Case No. S263180

In the

Supreme Court

of the

State of California

MATTHEW BOERMEESTER,
Plaintiff and Appellant,

v.

AINSLEY CARRY et al.,
Defendants and Respondents.

AFTER A PUBLISHED DECISION OF THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B290675
LOS ANGELES SUPERIOR COURT, THE HONORABLE AMY D. HOGUE,
CASE NO. BS170473

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

University of Southern California (USC) contends that decisions of the Court of Appeal regarding student discipline have moved beyond the principle that fair administrative hearing procedure provided by private organizations requires only "rudimentary procedural and substantive fairness." (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.) The decisions, according to USC, are "importing constitutional due process rules to regulate non-state actors and requiring universities to provide an increasingly burdensome array of litigation-like procedures in student discipline cases arising from allegations of sexual misconduct." (Opening Brief, p. 11.)

On the contrary, it is the universities that have moved beyond academia and research and into the investigation and adjudication of sexual misconduct in quasi-criminal proceedings and built Title IX departments that resemble prosecutorial agencies.[1] The universities have created their own "increasingly burdensome array of litigation-like procedures in student discipline cases arising from allegations of sexual misconduct." (See, 2 AR 478-496.) And not all private universities[2] find fairness to be burdensome. More than others, USC has been

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[1] Title IX Coordinator Gretchen Dahlinger Means directed USC's Title IX Office until recently. Ms. Means is a former prosecutor in the Sex Crimes Unit of San Diego District Attorney's Office. Ms. Means also trained and mentored U.S Marine Corps prosecutors on five west coast installations. (1 CT 33, n. 51.)

[2] Mr. Boermeester does not dispute here that USC is a private university and not a state-actor. (1 CT 12.)

beset by students who have successfully challenged the appearance of fairness and impartiality in USC Title IX internal regulations and administrative proceedings by judicial review.[3]

The most obvious distinction between USC and the private organization cases that USC cites is that those private societies, labor unions, and medical committees were not prosecuting sexual misconduct charges in quasi-criminal proceedings. The private organizations were generally deciding who belongs amongst their ranks and the more recent Court of Appeal cases have not imposed on private (or public) universities in that area – admissions, academic progress, tenure, etc. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545; *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803.)

Beginning in 2011, USC and other public and private universities responded with alacrity to calls to address a tide of sexual violence on American college campuses. (1 CT 13-18, 21-23.) Universities established new internal rules and administrative procedures to address any hostile environment

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[3] See, *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26; *Doe v. Allee* (2019) 30 Cal.App.5th 1036; *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221. In the trial court, USC sought judicial notice of three trial court decisions that went against accused male USC students. (2 CT 915-958.) Two of the decisions were overturned on appeal, *Doe v. Allee, supra,* and *Doe v. Ainsley Carry, Ed.D., et al.*, (Jan. 8, 2019, No. B282164). After the third matter was fully briefed and set for oral argument, USC dismissed its Title IX findings and sanctions against the accused male student and trial court judgment was ordered reversed. *(Doe v. Ainsley Carry, Ed.D., et al.,* (Feb. 14, 2020, No. B284183).)

due to sexual misconduct by simply expelling or suspending invariably male students.[4] This led to a significant push back by accused students and more recently cases presenting credible claims of gender discrimination in Title IX sexual misconduct proceedings on campus. (*Schwake v. Ariz. Bd. of Regents* (9th Cir. 2020) 967 F.3d 940, 946-948 (adopting the Seventh Circuit's far simpler and "straightforward pleading standard" as "hew[ing] most closely to the text of Title IX."); *Doe v. Purdue University* (7th Cir. 2019) 928 F.3d 652, 667-68; see also *Doe v. Univ. of the Scis.* (3d Cir. 2020) 961 F.3d 203, 209, citing *Doe v. Columbia Coll. Chi.* (7th Cir. 2019) 933 F.3d 849, 854-55.)

The Court of Appeal decisions have simply upheld longstanding common law principles of fairness and Due Process in narrow circumstances where the accused student faces severe disciplinary penalties and have generally treated private and public colleges and universities alike under Code Civ. Proc., § 1094.5. (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716; *Gupta v. Stanford University* (2004) 124 Cal.App.4th 407; *Knight v. South Orange Community College Dist.* (Feb. 10, 2021, No. G058644) ___Cal.App.5th___ [2021 Cal. App. LEXIS 120].)

STATEMENT OF THE CASE

The circumstances of this case illustrate why the common law right to fair procedure requires a private university to afford

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[4] *Knight v. South Orange Community College Dist.* (Feb. 10, 2021, No. G058644) ___Cal.App.5th___ [2021 Cal. App. LEXIS 120].

a student who is facing severe disciplinary sanctions with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses at a live hearing.

A. Matthew Boermeester and Zoe Katz

As of January 2017, Matthew Boermeester (hereinafter "Mr. Boermeester") and Zoe Katz[5] (hereinafter "Ms. Katz") were both undergraduate athlete-scholars attending USC. Ms. Katz was a senior, was captain of the USC women's tennis team, and a nationally ranked female singles tennis player. (2 CT 413; 1 AR 236.) Mr. Boermeester was also a senior, full-scholarship athlete who kicked the game-winning 46-yard field goal in the final second of the 2017 Rose Bowl to give USC a 52-49 victory over Penn State. (1 AR 199, n. 5; 2 AR 396.) Mr. Boermeester expected to graduate in May 2017 and planned to attend USC to obtain his master's degree while continuing to play USC football during the Fall 2017 semester, his final year of eligibility to play college football, in hopes of developing his ranking as a draft-eligible college football player for the NFL in the 2017 draft class. (2 CT 401-402.) Mr. Boermeester had undergone knee surgery on January 10, 2017 and was wearing a knee brace. (1 CT 30.) Mr. Boermeester was taking anti-inflammatory medication but had refused pain medication. (1 AR 171, 175.)

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[5] Zoe Katz has requested to be referred by her true name. Ms. Katz has spoken publicly about the injustice she has faced in this matter, participated in the trial court proceedings in her true name, and objects to USC's characterization of her as a "Jane Roe," a name often used for victims of sexual misconduct.

Ms. Katz had an on and off relationship with Mr. Boermeester before they began seriously dating in March 2016. (2 CT 710.) They broke up in October 2016 but saw each other nearly every day. (1 AR 172-173.) After his knee surgery, Mr. Boermeester was spending nights in Ms. Katz's apartment very near the USC campus. (2 CT 413.)

B. January 20, 2017

On January 20, 2017, at about 4:00 p.m. Ms. Katz drove Mr. Boermeester in her car and the two had dinner together for about two hours at the Cheesecake Factory, where Mr. Boermeester had "about three glasses of wine." (1 AR 15; 1 AR 171, 179.) After dinner, Ms. Katz left for another commitment and Mr. Boermeester stayed in the area and went shopping at The Grove with a friend. After shopping, Mr. Boermeester went to hang out with members of the USC water polo team at a friend's house, where Mr. Boermeester had four or five beers. (1 AR 175.) Ms. Katz later picked Mr. Boermeester up and they stopped at McDonald's on the way back to her apartment and got chicken and French fries, arriving home about 1:00 a.m. (1 AR 179.)

The spin that USC's uses to characterize Mr. Boermeester as an angry drunk and Ms. Katz as a "classic" domestic abuse victim[6] is first seen in USC's citation to the intake interviewer's notes that Mr. Boermeester "was the drunkest she has ever seen him" while omitting that he "was yelling and trying to be funny."

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[6] See, 1 AR 220, 1 AR 51-53, 2 AR 456; *Boermeester v. Carry* (2020) 49 Cal.App.5th 682, 709 (*Boermeester*) (dissent positing "a textbook case of domestic violence.")

(1 AR 184.) Mr. Boermeester had been drinking and was trying to be funny, but surveillance video shows him walking on his own, albeit with his bad knee. (1 AR 190.) When MB2 comes out with his trash, Mr. Boermeester quiets down immediately and walks inside. (*Id.*)

C. The Interaction on January 21, 2017

After picking up food from McDonald's, Ms. Katz and Mr. Boermeester arrived home about 1:00 a.m. Ms. Katz parked in her parking space in the alley behind her duplex[7] and the two were "playing around like we always do." (1 AR 179.) Mr. Boermeester was not angry and had no reason to be angry; he was yelling about winning the Rose Bowl and trying to be funny. (1 AR 8.) Mr. Boermeester can be seen limping with his knee brace, holding a white McDonald's bag of French fries in one hand. (1 AR 171.) Mr. Boermeester explained that he jokingly put his hand on Ms. Katz's neck as they were "laughing and messing around," but he was not rough with Ms. Katz, he did not choke Ms. Katz[8] or hit her head against a wall, and he and Ms. Katz were not arguing. (1 AR 172-173, 192.) This is supported by witness DH's[9] statement that he saw Mr. Boermeester's "hand [not hands] on her chest/neck" (1 AR 95) and is consistent with the security video. (1 AR 190.)

