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FACE RECOMMENDED TITLE IX DUE PROCESS PROCEDURES

Families Advocating for Campus Equality (FACE)[1] submits this document in response to a request for comments by U.S. Department of Education Proposed Rule: Evaluation of Existing Regulations, in accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda."

This document recommends procedures essential to ensure college and university Title IX disciplinary processes provide unbiased assessments of facts and evidence.[2] FACE's recommendations are based on reports from hundreds of students who have contacted us for support and advocacy over the past several years after being wrongfully accused of or found responsible for sexual misconduct. FACE is the only U.S. organization able to provide numerous student experiences exposing schools' desperate need for explicit guidance on implementing fair and balanced disciplinary procedures.

ADMINISTRATIVE PROCEDURE ACT COMPLIANCE

No one denies that sexual assault, on or off campus, is a heinous crime and those found responsible should be severely punished. However, enacting effective campus sexual assault prevention measures which protect victims while judiciously determining guilt cannot be accomplished in a vacuum. The creation of an effective strategy requires extensive research and consultation with those who possess expertise in many fields, including higher education, sexual violence and the law.

Secretary of Education DeVos has received overwhelming support from across the political spectrum for her plan to "launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way." [3] Widespread public notice-and-comment rulemaking as required by the federal Administrative Procedure Act (APA) provides the architecture for Americans' right to influence rules and regulations that will affect them, their organizations and their livelihoods. It is a method by which agencies are held accountable, and compliance provides assurance that agency decisions are fact-based and objective, and not the result of a particular political or social agenda.

The Department of Education Office for Civil Rights' (OCR) attempt to resolve campus sexual misconduct issues through guidance such as its April 4, 2011 "Dear Colleague Letter" (DCL),[4] without subjecting it to public notice and comment [5] was well-intentioned but imprudent. One frustrated university administrator

[1] FACE is a 501(c)(3) nonprofit whose mission is to provide advocacy and support to students impacted by inequitable Title IX disciplinary proceedings on college and university campuses. FACE represents students of all ethnicities, genders and gender identities and socioeconomic status. https://www.facecampusequality.org

[2] The term "due process" is used here in the broader sense, to refer to fair procedures generally. "Due process," however, is a legal term concerning a government's obligation to treat its citizens with fairness and equality when abridging their constitutional rights. In the campus context, due process technically would be relevant only in public schools, and courts have ruled it generally requiring just notice and a hearing.

[3] U.S. Department of Education Secretary Betsy DeVos, Prepared Remarks on Title IX Enforcement, September 7, 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement

[4] *Dear Colleague Letter*, U.S. Department of Education, Office for Civil Rights, *Ed.gov*, April 2011 (2011 DCL), p. 13, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html

[5] Bader, Hans, "Dept. of Ed's Sexual Harassment Guidance Radically Expands Harassment Liability," *CNSNews.com*, March 2, 2015, http://www.cnsnews.com/commentary/hans-bader/dept-eds-sexual-harassment-guidance-radically-expands-harassment-liability.

protested that DCL "strategies" were "imposed by a group of people who don't understand what we deal with every day, led by someone who has, according to her online bio, never done a job like mine," and which "undermine[] my judgment and my ability to make good decisions for my institution and my students."[6]

Discussing repercussions of OCR's failure to comply with the APA, Harvard Law Professors Jacob Gersen and Jeannie Suk Gerson explained, "this avoidance of administrative law norms has two important consequences. The first is the partial insulation of the sex bureaucracy from public or judicial scrutiny;" but the professors found more worrisome the lack of accountability for "policymaking by agency" or what Secretary DeVos in her recent speech called "rule by letter":

> The lack of openness to public comment and judicial review enables the slide—from regulating sexual violence and discrimination to regulating ordinary sex—to go unnoticed … To the extent that the bureaucracy is regulating sex, it should be seen for what it so that it can be publicly known and challenged.[7]

As noted by the Gersons, DCL has coerced schools into regulating ordinary sex. Fearing financial, political and reputational repercussions, institutions have applied OCR policies with a broad brush, often proscribing conduct any average American would consider acceptable. In fact, a leading provider of Title IX training throughout the country earlier this year 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."[8]

The fact that the DCL was issued by unelected and unaccountable government officials seeking to change sexual behavior through public policy undoubtedly has lead to the DCL's many shortcomings and devastating unintended consequences.[9] Many FACE students suspended or expelled following misguided or result-driven disciplinary processes have suffered tremendous emotional, educational and career-destroying impacts traceable to the 2011 DCL.

