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## DUE PROCESS PROCEDURES NECESSARY IN CAMPUS SEXUAL MISCONDUCT DISCIPLINARY PROCEEDINGS

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Following are the due process procedure Families Advocating for Campus Equality (FACE) believes are essential to ensure fair and balanced campus sexual misconduct disciplinary processes which result in unbiased assessments of the facts and evidence.

These recommendations were developed as the result of reports from the hundreds of students who have contacted FACE for support and advocacy over the past three years after having been accused of sexual misconduct, enduring misguided and result-driven campus disciplinary procedures, unfairly found responsible and suspended or expelled from their campuses. The procedures suggested here were also informed by a detailed review of existing campus policies including Stanford University,<sup>1</sup> recommendations from the American College of Trial Lawyers<sup>2</sup> and The NCHERM Group,<sup>3</sup> and the author's membership in an American Bar Association Task Force on the issue.<sup>4</sup>

**1. *EQUITABLE & UNBIASED PROCESSES:***<sup>5</sup> *Disciplinary proceedings should seek to ascertain the truth, not prove guilt or innocence.* Though SB169<sup>6</sup> and the 2011 Dear Colleague Letter (DCL)<sup>7</sup> both require “adequate, reliable and impartial investigations,” many schools do not believe it necessary to provide or even understand the mechanics of providing adequate, reliable and impartial processes, making it imperative that SB169 provide basic guidelines, such as those discussed here and in the accompanying FACE Comparison of CA SB169 Procedures With Recommended Due Process Procedures Table.<sup>8</sup>

The NCHERM Group, the leading provider of Title IX training throughout the country recently has warned schools that “[s]ome pockets in higher education have twisted the [DCL] and Title IX into a license to subvert due process and to become the sex police.”<sup>9</sup> Nevertheless, SB169 Section 4(k) as proposed intends to create future regulations which mimic all provisions enumerated by the 19-page DCL that are “not covered” by the bill itself. It is inappropriate for a California statute to impose unarticulated responsibilities on schools, especially when those responsibilities have been uniformly criticized and results of their application so obviously ineffective at resolving the intended problems.

**2. *IMPORTANCE OF DUE PROCESS:*** SB169's only mention of “due process,” cautions that a respondent's right to due process should not be allowed to interfere with protections for the complainant.<sup>10</sup> However, many of the due process-like procedures addressed below do not interfere with protecting and would in fact benefit complainants. Even victims' rights advocates have supported additional due process in campus sexual misconduct proceedings.<sup>11</sup> Due process is essential in

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<sup>1</sup> Stanford Student Title IX Investigation & Hearing Process, February 2016, at pp. 9-10, (various provisions of Stanford's Policy are paraphrased or summarized unless otherwise indicated) <https://stanford.app.box.com/v/student-title-ix-process>.

<sup>2</sup> American College of Trial Lawyers (ACTL), White Paper on Campus Sexual Assault Investigations, March 2017, at p. 11, (various provisions of ACTL's paper are paraphrased or summarized unless otherwise indicated) <http://files.constantcontact.com/dbc236ec501/9b906384-177d-42df-9e1a-bcb6f62d9340.pdf>.

<sup>3</sup> The 2017 NCHERM Group White Paper (NCHERM); Due Process and the Sex Police, p. 2, (provisions of the NCHERM White Paper are paraphrased or summarized unless otherwise indicated) <https://www.ncher.org/wordpress/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

<sup>4</sup> Cynthia P. Garrett, FACE Co President, is a member of an American Bar Association Task Force on the issue of campus sexual misconduct disciplinary procedures, which was able to reach a consensus among administrators, victims and women's rights advocates and defense attorneys. Release of that report is anticipated to be sometime in May 2017.

<sup>5</sup> These numbered categories correspond to those in the FACE Comparison of CA SB169 Procedures With Recommended Due Process Procedures Table, [https://drive.google.com/file/d/0B0CTUnodV2\\_iZmRpTTVXWW51Rk0/view?usp=sharing](https://drive.google.com/file/d/0B0CTUnodV2_iZmRpTTVXWW51Rk0/view?usp=sharing).

<sup>6</sup> SB169 provisions are based on the version as of May 4, 2017. SB169 sections are paraphrased or summarized unless otherwise indicated.