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[7] Ms. Katz shared one unit with other members of the women's tennis team and the other unit is occupied by several members of the men's tennis team. (1 AR 9.)

[8] Mr. Boermeester touched Ms. Katz with one hand and was holding the McDonald's bag in his other hand. (1 AR 179.)

[9] The University refers to witnesses by their initials in the Summary Administrative Review investigative report.

Ms. Katz and Mr. Boermeester agree to the sequence of events and agree that there was no violence, neither was angry, and that Ms. Katz suffered no harm. (1 AR 66-69, 192-214; 2 CT 401-403, 413-416; 3 CT 580-581, 612-615; 6 CT 1061-1073.) Ms. Katz attested, "No one was mad at all that night. We were laughing and messing around with each other. The Title IX office jumped to wrong and unsupported conclusions and now implies that [Mr. Boermeester]'s behavior must be because he was mad at something. That is not what happened. As was evidenced by my statements that night, the fact that we spent the entire weekend together, and my clear explanation of what transpired, I was never physically abused." (*Id.*) Ms. Katz had no bruising, no scrapes, nor any signs of physical harm anywhere on her body just two days after the incident. During her initial interview on January 23, 2017, Ms. Katz was "physically examined [by University personnel] … and there were no bruises or anything else anywhere on my body." (1 AR 194; 3 CT 580 ¶ 15.) USC does not mention the lack of physical evidence nor Ms. Means' examination of Ms. Katz.

D. The Security Video

Unbeknownst to Mr. Boermeester and Ms. Katz, their interaction had been recorded by a surveillance camera in the alley. (1 AR 190.) When USC finally showed them the three-minute and 53-second surveillance video, the video showed what Mr. Boermeester and Ms. Katz had described all along; how they could be seen in the alley talking, embracing, kissing, and playing with Ms. Katz's dog. (1 AR 74, 190, 203.)

USC's Title IX investigator's summary of the security video reflects an innocuous encounter. (1 AR 44-45.) Nowhere, even in the description written by USC's Title IX investigator is there any hitting, choking, punching, or other physical violence or physical harm. (AR 44-45.)

The Court of Appeal noted that "The surveillance video is not conclusive. The picture is grainy and there is no audio. The video camera is positioned approximately two buildings away from Roe and Boermeester. They are small figures in the frame of the video. Additionally, there is a light on the left side of the frame, which renders the interaction between Boermeester and Roe when they are near the wall barely visible." (*Boermeester*, *supra*, 49 Cal.App.5th at p. 707.)

E. What DH and MB2 Actually Said They Saw and Heard.

USC states that two fellow students saw the January 21 incident. (Opening Brief, p. 26-28; 1 AR 85, 95.) But what USC describes as the "incident" is not what the two fellow students said that they saw and heard. (Opening Brief, p. 16.)

1. Witness DH

DH came back from dinner and around 1:00 to 2:00 a.m. he was half asleep. (1 AR 95.) He heard a male yelling loudly and then he heard a female talking so he went to check by looking out his window. (*Id.*) DH saw Mr. Boermeester and Ms. Katz at the wall for "about three seconds." (*Id.*) Mr Boermeester had her "pinned against the wall with his hand on her chest/neck" and "Ms. Katz was trying to talk to him." (*Id.*) DH could not see Ms.

Katz's face and could not make out what they were saying. (*Id.*) Ms. Katz's dog was running around. (*Id.*) DH did not see or hear any contact of Ms. Katz hitting the wall. (*Id.*)

DH then told his roommate TS, "[Ms. Katz] and [Mr. Boermeester] are fighting." (*Id.*) The interviewer notes report that when DH and TS spoke to Ms. Katz, she said, "[I]t's fine," but DH and TS told her "it was not ok." (*Id.*) DH said she "seemed pretty scared" but that she wasn't "bawling and freaking out" as DH had expected. (*Id.*) DH and TS both said that Ms. Katz never expressed fear of Mr. Boermeester.[10] (1 AR 96, 127.)

TS did not see or hear any of the interaction in the alley. (1 AR 125.)

2. Witness MB2

MB2 was inside his apartment in a different building when he heard an argument and went down to see what was happening and to take out his trash. (1 AR 131.) MB2 vaguely knew the woman as his neighbor but had "never met the guy." (*Id.*) MB2 could not tell what they were arguing about but there was a dog there and it seemed like they were arguing over the dog. (*Id.*) There was no screaming and MB2 did not see anyone touch the other; they were just talking. (*Id.*) MB2 thinks he said hello and gave a wave and the two left after that. (*Id.*) The security video

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[10] In a declaration filed in the trial court, Ms. Katz testified, "DH and TS did not bring me back to their apartment I voluntarily went into their apartment while I was on my way to my apartment because they are my friends and I wanted to say, "Hi." I was not scared, worried, distressed, crying, or fearful of Matt Boermeester." (CT 1070 ¶ 14.)

is consistent with the information that MB2 provided over the phone on February 3, 2017. (1 AR 190.)

Over a month later, MB2 left a voicemail for the USC Title IX investigator stating that "the truth is that I saw everything" and that now MB2 wanted to share the truth and say why he had lied to the investigator.[11] (1 AR 85.) The investigator's notes of MB2's second telephone interview reflect that MB2 heard "laughing and screaming" sounds from the alley, which were playful at first. (*Id.*) MB2 then saw a guy standing around Ms. Katz with both of his hands around her neck, pushing Ms. Katz against the wall and MB2 heard Ms. Katz make "gagging" sounds. (*Id.*) "I could see in her eyes, she was very scared," according to MB2. (*Id.*) MB2 then went downstairs with his trash bag and asked how things were going which "broke it up." (*Id.*) Ms. Katz and Mr. Boermeester then walked back into her house.

The investigator's notes are silent about MB2's vantage point, whether MB2's apartment has window overlooking the alley, and how MB2 could see what he later claimed, and how he "could see in her eyes." (1 AR 85.) In his first telephone interview MB2 did not see anyone until he had left his apartment and gone downstairs. (1 AR 131.) In his second telephone interview MB2 witnesses the interaction before he went "downstairs with his trash bag and asked how things were going." MB2 only vaguely knew "the woman" as his neighbor but

[11] MB2 said that he had also lied to Mr. Boermeester's attorney.

said in his second telephone interview that he lied to the investigator and an attorney "out of respect to her." MB2 had never seen Mr. Boermeester before but opined "This guy is violent, he domestically was abusing her" and that he has "a history of violence." (1 AR 131.)[12]

F. The USC Title IX Investigation Begins

On January 21, 2017, at 9:21 p.m., Peter Smith emailed USC's Title IX Coordinator Gretchen Dahlinger Means that TS reported that "Zoe Katz said that her boyfriend was beating her up and throwing her against the wall and choking her." (2 AR 477.) TS, who had not seen or heard any part of the interaction in the alley and admittedly "never liked" Mr. Boermeester (1 AR 124-126), also told Dr. Nohelani Lawrence about the incident. (1CT 456; 3 CT 579 ¶ 10.) Dr. Lawrence called Ms. Katz to ask if she was alright. (*Id.*) Ms. Katz "told her the truth, that I was fine and that I did not need anything." (*Id.*) Ms. Katz did not know how Dr. Lawrence knew about her making noise in the alley, but Ms. Katz did not think the call was significant and that whatever Dr. Lawrence wanted seemed to be resolved. (*Id.*)

On January 22, 2017, Title IX Coordinator Means spoke with Peter Smith, TS, and DH in undocumented telephone calls. (1 AR 3.) Ms. Means also contacted Dr. Robin Scholefield, Associate Director of Sports Psychology at USC, and Richard Gallien, Coach for USC's Women's Tennis Team. (1 AR 1.)

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[12] Mr. Boermeester and Ms. Katz were not allowed to question MB2 about his revised account. (1 AR 6, 48; 2 AR 315-316.) The Title IX Office determined that MB2 was untruthful in his initial interview but truthful in his second interview. (1 AR 52.)

On January 23, 2017, women's tennis coach Richard Gallien insisted that Ms. Katz must attend a mandatory meeting with the USC Title IX Office. (2 CT 579.)

At the time Zoe Katz met with Title IX Coordinator Means, Title IX Investigator Lauren Helsper, and Dr. Lawrence, her USC-assigned advisor for the meeting, the USC Title IX officials believed that in the early morning of January 21, 2017 Mr. Boermeester had been angry and had choked Ms. Katz and repeatedly hit her head against a wall and that she was in an abusive relationship.[13] (2 AR 477.)

While what occurred during Title IX Office meeting on January 23, 2017 is disputed, it is undisputed that Ms. Katz never made a misconduct report against Mr. Boermeester. (1 AR 189; 3 CT 578 ¶ 3.)

