FIRE
Foundation for Individual Rights in Education

April 10, 2014

President Jonathan Veitch
Occidental College
Office of the President
Arthur G. Coons Administrative Center, Third Floor
Los Angeles, California 90041

Sent via U.S. Mail and Facsimile (323-259-2907)

Dear President Veitch:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is gravely concerned by the threat to Occidental College students' due process rights posed by Occidental's application of its policy on sexual assault against pseudonymous student John Doe, as documented in the case of *John Doe v. Occidental College*, Case No. BS147275, in the Superior Court of the State of California for the County of Los Angeles, Central District. Given the evidence presented by Doe in his petition, Occidental's finding that his accuser was incapacitated and thus unable to consent to sexual activity does not appear to have a reasonable basis in fact. Furthermore, the unwritten standard that Occidental seems to have applied to Doe in this case conflates intoxication with incapacitation, thereby eliminating the possibility of a student consenting to sexual activity while intoxicated to any degree and likely rendering many Occidental students unwitting rapists.

This is our understanding of the facts, taken from the pleadings available in *Doe v. Occidental*.

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The incident in question, according to Occidental's letter to Doe dated November 19, 2013, occurred "on or about the early morning hours of Sunday, September 8, 2013 between the approximate times of 12:50 A.M. and 2:00 A.M." Both Doe and his accuser were first-year students at Occidental who had moved into student dormitories approximately two weeks earlier. (Occidental's academic calendar lists August 24, 2013, as the beginning of "New Student Move-In.")

Complaints against Doe were filed with both the Los Angeles Police Department (LAPD) and Occidental College on or around September 16, 2013, eight days after the alleged incident. LAPD Detective Michelle Gomez interviewed the parties and witnesses and, in a Charge Evaluation Worksheet dated November 5, 2013, Deputy District Attorney Alison A. W. Meyers wrote:

> Witnesses were interviewed and agreed that the victim and suspect were both drunk, however, that they were both willing participants exercising bad judgment.
>
> I interviewed the victim regarding the facts of the case. ... Specifically the facts show the victim was capable of resisting based on her actions . ... More problematic is the inability to prove the suspect knew or reasonably should have known that she was prevented from resisting if she was in that state. It would be reasonable for him to conclude based on their communications and her actions that, even though she was intoxicated, she could still exercise reasonable judgment. That charge [the California law delineating rape in which "a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused"] is therefore declined based on lack of evidence.

(The copy of the police report provided to FIRE contains redactions.) The LAPD's refusal to charge Doe apparently ended the criminal justice system's involvement in this matter.

Meanwhile, as a result of the complaint, Occidental charged Doe with Sexual Assault and Non-Consensual Sexual Contact and engaged the private firm of Public Interest Investigations, Inc. (PII) to investigate on behalf of the college. The investigative report, dated November 14, 2013, states that the firm never interviewed Doe himself, since Doe's attorney advised him not to make any statement during the pendency of the criminal investigation, which did not end until November 5. Occidental also engaged an "External Adjudicator," Marilou F. Mirkovich of the law firm of Atkinson, Andelson, Loya, Ruud &

Romo, to make the final decision as to whether Doe had violated Occidental's sexual misconduct policy.

Mirkovich, using the report generated by PII, found that Doe had violated Occidental's sexual misconduct policy. While she found that it was "more likely than not that the Complainant engaged in conduct and made statements that would indicate she consented to sexual intercourse with the Respondent," she also found that under Occidental's sexual misconduct policy, Doe's accuser was "incapacitated" and that Doe knew or should have known that she was incapacitated and therefore unable to grant meaningful consent.

Occidental's sexual misconduct policy defines incapacitation as follows:

> Incapacitation: Incapacitation is a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless. An individual is incapacitated, and therefore unable to give consent, if s/he is asleep, unconscious, or otherwise unaware that sexual activity is occurring.
>
> Incapacitation may result from the use of alcohol and/or drugs. Consumption of alcohol or other drugs alone is insufficient to establish incapacitation. The impact of alcohol and drugs varies from person to person, and evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs impact an individual's:
>
> - decision-making ability;
> - awareness of consequences;
> - ability to make informed judgments; or
> - capacity to appreciate the nature and the quality of the act.
>
> Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known, [*sic*] that the Complainant was incapacitated.

The pleadings include screenshots of text messages exchanged between Doe and the accuser. (The text messages are attached to this letter.) These messages depict two adults who made a conscious and knowing decision to engage in sexual activity. For instance, a series of messages beginning at 12:31 a.m. on September 8 indicate that Doe and the accuser

were working together via text message to arrange for the accuser to sneak out of her room without being observed by her resident advisor and return to Doe's room, where, according to accounts noted in the PII investigation report, they had earlier engaged in sexual activity initiated in part by the accuser. A message sent by the accuser at 12:37 a.m. asked Doe, "Okay do you have a condom," to which he replied, "Yes." The pleadings also include screenshots of several text messages sent by the accuser at around the same time to a friend of hers, in which she says at 12:40 a.m.—only three minutes after she asked Doe whether he had a condom—"I'mgoingtohave sex now." (All text messages referenced in this letter are quoted exactly as originally written.)