<sup>7</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>

<sup>8</sup> FACE Comparison Table, note 5, *supra*.

<sup>9</sup> NCHERM, note 3, *supra*, at p. 2.

<sup>10</sup> SB169 Sections 4 & 6 (f), and Office for Civil Rights' “Questions and Answers about Title IX and Sexual Violence,” U.S. Dep't of Education (Apr. 29, 2014), p. 13, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

<sup>11</sup> Know Your IX, Fair Process in Campus Discipline, <https://www.knowyourix.org/issues/fair-process-campus-discipline/>.

campus processes because, although DCL proponents claim the process is merely “educational,”<sup>12</sup> as one court recently concluded such an argument “is not credible,” because the “stakes are very high, and students are ‘charged with serious offenses’ “that carry the potential for substantial public condemnation and disgrace.”<sup>13</sup>

**3. PROMPT & DETAILED NOTICES:** *Students must receive prompt and adequate notice of all actions and decisions relevant to the allegations.* Notices should be provided sufficiently in advance to allow parties a reasonable time to respond.

- Notice of the complaint must detail the facts on which the allegations are based, beyond merely listing “sexual misconduct,” or a similarly vague category.<sup>14</sup> Respondents must be informed of:
  - 1) the specific conduct at issue,
  - 2) the complainant’s identity and
  - 3) the date of the alleged incident prior to any interview by school personnel.
- Too often a student is not informed of the factual basis for the complaint until shortly before a hearing. This impedes respondents’ ability to defend themselves by obtaining evidence and locating witnesses, particularly when a complaint is brought long after the alleged incident, as many are, and memories have faded or witnesses graduated.
- Respondents also must be notified that their statements and other information they may provide to the school can be used in criminal proceedings.
- Parties should be provided timely notice of all meetings, including those with other parties, either before or soon thereafter, including updates on the status of investigations and resolutions and notice of the hearing and a copy of the investigation report sufficiently in advance to allow time to prepare for the hearing.<sup>15</sup>

**4. PARTY IDENTITY:** *The identities of parties and witnesses should be disclosed to the parties, unless there are legitimate, verifiable safety concerns.*

**5. LAW ENFORCEMENT:** *Complainants should be encouraged but not required to report criminal sexual violence to law enforcement, and should they choose to report, they must be supported by the school in that effort.*

- Filing a police report creates a record of repeat offenders even if the matter is not pursued.
- Title IX investigations should be stayed during criminal investigations, to allow for the expert collection and preservation of evidence, and non-punitive interim measures available to ensure student safety.
- Students are not able to defend themselves adequately when they are involved in a criminal investigation.

**6. NON-PUNITIVE INTERIM MEASURES:** *Interim measures should be non-punitive.* Similarly, a respondent’s interests should be taken into account in implementing interim measures, if they are not inconsistent with protecting the complainant. We have seen complainants go out of their way to attend respondent-related events seemingly for the primary purpose of retaliation.

**7. ADVOCATES & ATTORNEYS:** *Students must be permitted to be accompanied by an independent advocate or attorney throughout the disciplinary process, including during interviews.*

- Because colleges seek to protect complainants and their focus is frequently to establish guilt, respondents can often find themselves in a position similar to David facing Goliath, defending themselves against experienced lawyers or administrators.<sup>16</sup>
- Though schools sometimes require an independent employee be assigned as support for the respondent, such an employee owes allegiance to the school, is not normally bound by confidentiality laws and their participation is restricted during hearings and investigations. This disproportionately affects the respondent in the collection and presentation of evidence.

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<sup>12</sup> This point was addressed in *Doe v University of Notre Dame*, when, in response to the court’s query as to “why an attorney is not allowed to participate in the hearing especially given what is at stake—potential dismissal from school and the forfeiture of large sums of tuition money,” the campus official provided the commonly used rationalization that ‘it’s because he views this as an “educational” process for the student, not a punitive one.’ The court replied: ‘This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester’s worth of tuition is “punishment” in any reasonable sense of that term.’ *Doe v University of Notre Dame*, Case No. 3:17CV298, at pp. 25-26, (Dist. Court IN, South Bend, May 8, 2017, [https://drive.google.com/file/d/0B0CTUnodV2\\_iZ19NMkdwSVczSzA/view?usp=sharing](https://drive.google.com/file/d/0B0CTUnodV2_iZ19NMkdwSVczSzA/view?usp=sharing)).