From the outset of the investigation, the USC Title IX investigation was focused on establishing their narrative, and any denial or protestation by Zoe Katz was considered confirmation that she was a "classic", "textbook" victim of domestic abuse.

USC's efforts to establish the abusive relationship narrative began with Ms. Katz.

1. USC Title IX Interactions with Zoe Katz

On January 23, 2017, Coach Gallien told Ms. Katz that it was mandatory for her to attend a meeting with the Title IX

[13] The Title IX officials were all the decision makers against Mr. Boermeester. (2 AR 487.)

Office. (3 CT 579 ¶ 11.) Title IX Coordinator Means, Title IX Investigator Helsper, and counsellor Dr. Lawrence were present. (*Id.*, ¶ 12.) Ms. Means said she had heard about an incident reported by Ms. Katz's neighbor, and that Ms. Means, Ms. Helsper, and Dr. Lawrence wanted to inquire if Ms. Katz needed any counseling or support. (3 CT 580 ¶ 13.) No one told Ms. Katz what Peter Smith had reported to Ms. Means, nor that USC considered the meeting an "intake" interview for a report of prohibited conduct to bring an action against Mr. Boermeester. (*Id.*; 1 AR 183.) As Ms. Katz explained, "I didn't understand the purpose of the meeting or why I was there. Based on things they said and did, I believed that our discussion was like a counseling session where I was free to vent about my relationship or blow off steam." (1 AR 67.)

a. Ms. Katz Objects to USC Title IX's Misrepresentations and Mischaracterizations

Ms. Katz was never asked to confirm the accuracy of the non-verbatim, summarized notes taken by Title IX Investigator Helsper during her meeting and was disgusted to learn what USC's Title IX Office was claiming she had said during the private, unrecorded meeting:

> I was never shown any writings about statements that I had supposedly made during the January 23, 2017 meeting and I was shocked and disgusted with what was written. I don't know how I can state any more clearly what I have already said publicly: "I saw that statements of witnesses, including my own statements to Gretchen Dahlinger Means and

> Laruen Elan Helsper [sic], were misrepresented, misquoted and taken out of context in order to support Ms. Means' and Ms. Helsper's own personal opinions about what they think happened."
> (3 CT 581 ¶ 22.)

USC Title IX claims that Ms. Katz said Mr. Boermeester grabbed her by the neck and pushed her against a concrete wall, causing her to hit her head, that he "hits her," and that "[s]he often has bruises on her legs or arms because 'he is always doing something.'" (1 AR 184.) Ms. Katz vigorously disputed the misinformation reflected in the investigator's notes:

> I never told the Investigator that Respondent hit my head against a wall. He did not. I stated several times throughout the course of this investigation that Respondent and I were mutually rough housing and messing around. (Findings, p. 51). That is the truth. I also have never told the Title IX office that he hurts me when he is mad.
> (1 AR 192.)

b. No Request for Avoidance of Contact

USC claims that Ms. Katz requested an Avoidance of Contact directive. (1 AR 1.) Ms. Katz refuted this: "I did not ask for a no contact order from Matthew Boermeester and I told the Title IX personnel that I did not want a no contact order. During the meeting, Ms. Means said that some panel would meet and decide later whether there would be a no contact order, which USC later issued on its own." (3 CT 580 ¶ 18.) Ms. Katz did not understand the Title IX process and felt "pushed" into accepting

other protective measures by the "extremely aggressive" Title IX Office. (1 AR 168, 193.) For instance, Ms. Katz accepted "emergency housing" at the Radisson Hotel because Title IX Coordinator Means insisted that she accept it and advised her that it would be paid for by USC and that Ms. Katz "could call friends, have a slumber party, take a break, or just relax."[14] (3 CT 581 ¶ 19.) Ms. Katz repeatedly expressed to the Title IX Office that she did not want an investigation against Mr. Boermeester or an Avoidance of Contact order. (3 CT 580 ¶ 17; 6 CT 1070 ¶ 17.) Over Ms. Katz's protests, Title IX Coordinator Means "explained that we have to investigate[15] what happened on Friday even without her because of the witnesses and the neighbor." (1 AR 188; see also 1 AR 1.)

c. No Fear of Retaliation; No Recantation

USC claims that on January 24, 2017, Ms. Katz contacted the Title IX Coordinator and Investigator and asked to "withdraw her statement in fear of retaliation." (1 AR 3.) Importantly,

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[14] Ms. Katz left the Radisson after one night when she learned that she was not obligated to stay. (3 CT 581 ¶ 19.)

[15] This statement is not supported by USC Policy, which provides "individuals have the opportunity to decide whether or not they want to pursue a formal Title IX investigation. … Under most circumstances, the Title IX Office can honor the request of the Reporting Party. In limited circumstances, the Title IX Office may be required to investigate an incident of sexual misconduct against the choice of the Reporting Party; for example, when an incident involves a weapon or predatory drug use, when multiple victims are involved or when there is a danger to the greater community." (2 AR 482.) None of those "limited circumstances" existed in this matter.

there are no notes or records of this telephone conversation, other than in the timeline and summary that appears in the Investigator's SAR issued at the conclusion of the Title IX process. (1 AR 3, 12.) Because there are no notes or records of this phone conversation, Ms. Katz and Mr. Boermeester had no opportunity to dispute the "evidence" that Ms. Katz supposedly "recanted" her statement in fear of retaliation prior to USC's investigator determining that she had.

Ms. Katz clarified in her appeal, "[T]he Investigator's statements from me on January 24, 2017 are simply wrong. The report states that I wanted to withdraw my statement in fear of retaliation. (Summary of Administrative Report, p. 3). This is incorrect. I was not and never have been scared of retaliation from [Mr. Boermeester]." (1 AR 192.) USC has claimed that text messages evidence a recantation (1 AR 154), but Ms. Katz explained, "In text messages, I asked Lauren Elan Helsper not to blame the Title IX Office's decision to pursue an investigation on me. I wanted nothing to do with Title IX and I eventually had to get my own attorney, Ms. Shawn Holley, to protect me from the Title IX office and to enforce my rights." (6 CT 1071-1072 ¶ 29.)

When Ms. Katz asked for the Avoidance of Contact order to be lifted, investigator Helsper accused Ms. Katz "of engaging in witness tampering, malicious dissuasion, and retaliation," which the investigator threatened, "may ultimately affect her credibility." (1 AR 14, 168-169.)

On January 30, 2017, Ms. Katz requested a meeting with investigator Helsper to express that she felt "blindsided" and had

been "bullied" and "manipulated" at the initial meeting. (1 AR 4, 168-169.) Investigator Helsper told Ms. Katz about the security video from the alley. (1 AR 169.) Ms. Katz offered to provide commentary on the video footage as her official statement, but investigator Helsper responded that reviewing the footage during the investigation "would be a 'privilege' as it is usually not seen until Ev[idence] Review." (*Id.*) Investigator Helsper also patronized and infantilized Ms. Katz, saying that Ms. Katz was probably "too emotionally sensitive and overwhelmed" to watch the video footage. (6 CT 1072 ¶ 32.)

At another meeting not documented by the Title IX Office, Ms. Katz insisted and appeared eager to watch the video footage. (6 CT 1072 ¶ 32.) In response, Title IX Coordinator Means made an excuse as to why Ms. Katz could not watch the video, accused Ms. Katz of harassing witnesses, and threatened to open an investigation on Ms. Katz. (5 CT 1000; 6 CT 1072 ¶ 32.) USC refused to allow Ms. Katz and Mr. Boermeester to see the security video during the Title IX investigation, yet both students continued to maintain that the security video would show them horsing around in the alley.

On February 8, 2017, Ms. Katz publicly tweeted "The report is false." (1 AR 56.) Ms. Katz was then summoned to a meeting by the Title IX Office and interrogated about her motives for discussing the investigation on social media. (1 AR 14, 102-103.) Ms. Katz explained "I felt powerless throughout this whole thing. I was pissed that this was happening and that this was out of my control. So, I wanted to be able to say something coming

from me." (1 AR 102.) When asked whether she had been in contact with Mr. Boermeester since the issuance of the Avoidance of Contact order, Ms. Katz stated, "I am not in danger or feel threatened by him at all." (*Id.*) Ms. Katz asked for the Avoidance of Contact order to be lifted because "he is like my best friend, so it is like you are taking that away too." (1 AR 13.)

Investigator Helsper said that the avoidance of contact directive would not be lifted. (1 AR 103.) USC effectively barred Ms. Katz, an adult woman who was (and is) perfectly capable of making her own choices and acting in her own best interest, from seeing Mr. Boermeester — even off campus and outside Los Angeles. After the meeting, Title IX Investigator Helsper accused Ms. Katz of recording their conversation or having someone "listening in." (2 AR 422.)