These text messages are difficult to reconcile with Occidental's written definition of incapacitation. The messages demonstrate that Doe's accuser understood what she was planning to do (she told a friend she was going to have sex), with whom she was going to have sex (she asked Doe if he had a condom), when she would do it (she told a friend that she was going to have sex "now"), and where it would take place (her texts with Doe discussed how she would sneak out of her room to a specific, known place—Doe's room). While her texts did not discuss exactly why or how she would choose to have sex with Doe, the investigative report goes into some detail on pages 13–15 about the accuser's sexual advances towards Doe. The text messages and the accuser's concerted and deliberate effort to sneak out of her room for the purpose of having sex, described in text messages sent over 24 minutes, eliminate any possibility that she was physically helpless, asleep, unconscious, or unaware that sexual activity would occur.

However, Occidental's written definition of incapacitation does not appear to have been applied by the institution and its external adjudicator in reviewing the allegations against Doe. Page 11 of Mirkovich's decision shows that she chose to utilize a standard that differs significantly from Occidental's policy:

> In summary, the evidence shows that the Complainant, who is approximately 5'2" and of normal weight, was already significantly impaired by alcohol no later than 11:00 p.m. on the night of September 7, 2013. Nevertheless, the Complainant continued drinking swigs of vodka from a vodka bottle during the hour to hour and a half. As a result, the Complainant has very little memory of what occurred between the period beginning approximately 11:00 p.m. on September 7, 2013 until she woke up on September 8, 2013. In that regard, the Complainant does not recall creating or sending the text messages contained in the investigators' report during that time period and other events during that period, including having sexual intercourse with the

> Respondent. Thus, during that period the Complainant's level of intoxication by alcohol was so significant that she experienced "blackouts."
>
> In addition to the blackouts, multiple witnesses—Ms. Babcock, Ms. Peckham, and Ms. Welmond—observed that the Complainant was slurring her speech, stumbling, and not making sense during the relevant time period. Further, the fact that the Complainant removed her shirt while dancing with the Respondent and credibly testified that she would not normally do so when intoxicated caused the external adjudicator to find that by this point in the evening the Complainant's decision-making ability was significantly impaired. The external adjudicator finds that at the time the Complainant and the Respondent had sexual intercourse, the Complainant was not aware of the consequences of her action and she did not have the capacity to appreciate the nature and quality of the act. Accordingly, the external adjudicator finds that the Complainant was incapacitated at the time she engaged in the conduct or statements that indicated she consented to sexual intercourse with the Respondent.

There are a number of flaws in Mirkovich's analysis, but the heart of the problem is its contention that the accuser "did not have the capacity to appreciate the nature and quality of the act." This finding cannot be squared with the evidence presented. The text messages the accuser sent at the time indicate that she was aware that she was going to engage in sexual activity with Doe and indeed had the capacity to coordinate sneaking out of her room via text messages sent to him over a 24-minute period. The accuser's text message to her friend also reveals that she wanted to share the news that she was about to engage in sexual activity. Further, her question to Doe about whether he had a condom indicates that she was lucid enough to be concerned about the possibility of pregnancy and/or contracting a sexually transmitted disease. In light of these messages, a conclusive statement that such a person did not understand the potential consequences of sex or the "nature and quality of the act" of sex is unfounded.

Instead of applying Occidental's written policy, Mirkovich and Occidental seem to have applied an unwritten policy that turns what the Los Angeles County prosecutor labeled "willing participants exercising bad judgment" into sexual assault because the accuser's judgment was impaired and because she did not recall all of the details of what happened on the night in question. It is well established that almost any consumption of alcohol will likely have some deleterious effect on a person's judgment. For instance, West Virginia University's School of Public Health lists "decreased inhibition and judgment" as an effect

of a blood-alcohol level as low as .05%, which typically represents only one or two drinks.[1] The University of Notre Dame lists "[s]ignificant impairment of motor coordination and loss of good judgment" as effects of a blood-alcohol level of between 0.1% (the legal limit for driving in many states) and 0.125%, which can represent as few as four beers over a two-hour period.[2] And with regard to memory loss, the glossary for the popular "AlcoholEDU" curriculum used by many colleges states that "blackouts" can occur at blood-alcohol levels between 0.1%–0.15%.[3]

The possibility that one's judgment might be impaired or one's memories might fail while intoxicated does not strip students of the ability or right to make judgments about their activities while intoxicated, nor does it extinguish their ability to reason or make decisions. Occidental's written policy reflects that reality by recognizing that "[c]onsumption of alcohol or other drugs alone is insufficient to establish incapacitation" and defining incapacitation as "a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction) and/or is physically helpless." However, this is clearly not the standard that was applied in this case.