<sup>13</sup> ACTL, note 2, *supra*, at p. 11.

<sup>14</sup> For example, in *Doe v University of Notre Dame* granted the accused student’s request for a TRO against the school, noting that “the lack of meaningful notice to John of the allegations against him, so as to be able to adequately prepare his defense, has a more than negligible chance of being found to render the disciplinary process capricious ... John reasonably needed to know what contacts and conduct was being scrutinized for possible violation of which policies.” The court found that merely advising the student of policies violated, such as “sexual misconduct,” ‘amounts to no notice at all. ... This so-called “notice of charges” could not be further from revealing particular policy violations implicated, much less specific allegations of John’s objectionable conduct.’ Note 12, *supra*, at p. 21.

<sup>15</sup> NCHERM, note 3, *supra*, at pp. 17-18.

<sup>16</sup> See *Doe v University of Notre Dame*, note 12, *supra*, at pp. 25-26.

- 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.<sup>17</sup>

**8. CONFIDENTIAL ADVISORS:** *Both parties must have confidential advisors;* respondents can be unaware of how to defend their rights, unable to afford an attorney and traumatized by the isolation they experience after an accusation, particularly one that is false.

**9. STUDENT SUPPORT:** *Support services are must be provided to both parties.* Many schools provide support services for complainants although wrongfully accused respondents experience equivalent emotional trauma, such as PTSD, depression and suicidal ideation (a few wrongfully accused respondents have committed suicide.) These students also may experience repulsion and rejection by other students, friends and family who, not understanding campus culture, may presume their guilt. All students affected by disciplinary proceedings must be provided counseling, medical, and educational support services such as tutoring and grade forgiveness.

**10. UNAMBIGUOUS & PRECISE MISCONDUCT DEFINITIONS:** *Definitions should be specific and not employ criminal terminology.*

- Unfortunately, SB169's definitions are confusing and ill-defined. Currently, "sexual harassment" is a broad category which includes sexual assault, sexual misconduct, dating violence, domestic violence and stalking in addition to the traditional sexual harassment. In fact, many FACE student cases have been suspended or expelled for alleged conduct which did not even involve sexual intercourse.
  - 1) On campuses, the conduct included under the term "sexual misconduct" ranges from unwanted touching of a fully clothed body part to repeated verbal requests for sex.
  - 2) SB169 Section 2(a) defines it as 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.
- SB-169 Section 2(b) inexplicably states that sexual harassment also means 'sexual violence, without clarifying that under the DCL and more recent Title IX interpretation sexual violence may be a *form* of sexual harassment, but the latter term may not always signify violence.
- SB-169 Section 3(a) defines "sexual violence" as sexual acts against one's will or where there is an incapacity to consent due to victim's use of drugs or alcohol.
  - 1) However, the bill fails to define "incapable of giving consent." It would be far more effective to use the term "incapacitated," thereby providing a more definitive threshold which is also more likely to be within the capabilities of campus administrators to assess.
  - 2) The bill defines "sexual violence" to include:
    - a) Rape as defined as in the California Penal code (SB169 Section 3(b)).
    - b) Sexual assault or sexual battery as defined as in the California Penal code (SB169 Section 3 (c)).
    - c) Sexual coercion, with no definition or Penal code section cited. This is unacceptably vague: what is "sexual coercion?" Is it considered "coercion" when one party asks a partner for sex twice within an hour? Six times over the course of an evening?
  - 3) Unfortunately including both criminal and noncriminal conduct under the category "sexual violence" and conflating criminal terminology with non-criminal conduct code violations has serious repercussions:
    - a) Sexual misconduct or sexual harassment can remain on an respondent transcript, causing future schools and employers to grievously misinterpret the heinousness of the offense, impacting a student's future employability because these terms imply a more serious violation to those outside the campus community.
    - b) If a violation is not criminal, it should be called a 'student conduct code violation,' or another term not used for describing or implying criminal sexual conduct.

