDENT CONDUCT REVIEW REPORT

A. INTRODUCTION

Per Section XIII (V) of the UC San Diego *Student Conduct Code*, here is our official report for the Sex Offense Hearing conducted Friday, December 12, 2014, at 1:00 P.M. for John Doe (Case number: 01401-001-2014).

Those present for the review included:

Hearing Officer - Rebecca Otten, Director of Strategic Partnerships/Housing Allocations (Chair)
Hearing Officer – Jeff Hill, Assistant Director (The Village) of Residence Life
Hearing Officer – Kris Nelson, Representative of the Graduate Student Association
University Representative – Anthony Jakubisin, Assistant Director of Residence Life (Sixth College)
Respondent student – John Doe
Respondent's attorney – Matthew Haberkorn
Complaining Witness – Jane Roe
Advisor for the Complaining Witness – Nancy Wahlig, Director of Sexual Assault and Violence Prevention Resource Center

Student John Doe was alleged to have violated the following sections of the Student Conduct Code:

- Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Assault – "Sexual assault" means sexual activity that is engaged in without the effective consent of the other person and is intentional.
- Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct – "Sexual misconduct" means 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.

Specifically, he was alleged to have ignored Ms. Roe 's objections to sexual activity on the morning of February 1, 2014, in violation of the Student Sex Offense Policy.

The Review was recorded via digital recorder and is available for review from Natania Trapp.

B. FINDINGS

1. The respondent, John Doe, abstained from verbally presenting information at the Review; responding to most questions asked by the Hearing officers; and presenting a closing summary statement. John submitted 33 written questions to be asked of the complaining witness; 9 of the 33 questions that were relevant were re-phased and asked by the Chair. The Chair did not ask the questions that were already answered during the review or not relevant to the incident on the morning of February 1st. John submitted the "Respondent's Supplemental Submissions and Other Information Submitted in Support of his Defense."
2. The "Respondent's Pre-Hearing Submissions and Other Information Submitted in Support of his Defense" states "...**Respondent *unequivocally* told Dean Mallory the incident and actions now set forth in the letter from Attorney Dalcourt to the Director of the Office of Student Conduct did *not* occur. In other words, Respondent denied the digital penetration ever occurred and communicated the same to Dean Mallory....**" John verbally re-confirmed at the Hearing that there was no amorous contact between him and Jane on the morning of February 1, 2014. In addition, the "Respondent's Supplemental Submissions and Other Information Submitted in Support of his Defense" states "...the alleged digital penetration on February 1, 2014, if it even occurred (a fact vehemently denied by Respondent),..."
3. The Complaining Witness, Jane Roe , stated that John had sex with her on January 31, 2014, while "blacked out" drunk and that she awoke very sore. Jane stated that she physically wanted to have sex with Ryan but mentally wouldn't. Jane stated that on the morning of February 1, 2014, John put his hands down her pants and she told him directly to stop and pushed his hands away, further stating "I'm

sorry. I'm really sore." Jane stated that she repeatedly told John to stop and he did not. Jane stated to Ms. Elena Dalcourt at the UCSD Office for the Prevention of Harassment & Discrimination (OPHD) that John entered Jane 's vagina with his fingers a total of three times.

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.
5. The hearing panel found Jane credible in her assertion that John tried to digitally penetrate Jane 's vagina and he ignored her objections.
6. Ms. Elena Dalcourt at the UCSD Office for the Prevention of Harassment & Discrimination (OPHD) conducted an investigation of this incident and found "based upon the totality of the circumstances and the evidence presented, I find it more likely than not that on February 1, Mr. Doe ignored Ms. Roe 's objections to sexual activity in violation of the Student Sex Offense Policy."
7. The "Respondent's Pre-Hearing Submissions and Other Information Submitted in Support of his Defense" and the "Respondent's Supplemental Submissions and Other Information Submitted in Support of his Defense" states "...Further, Complainant's interviews summarized by OPHD in its investigative report, is lacking in credibility, for Complainant never mentioned the alleged acts of digital penetration..." When questioned at the review, Jane explained that she did not mention the digital penetration in her Request for Formal Investigation because she did not want to get into detail. She stated in the request that "...He then kept trying to move my underwear and touch me but I kept telling him that it hurt really badly and asked him to stop....". The panel found Jane 's response to be credible.

C. CONCLUSION

Based on the information presented at the Review, including the incident report, the investigative reports, the Respondent's pre-hearing submissions, the witnesses' statements, and the Respondent's supplemental submissions, we find it more likely than not that the Respondent, John Doe, violated the following section of the UC San Diego *Student Conduct Code*:

- Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct – "Sexual misconduct" means 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.

We do not find that the Respondent, John Doe, violated the following section of the UC San Diego *Student Conduct Code*:

- Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Assault – "Sexual assault" means sexual activity that is engaged in without the effective consent of the other person and is intentional.

D. SANCTIONS

After reviewing the University's Sanctioning Guidelines and the Respondent's student conduct record while taking into account our conclusion above, we recommend the following sanctions:

1. Suspension for one quarter.
2. Permanent No Contact Order, due to the potential for ongoing harm to the Complaining Witness.
3. A two hour sex offense/sexual harassment training with OPHD.
4. Counseling assessment with CAPS.

Respectfully submitted on December 17, 2014.

Rebecca Otten

Exhibit 18

John Doe

[redacted] Doe [redacted]

December 23, 2014

Impact Statement

Re: Case number: 01401-001-2014

Dear Dean Mallory,

I'm writing you in regard to the sanctions recommended by the Hearing Panel in its findings following my December 12, 2014 hearing. As you know, the Board found me responsible of "sexual misconduct" due to Jane Roe 's complaints, finding her credible in reporting allegations that I digitally penetrated her without her consent on the morning of February 1, 2014.

First, I affirm wholeheartedly that I never touched her that morning, and further that I always treated her with absolute respect and kindness throughout the entirety of our sexual relations. I do **not** have a warped understanding of the definition of sexual assault or sexual misconduct. Not only did the alleged violation **never** take place, but I also would never disregard the complainant's request to stop in any scenario. As you know, I made this quite clear in our meeting a few months ago.

I've made many mistakes throughout my life, but those mistakes have never reached a magnitude nearly as severe as sexual misconduct. The mistakes I've made have never and will never be at the expense of harming another individual. While I know that I unquestionably possess the moral aptitude to properly govern each and every one of my decisions, I also regard myself as a very intelligent individual with high aspirations who would never jeopardize my future by doing something as reckless as stated in the allegations. Quite frankly, I am too smart to even consider sexually violating a woman due to the resulting potential criminal implications, the threat of academic termination, and ultimately a destroyed future. I've been aware of those consequences my entire life and have never even contemplated testing those limits.

Unfortunately, I am now of the confirmed impression that UCSD administrators don't care to give me the slightest presumption of innocence. I am very well aware of the increasing anti-rape campus atmosphere, and agree that sexual assault is an extremely significant offense that requires intervention on all levels. Rape needs to be combatted, hut so do reports of false accusations. Just because society condemns any sexual assault so strongly, it is unlawful, unfair, and most certainly cruel, to presume that one is guilty. Throughout this process, I have hegun to really question the goodness of people, specifically the flawed rationale of someone who falsely accuses another for one's own sick enjoyment. But even more so, I question the goodness of those ruling in this case who deem my innocence, which has not been proven otherwise, an insufficient defense. Of course, I've only begun to realize that now. For some period of time, my optimistic delusion created a scenario that the UCSD investigator would come to my rescue and restore order. I thought I'd be able to file my own complaint for a wrongful accusation in no time, and the complainant would be reprimanded for her actions. But as painful as it is, I have alternatively become a scapegoat for society's most heinous crime epidemic and viewed as a morally defective individual. Meanwhile, my accuser is treated with unconditional sympathy regardless of her suspect motives. In knowing that the risk of reporting an unsubstantiated claim is very minimal, my accuser has taken advantage of the system. After impulsively and carelessly fabricating lies and duping many school officials, she's effectively altered my life and future. I strongly believe that these allegations stem from an internal religious conflict resulting from her own regretful decision to lose her virginity, or just as likely, she had parental pressure to report sexual allegations when they found out she was no longer a virgin. Either of these possibilities, undoubtedly coupled with her twisted psyche, fueled her complaint. Again, I **never** sexually assaulted her or touched her that morning. So why is my claim seemingly less credible than hers, despite the evidence I've provided to corroborate it? No auswer has been given. As predicted, the system has confirmed her belief that she need not be held

accountable for her own actions, and that is why it is meaningless for me to dwell on her malicious motives. My conjecture is unwelcomed and viewed with skepticism regardless of its merit.

Although I am very passionate about this issue, this is the first time I've really had my chance to openly express my feelings and the emotional burden I've endured over the last several months. I wake up every morning knowing that someone is out there trying to ruin my life even though I have done absolutely nothing wrong. I would go as far as to admit that I'm afraid of her, and I am genuinely afraid for anyone who wrongs her. Despite the distraction during this entire investigation, I try to focus on my schoolwork and continue tn work for the District Attorney approximately fifteen hours each week to keep myself busy and gain valuable experience. During this time, I've had almost no urge to socialize or do much else as I've come to ascertain the inevitable outcome of these sorts of cases. To make matters worse, I've heard rumors of my accuser slandering me from time to time. Thus, enjoying my quarter at school has been almost impossible. If good things happen to good people, then why am I suffering? Why is my accuser getting away with this? Those unresolved questions continue to eat at me.

As my hearing date drew nearer over the last month, I slowly regained enthusiasm. I thought that on December 12, 2014, the complainant would finally he exposed of her deceit and I'd bc free to move on with my life. I wasn't even nervous come the date of the hearing. The almost non-existent evidence that pointed towards my guilt paled in comparison to the exculpatory evidence I'd compiled. Complainant clearly lacked credibility, as shown through text messages and other factual findings. Her statements were inconsistent throughout the entire investigatinn from her initial Request for investigation thmugh and including the hearing. Even if something did occur, no judicial body could find me responsible based on the facts I'd presented. Yet, I was found responsible hecause she *"seemed"* credible. The Hearing Panel provided no other reasoning. I find it difficult to decipher how the Hearing Panel could determine her credibility when they were not able to "see" her during her testimony as she was behind a screen. It was as if the burden of proof

was placed on me and I was presumed to be guilty from the moment her allegations were reported. I was under the impression that the University, through its representative, had the burden of proof. I never expected that the esteemed institution of UCSD would subject me to the abuse of a kangaroo court.

