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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN DOE,

Petitioner and Appellant,

v.

AINSLEY CARRY, Ed.D., et al.,

Respondents.

B282164

(Los Angeles County
Super. Ct. No. BS155312)

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Reversed and remanded.

Hathaway Parker, Jenna E. Parker and Mark M. Hathaway for Petitioner and Appellant.

Young & Zinn, Karen J. Pazzani and Julie Arias Young; Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport for Respondents.

Dr. Kegan Allee (Dr. Allee), a Title IX¹ investigator for respondent University of Southern California (USC), conducted an investigation in which she concluded that petitioner and appellant John Doe² (John), a USC student, violated the university's Student Conduct Code. She determined that Doe engaged in sexual intercourse with student Jane Roe (Jane) while Jane was intoxicated and incapable of consent, and that John knew or reasonably should have known that Jane was incapacitated. Dr. Allee recommended that John be expelled from the university. John appealed Dr. Allee's findings to a student appeals panel and, ultimately, to USC's Vice Provost for Student Affairs, respondent Ainsley Carry, Ed.D. (Dr. Carry, or Vice Provost), who affirmed Dr. Allee's findings and imposed a sanction of expulsion. John challenged his expulsion by petition for a writ of administrative mandate in the superior court, which denied the petition. John appeals, contending, among other things, that he was denied fundamental fairness because Dr. Allee was actually biased against him, and because

¹ Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) forbids sex-based discrimination in all schools, colleges and universities that receive federal funding. (See 20 U.S.C. §§ 1681–1688.) Although Title IX does not specifically address sexual assault, the United States Supreme Court has held that a school may be liable for discrimination and may face, among other things, a loss of federal funding, for mishandling a student's claim of sexual assault. (See *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 633, 647–648.)

² For privacy reasons, the names of appellant and all students involved are changed or abbreviated.

USC's disciplinary procedure deprived him of a fundamentally fair hearing.

Recently, in *Doe v. Allee* (Jan. 4, 2019, B283406) __ Cal.App.5th __ [2019 WL101616] (*Allee*) we considered the same contentions in another case involving discipline of a USC student accused of sexual misconduct. We held that while the record did not support a finding that Dr. Allee was actually biased against the accused student, it nonetheless showed that USC's disciplinary procedure failed to provide a fair hearing, because the accused student faced severe disciplinary sanctions, the disciplinary decision turned on witness credibility, and USC's procedure failed to provide a mechanism for effective cross-examination of the accuser and adverse witnesses. In particular, we held "that 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, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments." (*Id.* at p. __ [2019 WL101616 at p. *1, 20].) Because USC's disciplinary review process failed to provide these protections, we concluded that the disciplinary decision against the accused student in *Allee* could not stand.

Our decision in *Allee* controls this case. John failed to demonstrate that Dr. Allee harbored actual bias. However, for the same reasons articulated in *Allee*—John faced severe discipline, witness credibility was key, and John was provided no meaningful opportunity for cross-examination at a hearing before a neutral factfinder—we conclude that USC failed to provide John a fair disciplinary hearing. Therefore, the disciplinary finding against John must be set aside. Because we reverse the trial court’s denial of writ relief on this basis, we do not reach John’s remaining contentions.³

FACTUAL AND PROCEDURAL BACKGROUND

1. *USC’s Student Conduct Code*

In pertinent part, USC’s Student Conduct Code (SCC) prohibits students from “[e]ngaging in any unwelcome sexual advance, . . . or other verbal or physical or non-consensual sexual conduct.” (§ 11.53.1.)⁴ Prohibited sexual assault includes nonconsensual sexual activity where, among other things, “[t]here is no ability to give or withhold consent due to incapacitation, . . . due to the influence of alcohol.” (§ E.2.III.)

³ John also argues (1) there is insufficient evidence to support USC’s findings, and (2) he was denied a fair hearing because “pecuniary and personal interests . . . in the outcome created an intolerably high risk of actual bias on the part of USC’s Title IX adjudicators,” as this case arose amidst threats by the federal government to withhold funding “in order to compel . . . universities to address sexual violence on their campuses.”

⁴ We refer to the SCC in effect at times relevant here.

