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Superior Court Of California  
County Of Los Angeles

NOV 17 2015

Sherri R. Carter, Executive Officer/Clerk  
By: Mary D. Clark, Deputy

1 MARK M. HATHAWAY, ESQ.  
2 (CA Bar #151332; NY Bar # 2431682;  
3 Washington DC Bar # 437335)  
4 WERKSMAN JACKSON  
5 HATHAWAY & QUINN LLP  
6 888 West Sixth Street, Fourth Floor  
7 Los Angeles, California 90017  
8 Telephone: (213) 688-0460  
9 Facsimile: (213) 624-1942  
10 E-Mail: mhathaway@werksmanjackson.com

11 Attorneys for Petitioner

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

14 JOHN DOE,  
15 Petitioner,  
16 v.  
17 OCCIDENTAL COLLEGE  
18 Respondent.

19 ) Case No. BS147275  
20 ) [Hon. Mary H. Strobel, Dept. 82]  
21 ) NOTICE OF MOTION AND  
22 ) MOTION TO COMPEL  
23 ) PRODUCTION OF  
24 ) ADMINISTRATIVE RECORD;  
25 ) DECLARATION; EXHIBITS  
26 ) Date: February 2, 2016  
27 ) Time: 9:30 a.m.  
28 ) Location: Dept. 82

29 TO RESPONDENT OCCIDENTAL COLLEGE AND ITS ATTORNEYS:

30 PLEASE TAKE NOTE that on February 2, 2016, at 9:30 a.m. before the  
31 Hon. Mary H. Strobel, Petitioner will move, and hereby does move, for an order  
32 compelling Respondent to prepare and produce the Administrative Record.

33 WERKSMAN JACKSON  
34 HATHAWAY & QUINN LLP

35 Dated: November 17, 2015

36   
37 MARK M. HATHAWAY  
38 Attorney for Petitioner

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 On June 17, 2014, Petitioner requested that Occidental College prepare and  
5 produce the Administrative Record. (See Exhibit 1)

6 Now, 595 days later (by the time of the hearing on this motion), Occidental  
7 College still has not prepared an Administrative Record in spite of repeated  
8 assurances and promises.

9  
10 II.

11 FACTUAL BACK GROUND

12 This case arises amidst a growing national controversy over threats by the  
13 U.S. Department of Education's Office of Civil Rights ("OCR") to withhold federal  
14 education dollars in order to compel colleges and universities to stem a purported  
15 tide of sexual violence on American campuses.<sup>1</sup>

16 Respondent Occidental College is under investigation by the U.S.  
17 Department of Education, Office of Civil Rights,<sup>2</sup> for the college's failure to  
18 address the so-called "rape culture" and "sexual assault epidemic" on campus.<sup>3</sup>

19 \_\_\_\_\_  
20 <sup>1</sup> "Sexual violence" refers to physical sexual acts perpetrated against a person's will  
21 or where a person is incapable of giving consent, including rape, sexual assault, sexual  
22 battery, sexual abuse, and sexual coercion. All such acts of sexual violence are forms of  
23 sex discrimination prohibited by Title IX. See April 4, 2011 Dear Colleague Letter issued  
24 by the Office for Civil Rights, U.S. Department of Education.

24 <sup>2</sup> As of April 1, 2015, there were 113 sexual violence cases under investigation at  
25 106 postsecondary institutions in the United States. U.S. Dept. Education Office of Civil  
26 Rights.

26 <sup>3</sup> In February 2012, Occidental College professors Caroline Heldman and Danielle  
27 Dirks founded the Occidental Sexual Assault Coalition, an advocacy group seeks to  
28 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/>)

1 Recent U.S. government data shows that Occidental College's rate of reported  
2 student sexual misconduct is *more than 15 times higher* than the rate of sexual  
3 misconduct the next ten highest California colleges and universities combined.<sup>4</sup>

4 Under the threat of federal fines and the loss of federal funding, including the  
5 loss of federally-guaranteed loans for its student, Occidental College now operates  
6 its own private sexual misconduct investigation and adjudication system that is  
7 utterly lacking in due process. Occidental College is the subject of at least three  
8 pending writ petitions in this court,<sup>5</sup> and is routinely mentioned in public discourse  
9 over Title IX and campus sexual violence in the national press.<sup>6</sup> In purporting to  
10 adjudicate cases of sexual misconduct by male students, Occidental College serves  
11 its own financial and institutional interests, not the interests of the public nor the  
12 People of the State of California.

