

# FACE COMPARISON OF CA SB169 PROCEDURES WITH RECOMMENDED DUE PROCESS PROCEDURES<sup>1</sup>

	CALIFORNIA SB169 <sup>2</sup>	NCHERM WHITE PAPER <sup>3</sup>	ACTL WHITE PAPER <sup>4</sup>	STANFORD POLICY <sup>5</sup>	FACE RECOMMENDATIONS <sup>6</sup>
<b>1. EQUITABLE &amp; UNBIASED PROCESS</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (c)(3) &amp; (c)(3)(H): <i>require adoption of grievance procedures providing 'prompt and equitable resolution' of sexual harassment complaints.</i> [Q&amp;A 12]<sup>7</sup></li> <li>◆Sec. 4 &amp; 6 (c)(3)(C): <i>require adequate, reliable and impartial investigations including the opportunity for both parties to present witnesses &amp; other evidence.</i> [Q&amp;A 12]</li> </ul>	<ul style="list-style-type: none"> <li>◆NCHERM is the leading provider of Title IX coordinator training (or SB169 'equity coordinator') throughout the country.</li> <li>◆Parties should have the right to a process free from discrimination, including gender discrimination, neutral, unbiased, impartial fact-finders and objective decisions on whether the conduct violates school policy. [17, 18]<sup>8</sup></li> </ul>	<ul style="list-style-type: none"> <li>◆By expanding Title IX and creating procedures, which are mandatory, OCR has "involved itself" in school discipline protocols. This and the ability to command compliance through fines and funding, requires OCR to provide due process protections for accused students at both private and public institutions. [12, 14]</li> </ul>	<ul style="list-style-type: none"> <li>◆STANFORD's Policy 'sets forth fair and equitable procedures for the review and adjudication of sexual violence complaints made against students.' and precludes those with a conflict of interest from serving on a hearing panel. [1, 17]</li> </ul>	<ul style="list-style-type: none"> <li>◆SB169 requires 'adequate, reliable and impartial investigations' as does the Dear Colleague Letter (DCL).<sup>9</sup></li> <li>◆<i>Unfortunately, due to the focus on victims' rights on campus many schools do not believe it is necessary to provide or even understand the mechanics of providing adequate, reliable and impartial processes, making it crucial that SB169 provide basic guidelines, such as those discussed here.</i></li> </ul>
<b>2. IMPORTANCE OF DUE PROCESS</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (f): <i>require schools to ensure that steps taken to accord due process rights to the 'alleged perpetrator' do not restrict or unnecessarily delay the protections for a complainant.</i> [Q&amp;A 13]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties have the right to a fundamentally fair process. [18]</li> <li>◆'Some pockets in higher education have twisted the [DCL] and Title IX into a license to subvert due process and to become the sex police.' [2]</li> </ul>	<ul style="list-style-type: none"> <li>◆Due process is necessary because the 'stakes are 'very high,' and students are 'charged with serious offenses' "that carry the potential for substantial public condemnation and disgrace." [11]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be provided a written 'Notice of Concern' providing sufficient detail regarding allegations and applicable school policies for the respondent to respond to &amp; both parties to understand scope of the investigation. [9]</li> </ul>	<ul style="list-style-type: none"> <li>◆SB169 never mentions due process, except to caution that the respondent's due process rights <i>should not be allowed to interfere with the process.</i></li> <li>◆There are many due process-like procedures available that do not interfere with protecting complainants, as shown by the STANFORD policy.</li> </ul>
<b>3. PROMPT &amp; DETAILED NOTICES</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (c)(3)(E), (g) &amp; (c)(3)(G)(ii): <i>require schools to notify parties of outcomes of the complaint and any appeal.</i> [Q&amp;A, 12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be provided notice of the policies violated and detailed descriptions of the charges before an interview or hearing. [17, 18]</li> <li>◆Parties should be provided timely notice of all meetings, including those with other parties, either before or soon thereafter. [18]</li> <li>◆Parties should receive timely and regular updates on the status of investigations and resolutions. [17-18]</li> <li>◆Parties should receive notice of the hearing and a copy of the investigation report with adequate time to prepare for the hearing. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆Respondents should have the right to be promptly provided with details of allegations and advised of the right to consult legal counsel. [13]</li> </ul>	<ul style="list-style-type: none"> <li>◆Policy provides for prompt written notices throughout the process, from the beginning of the investigation through appeals. [9-13, 17-18, 20 ]</li> </ul>	<ul style="list-style-type: none"> <li>◆Respondents must be informed promptly, and prior to any school interview, of a pending investigation and details about conduct on which any allegations are based.</li> <li>◆FACE supports STANFORD, ACTL &amp; NCHERM policies calling for prompt and adequate notice of all actions and decisions relevant to the allegations.</li> <li>◆Notices should be provided sufficiently in advance to allow both parties a reasonable time to respond.</li> <li>◆Respondents should be notified that statements and other information acquired by or provided to the school can be used in criminal proceedings.</li> </ul>