“An affirmative consent standard applies in the determination of whether consent was given by both parties to sexual activity. ‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other . . . to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. . . . [¶] It shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity under either of the following circumstances: [¶] The accused’s belief in affirmative consent arose from the intoxication or recklessness of the accused. [¶] The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented. [¶] It shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances: [¶] . . . [¶] The complainant was incapacitated due to the influence of . . . alcohol . . . , so that the complainant could not understand the fact, nature, or extent of the sexual activity.” (§ E.2 III 4.)

2. *The Incident*

Our factual recitation is drawn from the administrative record compiled in Dr. Allee's investigation. Where relevant, we note factual discrepancies among the witnesses.

Jane and John first met on the evening of October 24, 2014, at a themed "Around the World" mixer organized by John's fraternity, and attended by several members of Jane's sorority. The event began with an Italian-themed dinner and several types of alcohol at the fraternity house. At dinner, Jane sat across from John. She consumed two vodka drinks (a total of about four shots of vodka) and a cup of wine at the fraternity house. At some point wine was spilled on Jane's blouse, and John gave her a shirt to wear. Jane told Dr. Allee that she was "clearly drunk" by the time the group left the fraternity house. However, John said that at dinner Jane told him and KFH, his fraternity brother, "she can drink a lot, and not seem drunk."

After dinner, the group headed to a bowling alley in Little Tokyo for the Asian-themed portion of the event. Jane rode in an Uber car with her sorority sister, JA, John, and KFH. Jane brought a cup of wine with her in the Uber. The underage group was not permitted to enter the bowling alley. After about 30 to 40 minutes (during which no alcohol was consumed), the group took Uber cars to KFH's apartment at University Gateway (Gateway), an off-campus housing complex, for the Mexican-themed portion of the evening. JA, who rode with Jane, stated that John had his arm around Jane's waist, and Jane "looked like she was having a good time."

John and Jane arrived at Gateway shortly after 10:00 p.m. According to Jane, she began “browning out” during the Uber ride to Gateway. After arriving at KFH’s apartment at Gateway, John recalled that he and Jane sat together on a couch and they each drank a shot of tequila. Jane recalled drinking at least two shots of tequila at KFH’s apartment. She believed that she “definitely drank more,” but could not recall how much more and did not remember anything beyond that point. Six witnesses observed that Jane became obviously “intoxicated,” “really drunk” and “swaying,” “stumbling and slurring her words” as the evening wore on, particularly at Gateway. At least one believed she drank more than two shots of tequila at Gateway (e.g., her friend JA said Jane drank eight or nine shots of tequila). Seven witnesses reported that, although Jane (like everyone) was drinking, she did not seem visibly impaired, or at least no more impaired than anyone else in the group.

John told Dr. Allee that he and Jane were “dancing together” and “making out” in the living room. Jane suggested that they “go somewhere more private,” then took him by the hand and led him into the bedroom that belonged to KFH. They proceeded to engage in sexual activity. He described Jane as “functional,” “coherent” and “aware the whole time” during the sexual activity. They took off one another’s shirts, and Jane stood on her knees on the bed to remove her skinny jeans. While digitally stimulating one another, John asked Jane if he “[s]hould . . . grab a condom?” She responded, “Yes” and removed her underwear. John described Jane as an “active participant” in sexual

intercourse, and said she had wrapped her legs around him and told him that it “felt good.” Jane told Dr. Allee that she did not recall kissing John, suggesting that they go somewhere more private, or any of the sexual activity that formed the basis for her subsequent Title IX complaint.

Three members of Jane’s sorority saw Jane and John in KFH’s bedroom. ST walked in while Jane and John—both fully clothed—were kissing. She asked Jane if she was “ok?” to which Jane responded, “Yeah I’m good.”

Later, John (who was shirtless) opened the bedroom door after Jane’s roommate and best friend, KG, knocked on it. KG reported that she told John, “she’s really drunk, don’t try anything”; he closed the door. John denied that this happened. KG told Dr. Allee that she told SM, who was her friend and a member of the fraternity, that “[Jane was] really drunk and blacked out,” and asked him to “make sure nothing happened.” However, SM denied that KG expressed concerns about Jane to him on October 24, and DD, who was with SM during the party, said KG never spoke with SM to express apprehension about Jane. KG also told Dr. Allee that SM opened the door to KFH’s room, KG observed that Jane had her pants “down around her knees.” KG did not attempt to intervene in or stop the sexual activity, and left the Gateway apartment early because she “didn’t know a lot of the guys.”

