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5. Mr. *Doe* appeals the findings and sanctions on the grounds that:

- (a.) Procedural and substantive errors occurred that significantly affected the outcome of the hearing; and
- (b.) New evidence is now available that could substantially impact the original findings or sanctions. (See Exh. 1, page 45.)

PROCEDURAL HISTORY

6. Occidental College is under scrutiny for alleged indifference to sexual violence on campus in violation of Title IX, the federal civil rights law that prohibits discrimination in education on the basis of gender. In April 2013 Occidental College professors Caroline Heldman and Danielle Dirks¹, in association with 36 alleged victims of rape or sexual assault at Occidental, filed a 250-page complaint with the U.S. Department of Education's Office of Civil Rights alleging that Occidental maintains a hostile environment for sexual assault victims and their advocates and violated Title IX laws against sexual discrimination and the Clery Act, which requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses.² Compliance with reporting sexual assaults is monitored by the U.S. Department of Education, which can impose civil penalties, up to \$35,000 per violation, against institutions for each infraction and can suspend institutions from participating in federal student financial aid programs. (See 20

¹In February 2012, Occidental College Associate Professor of Politics Caroline Heldman and Assistant Professor of Sociology Danielle Dirks founded the Occidental Sexual Assault Coalition, a campus advocacy group that has pushed the college to address what it calls the "rape culture" on campus and with a "mission is to raise awareness of the sexual assault epidemic." (<http://oxysexualassaultcoalition.wordpress.com/>)

² Occidental College Sexual Assault Response Subject Of Federal Complaints, www.huffingtonpost.com 04/19/2013, Updated: 12/03/2013, Tyler Kingkade, see also USC, Occidental Underreported Sexual Assaults, *Los Angeles Times*, October 7, 2013, Jason Song and Jason Felch.

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1 U.S.C. § 1092(f), with implementing regulations in the U.S. Code of Federal
2 Regulations at 34 C.F.R. 668.46.)

3 7. In September 2013, Occidental College settled with at least ten of the
4 Occidental student complainants under an agreement negotiated by attorney Gloria
5 Allred. The ten female complainants received cash payments from Occidental
6 College and agreed not to participate in the Occidental Sexual Assault Coalition.
7 Asst. Professor Danielle Dirks criticized attorney Gloria Allred's negotiated
8 settlement stating that requiring "the women to remain silent and not to participate
9 in campus activism could have a chilling effect at Occidental."³

10 8. In August 2013, Occidental College implemented its new Sexual
11 Misconduct Policy⁴ (Exh. 1; Exh. 6, page 1) that has caused the pendulum to swing
12 far in the other direction with Occidental discriminating against male students in
13 order avoid federal penalties and settlement pay-outs for Occidental's past
14 indifference to the plight of female students.

15 9. On September 16, 2013, Mr. *John Doe* was accused of violating
16 the Occidental College Sexual Misconduct Policy as follows:

17 *Jane Doe* (a first-year freshman, Class of 2017) alleges that on or
18 about the early morning hours of Sunday, September 8, 2013 between the
19 approximate times of 12:50 A.M. and 2:00 A.M., she and Mr. *Doe* (a
20 first-year freshman, Class of 2017) had sex. During the investigation, Ms.
21 *Jane Doe* recalled performing oral sex on Mr. *Doe*, but could not
22 specifically recall having intercourse with Mr. *Doe* in his dormitory room
23 on the second floor of Braun Hall. Ms. *Jane Doe* alleges that she consumed
24 multiple alcoholic beverages in the hours leading up to the sexual contact.
(Exh. 2, page 1.)

25 ³ Rape Settlement at Occidental College: Victims Barred from Campus Activism,
26 *The Nation*, Jon Wiener, September 19, 2013.

27 ⁴ The Policy was developed with the assistance and recommendations of former sex
28 crime prosecutors Lisa M. Gomez and Gina Maisto Smith, attorneys with the Philadelphia
law firm of Pepper Hamilton LLP.