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4. PARTY IDENTITY	No provisions	♦Parties should be informed of the identity of complainant and witnesses, unless there are verified significant safety concerns or the identity of witnesses irrelevant [18]	<i>Does not address</i>	♦Does not guarantee confidentiality but will be considered.[6]	♦FACE agrees with NCHERM that identities of parties and witnesses should be disclosed unless there are legitimate, verifiable safety concerns.
5. LAW ENFORCEMENT	♦No provision concerning cooperation with law enforcement agencies or the "Memorandum of Understanding" between schools and law enforcement provided by federal Title IX guidance.	<i>Does not address</i>	<i>Does not address</i>	♦Re: Criminal conduct - STANFORD encourages complainants to report to law enforcement but does not require it. [6]  ♦School staff are required to report criminal conduct, but not to identify a complainant unless the complainant consents or is a minor. [6]	♦When a police investigation is pending, schools should cooperate if possible under applicable laws, allowing evidence collection and preservation.  ♦With criminal conduct, complainants should be <i>encouraged but not required</i> to file a police report and supported by school in that effort, because reporting creates a record of repeat offenders.
6. NON-PUNITIVE INTERIM MEASURES	♦Sec. 4 & 6 (j); require schools to protect the complainant ... including taking interim steps before the final outcome of investigation ... promptly once it has notice of sexual harassment allegation [and] notify the complainant of options to avoid contact with the alleged perpetrator ...	♦Parties should have the right to the least restrictive interim measures necessary. [17]  ♦If an interim suspension is imposed, respondents should have the right to challenge its imposition. [17]  ♦Parties subjected to interim actions should have the right to due process, as detailed in the school's procedures. [18]	<i>Does not address</i>	♦Interim measures determined case-by-case and may include housing, academic accommodations, escorts, counseling, no-contact directives, extracurricular and removal from the school community. [7]  ♦If 'not inconsistent' with the above, schools should consider respondent's academic, living and other activities in setting interim measures, and possible circumstances in which the respondent might have priority to attend a class or event. [28]	♦FACE favors NCHERM & STANFORD policies that interim measures should be non-punitive.  ♦FACE supports STANFORD's policy that a respondent's interests may be taken into account in implementing interim measures, if 'not inconsistent' with protecting a complainant. <i>This is because we have seen complainants go out of their way to attend respondent-related events seemingly for the primary purpose of retaliation.</i>
7. ADVOCATES & ATTORNEYS	No provisions	♦Parties should have the right to access an advisor of their choice throughout the process. [17]	♦Parties must be promptly advised of their right to retain legal counsel. [13]  ♦Parties should be advised of right to be accompanied by legal counsel at all stages of investigation or hearing.[2]	♦Support Person: <ul style="list-style-type: none"> <li>• may also be an attorney and accompany parties to hearing but must follow the same policies as party.</li> <li>• is only an advisor and may not speak or write on behalf of party. [7]</li> </ul> ♦Both parties are entitled to nine hours of paid attorney fees for consulting an attorney from an approved school list or can retain their own attorney. [8]	♦2013 VAWA allows both parties an advisor who can also be an attorney; NCHERM, ACTL and STANFORD allow parties to chose an advisor.  ♦All advocates should have the same access to evidence as the party they represent and the right to communicate with that party and to be present during all meetings and proceedings.