PRESSURE RESULTED IN UNFAIR PROCEDURES

OCR has guaranteed compliance with its directives by subjecting institutions to onerous Title IX investigations, publicizing institutions' names prior to findings of wrongdoing and threatening to withhold their federal funding.[10] However, the broad responsibilities OCR imposed upon institutions of higher education have been uniformly criticized as unfair, inequitable and generally ineffective at educating students about or preventing sexual misconduct on college and university campuses.[11]

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[6] Anonymous, *An Open Letter to OCR*, October 28, 2011, Inside Higher Education, https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students

[7] Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev., August 2016, http://www.californialawreview.org/wp-content/uploads/2016/09/Gersen-and-Suk-37-FINAL.pdf

[8] The 2017 NCHERM Group White Paper (NCHERM); Due Process and the Sex Police, p. 2, https://www.ncherm.org/wordpress/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.

[9] Not only did OCR neglect to consult interested parties, according to twenty-six law professors OCR also "ignored constitutional law, judicial precedent and Administrative Procedure Act requirements and "brazenly nullified the Supreme Court definition of campus sexual harassment." "Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault," May 16, 2016, posted by U.S. Senator Lankford (Law Professors' Open Letter),https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf

[10] 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*, February 18, 2015, Harvard Law Review, Vol. 128:103 (2015) http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/

[11] According to Janet Napolitano, the "regulatory apparatus that surrounds campus sexual violence and sexual assault drives these institutions to devote significant resources to prescriptive compliance regimes, often at the expense of improving prevention, response, and support programs." Janet Napolitano, '"Only Yes Means Yes:" An Essay on University Policies, Regarding Sexual Violence and Sexual Assault.' *Yale Law and Policy Review*, pp. 396-397, at p. 388, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1684&context=ylpr

The 2011 DCL also neglected to provide campuses with tangible tools to accomplish the broad policy goals it sought to achieve. These omissions are particularly troublesome given the fact-specific nature of most campus sexual misconduct disputes and the importance and extreme difficulty of accurately assessing credibility in "he said/she said" cases, particularly when alcohol is a factor. As such, the DCL's proscribed policies do not assist campus administrators in negotiating the extremely complex issues inherent in investigating and adjudicating campus sexual misconduct disputes.

The difficulty of campus tribunals reaching reliable decisions is further exacerbated by the absence of adequate professional training and an institution's inherent conflict of interest in protecting its reputation. The National Association of College and University Attorneys (NAS), a group comprised of professors, graduate students and administrators, has expressed concerns that the "increasingly complex rules sometime[s] go well beyond" the "capacity" of those charged with their implementation.[12] Peter Wood, NAS President, wrote to members of congress "The creation of these college tribunals in response to pressure from OCR has alarmed faculty members across the country."[13] Another report quoted a campus administrator complaining that the DCL has '"imposed on entities ill-trained or equipped for the task, a quasi-judicial role, with the implication that 'justice,' however defined, can be satisfactorily rendered through processes that cannot possibly replicate a genuine legal proceeding."'[14]

VICTIM RIGHTS MUST BE PRESERVED

FACE supports continued enforcement by OCR of institutions' responsibility to protect students under Title IX, and opposes any attempt to deny or restrict needed protections for victims of sexual violence. FACE agrees wholeheartedly with Secretary DeVos that sexual misconduct is "reprehensible, disgusting, and unacceptable," that discrimination occurs when a school "refuses to take seriously a student who reports sexual misconduct," and that "educational institutions have a responsibility to protect every student's right to learn in a safe environment and to prevent unjust deprivations of that right." [15]