JA, Jane’s third companion, told Dr. Allee that she walked into KFH’s bedroom and saw John “completely naked,” wearing a condom. She did not intervene. Instead, she immediately shut the door and

went back to the party. JA claimed that she did not know at the time that Jane was in the room.

KFH told Dr. Allee that he went into his bedroom, saw John and Jane having sex and “teased them for being on [his] bed. . . . They sat up and were laughing.” Both John and Jane “hint[ed]” that KFHH should leave the room, then John ushered him out and closed the door. After KFHH left the room, he jokingly yelled in the living room, “They’re having sex.” No one intervened.

After the sexual activity, JA returned to KFHH’s bedroom and told Jane they “should get going.” John said Jane dressed herself, standing on one leg to pull on her skinny jeans. But JA told Dr. Allee that Jane had “problems getting her clothes on.” JA had to help John put Jane’s shoes on, and John buttoned her shirt. After JA helped Jane get dressed, the two women left the apartment at 11:22 p.m. They left behind Jane’s purse, phone and keys. Surveillance video revealed that it took JA and Jane almost nine minutes to travel the hallway to the elevator (a distance covered in 36 seconds by two other individuals shown on the video). The video showed Jane swaying and stumbling as she made her way down the hallway. At one point, Jane fell and her head bounced off the ground, her foot twitched and she lay on the ground almost motionless for about a minute. At another point, JA crouched and then fell to the floor. Jane leaned against a wall, then fell down as well. JA did not remember falling, but told Dr. Allee “I think we were laughing.” She described Jane as “unresponsive,” and said that, after helping Jane to her feet, they continued down the hall,

stopping for a periodic “breather.” After SB, a sorority sister, and ST2, a fraternity member, entered the hallway, JA and Jane began walking faster and in a more normal fashion. After leaving Gateway, JA and Jane walked to a Subway restaurant and then to another restaurant for frozen yogurt before returning to their residence hall.

When Jane awoke the next morning she was still wearing John’s shirt (although she did not know to whom it belonged or how she came to wear it). Her pants were buttoned but unzipped, her underwear was on sideways, and she did not have her bra or shirt. Jane could not find her phone or purse, and could not remember what happened the night before. She asked JA to come over.

When JA arrived, she suggested that John might have Jane’s belongings because he and Jane had been “hanging out.” Jane had no memory of that. JA told Jane she had gone into a room alone with John and that, when JA had knocked, John opened the door wearing a condom. Jane was “freaking out,” and asked whether John had “[had] sex with [her]?” because she did not remember even kissing him and had met him only a few hours before JA saw them in the bedroom.

Later that morning, at JA’s request, John brought Jane’s purse to her residence hall, and asked Jane to return his shirt. While Jane was out of the room, JA asked John if he had sex with Jane. John said he had. JA told him that Jane “doesn’t remember anything. You need to know that’s not ok. You need to tell her or I will.” John said “[he] had no idea [Jane] was blacked out,” was shocked that she did not recall having sex, and said he would not have had sex with her if he thought

she would not remember. He also said he had “used a condom so there really shouldn’t be a problem.” JA told John that “[he couldn’t] do this in the future. [Jane] was very drunk.” John promised to bring over Jane’s phone later and speak to her privately about the sexual activity, then left.

After John left, JA told Jane that she and John had engaged in sex. Jane’s friends believed that Jane was the victim of a sexual assault, and encouraged her to get a “rape kit.” JA contacted the Santa Monica–UCLA Rape Treatment Center on Jane’s behalf.

Later that day John returned Jane’s phone to JA and asked her to “tell [Jane] that I feel really badly about what happened last night and I’d like to talk about it if that’s cool with her.” A few days later, he sent Jane a Facebook message stating, “[h]ey [Jane] I don’t know if [JA] ever told you but I feel pretty badly about what happened the other night and I’d really like to talk to you about it to make sure were [sic] both on the same page here.” Jane did not reply.

3. Misconduct Proceedings

On November 18, 2014, Jane filed a complaint with USC’s Title IX Office, alleging that she had been too intoxicated on October 24, 2014 to consent to sexual activity with John. USC’s Title IX investigator, Dr. Allee, was assigned to investigate the matter. Jane gave Dr. Allee the names of seven witnesses (JA, KG, ST, SM, AW, SB, and KFH).