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<b>8. CONFIDENTIAL ADVISORS</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (c)(2): <i>designate a 'sex equity coordinator' to coordinate and carry out responsibilities under section. .. may be same as federal Title IX coordinator, if one exists.</i></li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should have the right to access an advisor of their choice throughout the process. [17]</li> </ul>	<p><i>Does not address</i></p>	<ul style="list-style-type: none"> <li>◆Confidential school resource - individual exempted by law from obligation to report an allegation to the Title IX Coordinator or law enforcement. [4]</li> </ul>	<ul style="list-style-type: none"> <li>◆Both parties must have confidential advisors; respondents can be unaware of how to defend their rights, unable to afford counsel and traumatized by the isolation they experience after an accusation, particularly one that is false.</li> </ul>
<b>9. STUDENT SUPPORT</b>	<p><i>No provisions</i></p>	<p><i>Does not address</i></p>	<p><i>Does not address</i></p>	<ul style="list-style-type: none"> <li>◆Provides the above-described "Support Person" for both parties, and encourages 'Parties ... to seek the help of a Support Person during this process.' [7, 27]</li> </ul>	<ul style="list-style-type: none"> <li>◆Both parties need academic as well as emotional support; respondents need support to prevent further trauma and attempted suicides which occur often among wrongfully accused students.</li> </ul>
<b>10. UNAMBIGUOUS &amp; PRECISE MISCONDUCT DEFINITIONS</b>	<ul style="list-style-type: none"> <li>◆Sec.2 (a): <i>Sexual harassment: unwelcome sexual advances, requests for sexual favors, and other verbal, visual, physical conduct of sexual nature [if] submitting was a condition of employment, grades, etc.</i></li> <li>◆Sec.2 (b): <i>Sexual harassment also means 'sexual violence' [includes, not 'means?']</i></li> <li>◆Sec.3: <i>Sexual violence: (a) sexual acts against will or incapacity to consent due to victim's use of drugs or alcohol (b) Rape [Penal code cite], (c) Sexual assault or sexual battery [Penal code cite], (d) Sexual coercion [NOT defined &amp; no Penal code section-is sexual coercion criminal sexual "violence?"]</i></li> </ul>	<ul style="list-style-type: none"> <li>◆Provides two examples of schools' inability to distinguish conduct code violations from acceptable sexual behavior. [7, 10]</li> <li>◆Criticizes overly strict sexual policy interpretations. Consent 'can become absurd in practice if taken to an extreme;' rudeness or insensitivity may need correction but not discipline. [5, 6, 14]</li> <li>◆Context is relevant: consent is contextual &amp; transactional and interactions should be viewed within the context of the larger relationship, avoiding the tendency 'to hyper-focus on each touch within an interaction. [6]</li> <li>◆ Consent can be non-verbal, assumed and retroactive based on the parties' relationship. [10, 13]</li> <li>◆Discomfort with a sexual experience should not be confused with experiencing non-consensual sexual conduct. [9]</li> </ul>	<p><i>Does not address</i></p>	<ul style="list-style-type: none"> <li>◆ <i>Sexual Harassment:</i> unwelcome sexual advances, requests for sexual favors, sexual visual, verbal or physical conduct (<u>beyond 'expression of views, words, symbols, or thoughts that some person finds offensive'</u>); must be sufficiently severe, persistent, or pervasive to interfere with participation in school activities. [24]</li> <li>◆Whether conduct creates a hostile environment is determined using <u>both a subjective and objective standard.</u> [24-25]</li> <li>◆ <i>Sexual Misconduct:</i> sexual act 'without indication of Consent,' including vaginal or anal intercourse; digital penetration; oral copulation; penetration with foreign object; recording, photographing, etc., without other's knowledge. [25]</li> <li>◆ <i>Sexual Assault:</i> Sexual Misconduct with force, violence, duress, menace or inducing or knowingly taking advantage of incapacitation. [24]</li> <li>◆Distinguishes intoxication from inability to consent due to incapacitation. [22]</li> </ul>	<ul style="list-style-type: none"> <li>◆We support STANFORD policy limiting the term 'sexual assault' to Penal Code offenses. Conflating criminal terminology with non-criminal conduct code violations causes students to lose employment and educational opportunities because a transcript reports 'sexual assault' for an 'unwanted' hug or kiss, implying a more serious violation to those outside the campus community.</li> <li>◆If a violation is <u>not</u> criminal, it should be called 'student conduct code violation,' or any other term not used for describing or defining criminal sexual conduct.</li> <li>◆We also favor STANFORD's use of both subjective <u>and</u> objective standards in evaluating whether conduct is hostile, as well as excluding from hostile conduct '<u>expression of views, words, symbols, or thoughts'</u> even though someone may <u>find it 'offensive.'</u></li> <li>◆ SB169 should use 'respondent' along with 'complainant' instead of 'perpetrator' which hints of bias and imputes guilt.</li> </ul>