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1 10. Ms. *Jane Doe* initially denied that she had been raped or sexually
2 assaulted and did not want to make a formal complaint (Exh. 4, pages 46, 53), but
3 eventually relented a week later because she was told that 90% of rapes are done by
4 repeat offenders and Asst. Professor Dirks told her that “*Doe* fits the profile of
5 other rapists on campus in that he had a high GPA in high school, was his class
6 valedictorian, was on the water polo team, and was ‘from a good family.’”⁵ (Exh 4,
7 page 41.) Ms. *Jane Doe* also stated that she decided to report what had happened
8 when she realized how much it had affected her emotionally, while seeing no
9 reaction from Mr. *Doe* . She noted that he attended his classes without difficulty,
10 and she “saw that he wasn’t fazed by what had happened at all.” (Exh. 4, page 40.)

11 11. Also on or about September 16, 2013, Ms. *Jane Doe* filed a sexual
12 assault report with Los Angeles Police Department. (Exh. 4, page 41.) Los
13 Angeles Police Department Det. Michelle Gomez was in charge of the LAPD
14 investigation and interviewed Ms. *Jane Doe* and other student witnesses at
15 Occidental. On November 5, 2013 the Los Angeles District Attorneys Office,
16 Sexual Crimes Unit declined to prosecute for lack of evidence. Deputy District
17 Attorney Alison Meyers concluded, after meeting with Ms. *Jane Doe*, that both
18 parties were drunk and “they were both willing participants exercising bad
19 judgment” and “[s]pecifically the facts show the victim was capable of resisting
20 based on her actions.” Deputy Meyers also stated that “it would be reasonable for
21 him to conclude based on their communications and her actions that, even though
22 she was intoxicated, she could still exercise reasonable judgment.” (Exh. 3, page 1-
23 2.)

24 12. On November 14, 2013, Occidental’s investigators submitted their
25 _____

26 ⁵ On September 20, 2013, four days after Ms. *Jane Doe* filed her complaint, Asst.
27 Professor Dirks told the LA Times, “I’ve heard from three students since the beginning of
28 the school year who say they were raped. None of them has been handled appropriately.”
(Occidental College Chief Asks for Reconciliation after Accusations, *Los Angeles Times*,
September 20, 2013, Jason Felch and Jason Song.)

1 investigative report that confirmed what law enforcement had found, including that
2 just before going to Mr. *Doe* 's dorm room to have sex, she texted to Mr. *Doe* ,
3 "Okay do you have a condom." When Mr. *Doe* replied, "Yes," Ms. *Jane Doe*
4 texted back, "Good give me two minutes." (Exh. 4, page 93.) Ms. *Jane Doe* then
5 texted to another friend, "The worlds moving I'mgoingtohave sex now." (Exh. 4,
6 page 120.)

7 13. In spite of Ms. *Jane Doe*'s written confirmation of consensual sex, the
8 LAPD criminal investigation, the District Attorney's rejection for lack of evidence,
9 and Occidental's own investigative report, Occidental was determined to hold Mr.
10 *Doe* , but not Ms. *Jane Doe* , responsible for violating the Sexual Misconduct
11 Policy in order to bolster Occidental's defense against campus activists and the loss
12 of federal education funding and fines.

13 14. In fact, there was no sexual assault, no non-consensual sexual contact,
14 and no violation of Occidental's Policy. Indeed Ms. *Jane Doe* perpetrated exactly
15 the same conduct against Mr. *Doe* when she went back to his dorm room and
16 performed oral sex on him while he was intoxicated and had sexual intercourse.
17 Mr. *Doe* is being expelled because he is male; Ms. *Jane Doe* is not because she
18 is female.

19
20 SUMMARY OF THE FACTS

21 15. *Jane Doe* was drunk the night of Friday, September 6, 2013
22 and attended a dance party in Mr. *Doe* 's dorm room at 207 Braun. (Exh. 4, page
23 31.) Ms. *Jane Doe* suffered from a hangover the next morning (Exh. 4, page 31),
24 and "has always loved dancing, particularly when she is drunk." (Exh. 4, page 33).

25 16. On Saturday evening, September 7, 2013, Ms. *Jane Doe* was drunk
26 again, taking part in "pre-gaming," an Occidental ritual where under-age students
27 consume alcohol before attending a college sports game, in this case the men's
28 soccer game between Occidental and Arizona Christian in Jack Kemp Stadium.