The excitement and anticipation of finally being able to prove that I was innocent was replaced by even more despair and hopelessness. During the six-month investigation, I had reminded myself that the truth would be revealed eventually. How could it not? After all, that's what I was taught to believe my entire life. Even girls in Complainant's sorority assured me she wouldn't get away with this. But the hearing has passed and the reality is that I've been found responsible. I've been found responsible by school faculty and student members of the very thing that could put someone in prison. The decision was made available to me during my final exams' week too, as if I wasn't already under enough stress. I've been trying to complete my finals while somehow trying to cope with the erroneous decision that is sure to negatively impact the rest of my life, but the truth is I'm devastated.

I had planned on applying to law school next fall, but with sexual misconduct on my record I'll have no shot of acceptance. Because I have very few material assets, my education although intangible, is unquestionably my most valuable asset. The inability to attend any type of graduate program could cost me economically over the course of my lifetime. Upon the recommended academic suspension, I will lose my job at the District Attorney's office that pays me an hourly wage well above any alternative. Without a job and/or status as a full time student, I will lose my financial aid and won't be able to pay for my housing. When my accuser returns to UCSD, I am positive she'll try and destroy my reputation, and it is unlikely I can transfer to another high caliber university with sexual misconduct on my record. Although mandatory counseling is the least punitive sanction, it may be the most troubling for me to grasp. The members of the Hearing Panel, along with the University Representative, are not aware of the values that I possess, nor do they

know me in the very least. They've simply heard a scorned girl defame me and were led to believe that I have no respect for women. My character has never been more inaccurately judged.

I intend to appeal the finding of responsibility to the Council of Provosts on account of the evidence not supporting the findings, and the school's complete disregard of my dne process rights. While I wait in hopes of some sort of poetic justice, I ask that you consider reducing *and* deferring all of the recommended sanctions until a decision on the appeal is made. Natania Trapp has assured me that sanctions will not take effect until the end of the appeal process.

I may be slightly ambitious to expect you to believe everything I say, but if you acknowledge the possibility of my innocence, please reconsider many of the recommended sanctions, namely the suspension, and remove them all together. Clearly, I do not pose a threat to anyone on campus and I have exhibited great academic success, especially this quarter. I know that as the Dean of Students your mission is to promote the fairness of the academic environment and make sure all of your students succeed. It would be a disaster if my opportunity to continue my education, without any lapse due to a suspension, suddenly became limited. If I am not suspended, I would be able at the very least, to keep my joh even though the damage to my record in itself will already prove to cost me my career path. That being said, however, the emotional damage to me is irreparable.

I hope you take what I have written very seriously, and I apologize if in the course of this letter you found my comments against the Complainant to be harsh. I would never speak so flippantly about a victim of sexual assault, or someone who was truly traumatized by an unwelcoming sexual experience but the Complainant has, simply put, not been honest and forthright. I have tried so hard not to disparage her and have tried to respect the entire process over the last six months, but I've reached a tipping point. I promise to you as well as anyone reading this letter that everything I've stated is truthful. I'm sure you'd agree that just as every offender of sexual assault should be punished, an innocent person should never be.

If you would like to speak with me in person I'd be more than happy to do so.

Respectfully Submitted,

John Doe

Exhibit 19

From: studentconduct@ucsd.edu
Subject: Formal Hearing Sanction Letter
Date: January 13, 2015 at 11:40 AM
To: matthewhaberkorn@mac.com

SENT VIA E-MAIL

January 13, 2015

John Doe
Doevy@ucsd.edu
Case number: 01401-001-2014

Dear John ,

This email is a follow-up to your recent formal hearing to discuss your alleged violations of the UC San Diego Student Conduct Code.

You previously received a copy of the Formal Hearing Report, which summarizes the findings from the hearing and recommended sanctions. Based off the findings detailed in the report, you were found responsible for the following violations of the UC San Diego Student Conduct Code:

Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct - "Sexual misconduct" means 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.

Dean Mallory reviewed the Hearing Report, applicable statements submitted by both parties, your student conduct record, and the University's Sanctioning Guidelines to determine the sanctions in your case. After careful and deliberate review, Dean Mallory has assigned the following sanctions:

1. Suspension
Complete by: Saturday, December 12, 2015
You are suspended from UC San Diego for one year, through the date listed above. The suspension goes into effect 10 business days from the date of this letter. Violation of the conditions of your suspension or of University policies or campus regulations during the period of the suspension may be cause for further student conduct action, which may include dismissal from the University. A notation of suspension will appear on your transcript during the period of suspension. Additionally, a hold will be placed on your student account.

NOTE: Students suspended for 2 quarters or more, must reapply for admission after the suspension. See https://students.ucsd.edu/academics/enroll/special-enrollment/readmission-to-ucsd.html for more information and for application dates. You can contact your College with questions about readmission.

2. Probation
You are placed on non-academic probation for the duration of your tenure as an undergraduate at UC San Diego. Any additional violations of University policies may result in further student conduct action, which may include suspension or dismissal from the University.

3. Mandated Assessment
Complete by: Friday, February 13, 2015
You are required to attend a counseling assessment at UCSD Counseling and Psychological Services, and to sign a release allowing CAPS to inform me once the assessment has been completed. Call CAPS at (858) 534-3755 by the date listed to schedule your assessment. Failure to schedule and/or attend the assessment will result in a hold being placed on your UCSD account which prevents future registration, as well as release of academic records and transcripts.

4. Meetings
Complete by: Friday, January 29, 2016
You are required to meet with Michael Sandulak in the Office for the Prevention of Harassment and Discrimination to discuss the UC San Diego Sex Offense Policy; this meeting must occur no later than one month following your return to UCSD. To schedule an appointment with Mr. Sandulak, please contact OPHD directly at 858-534-8298. Failure to complete the meeting by the date listed will result in a hold being placed on your student account, which prevents adding/dropping classes, future registration, as well as the release of academic records and transcripts.

5. Ethics Workshop (Practical Decision Making Assessment and Reflection)
Complete by: Friday, January 29, 2016
You are required to attend a Practical Decision Making Workshop. Please contact the Office of Student Conduct at 858-534-6225 to schedule your session by the date listed. You are required to pay a $50 fee to attend the workshop, with check made payable to UC Regents and submitted to the Office of Student Conduct (Student Services Center, Suite 562). Failure to pay this fee and/or attend the session will result in a hold being placed on your student account, which prevents future registration, as well as release of academic records and transcripts.

6. No Contact Order
You are to have no verbal, written, electronic or other contact with Jane Roe for the duration of your tenure as an undergraduate at UC San Diego. This order includes all interpersonal communication, including, but not limited to, social interaction, telephone correspondence, email, text message, social networking websites, etc., and is effective immediately. Failure to adhere to this order will result in further student conduct action, which may include probation, suspension, or dismissal from the University.

conduct action, which may include probation, suspension, or dismissal from the University.

You may appeal the finding(s) of responsibility and/or request to reduce the imposed sanctions to the Office of Student Conduct within ten business days from the date of this letter. Appeals and sanction reduction requests will be reviewed by the appropriate individual or group as described in Section V of the Hearing Procedures for Alleged Sex Offense, Harassment, and Discrimination Violations. You can also access the form used to submit an appeal or reduction in sanctions at studentconduct.ucsd.edu. Additionally, you will be notified by me via email if the complainant submit an appeal.

This letter and the information pertaining to this case is part of your student conduct record and will remain on file for seven years from the date of the incident. Section VI of the Hearing Procedures for Alleged Sex Offense, Harassment, and Discrimination Violations describes our student conduct record keeping procedures.

If you have any questions about your case, please contact me at cmeagher@ucsd.edu or at 858-534-6225. PLEASE DO NOT REPLY TO THIS SYSTEM EMAIL.

Sincerely,

/s/
Caitlin Meagher
Administrative Assistant, Office of Student Conduct

cc: file

From: studentconduct@ucsd.edu
Subject: Formal Hearing Sanction Letter
Date: January 13, 2015 at 11:40:10 AM PST
To: matthewhaberkorn@mac.com

SENT VIA EMAIL

January 13, 2015

John Doe
Doe vv@ucsd.edu
Case number: 01401-001-2014

Dear John,

This email is a follow-up to your recent formal hearing to discuss your alleged violations of the UC San Diego Student Conduct Code.

You previously received a copy of the Formal Hearing Report, which summarizes the findings from the hearing and recommended sanctions. Based off the findings detailed in the report, you were found responsible for the following violations of the UC San Diego Student Conduct Code:

Section VII, Letter AA (Other University Policies)/UC San Diego Sex Offenses Policy/Sexual Misconduct - "Sexual misconduct" means 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.

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NOTE: Students suspended for 2 quarters or more, must reapply for admission after the suspension. See https://students.ucsd.edu/academics/enroll/special-enrollment/readmission-to-ucsd.html for more information and for application dates. You can contact your College with questions about readmission.

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You are required to attend a counseling assessment at UCSD Counseling and Psychological Services, and to sign a release allowing CAPS to inform me once the assessment has been completed. Call CAPS at (858) 534-3755 by the date listed to schedule your assessment. Failure to schedule and/or attend the assessment will result in a hold being placed on your UCSD account which prevents future registration, as well as release of academic records and transcripts.

4. Meetings
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Complete by: Friday, January 29, 2016

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6. No Contact Order

You are to have no verbal, written, electronic or other contact with Jane Roe for the duration of your tenure as an undergraduate at UC San Diego. This order includes all interpersonal communication, including, but not limited to, social interaction, telephone correspondence, email, text message, social networking websites, etc., and is effective immediately. Failure to adhere to this order will result in further student conduct action, which may include probation, suspension, or dismissal from the University.