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<b>11.</b> <b>UNBIASED INVESTIGATION</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (c)(3)(G)(i): <i>require schools to conduct a full investigation of complaint.</i></li> <li>◆Sec.4 &amp; 6 (c)(3)(C) <i>require adequate, reliable and impartial investigations of complaints.</i> [Q&amp;A, 12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Interviews of parties should be conducted with the same procedural protections as a hearing (because interview is an administrative hearing). [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆It 'is important to ensure that students investigated for, or charged with sexual assault or misconduct violations be afforded basic fairness and due process.' [1]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties have the right to participate in an investigation by identifying witnesses and providing relevant information. [9]</li> <li>◆Parties are permitted to: submit information; a list of witnesses; and request Investigator collect information not accessible to the requesting party. [10]</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE favors STANFORD &amp; NCHERM provisions allowing parties to participate in the investigation, and particularly appreciates STANFORD's specific instructions and NCHERM's call for procedural protections during interviews.</li> </ul>
<b>12.</b> <b>IMPARTIAL INVESTIGATOR</b>	<ul style="list-style-type: none"> <li>◆No requirements except for a 'full investigation' [Sec. 4 &amp; 6 (c)(3)(G)(i)] and that it be 'adequate, reliable, and impartial' [Sec. 4 &amp; 6 (c)(3)(C)]</li> </ul>	<ul style="list-style-type: none"> <li>◆Right to a process free of (sex/ gender/protected class etc.) discrimination. [18]</li> <li>◆Right to competent and trained investigators and decision-makers. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆'OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students accused of sexual misconduct.' [3]</li> </ul>	<ul style="list-style-type: none"> <li>◆Title IX Coordinator assigns investigator who gathers information, may collect documents and other information and interviews parties and/or witnesses [10]</li> <li>◆Investigator must attend the hearing and be available for questioning [17]</li> </ul>	<ul style="list-style-type: none"> <li>◆Must be impartial, fair, have no conflicts of interest and <u>objectively trained</u> on investigation techniques ('believe the victim' training may favor complainants.)</li> <li>◆FACE supports STANFORD's provision requiring an investigator to be available at the hearing for questions regarding the investigation and the final report.</li> </ul>
<b>13.</b> <b>COMPREHENSIVE INVESTIGATION REPORT</b>	<p>No provisions except the above.</p>	<ul style="list-style-type: none"> <li>◆Parties should have the right to a COPY of the investigation report prior to its finalization and prior to any hearing. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be given written findings of fact upon completion of the investigation, sufficiently detailed to permit meaningful appellate review. [14]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties may review the 'Hearing File.' [9]</li> <li>◆Investigator may refuse evidence that's duplicative; invades privacy; difficulty to access outweighs value; and past sexual history other than between the parties unless it indicates a pattern. [10-11]</li> <li>◆The investigator submits 'a Charge Letter' which summarizes investigation results but <u>does not contain conclusions or findings of fact regarding guilt.</u> [12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Investigators should compile a report identifying all evidence and allow parties time to suggest additions or exclusions.</li> <li>◆Parties should be permitted to submit responses to the final report.</li> <li>◆Due to risk of confirmation bias, FACE supports STANFORD policy <u>precluding investigator from making conclusions and findings regarding guilt.</u></li> </ul>
<b>14.</b> <b>COMPLETE ACCESS TO EVIDENCE</b>	<p>No provisions</p>	<ul style="list-style-type: none"> <li>◆Parties should be given COPIES of all reports &amp; access to other documents &amp; evidence to be used in the responsibility determination, reasonably prior to the decision (may be in redacted form.) [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be given access to all evidence at a meaningful time and in a meaningful manner, so they can adequately respond. [2]</li> </ul>	<ul style="list-style-type: none"> <li>◆Following notice of the hearing, parties receive electronic access to the Hearing File, a log of evidence collected and explanations for any redactions or exclusions. [12]</li> <li>◆An Evidentiary Specialist is a person with specialized knowledge in evidence (such as legal training) [21]; parties have 5 days to raise evidence concerns with the Evidence Specialist. [12,13]</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE favors STANFORD policy that one not the investigator to decide information included in final report.</li> <li>◆We favor STANFORD and NCHERM policies allowing parties to have access to (and preferably copies) all inculpatory and exculpatory evidence, including reports, witness and complainant statements, written and electronically stored information, social media, etc.</li> </ul>

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<b>15. WITNESS TESTIMONY</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6 (c)(3)(C): <i>adequate, reliable, impartial investigation ... including the opportunity for both parties to present witnesses and other evidence.</i> [Q&amp;A, 12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be permitted to suggest witnesses and questions to be asked of them (excluding solely character witnesses.) [18]</li> </ul>	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Expert witnesses are allowed only when necessary. [15]</li> <li>◆At the conclusion of a party's or witness' session with the Hearing Panel, there is a break to allow the party listening to the hearing to email follow-up questions to the Hearing Coordinator. [17-18]</li> </ul>	<ul style="list-style-type: none"> <li>◆If a witness account is important for establishing misconduct, FACE prefers the witness personally appear before decision-makers or by Skype (or similar). Live testimony aids credibility decisions.</li> <li>◆Members of the school community should have an obligation to provide relevant evidence if called upon.</li> </ul>
<b>16. RIGHT TO BE HEARD</b>	<ul style="list-style-type: none"> <li>◆Sec. 4 &amp; 6(c)(3)(C): <i>including opportunity for both parties to present witnesses and other evidence.</i> [Q&amp;A, 12] [<i>Unclear if this requires formal hearing</i>]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should have the right to be informed of and the chance to fully and fairly defend against all allegations and respond to all evidence on the record. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should be given an investigation or hearing with consideration for any appearance of partiality. [12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties are not in same room, but can appear in person, by telephone or Skype, etc. and other party may listen in by telephone (or similar technology).[17]</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE agrees with STANFORD's policy not requiring parties to be present in the same hearing room, but prefers parties be able to hear testimony.</li> </ul>
<b>17. ADMISSIBILITY &amp; RELEVANCY OF EVIDENCE</b>	<ul style="list-style-type: none"> <li>◆Sec.4 &amp; 6 (c)(3)(C): <i>adequate, reliable, impartial investigation ... including the opportunity for both parties to present witnesses &amp; other evidence.</i> [Q&amp;A, 12]</li> </ul>	<ul style="list-style-type: none"> <li>◆Parties should have the right to have only relevant past history or records considered as evidence. [18]</li> </ul>	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Parties have right to suggest inclusion or exclusion of witnesses or evidence in the Hearing File and request review by an Evidentiary Specialist [4, 9,16]</li> <li>◆A respondent's character evidence/past violations are not usually admitted during fact-finding process.[14]</li> <li>◆Past sexual history between parties is relevant only when it concerns credibility or shows pattern of conduct or knowledge of wrongdoing [14]</li> </ul>	<ul style="list-style-type: none"> <li>◆Evidence should be admitted if it is not too repetitious, is relevant and a reasonable person would find it reliable.</li> <li>◆Evidence is relevant if it reflects on the credibility of a party or witness or relates to an important fact in dispute.</li> <li>◆Character evidence should be excluded from the fact-finding stage.</li> <li>◆Past sexual history unrelated to parties' relationship should be admitted only if it provides evidence on a disputed fact.</li> </ul>
<b>18. ONE INVESTIGATOR - ADJUDICATOR</b>	<p><i>Unclear, but with respect to DCL, one court remarked that the dangers of combining these powers in a single individual, with few rights to appeal and review, are 'obvious.'</i> [ACTL 10]</p>	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Notes heightened need for unbiased investigator if no separate adjudicator hears evidence or makes factual findings.[ 13]</li> <li>◆Notes need for meaningful appellate review and written findings of fact adequately setting forth basis for the decision [14]</li> </ul>	<ul style="list-style-type: none"> <li>◆Policy does not provide for this process.</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE disapproves of the investigator also serving as decision-maker due to confirmation bias; we prefer a separate decision-maker to offset the potential for investigator bias, and to hear the parties.</li> <li>◆FACE strongly believes a clear and convincing standard of proof should be required when the investigator and decision-maker roles are combined.</li> </ul>

