S263180

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Matthew Boermeester,
Petitioner and Appellant,

v.

Ainsley Carry et al.,
Respondents and Appellees.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B290675

LOS ANGELES SUPERIOR COURT, THE HONORABLE AMY D. HOGUE,
CASE NO. BS170473

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

HATHAWAY PARKER
MARK M. HATHAWAY (STATE BAR NO. 151332)
JENNA E. PARKER (STATE BAR NO. 303560)
445 S. FIGUEROA STREET, 31ST FLOOR
LOS ANGELES, CALIFORNIA 90071
TEL: (213) 529-9000/FAX: (213) 529-0783
mark@hathawayparker.com

ATTORNEYS FOR PETITIONER AND APPELLANT
MATTHEW BOERMEESTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

California Cases

Regulations

INTRODUCTION

Amici all take the similar position that although the strictures of a fair procedure should be flexible, the Court should make an inflexible, hard-and-fast rule that under no circumstances should a private university afford a student who is the subject of a disciplinary proceeding with the opportunity to cross-examine witnesses at a live hearing. Some Amici go further and contend that the Court should impose a rule that accusers and accused alike must be denied the right to a live hearing before a neutral adjudicator. Mr. Boermeester respectfully disagrees and hereby submits his Consolidated Answer to Amicus Curiae Briefs.

I. THE COURT IS NOT CONSIDERING FAIRNESS STANDARDS IN MEDICAL DISCIPLINARY PROCEEDINGS

The California Hospital Association's ("CHA") submitted its amicus curiae brief on June 30, 2021, expressing concern that the Court's decision in this case will affect medical disciplinary hearings. The Court is not considering fairness standards in medical disciplinary cases. It is narrowly considering, "Under what circumstances, if any, does the common law right to fair procedure require a private university to afford a student who is the subject of a disciplinary proceeding with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses at a live hearing?" The Court is also not imposing "blanket mandatory live cross-examination requirement on fair procedure" in all private institutions. (CHA Amicus Brief, p. 7.)

II. PRIVATE MEDICAL INSTITUTIONS ARE NOT IN A SUPERIOR POSITION TO OPINE ON PROCEDURAL FAIRNESS IN UNIVERSITY SEXUAL MISCONDUCT CASES

Though not relevant to this Court's inquiry, Mr. Boermeester addresses concerns that may be applicable to considerations regarding student discipline at private universities. California's hospitals and health systems include over a million healthcare workers in the state of California who are entitled to a fair procedure when facing medical discipline.[1] Though private medical institutions may be best suited to determine the qualifications of their employees, they are not best suited to determine what constitutes a fair procedure when an employee is accused of medical misconduct. Like private universities, private hospitals argue for autonomy so that they can continue to dispose of "problem" employees (and students) who pose a threat to their public image and revenue.[2]

CHA asserts, "The Court should answer this question ["Under what circumstances, if any, does the common law right

---

[1] Total Healthcare Employment (May 2020) Kaiser Family Foundation, https://www.kff.org/other/state-indicator/total-health-care-employment/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D

[2] Despite the University of Southern California's ("USC") status as a non-profit corporation, USC ended fiscal year 2019 with $9.2 billion in net assets, which represents a 19% increase in net assets since 2015. (University of Southern California Financial Report 2019, p. 7, https://about.usc.edu/files/2020/07/USC-2019-Annual-ReportFINAL.pdf.)

to fair procedure require a private university to afford a student who is the subject of a disciplinary proceeding with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses at a live hearing?"] with a resounding "no" to protect California hospital patients. (CHA Amicus Brief, p. 9.) But as in the university discipline setting, there are certain circumstances in which the consequences faced by accused medical professionals (i.e., loss of career and reputation) are so severe and the evidence in such dispute that cross-examination is advantageous not only for the accused, but also to the peer review committee and the hospital in determining the truth of the accusations. Patients and hospitals benefit when good doctors and staff remain in their positions and are not removed or terminated unnecessarily. It seems self-evident that if a healthcare worker makes a report that could potentially end another healthcare workers career, they should at least be questioned about it. Unchallenged reports and allegations are not sufficient to justify depriving a medical professional (or a student) of their livelihood and reputation.