13 In this case, Occidental College expelled John Doe for sexual assault and  
14 non-consensual sexual contact with a female student during the first week of school  
15 in August 2013. It would be difficult, however, to imagine a better documented  
16 case of consensual sexual intercourse than Jane Doe's interaction with John Doe on  
17 the night of September 7, 2013. Jane Doe initiated the sexual contact, then asked  
18 the male student for a condom in writing, then texted a friend that she was going to  
19 have sex, then asked for a condom again when she got to John Doe's dorm room,  
20 then she willingly performed consensual oral sex on John Doe, then she told friends

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22 <sup>4</sup> Source, <http://ope.ed.gov/security/> 2013 data for all public and private 4-year  
23 California institutions.

24 <sup>5</sup> See *Doe v. Occidental College*, LASC Case No. BS147275 and *Doe v. Occidental*  
25 *College*, LASC Case No. BS150532, *Doe v. Occidental College*, LASC BS155004. In  
26 addition, Occidental College's adjudicator Ms. Marilou Mirkovich was also hired by  
27 USC's Title IX office to act as a Title IX investigator in another pending appeal. *John Doe*  
*v. University of Southern California*, LASC Case No. BS152306.

28 <sup>6</sup> See, Richard Dorment, *Occidental Justice*, (April 2015) Esquire.

1 through John Doe’s dorm room door that she was “fine” when she was having sex,  
2 and then continued sexual intercourse when another student walked in on the  
3 couple in the midst of sexual intercourse, and then she texted smiley faces [☺] to  
4 friends right after having sexual intercourse, as soon as she left John Doe’s dorm  
5 room. (Verified Petition, 6:19 - 7:8.)

6 Jane Doe was encouraged to file a sexual misconduct complaint against John  
7 Doe by Occidental College Asst. Prof. Danielle Dirks, who told Jane Doe she was  
8 raped, said Jane Doe was suffering from PTSD, and told her that “[John Doe] fits  
9 the profile of other rapists on campus in that he had a high GPA in high school, was  
10 his class valedictorian, was on [a sports] team, and was ‘from a good family.’”  
11 (Verified Petition, 5:23-6:2, Petition, Exhibit 4, Page 53.)

12 Occidental College’s private investigation and adjudication process focuses  
13 on validating the initial allegations of sexual misconduct, rather than arriving at a  
14 fair and impartial determination of the facts. Accused male student are prevented  
15 from challenging or confronting the witnesses against them in any meaningful  
16 manner. Questioning is entirely controlled by Occidental College’s attorney and no  
17 effort is made to challenge contradictory and inconsistent statements by witnesses  
18 against the accused male student. Occidental College’s Title IX hearing follows no  
19 rules of evidence and the adjudicator may consider matters outside the record of the  
20 hearing. Occidental College prohibits the accused male student from having copies  
21 of any of the witness statements or evidence against him and prohibits him from  
22 sharing documents with third parties, including presenting documents to this court,  
23 under the threat of further discipline by Occidental College. Occidental College  
24 denies accused male students the right to counsel, while at the same time  
25 conducting its own investigation and adjudication process through phalanx of  
26 private investigators, attorneys, and other professionals. Under its current policy,  
27 an attorney may serve as an “advisor”, but is prevented from speaking or  
28 participating on the accused male student’s behalf in any manner.

