**Case No. D068901**

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

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The Regents of the University of California

*Respondent and Appellant,*

vs.

John Doe

*Petitioner and Respondent.*

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

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# APPELLANT'S ANSWER TO AMICUS BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

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## I. INTRODUCTION

The amicus brief filed by the Foundation for Individual Rights In Education ("FIRE") focuses on perceived inequities and due process violations that have occurred in other sexual misconduct hearings, at other universities, which have used different proceedings than those used by the University of California San Diego in Doe's sexual misconduct hearing. This Court is, of course, not reviewing the merits of cases that are not before it. Instead, this Court's review is limited to whether the University's determination that Doe committed sexual misconduct was supported by substantial evidence, whether the sanctions imposed were within the discretion of the University, and whether University procedures afforded Doe due process.

On this score, FIRE has little to say. FIRE makes only three arguments that are specific to this case, all of which have already been thoroughly addressed in Appellant's Opening and Reply Briefs. First, FIRE argues that it was improper for the Hearing Panel to consider the investigative report written by Elena Dalcourt, a complaint resolution officer for the Office for the Prevention of Harassment and Discrimination ("OPHD"); second, FIRE asserts that Doe should have been provided with Ms. Dalcourt's interview notes; third, FIRE argues it was improper for the University to require Doe to submit questions to Roe through the Hearing Panel. Each of these arguments lacks merit.

First, the Panel's consideration of the investigative report was proper. University misconduct hearings are not subject to the formal rules of evidence, such as the hearsay rule. In any event, Doe waived this argument by not requesting Ms. Dalcourt's presence at the hearing. Further, neither Doe nor FIRE have been able to show any prejudice that resulted from consideration of the report. Finally, the Hearing Panel made independent findings regarding the credibility of Doe's and Roe's

testimony that are sufficient to uphold its determination of sexual misconduct even if Ms. Dalcourt's report had not been before the Panel.

Second, under well-established law Doe was entitled only to the gist of Roe's testimony against him, which he received. The University provided Doe with the investigative report prior to the hearing and that report discussed in detail Roe's accusations against Doe. Roe testified at the hearing consistent with those accusations. Further, the 14 witnesses interviewed by Ms. Dalcourt did not testify about the event of the morning of February 1, which was the only event for which Doe was charged.

Third, the requirement that Doe submit questions through the Panel was proper. Just like Doe in his Response Brief, FIRE fails to establish that the Panel's exclusion of irrelevant, repetitive, or harassing questions was improper or prejudicial. To the contrary, FIRE's own authority supports the propriety of submitting questions through a panel.

For all of these reasons, FIRE's brief does not present a persuasive argument for affirmance of the trial court's judgment.

## II. ARGUMENT

### A. The Propriety Of Other Universities' And Colleges' Procedures Is Not Before This Court

In its brief, FIRE focuses on alleged deprivations of due process that occurred in other sexual misconduct proceedings at other universities. For instance, FIRE states that this Court's decision will have a significant impact on the use of "single investigator" models by universities. (FIRE Brief 10.) Regardless of that model's merits, it is not before this Court. It is undisputed that the University here conducted an investigation, and, following that investigation, held a hearing at which both John Doe and Jane Roe were permitted to testify before a three-person panel. (Appellant's Opening Brief ("AOB") 7-8.) The Panel ultimately determined that Doe was responsible for sexual misconduct, a finding that

was upheld by both the Council of Deans and the Council of Provosts. (*Id.* at 9-10.) FIRE's complaints regarding the single investigator model employed at Brown University and Pennsylvania State University (FIRE Brief 10) are inapposite to the case before the Court here.

Similarly, FIRE's reliance on cases discussing different universities' procedures applied to different sets of facts is misplaced. For instance, the court in *Doe v. Brandeis University* (D. Mass, Mar. 31, 2016, No. 15-11557-FDS) __ F.Supp.3d __ [2016 WL 1274533] evaluated a Brandeis University procedure that granted adjudicatory authority to a Special Examiner and did not give the accused notice of the details of the charges or the evidence used against them. (*Id.* at p. *3.) In contrast, the University here provided Doe with repeated and detailed notice of the charges and evidence against him and convened a three-person panel to determine whether Doe had committed sexual misconduct.[1] (See AOB 7-9.)