Though CHA opposes "inflexible hearing procedures," it's rigid "no cross-examination" stance is exactly that. (CHA Amicus Brief, p. 17.) CHA argues that requiring cross-examination for private institutions "would create a perverse incentive for subjects of disciplinary action to intimidate and retaliate against witnesses to discourage them from testifying." (CHA Amicus Brief, pp. 19-20.) But allowing unquestioned reports against physicians and other hospital staff to serve as the basis for

discipline may also invite intimidation and retaliation from complainants who realize that they will not be expected to support their allegations with testimony or evidence. It also incentivizes lazy, careless, and biased investigations and adjudications, rather than thorough truth-seeking proceedings, which are in the best interest of hospitals, their employees, and patients alike.

III. THE CALIFORNIA ATTORNEY GENERAL'S POSITION IGNORES FEDERAL AND STATE LAW

The California Attorney General Rob Bonta swore an oath to bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California. And yet, on July 1, 2021, Attorney General Bonta submitted his amicus curiae brief endorsing procedures that are decidedly misaligned with fundamental notions of fairness and due process. Attorney General Bonta opposes students' right to cross-examination in university sexual misconduct discipline proceedings, and also posits that the obsolete and unlawful single-investigator-model, whereby a single individual conducts a Title IX investigation and makes all factual findings and determinations of responsibility, should be revived. Courts have recognized the immense shortcoming of the single-investigator-model specifically in cases like Mr. Boermeester's, where the Title IX investigator, having no oversight or accountability, exercised unfettered discretion in questionable ways. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1067-70.)

Attorney General Bonta's position that students are not entitled to a live hearing and cross-examination is contrary not only to state law, but also to federal law. The Federal Title IX Regulations require universities to (1) "provide for a live hearing" at which "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility";[3] (2) eliminate use of the "single investigator model," whereby the investigator is the sole individual who investigates and makes findings of responsibility, as in the university proceedings;[4] and (3) provide the accused an opportunity to "inspect and review" all the evidence collected during the investigation, "including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility."[5] Based on its review of 124,000 public comments on the proposed regulations, the U.S. Department of Education concluded that providing students a hearing with cross-examine before a neutral adjudicator is the best way to uphold Title IX's non-discrimination mandate while at the same time meeting requirements of constitutional due process and fundamental fairness. Cross-examination is a vital component of a student's right to be heard.

The Attorney General's suggestion that the University of California and the California State Universities enforce an

---

[3] 34 C.F.R. § 106.45 (b)(6).
[4] 34 C.F.R. § 106.45(b)(7)(i).
[5] 34 C.F.R. § 106.45(b)(5)(vi).

"investigative" model in opposition to the Federal Title IX Regulations is ludicrous. Both university systems have adopted a hearing process consistent with the Federal Title IX Regulations, or they would be at risk of losing billions of dollars in federal funding.

IV. THE 'TWO-TRACK' SYSTEM IS CREATED BY SCHOOLS, NOT COURTS

The California Women's Law Center et al. ("CWLC"), filed their amicus curiae brief on July 1, 2021. CWLC claims, "The law as it stands is a two-track system—separate and unequal—requiring an opportunity to cross-examine parties and witnesses only in gender-based disciplinary proceedings." (CWLC Amicus Curiae Brief, p. 12.) Not exactly.

The University of California affords students accused of ***non-sexual misconduct***, "The opportunity for a prompt and fair hearing where the University shall bear the burden of proof, and at which the student shall have the opportunity to present documents and witnesses and to confront and cross-examine witnesses presented by the University[.]"[6] The California State University also affords students accused ***of non-sexual misconduct*** live evidentiary hearings with cross-examination.[7]

---

[6] Policies Applying to Campus Activities, Organizations and Students (PACAOS) 100.00 Policy On Student Conduct And Discipline (August 14, 2020) p. 7, https://policy.ucop.edu/doc/2710530/PACAOS-100.

[7] California State University Executive Order 1098 (Revised August 14, 2020) Article III section D, https://calstate.policystat.com/policy/8453518/latest/

Like their counterparts, California private universities generally provide procedures that include live hearings and cross-examination to students accused of non-sexual, non-academic misconduct.[8] Students accused of sexual misconduct have not gained any procedural rights not afforded to other students; instead, schools removed significant procedural rights from students accused of sexual misconduct. As a result of litigation by students like Mr. Boermeester, universities have been compelled to restore those procedural rights. It has taken, and continues to take, considerable effort and expense to induce