DCL policies have been shortchanging victims as well as accused students, and leaving potential rapists to roam our streets and prey upon nonstudent victims.[16] OCR policies have been criticized for not serving those they were intended to protect and doing "relatively little to promote complainants' immediate access to education." [17] An attorney for the Victim Rights Law Center complained that OCR's practice of conducting in-depth reviews of campus policies was "terrible for victims" because "it utterly fails to provide remedies to individual victims" who, after filing a complaint, were effectively being told '"we'll see you in four years while we do a compliance review."' [18] The American College of Trial Lawyers' (ACTL) March White Paper on current practices in campus sexual assault investigations concluded, "*[u]nder the current system,*

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[12] Kelderman, Eric, "In Context, Sexual Assault; College Lawyers Confront a Thicket of Rules on Sexual Assault," *Chronicle of Higher Education,* Fall 2014, http://www.chronicle.com/items/biz/pdf/sex_assault_brief_fall2014.pdf

[13] Wood, Peter, "National Assn. of Scholars Letter to Members of Congress: Rein in the DoED's Office for Civil Rights," March 4, 2015, https://www.nas.org/articles/letter_to_senators_dont_expand_the_does_office_for_civil_rights

[14] SAVE "Six-Year Experiment in Campus Jurisprudence Fails to Make the Grade," 201, (SAVE Special Report), quoting John McCardle, Vice Chancellor of the University of the South at Sewanee, Tennessee, in a letter to SAVE's President, "Threat of Litigation as a Constraint," *Personal communication*, 2017, http://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-in-Campus-Jurisprudence.pdf

[15] U.S. Department of Education Secretary Betsy DeVos, Secretary DeVos Prepared Remarks on Title IX Enforcement, September 7, 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement

[16] Rape, Incest & Abuse National Network (RAINN), "Campus Sexual Violence: Statistics," https://www.rainn.org/statistics/campus-sexual-violence ("Female college-aged students (18-24) are 20% less likely than non-students of the same age to be" sexually assaulted.)

[17] Alyssa Peterson & Olivia Ortiz, A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints, *The Yale Law Journal*, May 2016, http://www.yalelawjournal.org/feature/a-better-balance-effective-protection-through-title-ix-complaints

[18] Linderman, Juliet, "More complaints, broader reviews of campus sex assaults leave some victims hanging for years," *US News & World Report*, June 8, 2015, https://www.usnews.com/news/us/articles/2015/06/08/broader-probes-of-campus-sex-assaults-leave-victims-hanging

everyone loses."[19]

Victim rights advocates have called for additional due process in campus sexual misconduct proceedings.[20]

> In fact, feminists should be especially concerned, not just about creating enforcement proceedings, but about their fairness. If there is a widespread perception that the balance has tilted from no rights for victims to no due process for the accused, we risk a backlash. Benighted attitudes about rape and skepticism about women victims die hard. It takes only a few celebrated false accusations of rape to turn the clock back.[21]

The absence of basic fairness harms those Title IX is intended to protect by delegitimizing investigations and, according to a Stanford survivor, contributes "to a greater culture of disbelief and anger at sexual assault survivors, who, as the plaintiffs, are held responsible for wrongful convictions, and seen as altogether less honest or legitimate." [22] Even more distressing, there are indications that DCL policies are "harming those it purports to protect" by undermining rather than aiding campus sexual assault prevention and reporting efforts.[23] In addressing the growing sentiment that campus adjudications are biased and unreliable, the ACTL concluded that increased procedural protections would "*enhance public confidence in [campus] adjudicative procedures and the broader goal of prevention."* [24]

COURT DECISIONS IN FAVOR OF ACCUSED STUDENTS

Courts across the country are increasingly recognizing that schools are not providing the basic fairness one would expect from an institution of higher education and finding that DCL-mandated disciplinary procedures have lead to biased and often predetermined results. There have been nearly seventy decisions in favor of accused students in the past three years, almost thirty of which were decided in 2017 alone.[25]

A few of the more egregious examples:

- A Massachusetts federal district court judge refused to dismiss an expelled student's Title IX discrimination claims, finding Amherst acted with "deliberate indifference" when it refused to investigate and ignored evidence supporting the student's claim that he was in reality the victim.[26]
- The Second Circuit Court of Appeal reversed a lower court's dismissal of an accused student's Title IX gender discrimination claim, holding he has sufficiently alleged that he was the victim of gender