1 "Okay." (Exh 4, pages 92, 108.) At 12:36, Mr. Doe texted, "Make them leave.
2 Tell them you want to sleep. I'dc. Just get back here." Ms. Jane Doe responded to
3 Mr. Doe, "Okay do you have a condom." When Mr. Doe replied, "Yes," Ms.
4 Jane Doe texted back, "Good give me two minutes." Ms. Jane Doe then created
5 a ruse to sneak past her friends and her Resident Advisor to get back downstairs to
6 Mr. Doe's dorm room to have sex. (Exh. 6, page 8.) Just before going back to
7 Mr. Doe's dorm room to have sex, Ms. Jane Doe texted another friend, "The
8 worlds moving I'mgoingtohave sex now." (Exh. 4, page 17.)

9 20. At 12:42 a.m. Mr. Doe texted to Ms. Jane Doe, "Knock when you
10 are here." (Exh. 4, page 17.) Ms. Jane Doe snuck past her friends and R.A. and
11 walked downstairs to Mr. Doe's room at approximately 1:00 a.m., knocked on the
12 door, went in, took off her earrings, got undressed, performed oral sex on Mr.
13 Doe and had sexual intercourse. When Mr. Doe was out of his dorm room for a
14 few minutes in the bathroom, Ms. Jane Doe called out to a friend knocking on the
15 door, "Yeah I'm fine," – three times. (Exh. 4, page 57.) Ms. Jane Doe heard Mr.
16 Doe tell her that his roommate Gavin Rose had just come in. (Exh. 4, page 36.)
17 Mr. Rose said that he witnessed the couple having sex when he opened the door and
18 saw Ms. Jane Doe's legs moving. (Exh. 4, page 78.)

19 21. Shortly before 2:00 a.m. Ms. Jane Doe got dressed and left Mr.
20 Doe's room, forgetting her belt and earrings. (Exh. 4, pages 36, 96.) At 2:05 a.m.
21 Ms. Jane Doe began texting her various friends again including with the smiley
22 face symbol, [":"] (Exh. 4, pages 120, 122, 123, 125, 127.)

23 22. Ms. Jane Doe then returned to her own room, changed into pajamas,
24 and went to bed. As soon as her roommate left her alone, Ms. Jane Doe got out of
25 bed again because, "I didn't feel like going to sleep." (Exh. 4, page 37.) She found
26 her phone and her key card, and put on her shoes, walked down the stairs and across
27 the grassy area known as "Stewie Beach" to Stewart-Cleland Hall, a.k.a Stewie.
28 Ms. Jane Doe walked in the front entrance of Stewie, went to the common room,

1 saw a male student whom she met the night before, and sat on his lap, talking and
2 joking. (Exh. 4, pages 37, 45; Exh. 6, page 10.) The last of her texts that Ms.
3 *Jane Doe* provided to investigators was at approximately 2:30 a.m. when she told
4 a friend that she was in Stewie. (Exh. 4, page 123.) Her roommate went to Stewie
5 brought her back to their dorm room and put her to bed again. Ms. *Jane Doe* fell
6 asleep around 3:00 a.m. or 3:30 a.m. Six hours later at 9:00 a.m. Ms. *Jane Doe*
7 woke up feeling drunk with a lightheaded feeling and dehydrated. (Exh. 4, page
8 37.)

9
10 FINDINGS AND SANCTIONS

11 23. Procedural and Substantive Errors Significantly Affected the Outcome.

12 Occidental College disciplinary proceedings are to be conducted in
13 compliance with the requirements of state and federal law (Exh. 1, page 8), which
14 require at minimum that Occidental's policy and proceedings must be non-
15 discriminatory, fair, impartial, treat participants in good faith, not violate students'
16 civil rights, not be arbitrary or capricious, and permit only findings that are
17 supported by the evidence, and reach only decisions that are supported by the
18 findings.⁷ In this case, Occidental has failed on every point.

19 (a.) No Rights for the Accused.