[8] See e.g.,

- Code of Student Conduct (August 1, 2020) Occidental College, pp. 15-18, https://www.oxy.edu/sites/default/files/assets/REHS/Conduct/oxy_20-21_code_of_student_conduct.pdf;
- Overview of the Judicial Process for Responding Students (2019-2020) Stanford University, p. 11, https://communitystandards.sites.stanford.edu/sites/g/files/sbiybj10431/f/ocs_overview_for_resp_students_2019-2020.pdf;
- Student Conduct Process (2020-2021) Claremont McKenna College, Section 4 "Investigation Review Hearing," https://catalog.claremontmckenna.edu/content.php?catoid=26&navoid=3811;
- Student Conduct Code (2021) Loyola Marymount University, p. 16, https://studentaffairs.lmu.edu/media/studentaffairs/osccr/documents/2021-Student-Conduct-Code.pdf;
- Student Conduct Procedures (2021) Chapman University, see "Hearings for Incidents Not Related to Sexual Misconduct" section, https://www.chapman.edu/students/policies-forms/student-conduct/student-conduct-procedures.aspx

universities to comply with their obligation to treat all students fairly. Case law did not create two tracks for school disciplinary proceedings; schools created two tracks for school disciplinary proceedings in their effort to provide fewer procedural protections to students accused of sexual misconduct.

Amici presents the misleading statistic that "the overall rate of false accusations of sexual assault is between 2% and 7%." (CWLC Amicus Curiae Brief, p. 18.) Note that "A false report is a reported crime to a law enforcement agency that an investigation *factually proves never occurred*."[9] While 2% to 7% of sexual assault allegations are *proven* to have never occurred (a remarkably high number in and of itself), a far greater number of sexual assault allegations are found to be baseless and unsubstantiated. In the criminal setting, approximately one-third of such allegations are unfounded.[10]

Mr. Boermeester and his counsel recognize the courage it takes for victims and survivors of sexual assault to come forward and commend them for their bravery. That being said, Mr. Boermeester's counsel, Jenna Parker, served as the advisor for the accused student in the college discipline matter involving

---

[9] See False Reporting Overview (2012) National Sexual Violence Resource Center, at pp. 2-3, https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf

[10] SAVE (May 7, 2021), One-Third of Sexual Assault Allegations in Criminal Setting Are Unfounded. https://www.saveservices.org/2021/05/one-third-of-sexual-assault-allegations-are-unfounded/

Maryam I, who is featured in CWLC's amicus curiae brief for her position on cross-examination.

Maryam I. and the student respondent in the college Title IX proceedings had dated from October 2017 until the respondent broke up with her in December 2018. In March 2019, Maryam I. alleged that the respondent had exhibited controlling behavior during their relationship and had grinded on her without her consent on one occasion while he was asleep. Two months later, in May 2019, Maryam I. added further allegations that she had not consented to sexual intercourse with the respondent on several occasions during their dating relationship, and she did not consent to being "punched in the face during sexual intercourse." The respondent denied Maryam I.'s allegations.

During the investigation, Maryam I. made several statements that conflicted with her allegations and reflected negatively on her credibility. For instance, regarding the allegation that the respondent punched her in the face during sexual intercourse without consent, Maryam I. initially stated, "Respondent wanted to try all these sexual things because they were in a relationship. Some of the things he tried was punching her in the face and punching or kicking her in the stomach during sex. Because she agreed, Claimant won't say that Respondent beat her up."[11]

In a later interview, Maryam I. clarified,

> She asked to get punched for several reasons. First, to make things real for her (meaning to

[11] The quotations are taken from the summaries of Maryam I.'s Title IX investigation interviews.

> leave marks on her as compared to emotional scars). Second, at that point in her life, Claimant genuinely thought she deserved to feel pain. Third, Claimant also really wished that Respondent was physically abusing her instead of emotionally abusing her. Claimant would have preferred physical abuse because she would have had bruises and then people might have helped her more. Claimant wouldn't have to talk about emotional woes any more - she could talk about physical injuries. Claimant explained that being guilt-tripped doesn't seem as bad as being punched. She was the one who asked Respondent to punch her initially, but those were the reasons for it. The punching thing happened a few times. It happened a few times because the punching wasn't leaving a bruise and she wanted to see a bruise. Claimant wanted to show something to her friends. A lot of her friends had stopped talking to her at that point."

Cross-examination as a truth-seeking device in this case likely would have revealed that Maryam I. had lied to friends about the respondent's conduct, and her allegations of physical abuse and sexual assault during their dating relationship, which no one else had witnessed, generally lacked credibility.