Expressing that it was only the University that was victimizing her, Ms. Katz stated, "it is insulting that the University believes that I am some sort of 'victim' who would tolerate being abused by Matt or by anyone." (1 AR 68.) Reiterating her position that the University process was biased and unjust, Ms. Katz stated, "**I would not tolerate [abuse]. … MATT DID NOTHING TO HURT ME NOR DID HE HURT ME OR TRY TO HURT ME.**" (1 AR 68, emphasis in original.) Ms. Katz continued:

> [M]y voice is not being heard.
>
> If anyone has been abusive to me or disrespectful of me, it has been the University, not Matt. I feel that I have been mistreated, misled, manipulated, and lied to by the

> University. It is the University and not Matt which has hurt me and caused me unbelievable pain and distress.
> (1 AR 69.)

2. USC Title IX Interactions With Mr. Boermeester

a. Mr. Boermeester Is Summarily Suspended then Charged

On January 25, 2017, Mr. Boermeester was summarily suspended indefinitely without prior notice or a fair hearing and was told that he was not allowed to have any contact whatsoever with Ms. Katz. (2 AR 472-473.)

On January 26, 2017, Title IX Coordinator Gretchen Dahlinger Means notified Mr. Boermeester that a Title IX investigation was underway into an allegation of Intimate Partner Violence. (2 AR 470.)

On January 30, 2017, Mr. Boermeester and his mother, an attorney, met with investigator Helsper. (1 AR 171.) Mr. Boermeester agreed that he had placed his hand on Ms. Katz's neck but explained that he and Ms. Katz were "'horsing around.' There was zero animosity." (1 AR 179-181.) Mr. Boermeester expressed, "There was no chance of me causing physical harm. If I did Zoe would be going against me and not with me." (*Id.*) Mr. Boermeester also reported that he and Ms. Katz had spent the next three nights together after January 21, 2017. (1 AR 172.) Mr. Boermeester suggested two witnesses to be interviewed, BE and LE. (1 AR 177.) Despite interviewing over a dozen other witnesses who had no relationship to or knowledge of the

interaction in the alley, the Title IX Office refused to interview the witnesses suggested by Mr. Boermeester. (1 AR 3-7.)

Mr. Boermeester requested that the indefinite suspension be modified or lifted so he could complete his degree and continue physical therapy for his injured and swollen knee. (2 AR 443-444; 2 CT 401 ¶¶ 6-7.) The indefinite suspension was derailing Mr. Boermeester's plans to pursue a master's degree and continuing to play football at USC in hopes of pursuing a professional NFL career. (2 CT 401 ¶¶ 6-7.) His appeal of the indefinite suspension was denied by Ainsley Carry without a hearing and without any showing that Mr. Boermeester posed a risk to the campus community. (2 AR 442.)

b. USC Issues Avoidance of Contact Charges

Within days of Ms. Katz' February 8, 2017 public tweet and her meeting with the Title IX Office, investigator Helsper notified Mr. Boermeester that the Title IX Office was adding a second violation for "contacting and communicating with Zoe Katz via text, phone call, social media, and in-person since the issuance of the Avoidance of Contact Order." (1 AR 5; 2 AR 414.) Mr. Boermeester insisted that he had complied with the Avoidance of Contact order by not initiating contact with Ms. Katz, as he was living in San Diego and had not returned to USC or Los Angeles since the imposition of the suspension. (1 AR 17, 89.)

3. 16 Other Witnesses Interviewed

USC Title IX Office's efforts to establish the narrative of an ongoing abusive relationship is also seen in the extent of the Title

IX Office's investigation. Although DH and MB2 were the only percipient witnesses to any part of the interaction in the alley, other than Mr. Boermeester and Ms. Katz, Title IX investigator Helsper, at times accompanied by Title IX Coordinator Means, interviewed and re-interviewed sixteen witnesses, including Mr. Boermeester's ex-girlfriend who had no connection or insight into the incident that occurred on January 21, 2017 and was not a USC student. (1 AR 2-4.) Some interviews were conducted in person, though many took place only by telephone.[16] (See 1 AR 87 (AB), 92 (SS), 115 (CR), 85 and 131 (MB2) 136 (Richard Gallien), 139 (Peter Smith).) None of the interviews were audio recorded, and there is no record of the actual questions asked or the verbatim responses of the witness. None of the witnesses were permitted to see the Title IX Investigator's summaries of their interview for accuracy. Without a live hearing, there was no way to confirm the accuracy of the interview notes.

Many of the witnesses interviewed were influenced by the gossip, media reports, and the public nature of Mr. Boermeester's removal from USC's campus and the USC football team. (See 1 AR 85-164.) As summarized by one witness, "He wouldn't get suspended over nothing, so they know something happened[.]" (1 AR 27.)

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[16] Not only was this contrary to USC's Policy, which "requires the Investigator to personally see and hear all parties and witnesses to the investigation, putting him/her in the best position to make determinations as to credibility and relevance" (1 AR 219), but conducting interviews by phone precludes accurate identification of witnesses and evaluation of credibility.

G. USC Title IX Adjudication Process

As of January 2017, USC's Title IX policy did not provide for a formal evidentiary hearing or cross-examination. (2 AR 492-493.) The Title IX Coordinator Gretchen Dahlinger Means oversees all reports and investigations and Title IX investigator Helsper, in consultation with Title IX Coordinator Means, conducts the investigation, makes all relevancy and credibility determinations, and makes all findings of fact, in the absence of a live, in-person evidentiary hearing. (2 AR 488; 2 AR 492-493, section X; 4 CT 717 ¶ 80.)

At the conclusion of the initial Title IX investigation, the parties may participate in "Evidence Review." (2 AR 492.) The parties may view the investigator's summaries of witness interviews and other evidence collected but do not receive copies. (*Id*.) Following "Evidence Review", the policy calls for an "Evidence Hearing" where the parties each meet individually and separately with the Title IX Coordinator and Title IX investigator to respond orally or by written submission to the evidence they are permitted to view during "Evidence Review." (2 AR 493.) Following the "Evidence Hearing," the Title IX Coordinator and the Title IX Investigator then determine whether the student violated the policy based on the investigator's factual findings.[17] (2 AR 493.) The Title IX Investigator, in consultation with the Title IX Coordinator, prepares a Summary Administrative

[17] The Title IX Coordinator also sits in on the meeting of the Misconduct Sanctioning Panel. (2 AR 493.)

Review ("SAR"), "a report that analyzes the information collected and makes findings of fact and policy violation." (*Id.*)

1. Both Parties Participate In "Evidence Review"

On March 8 and 10, 2017, Mr. Boermeester and Ms. Katz participated in "Evidence Review," where they separately viewed the information gathered or prepared by the Title IX investigator, totaling over 100 pages of documentary evidence, plus video footage and an audio recording. (1 AR 47, 84-191; 2 AR 357-358.) Mr. Boermeester and Ms. Katz were permitted to take only "a pencil/pen and notepad" into the room as they reviewed the evidence. (2 AR 365, 367.)

On March 22, 2017, Mr. Boermeester and Ms. Katz each submitted written responses to the evidence. (1 AR 3, 59-69.) Mr. Boermeester denied the university's allegations against him and highlighted flaws in the investigation. (1 AR 59-66.) Ms. Katz reiterated what she had maintained all along:

> "**First, I want to make clear that Matt Boermeester has NEVER hit, choked, kicked, pushed or otherwise physically abused me and he did not do so on January 21, 2017.**"
>
> (1 AR 67-68, emphasis in original.)

2. No Cross-Examination Allowed for Any Witnesses

On March 22, 2017, Mr. Boermeester's advisor/attorney inquired about the format for submitting questions for the other party. (1 AR 295.) Investigator Helsper responded, "You send me the questions and we will ask them of [Ms. Katz]. You will get

the answers to all of her questions in the SAR (my report)." (1 AR 294.)

Mr. Boermeester's advisor/attorney, recognizing that Ms. Katz "has multiple statements where she has made clear that she is not comfortable with the way her statement has been reported," requested to have a "direct response from [Ms. Katz] without any Title IX filter" by having his questions "sent to [Ms. Katz] and her advisor," to permit Ms. Katz "to review them, write an answer and send them back to you to send to us[.]" (1 AR 293-294.) Title IX Coordinator Means responded, "The process does not afford that." (1 AR 293.)

All that the "process" afforded was for Title IX Coordinator Means to question Ms. Katz again in private with no assurance that Mr. Boermeester's questions would even be asked, or how they would be asked, and no way for Mr. Boermeester to know if Title IX Coordinator Means had accurately reported Ms. Katz's answers. (2 AR 493, section IX.A.4.)

Mr. Boermeester did not refuse to submit questions to Ms. Katz; he refused to submit questions to USC's Title IX Investigator and Title IX Coordinator to ask Ms. Katz in private with no record, given that Ms. Katz had "made clear that she [wa]s not comfortable with the way her statement ha[d] been reported." (1 AR 293-294.) The exact words of the exchanges appear in the record at 1 AR 291-294. Mr. Boermeester's advisor noted his concern that, "The failure to record or transcribe any of the interviews and the admission by at least one witness that he

lied during his initial interview have shaken our confidence in the accuracy of this investigation." (1 AR 293.)