1 The administrative appeal at Occidental College is a sham and pretense and is  
2 not independent in any sense. The “designated Appeals Officer” is merely another  
3 lower-level college employee, who cannot even consider the record of the Title IX  
4 sexual misconduct hearing. Under Occidental College’s policy, the administrative  
5 appeal does not consider whether the findings are supported by the preponderance  
6 of the evidence nor whether the sanctions are justified and properly imposed.

7 Petitioner seeks court review of Occidental Colleges Title IX sexual  
8 misconduct investigation and proceedings and in order to file his opening Brief,  
9 Petitioner needs Occidental College to produce the administrative record, or agree  
10 to  
11 the Administrative Record that Petitioner produced over a year ago, attached here  
12 to as Exhibit 2, with the addition of the December 7, 2013 hearing transcript, filed  
13 herein under seal.

14  
15 III.

16 ARGUMENT

17 A. THE COURT SHOULD ORDER RESPONDENT TO PREPARE  
18 AND PRODUCE THE ADMINISTRATIVE RECORD OF ITS  
19 ACTION AGAINST PETITIONER.

20 An administrative order or decision cannot ordinarily be challenged on  
21 evidentiary grounds unless the administrative record is obtained and filed with the  
22 court. *Alford v. Pierno* (1972) 27 Cal. App. 3d 682, 690.

23 The court is empowered by Code Civ. Proc. § 1094.5(a) to order the agency,  
24 in this case Occidental College, to prepare and produce the record:

25 . . . All or part of the record of the proceedings before the  
26 inferior tribunal, corporation, board, or officer may be filed with  
27 the petition, may be filed with respondent's points and  
28 authorities, or may be ordered to be filed by the court. Except  
when otherwise prescribed by statute, the cost of preparing the

1 record shall be borne by the petitioner. Where the petitioner has  
2 proceeded pursuant to Article 6 (commencing with Section  
3 68630) of Chapter 2 of Title 8 of the Government Code and the  
4 Rules of Court implementing that section and where the  
5 transcript is necessary to a proper review of the administrative  
6 proceedings, the cost of preparing the transcript shall be borne  
7 by the respondent. Where the party seeking the writ has  
8 proceeded pursuant to Section 1088.5, the administrative record  
9 shall be filed as expeditiously as possible, and may be filed with  
10 the petition, or by the respondent after payment of the costs by  
11 the petitioner, where required, or as otherwise directed by the  
12 court. If the expense of preparing all or any part of the record  
13 has been borne by the prevailing party, the expense shall be  
14 taxable as costs. Cal Code Civ Proc § 1094.5 (a).

15 The superior court cannot decide an administrative mandamus case without  
16 reviewing the administrative record. *Ocheltree v. Gourley* (2002) 102 Cal. App. 4th  
17 1013, 1017-1018. When the decision to be reviewed was made by an agency  
18 subject to Gov. Code § 11500 et seq., upon request of the Petitioner the agency is  
19 required to prepare and deliver the record within 30 days after the request.

20 IV.

21 CONCLUSION

22 For the reasons set forth above, Respondent Occidental College should be  
23 ordered to prepare, and produce to Petitioner, the Administrative Record of the  
24 underlying disciplinary matter, or in the alternative, the court should grant the  
25 Petition for Writ of Mandate and order that Occidental College's administrative  
26 action and sanctions against Petitioner be dismissed.

27 WERKSMAN JACKSON  
28 HATHAWAY & QUINN LLP

Dated: November 17, 2015

  
MARK M. HATHAWAY  
Attorney for Petitioner

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DECLARATION OF MARK M. HATHAWAY


I, Mark M. Hathaway, declare:

I am an attorney admitted to practice in all courts in the State of California, the State of New York, and the District of Columbia and am responsible for representation of Petitioner John Doe in this matter. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

1. On June 17, 2014 Petitioner requested the administrative record from Respondent Occidental College. A true and correct copy of the request is attached hereto as Exhibit 1.

2. Occidental College did not produce the Administrative Record timely so on October 24, 2014, Petitioner produced and lodged with the court his Administrative Record in three volume, Volumes I, II and III. A true and correct copy of Petitioner's Administrative Record Vols I, II, and III are attached hereto as Exhibit 2, Exhibit 3, and Exhibit 4.

