



## Families Advocating for Campus Equality

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July 28, 2015

The Honorable Lamar Alexander  
Committee on Health, Education, Labor & Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

RE: Statement by Families Advocating for Campus Equality (FACE) for U.S. Senate Health, Education, Labor and Pensions Committee Hearing, "Reauthorizing the Higher Education Act: Combating Campus Sexual Assault".

Dear Senator Alexander and Members of the Committee on Health, Education, Labor, and Pensions,

FACE is very concerned with the continued failure of the Campus Accountability and Safety Act (CASA) to propose adequate procedural due process protections for students. In fact, the phrase "due process" appears only three times in CASA's fifty-one pages:

§125(b)(8)(C) requires notice of "**due process protections available** to the victim and the accused student, including those **described in §485(f)(8)(B)(iv)** and any other rights or **due process** protections that the victim or the accused student may have **under the institution's policies.**"

§125(b)(8) requires 24 hour written notice of the disciplinary process "sufficiently in advance of a disciplinary hearing to provide both the victim and the accused student with the opportunity to meaningfully exercise the **due process rights afforded to them under institutional policy.**"

The phrase "**due process protections available**" refers to that already required by campus policies or law, which is insufficient. References to "**due process ... under the institution's policies**" adds nothing because under preexisting law private institutions need not provide any due process, and public institutions need only provide minimal. The "**due process ... described in §485(f)(8)(B)(iv)**" also provides no due process, because that section is already law.

Much of the unfairness in campus disciplinary proceedings is the result of guidance issued by the Department of Education's Office for Civil Rights (OCR), which reduced due process protections *without providing countervailing procedures to ensure those processes remain fair and result in accurate decisions.*

## WHY DUE PROCESS IS IMPORTANT IN CAMPUS DISCIPLINARY PROCEEDINGS

**1. Students need to be informed of the specific conduct at issue:** Disciplinary notices typically do not describe the specific conduct at issue. This is problematic, particularly when a complaint is brought long after the alleged incident (which many are), and memories have faded or witnesses graduated.

**2. Investigations and hearings must be unbiased:** Campus investigators often gather evidence to demonstrate an accused's guilt, but fail to interview witnesses or collect evidence that may undermine the allegations. Investigators may also act as prosecutor at hearings, presenting evidence only on behalf of an accuser. Students have been blindsided by decisions based on incomplete or skewed facts because they believed the system was fair and truth would prevail, and failed to produce evidence on their behalf.

**3. Students must have an advocate throughout the disciplinary process:** Because colleges seek to protect accusers, the accused might as well be David facing Goliath. Although CASA requires an independent employee be provided, their participation is often restricted during investigations or hearings, which disproportionately affects the accused in the collection and presentation of evidence.

**4. Students must have access to all evidence:** Presentation and discovery of the truth is hampered by barring students from contacting potential student witnesses, denying access or sufficient time to review investigation records and witness statements, or by denying permission to photocopy evidence.

**5. Students' ability to question witnesses is crucial to credibility:** Students are prohibited from questioning witnesses, and panels refuse to present some questions even when submitted in writing. Cross-examination is essential when the issue is one of credibility, which is often the *only* issue in "he said-she said" cases. Students also are not allowed to question the investigator whose report is relied upon in determining guilt. There is no justification for denying cross-examination of any witness; while *accusers* may be traumatized by confrontation, non-accusing witnesses are not similarly vulnerable.

**6. Accused students must be presumed innocent:** A presumption of innocence is critical in disciplinary proceedings where false allegations are more frequent due to expanded definitions of sexual assault, and also because disincentives for making false allegations (trauma, shame and fear of repercussions), which historically deterred victims from criminal reporting, has been replaced by a seemingly respected status, for which "victims" are showered with media attention and invited to the State of the Union Address. False allegations also are more likely in the absence of sworn testimony and restrictions on hearsay and cross-examination. Most FACE cases involve scenarios in which false accusations occur frequently, including "attempts to conceal or deny discovered infidelity ... consensual sexual activity that is subsequently regretted ... complaints following the breakdown of a relationship."

**7. Presumptions should not be based on traditional notions of gender:** OCR mandated procedures exacerbate the effects of affirmative consent policies which reinforce gender-biased decision-making because they (1) presume the male initiated the encounter; (2) penalize the initiator, but not the accuser, for alcohol violations; (3) demand the initiator assess the accuser's intoxication despite his own; (4) negate valid consent when he "should have known" the accuser was intoxicated; (5) do not require the accuser to have communicated any objection; and (6) excuse only the accuser's intoxication, even when self-induced. These presumptions tilt decisions in favor of accusers, demanding "a finding that conduct was unwelcome *solely* because of the complainant's drug or alcohol consumption ... [while] denying the accused any mitigation because of his."