3. USC Title IX Office Issues the SAR

On April 27, 2017, Title IX Investigator Helsper and Title IX Coordinator Means issued the SAR, finding Mr. Boermeester "responsible for the charged violations." (1 AR 1-80, 257-258.) Investigator Helsper and Title IX Coordinator Means also found that Mr. Boermeester "violated the AOC on multiple occasions" by communicating with Ms. Katz by cell phone, regardless of whether Ms. Katz had initiated the communications. (1 AR 53-54.) In the SAR, USC raised for the first time that Zoe Katz had recanted. (1 AR 10 n. 15; 1 AR 51, 53.)

4. USC's Sanctioning Panel Orders Expulsion

On May 2, 2017, USC's anonymous Misconduct Sanctioning Panel convened in closed session and decided that expulsion was the appropriate sanction. (1 AR 249, 254.) The Misconduct Sanctioning Panel is trained and overseen by Title IX Coordinator Means, and Ms. Means is present during their deliberations. (2 AR 493, section XI.B)

5. USC's Appeal Panel Denies Both Appeals but Recommends Suspension, Not Expulsion

Mr. Boermeester and Ms. Katz each appealed the findings and decisions, urging the Appeal Panel to hold that no Policy violations had occurred. (1 AR 192-214.) Ms. Katz expounded in her appeal, "Throughout this process, my voice has not been heard. I ask that, now, during this appeal, the appellate panel

hears my voice. I request that you overturn Respondent's expulsion and fully reinstate him." (1 AR 195-196.)

Mr. Boermeester and Ms. Katz each submitted a written response to the other's appeal, expressing support and agreeing that the findings and sanctions against Mr. Boermeester should be overturned.[18] (1 AR 209-214.) Ms. Katz commented, "Instead of accepting me at my word, the Investigators repeatedly belittle me in their Report and make me sound like a fragile woman who can't think for herself or make decisions on her own." (1 AR 213.) Ms. Katz called for a new investigation to be performed by a neutral investigator so that the truth could prevail. (1 AR 214.) The Appeal Panel found that the SAR conclusions were supported by substantial evidence. (1 AR 217.) Regarding Ms. Katz's attestations that she was not a domestic abuse victim, the Appeal Panel reiterated investigator Helsper's demeaning finding that recantation is an "expected, normative behavior for the type of relationship initially described by the Reporting Party to Title IX." (1 AR 220.) The Appeal Panel, however, determined that expulsion was "grossly disproportionate to the violations found," and recommended a two-year suspension and a 52-week domestic violence batterers program in lieu of expulsion. (1 AR 218.)

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[18] According to one education consultant, "Students disciplined under Title IX face greater challenges in continuing their educations than any other group of students I have served. This includes students who have served jail time for felonies and those who have admitted to unprosecuted felonious actions, such as drug trafficking." (3 CT 601 ¶ 23.)

6. Dr. Ainsley Carry Orders Expulsion

On July 7, 2017, Dr. Ainsley Carry, who had summarily denied Mr. Boermeester's appeal of his indefinite suspension five months previously, approved the findings and conclusions reached by Title IX Investigator Helsper and Title IX Coordinator Means. Dr. Carry also rejected the Appeal Panel recommendation of suspension and ordered Mr. Boermeester expelled. (1 AR 221-222.)

Despite no evidence of any physical harm to Ms. Katz, and her strenuous denials, Dr. Carry reasoned that Mr. Boermeester's lack of intent in causing Ms. Katz physical harm was not a mitigating factor, and expulsion was the appropriate sanction "given the nature of the harm inflicted upon the Reporting Party[.]" (1 AR 221.)

On July 30, 2018, Ms. Katz released a public statement about USC's unjust Title IX proceedings. (1 CT 415-416.)

7. No Impartial Deciders[19]

USC claims to be "committed to the timely and fair resolution of disciplinary problems in an adjudicatory process" (1

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[19] An impartial decider is a core protection even under fair procedure. (*Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, 389.) "Moreover, [f]airness requires a practical method of testing impartiality. (*Hackethal v. California Medical Assn., supra,* 138 Cal.App.3d 435, 444.)" (*Rosenblit v. Superior Court* (l991) 231 Cal.App.3d 1434, 1448.) USC provides no information regarding the training and qualifications of its investigators, nor of their neutrality and impartiality. (1 CT 27-28.) In another trial court case, Gretchen Dahlinger Means referred to the

AR 50) and that both parties are entitled to "A fair, thorough, reliable, neutral and impartial investigation by a trained and experienced investigator." (2 AR 454.) But the record shows that before ever speaking with Zoe Katz on January 23, 2017, all of the USC Title IX deciders believed that Mr. Boermeester had been angry, had choked Ms. Katz, had repeatedly pushed her head into a cinder block wall, that Ms. Katz was a victim of domestic violence, and that Mr. Boermeester posed a substantial threat to the safety and well-being of Ms. Katz and/or the greater USC campus community. (2 AR 477.)

After Ms. Katz refused to participate in a Title IX investigation against Mr. Boermeester, the USC Title IX Office initiated an investigation against her express wishes, contrary to USC's Title IX policy. (1 AR 1, 188; 2 AR 482.)

On January 25, 2017, USC Title IX Office summarily suspended Mr. Boermeester indefinitely from campus and football, without notice or hearing. (2 AR 472; 1 AR 16.)

On January 26, 2017, the USC Title IX Office brought charges against Mr. Boermeester for Intimate Partner Violence.

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accused male student and his advisor as "motherfuckers" while describing the female complainant as "cute" "intelligent" and "a catch." (5 CT 876, n. 4; 5 CT 901-902.) The trial court in that case found such statements to "amply demonstrate an unacceptable probability of actual bias" against the accused student. (5 CT 893-906.) A pending lawsuit against USC filed by a former employee/attorney supervised by Gretchen Dahlinger Means alleges that USC's investigatory practices include routine predetermination of outcomes and spoliation of evidence. (*Doe v. University of Southern California*, Central District, Western Division, Case No. 2:20-cv-06098.)

(2 AR 470.) The next day the USC Title IX Office obtained and reviewed the security video from the alley, which was inconclusive at best and contradicted USC's theory at worst. (1 AR 74; 2 AR 469.)

On January 30, 2017, investigator Helsper told Ms. Katz about the video but said, "I don't have access to view it this point." (1 AR 169.) Investigator Helsper also met with Mr. Boermeester that same day but did not tell him about the video.[20] (1 AR 171-178.)

Although a review of the security video by either Ms. Katz or Mr. Boermeester might have ended Title IX investigation at that point, USC had already charged Mr. Boermeester and removed him from campus very publicly.

On January 31, 2017, Dr. Ainsley Carry summarily denied Mr. Boermeester's appeal of the indefinite suspension. (1 AR 75; 2 AR 442.)

USC's Title IX Office spent the next three months digging into the private lives of Mr. Boermeester and Ms. Katz to support the abusive relationship narrative that USC's deciders firmly believed at the outset.

Matthew Boermeester never had a chance.

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[20] USC withheld the video for another two and half months, however, neither Ms. Katz nor Mr. Boermeester changed their claims about horsing around in the alley, believing that the video would confirm what they had been saying. (1 AR 54.)

LEGAL ANALYSIS

I. THE COMMON LAW RIGHT TO FAIR PROCEDURE REQUIRES A PRIVATE UNIVERSITY TO AFFORD STUDENTS FACING SEVERE DISCIPLINARY SANCTIONS WITH THE OPPORTUNITY TO UTILIZE CERTAIN PROCEDURAL PROCESSES, SUCH AS CROSS-EXAMINATION OF WITNESSES AT A LIVE HEARING.

A. Summary of Current Law

1. Federal Title IX

At the federal level the issue of sexual misconduct on college and university campuses is primarily addressed by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. From Title IX's enactment in 1972 until 1997, the Department of Education (Department) never asserted jurisdiction over student-on-student sexual violence. In March 1997, however, the Department issued regulations that required schools to have policies and procedures in place to deal with such conduct.[21] In January 2001, the Department issued additional guidance[22] for schools to address sexual misconduct, provide Due Process, and alleviate any hostile environment on campus. In 2011, the Department's Office for Civil Rights (OCR) issued a

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[21] "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." (62 Fed. Reg. 12034.)

[22] OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX (2001) at 36 n.98 (66 Fed. Reg. 5512 (January 19, 2001)

"Dear Colleague Letter"[23] (now rescinded), which advised that Title IX incorporated and adopted the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. (See 34 C.F.R. § 106.71.) The Title IX regulations, therefore, required that university and college sexual misconduct decisions must be "supported by and in accordance with the reliable, probative and substantial evidence." (See 5 U.S.C. § 556(d).) 5 U.S.C. § 556(d) also provides in relevant part:

> . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . .

On August 14, 2020, the Department of Education amended the regulations implementing Title IX ("Regulations") to specify how recipients of Federal financial assistance covered by Title IX, like USC, must respond to allegations of sexual harassment and misconduct consistent with Title IX's prohibition against sex discrimination. (34 C.F.R. § 106.)

The Regulations require every college and university that receives federal funds to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sexual harassment,[24] which encompasses sexual assault, dating violence, domestic violence,

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[23] Ali, Russlyn. *Dear Colleague Letter*. April 4, 2011. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

[24] 34 C.F.R. § 106.8 (c).

and stalking.[25] "A recipient [of federal funding] with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."[26] The fundamental principle of such a system is that it be "prompt and equitable."[27]

Among other things, the 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";[28] (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;[29] 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."[30]

In supporting the Regulations, the American Civil Liberties Union ("ACLU"), stated that a fair process requires "the right to a

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[25] 34 C.F.R. § 106.30 (a).
[26] 34 C.F.R. § 106.44 (a).
[27] 34 C.F.R. § 106.8 (b).
[28] 34 C.F.R. § 106.45 (b)(6).
[29] 34 C.F.R. § 106.45(b)(7)(i).
[30] 34 C.F.R. § 106.45(b)(5)(vi).

live hearing and an opportunity for cross-examination in the university setting."[31]

2. Code Civ. Proc., § 1094.5

California's procedural and substantive standards for administrative agency proceedings, including student discipline, begin with Code Civ. Proc., § 1094.5 subdivisions (b) and (c), which require that (1) there be "a fair trial," which "means that there must have been 'a fair administrative hearing'"; (2) the proceeding be conducted "in the manner required by law"; (3) the decision be "supported by the findings"; and (4) the findings be "supported by the weight of the evidence," or where an administrative action does not affect vested fundamental rights, the findings must be "supported by substantial evidence in the light of the whole record."[32]

The remedy of administrative mandamus is not limited to public agencies; rather it applies to private organizations that provide for a formal evidentiary hearing. (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722–1723 (*Pomona College*) (§ 1094.5 applicable to private universities).) Moreover, failure to exhaust administrative remedies is a proper basis for

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[31] Cole, David. *ACLU Comments in Response to Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," RIN 1870-AA14*. January 30, 2019. https://www.aclu.org/sites/default/files/field_document/2019_1_30_title_ix_comments_final.pdf

[32] The Court may refrain from evaluating the sufficiency of evidence if there are errors in the administrative process. (*Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 61.)

demurrer. (*Id.* at pp. 1730–1731; *Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411 (*Gupta*) (Code Civ. Proc., § 1094.5 applied to student who was subject to university disciplinary proceedings); *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802.)

The doctrine of exhaustion of judicial remedies precludes any civil action by an aggrieved student unless the student first challenges the Title IX administrative decision through a petition for writ of mandamus. (*Gupta*, *supra*, 124 Cal.App.4th at p. 411; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

3. California Student Discipline Cases

The "fair hearing" requirements of Code Civ. Proc. § 1094.5 subd. (b) can only be satisfied through adherence to principles of procedural due process, which apply directly to public colleges and universities through the Fourteenth Amendment, and to private colleges and universities by analogy.[33] (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221 (*USC1*).) Of course, "[s]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved." (*Id.* at p. 244, quoting *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) While California law does not require any specific form of disciplinary hearing, a

[33] USC objects that the "distinction between fair procedure and due process rights" is like arguing the distinction between sushi and lasagna (Opening Brief, p. 35), but in the narrow context of Title IX sexual misconduct cases at *public versus private universities*, the distinction is more like arguing the difference between Chicago-style pizza and deep-dish pizza.

university is bound by its own policies and procedures. (*Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1271-72.)

The Fourth Appellate District recently summarized the consensus of the recent Title IX sexual misconduct cases to require that a student facing suspension or expulsion for nonconsensual sexual activity has the right to notice of the charges; the school must follow its own policies and procedures; the accused student must have access to the evidence; there must be an in-person hearing, including testimony from the parties and witnesses; and because most cases turn on credibility (he-said, she-said), the adjudicator or adjudicators must be able to see the parties' testimony and the testimony of important witnesses so their demeanor may be observed, and the accused student must have an opportunity for cross-examination. (*Knight v. South Orange Community College Dist.* (Feb. 10, 2021, No. G058644) ___Cal.App.5th___ [2021 Cal. App. LEXIS 120], at *18-19, citing *Goss v. Lopez* (1975) 419 U.S. 565, 583-84 (*Goss*); see also *Boermeester, supra,* 49 Cal.App.5th at pp. 698-699, citing *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1061 (*Allee*), *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1232, fn. 25, *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 56; *Pomona College, supra,* 45 Cal.App.4th at pp. 1729–1730; *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1104, *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637 (*Westmont College*), *Doe v. Occidental*

College (2019) 40 Cal.App.5th 208, 224; *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1271-72.

California courts have also described the value of higher education as "an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training." (*Goldberg v. Regents of University of Cal.* (1967) 248 Cal.App.2d 867, 876.) "Expulsion denies the student the benefits of education at his chosen school. Expulsion also damages the student's academic and professional reputation, even more so when the charges against him are serious enough to constitute criminal behavior. Expulsion is likely to affect the student's ability to enroll at other institutions of higher education and to pursue a career." (*Furey v. Temple Univ.* (E.D. Pa. 2012) 884 F.Supp.2d 223, 245-48.) The consequences of university sanctions in Title IX matters, recognized that the "stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings." *(Doe v. Brandeis Univ. (D.Mass. 2016)* 177 F. Supp. 3d 561, 602.) "Suspension 'clearly implicates' a protected property interest, and allegations of sexual assault may 'impugn [a student's] reputation and integrity, thus implicating a protected liberty interest." (*Doe v. Univ. of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 399.) Moreover,

> Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. *Miami Univ.*, 882 F.3d at 600. The student may be forced to withdraw from his classes and move out of

> his university housing. *Id*. His personal relationships might suffer. See *id*. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled. *Id*.
>
> (*Doe v. Baum* (6th Cir. 2018) 903 F.3d 575, 582 (*Baum*).)

"Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion." (*Brandeis*, *supra*, 177 F.Supp.3d at p. 573.)

The United States Supreme Court has also distinguished the risk of error and value of procedural safeguards when a school makes academic decisions from the risk and value when it makes decisions about disciplining a student for misconduct. The Supreme Court held that "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." (*Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 86.) The Supreme Court further stated, "Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind." (*Id.* at p. 87.)

4. Common Law Fair Procedure Can Require Private Organizations to Conduct Live Hearings with Cross-Examination

Although alumni may disagree, USC has much in common with UCLA, more so than the private societies, trade unions, medical committees, and preferred providers that USC discusses at some length. Even so, the fair procedure cases support that fair procedure can require private universities to afford accused students in Title IX sexual misconduct disciplinary proceedings an opportunity to confront and cross-examine witnesses in a live hearing with impartial deciders. (*Cason v. Glass Bottle Blowers Asso.* (1951) 37 Cal.2d 134, 144; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 904 (fair hearing includes ample notice, opportunity to hear and cross-examine witnesses and to present evidence.)

Private entities that affect public interest (such as a university) "must comply with the common law right to fair procedure." (*Potvin v. Metro. Life Ins. Co.* (2000) 22 Cal. 4th 1060, 1071 (one on whom an important benefit or privilege has already been conferred may enjoy legal protections not available to an initial applicant for the same benefit).)

The purpose of the common law right to fair procedure is to protect against arbitrary decisions by private organizations, which means the decision-making "must be both substantively rational and procedurally fair." (*Pinsker v. Pac. Coast Soc. of Orthodontists* (1974) 12 Cal. 3d 541, 550.)

> The minimum requirements are described in varying ways and may depend upon the action

> contemplated by the organization and the effect of that action on the individual. If the requirements that have been announced by the cases and literature were compiled the list would closely resemble a list of the requirements of procedural due process.
>
> (*Hackethal v. Cal. Medical Assn.* (1982) 138 Cal.App.3d 435, 442 (impartial adjudicator must be included in fair procedure of private institution.)

Adequate notice of charges and a reasonable opportunity to respond are basic to both due process and fair procedure. (*Applebaum v. Board of Directors*, (1980) 104 Cal.App.3d 648, 657); *Ezekial v. Winkley* (1977) 20 Cal.3d 267 (a surgical resident in a private teaching hospital stated a cause of action under the "fair procedure" doctrine.); *Pinsker v. Pac. Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 166 (fair procedure require a method that "comport[s] with the fundamentals of due process."); *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802; *Pinsker v. Pac. Coast Soc. of Orthodontists* (1974) 12 Cal. 3d 541; *Applebaum v. Board of Directors* (1980) 104 Cal. App. 3d 648; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257; *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206; *Rosenblit v. Superior Court* (1991) 231 Cal. App. 3d 1434; *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, (right to neutral adjudicator among core protections under fair procedure); *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 528–529 (impartial adjudicator must be included in fair procedure of private institution.); *Kaiser Foundation Hospitals v. Superior Court*

(2005) 128 Cal.App.4th 85, (core protections are "fundamental to any fair administrative remedy, whether the remedy is governed by principles of 'fair procedure' or 'due process'".)