You may appeal the finding(s) of responsibility and/or request to reduce the imposed sanctions to the Office of Student Conduct within ten business days from the date of this letter. Appeals and sanction reduction requests will be reviewed by the appropriate individual or group as described in Section V of the Hearing Procedures for Alleged Sex Offense, Harassment, and Discrimination Violations. You can also access the form used to submit an appeal or reduction in sanctions at studentconduct.ucsd.edu. Additionally, you will be notified by me via email if the complainant submit an appeal.

This letter and the information pertaining to this case is part of your student conduct record and will remain on file for seven years from the date of the incident. Section VI of the Hearing Procedures for Alleged Sex Offense, Harassment, and Discrimination Violations describes our student conduct record keeping procedures.

If you have any questions about your case, please contact me at cmeagher@ucsd.edu or at 858-534-6225. PLEASE DO NOT REPLY TO THIS SYSTEM EMAIL.

Sincerely,

/s/
Caitlin Meagher
Administrative Assistant, Office of Student Conduct

cc: file

Exhibit 20

Begin forwarded message:

From: "Mallory, Sherry" <slmallory@ucsd.edu>
Subject: RE: Case Number 01401-001-2014
Date: October 17, 2014 at 10:57:40 AM PDT
To: matthew haberkorn <matthewhaberkorn@mac.com>, "John Doe@ucsd.edu" <John Doe@ucsd.edu>

Matthew & John,

I apologize for the delay in responding. As I mentioned during our meeting on Monday, I consider OPHD's finding of an alleged violation to be sufficient evidence to sustain the allegation and to forward the case to the Student Conduct Office for review.

As requested, I have re-reviewed the complainants' statement of facts submitted on June 16. While she does not specifically reference digital penetration, she does mention touching and a request to stop. Students often expand on the statements included in their initial complaints during follow-up conversations (with OPHD, the Office of Student Conduct, or the Student Conduct Officer hearing the case); I expect that is what happened in this instance.

If you have specific questions about the review process, I would encourage you to follow up directly with the Office of Student Conduct.

Sherry Mallory
Dean of Student Affairs, Revelle College

From: matthew haberkorn [mailto:matthewhaberkorn@mac.com]
Sent: Monday, October 13, 2014 4:29 PM
To: Mallory, Sherry
Cc: Doeyy@ucsc.edu
Subject: Re: Case Number 01401-001-2014

Sherry,

Thank you for meeting with me, John Doe and his father, [redacted], this afternoon. Unfortunately, our meeting did not go as I planned. While I was not allowed to communicate with you during the meeting, I see nothing in the Hearing Procedures for Alleged Sex Offense, Harassment or Discrimination Violations which prohibits this communication post-hearing and before you send this matter on for handling via the Formal Hearing Process.

First, the Hearing Procedures at paragraph II Administrative Resolution subparagraph J states the following: "[i]f the student accused does not accept responsibility for all alleged violations and the Dean determines there is not a preponderance of the evidence to sustain all alleged violations . . . he/she will notify the accused . . . that the alleged violations have been dismissed." As you now know, Mr. Doe did not accept responsibility for the alleged violation set forth in your September 25, 2014 email and contained in the UC San Diego Office of Student Conduct report wherein it is alleged that Mr. Doe was asked to refrain from "touching and digitally penetrating" the complainant and he "did not comply with her requests." We were hopeful that you could see from the report and the June 16, 2014 Request for Formal Investigation that this matter cannot be proven by a preponderance of the evidence.

The statements of the complainant and witnesses interviewed during the investigation led to a finding by the UC San Diego Office of Student Conduct that insufficient evidence existed on two of three charges. That being said, the only evidence of the alleged violation, which you have not yet dismissed but have clear and concise authority to do so, is that of the complainant's own statements. Of interest, I ask you to please review her June 16, 2014 typewritten statement of the facts. Nowhere does she allege what Mr. Doe is now being charged with. In our meeting today, Mr.Doe unequivocally told you the actions did not occur. Also, the complainant's credibility is suspect. Not only were her charges of nonconsensual sex and harassment found to not be worthy of pursuing, but so-called evidence of the February 1, 2014 incident was not even reported by her - even after first complaining on June 5, 2014 to the UC San Diego Office of Student Conduct and then being first interviewed by Elena Dalcourt on June 12, 2014. For some reason, the allegation of nonconsensual digital penetration was first "developed" somehow during the investigation. It was not until we received the report that Mr. Doe was even made aware of such an allegation.

We would ask you to reconsider this matter and dismiss the alleged violation based on the preponderance of the evidence tipping in favor of the accused. If the complainant and eyewitness accounts were not credible enough on two of the alleged violations, I cannot fathom how one can deem the complainant credible on the current alleged violation given the lack of it even being reported by her after first complaining and then being interviewed four days before her Request for Formal Investigation was submitted. I would also add to this the contention that the complainant's motive should be questioned. Why wait over three months to file any complaint when, in the meantime, the two were getting along fine until the May incident and complainant heard about Mr. Doe being invited by another young woman to the same sorority formal to be attended by complainant? This case sounds more like a scorned young woman than one meriting the potential ruination of Mr. Doe's future as a student at UCSD, potential grad student and professional career. I look forward to hearing from you in this regard.
Sincerely,
Matt Haberkorn

On Oct 8, 2014, at 12:57 PM, Mallory, Sherry <slmallory@ucsd.edu> wrote:

> Matthew,
> Thank you for your note. John already confirmed that you would be attending the administrative resolution with him.
> As per section VI(G)5 of our Student Conduct Code (attached), you will be limited to communicating with John during our meeting, and may not interrupt, disrupt, or directly participate in the meeting.
> I look forward to seeing you on Monday. If you need directions to Revelle's Administration Building or information about parking, feel free to contact John Trias at 858-534-3493.
> Sherry
> *Sherry L. Mallory, Ph.D.*
> *Dean of Student Affairs, Revelle College*
> *University of California, San Diego*
> *9500 Gilman Dr., Dept. 0321*
> *La Jolla, CA 92093-0321*
> *Tel: (858) 534-3493*
> *Fax: (858) 534-4663*
> *slmallory@ucsd.edu*
>
> **From:** matthew haberkorn [mailto:matthewhaberkorn@mac.com]
> **Sent:** Wednesday, October 08, 2014 12:40 PM
> **To:** Mallory, Sherry
> **Cc:** [redacted]@ucsd.edu
> **Subject:** Case Number 01401-001-2014
> Dear Dean Mallory,
> Please be advised that I represent John Doe, the accused in allegations set forth in a June 16, 2014 Student Sex Offense Policy Request for

Formal Investigation initiated by Jane Roe
. I understand that Mr. Doe has scheduled an Administrative Resolution meeting with you on Monday, October 13, 2014 at 2:00 p.m. in your office.

In accordance with the *Hearing Procedure for Alleged Sex Offense, Harassment or Discrimination Violations* at paragraph II. Administrative Resolution, subparagraph E, I am providing you with the requisite two business day notice that I will be accompanying Mr. Doe as his advisor at this Administrative Resolution meeting.

In the meantime, I would appreciate your replying to this email confirming your receipt.

Sincerely,

Matthew H. Haberkorn, Esq.
Haberkorn & Associates, a Professional Corporation
Mail: PO Box 7474 Menlo Park, CA 94025
e: matthewhaberkorn@mac.com
t: 650-268-8378
f: 650-332-1528
695 Oak Grove Avenue, Suite 210
Menlo Park, CA 94025

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return e-mail and please delete this message from your system.

<uc-san-diego-student-conduct-code2014.pdf>

Exhibit 21

REVIEW PROCEDURES FOR ALLEGED SEX OFFENSE, HARASSMENT OR DISCRIMINATION VIOLATIONS

Interim Procedures Effective: January 30, 2013

Updated: August 21, 2013, July 22, 2014

TABLE OF CONTENTS

Complaints of alleged violations of the *UC San Diego Student Conduct Code* involving sex offenses, harassment or discrimination are initially referred to the Office for the Prevention of Harassment & Discrimination (OPHD), where they may be resolved or investigated pursuant to the UC San Diego *Sex Offense Policy* or *Procedures for Discrimination and Harassment Complaint Resolution*, resulting in an investigative report. Once an investigative report has been issued to the Office of Student Conduct, these procedures are used for the further handling of these complaints.

I. PROCESSING INVESTIGATIVE REPORTS AND COMPLAINTS

A. Upon receipt of the investigative report from OPHD, the Director of Student Conduct or their designee will review the report to determine whether there is reasonable cause to believe the UC San Diego *Student Conduct Code* was violated. If reasonable cause is present, the referral and resolution of reports will be handled in the following manner:

1. Reports involving undergraduate students will be referred to the Dean of Student Affairs for the respondent's college of registration.
2. Reports involving graduate students will be referred to the Assistant Dean of Graduate Studies.
3. Reports involving medical students will be referred to the Associate Dean for Admissions and Student Affairs.
4. Reports involving pharmacy students will be referred to the Director of Student Affairs and Admissions for the Skaggs School of Pharmacy.
5. Reports involving Extension students will be referred to the Student Affairs Manager of UC San Diego Extension.

B. If there is reasonable cause to believe the UC San Diego *Student Conduct Code* was violated, the relevant Dean, Director, or Manager (Dean) will notify OPHD, the complainant and the respondent in writing within 10 business days from the date of receiving the investigative report, unless circumstances make this unreasonable. This notification letter, as described below, will be sent in writing to the respondent's UCSD or current email address and/or by U.S. Mail sent to the student's current address of record.

C. If there is not reasonable cause to believe the UC San Diego *Student Conduct Code*

was violated, the Director of Student Conduct or their designee will notify OPHD, the complainant and respondent in writing within 10 business days of receiving the report that the complaint has been dismissed.

D. All deadlines and time requirements in these *Review Procedures* involving the student conduct process may be extended for good cause as determined by the Director of Student Conduct or their designee. Requests for extensions of deadlines must be made in writing to the Director or Student Conduct or their designee, who will determine, based on the totality of the circumstances, whether or not the extension is granted. If an extension is granted, the Director of Student Conduct or their designee will specify the date of the new deadline or event.