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<b>19. HEARING ALTERNATIVES</b>	<p>No provisions</p> <p>[Q&amp;A, 25: 'Title IX does not necessarily require a hearing.']</p>	Does not address	Does not address	<ul style="list-style-type: none"> <li>♦Allows resolution without a hearing if all parties agree and the investigator determines it is appropriate. No appeal is allowed. [11]</li> </ul>	<ul style="list-style-type: none"> <li>♦Schools should be permitted to allow non-mediation alternatives if appropriate.</li> <li>♦Both parties must voluntarily agree to participate in any such process and may withdraw their consent at any time.</li> </ul>
<b>20. PARTY SILENCE &amp; PRESENCE</b>	No provisions	Does not address	<p>Suggests alternative ways to hear testimony:</p> <ul style="list-style-type: none"> <li>♦ Recorded testimony</li> <li>♦ Screen between parties</li> <li>♦ Testimony via closed circuit television. [16]</li> </ul>	<ul style="list-style-type: none"> <li>♦Parties have the right to decline to give a statement about the allegations or attend a hearing. [9]</li> </ul>	<ul style="list-style-type: none"> <li>♦Neither party should be required to participate in a disciplinary process.</li> <li>♦Silence must not support guilt finding, especially with a criminal action pending.</li> <li>♦A party who chooses to remain silent should still be able to present evidence or question evidence that is presented.</li> </ul>
<b>21. IMPARTIAL &amp; UNBIASED DECISION-MAKERS</b>	No provisions	<ul style="list-style-type: none"> <li>♦Parties should have the right to have decision-makers and decisions free of bias or conflicts of interest. [18]</li> <li>♦Parties should have the right to advance notice of the identity of the decision-makers. [18]</li> <li>♦Right to competent and trained investigators and decision-makers. [18]</li> </ul>	<ul style="list-style-type: none"> <li>♦Avoid 'any appearance of partiality,' including any arising from fact-finder's other responsibilities. [12]</li> <li>♦Screen for and assign only those without actual or perceived bias. [13]</li> <li>♦Consider using outside persons and organizations to serve as investigators and decision-makers. [13]</li> </ul>	<ul style="list-style-type: none"> <li>♦Provides a neutral Hearing Panel with three trained panelists who decide case using preponderance of the evidence and will not prejudice outcome. [9, 16-17]</li> <li>♦Panel members must have no conflicts of interest, prior knowledge, relationship with either party, etc. A Hearing coordinator decides if conflict exists. [17]</li> </ul>	<ul style="list-style-type: none"> <li>♦We favor STANFORD policy requiring 3 unbiased panel members who are diverse in gender, race, age, sexual orientation and position and receive explicit training on objective adjudication; <i>'believe the victim'</i> is appropriate for support, but has no place in a hearing.</li> <li>♦Use of administrators/professors could affect their objectivity due to their immersion in campus culture.</li> <li>♦Parties should be advised of panel members' identity in advance.</li> </ul>
<b>22. LIMITED CROSS- EXAMINATION</b>	No provisions	<ul style="list-style-type: none"> <li>♦Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses). [18]</li> </ul>	<ul style="list-style-type: none"> <li>♦Parties should be allowed cross-examination in a manner the school deems appropriate to assess credibility [2, 13]</li> <li>♦Questions should be submitted through a third party (hearing officer or investigator) [16]</li> </ul>	<ul style="list-style-type: none"> <li>♦Provides a break during hearing to allow for submission of follow-up questions [17-18]</li> </ul>	<ul style="list-style-type: none"> <li>♦Parties should not be permitted to question one another or witnesses directly, but must have an ongoing opportunity to offer questions to be asked through the decision-maker(s), including questions arising from testimony or statements at the hearing.</li> <li>♦The panel or a third party should determine the propriety of any questions submitted by the parties.</li> </ul>