FIRE's discussion of alleged injustices suffered by individuals accused of sexual misconduct is also not properly before this Court. (See FIRE Brief 11-16.) FIRE's one-sided accounts, many of which ignore whether the accused was actually found responsible for sexual misconduct, have no bearing on the matter before this Court. Whatever perceived inequities may have occurred in these other situations, they did not affect Doe. As the University's Opening and Reply Briefs establish, Doe was provided with due process, the University's decision was supported by

[1] FIRE also discusses *Prasad v. Cornell University* (N.D.N.Y., Feb. 24, 2016, No. 5:15-CV-322) 2016 WL 3212079 which involved a model whereby an investigator issued a report which was then reviewed by "fact finders" who could only affirm the report, modify it or remand back for further investigation, but could not hold a hearing like the one Doe was afforded. (*Id.* at p. *15.)

substantial evidence, and the sanction of a one year and one quarter suspension was well within the University's discretion.

### B. Doe Received The Process He Was Due

#### 1. Doe Received Ample Notice And Opportunity To Present Defenses

FIRE argues that university procedures afforded students accused of sexual misconduct do not reflect the seriousness of a finding of responsibility of sexual misconduct. (See, e.g., FIRE Brief 27-28.) Such an assertion does not apply to the University's procedures. The University and UCSD have promulgated procedures specific to allegations of sexual misconduct entitled Review Procedures for Alleged Sex Offense, Harassment or Discrimination Violations. (Administrative Record ( "AR") 357; AOB 8.) These procedures, in effect at the time of Doe's hearing, reflect the importance and seriousness of a charge of sexual misconduct and provide fair processes for both the complainant and respondent. (See, e.g., AR 363 [noting ability of Respondent to present information and witnesses at the hearing]; AOB 8.)

Pursuant to these procedures and as set forth in detail in the University's briefing, Doe received plentiful notice and ample opportunity to present defenses. That notice included: (1) an August 26, 2014 email from Ms. Dalcourt to Doe's lawyer specifying the charges she was investigating, including a charge involving digital penetration on the morning of February 1, 2014; (2) an email from the Dean stating that Doe had been charged under the Student Conduct Code for sexual misconduct; and (3) a notification of his hearing and packet of information that included the OPHD investigative report and Roe's June 16, 2014 Request for Investigation to the OPHD. (AOB 26; AR 461, 414, 419, 438.)

The University also provided Doe with repeated opportunities to present his defenses. Before, at, and after the Panel hearing, Doe had the

opportunity to present written briefing and relevant documents, testify, and call witnesses. (AOB 26; AR 283.) Prior to the hearing, Doe provided a 19-page pre-hearing submission containing case citations and a lengthy statement of facts. (AR 423-41.) At the hearing, Doe submitted questions to be asked of Roe by the Panel, selectively invoked the Fifth Amendment, and did not call any witnesses, but had the opportunity to do so. (AR 363 ["The respondent will then have the opportunity to provide information and witnesses about the incident supporting their perspective."].) On the day of the hearing, Doe also provided a written, six-page post-hearing submission that argued, in part, that the evidence did not support a finding of non-consensual sexual activity on the morning of February 1 because consensual acts occurred the night before and the night of February 1, 2014. (AR 612-17.)

Given the notice and opportunity to present defenses provided to Doe, it is clear that the University took seriously the gravity of Doe's alleged offense and provided appropriate procedural considerations for both Doe and the victim.

### 2. FIRE's Limited Criticism Of The University's Procedures Is Ill Founded

The parties' briefs have already addressed at length the three specific criticisms FIRE offers against the University's procedures. As summarized below, none have merit.

#### a. The Panel's Citation To The Investigative Report Was Proper

Although FIRE repeats the trial court's conclusion that the Panel improperly relied on the investigative report of Ms. Dalcourt (FIRE Brief 18-19), it does not address any of the University's arguments for why that finding was in error. The trial court, and now FIRE, err for at least four reasons. First, due process does not require application of formal

evidentiary rules including with respect to hearsay. (AOB 39; see *Goldberg v. Regents of University of Cal.* (1967) 248 Cal.App.2d 867, 883-84 ["Clearly, there is no merit in the contention that plaintiffs were deprived of procedural due process because the Committee did not follow the rules of evidence usually applicable in judicial proceedings …."].) Second, despite the University's procedures expressly stating that the investigative report would serve as the primary fact-finding document (AR 363) and the University informing Doe that the Panel would review the document (AR 419, 438), Doe did not request Ms. Dalcourt's presence at his hearing. Accordingly, he has waived any objection to not being able to cross-examine her. (AOB 40.) Third, Doe was not prejudiced by Ms. Dalcourt not being present at the hearing. Doe had numerous opportunities to refute Ms. Dalcourt's findings, and did contest her findings in his pre-hearing submission. (*Ibid.*) Fourth, the Panel's determination of sexual misconduct did not depend on Ms. Dalcourt's investigative report. The Panel made specific, independent findings that Roe's testimony regarding Doe's digital penetration was credible. (AR 621.) These findings standing alone are sufficient to sustain the University's finding that Doe was responsible for sexual misconduct.