II. ADMINISTRATIVE RESOLUTION

An Administrative Resolution is a meeting between the relevant Dean and the respondent to determine whether the respondent accepts responsibility for the alleged violations. If the respondent accepts responsibility, the Dean will assign fair and appropriate sanctions. Formal review procedures will be used when the respondent and relevant Dean are unable to come to an agreed-upon resolution to the alleged violations. The following provisions apply to Administrative Resolution meetings.

A. If there is reasonable cause to believe the UC San Diego *Student Conduct Code* was violated, the Dean will provide the complainant and the respondent with the following information in writing:

1. Notification of the alleged violations;
2. Summary of the evidence relating to the alleged violations;
3. Notice that the respondent has five business days from the notice to contact the Dean to schedule an Administrative Resolution meeting;
4. Information about how to review case materials prior to the meeting (*e.g.* investigative report, police report, etc.);
5. Information about how to request the presence of a witness(es); and
6. Information about how to request assistance from the A.S. Office of Student Advocacy and the Office of Student Legal Services.

B. If the respondent cannot attend the scheduled Administrative Resolution meeting, they must contact the Dean to request a new date and/or time for the meeting. It is at the discretion of the Dean if the meeting will be rescheduled. If, after proper notice, the respondent does not appear at the scheduled date and/or time, the Dean will refer the matter to the Director of Student Conduct or their designee for a formal review.

C. Administrative Resolution meetings will be closed to the public. Recording devices (audio and/or video) of any kind are not permitted for use by the respondent, complainant, witnesses, or advisors.

D. Complainants and respondents are entitled to be assisted by an advisor during an Administrative Resolution meeting. A trained student advocate, from the Associated Students Office of Student Advocacy or the Graduate Student Association, serving as an advisor may speak on behalf of their advisee. UC San Diego students, faculty, and staff or attorneys serving as an advisor are allowed to be present at the meeting but only to confer with their advisee. Students electing to be accompanied by an advisor must

notify the Dean at least two business days prior to the meeting.

E. At the meeting, the Dean will explain the Administrative Resolution process, applicable rights and responsibilities, and the alleged violations to the respondent. The respondent will then have the opportunity to accept responsibility for the alleged violations. If the respondent accepts responsibility for the alleged violations, the Dean will explain the potential sanctions. The Dean may meet with the complainant or request an impact statement from the complainantto assist with the sanctioning process.

F. If the respondent accepts responsibility for violating the UC San Diego *Student Conduct Code*, the Dean will notify them in writing with a brief summary of the meeting and assigned sanctions within ten business days, unless circumstances warrant otherwise. To the extent the complainant is entitled to know the assigned sanctions, the complainant will also be notified in writing at the same time as the respondent.

G. If the respondent accepts the Administrative Resolution, but disagrees with the assigned sanction(s), they may submit a written request to alter or reduce the sanction(s) as described in Section V below. Conversely, to the extent the complainant is entitled to know the assigned sanctions, they may submit a request to alter or augment the sanction(s) per the requirements of Section V below.

H. If the respondent does not accept responsibility for all alleged violations, the Dean will refer the matter to a review as described in Section III below. Where there is more than one alleged violation and the respondent does not accept responsibility for all alleged violations, the student may request a review only for the alleged violations for which he/she did not accept responsibility in the meeting.

I. If OPHD has provided the complainant with any interim remedies, the Dean will discuss any decision to change such remedies with OPHD and the Director of Student Conduct or their designee prior to making such change.

III. STUDENT CONDUCT REVIEW PROCESS

If the respondent does not accept responsibility for all alleged violations at the Administrative Resolution meeting, they have the right to a Student Conduct Review. During the review, the Review Panel or Review Officer will hear and receive the respondent's and complainant's information about the incident, meet with relevant witnesses, determine the responsibility of the respondent, and recommend appropriate sanctions. During the review, the respondent and complainant will both have the opportunity to suggest questions to be asked by the Review Panel or Review Officer to the other person and witnesses.

The Director of Student Conduct or their designee will manage the review process. They will be responsible for selecting the Review Panel members or Review Officer, notifying the parties about essential review information (including date/time/location, witnesses, reports), and coordinating communication about the Review Panel or Review Officer's decision and the sanctions assigned by the Dean.

A. If the respondent does not accept responsibility at the Administrative Resolution meeting for all alleged violations, the Director of Student Conduct or their designee, in consultation with the relevant Dean, will appoint a panel of three Review Officers or a

single staff or faculty Review Officer. The Director of Student Conduct or their designee will make this decision based on the totality of the circumstances.

1. If the Director of Student Conduct or their designee appoints a panel, it will typically be composed of three staff or faculty members. Up to one student panelist may be included at the discretion of the Director of Student or their designee. The Chair of the panel will be a staff or faculty member.
2. If a panel member or Review Officer is unable to participate in the review, the Director of Student Conduct or their designee will select another Review Officer to replace the unavailable member or Review Officer.
3. Prior to the review, all Review Panel members and Review Officers will be jointly trained by the Office of Student Conduct, Sexual Assault & Violence Prevention Resource Center (SARC), the UC San Diego Police Department, and OPHD regarding issues specific to sex offense, harassment or discrimination cases. Any new participant will have received training described in this section.

B. The Director of Student Conduct or their designee will select a University Official to serve as the University Representative for the review. The role of the University Representative will be to present information from the investigative report and other relevant documents supporting the alleged violations. The University Representative will work with the Office of Student Conduct to coordinate the appearance of witnesses, including the complainant, supporting the alleged violations.

C. The complainant and respondent will each have the opportunity to individually meet with the Director of Student Conduct or their designee individually prior to scheduling the review. The purpose of the meeting is for the Director of Student Conduct or their designee to explain the review process, key deadlines, and answer any relevant questions. The Director of Student Conduct or their designee will also request scheduling information from the complainant and respondent to facilitate scheduling the review. If the parties, after proper notice, do not schedule a meeting with the Director of Student Conduct or their designee, the review will be scheduled without their input.

D. The Director of Student Conduct or their designee will provide the complainant and respondent and complainant with the following information in writing at least ten business days prior to the Review:

1. Notification of the alleged violations;
2. Summary of the evidence relating to the alleged violations;
3. The date, time, place, and location of the review;
4. The name(s) of the Review Panel members/Review Officer and University Representative;
5. Copies of the investigative report and other relevant documents.
   ;
6. Information about how to request the presence of witnesses;
7. Information about how to request assistance from the A.S. Office of Student Advocacy and the Office of Student Legal Services; and
8. Contact information for the Office of Student Conduct.

E. The Director of Student Conduct or their designee will provide the complainant with the following information in writing at least ten business days prior to the review:

1. Notification of the alleged violations;
2. Summary of the evidence relating to the alleged violations;
3. The date, time, place, and location of the review;
4. The name(s) of the Review Panel members or Review Officer and University Representative;
5. Copies of the investigative report and other relevant documents.
6. Information about how to request the presence of witnesses;
7. Information about how to request assistance from the Sexual Assault & Violence Prevention Resource Center and the Office of Student Legal Services; and
8. Contact information for the Office of Student Conduct.

F. The review process is confidential and reviews will be closed to the public. Documents prepared in anticipation of the review (e.g. the investigation report, the pre-review submissions referenced below); documents, testimony, or other information introduced at the review; or any transcript of the review itself may not be disclosed except as required or authorized by law.

G. If circumstances warrant, the review may be held at any time, including, but not limited to, during the summer session(s), between academic terms, or during a University holiday period.

H. Requests to change the time, date, or place of the review must be made in writing by the complainant or the respondent to the Director of Student Conduct or their designee no later than five business days prior to the date of the review. It is at the discretion of the Director of Student Conduct or their designee if the review will be rescheduled. The Respondent or Complainant may each only request one change to the date and/or time of the review.

I. Both the complainant and the respondent may be present at the entire review or may elect not to appear at the review. Additionally, the respondent may remain silent throughout the review process and his or her silence will not be taken as an inference of responsibility for the alleged violations. Failure to appear at the review will not be cause to cancel, postpone, or reschedule the review and the review will be conducted in accordance with these procedures.

J. The complainant and respondent may have advisors present to support and assist them during all stages of the review process, including pre-review meetings. Potential advisors include an A.S. Student Advocate, a UCSD student, staff, or faculty member, or an attorney. However, only A.S. Student Advocates may speak on behalf of their advisee.

1. Notice that an advisor will be present must be provided to the Director of Student Conduct or their designee at least five business days prior to the date of the review.
2. The Director of Student Conduct or their designee may disallow a particular advisor in cases where an advisor might be a witness or where the advisor's presence, in the Director of Student Conduct or their designee's sole judgment, would be, or at any time becomes, obstructive to the process or other good cause.
3. An advisor may not direct questions to the panel or to witnesses at the review,

but may suggest questions in writing to the Panel and may consult with the student being assisted. The Review Panel Chair or Review Officer will not allow an advisor's presence to inhibit the parties' sharing of information or the conduct of the review and may remove any advisor who unnecessarily disrupts the review.

K. Either party may have an interpreter or translator present to assist them with potential language issues during the review. Notice that an interpreter or translator will be present must be provided to the Director of Student Conduct or their designee at least five business days prior to the date of the review. The party requesting the presence of an interpreter or translator is responsible for finding and securing a person to serve in this role. Interpreters and translators may not serve in the role of advisors (e.g. attorneys or A.S. Advocates).

L. The complainant or respondent may request, in writing, that a Review Panel member or Review Officer be disqualified from participating in a review. The request must be made to the Director of Student Conduct or their designee at least five business days before the scheduled review and must include an explanation as to why the person is unable to make an impartial and unbiased decision.

1. In responding to such requests, the Director of Student Conduct or their designee will disqualify any Review Panel member or Review Officer who is not able, in their judgment, to make an impartial and unbiased decision.
2. If the Director of Student Conduct or their designee grants a disqualification request, they will select another Review Panel member or Review Officer to replace the disqualified panel member or Review Officer and notify the respondent and complainant at least one business day prior to the review.