# FACE COMPARISON OF CA SB169 PROCEDURES WITH RECOMMENDED DUE PROCESS PROCEDURES<sup>1</sup>

	CALIFORNIA SB169 <sup>2</sup>	NCHERM WHITE PAPER <sup>3</sup>	ACTL WHITE PAPER <sup>4</sup>	STANFORD POLICY <sup>5</sup>	FACE RECOMMENDATIONS <sup>6</sup>
<b>23. TIME LIMITS</b>	<ul style="list-style-type: none"> <li>◆Sec.4 &amp; 6(c)(3)(D) &amp; (c)(3)(G): <i>reasonably prompt time frames for all stages of the process</i> [Q&amp;A 12], including ... the process for extending timelines.</li> </ul>	<ul style="list-style-type: none"> <li>◆Right to clear timelines for resolution. [18]</li> </ul>	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Requires an attempt to reach a resolution within 60 calendar days from the date of issuance of Notice of Concern, although the school will not compromise a thorough and fair process in meeting the 60-day guideline. [12]</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE supports STANFORD policy that resolution within 60 days should be the goal, but a thorough and fair process should not be compromised in order to meet the 60-day guideline.</li> </ul>
<b>24. DETAILED RECORDS</b>	No provisions	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Parties must be given detailed findings of fact to permit meaningful appellate review. [14]</li> </ul>	<i>Does not address</i>	<ul style="list-style-type: none"> <li>◆Hearing should be recorded or transcribed to allow for appeals and judicial or administrative review.</li> </ul>
<b>25. REASONABLE STANDARD OF EVIDENCE &amp; ADEQUATELY TRAINED DECISION-MAKERS</b>	<ul style="list-style-type: none"> <li>◆Already required by CA law to be preponderance; schools need clarification for proper application of standard- see FACE Recommendations.</li> <li>◆Comment: one difficulty with the preponderance standard is that decision-makers believe they must choose one party over the other - that there is no neutral position. Thus it must be clarified that their decision is not whether one party or the other is more credible or has more evidence (they may be both credible, but the evidence still does not pass the threshold), -- the decision should be whether there is sufficient evidence to make the occurrence of the violation more probable than not. See NCHERM White Paper for more explanation. [16-18]</li> </ul>	<ul style="list-style-type: none"> <li>◆School bears the burden to prove a violation of policy and <u>non-consent</u>. [16, 18]</li> <li>◆NCHERM favors preponderance standard of evidence, but cautions that because preponderance 'is a fairly minimal standard, 'it must be applied with steadfast rigor.' [5, 18]</li> <li>◆If parties are equally persuasive in assertions of consent/non-consent, the school has not met its burden and the respondent cannot be found in violation of policy. [16]</li> <li>◆Cautions schools to 'separate less-than-ideal sexual experiences from those that are 'sexually transgressive.' [6]</li> <li>◆Right to a finding that is neither arbitrary nor capricious. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆ Recommends clear and convincing evidence, due to 'significant adverse consequences to students found responsible' along with "absence of virtually all of the procedural rights provided in civil lawsuits, such as voir dire, trial by judge or jury, or full cross-examination.' The lower standard is inadequate when respondents 'risk a substantial tarnishing of their reputation.' [2, 16-17]</li> <li>◆'Procedural justice can ... ensure sexual assault investigations are regarded with seriousness and respect, ending the backlash incurred by any public perception that these investigations serve only to railroad and scapegoat individual men.' [15]</li> </ul>	<ul style="list-style-type: none"> <li>◆Uses preponderance of evidence standard BUT requires the decision of the three person panel to be unanimous in order to find the respondent responsible. [18]</li> </ul>	<ul style="list-style-type: none"> <li>◆FACE supports a higher standard of evidence, but favors STANFORD policy because along with its application of the preponderance standard it requires the panel decision be unanimous, and also provides many of the other due process procedures discussed in this chart.</li> <li>◆If the preponderance standard is used, then decision-makers <u>must be given instructions on how to properly apply preponderance standard</u> (see <i>Comment</i> under SB169 #25.):                         <ul style="list-style-type: none"> <li>• evaluate the quality of evidence;</li> <li>• give more weight to higher quality or reliable evidence than low quality;</li> <li>• quantity of evidence alone does not support a responsibility finding;</li> <li>• should only find respondent engaged in misconduct if they are unanimously convinced there is sufficient, relevant, probable and persuasive evidence and that evidence outweighs any evidence that the alleged conduct did not occur;</li> </ul> </li> </ul>