On November 26, 2014, John was provided written notice of the specific charges being investigated by Dr. Allee, his right to inspect the

report, and his obligation to meet with Dr. Allee by December 5, 2014, alone or with an advisor. John was informed that, on October 24, 2014, at Gateway, he was alleged to have violated sections 11.40 (unauthorized alcohol use), 11.51.A (harassment), and 11.53.A-D (nonconsensual sexual conduct, nonconsensual sexual touching, attempted intercourse or sexual contact, and nonconsensual vaginal penetration) of the SCC.

John and an advisor met with Dr. Allee on December 5, 2014. The purpose of that meeting was for John to review the report, discuss the allegations, his rights and the investigative process. It was also an opportunity for John to share his memory of events with Dr. Allee, and to identify possible witnesses and other evidence. John identified six witnesses: MM, DD, KE, ST2, SM, and KFH, the latter two of whom had also been named by Jane.

Dr. Allee interviewed a total of 15 witnesses: those identified by Jane and John, plus four others whose names surfaced during her investigation. She also reviewed other evidence: screen shots of a Facebook message from John to Jane, messages between John and Jane, messages John and Jane sent to each other and other students, an email she received from John, seven video surveillance excerpts, and student housing access logs for four students. Dr. Allee informed John of every witness interviewed in her investigation and, at his request, provided written reports summarizing their statements.

The investigation was closed on February 18, 2015. After concluding her investigation, Dr. Allee generated a “Summary

Administrative Review” (SAR) report. In the SAR, Dr. Allee concluded, based on a preponderance of the evidence, that Jane had lacked the capacity to consent, that John knew or should have known she was incapacitated and that he, “more likely than not, engaged in unwanted sexual conduct that ranged from fondling to vaginal penetration.” The SAR observed that John’s comments during the investigation reflected an effort to deflect responsibility for what had happened onto Jane’s friends, and a failure to acknowledge that it was he who had engaged in sexual conduct with Jane at a time when she lacked the capacity to consent. The SAR concluded that John violated sections 11.40, and 11.53.[1] through [4] of the SCC, and Dr. Allee recommended that he be expelled.

Assisted by counsel, John appealed the findings and recommended sanctions in the SAR, and reviewed the information collected by Dr. Allee. At USC, administrative appeals of Title IX investigations are conducted solely on the basis of documentary review by an anonymous three–member Student Behavior Appeals Panel (SBAP), appointed by the Vice Provost for Student Affairs. The SBAP includes at least one faculty member trained to review sexual misconduct cases.

The stated grounds for John’s appeal were that: (1) he was denied a fair hearing; (2) USC committed a prejudicial abuse of discretion in conducting the SAR; (3) the SAR decision was not supported by Dr. Allee’s findings; (4) the evidence was insufficient to support Dr. Allee’s findings; (5) he had obtained exculpatory evidence that had not been available during the investigation; (6) in conducting the investigation,

Dr. Allee had failed to adhere to USC rules or regulations; and (7) expulsion was an excessive sanction.

The SBAP met on April 22, 2015 to review the file. The SCC does not permit the SBAP to substitute its opinion for an investigator's with regard to credibility determinations, nor may it make new findings of fact. The SBAP must defer to the investigator's factual findings if the record contains substantial evidence to support them, and may alter a sanction only if it is unsupported by the findings, or is grossly disproportionate to the violation committed.

The SBAP concluded that Dr. Allee's investigation adhered to USC's established procedures, and that John was provided due process pursuant to those procedures. It found that the record contained sufficient evidence to, among other things, "support the finding that [Jane] was visibly incapacitated . . . prior to sexual activity with [John] in Gateway."⁵ The SBAP concluded that John's claim "that he may not have been sober or using his best judgment when he believed [Jane] affirmatively consented to the sexual activity [was] not a valid excuse," and found the record contained sufficient evidence to support Dr. Allee's finding that John knew or should have known Jane was incapacitated and unable to consent. The SBAP rejected John's contentions that Dr.

⁵ The SBAP found insufficient evidence in the record to support Dr. Allee's finding that Jane had been visibly incapacitated from as early as the time the group tried to go bowling in Little Tokyo.