20 Occidental College's new 46-page Sexual Misconduct Policy ("Policy")
21 denies accused male students the most basic due process recognized by the U.N.
22 Universal Declaration of Human Rights, the U.S. Constitution, and the California
23 Constitution, including the assistance of counsel, the right to remain silent in the
24 face of criminal accusations, and the presumption of innocence. Occidental claims
25 that the Policy is fair and balanced because both sides are treated equally; however,
26 in practice, Occidental pits accused male students (with only high school

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28 ⁷ See, e.g., Title IX, Civ. Code § 43, Civ. Code § 52 et seq., Code Civ. Proc. §
1094.5, *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.

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1 educations) against Occidental's sophisticated, well-organized institutional process
2 designed by former criminal prosecutors and run by academics, a professional and
3 experienced staff, private investigators, and outside consultants and attorneys, while
4 the female student is supported by Occidental's Sexual Assault Coalition and the
5 National Women's Law Center and given access to advisors and advocates anytime
6 day or night.⁸ This denial of basic due process is a procedural error that is
7 discriminatory, unfair, lacking in good faith, in violation of students' civil rights,
8 and that significantly affected the outcome of the hearing.

9 (b.) Lack of Diversity.

10 The utter lack of any gender diversity among Occidental personnel, advisors,
11 outside contractors, adjudicator, and consultants involved in this disciplinary
12 proceeding reflects actual and apparent bias against students of the male gender.
13 This lack of diversity is discriminatory, unfair, lacking in good faith, violates
14 students' civil rights, and significantly affected the outcome of the hearing.

15 (c.) Irrelevant and Prejudicial Materials Presented.

16 Mr. *Doe* has the right to have the only evidence that is relevant and
17 nonprejudicial presented at the hearing. (See, Exh. 1, page 38.) In this case,
18 Occidental redacted information favorable to Mr. *Doe* from its Investigation
19 Report,⁹ which was presented at the hearing, but left intact in the Investigation
20 Report statements of personal opinion that are highly prejudicial and are neither
21 direct observations nor reasonable inferences from the facts, including the
22 following:

- 23 i. "*Doe* fits the profile of other rapists on campus in that he had
24 a high GPA in high school, was his class valedictorian, was on
25 the water polo team, and was 'from a good family.'" (Exh. 4,

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27 ⁸ In contrast, Mr. *Doe* was unable to secure an advisor until mid-November. (Exh.
28 4, page 3.)

⁹See Exh. 4, pages 3, 25, 26-28, 40, 41, 54, 63, 65, and 83-87.

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page 41.)

- ii. “*Jane Doe*’s symptoms are like “the dozens of other survivors [of sexual assault] I have met with on campus.” (Exh. 4, page 53.)
- iii. “*Jane Doe* appeared to be “in a strong state of denial” about the events, and told her at one point that she was not yet able to call the incident “rape.”” (Exh. 4, page 53.)
- iv. “*Jane Doe*’s reluctance to call what had happened to her “rape” was consistent with other victims of sexual assault. . . on campus.” (Exh. 4, page 53.)
- v. “*Doe* was ‘acting in the same way all these other young men [involved in sexual assaults] have acted’ by checking in on *Jane Doe* after the incident, and seeking to manage *Jane Doe* by being nice in a manner. . . described as “disingenuous.” (Exh. 4, page 54.)
- vi. *Jane Doe* was experiencing Post-Traumatic Stress Disorder (PTSD) (Exh. 4, page 53.)

Admitting statements of personal opinion by an Occidental professor and the founder of the Occidental Sexual Assault Coalition that refer to Mr. *Doe* as a “rapist,” stating that he acts like other sex assault perpetrators, and that Ms. *Jane Doe* is in denial about being raped, is far more prejudicial than probative. Including such statements while at the same time excluding relevant evidence favorable to Mr. *Doe* is a substantive error that significantly affected the outcome of the hearing.

(d.) No Hearing Panel Convened.