**11. UNBIASED INVESTIGATION:** *Party interviews should be conducted with the same procedural protections as hearings.*<sup>18</sup>

- Campus investigators often gather evidence to demonstrate guilt, while neglecting to interview witnesses or collect evidence that may undermine the allegations.
- An investigator may also act as a prosecutor at hearings, and present evidence only on behalf of a complainant.
- In case after case discovery in connection with a civil lawsuit has revealed significant evidence such as text messages, emails and other social media sources which exonerates a respondent, but was not produced at the campus proceeding because the investigator did not request or have access to such information.<sup>19</sup>

<sup>17</sup> In *Doe v University of Notre Dame*, during the hearing the advisor was 'not allowed to "make comments, pass notes"' and "could confer with their respective advisors during the hearing only on breaks, taken entirely at the discretion of the Hearing Panel." Note 12, *supra*, at p. 14.

<sup>18</sup> NCHERM, note 3, *supra*, at p. 18.

<sup>19</sup> *Doe v University of Notre Dame*, the respondent requested access to the complainant's text messages to rebut her hearing testimony, but the school refused. According to the court, the respondent "didn't have access to these texts messages because it was Jane who selectively chose which texts would be produced during the investigation." Note 12, *supra*, at pp. 15-16.

- Respondents who were loyal to their school and believed the system was fair and truth would prevail have been blindsided by decisions based on incomplete or skewed facts, often because they were unaware of the need to produce evidence on their own behalf.

**12. IMPARTIAL INVESTIGATOR:** *Respondents must be presumed innocent.*

- A presumption of innocence is critical in the campus process where wrongful allegations and findings are more prevalent due to expanded definitions of sexual harassment, narrow definitions of consent, the absence of sworn testimony, restrictions on hearsay and cross-examination and the lower standard of evidence.<sup>20</sup>
- Wrongful allegations and findings also are more likely on campus because historical disincentives for false *criminal* reporting (such as trauma, shame and fear of repercussions) have been mitigated by a protected and even respected status on many campuses. Furthermore, the vast majority of cases involve scenarios in which wrongful or exaggerated accusations occur most frequently, such as “attempts to conceal or deny discovered infidelity ... consensual sexual activity that is subsequently regretted ... [and] ... complaints following the breakdown of a relationship.”<sup>21</sup> Students have reported that if they wish to “Title IX” someone, they need only “fill out a form.”

**13. COMPREHENSIVE INVESTIGATION REPORT:** *A comprehensive report should identify all evidence collected.*

- Both parties should receive a copy of the investigation report and be permitted to submit suggestions for additions and exclusions, as well as to submit responses to the final report.<sup>22</sup>
- Due to confirmation bias, an investigator must be precluded from making responsibility conclusions and findings of fact.<sup>23</sup>

**14. COMPLETE ACCESS TO EVIDENCE:** *Students must have access to all evidence.*

- If the school process seeks the truth, there is no reason to deny access to all evidence collected or discovered.
- Currently, often under the pretext of confidentiality, discovery of the truth is hampered because respondents is:
  - 1) barred from contacting potential student witnesses,
  - 2) denied access to evidence or sufficient time<sup>24</sup> to review records, and
  - 3) forbidden to photocopy or take detailed notes on investigation records and witness statements.<sup>25</sup>
- NCHERM warns all parties should be given copies of reports and access to evidence used in responsibility decisions.<sup>26</sup>

**15. WITNESS TESTIMONY:** *Parties should be able to suggest witnesses and present written questions to them, as well as follow up questions generated by their statements or testimony.*

- SB 169 Sections 4 and 6(c)(3)(C) provide that both parties should have “the opportunity ... to present witnesses and other evidence.” However, schools limit questions and may not allow follow up questions generated by testimony.
- If a witness account is pivotal for finding responsibility, fact-finders should be able to hear their testimony in person or by electronic means.

**16. RIGHT TO BE HEARD:** *Parties should be given an opportunity to be heard by fact-finders.* Parties must be informed of and the chance to fully and fairly defend against all allegations and respond to all evidence on the record.