During the year-long Title IX investigation, Maryam I. and the respondent both continued attending classes and avoided each other, pursuant to mutual a no-contact order. The hearing went forward in March 2020, the day the college was sending students home due to the COVID-19 pandemic. During the hearing, the respondent and his advisor were placed in a separate room from the hearing officer but were able to watch

and listen to the proceedings through a video monitor. The complainant and her advisor(s) were also placed in a separate room. There was no direct cross-examination during the hearing. The parties submitted written questions to the hearing officer who asked the questions that she found appropriate. Maryam I. never faced questioning by respondent's advisor and was never in the same room as respondent's advisor. In fact, Maryam I. and the respondent's advisor never saw each other or interacted at all during the entirety of the proceedings.

The respondent did not request an alternative resolution, it was suggested to both parties by the college's Title IX Officer as an alternative resolution because the campus was closing due to the COVID-19 pandemic, and both parties mutually agreed to the terms.

Due process exists to counteract bias and presumption, to insist that facts govern over passion, to protect those who cannot protect themselves, and to prevent abuse of the disfavored. For these reasons, due process protections are important to ensure the rights of all students, regardless of gender identity, sexual orientation, and other protected characteristics.

V. UNIVERSITIES THAT ACT AS PROSECUTORIAL AND ADJUDICATORY BODIES MUST PROVIDE A FAIR PROCESS TO STUDENTS

On July 1, 2021, California Institute of Technology, Chapman University, Claremont McKenna College, Occidental College, and Pepperdine University filed their joint amicus curiae brief opposing any judicially imposed procedures for adjudicating

sexual misconduct and claiming that the burden of conducting fair hearings is simply too great. Conspicuously, these private universities provide no actual data about the number of complaints they adjudicate each year or the financial hardship of providing students a hearing with cross-examination before a neutral adjudicator. According to a Senate Assembly Committee on Appropriations hearing held on August 21, 2019, the California Community Colleges (116 campuses), the University of California (10 campuses), and the California State Universities (23 campuses) each conduct about 100 hearings per year to adjudicate allegations of sexual harassment and sexual misconduct.[12] This means there are between less than one and ten Title IX hearings held per year on California public university and college campuses. The benefits of providing greater procedural protections to students in these few situations would seem to outweigh any hardship to colleges and universities. As noted, many of these same universities already conduct live evidentiary hearings and have no issue requesting witness attendance and permitting cross-examination in the context of non-sexual misconduct.

Title IX requires universities to respond appropriately to allegations of sexual harassment to address a hostile environment on campus, not to come to the aid of non-complainants who never asked for nor needed assistance, nor to

---

[12] California Legislative Information, 08/19/19- Assembly Appropriations, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB493

prosecute and severely punish accused students with lengthy suspensions or expulsion. The Federal Title IX Regulations even narrowed the scope of conduct requiring a campus response. For instance, universities are not required to respond to off-campus conduct or conduct that occurs in study abroad programs. In counsel's experience, many universities are going above and beyond the mandate of Title IX to prosecute and punish students over whom they have no jurisdiction, such as students who have already graduated, and students for conduct that occurred before they were enrolled at the university. Universities cannot on the one hand complain about the burden of conducting fair proceeding to adjudicate sexual misconduct, but on the other hand zealously prosecute and punish the accused.

Title IX, SB No. 493, and California Court of Appeal decisions provide flexibility in the handline of sexual misconduct allegations. If universities continue to impose severe punishments on students, then they must afford those students a fair hearing before an impartial adjudicator with cross-examination. (See the "second level" Due Process described in *Knight v. South Orange Community College District* (2021) 60 Cal.App.5th 854, 865-866.)

VI. CONCLUSION

Based upon the foregoing, Mr. Boermeester respectfully requests that this Court hold that the appellate court's determination that he was entitled to a live hearing with the right to cross-examine witnesses was correct and affirm the court below.

DATED: August 6, 2021

Respectfully submitted,

HATHAWAY PARKER

By: Jenna E. Parker

Mark M. Hathaway, Esq.
Jenna E. Parker, Esq.
Attorneys for Petitioner
MATTHEW
BOERMEESTER

CERTIFICATE OF COUNSEL

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), the undersigned certifies that this brief contains 2,860 words, according to the Microsoft Word word count program. The word count includes footnotes but excludes the proof of service.