M. Either party may request a pre-review meeting in writing to the Director of Student Conduct or their designee, at least five business days prior to the date of the review. The Director of Student Conduct or their designee may also schedule a pre-review meeting on the request of the Review Panel Chair, Review Officer, or University Representative. Pre-review meetings are held separately for the complainant and respondent.

1. The purpose of the pre-review meeting is to address any procedural questions pertaining to the review process. Additionally, the parties may be accompanied by their advisor(s).
2. During the pre-review meeting, the Review Panel Chair or Review Officer may exclude from the review information that they deem irrelevant, or unnecessarily repetitive, and may make other decisions, as he or she deems necessary, to assure that the review is conducted fairly and efficiently.

N. Either party may suggest witnesses for the Review Panel or Review Officer to meet with during the review. Witness lists must be submitted to the Director of Student Conduct or their designee at least five business days prior to the review. The Review Panel Chair or Review Officer may take steps to prevent the harassment or intimidation of any of complainant, respondent or witnesses.

1. If a witness is not available to attend the review, the Director of Student Conduct or their designee may allow witness participation by video conferencing (e.g. Skype).

2. Written witnesses statements will not be reviewed by the Review Panel or Review Officer unless they are signed by the witness and witnessed by the Director of Student Conduct or their designee or a certified notary public.
3. Witnesses other than the parties will be excluded from the review, except when they are providing information to the Review Panel or Review Officer.

O. The Review Panel, Review Officer, or University Representative may seek advice from the Director of Student Conduct or their designee throughout the review process on questions relating to these *Review Procedures*.

P. The Review Panel or Review Officer is empowered to hear all alleged violations of the UC San Diego *Student Conduct Code* directly relating to the incident.

Q. The Director of Student Conduct or their designee will arrange for an audio recording of the review. This recording will be kept by the Director of Student Conduct or their designee and a copy will be provided to either party upon request. The failure to record all or part of a review, such as a malfunctioning recorder, will not be grounds for invalidating the review or grounds for appeal. Recording devices (audio and/or video) of any kind are not permitted for use by the respondent, complainant, witnesses, or advisors.

R. The Review Panel Chair or Review Officer may allow the complainant or any witness to be visually or physically separated from the respondent. This may include the use of a retractable wall or screen, television or computer monitor, or other appropriate technology. Requests for visual or physical separation should be made to the Director of Student Conduct or their designee at least three business days prior to the review.

S. The Review Panel or Review Officer will review in advance of the review all of the written materials provided to them by the Director of Student Conduct or their designee. The complainant and respondent will also receive these materials prior to the review. All participants will be expected not to repeat undisputed details or non-material circumstances that would merely duplicate information in the Investigative Report or in other written materials.

T. The Review Panel Chair or Review Officer will begin the review by explaining the review process to all participants. The Review Panel or Review Officer will hear and receive information and witnesses about the incident from the University Representative, including information directly from the complainant, which support the alleged violations. The respondent will then have the opportunity to provide information and witnesses about the incident supporting their perspective. Both the University Representative and respondent will have the opportunity to provide summary statements prior to the conclusion of the review. The Review Panel Chair or Review Officer will conclude the review by explaining the next steps in the process.

1. The Review Panel or Review Officer will receive and consider all information and evidence for the alleged violations at issue in the case that he or she deems relevant and useful. The investigative report produced by OPHD serves as the primary fact-finding document for the incident. Formal rules of evidence (e.g. California Evidence Code) do not apply. Evidence of the complainant's

past sexual history will not be permitted at the review unless it is relevant to the complainant.

2. The Review Panel or Review Officer will be responsible for asking questions to parties and witnesses during the review. Parties may provide questions in writing to the Review Panel Chair or Review Officer to be asked of the other party or witnesses at the Chair's or Review Officer's discretion. The Chair or Review Officer may exclude any unduly repetitious or irrelevant questions or information. Review participants are not required to provide information that would be incriminating.
3. The Review Panel Chair or Review Officer may institute reasonable time restrictions on participant and witness testimony, presentation of information, and summary statements in order to complete the review in a reasonable amount of time.

U. After conducting a review, the Review Panel or Review Officer will deliberate privately. The determination(s) of the Panel will be made by majority vote.

1. Based on the information in the investigative report and the information presented at the review, the Panel or Review Officer will first determine whether there is a preponderance of the evidence that the respondent is responsible for the alleged violation(s). If there is not a preponderance of the evidence for all alleged violations, the respondent will be found not responsible for all alleged violations.
2. In determining whether or not the respondent is responsible for the violations, the Panel or Review Officer will base their determination(s) of responsibility on the preponderance of the evidence standard, with the University bearing the burden of proof.
    a. Preponderance of the evidence means that is "more likely than not" that a respondent violated the UC San Diego *Student Conduct Code*.
    b. In this context, the respondent will be found to be responsible for the alleged violations if the Review Panel (by a majority vote) or Review Officer concludes that the alleged violations more likely than not occurred based on careful review of all information presented.
3. If the respondent is found responsible for one or more of the alleged violation(s), the Review Panel or Review Officer will make non-binding advisory sanction recommendations to the relevant Dean. In such cases, the Director of Student Conduct or their designee will verbally notify the Review Panel or Review Officer of the baseline sanctions for the violation(s) and the accused student's previous student conduct history, if any, before the Review Panel or Review Officer determines its sanction recommendations.
    a. Previous student conduct history will be limited to student conduct cases where the respondent accepted responsibility, was found responsible for violating the UC San Diego *Student Conduct Code* or was issued a Notice of Inappropriate Conduct. Cases where a respondent was found not responsible for violating the UC San Diego *Student Conduct Code* or all charges were dismissed will not be introduced.
    b. In notifying the Review Panel or Review Officer of the student conduct history for the respondent, the Director of Student Conduct or their designee will provide the date of the incident, a description of the violations, and the assessed sanctions. However, the Director of the

Student Conduct or their designee has the discretion to exclude information which implicates federal privacy laws or is protected by disclosure (*e.g.* FERPA, HIPAA).

c. When recommending sanctions, the Review Panel or Review Officer is required to consider suspending or dismissing any respondent found responsible for sexual assault, sexual misconduct, domestic violence, stalking harassment, or discrimination. However, the Review Panel or Review Officer may recommend any sanction that it finds to be proportionate to the violation(s). Other potential sanctions include, but are not limited to, probation, no contact orders, educational programs (e.g. Anger Management, alcohol and drug sessions), loss of privileges, and/or exclusion from campus areas of campus and activities.

IV. REVIEW REPORT AND SANCTIONS

Within five business days after the conclusion of deliberations, the Review Panel Chair or Review Officer will submit a Review Report to the Director of Student Conduct or their designee summarizing the alleged violations and the Review Panel or Review Officer's findings as to each alleged violation. In addition, the Review Report may include non-binding recommendations regarding sanctions.

A. If the respondent is found responsible for a violation, the Director of Student Conduct or their designee will provide the respondent and relevant Dean or group with a copy of the Review Report within five business days after receiving the report. The complainant will likewise be provided a copy of the Review Report, which will be redacted to the extent required by University policy.

B. The complainant will have five business days from the date of notification of the review decision to submit an impact statement to the Director of Student Conduct or their designee for review by the relevant Dean or group. At the same time, respondent will also have five business days to submit a statement to the Director of Student Conduct or their designee for review by the relevant Dean or group describing any circumstances they believe the Dean or group should take into account when assigning sanctions.

C. Once both parties have had the opportunity to submit their respective statement(s), the Director of Student Conduct or their designee will forward the statements to the relevant Dean or group for review. The relevant Dean or group will not be bound by these statements in determining sanctions and neither party will be entitled to view and/or respond to statements submitted by the other party.

D. In assigning sanctions, the relevant Dean should consider the findings in the Review Report, the University's Sanctioning Guidelines, and the respondent's student conduct record. As stated in Section IV (V)(3)(c)(1) above, the Dean or group is required to consider suspension or dismissal for any student found responsible for any violation involving sexual assault, sexual misconduct, domestic violence, stalking harassment, or discrimination.

1. If the Dean determines that a suspension or dismissal is warranted as a sanction for an undergraduate student, they will consult with the Council of Deans of

Student Affairs. The Council of Deans of Student Affairs will make the final determination of sanctions.

2. If the Dean determines that a suspension or dismissal is warranted as a sanction for a graduate student or Extension student, they will consult with the Director of Student Conduct or their designee about the final determination of sanctions.

3. If a medical or pharmacy student is found responsible for sex offense, harassment, or discrimination violations, the Director of Student Conduct or their designee will forward the Review Report and supporting statements to the relevant Standing and Promotions Committee (School of Medicine) or Academic Oversight Committee (Skaggs School of Pharmacy) for review. The relevant committee will meet with the respondent and assign sanctions based on the recommended sanctions in the report, their applicable sanctioning guidelines, and the student's record.

F. Notice of sanctions assigned by the relevant Dean or group will be provided at the same time to both parties by the Director of Student Conduct or their designee within 10 business days from the receipt of both parties' statements. The notice to the complainant will include the name of the respondent, any violations found to have been committed and, when permitted by law and UC San Diego policy, any sanctions assigned.[2]

G. The implementation of sanctions may be deferred during the appeals process at the discretion of the relevant Dean or group, in consultation with the Director of Student Conduct or their designee.

H. If the Review Panel or Review Officer finds the respondent not responsible for all alleged violations, the Director of Student Conduct or their designee will provide the respondent and relevant Dean or group with a copy of the Review Report within 10 business days after receiving the report. The Review Report will be redacted to the extent required by University policy.[3]

V. APPEALS

The complainant and respondent may appeal the determination of responsibility or sanction(s) (for the complainant, to the extent disclosure of sanctions is permissible under law and UC San Diego policy) via email to the Director of Student Conduct or their designee within ten business days after the notice of sanctions has been received.

A. All appeals will be reviewed in the following manner:
   1. Appeals submitted by an undergraduate student will be reviewed by the Council of Provosts.
   2. Appeals submitted by a graduate student will be reviewed by the Dean of Graduate Studies.
   3. Appeals submitted by a medical or pharmacy student will be reviewed by the relevant Dean of their school.