**b. Doe Received More Than Sufficient Notice Of The Witnesses Against Him.**

FIRE also repeats the argument that Doe should have had access to the investigator's interview notes of the 14 witnesses and Roe. (FIRE Brief 18, 25.) However, even Doe admits that, under California law, he was entitled only to "the names of the witnesses against him and an oral or written report on the facts to which each witness testifies." (Respondent's Brief 36, citing *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 245, rehg. den. (May 2, 2016), review den. (Aug. 10, 2016).)

With regard to witness testimony, Doe was entitled to a "statement of the gist of their proposed testimony." (*Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 771.) Doe received the gist of Roe's testimony, and Roe and Doe were the only witnesses who testified at the hearing. Doe received both Roe's initial Request for Investigation (AR 392-96) and the OPHD's Investigative Report, which summarized the University Investigator's interviews with Roe. (AR 395-409.) These documents provided Doe with the gist of Roe's testimony, and significantly more.

FIRE's claim that Doe was entitled to the interview statements of the 14 other individuals with whom Ms. Dalcourt spoke ignores that these interviews concerned the evening of January 31 (AR 400-01, 407), and an alleged retaliation incident (AR 405), neither of which formed the basis for a charge at the hearing. (AOB 42.)

### 3. The Requirement That Doe Submit Questions To The Panel Was Proper

Like Respondent, FIRE criticizes the Panel Chair's decision to not ask certain questions submitted by Doe without pointing to any specific question that FIRE can show should have been asked or could have possibly altered the outcome of the hearing. (See FIRE Brief 25-26; Respondent's Brief 33-34.) As set forth in detail in the University's Opening Brief, the questions excluded by the Panel Chair were repetitive, irrelevant, or harassing, and their exclusion was not in any way prejudicial. (AOB 28-37; see also Reply Brief 36-37.)

FIRE does not cite any authority holding that submitting questions through a panel during a university proceeding is improper. In fact, the only case cited by FIRE that addresses submitting questions through a panel suggests that such a procedure is consistent with the requirements of due process. (FIRE Brief 24, citing *Donohue v. Baker* (N.D.N.Y. 1997)

976 F.Supp. 136].) In *Donohue*, the Northern District of New York held, "[a]t the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and *to direct questions to his accuser through the panel*." (*Id*. at p. 147, italics added.)

Finally, FIRE's argument that the way to prevent re-traumatization of complainants in sexual misconduct proceedings is to allow cross-examination by respondents' attorneys is misguided. (FIRE Brief 26.) Few would regard introducing into the process aggressive cross-examination by a seasoned trial lawyer to be an effective strategy for mitigating the trauma associated with reliving an act of sexual misconduct. FIRE's flawed trauma-mitigation strategy raises a broader problem. As set forth in detail in the University's Reply Brief, allowing counsel to participate in university and college disciplinary hearings would turn such proceedings into court trials or a near equivalent. Universities and colleges would be forced to hire attorneys to represent the university and the complainant, as well as judges, arbitrators, or other highly-trained neutrals capable of overseeing vastly more complex proceedings. Due process simply does not demand such a drain on universities' and colleges' scarce resources. (Reply Brief 26, citing *Osteen v. Henley* (7th Cir. 1993) 13 F.3d 221, 225-26 [noting that recognizing a right to have counsel participate in the hearings "would force student disciplinary proceedings into the mold of adversary litigation"].)

## III. CONCLUSION

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

DATED: September 9, 2016 MUNGER, TOLLES & OLSON LLP
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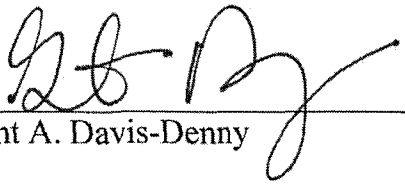
By: 
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## CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.486(a)(6) and 8.204(c) of the California Rules of Court, the enclosed "Appellant's Opening Brief" is produced using 13-point Roman type, and that, including footnotes, but excluding the tables, the certificate, the verification and any support documents, the brief contains approximately 2,350 words, which is less than the 14,000 words allowed by these rules. Counsel relies on the word count of the computer program used to prepare this brief.

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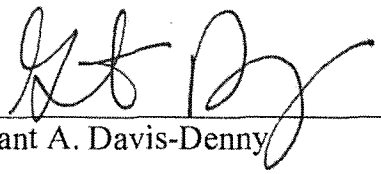
By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on ***September 9, 2016***, at Los Angeles, California.

Vivian S. Rodriguez