Allee failed to comply with USC’s rules and regulations.⁶ The SBAP also concluded that expulsion was an excessive sanction, and recommended instead a three–year suspension and avoidance of contact with Jane. The SBAP’s recommendation was submitted to Dr. Carry.

On May 7, 2015, Dr. Carry accepted Dr. Allee’s decision and the SBAP’s recommendations regarding John’s violations of the SCC. However, he rejected the SBAP’s recommendation for suspension, and upheld Dr. Allee’s sanction of expulsion.

4. *Writ Petition*

John challenged his expulsion by filing a petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.) He argued that the procedure employed by USC was unfair because there was “an unacceptable probability” that Dr. Allee was biased, he had not received a fair hearing, and the SAR’s findings lacked sufficient evidentiary support.

The court found that John was provided a fair hearing and rejected as speculative his assertion that Dr. Allee was or likely was biased against any man accused of sexual assault. The court also rejected John’s claim that the record contained insufficient evidence to support USC’s findings that Jane was incapacitated, a fact which John

⁶ The SBAP rejected the finding in the SAR that John committed attempted intercourse or sexual contact, on the ground that he could not reasonably be found responsible for both attempting and completing the same act.

knew or reasonably should have known. The trial court found that USC’s decision to expel John was supported by substantial evidence, and denied the petition. John timely appealed.

DISCUSSION

1. *Standard of Review*

“The remedy of administrative mandamus . . . applies to private organizations that provide for a formal evidentiary hearing.” (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 237, fn. 9 (*Doe v. USC(1)*.) “The scope of our review . . . is the same as that of the trial court. [Citation.] ‘An appellate court in a case not involving a fundamental vested right reviews the agency’s decision, rather than the trial court’s decision, applying the same standard of review applicable in the trial court.’ [Citation.]” (*Id.* at p. 239; *Doe v. Regents of University of California (Santa Barbara)* (2018) 28 Cal.App.5th 44, 55 (*UCSB*); *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1065 (*CMC*); *Doe v. Regents of University of California (San Diego)* (2016) 5 Cal.App.5th 1055, 1073 (*UCSD*).

“We review the fairness of the administrative proceeding de novo. ‘A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law.’ [Citation.] ‘The statute’s requirement of a “fair trial” means that there must have been “a fair administrative hearing.” [Citations.]’ (*Doe v. USC(1), supra*, 246 Cal.App.4th at p. 239; *Allee, supra*, __ Cal.App.5th at p. __ [2019

WL101616 at p. *14 ____].) This and numerous other courts have applied this standard to disciplinary decisions involving sexual misconduct at private and public universities. (Ibid.; *Doe v. USC(1)*, *supra*, 246 Cal.App.4th at p. 239; *UCSD*, *supra*, 5 Cal.App.5th at p. 1072; *CMC*, *supra*, 25 Cal.App.5th at p. 1065; *UCSB*, *supra*, 28 Cal.App.5th at p. 56; *Doe v. University of Southern California* (Dec. 11, 2018) ___ Cal.App.5th ___, ___ [2018 WL6499696 at p. *12] (*Doe v. USC(2)*.)

2. *John Has Not Demonstrated That Dr. Allee Harbored Bias*

John contends that Dr. Allee’s areas of academic research, and professional advocacy on behalf of victims of sexual assault prior to her employment by USC, demonstrate she is biased in favor of alleged victims of sexual assault, or at least a high probability that she harbors such bias.⁷ We disagree. The trial court properly concluded that USC’s disciplinary decision could not be invalidated solely on the basis of an inference or the appearance of bias. (See *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219; cf., *BreakZone Billiards v. City of Torrance* (2000)

⁷ Prior to her employment at USC, Dr. Allee worked as an Assistant Director for Women’s Center Programming and Campus Advocacy at the University of California, Santa Barbara (UCSB), directing outreach and services for female survivors of interpersonal violence and harassment, and as an Assistant Director for UCSB’s Rape Prevention Education Program. She has given and attended presentations on gender-based violence, focused on the rights of alleged victims and, in 2012, received an award for her service as an “exemplary advocate for survivors of sexual assault.”