[2] See *Family Educational Rights and Privacy Act* 34 C.F.R. 99.31(a)(13)

[3] *Id.*

4. Appeals submitted by an Extension student will be reviewed by the Dean of UC San Diego Extension.

B. Consistent with federal law, the complainant may appeal only the parts of the determination of responsibility or sanctions directly related to them.

C. An advisor or any other person may assist the complainant or respondent in preparing an appeal.

D. Appeals must be based only upon one or more of the following grounds:
1. The decisions of responsibility for the violation(s) are not supported by the findings;
2. There was unfairness in the proceedings that prejudiced the result (e.g. the denial of due process);
3. There is newly discovered evidence not known at the time of the review, and which could not reasonably have been known through the exercise of reasonable diligence, that would have affected the result; or
4. The sanction(s) imposed was grossly disproportionate to the violation committed.

E. Once an appeal is submitted, the following protocol will normally apply:
1. The Director of Student Conduct or their designee will forward the appeal request to the appropriate person or group, who will make the final determination of the appeal. The Director of Student Conduct or their designee will also notify the non-appealing party via email of the appeal. In considering an appeal, the appropriate group or person may consult with any person or make any inquiries they deem appropriate for a fair resolution of the appeal.

2. The group or person reviewing the appeal may do any of the following:
    a. Deny the appeal;
    b. Grant all or part of the appeal and, if appropriate, send the case back for re-review or modify the sanction(s).
    c. Dismiss the case in its entirety; or
    d. Take other actions as deemed appropriate.

3. Notice of the decision on the appeal will be provided to both parties by the Director of Student Conduct or their designee within 10 business days from the request for appeal. The decision on appeal will be final.

VI. STUDENT CONDUCT RECORDS

The referral of an OPHD investigative report to the Office of Student Conduct may result in the development of a student conduct record in the name of the respondent.

A. Student conduct records will generally contain the applicable investigative report(s), incident report(s) and/or police report(s), meeting and decision letters, and other documents related to the incident.

B. In pending student conduct actions that could result in the suspension or dismissal of the respondent, a temporary hold will normally be placed on the respondent's account by the Director of Student Conduct or their designee.

C. The student conduct record of a student found responsible of any allegation(s) against them will normally be retained by the Director of Student Conduct or their designee as a student conduct record for not longer than seven years from the date of the incident. If a student leaves UC San Diego without graduating, their student conduct record will normally be retained by the Director of Student Conduct or their designee for not longer than seven years from the date of the incident. However, the record of a disciplinary matter resulting in a student's dismissal will be retained permanently.

D. Student conduct records of a student found not responsible for all violations of this Policy will be retained for seven years from the date of the incident to comply with Clery Act requirements. However, such records will not be considered while determining sanctions in a given case.

E. Whenever any information is included by the Director of Student Conduct or their designee or any University Official in a student conduct record, the student will be allowed to include in the record a brief written statement or response concerning the student conduct action. The student may not request a change in the underlying decision or sanction(s) through this process.

F. The Director of Student Conduct or their designee will forward the final results of sex offense, harassment, and discrimination cases to OPHD once the appeals process has concluded. The notice will include the names of the respondent and complainant, determination(s) of responsibility, assessed sanctions (if any), and decision on appeal.

Supplement

APPEAL TO THE COUNCIL OF PROVOSTS
OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO

In re, John Doe Respondent.	CASE NO.: 01401-001-2014 SUPPLEMENTAL INFORMATION IN SUPPORT OF APPEAL FROM UC SAN DIEGO OFFICE OF STUDENT CONDUCT REVIEW REPORT Date of Report: December 17, 2014

TO THE HONORABLE COUNCIL OF PROVOSTS:

Daniel J. Donoghue, PhD, Provost, Professor of Chemistry and Biochemistry,
Sixth College, University of California, San Diego
Ivan Evans, PhD, Acting Provost and Professor of Sociology
Warren College, University of California, San Diego
Allan Havis, MFA, Provost. Professor of Theater
Thurgood Marshall College, University of California, San Diego
Richard Madsen, PhD, Acting Provost and Distinguish Professor of Sociology
Eleanor Roosevelt College, University of California, San Diego
John C. Moore, Provost and Professor of Linguistics,
John Muir College, University of California, San Diego
Paul Yu, PhD, Provost, Professor, Electrical and Computer Engineering
Revelle College, University of California, San Diego

On January 28, 2015 Respondent John Doe submitted his appeal of the improper findings and sanctions for an alleged incident of sexual misconduct under the UC San Diego Student Sex Offense Policy. Following submission of his Appeal, additional information has come to light, as recently as February 23, 2015, that bears on the issue of unfairness in the proceeding. Mr. Doe respectfully asks the Council of Provosts to consider the following points and additional exhibits:

1. On September 23, 2014, while considering OPDH's report against Mr. Doe, Dean Sherry L. Mallory publically tweeted: **"**I've pledged my commitment to help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle" Appeal Exhibit 12, Exhibit 22, p. 1.

2. On October 13, 2014, Dean Sherry L. Mallory's Administrative Resolution meeting with Mr. Doe lasted only 15 minutes. Mr. Doe's attorney was present at the meeting but not permitted to speak. Dean Mallory immediately forwarded the matter to the Student Conduct Review Panel for a formal hearing even though: (1) OPDH found that two of Ms. Roe 's misconduct claims against Mr. Doe lacked evidentiary support; (2) OPDH did not find Ms. Roe 's claim of non-consensual sexual activity on the evening of January 31, 2014, which was contradicted by other witnesses and text messages, to be credible (Exhibit 11, pp. 4-7); and, (3) Ms. Roe admitted she had consensual sexual intercourse within hours after the purported non-consensual touching on the morning of February 1, 2014. Exhibit 6, p. 3; see also, Exhibit 15, Hearing Transcript 21:11-13.

3. On January 13, 2015, Dean Sherry L. Mallory substantially increased the one quarter suspension that the UCSD Student Conduct Review Panel had recommended and imposed a one year suspension, effectively expelling Mr. Doe and requiring him to reapply for admission to UCSD in December 2015; Dean Mallory imposed significant additional sanctions. Exhibit 19.

4. On February 19, 2015, Dean Sherry L. Mallory, co-chair of the NASPA Western Regional Conference, publically forwarded an open letter issued by NASPA in concert with national women's and victims' rights organizations. See Exhibit 22, p. 1; Exhibit 24, p. 1. In its open letter, NASPA advocates opposition to legislation that would *inter alia* permit counsel in disciplinary hearings and allow broader rights to accused students to challenge adverse findings in court and to obtain monetary damages for false accusations. Exhibit 23.

5. UCSD policy may allow Dean Sherry L. Mallory to actively participate in national advocacy organizations, to advocate on behalf of sexual assault victims, and to lobby against rights for accused male students, however, the record of Dean Mallory's public advocacy introduces impermissible actual and apparent gender bias in the UCSD sexual misconduct disciplinary process, which requires fairness and impartiality in order to reach sound and supportable decisions. See Dear Colleague Letter, Office of Civil Rights,

U.S. Department of Education. Exhibit 13, pp. 147-165. Dean Mallory should have recused herself from this disciplinary process, and should be recused from participation in future UCSD sexual misconduct proceedings where demonstrated fairness and impartiality for all participants is required.

In light of the foregoing and the matters set forth in the Appeal filed January 28, 2015, Respondent Mr. John Doe respectfully requests that the Council of Provosts determine that he was improperly found responsible for violating the UC San Diego Student Conduct Code and dismiss this case in its entirety.

Respectfully Submitted,

John Doe

MATTHEW H. HABERKORN, ESQ., State Bar No. 152424
HABERKORN & ASSOCIATES
P.O. Box 7474
Menlo Park, CA 94025
Tel: 650-268-8378
Fax: 650-332-1528
E-mail: matthewhaberkorn@mac.com
ATTORNEY FOR RESPONDENT

MARK M. HATHAWAY, ESQ.
(California Bar No. 151332;
New York Bar No. 2431682
Washington DC Bar No. 437335)
WERKSMAN JACKSON
HATHAWAY & QUINN LLP
888 West Sixth Street, Fourth Floor
Los Angeles, California 90017
Telephone: (213) 688-0460
Facsimile: (213) 624-1942
E-Mail: mhathaway@werksmanjackson.com
ATTORNEYS FOR RESPONDENT

Exhibit 22

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@SherryMallory

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I've pledged my commitment to help stop sexual assault because NO student should ever have to go through that! #ItsOnUsUCSD #UCSD #Revelle

RETWEET 1

FAVORITES 2

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RT "@insidehighered: Open letter calls for legislators to reconsider sexual assault bills - bit.ly/1CNiTc7" #SAHElaw #NASPA

7:15 AM - 19 Feb 2015

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Exhibit 23

An open letter on campus sexual assault to elected leaders in all 50 states

POSTED ON FEBRUARY 19, 2015 BY ANDREW MORSE

Within legislative chambers across the country, the recent debate about the appropriate course of policy action related to campus sexual assault has risen to a crescendo. Tasked with both a moral duty to prevent and end such violence as well as the responsibility to ensure statutory and regulatory compliance on their campuses, higher education leaders are critical voices to shape the contours of policy. They are joined by victim advocacy organizations in leading the nation-wide discussion about how colleges and universities can and should be responding to campus sexual assault, and both groups are committed to serving as strong advocates for safe, equitable and inclusive campus environments.

As elected state leaders deliberate on proposed legislation that would change how professionals work to address sexual assault and gender-based violence at our colleges and universities, it is critical for higher education professionals and victim advocates to raise our voices and ensure the safety and well-being of our students and campus communities. In an open letter to elected leaders across the United States, NASPA and its joining associations and organizations share deep concern with bills pending before

at least nine state legislatures: Iowa, Virginia, Texas, Maryland, New Jersey, Rhode Island, California, South Carolina, and North Dakota.