DATED: August 6, 2021

Respectfully submitted,

HATHAWAY PARKER

By: Jenna E. Parker

Mark M. Hathaway, Esq.
Jenna E. Parker, Esq.
Attorneys for Petitioner
MATTHEW BOERMEESTER

PROOF OF SERVICE
Boermeester v. Carry et al.
Case No. S263180

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 S. Figueroa Street 31st Floor, Los Angeles, California 90071.

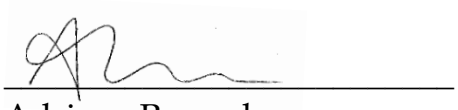
On August 6, 2021, I served the foregoing document **CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on August 6, 2021, at Los Angeles, California.



Adriana Recendez

SERVICE LIST
Boermeester v. Carry et al.
Case No. S263180

Individual / Counsel	Party Represented
Julie Arias Young Karen J. Pazzani Young & Zinn LLP 1150 South Olive Street Suite 1800 Los Angeles, CA 90015-3989 Phone: (213) 362-1860 Fax: (213) 362-1861 jyoung@yzllp.com kpazzani@yzllp.com	Defendants and Respondents **AINSLEY CARRY and THE UNIVERSITY OF SOUTHERN CALIFORNIA** ***Via TrueFiling***
Beth Judith Jay Jeremy Brooks Rosen Mark Andrew Kressel Scott P. Dixler Horvitz & Levy LLP 3601 W. Olive Avenue, 8th floor Burbank, CA 91505-4681 Phone: (818) 995-0800 Fax: (844) 497-6592 bjay@horvitzlevy.com jrosen@horvitzlevy.com mkressel@horvitzlevy.com sdixler@horvitzlevy.com	Defendants and Respondents **AINSLEY CARRY and THE UNIVERSITY OF SOUTHERN CALIFORNIA** ***Via TrueFiling***

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BOERMEESTER v. CARRY**
Case Number: **S263180**
Lower Court Case Number: **B290675**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mark@hathawayparker.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Answer to Amicus Briefs

Service Recipients:

Person Served	Email Address	Type	Date / Time
Theane Evangelis Gibson, Dunn & Crutcher, LLP 243570	tevangelis@gibsondunn.com	e-Serve	8/6/2021 4:19:26 PM
Alexis Piazza Office of the Attorney General 316047	alexis.piazza@doj.ca.gov	e-Serve	8/6/2021 4:19:26 PM
Lowell Brown Arent Fox LLP	brown.lowell@arentfox.com	e-Serve	8/6/2021 4:19:26 PM
Apalla Chopra O'Melveny & Myers 163207	achopra@omm.com	e-Serve	8/6/2021 4:19:26 PM
Sarah Hamill Horvitz & Levy LLP 328898	shamill@horvitzlevy.com	e-Serve	8/6/2021 4:19:26 PM
Scott Dixler Horvitz & Levy LLP 298800	sdixler@horvitzlevy.com	e-Serve	8/6/2021 4:19:26 PM
Alecia Turner California Attorney General	Alecia.Turner@doj.ca.gov	e-Serve	8/6/2021 4:19:26 PM
Lowell Brown Arent Fox LLP 108253	lowell.brown@arentfox.com	e-Serve	8/6/2021 4:19:26 PM
Beth Jay Horvitz & Levy, LLP 53820	bjay@horvitzlevy.com	e-Serve	8/6/2021 4:19:26 PM
Jenna Parker Hathaway Parker LLP	jenna@hathawayparker.com	e-Serve	8/6/2021 4:19:26 PM
Mark Hathaway	mark@hathawayparker.com	e-	8/6/2021

Hathaway Parker LLP 151332		Serve	4:19:26 PM
Karen Pazzani Young & Zinn LLP 252133	kpazzani@yzllp.com	e-Serve	8/6/2021 4:19:26 PM
Jeremy Rosen Horvitz & Levy LLP 192473	jrosen@horvitzlevy.com	e-Serve	8/6/2021 4:19:26 PM
Mark Kressel Horvitz & Levy, LLP 254933	mkressel@horvitzlevy.com	e-Serve	8/6/2021 4:19:26 PM
Cynthia Garrett Families Advocating for Campus Equality 106218	CPGarrett@FACECampusEquality.org	e-Serve	8/6/2021 4:19:26 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/6/2021

Date

/s/Mark Hathaway

Signature

Hathaway, Mark (151332)

Last Name, First Name (PNum)

Hathaway Parker

Law Firm