According to Occidental’s Sexual Misconduct Policy formal resolution of a complaint is to occur through the use of a Conduct Conference or a Hearing Panel. (Exh. 1, page 34.) The Hearing Panel typically consists of three members drawn

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1 from a pool of trained faculty and campus administrators (Exh. 1, page 35) and the
2 Hearing Panel Procedures are set forth at pages 39 through 42 of the Policy. (Exh.
3 1, page 39-42.) These policies and procedures give only the outward appearance of
4 fairness and impartiality. In fact, under its "Policy" Occidental may hire an external
5 adjudicator to serve as a member of the Hearing Panel or in lieu of the Hearing
6 Panel altogether, or have the Vice President for Student Affairs and Dean of
7 Students decide the case, or have the case decided by a designee of the Vice
8 President for Student Affairs and Dean of Students, or Occidental "may substitute
9 an entirely different method of adjudication at its discretion." (Exh. 1, page 35.) A
10 "policy" that Occidental may unilaterally change entirely at any time is no policy.¹⁰
11 In this case, Occidental refused to convene a Hearing Panel because the facts so
12 clearly show consensual sex that Occidental could not rely on a three-member panel
13 to hold the male student responsible. Occidental's failure to hold the typical three-
14 member Hearing Panel is a procedural and substantive error that significantly
15 affected the outcome of the hearing.

16 (e.) Relevant Questions Not Asked.

17 According to Occidental's Policy, all parties in the hearing have the
18 opportunity to ask questions of witnesses through the Hearing Panel (Exh. 1, page
19 38) and are encouraged to prepare a list of written questions in advance. (Exh. 1,
20 page 41.) Mr. *Doe* presented written questions for the witnesses at the hearing, as
21 he was encouraged, but questions were not asked that go to the heart of Ms.
22 *Jane Doe*'s complaint that "Ms. *Jane Doe* recalled performing oral sex on Mr.
23 *Doe* , but could not specifically recall having intercourse with Mr. *Doe* in his
24 dormitory room" because "Ms. *Jane Doe* alleges that she consumed multiple
25 alcoholic beverages in the hours leading up to the sexual contact." (Exh. 2, page 1;

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27 ¹⁰ Policy: a definite course or method of action selected from among alternatives
and in light of given conditions to guide and determine present and future decisions.
28 Merriam-Webster.com. Merriam-Webster, n.d. Web. 5 Jan. 2014.
<<http://www.merriam-webster.com/dictionary/policy>>.

1 see Exh 10.) Occidental did not confront Ms. *Jane Doe* concerning her selective
2 memory when she remembers significant details about her actions that night but not
3 during the “missing hour” when she went back to Mr. *Doe* ’s room to have sex.
4 “That [missing] hour still freaks me,” Ms. *Jane Doe* told Occidental. (Exh. 4, page
5 40.) But Ms. *Jane Doe*’s memory of the hour is not “missing,” merely highly
6 selective (and convenient). For instance, Ms. *Jane Doe* remembered agreeing to
7 come back down to Mr. *Doe* ’s room to have sex, remembered giving Mr. *Doe*
8 her cell phone number so he could text her when to come back, remembered texting
9 her friend in Tennessee “I’mgoingtohavensexnow,” remembered being excited to
10 sneak out of her room to get back to Mr. *Doe* ’s room, remembered throwing up,
11 remembered getting a piece of gum, remembered asking Mr. *Doe* if he had a
12 condom because she had not used any birth control, remembered that while Mr.
13 *Doe* was out of the room someone knocked on the door and asked if she was ok,
14 remembered responding three times to her friend that she was fine, remembered
15 performing oral sex on Mr. *Doe* , remembered Mr. *Doe* saying that his
16 roommate Gavin had just come in the room while they were having sexual
17 intercourse and saw Ms. *Jane Doe*’s legs moving. (Exh. 4, pages 33-36, 78.)
18 Occidental ignores these facts in its findings because the relevant questions
19 prepared by Mr. *Doe* weren’t asked, contrary to what Occidental states in its
20 findings letter. (See, Exh. 6, page 3, fn. 2; Exh. 10.)

21 Occidental’s refusal and failure to pose the relevant questions to confront Ms.
22 *Jane Doe* concerning the heart of her complaint are substantive and procedural
23 errors that significantly affected the outcome of the hearing.