In fact, the weakened definition of incapacitation applied by Occidental in Doe's case is so faulty and unfair that, using the same applied definition and given the same evidence, Doe's accuser would be guilty of sexually assaulting Doe. There does not appear to be any dispute that Doe was intoxicated; the accounts of witnesses found on pages 13–15 of the investigative report make clear that both Doe and his accuser were intoxicated. Also, on page 10 of Mirkovich's report, Mirkovich points out that the accuser "subsequently recalled giving the Respondent [Doe] oral sex; however, the Respondent does not recall this act," indicating that Doe (like his accuser) experienced a "blackout" during the night. The investigative report goes into some detail about the accuser's sexual advances towards Doe. For instance, page 15 of the investigative report states, "Hayward said that while Jane Doe was on top of John on the bed, the two of them were 'getting really physical.' Hayward recalled that Jane Doe 'was kind of riding on top of [Doe]. Her hips were moving.' Hayward said, 'It looked like something sexual was going down.'" And given that the relevant text message evidence consists largely of conversations between Doe and his accuser that were

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[1] West Virginia University, School of Public Health, *Short-Term Effects of Alcohol, available at* http://publichealth.hsc.wvu.edu/Alcohol/Effects-on-the-Body/Short-Term-Effects (accessed April 8, 2014).

[2] Notre Dame University, Office of Drug and Alcohol Education, *What Is Intoxication? available at* http://oade.nd.edu/educate-yourself-alcohol/what-is-intoxication/ (accessed April 8, 2014).

[3] AlcoholEDU, *Glossary, available at* http://www.alcoholedu.com/glossary.html (accessed April 8, 2014).

evidently understood by both sides, their level of comprehension of the nature and quality of the act would appear to be equal. Thus, based upon Occidental's findings under the standard it applied to Doe (which differs from its actual, written standard), Occidental should have no choice but to determine that Doe's accuser also committed sexual assault against Doe.

The fact that the applied definition of incapacitation would make *both* parties guilty of sexually assaulting one another brings into stark relief the fundamental unfairness and lack of substantive due process present in Occidental's actions against Doe. While the culture of excessive alcohol consumption present on countless campuses across the country has lamentable consequences, it is far more troubling to institute a system in which two drunk students who explicitly consent to having sex with one another could nevertheless be unwittingly sexually assaulting one another. This will only result in a campus full of hundreds or even thousands of unwitting rapists. Such an approach inevitably results in the unfair and highly detrimental branding of innocent students as rapists. Indeed, it achieves the opposite of its aim of educating students on the seriousness of actual sexual assault, instead teaching Occidental students that being found guilty of rape at Occidental has little to do with whether or not such an offense truly occurred.

There are also substantial due process concerns presented by employing an unwritten standard of any kind in judging whether or not a student has committed sexual assault. It has long been established that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Kolender v. Lawson,* 461 U.S. 352 (1983), *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). And while FIRE cites the Supreme Court for this basic proposition of law, this principle holds not just for laws instituted by the federal government or state entities, but also for rules at Occidental or any other college committed to fundamental fairness in its student disciplinary procedures. There can be no justice if a reasonable student can only guess at what is prohibited. In this case, since Occidental applied a standard other than the standard written in its policies—a standard seemingly constructed for this particular case—Doe had no way of knowing that sexual activity for which he received consent, *even according to Occidental's own adjudicator*, would nonetheless be deemed sexual assault. Doe had the right to rely on Occidental to follow its own written guidelines when determining his fate as a student, and Occidental manifestly did not follow these guidelines.

FIRE commends Occidental for conducting what appears to be a very thorough investigation into the events of September 8, 2013. This speaks well of Occidental's efforts to address the problem of sexual assault on campus. Occidental's written standard for incapacitation is also entirely defensible. But these commendations do not and cannot excuse Occidental's failure to fairly apply its policies while adjudicating the allegations against John Doe. We recognize that in the wake of Occidental's settlement with the many students represented by attorney Gloria Allred, the corresponding investigation by the Department of Education's Office for Civil Rights into Occidental's treatment of sexual assault complaints, the creation of a White House task force on campus sexual assaults, and increasing national attention to the issue, the college is under a great deal of internal and external pressure to be aggressive in dealing with complaints of sexual assault. Yet this focus cannot and must not ever justify the unfair treatment of an accused student and the disregard of his or her right to fundamentally fair proceedings.

FIRE requests that Occidental reconsider the findings of its external adjudicator, given the obvious and unavoidable difference between the adjudicator's applied standard and Occidental's written standard for incapacitation in the context of sexual assault. As all of the information contained in this letter comes from publicly available court filings, and the students at issue are referred to pseudonymously in those filings, Occidental need not fear violating the Federal Educational Rights and Privacy Act (FERPA) in addressing FIRE's concerns. We therefore request a response by April 30, 2014.

Sincerely,

Robert Shibley
Senior Vice President

Encl.

cc:
Jorge Gonzalez, Dean of the College, Occidental College
Barbara J. Avery, Vice President for Student Affairs and Dean of Students, Occidental College
Ruth Jones, Title IX Coordinator, Occidental College
John Doe