Signed under the penalty of perjury at Los Angeles California on November 17, 2015.

  
Mark M. Hathaway Declarant

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PROOF OF SERVICE

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 888 West Sixth Street 4<sup>th</sup> Floor, Los Angeles CA 90017.

On November 17, 2015 I served the foregoing document, described as NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF ADMINISTRATIVE RECORD; DECLARATION; EXHIBITS on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jonathan M. Brenner  
SIDLEY AUSTIN LLP  
555 West Fifth Street, Suite 4000  
Los Angeles, California 90013  
Telephone: (213) 896-6000  
Facsimile: (213) 896-6600  
E-mail: jbrenner@sidley.com  
ATTORNEYS FOR RESPONDENT OCCIDENTAL COLLEGE

BY FACSIMILE TRANSMISSION from FAX No. (213) 624-1942 to the fax numbers set forth above.  
 The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

BY EXPRESS SERVICE: I caused such document to be deposited in a box or other facility regularly maintained by the express service carrier or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

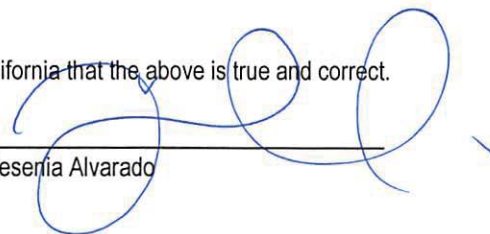
BY MAIL as follows:  
By placing  the original  a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY ELECTRONIC TRANSMISSION - I transmitted a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

BY PERSONAL SERVICE as follows: I delivered a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by a process server employed by

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

Executed on November 17, 2015 at Los Angeles, California.

  
\_\_\_\_\_  
Yesenia Alvarado



# Exhibit 1

MARK J. WERKSMAN  
MARK M. HATHAWAY\*  
KELLY C. QUINN\*\*  
MELISSA A. WEINBERGER  
NINA DALY

\*CERTIFIED SPECIALIST - TAXATION LAW  
THE STATE BAR OF CALIFORNIA  
BOARD OF LEGAL SPECIALIZATION

\*\*CERTIFIED SPECIALIST - APPELLATE LAW  
THE STATE BAR OF CALIFORNIA  
BOARD OF LEGAL SPECIALIZATION

LAW OFFICES OF  
MARK J. WERKSMAN  
888 WEST SIXTH STREET  
FOURTH FLOOR  
LOS ANGELES, CALIFORNIA 90017  
TELEPHONE (213) 688-0460  
FACSIMILE (213) 624-1942  
WWW.WERKSMANLAW.COM

\*ADMITTED IN CALIFORNIA,  
NEW YORK AND WASHINGTON D.C.

June 17, 2014

VIA FACSIMILE TO (213) 896-6600 AND  
EMAIL TO [jbrenner@sidley.com](mailto:jbrenner@sidley.com)

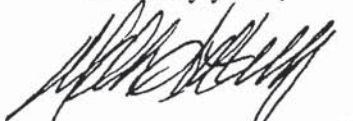
Jonathan M. Brenner, Esq.  
Sidley Austin LLP  
555 West Fifth Street, Ste. 4000  
Los Angeles, CA 90013

Re: John Doe v. Occidental College, LASC Case No. BS147275

Dear Mr. Brenner;

Although we have had discussions about Respondent's preparation of the administrative record, and the Petition states that the administrative record will be submitted as soon as Respondent provides the administrative record, I understand from your comment to Judge Lavin this morning that Occidental College may be awaiting a more formal request for Respondent to prepare the administrative record. Please accept this letter as the request for Respondent to prepare the administrative record. In the alternative, please provide a certified copy of the transcript and the audio recording of the December 7, 2013 hearing, which have not been provided despite repeated verbal and written requests, and Petitioner will prepare the administrative record.

Sincerely yours,



MARK M. HATHAWAY