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[19] American College of Trial Lawyers "White Paper on Campus Sexual Assault Investigations," March 2017, p. 18, emphasis added (ACTL White Paper) http://files.constantcontact.com/dbc236ec501/9b906384-177d-42df-9e1a-bcb6f62d9340.pdf

[20] FACE Co President and California attorney Cynthia P. Garrett served on an American Bar Association (ABA) Criminal Justice Section Task Force, which in June 2017 issued "Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct." The Task Force reached a consensus among administrators, victim and women's rights advocates and defense attorneys. The Recommendations and a list of Task Force members can be found at: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf

[21] Nancy Gertner, "Sex, Lies, and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process?," *The American Prospect* at p. 3 (Winter 2011).

[22] Anonymous, *A Survivor Speaks Out Against Stanford's Sexual Assault Proposal,* Stanford Daily, April 7, 2015, https://stanfordreview.org/a-survivor-speaks-out-against-stanfords-sexual-assault-proposal-9012b9a330b

[23] Id.

[24] ACTL White Paper, note 19, *supra*, at p. 15, emphasis added.

[25] KC Johnson, "Post Dear-Colleague Letter, College/University Defeats," accessed September 20, 2017, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/htmlview - gid=0 These decisions frequently involve a court's refusal to dismiss the student's claims or complaints/writs seeking declarative relief such as restraining orders or asking the court to vacate decisions. Although many are preliminary motions they are significant because the school settles the majority of these cases soon after the decision.

[26] *Doe v. Amherst College*, Civil Action No. 15-30097-MGM, (US Dist Court MA., Feb. 27, 2017.) (blacked-out male student given oral sex by his girlfriend's roommate who later accused him of rape. However text messages the accuser sent later that evening revealed she knew he was too intoxicated to lie for her.)

bias.[27]

- A federal court in Rhode Island allowed an accused student's Title IX claim to proceed based on allegations that Brown had banned him from campus without an investigation or hearing, refused him access to evidence and prevented him from defending himself.[28]
- A New York appellate court reversed a lower court dismissal of an accused student's claim against the State University of New York and criticized the school's reliance on weak hearsay evidence. [29]
- A Virginia district court granted an accused student summary judgment, finding the school's "accumulation of mistakes" violated the student's liberty interest by 'plainly call[ing] into question plaintiffs "good name, reputation, honor, or integrity."' [30]
- A Massachusetts district court criticized Brandeis' failure to provide an accused student "a variety of procedural protections . . . many of which, in the criminal context, are the most basic and fundamental components of due process of law," [31]
- In Virginia a court found there was potential gender bias because the Title IX officer had opined "sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations."[32]
- The Second Circuit Court of Appeal found an accused student had sufficiently pled gender bias based on "pro-female, anti-male bias . . . adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students."[33]
- A California Superior Court Judge found San Diego State University's disciplinary process "*enough to shock the Court's conscience.*"[34]
- Another Superior Court Judge found that due process had "completely been obliterated" by UC Davis.[35]
- A California Court of Appeal reversed a dismissal of the student's claim, concluding that USC denied the student "a fair hearing … and substantial evidence does not support: the findings"[36]
- In a second USC case, the same Court of Appeal found the university had violated the student's due process rights by not giving him a chance to defend himself.[37]
- The Riverside County Superior Court granted a student's stay of his expulsion and criticized LaSierra University administrators for seeking to expel the student without a hearing, identifying

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[27] *Doe v. Columbia Univ.,* 831 F.3d 46 (2d Cir. 2016)*;* for other decisions upholding accused student claims *see Doe v. Rectors and Visitors of George Mason Univ.*, 132 F.Supp.3d 712 (E.D.Va 2015) (student deprived of property interest through an "accumulation of mistakes"); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016); *Doe v. Middlebury Coll.*, No.1:15-cv-192-jgm, 2015 WL 5488109 (D. Vt. Sept. 16, 2015); *Doe v. Brandeis Univ.*, 177 F.Supp.3d 561 (D. Mass. 2016).