The same is true of the labor union and private society cases. When a private organization's procedures are "lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men passing upon the rights of their fellow men," courts should intervene. (*Otto v. Journeymen Tailors' Protective & Benevolent Union* (1888) 75 Cal. 308, 316; *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 730; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315; *Ellis v. American Fedn. Of Labor* (1941) 48 Cal.App.2d 440; *Von Arx v. San Francisco Gruetli Verein* (1896) 113 Cal. 377, 379; *Taboada v. Sociedad Espanola de Beneficencia Mutua* (1923) 191 Cal. 187 (plaintiffs are entitled to the writ of mandamus restoring them to their privileges in the society); *Wilson v. San Luis Obispo County Democratic Central Com.* (2009) 175 Cal.App.4th 489 (Plaintiff was afforded the basic requirements of common law fair procedure: adequate notice of the charges against her and a reasonable opportunity to respond.).)

The private organizations cases establish that common law fair procedure can require private universities to conduct live hearings with cross-examination.

5. Private Universities Remain Gatekeepers Under *Allee, Westmont,* Etc.

Private universities still remain as gatekeepers for entry to their institutions. The Court of Appeal cases regarding Title IX

sexual misconduct discipline impose no burden on the "'four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" (*Pomona College, supra,* 45 Cal.App.4th at pp. 1726-1727 (judicial review of tenure decisions in California is limited to evaluating the fairness of the administrative hearing in an administrative mandamus action); see also *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545; *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803.)

USC complains of burdensome procedures in student sexual misconduct cases but makes no showing of any actual harm or prejudice caused by providing accused students with fair procedures in sexual misconduct cases. In fact, the August 21, 2019 Senate Assembly Committee on Appropriations hearing on SB 493 assumed approximately 200 total sexual misconduct proceedings annually for the 767,000 students at the University of California and California State University. (See fn. 38, below.) Extrapolating for USC's 46,000 undergraduate, graduate, and professional students, USC holds approximately twelve sexual misconduct hearings each year.[34]

Title IX requires USC to take steps to address a hostile environment on campus, not severely punish accused students with suspension and expulsion. Title IX, SB 493, and the Court

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[34] https://about.usc.edu/facts/ ; https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/enrollment https://www.universityofcalifornia.edu/infocenter/fall-enrollment-glance

of Appeal decisions provide flexibility, however, "[i]t is ironic that an institution[s] of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy." (*Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 61.)

B. Improper Deference to Private Institutions

It should be noted that USC does not object to preferential treatment afforded public universities when it comes to the presumption of correctness, presumption of impartiality,[35] and the limitations placed upon independent judgment review of government agency decisions under Code Civ. Proc., § 1094.5. This deference of the judicial branch to governmental agency administrative decisions is born of the doctrine of separation of powers and the official duty presumption. (See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 140 (*Bixby*) ("The doctrine of separation of governmental powers under the California Constitution provides both independent judgment and substantial evidence review of administrative decisions."); *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812 (*Fukuda*) (findings of a state board where formal hearings are held come before courts with a strong presumption

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[35] *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741-742 ("[T]he presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.")

of correctness based primarily on the presumption "that official duty has been regularly performed"); Evid. Code, § 664.)

Private colleges and private universities are not governmental agencies that have been granted judicial powers by the constitution or by the Legislature, nor are their private employees entitled to the official duty presumption under Evid. Code, § 664. There is no justification for the courts to distinguish the process due to students at public universities versus private universities, while at the same time deferring to the decisions made by private universities as though they are governmental agencies performing an official duty. USC serves its own private institutional and financial interests, not the interests of the general public, nor the People of the State of California, and its administrators and Title IX personnel are not public officials. The preference given to one private litigant over the rights of the other, i.e., favoring USC over Mr. Boermeester, is inconsistent with the precept of equal protection under the law embedded in the constitutions of this state and of the United States.

II. MR. BOERMEESTER DID NOT WAIVE HIS RIGHT TO CROSS-EXAMINATION

Three thousand years ago King Solomon acknowledged that "in a lawsuit the first to speak seems right until someone comes forward and cross-examines." (Proverbs 18:17 (NJV).) More recently cross-examination has been described as "the greatest legal engine ever invented" for uncovering the truth. (*Baum, supra,* 903 F.3d at p. 581.)

USC's policy, however, precluded any opportunity for accused students to cross-examine any witnesses. (2 AR 478.) Mr. Boermeester did not waive any right; the right was not permitted under USC's policy. Mr. Boermeester was following USC's established rules and procedures and USC did not allow for questioning of witnesses at an in-person hearing before impartial deciders.

In fact, Mr. Boermeester had questions for Ms. Katz and asked that his questions be provided verbatim to her, and that her complete, unfiltered answers be returned to him. (1 AR 293-294.) USC denied his request because the "process does not afford that." (1 AR 293.) Mr. Boermeester did not forego any legal procedures to which he might be entitled under USC's policy. (See, *Samaan v. Trs. of Cal. State Univ. & Colleges* (1983) 150 Cal.App.3d 646, 659.)

The cumbersome procedure of submitting questions to an adverse party,[36] to be approved and modified by the adverse party, and then posed by the adverse party to a witness in private with no record, is not at all equivalent to the back-and-forth cross-examination of a witness before a neutral/impartial adjudicator. (*Baum, supra,* 903 F.3d at p. 582.)

Mr. Boermeester had no obligation nor ability to compel USC to provide for procedures outside of USC's policies,

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[36] USC's Title IX Office was the complaining party against Mr. Boermeester and directly adverse to him. (1 AR 1.) Ms. Katz was nominally the "Reporting Party" under USC's policy. (2 AR 479.) USC Title IX Office cannot be said to be impartial under the circumstances.

especially those not supported by case or statutory law at the time. (*People v. Brooks* (2017) 3 Cal.5th 1, 92 (no requirement "to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"); *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334 (right to raise an issue for the first time on appeal if it is based upon a change in the law that was not reasonably foreseeable); *Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1497 (recognizing that a party is excused from exhausting applicable administrative remedies where the reviewing agency has already rejected the party's claim or announced its position on the claim).) Students should not have to ask for fair procedures during university disciplinary adjudications.

USC's cited authorities are not directly on point. (See, *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 183 (mere filing of a lawsuit does not constitute a waiver of the right to arbitrate); *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 766 (analyzing principles of estoppel and waiver under Evid. Code, § 623); *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510 (judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency); *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 826; *Samaan v. Trs. of Cal. State Univ. & Colleges* (1983) 150 Cal.App.3d 646, 659; *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 225.)

III. THE ERROR IN FAILING TO PROVIDE A LIVE HEARING, CROSS-EXAMINATION, AND IMPARTIAL DECIDERS WAS NOT HARMLESS.

1. USC's Errors Were Extremely Consequential

USC's disciplinary decision depended primarily on assessing witness credibility, but the issue of cross-examination was compounded by USC's failure to provide impartial deciders under a fair procedure. Here, the deciders were the prosecutors.

To set the record straight, Mr. Boermeester did not admit to grabbing Zoe Katz's neck. He admitted to "putting [his] hand on her neck" in a joking way that was "normal" for him and Zoe Katz. (1 AR 173-174, 179.) He stated, "I wasn't choking her or slamming her head on a wall. She would be on the other side of me [in investigation] if I did." (1 AR 173.) Mr. Boermeester did not admit to pushing Ms. Katz against a wall but did confess to standing next to a wall while Zoe Katz was "against it." (1 AR 173, 175, 181.)

The security video was inconclusive, but consistent with Ms. Katz' and Mr. Boermeester's account of horseplay and trying to be funny. DH saw Mr. Boermeester and Ms. Katz at the wall for "about three seconds." (1 AR 95.) Mr Boermeester was "holding her against the wall" "with his hand on her chest/neck" and "Ms. Katz was trying to talk to him." (1 AR 95.) DH's testimony is consistent with what Mr. Boermeester told the USC Title IX Office on January 30, 2017 (1 AR 179) and consistent with the video. (1 AR 190.) The information that MB2 provided over the phone on February 3, 2017 was also consistent with the video and Mr. Boermeester's statement. (1 AR 131; 1 AR 190.)

As of mid-March 2017, USC's Title IX prosecutors had four witnesses and a video tape that all tended to support what Mr. Boermeester and Ms. Katz had been saying, that Mr. Boermeester had been drinking, was yelling and trying to be funny, and the two were horsing around in the alley and that Ms. Katz suffered no physical harm.