81 Cal.App.4th 1205, 1236 [“A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty” in a hearing officer].) As the trial court explained, “[t]he fact that, before her employment at USC, Dr. Allee did some work as a [victim’s] advocate, researched gender issues, and gave presentations regarding preventing sexual assault, does not establish that Dr. Allee is likely biased against all men who are accused of sexual assault. [John’s] argument is highly speculative and based on unwarranted inferences.” As we concluded in *Allee* on similar facts, John’s burden was to show actual bias; “[a] disciplinary decision may not be invalidated solely on the basis of an inference or appearance of bias.” (*Allee, supra*, __ Cal.App.5th __ [2019 WL101616 at p. *14.]

3. USC’s Disciplinary Process in Cases Involving Allegations of Sexual Misconduct is Fundamentally Flawed and Violated John’s Right to a Fair Hearing

John contends that USC’s disciplinary process, which lacks any mechanism for a student accused of sexual misconduct to test the credibility of his accuser or witnesses against him before an impartial decision-maker, deprived him of a fair hearing because he faced severe discipline and the issue of credibility was essential to USC’s findings.⁸

⁸ USC argues that John forfeited this issue by not raising it in the trial court. John raised the issue after the parties completed briefing in this matter on April 5, 2016, and we issued our decision in *Doe v. USC(1), supra*, 246 Cal.App.4th 221, that same date. Regardless, this purely legal question

As noted, we considered this issue recently in *Allee, supra*, ___ Cal.App.5th __ [2019 WL101616]. There, we reviewed the developing case law discussing the requirements of a fair hearing in university disciplinary proceedings involving allegations of sexual misconduct, where resolution of conflicting accounts turns on witness credibility.

We agreed with the decisions in *CMC, supra*, 25 Cal.App.5th at page 1070, *UCSB, supra*, 28 Cal.App.5th at p. 60, and *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 401, that where credibility is central to a university’s determination, a student accused of sexual misconduct has a right to cross-examine his accuser, directly or indirectly, so the factfinder can assess the accuser’s credibility. Recognizing the risk that an accusing witness may suffer trauma if personally confronted by an alleged assailant at a hearing, we reiterated our observation in *Doe v. USC(1), supra*, 246 Cal.App.4th at page 245, footnote 12, that mechanisms can readily be fashioned to “provid[e] accused students with the opportunity to hear the evidence

may be raised for the first time on appeal. (*CMC, supra*, 25 Cal.App.5th at p. 1066, fn. 7.)

In any event, following oral argument we directed the parties to submit supplemental briefs to address two decisions issued after briefing was completed in this matter, *CMC, supra*, 25 Cal.App.5th 1055, and *Doe v. Baum* (6th Cir. 2018) 903 F.3d 575 (*Baum*). The parties were specifically asked to discuss “(1) whether, and to what extent, these decisions suggest that [John] is entitled to a process in which he can question, even if indirectly, Jane Doe and adverse witnesses before the finder of fact who determines witness credibility; and (2) if so, whether the procedure employed in this case adequately protected that right.”

being presented against them without subjecting alleged victims to direct cross-examination by the accused” (*Allee, supra*, __ Cal.App.5th at p. __ [2019 WL101616 at p. *18]), and noted that in *CMC, supra*, 25 Cal.App.5th at page 1070, the court suggested an accuser could be present “either physically or through videoconference or like technology to enable the finder of fact to assess the complaining witness’s credibility in responding to its own questions or those proposed by the accused student.” (*Allee, supra*, __ Cal.App.5th at p. __ [2019 WL101616 at p. *18]; see also *UCSD, supra*, 5 Cal.App.5th at pp. 1103–1104; *Baum, supra*, 903 F.3d at p. 583, fn. 3.) In addition, we agreed with the holding of *Baum, supra*, 903 F.3d at pages 581-582, extending the right of cross-examination to the questioning of witnesses other than the complainant where their credibility is critical to the factfinder’s determination. (*Allee, supra*, __ Cal.App.5th at p. __ [2019 WL101616 at p. *18].)

In one respect, we disagreed with the reasoning of *Doe v. USC(2), supra*, __ Cal.App.5th __ [2018 WL 6499696]. The court in that case found that a USC student accused of sexual assault and rape, and facing expulsion, was denied a fair hearing when, among other things, USC’s Title IX investigator failed personally to interview critical witnesses to observe their demeanor and assess credibility. (*Id.* at pp. __ [2018 WL6499696 at pp. *6-17.]) The court reversed and remanded the matter to permit USC to conduct a new disciplinary hearing. In the event the university chose to reopen the investigation, it was instructed that providing the “accused student . . . the opportunity indirectly to

question the complainant” would be part of the investigator’s obligation to assess credibility. (*Id.* at p. ____ [2018 WL6499696 at p. *17.]