[28] *Doe v Brown,* C.A. No. 1:15-cv-00144-S-LDA (D. R.I., Feb. 22, 2016)

[29] *Haug v State University of New York*, No. 522632*,* (State of New York, Appellate Division, Third Judicial Dept., Apr. 6, 2017).

[30] *Doe v. Rectors and Visitors of George Mason University,* 149 F.Supp. 3d 602, 613-14 (E.D. Va. 2016) (quotation omitted).

[31] *Doe v. Brandeis Univ*., 177 F.Supp. 3d 561, 603 (D. Mass. 2016)

[32] *Doe v. Washington & Lee University,* No. 6:14-cv-00052, 2015 WL 4647996 at *10 (W.D. Va. Aug. 5, 2015)

[33] *Doe v. Columbia Univ*., 831 F.3d 46, 56 (2d Cir. 2016).

[34] *John Doe v. Rivera (SDSU),* No: 37-2015-00029558-CU-WM-CTL (San Diego County Sup. Court, Feb. 1, 2017 Minute Order)(emphasis added).

[35] *John Doe. v. Donald Dudley, Director of Student Judicial Affairs, et al.*, No. PT 15-1253 (Yolo County Sup. Court, Sept. 22, 2015.)

[36] *Dixon v. Kegan Allee et al*, Case No. BS157112 (Los Angeles Sup. Court, Aug. 12, 2015)

[37] *John Doe v University of Southern California*, 246 Cal. App. 4th 221 (2016).

witnesses or disclosing evidence.[38]

Although we know of one determination letter issued by OCR in response to an OCR complaint filed by an accused student in which OCR found the college had subjected its student to "an inequitable grievance and appeal process,"[39] there is still a long road to improving OCR's track record in recognizing the unfairness of some institutions' Title IX policies.

Despite vociferous criticism of Secretary DeVos' September 7th remarks by some victim advocates, in her speech the Secretary exhibited a very clear understanding of the needs of sexual assault victims and schools' responsibility to address sexual violence on their campuses. The Secretary repeated throughout her speech that she has no intent to deny victims adequate protections or allow campuses to return to the days when allegations were swept under the rug. Perhaps these advocates object to the end of a practice that has made it relatively easy for some school disciplinary panels to find innocent students responsible for sexual misconduct; in the words of one female student, someone can be "Title IX'd" by merely "filling out a form."

However, our justice system was not founded on the principle that guilty findings should be easy, but rather that we should take extra steps to ensure they are correct. As Secretary DeVos rightly observed "the rights of one person can never be paramount to the rights of another," and, like Secretary DeVos, at FACE we do not believe that protecting victims on the one hand and ensuring fairness and accuracy on the other are mutually exclusive goals.

FACE RECOMMENDATIONS FOR PROCEDURAL FAIRNESS

FACE's recommended procedures were, in addition to FACE student experiences, informed by our comprehensive review of existing campus policies as well as the suggestions of several respected organizations including those issued in June 2017 by the American Bar Association's Criminal Justice Section,[40] Stanford University's Title IX policy,[41] March 2017 recommendations from the American College of Trial Lawyers[42] and The NCHERM Group White Paper published in April 2017.[43]

1. ***EQUITABLE & UNBIASED PROCESSES***: [44] *It would seem axiomatic that disciplinary proceedings should seek to ascertain the truth, not prove guilt or innocence.* Though the 2011 Dear Colleague Letter (DCL) requires "adequate, reliable and impartial investigations,"[45] many schools do not believe it necessary or understand the mechanics of providing adequate, reliable and impartial processes, making it imperative that OCR provide basic guidelines, such as those discussed here and in the accompanying FACE Comparison and Recommended Due Process Procedures Table.[46]
2. ***IMPORTANCE OF DUE PROCESS***: *The 2011 DCL cautions that a respondent's right to due process should*