**17. ADMISSIBILITY & OF RELEVANCY OF EVIDENCE:** *All relevant evidence must be considered in a process seeking to ascertain the truth.*

- SB-169 Sections 4 and 6(c)(3)(C) require grievance procedures to provide both parties the opportunity to present witnesses and evidence. Unfortunately, SB169 provides no clarification with respect to the types of evidence admissible, how the evidence is to be accessed or presented, the parties’ rights to question evidence, rules for disclosure or sequestration, rape shield rules, etc.

<sup>20</sup> Research has undermined David Lisak’s much relied upon study which estimated only 2-9% of accusations are false. See Soave, Robby, “How an Influential Campus Rape Study Skewed the Debate; Widely cited study relies on surveys that don’t actually have anything to do with on-campus rape assaults,” *Reason.com*, July 28, 2015, <http://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong>.

<sup>21</sup> Saunders, Candida L., “The Truth, The Half-Truth, and Nothing Like the Truth, Reconceptualizing False Allegations of Rape,” *The British Journal of Criminology*, Vol. 52(6), pp. 1152-1171, <http://bjc.oxfordjournals.org/content/52/6/1152.full.pdf>; see also Erwin, John, “Missing the Mark; False Allegations in the U.S. Government,” *American Analyst*, August 8, 2014, p. 8 (in his article Erwin refers to Saunders’ article as the “best overview of the issue,” and references several other studies examining the likelihood of false allegations), [https://drive.google.com/file/d/0B0CTUnodV2\\_iSTBQNDNScDIVV2s/view?usp=sharing](https://drive.google.com/file/d/0B0CTUnodV2_iSTBQNDNScDIVV2s/view?usp=sharing).

<sup>22</sup> Stanford, note 1, *supra*, at pp. 9-10; NCHERM, note 3, *supra*, at p.18.

<sup>23</sup> Stanford, note 1, *supra*, at p.12.

<sup>24</sup> For example, in *Doe v University of Notre Dame*, the district court, calling it a “data dump,” noted that before the hearing the respondent was given “two-and-a-half days to review” “a substantial volume of new material.” The court found “[s]uch a process is not designed to facilitate a fair hearing for which John is fully prepared to respond against Jane’s allegations and evidence.” Note 12, *supra*, at pp. 25, 15.

<sup>25</sup> In *Doe v University of Notre Dame*, the district court noted that the respondent was permitted to “review, but not photocopy or otherwise duplicate, the Administrative Investigation documents (over 350 pages) prior to the hearing.” Note 12, *supra*, at p. 14.

<sup>26</sup> NCHERM, note 3, *supra*, at p. 18.



- Further clarification is needed because:
    - 1) Decision-makers consistently ignore the context of the parties' relationship, finding texts, photographs and witness statements "irrelevant," on the basis that only evidence during the alleged event is relevant. Decision-makers must consider the circumstances concerning the parties' relationship; as NCHERM recently explained, context is relevant: consent is contextual and 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."<sup>27</sup>
    - 2) Decision-makers frequently reject phone records, blood tests, polygraph results and other forensic data unless produced by the campus investigator, thereby preventing consideration of exculpatory evidence an investigator may have overlooked or intentionally ignored.
18. **ONE INVESTIGATOR-ADJUDICATOR:** *an investigator serving as decision-maker should be discouraged.*
    - A separate decision-maker offsets the potential for investigator bias. and to hear the parties.
    - A clear and convincing standard of proof should be required to offset potential bias when the investigator and decision-maker roles are combined.
  19. **HEARING ALTERNATIVES:** *Schools should be permitted to allow non-mediation alternatives if appropriate. Both parties must voluntarily agree to participate in any such process and may withdraw their consent at any time.*
  20. **PARTY SILENCE & PRESENCE:** *Neither party should be required to participate in a disciplinary process.*
    - Silence must not support guilt findings especially with a criminal action pending.
    - A party who chooses to remain silent should still be able to present evidence or question evidence that is presented.
  21. **IMPARTIAL & UNBIASED DECISION-MAKERS:** *A panel should be comprised of three unbiased members who are diverse in gender, race, age, sexual orientation and position and receive explicit training on objective adjudication.*
    - 'Believe the victim' is appropriate for support, but has no place in a hearing.
    - Use of administrators/professors could affect their objectivity due to their immersion in campus culture.
    - Parties should be advised of decision-makers' identity in advance.
  22. **LIMITED CROSS-EXAMINATION:** *Questioning of witnesses is crucial to evaluating credibility.*
    - Credibility, is often the *only* issue in campus "he said–she said" cases.
    - Though policies allow questions submitted in writing, decision-makers sometimes unreasonably refuse to ask questions and often follow up questions in response to testimony are denied.<sup>28</sup>
    - Respondents also are not permitted to question the investigator whose report is relied upon in determining guilt.
  23. **TIME LIMITS:** *Completion of a disciplinary process in 60 days should be the goal, but a thorough and fair process should not be compromised to meet that deadline.*
  24. **DETAILED RECORDS:** *Disciplinary proceedings must be documented. Colleges should maintain written, video or audio records of all proceedings including investigations, to facilitate a decision's review and/or appeal.*
  25. **REASONABLE STANDARD OF EVIDENCE & ADEQUATELY TRAINED DECISION-MAKERS:** *The standard of evidence must protect against life-altering consequences.*
    - The preponderance standard of evidence "is a fairly minimal standard," and "it must be applied with steadfast rigor."<sup>29</sup>
    - Due to the low standard of evidence, FACE supports Stanford's requirement that a panel of three decision-makers be unanimous.<sup>30</sup>
    - Unfortunately, decision-makers believe they must choose one party over the other -- that there is no neutral position. However, "if the parties are equally persuasive" in their assertions, the school "has not met its burden and the responding party cannot be found in violation of the sexual misconduct policy."<sup>31</sup>
    - It must be clarified that it is not the job of decision-makers to decide 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.*<sup>32</sup>