Although USC’s procedures do not provide an accused student the right to submit questions to be asked of the complainant, the court required that the university do so. The court specifically declined to reach the question whether USC’s failure to provide a procedure to permit an accused student indirectly to question witnesses against him violated his right to a fair hearing. (*Id.* at p. *17, fn. 36.) In the course of its discussion, the court observed in a footnote: “Although the Title IX investigator held dual roles as the investigator and adjudicator, ‘the combination of investigative and adjudicative functions does not, without more, constitute a due process violation’ [Citations.]” (*Id.* at p. ____ [2018 WL6499696 at p. *15, fn. 29.]

As we explained in *Allee, supra*, __ Cal.App.5th at pp. __ [2019 WL101616 at p. *19], “[i]n our view, the analysis in *USC v. Doe(2)* did not fully consider a key question: whether the right to a fair hearing, and in particular the right to cross–examination, has any practical efficacy without structural procedural changes in a procedure such as that used by USC. It is true that an administrative procedure in which a single individual or body investigates and adjudicates does not, ‘without more,’ violate due process. In *Doe v. USC(1), supra*, 246 Cal.App.4th 221, we recognized “‘the value of cross-examination as a means of uncovering the truth [citation], [but] reject[ed] the notion that as a matter of law every administrative appeal . . . must afford the [accused] an opportunity to confront and cross-examine witnesses.’” (*Id.*

at p. 245.) We adhere to that view. However, as we also observed, the “[s]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved.” [Citation.]’ (*Id.* at p. 244.) When credibility of witnesses is essential to a finding of sexual misconduct, the stakes at issue in the adjudication are high, the interests are significant, and the accused’s opportunity to confront adverse witnesses in the face of competing narratives is key. ‘Cross-examination takes aim at credibility like no other procedural device.’ (*Cincinnati, supra*, 872 F.3d at p. 401.) Under such circumstances, the performance of this key function is simply too important to entrust to the Title IX investigator in USC’s procedure.” (*Allee, supra*, at p. ____ [2019 WL101616 at p. *19].)

“As we have explained, in USC’s system, no in–person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student’s right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination: adversarial questioning at an in–person hearing at which a neutral factfinder can observe and assess the witness’ credibility. (See *Baum, supra*, 903 F.3d at p. 586 [“Few procedures safeguard accuracy better than adversarial questioning”

through cross-examination]; cf., *Whitford v. Boglino* (7th Cir. 1995) 63 F.3d 527, 534 [due process forbids an officer who was substantially involved in the investigation of charges against an inmate from also serving on the adjudicating committee].) At bottom, assessing what is necessary to conduct meaningful cross-examination depends on a common sense evaluation of the procedure at issue in the context of the decision to be made. From that prospective, a right of ‘cross-examination’ implemented by a single individual acting as investigator, prosecutor, factfinder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself.” (*Allee, supra*, at p. ___ [2019 WL101616 at p. *19, fn. omitted.]

“Moreover, the harm to fundamental fairness created by USC’s system is amplified by the limited review of the investigator’s factual findings available in the university’s appellate process. As we have explained, the SBAP’s review relies wholly on the SAR, plus any additional written materials accepted on appeal, and is limited to review for substantial evidence. The SBAP may not substitute its credibility findings for those made by the investigator, and may not make new factual findings. Because a version of events provided by a single witness (assuming it is not implausible on its face) constitutes substantial evidence, the mere fact that the complainant’s allegations of misconduct are deemed credible by the investigator constitutes substantial evidence. Thus, the SBAP will virtually never be in a position to set aside an investigator’s factual findings. Moreover,

because the SBAP cannot modify a sanction imposed by the investigator unless it is unsupported by the investigator’s factual findings or is grossly disproportionate to the violation shown by those findings, the sanction imposed by the investigator will rarely, if ever, be modified.”⁹ (*Allee, supra*, ___ Cal.App.5th at p. ___ [2019 WL101616 at p. *19].)