24 (f.) Misstated Standard of Proof.

25 Occidental misstates the standard of proof and its own Policy in order to
26 dismiss and ignore the prosecutor’s finding of lack of evidence to charge Mr. *Doe*
27 for sexual assault and non-consensual sexual contact. (Exh. 6, page 5; see Exh. 3.)
28 The Policy states that Occidental’s definition of sexual assault incorporates both

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1 federal and state law and both the Policy and California law have the same
2 elements. (Exh. 1, page 10; see Pen. Code § 261(a)(3).) The test in California for
3 the government to hold a citizen to answer for a felony is “a strong suspicion,”
4 which is *less* than the preponderance of the evidence standard under Occidental’s
5 Policy.¹¹ In order to reach Occidental’s desired result to hold the male student
6 responsible, Occidental misstates the prosecutor’s finding of “no strong suspicion”
7 of sexual assault in order to find Mr. *Doe* responsible under Occidental’s higher
8 standard proof. Occidental’s misstatement of the standard of proof and
9 misstatement of its own Policy are substantive and procedural errors that
10 significantly affected the outcome of the hearing.

11 (g.) Findings Not Supported by the Evidence.

12 It would be difficult to imagine a better documented case of consensual sex
13 than this case, where the female student initiates the sexual contact, asks for a
14 condom in writing, tells a friend she is going to have sex in writing, tells friends she
15 is “fine” when she is having sex, willingly performs oral sex, is interrupted by a
16 roommate while having sexual intercourse and continues, and then sends smiley
17 faces to friends right after having sex.

18 In fact, Occidental made findings that Ms. *Jane Doe* engaged in conduct and
19 made statements that would indicate she consented to sexual intercourse with Mr.
20 *Doe* (Exh. 6, page 8) and there was no force, threat of force, or coercion involved.
21 (Exh. 6, page 6, fn. 5.)

22 These findings, which are supported by the evidence, should have concluded
23 the hearing in Mr. *Doe* ’s favor.

24 To obtain its desired result, however, Occidental made the further
25 unsupported and erroneous findings that Ms. *Jane Doe* was incapacitated when
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27 ¹¹Reasonable or probable cause “means such a state of facts as would lead a man of
28 ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of
the guilt of the accused.” (*People v. Nagle* (1944) 25 Cal.2d 216,222.)

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1 she engaged in the conduct or statements that indicated she consented to sexual
2 intercourse and when she had sexual intercourse because Ms. *Jane Doe* “did not
3 have the capacity to appreciate the nature and quality of the act.” (Exh. 6, page 11.)

4 Occidental’s reasoning is entirely circular and misstates its own definition of
5 “Incapacitation”.¹² Occidental attempts impossible mental gymnastics in
6 maintaining that while Ms. *Jane Doe* was consciously performing voluntary acts
7 that indicate she consented to sexual intercourse, she did not have the capacity to
8 perform the very acts that she was in fact performing. The evidence clearly shows
9 that at the time she was having sex in Mr. *Doe*’s dorm room, Ms. *Jane Doe* was
10 conscious, not asleep, and was aware sexual activity was occurring.¹³ (See, Exh. 1,
11 page 13.)

12 Finally, Occidental wrongly faults Mr. *Doe* for failing to do the impossible
13 and “fully appreciate the significance of events” that he did not and could not have
14 observed. Events such as Ms. *Jane Doe*’s taking off her shirt while dancing in his
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19 ¹² “Incapacitation: Incapacitation is a state where an individual cannot make an
20 informed and rational decision to engage in sexual activity because s/he lacks conscious
21 knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or
22 how of the sexual interaction) and/or is physically helpless. An individual is incapacitated,
23 and therefore unable to give consent, if s/he is asleep, unconscious, or otherwise unaware
24 that sexual activity is occurring.” (Exh. 1, page 13.) Occidental also confuses appreciation
25 of the nature and quality of the act with appreciation of the *consequences* of the act, and
26 wrongly equates *intoxication* with *incapacitation*. Clearly both parties were drunk and they
27 were both willing participants exercising bad judgment, but neither was incapacitated
28 under the Policy definition.