In some states, proposed legislation would require colleges and universities to refer all reports of sexual assault the institution receives from victims to local law enforcement, essentially turning all reports of sexual assault to the university into a report to law enforcement. If enacted, state lawmakers would place campuses in conflict with certain provisions of federal laws, including Title IX, the Clery Act, and the Violence Against Women Act. Mandatory referral requirements would obstruct a victims' right to an equal educational environment by increasing the likelihood that victims who do not want to report to law enforcement will not report to anyone and thereby be unable to access their federally protected rights. These bills would make it more difficult for victims to access the full range of reporting options guaranteed under federal law by restricting confidentiality in the reporting process, as well as perpetuating stereotypical and discriminatory attitudes towards victims.

Legislation proposed in other states would create rights for accused students, but not victims, to be represented by attorneys in internal student disciplinary proceedings, to petition state courts for judicial review of disciplinary proceedings, and to get a court to award monetary damages if it finds in favor of the accused student in such judicial review proceedings. Providing these rights to accused students alone leads to inequality between students that makes it virtually impossible for colleges and universities to protect their students' rights to equal educational opportunities under Title IX.

On behalf of tens of thousands of college and university administrators, law enforcement professionals, and victim advocates nationwide, NASPA and our joining associations and organizations encourage policymakers to reconsider legislation that would increase the difficulty for campuses to prevent and end this violence and its devastating effects on victims' lives. And although we applaud the aim to assist institutions of higher education to improve upon the response to sexual and other forms of gender-based violence, an aim we all share, we encourage our elected leaders to collaborate with campus professionals and victim advocacy organizations to identify a course of action that responds effectively to this critically important issue.

LEAVE A REPLY

You must be a NASPA member to leave a comment.

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Exhibit 24

2015 NASPA WESTERN REGIONAL CONFERENCE:

MORE INFO

NEWS & ANNOUNCEMENTS

Stay tuned for updates from the NASPA WRC 2015 Committee.

Conference Committee

Conference Co-Chair
Christine Quemuel
University of Hawaii at Manoa
quemuel@hawaii.edu

Asst. to Conference Co-Chair
Isaac Rodriguez Lupercio
University of Hawaii at Manoa
iarl@hawaii.edu

Asst. to Conference Co-Chair
Marie Minnick
University of San Diego
mminnick@sandiego.edu

Assessment & Innovation Co-Chair
Josie Ahlquist
Cal Lutheran University
josie.renee.ahlquist@gmail.com

Region V Director
Deneece Huftalin
Salt Lake Community College
deneece.huftalin@slcc.edu

Region VI Director
Lori Ideta
University of Hawaii at Manoa
ideta@hawaii.edu

Assessment & Innovation Co-Chair
Jennifer Rodil
Harvey Mudd College
jenniferroserodil@gmail.com

DOS/AVP Institute Co-Chair
Jon Eldridge
College of Marin
jonathan.eldridge@marin.edu

DOS/AVP Institute Co-Chair
Jim Drnek
Cal State Bakersfield
jdrnek@csub.edu

Faculty Liaison
Anna Ortiz
Cal State Long Beach
anna.ortiz@csulb.edu

Grad Student Institute Co-Chair
Justin Gomez
UC Berkeley
justin.gomez@berkeley.edu

Grad Student Institute Co-Chair
Teri Thomas
Menlo College
teri.thomas@menlo.edu

Grad Student Liaison
Wiliama Sanchez
Cal State Fullerton
09wisanc@gmail.com

Hotel Liaison
Sunny Lee
UC Berkeley
sunnylee@berkeley.edu

Local Arrangements Co-Chair
Chrissy Roth-Francis
UC Berkeley
rothfrancis@berkeley.edu

Local Arrangements Co-Chair
Fred McCall
UC Berkeley
fredmccall@berkeley.edu

Major Speakers Co-Chair
Jennifer Pagala Barnett
University of Hawaii at Manoa
jpagala@hawaii.edu

Major Speakers Co-Chair
Faith Kazmi
Stanford University
faithk@stanford.edu

Mid-Level Institute Co-Chair
Kari Ellingson
The University of Utah
kellingson@sa.utah.edu

Mid-Level Institute Co-Chair
Wendy Endress
The Evergreen State University
endressw@evergreen.edu

New Professional Institute Co-Chair
Monica Nixon
Seattle University
mnixon@seattleu.edu

New Professional Institute Co-Chair
Karina Viaud
UC San Diego
kviaud@ucsd.edu

Nor Cal Chair
Evette Castillo Clark
St. Mary's College of California
ecc4@stmarys-ca.edu

NUFP Institute Co-Chair
Akirah Bradley
UC Berkeley
akirahjb@berkeley.edu

NUFP Institute Co-Chair
Danielle Quiñones-Ortega
UC Santa Barbara
danielle.quinones@sa.ucsb.edu

Programs Co-Chair
Anna Gonzalez
Lewis & Clark College
annag@lclark.edu

Programs Co-Chair
Nalani Balutski
University of Hawaii at Manoa
balutski@hawaii.edu

Regional KC Co-Chair
Molly Bechtel
UC Davis
mmbechtel@ucdavis.edu

Regional KC Co-Chair
C. Anthony Keen
San Diego State University
akeen@mail.sdsu.edu

Registration
Dee Uwono

Registration
Sabrina Fallejo

Research Institute Co-Chair
Erin Kahunawai Wright

Honolulu Community College
deeuwono@hawaii.edu

University of Hawaii at Manoa
fallejo@hawaii.edu

University of Hawaii at Manoa
ewright@hawaii.edu

Research Institute Co-Chair

Sumun Pendakur

Harvey Mudd College
spendakur@hmc.edu

Region VI Webmaster

Marcus Rodriguez

Cal State LA
mrodriguez@cslanet.calstatela.edu

Sponsors

Harry LeGrande

UC Berkeley
legrande@berkeley.edu

SSAO Institute Co-Chair

Luoluo Hong

San Francisco State University
luoluo@sfsu.edu

SSAO Institute Co-Chair

Tony Ross

Cal State LA
tony.ross@calstatela.edu

Marketing, Outreach, & Social Media Co-Chair

Alex Froelich

Loyola Marymount University
alexandra.froehlich@lmu.edu

Marketing, Outreach, & Social Media Co-Chair

Nancy Nguyen

San Jose State University
nancy.nguyen41@gmail.com

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Cal State Fullerton
larrymartin@fullerton.edu

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Eté Martínez Anderson

Saint Mary's College of California
eanderso@stmarys-ca.edu

Volunteers Co-Chair

Marlene Scherer Stern

Stanford University
marlene@stanford.edu

2016 Conference Chair

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University of Utah
smcaward@sa.utah.edu

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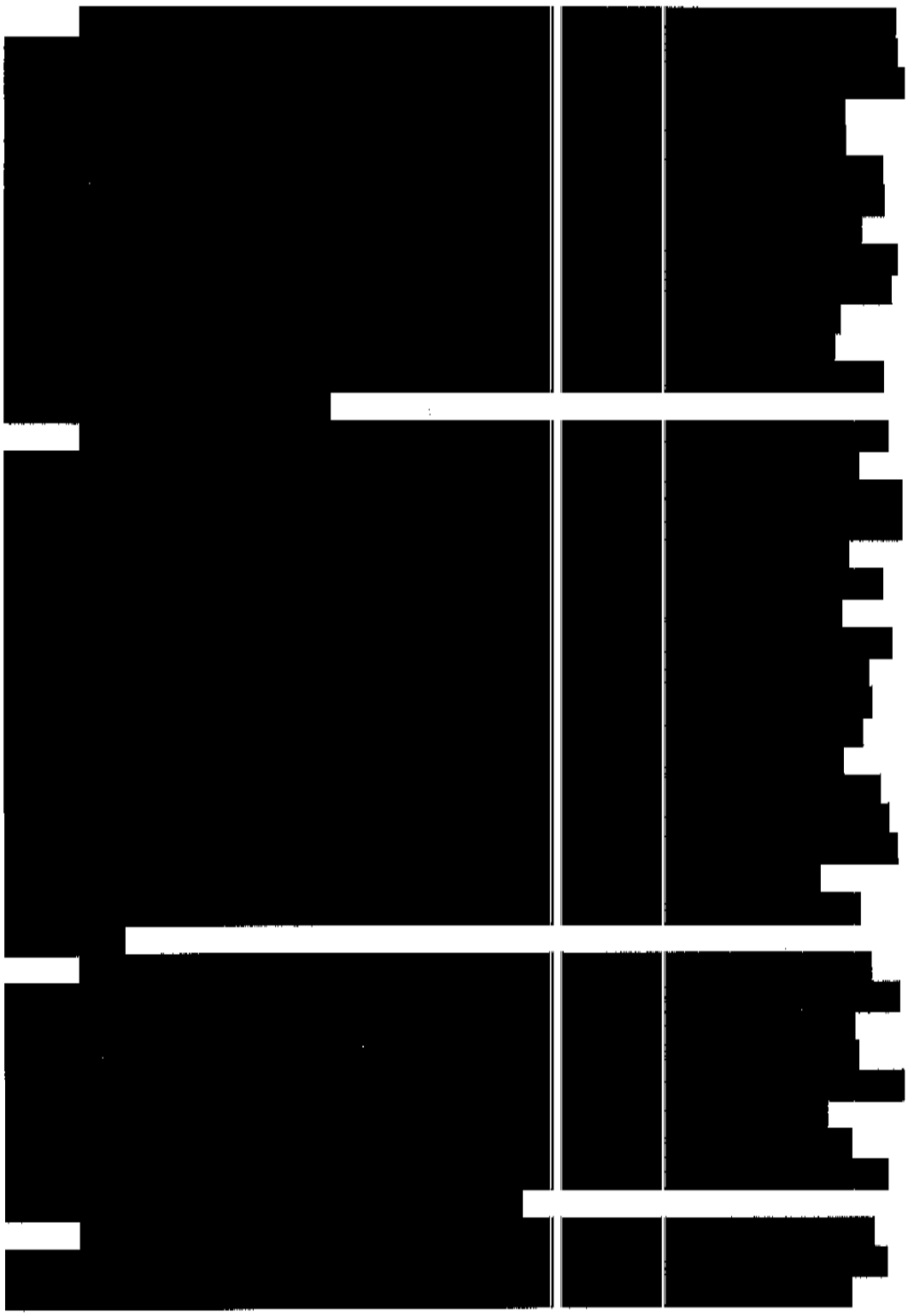
Exhibit 25