<sup>27</sup> NCHERM, note 3, *supra*, at p. 6. Similarly, the district court in *Doe v University of Notre Dame*, noted that "[i]n a disciplinary matter concerning behavior in a long-term existing relationship, context matters, and the motive of the complainant (as it relates to credibility) bears more scrutiny than in some other cases." Note 12, *supra*, at p. 23.

<sup>28</sup> In *Doe v University of Notre Dame*, the court observed "[t]hat all questions must be proposed in writing and are asked of witnesses only at the discretion of the Hearing Panel does not permit a robust inquiry in support of a party's position. The stilted method does not allow for immediate follow-up questions based on a witness's answers, and stifles John's presentation of his defense to the allegations." Note 12, *supra*, at p. 25.

<sup>29</sup> NCHERM, note 3, *supra*, at pp. 5, 18.

<sup>30</sup> Stanford, note 1, *supra*, at p. 18.

<sup>31</sup> NCHERM, note 3, *supra*, at p.16.

<sup>32</sup> NCHERM, note 3, *supra*, at p.16.

- Decision-makers must also be given instructions on how to properly apply the preponderance of evidence standard, such as:
  - 1) to evaluate the quality of evidence;
  - 2) give more weight to higher quality or reliable evidence than that of low quality;
  - 3) that quantity of evidence alone does not support a responsibility finding; and
  - 4) that respondent should be found to have engaged in misconduct only if the decision-makers believe there is sufficient, relevant, probable and persuasive evidence and that evidence outweighs any evidence that the alleged conduct did not occur.
- There must be no gender-based presumptions or shifting of the burden of proof: OCR policies and California laws reinforce gender-biased decision-making caused by affirmative consent policies under which campus fact-finders:
  - 1) presume males initiate sexual encounters, even when evidence shows otherwise;
  - 2) penalize only an initiator for alcohol violations, even when an complainant's intoxication was self-induced;
  - 3) demand the initiator gauge the intoxication level of an complainant who may appear lucid and be in a blackout;
  - 4) negate otherwise valid consent when it is later decided the respondent "should have" accurately gauged the complainant's intoxication;
  - 5) absolve an complainant from conveying objection to the sexual activity; and,
  - 6) transfer the burden of proof to the respondent to prove consent was obtained.<sup>33</sup>
- Together the above factors undoubtedly tilt decisions in favor of complainants, and demand "a finding that conduct was unwelcome solely because of the [complainant's] drug or alcohol consumption ... [while] denying the respondent any mitigation because of his."<sup>34</sup>

**26. DETAILED FINDINGS:** Findings must be specific and provide a rational basis for the decision and which allows parties to file meaningful appeals.