¹³ Occidental also ignores Ms. *Jane Doe*’s statements about what she does
remember from the “missing hour,” which contradicts a finding of incapacitation. (Exh. 4,
pages 34-36.) Occidental’s finding that Ms. *Jane Doe* “does not recall creating or sending
the text messages contained in the investigators report during that time period and other
events during that period” is directly contradicted by Ms. *Jane Doe*’s own statements in
the Investigators Report. (Exh. 6, page 11; see Exh. 4, pages 33-37.)

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1 room was inconsistent with her customary behavior,¹⁴ what Ms. *Jane Doe* did
2 outside of his dorm room that night, or what her friends were thinking. (Exh. 6,
3 page 12.) All a sober Mr. *Doe* would have observed when Ms. *Jane Doe* was
4 dancing in his room is that she was swigging vodka, was coming on to him, wanted
5 to stay with him, and didn't want to leave with her friends. Both were intoxicated
6 but neither was incapacitated.

7 Occidental's findings that are not supported by the evidence are procedural
8 and substantive errors that significantly affected the outcome of the hearing.

9 (h.) Decision Not Supported by the Findings.

10 Under Occidental College's new Sexual Misconduct Policy, Section F.
11 Sanctions, "The hearing panel will make a recommendation about the appropriate
12 sanction." (Exh. 1, page 43.)

13 Sanctions for a finding of responsibility for sexual assault range from
14 suspension to expulsion, however, "[t]he hearing panel may deviate from the range
15 of recommended sanctions, based upon a full consideration of the following factors:
16 (1) the Respondent's prior discipline history; (2) how the College has sanctioned
17 similar incidents in the past; (3) the nature and violence of the conduct at issue; (4)
18 the impact of the conduct on the Complainant; (5) the impact of the conduct on the
19 community, its members, or its property; (6) whether the Respondent has accepted
20 responsibility for his actions; (7) whether the Respondent is reasonably likely to
21 engage in the conduct in the future; (8) the need to deter similar conduct by others;
22 and (9) any other mitigating or aggravating circumstances, including the College's
23 values." (Exh. 1, pages 42-43.)

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26 ¹⁴ The first-year students had known each other for less than two weeks and could
27 have no knowledge or experience with each other's customary behavior. Ms. *Jane Doe*'s
28 own statements that she loves dancing when she is drunk, that she was drunk the night
before, and evidence that she becomes flirtatious when she is drunk, and that she flirted
with other male students both before and after having sex with Mr. *Doe* do not show that
her removal of her shirt is inconsistent with her customary behavior.

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1 In this case, Occidental College imposed the maximum sanction of expulsion
2 in the absence of any Hearing Panel recommendation (or adjudicator standing in
3 lieu of a Hearing Panel), a procedural error that significantly affected the outcome
4 of the hearing.

5 The decision to expel Mr. *Doe* is not supported by the findings that Ms.
6 *Jane Doe* engaged in conduct and made statements that would indicate she
7 consented to sexual intercourse with Mr. *Doe* (Exh. 6, page 8) and there was no
8 force, threat of force, or coercion involved. (Exh. 6, page 6, fn. 5.) This is
9 especially true in light of the nine factors to be considered under the Policy in that
10 there is no prior discipline history, there is no violent conduct at issue, Mr. *Doe*
11 has accepted responsibility for his actions and is not reasonably likely to engage in
12 the conduct in the future (Exh. 7), expulsion was not imposed by Occidental for
13 similar incidents in the past, and various mitigating circumstances, including
14 Occidental's failure to prevent or investigate the hazing of Mr. *Doe* (which led to
15 his intoxication and poor judgment) and Occidental's toleration of "pre-gaming"
16 and under-age drinking and failure to intervene when Ms. *Jane Doe* was found
17 drunk in public by Occidental security.

18 Occidental made decisions in a manner that does not conform with its own
19 Policy and that are not supported by the findings, which are procedural and
20 substantive errors that significantly affected the outcome of the hearing.

21
22 24. New Evidence Unavailable at the Original Hearing.

23 (a.) Redacted Evidence.