“In light of these concerns, we hold that 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, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system.” (*Allee, supra*, ___ Cal.App.5th at p. ___ [2019 WL101616 at p. *20].)r

⁹ In the instant case, the SBAP upheld Dr. Allee’s factual findings (with one minor exception, concluding that the record did not support a finding that Jane had been visibly incapacitated when the group tried to go bowling in Little Tokyo). The SBAP also upheld Dr. Allee’s finding that John knew or should have known Jane was incapacitated and unable to consent. Based on its review, SBAP recommended the lesser sanction of suspension. However, the Vice Provost, vested with apparently unfettered discretion, rejected the SBAP’s suspension recommendation and upheld Dr. Allee’s recommendation of expulsion as appropriate for John’s violation of the SCC.

This analysis controls our decision here.

a. *John Was Entitled to a Process Which Permitted Him to Cross-Examine Jane*

Accused of sexual misconduct, John faced (and received) a severe sanction: expulsion. (See e.g., *CMC, supra*, 25 Cal.App.5th at p. 1070 [one-year suspension plus additional restrictions constitutes sufficiently severe consequence to warrant cross-examination]; *Baum, supra*, 903 F.3d at p. 580 [student forced to withdraw when faced with expulsion]; *UCSB, supra*, 28 Cal.App.5th at p. 54 [two-year suspension].)

Further, the determination of the charges of sexual misconduct principally turned on witness credibility. At issue was whether Jane was so intoxicated she lacked the capacity to consent to sex and, if so, whether John knew or reasonably should have known that she lacked that capacity. Dr. Allee interviewed 15 third-party witnesses and reviewed other evidence (including video evidence depicting Jane's conduct shortly after leaving the apartment at Gateway). The evidence regarding the question of Jane's capacity to consent, and whether (if she lacked that capacity) John reasonably should have known it, was in substantial conflict, and reasonable minds could draw different conclusions.

John and Jane's accounts of their encounter are in stark contrast. John claims Jane initiated their sexual encounter by suggesting they go somewhere private, led him into the bedroom, and was a "functional,"

“coherent” participant in the sexual activity, “aware the whole time.” Jane claims she was so intoxicated at Gateway that she did not recall having sex with John, let alone knowingly consenting to do so.

The independent evidence was far from conclusive. There was evidence Jane may have consumed as many as nine alcoholic drinks between 7:30 p.m. and 11:22 p.m., the video evidence showed conduct consistent with severe intoxication as Jane was leaving, and several witnesses described her as noticeably drunk. Indeed, KG, Jane’s best friend, said she knocked on the bedroom door and warned John that Jane was “really drunk,” and he should not “try anything.” KG also claimed to have asked SM, her friend and a member of John’s fraternity, to “make sure nothing happened,” because “[Jane was] really drunk and blacked out.”

However, John and SM each denied that this happened. As John notes, despite her concern that her best friend was “really drunk and blacked out,” KG did not intervene to stop any sexual activity. Instead, she left the party. Also, the statements of other witnesses who observed and interacted with Jane at relevant times suggested that she was capable of conscious decisions. For instance, ST, a member of Jane’s sorority, stated that she walked in while Jane and John were in the bedroom (still fully clothed) and asked if Jane was “ok?”, to which Jane replied, “Yeah I’m good.” John’s fraternity brother, KFH, entered the bedroom while John and Jane were having sex, and teased them for being in his bed. He reported that Jane and John both “sat up and were laughing,” and “hint[ed]” that he should leave.

In short, John and Jane’s accounts differ, and the third-party witnesses and video evidence did not paint a consistently clear picture of Jane’s condition at the time of her encounter with John. (See *Allee*, *supra*, __ Cal.App.5th at p. __ [2019 WL101616 at pp. *20-21]; *CMC*, *supra*, 25 Cal.App.5th at p. 1057.) Under these circumstances, as we held in *Allee*, fundamental fairness dictates that John was entitled to cross-examine Jane and adverse witnesses, directly or indirectly, at a hearing at which the witnesses appeared in person or by other means before a neutral adjudicator with the power to make findings of credibility and fact. (*Id.* at p. __ [2019 WL101616 at p. *21.] That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system. Because USC failed to provide such a procedure, the adjudication findings that John committed sexual misconduct in violation of the SCC cannot stand.

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DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to grant John's petition for writ of administrative mandate. John is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.