# FACE COMPARISON OF CA SB169 PROCEDURES WITH RECOMMENDED DUE PROCESS PROCEDURES<sup>1</sup>

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<b>26. DETAILED FINDINGS</b>	<i>No provisions</i>	<ul style="list-style-type: none"> <li>♦Parties have the right to receive the outcome/final decision in writing as per VAWA §304 [18]</li> <li>♦Parties should have the right to a detailed rationale for both the finding and sanctions. [18]</li> </ul>	♦Adequate written factual findings are needed to permit meaningful appellate review. [3]	♦A finding of responsibility must be explained with enough specificity to allow parties to file meaningful appeals. [19]	<ul style="list-style-type: none"> <li>♦FACE favors STANFORD &amp; NCHERM requirement for findings to be specific and provide a rational basis for the decision.</li> <li>♦FACE also supports STANFORD's allowance of educational and training remedies when justified by the facts.</li> </ul>
<b>27. PROPORTIONATE SANCTIONS</b>	<i>No provisions</i>	♦Sanctions imposed should be proportionate to severity of the violation and cumulative conduct record of the respondent. [18]	<i>Does not address</i>	<ul style="list-style-type: none"> <li>♦The sanction phase is and parties can submit aggravating or mitigating facts. [18]</li> <li>♦Expulsion is the 'expected sanction' for Sexual Assault <i>[which is criminal]</i>. [26]</li> <li>♦Panel must impose sanctions reflecting the seriousness of the incident and harm to the complainant and community. [26]</li> <li>♦Available remedies include educational counseling and training. [29]</li> </ul>	<ul style="list-style-type: none"> <li>♦No one sanction should be presumed or required; a presumption of expulsion or suspension or expulsion may discourage reporting.</li> <li>♦FACE favors STANFORD &amp; NCHERM policies allowing sanctions to account for mitigating factors, prior conduct history, nature and seriousness of the offense and the impact on the complainant and school community.</li> </ul>
<b>28. RIGHT TO APPEAL</b>	♦Sec. 4 & 6 (c)(3)(G) (iii): <i>The parties may file an appeal.</i>	♦Parties should have the right to appeal on limited, clearly identified grounds. [18]	♦Parties should be given oral written findings of fact on completion of the investigation which are sufficiently detailed to permit meaningful appellate review. [12]	<ul style="list-style-type: none"> <li>♦Decision to charge/not charge is appealable based on procedural irregularities, new evidence not available earlier, or unreasonableness of the decision and/or sanction. [11, 19]</li> <li>♦Appeal can be de novo. [20]</li> <li>♦Expulsion is reviewed by provost. [20]</li> </ul>	♦Grounds for appeal should be limited to new information not known/available at hearing; procedural error materially affecting findings (includes improperly excluding or including evidence); imposition of disproportionate sanctions; or conduct does not violate policy.
<b>29. UNDERSERVED POPULATIONS</b>	♦Sec.1 (a): <i>Education has long been recognized as the great equalizer in America.</i>	<i>Does not address</i>	<i>Does not address</i>	<i>Does not address</i>	♦Though SB169 postures that education is a 'great equalizer,' the policies it seeks to codify have been shown to undermine that effect by ignoring the DCL's disproportionate impact on minorities, first generation and financial aid students, and other similarly-situated populations.
<b>30. ALCOHOL ABUSE</b>	<i>No provisions</i>	<i>Does not address</i>	<i>Does not address</i>	<i>Does not address</i>	♦Schools must develop education and other policies designed to reduce the incidence of sexual conduct violations associated with alcohol and drug abuse.