On March 14, 2017, MB2's purportedly changed statement over the telephone gave USC Title IX prosecutors what they needed. MB2 now admitted lying to USC Title IX and to Mr. Boermeester's attorney, and his new claims were at signiciant odds with his initial description of events, including his interaction with Ms. Katz a few days after. (1 AR 85-86.) MB2's lack of credibility is obvious, yet there was little inquiry in the record by the investigator and no opportunity for Mr. Boermeester to question MB2, such as, "What have you heard about the case in the previous month?" "Have you spoken with anyone about the case against Mr. Boermeester?" "What news articles have you read or seen?" "How is your apartment situated?" "Can you see the alley from inside your apartment?" "What were you doing when you heard the laughing and screaming?" "Were you wearing your contacts?" "Glasses?" "Why does the surveillance video support your version of events that you told over the phone on February 3, 2017 but not the version you told over the phone on March 14, 2017?" "Have you heard that there is surveillance video?" "What are your comments on viewing the video?" "When did you first want to 'beat the shit out of this guy?'" "How could you see fear in Ms.

Katz' eyes from where you were?" "Did you know that DH and TS, who know Ms. Katz more than vaguely, said that Ms. Katz never expressed fear of Mr. Boermeester?" "Did you actually say the words in quotes by the interviewer, 'He domestically was abusing her'?" "Was that something the investigator suggested to you?"

Regarding the alleged violation of the Avoidance of Contact Order, both Mr. Boermeester and Ms. Katz maintained that Mr. Boermeester complied with the Avoidance of Contact Order. (1 AR 53.) Witnesses who supposedly overheard Ms. Katz speaking with Mr. Boermeester via cell phone could have easily been mistaken. Mr. Boermeester's advisor's knowledge that Ms. Katz had been shown the surveillance video during her Evidence Review more likely came from speaking with the attorney Ms. Katz hired to protect herself from the Title IX office. Emails show that Mr. Boermeester and Ms. Katz were both respectful of USC's Avoidance of Contact order. (1 AR 271, 2 AR 321-322.)

Cross-examination of Ms. Katz and MB2 in a live hearing before *impartial deciders* was crucial to Mr .Boermeester's presentation of his defense. Impartial deciders would be able to determine whether Ms. Katz was credible in her claims of mistreatment and false statements by USC Title IX Office, that she was not a "classic" "textbook" domestic abuse victim, and that she had no physical harm from the horsplay in the alley. Impartial deciders would be able to determine whether MB2 was lying the first time or the second time he spoke to USC Title IX.

Mr. Boermeester faced the devastating loss of his education, his NFL prospects, professional future, and reputation in a Title IX administrative process with no rules of evidence and a low burden of proof that is often described as "50% plus a feather." While Mr. Boermeester was fighting for "feathers" of evidence to prove his innocence, USC Title IX prosecutors were working to take "feathers" away.

No reasonable person could consider that under the cicumstances, USC's denial of cross-examination in a live hearing before impartial deciders was harmless. There is more than a reasonable likelihood the result would have been different USC provided a live hearing and cross-examination. Failure to do so was a prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b); *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 990-991; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307-308; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215; *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 826; *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 241-242.)

2. Uncorroborated Hearsay Is Not Substantial Evidence

Although the reviewing court does not assess witness credibility on substantial evidence review, the court must determine whether USC relied on "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*California Youth Authority v. State Personnel Bd.*

(2002) 104 Cal.App.4th 575, 584.) The Supreme Court has long recognized that "'[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.' There must be substantial evidence to support such a . . . ruling, and hearsay, unless specially permitted by statute is not competent evidence to that end. [Citations omitted.] Except in those instances recognized by statute where the reliability of hearsay is established, 'hearsay evidence alone "is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence. [Citation.]"'" (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1244-1245.)

Substantial evidence review cannot rely "on isolated evidence torn from the context of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.) "[I]t is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not 'blindly seize any evidence . . . in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.]" (*Id.*)

Without a live hearing, the witness testimony is uncorroborated hearsay that does not amount to substantial evidence. Ms. Katz presented sworn testimony that disputes USC Title IX Office's interview notes of statements attributed to

her.[37] (3 CT 578-581, 6 CT 1068-1073.) The security video is inconclusive but is consistent with Ms. Katz's sworn statement, as well as what Mr. Boermeester and DH told the investigator. After claiming that he had lied, MB2's over the telephone uncorroborated second hearsay version of events is not evidence that a reasonable mind might accept as adequate to support a conclusion.

In the light of the whole record, this evidence is not substantial and cannot support a finding that Mr. Boermeester was responsible for Intimate Partner Violence.

IV. SB-493 HAS NO EFFECT ON THE RESOLUTION OF THE ISSUES PRESENTED BY THIS CASE

A. SB 493 Supplements Federal Law

The California Legislature recognizes education as "the great equalizer in the United States." (Senate Bill No. 493 (2019-2020 Reg. Sess.) § 1, subd. (a).) "Protecting students' civil rights, including the right to an educational environment free from discrimination, is of paramount importance." (*Id*., § 1, subd. (b).)

The legislative intent behind SB-493 is "to account for the significant individual civil consequences faced by respondents alleged to have committed sexual violence as well as the significant harm to individual complainants and to education equity more generally if sexual violence goes unaddressed" and to "provide additional civil rights protections to students in

[37] USC's claim that Ms. Katz recanted was not presented until the Title IX administrative process had concluded. (1 AR 10 n. 15.)

California institutions of higher education."[38] (*Id*. § 1, subds. (n), (q).)

SB 493 is intended to supplement the federally required grievance procedure under 34 C.F.R 106 and "to clarify the process for adjudicating complaints of sexual or gender-based violence, including dating or domestic violence, at postsecondary educational institutions in the State of California [that receive state funding]." (*Id*. § 1, subds. (n), (q).) A university's rules and procedures must provide the elements specified in both 34 C.F.R. 106 and SB 493 (codified at California Education Code § 66281.8). (*Id*.) To the extent that SB 493 and 34 C.F.R. 106 conflict, SB 493 provides that on or after the date of implementation at a postsecondary institution, any provision of SB 493 that conflicts with federal law "shall be rendered inoperative for the duration of the conflict and without affecting the whole." (*Id*. § 3, subds. (e), (f).)

SB 493 is largely consistent with the federal Title IX regulations; however, USC notes two areas where they diverge. SB 493 leaves it up to universities to decide whether to conduct hearings and prohibits cross-examination performed by parties or their advisors. (*Id*. § 3, subds. (b)(4)(A)(viii), (b)(4)(A)(viii)(I).)

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[38] According to a Senate Assembly Committee on Appropriations hearing held on August 21, 2019, the California Community Colleges, the University of California, and the California State Universities each conduct about 100 hearings to adjudicate sexual harassment per year, and the bill is also intended to minimize costs due to increased litigation. Litigation will be unnecessary if universities conduct fair proceedings and respect the rights of students.

Federal law requires live hearings with cross examination performed by the parties' advisors. (34 C.F.R. § 106.45 subd. (b)(6).) These sections of SB 493 that conflict with federal law are currently inoperative at any post-secondary institutions that have implemented SB 493.

SB 493 does not appear to have any effect on the resolution of the issues presented in this case. California law sets forth the requirements for a fair procedure at private universities. The authority bestowed upon universities by SB 493 to decide whether to hold a hearing is inoperative, but nevertheless, it would not conflict with the common law requirements for a fair hearing under Code Civ. Proc., § 1094.5. By giving universities the option to conduct hearings, and requiring that hearings include some form of cross-examination, the Legislature is allowing SB 493 and the common law to co-exist harmoniously. Universities must rely on the common law in deciding whether the circumstances of each case require a hearing. California appellate decisions do not mandate private universities to adopt procedures that include live hearings with cross-examination in all situations, but only under a very narrow set of circumstances "when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation." (*Allee*, *supra*, 30 Cal.App.5th at p. 1039.)

B. Judicial Decisions Are Retrospective in Nature

The Legislature has not disapproved of nor reversed the reasoning adopted by the majority below. The non-retroactivity

provision in SB 493 § 3, subd. (g)(1) is a mechanism to reduce costly litigation against universities besieged by a recession and pandemic-related budget cuts. Judicial decisions are, by nature, retroactive due to stare decisis. Courts, unlike the Legislature, do not make law, they find the law. The requirements of a fair process under the common law do not begin or end with *Allee* or *Westmont College*. The legal principles stated in those decisions have always existed, even if they were not authoritatively articulated when Mr. Boermeester was summarily suspended and then expelled in 2017.

V. 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: March 12, 2021

Respectfully submitted,

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Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), the undersigned certifies that this brief contains 13,524 words, according to the Microsoft Word word count program. The word count includes footnotes but excludes the proof of service.

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