**8. The standard of proof must be higher because the consequences can be life-altering:** Prior to OCR intervention, most colleges relied on the "clear and convincing" standard of proof used "in civil cases

involving ... quasi-criminal wrongdoing,” and with issues “more substantial than mere loss of money” such as a tarnished reputation. The standard of proof must be higher because false accusations devastate a student’s educational and career opportunities and emotional well-being.

**9. The accuser’s subjective perspective should not be given precedence:** Unreasonable expectations should not supersede what is objectively reasonable. However, campus adjudicators are instructed to accept an accuser’s subjective belief at face value. Therefore, if an accuser subjectively believes there was no consent, the accused is guilty, *no matter how objectively reasonable he interpreted the situation*. Thus, a decision based only on the accuser’s manifestly unreasonable belief causes the accused’s fate to unreasonably and illogically rest on that which the accused could not reasonably have known.

**10. Disciplinary panels must consider all relevant evidence:** Hearing panels often refuse as irrelevant evidence demonstrating an accuser’s continued sexual relationship with the accused after the alleged assault, such as texts and photographs. Panels also reject phone records, blood tests, polygraph results and other forensic data unless produced by the campus investigator, thereby preventing consideration of exculpatory evidence the investigator may have overlooked or intentionally ignored.

**11. Disciplinary sanctions should consider the motivation for and reasonableness of the conduct:** Panels must be permitted to exercise discretion in the imposition of penalties. Currently, in an effort to demonstrate they are responsive to sexual assault, panels indiscriminately suspend or expel any student adjudicated guilty, whether or not there was an intent to harm or an honest belief in consent, no matter how egregious the violation, and even when the he-said, she-said controversy was difficult to unravel.

**12. Definitions should provide specific descriptions and not use criminal terminology:** Ambiguous and expansive definitions of sexual misconduct and consent cause students to interpret the same behavior differently: was the motivation for the accused’s “unwanted touching” sexual? Converting behavior such as “unwanted touching” into “sexual assault” also implies a more serious and unwanted offense than may have been committed; nevertheless, this will remain in an accused student’s records permanently, causing future schools and employers to misinterpret the heinousness of the offense.

**13. False allegations and retaliation should be sanctioned:** CASA must protect all students against false allegations by requiring campuses to impose sanctions when students are not truthful in their testimony, as well as sanction retaliation and harassment against either party.

**14. Records of disciplinary hearings:** CASA must require colleges to keep written, video or audio records of all disciplinary proceedings including investigations. Decisions are difficult to appeal without records.

## **OTHER ISSUES**

**1. Support services for both parties:** CASA proposes support services for “victims” although accused students experience equivalent emotional trauma such as PTSD, suicidal thoughts and depression. The falsely accused also may experience repulsion and rejection by friends and even family. All students affected by disciplinary proceedings must be provided counseling and medical, and educational support services.

**2. Criminal sexual violence should be handled by law enforcement:** Colleges must handle noncriminal sexual misconduct violations. However, delegating investigation and adjudication of *criminal* reports to law enforcement will maintain the delicate balance between the accuser’s right to be safe in their environment with the accused’s right to be afforded procedures guaranteeing a judicious outcome. If the

accuser wishes to pursue criminal charges, the college should designate an independent support person to accompany the accuser to all meetings and hearings throughout the criminal process.

**3. Title IX investigations should be stayed while criminal prosecutions are pending:** Students are not able to defend themselves when what they say may incriminate them in a criminal investigation.

**4. When an accused student has been exonerated, all disciplinary records should be sealed:** Only sealing of records can preserve an exonerated accused student's reputation.

**5. OCR must be precluded from reinvestigating resolved matters:** Except when there is material new evidence, reopening pressures campuses to reverse decisions in order to avoid OCR sanctions.

### **CONCLUSION**

FACE appreciates this opportunity to suggest changes to CASA, which we believe will help ensure campus disciplinary proceedings are transparent and unbiased, and individual disciplinary decisions are not motivated by threats of penalties or political pressure to report a threshold number of assaults, but are evaluated in accordance with reasonable and objective behavioral standards and the decision makers' independent evaluation of all available relevant and reliable evidence.

FACE representatives are available to provide the HELP committee with testimony regarding the detrimental effects of the college disciplinary process on falsely accused students and their families. Please allow us to assist you in finding an equitable solution to this complex issue.

Respectfully,

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