# FACE COMPARISON OF CA SB169 PROCEDURES WITH RECOMMENDED DUE PROCESS PROCEDURES<sup>1</sup>

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31. INSTITUTIONS SUBJECT TO SB169	<ul style="list-style-type: none"> <li>◆ <i>Sec.6 (a): For the purposes of this section, "school" means the University of California, California State University, or the California Community Colleges, a private postsecondary educational institution, or an independent institution of higher education, that receives state funds for student financial aid.</i></li> <li>◆ <i>Sec. 4(a): For the purposes of this section, a "school" is any elementary or secondary school that receives state financial assistance.</i></li> </ul>	<ul style="list-style-type: none"> <li>◆ Warns that 'more and more courts seem to be affording due process rights (or the equivalent) to students enrolled in private colleges, including recent decisions at the University of Southern California and Brandeis University.' [19]</li> <li>◆ OCR's Wesley Resolution 'makes the case for Title IX-derived due process rights at a private college' for a respondent; reflects the idea that Title IX focuses on equity for both parties, not just the reporting party. [19]</li> </ul>	<ul style="list-style-type: none"> <li>◆ There is no consensus as to how much process is constitutionally or contractually required to be provided to respondents, and the outcome often depends on whether the institution is public or private. [2]</li> <li>◆ DCL left institutions 'uncertain as to their obligation to provide due process protections.' [8]</li> </ul>	N/A	<ul style="list-style-type: none"> <li>◆ SB169 does not distinguish between public and private schools, ignoring a significant discrepancy in the rights of students attending <i>public schools</i>, which are held to higher fairness and due process standards, and <i>private</i> which are not. We agree with ACTL that equality and fairness require SB169 to provide due process for private as well as public school students.</li> <li>◆ SB169 should not impose 'grievance procedures' on elementary or secondary schools; educational and training remedies to address children's sexual misconduct would be more appropriate in these schools.</li> </ul>
32. SCHOOLS NEED DUE PROCESS GUIDANCE	<ul style="list-style-type: none"> <li>◆ <i>Sec. 4 &amp; 6(c)(3): Instruct schools to adopt &amp; publish grievance procedures for prompt &amp; equitable resolution of sexual harassment claims.</i></li> <li>◆ <i>Sec. 4(k) &amp; 6(l): instruct education department to adopt regulations to ensure implementation consistent with the DCL [which] shall include, ...all provisions of these federal regulations not covered in this section.</i></li> </ul>	<ul style="list-style-type: none"> <li>◆ Higher education continues to veer off-course in resolutions of college sexual violence allegations. [4]</li> <li>◆ Schools are 'losing case after case in federal court on what should be very basic due process protections;' 'losing more cases than they are winning.' Recently there have been pro-respondent court decisions at George Mason, James Madison, and Brandeis universities. [2-3]</li> <li>◆ Schools are using a microscope to police student sexual conduct; 'If you are the sex police, your overzealousness to impose sexual correctness is causing a backlash that is going to set back the entire consent movement.' [4, 5]</li> </ul>	<ul style="list-style-type: none"> <li>◆ 'Under the current system everyone loses:'                             <ul style="list-style-type: none"> <li>● respondents are deprived of fundamental fairness;</li> <li>● complainants' experiences are undermined by the unreliability of decisions;</li> <li>● schools are trapped between the two and facing lawsuits and potential funding loss. [18]</li> </ul> </li> <li>◆ ACTL believes its recommendations would enhance procedural justice and ensure the confidence of participants and the public in the fairness of Title IX investigations. [15, 18]</li> </ul>	N/A	<ul style="list-style-type: none"> <li>◆ Although <u>Sec. 6(c)(3)</u> instructs schools to develop grievance procedures, neither SB169 nor OCR has provided guidance on specific due process procedures necessary to protect respondents. Adding due process provisions will improve both parties' experience because decisions will be more credible and trustworthy.</li> <li>◆ Our experience with the DCL along with the concerns expressed by NCHERM and ACTL confirm that our schools need specific instruction on creating and applying equitable grievance procedures for sexual offenses on campuses. Furthermore, such procedures can only be created in consultation with those who possess expertise in the fields of sexual violence, law and education.</li> </ul>

Respectfully Submitted,

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*Families Advocating for Campus Equality (FACE) is a 501(C)(3) organization whose mission is to provide support and advocacy for students adversely impacted by campus sexual misconduct disciplinary policies.*  
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<sup>1</sup> The various provisions of SB169 as well as the NCHERM, ACTL White Papers and Stanford Policies are paraphrased or summarized unless otherwise indicated.

<sup>2</sup> SB169 provisions are based on the version as of May 4, 2017.

<sup>3</sup> The 2017 NCHERM Group White Paper; Due Process and the Sex Police, p. 4, <https://www.ncherp.org/wordpress/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>

<sup>4</sup> American College of Trial Lawyers, White Paper on Campus Sexual Assault Investigations, March 2017 <http://files.constantcontact.com/dbc236ec501/9b906384-177d-42df-9e1a-bcb6f62d9340.pdf>

<sup>5</sup> Stanford Student Title IX Investigation & Hearing Process, February 2016 <https://stanford.app.box.com/v/student-title-ix-process>

<sup>6</sup> Recommendations provided by FACE are based on research including of school policies, reports and our experiences with hundreds of students accused of sexual misconduct on campuses.

<sup>7</sup> These provision(s) are taken from the Office for Civil Rights' "Questions and Answers about Title IX and Sexual Violence," U.S. Dep't of Education (Apr. 29, 2014), (O&A, page numbers in brackets), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

<sup>8</sup> Numbers in brackets refer to page numbers of the various reports and SB169.

<sup>9</sup> *Dear Colleague Letter*, U.S. Department of Education, Office for Civil Rights, *Ed.gov*, April 2011 (2011 DCL) <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>