Victim Statement-With Regards to Ryan Levy's Actions



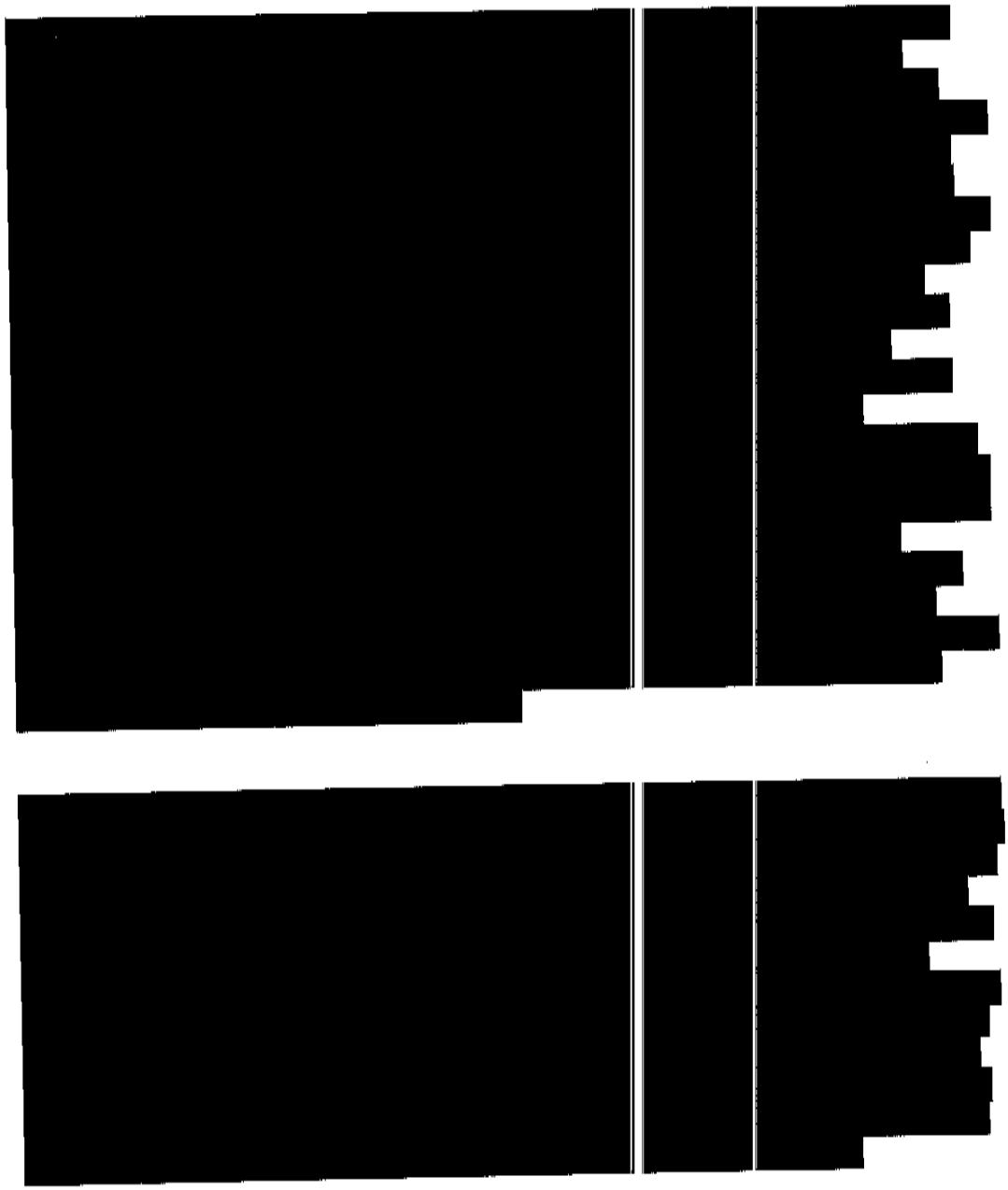


Exhibit 26

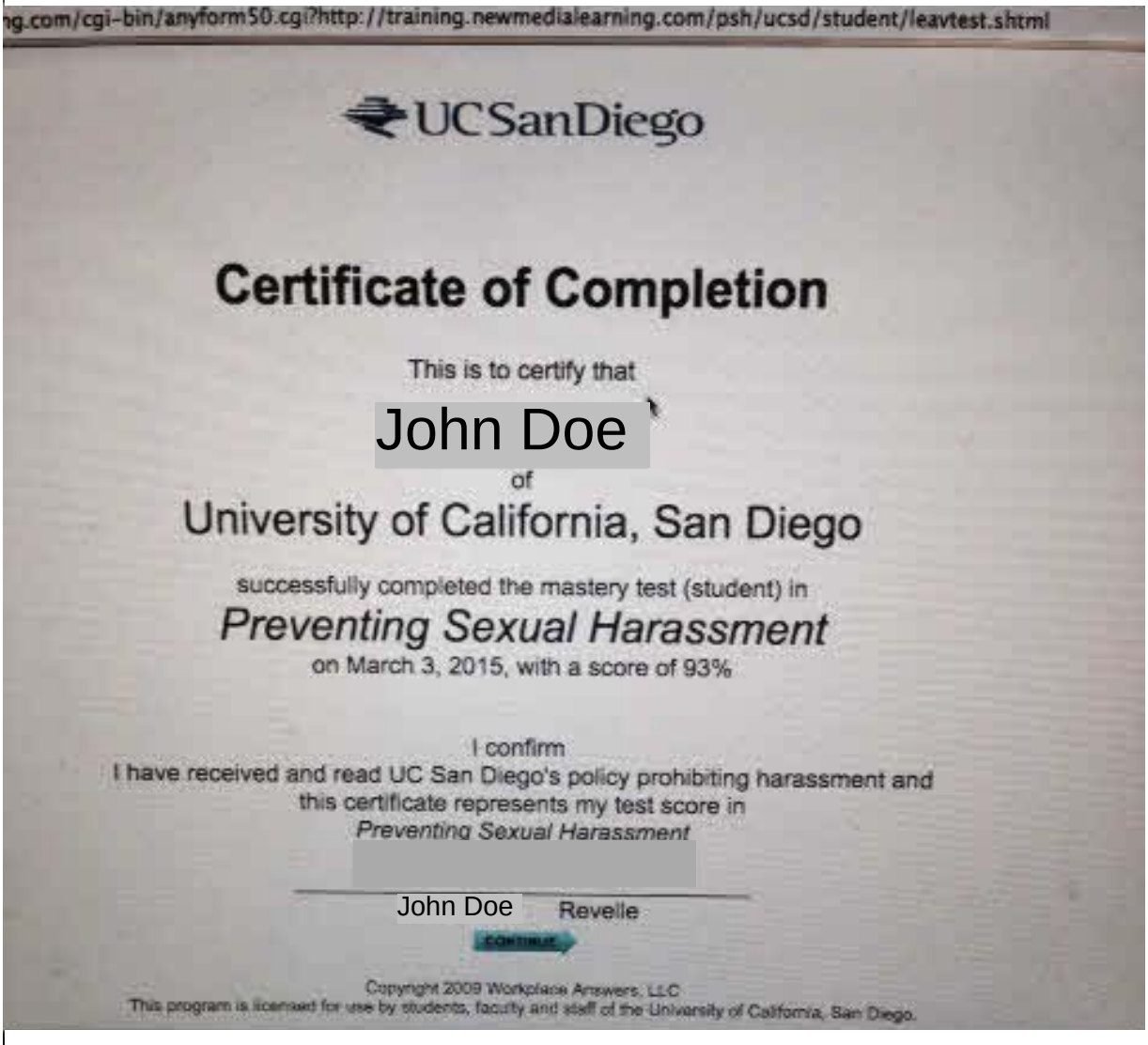

ng.com/cgi-bin/anyform50.cgi?http://training.newmedialearning.com/psh/ucsd/student/leavtest.shtml
UC San Diego
Certificate of Completion
This is to certify that
John Doe
of
University of California, San Diego
successfully completed the mastery test (student) in
Preventing Sexual Harassment
on March 3, 2015, with a score of 93%
I confirm
I have received and read UC San Diego's policy prohibiting harassment and this certificate represents my test score in
Preventing Sexual Harassment
John Doe Revelle
CONTINUE
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Exhibit 27

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9500 Gilman Drive, MC# 0321
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http://revelle.ucsd.edu

March 20, 2015

John Doe
[redacted]@ucsd.edu

RE: Incident #01401-001-2014

Dear John,

On January 28, 2015 you submitted an appeal for Student Conduct Case #01401-001-2014; on March 3, 2015 you submitted supplemental information in support of your appeal.

Following a careful review of your appeal, the Council of Provosts determined the following:

1. The decision of responsibility is supported by the findings;
2. There was not unfairness in the proceedings that prejudiced the result; and
3. The sanctions assigned were not grossly disproportionate to the violation committed (in fact, as noted below, the Council of Provosts determined that a longer suspension is warranted).

The Council of Provosts hereby modifies the sanctions that were previously communicated to you on January 13, 2015. You are suspended from UC San Diego for one year plus one quarter, effective as of the beginning of the spring quarter of 2015 (you will be eligible to return to UC San Diego after the end of the spring quarter of 2016). Additionally, you will be placed on non-academic probation for the duration of your tenure as an undergraduate at UC San Diego. Upon your return, you are required to attend a counseling assessment at CAPS, a mandated meeting with a representative from the Office for the Prevention of Harassment and Discrimination, and the Practical Decision Making Assessment and Reflection Workshop. You are also to have no further contact of any kind with the Complainant for the duration of your tenure at UC San Diego.

Sanction deadlines for the counseling assessment, mandated meeting, and Practical Decision Making workshop will be reset, based on your quarter of return to UC San Diego. I encourage you to follow up with Dean Sherry Mallory if you have any questions regarding the sanction details.

Sincerely,

Paul Yu
Provost, Revelle College

cc: Sherry Mallory, Dean of Student Affairs, Revelle College
Ben White, Director, Office of Student Conduct