24 In this case Occidental improperly redacted information favorable to Mr.
25 *Doe* from its Investigation Report,¹⁵ evidence unavailable during the original
26 hearing that could substantially impact the original findings or sanctions. The
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¹⁵See Exh. 4, pages 3, 25, 26-28, 40, 41, 54, 63, 65, and 83-87.

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1 redacted favorable evidence included the redaction of an entire exhibit to the
2 Investigative Report (Exh. 4, pages 83-87), which contain the prosecutor's finding
3 of lack of evidence to charge Mr. *Doe* for sexual assault and non-consensual
4 sexual contact. (See Exh. 3.) Occidental misstated the elements and standard of
5 proof of sexual assault under its own Policy and state law in order to ignore the
6 relevant finding of "no strong suspicion" of sexual assault in order to find Mr.
7 *Doe* responsible under Occidental's higher standard proof of a preponderance of
8 the evidence.

9 The redacted information in the Investigative Report that is favorable to Mr.
10 *Doe* should be presented in further proceedings.

11 (b.) Blood Alcohol Levels and Stages of Acute Alcoholic
12 Influence/Intoxication

13 The level of Ms. *Jane Doe*'s blood alcohol over the course of the evening of
14 September 7, 2013 and morning of September 8, 2013 is central to any
15 determination of incapacitation due to her voluntary alcohol consumption.
16 Occidental noted in its findings the evidence of Ms. *Jane Doe*'s height and weight
17 and alcohol consumption that night, but makes no reference to any standard Blood
18 Alcohol Content (BAC) Charts or the standard Stages of Acute Alcoholic
19 Influence/Intoxication. (See Exh. 9.)

20 Without reference to the standard BAC reference charts, Occidental's
21 conclusion are speculative, if not intentionally false. For instance, Occidental
22 asserts that Ms. *Jane Doe* had very little memory of what occurred between the
23 period beginning approximately 11:00 p.m. on September 7, 2013 until she woke up
24 on September 8, 2013 and does not recall creating or sending the text messages
25 contained in the investigators report. (Exh. 6, page 11.) This is false and not
26 supported by the evidence. In fact Ms. *Jane Doe* remembered agreeing to come
27 back down to Mr. *Doe*'s room to have sex, remembered giving Mr. *Doe* her cell
28 phone number so he could text her when to come back, remembered texting her

1 friend in Tennessee "I'm going to have sex now," remembered being excited to sneak
2 out of her room to get back to Mr. *Doe*'s room, remembered throwing up,
3 remembered getting a piece of gum, remembered asking Mr. *Doe* if he had a
4 condom because she had not used any birth control, remembered that while Mr.
5 *Doe* was out of the room someone knocked on the door and asked if she was ok,
6 remembered responding three times to her friend that she was fine, remembered
7 performing oral sex on Mr. *Doe*, remembered Mr. *Doe* saying that his
8 roommate Mr. Rose had just come in the room while they were having sexual
9 intercourse. (Exh. 4, pages 33-36.) Ms. *Jane Doe* also remembered going back to
10 her own room, remembered meeting her friends again, remembered having her
11 phone taken away, remembered going to bed. She remembered that as soon as her
12 roommate left her alone, Ms. *Jane Doe* got out of bed again because, "I didn't feel
13 like going to sleep." (Exh. 4, page 37.) She remembered finding her phone and her
14 key card, and putting on her shoes, walking down the stairs and across the grassy
15 area known as "Stewie Beach" to Stewart-Cleland Hall, a.k.a Stewie. Ms.
16 *Jane Doe* remembered walking in the front entrance of Stewie, going to the
17 common room, seeing a male student whom she met the night before, and
18 remembered sitting on his lap, talking and joking about a NASCAR program on the
19 television. (Exh. 4, pages 37.)

20 Based on standard Blood Alcohol Level Charts and the standard Stages of
21 Acute Alcoholic Influence/Intoxication, which were not available at the original
22 hearing, Ms. *Jane Doe*'s symptoms and behavior reflect that she was at the
23 Euphoria or Excitement Stage of Alcoholic Influence and was not incapacitated.

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27
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Respectfully submitted,

January 6, 2014

John Doe

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