**27. PROPORTIONATE SANCTIONS:** Adjudications and sanctions should consider the motivation for and reasonableness of the conduct.

- In attempting to demonstrate responsiveness to sexual assault, decision-makers indiscriminately suspend or expel students found responsible, despite lack of 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 indecipherable or both parties were equally intoxicated.
- Decision-makers must consider all circumstances in adjudication and imposition of penalties, and sanctions should account for mitigating<sup>35</sup> and aggravating factors, prior conduct history, the nature and seriousness of offense and the impact on the complainant and community.
- Sanctions should include an allowance of educational and training remedies when justified by the facts.<sup>36</sup>

**28. RIGHT TO APPEAL:** Grounds for appeal should be limited to:

- 1) new information not known or available at hearing;
- 2) procedural error materially affecting the findings (includes improperly excluding or including evidence);
- 3) the imposition of disproportionate sanctions; or
- 4) that the conduct does not violate school policy.

**29. UNDERSERVED POPULATIONS:** Though SB169 recites that education is a 'great equalizer,' the policies it seeks to codify have been shown to undermine that effect by disproportionately impacting minorities, first generation, financial aid students, and other similarly-situated student populations.

**30. ALCOHOL ABUSE:** Schools must develop education and other policies designed to reduce the incidence of sexual conduct violations associated with alcohol and drug abuse, especially in a culture where it is common to "pre-game" before an event by ingesting shots of alcohol.

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<sup>33</sup> In one case the judge ruled that to require the respondent to prove consent violated due process. Greenfield, Scott H., "Affirmative Consent is Unconstitutional," *Simple Justice, A Criminal Defense Blog*, August 11, 2015, <http://blog.simplejustice.us/2015/08/11/affirmative-consent-is-unconstitutional/>.

<sup>34</sup> Halley, Janet, Commentary, "Trading the Megaphone for the Gavel in Title IX Enforcement; Backing off the hype in Title IX enforcement," *Harvard Law Review Forum*, 128 Harv. L. Rev. F. 103, February 18, 2015 (a "witch hunt" due to "pressure on schools to hold students responsible for serious harm even when — precisely when — there can be no certainty about who is to blame for it."), <http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/>.

<sup>35</sup> "John's depression ... was not taken into account in the disciplinary process." *Doe v University of Notre Dame*, note 12, *supra*, at p. 24.

<sup>36</sup> Stanford, note 1, *supra*, at p. 26; NCHERM, note 3, *supra*, at p. 18.

**31. INSTITUTIONS SUBJECT TO SB169:** *SB169 does not distinguish between public and private schools, ignoring a significant discrepancy in the rights of students attending public schools, which are held to higher fairness and due process standards, and private which are not.*

- 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.<sup>37</sup>
- Equality and fairness require SB169 to provide due process for private as well as public school students.<sup>38</sup>
- NCHERM has warned 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.’<sup>39</sup>
- 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.<sup>40</sup>
- 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.

**32. SCHOOLS NEED DUE PROCESS GUIDANCE:** *Although SB169 Section 6(c)(3) 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’ experiences because decisions will have more credibility and be more trustworthy.
- 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 in order to correct current practices. Even if the DCL were withdrawn, many campus leaders have expressed their commitment to keeping the same processes, and schools will continue to be under political pressure to do so.
- Furthermore, such procedures can only be created in consultation with those who possess expertise in the fields of sexual violence, law and education.

## CONCLUSION

FACE appreciates your consideration of our comments and suggestions to 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 sexual assaults. We believe the integrity of campus disciplinary decisions will be preserved and prevention efforts more successful when decisions are based on fair procedures, reasonable and objective behavioral standards and the decision-makers’ independent evaluation of all available relevant and reliable evidence.

FACE students and representatives are available to provide testimony regarding the effects of the current college disciplinary process on falsely respondents and their families.

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.*

[www.facecampusequality.org](http://www.facecampusequality.org)

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<sup>37</sup> ACTL, note 2, *supra*, at p. 2.

<sup>38</sup> ACTL, note 2, *supra*.

<sup>39</sup> NCHERM, note 3, *supra*, at p. 19.

<sup>40</sup> NCHERM, note 3, *supra*, at p. 19.