[38] *John Doe v Marnie Straine, Interim Title IX Coordinator, et al.,* Case Case No. RIC 1606115 (Riverside County Sup. Court, July 15, 2016) (Student was denied "factual basis of the charges against him," "access [to] any evidence," and "opportunity to appear directly before the decision-making panel to rebut the evidence presented against him.")
[39] Letter from Beth Gellman-Beer, Supervisory Attorney of OCR Philadelphia to Robert E. Clark III, President of Wesley College at 1 (Oct. 12, 2016), https://www.documentcloud.org/documents/2671380-Wesley-College-Clery-Act-Determination.html
[40] ABA Task Force, note 20, *supra*.
[41] Stanford Student Title IX Investigation & Hearing Process, February 2016, https://stanford.app.box.com/v/student-title-ix-process.
[42] ACTL White Paper, note 19, *supra*.
[43] NCHERM, note 8, *supra*.
[44] These numbered categories correspond to those in the FACE Comparison Table of Recommended Title IX Due Process Procedures, which can be found at the end of this document.
[45] *Dear Colleague Letter*, note 4, *supra*, at p. 13.
[46] FACE Comparison Table, note 44, *supra*.

not be permitted to interfere with protections for the complainant.[47] However, FACE recommendations are not inconsistent with victim protections.

Those who advocate maintaining the status quo have repeatedly insisted campus Title IX disciplinary processes are merely "educational"[48] while our experiences with FACE students indicate that too often these processes become adversarial. A federal district court recently rejected the "it's only educational" argument as "not credible," recognizing "stakes are very high, and students are charged with serious offenses" ... "that carry the potential for substantial public condemnation and disgrace."[49]

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 to the allegations, and ABA's Recommendations require that in any event notice must be provided prior to questioning by the school.[50]

   - Notice of the complaint must detail the facts on which the allegations are based, beyond merely listing "sexual misconduct," or a similarly vague category.[51] Prior to any interview by school personnel respondents must be informed of:

     1) the specific conduct at issue,
     2) the complainant's identity, and
     3) the date of the alleged incident.[52]

   - 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 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, updates on the status of investigations and resolutions, notice of the hearing and a copy of the investigation report sufficiently in advance to allow time to prepare for the hearing.[53]

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[47] 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

[48] 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

[49] ACTL, note 19, *supra*, at p. 11.

[50] ABA, note 20, *supra*, at p. 4.

[51] 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 48, *supra*, at p. 21.

[52] The ABA recommendations require: "the date of the alleged incident if known, a summary of the alleged facts, a summary of the specific policy violation(s) under investigation by the school, and instructions on how to access the relevant policy and adjudicatory process." ABA, note 20, *supra*, at p. 4.

[53] NCHERM, note 8, *supra*, at pp. 17-18.

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, the school must support them 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. Non-punitive interim measures can be implemented to ensure student safety. FACE agrees with the ABA Report's recommendation that when a "police investigation has been initiated, schools work cooperatively with law enforcement to the extent permissible by state and federal law." [54]
   - Students are not able to defend themselves adequately when they are involved in a criminal investigation, so a stay of the disciplinary process should be permitted, with the application of appropriate interim measures.

6. ***NON-PUNITIVE INTERIM MEASURES:*** *Interim measures should be non-punitive.* Similarly, if they are not inconsistent with protecting the complainant, a respondent's interests should be taken into account in implementing interim measures. FACE has cases in which complainants attended respondent-related events seemingly for the purpose of harassment and/or retaliation.[55]

7. ***ADVOCATES & ATTORNEYS:*** *Students must be permitted to accompanied by an independent advocate or attorney throughout the disciplinary process, including during interviews and hearings.* 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.[56]

   - The Violence Against Women Authorization Act of 2013 provides if one party is entitled to an advisor the other should be as well. However, the school typically represents a complainant's interests, minimizing or eliminating his or her need for a legal advocate. Respondents, on the other hand, often eighteen or nineteen years of age, are forced to construct a defensive strategy against allegations effectively prosecuted by experienced campus administrators and sometimes even attorneys while simultaneously being denied similar expert or legal assistance.
   - FACE agrees with the ABA recommendation that advocates should have the same access to evidence as the party they represent, the right to be present and permitted to communicate with and advise the student during all meetings and proceedings.[57]

8. ***CONFIDENTIAL ADVISORS****: Both parties must have confidential advisors.* Respondents are very unlikely to be aware of the logistics of defending their rights, unable to afford an atorney and traumatized by the isolation they experience after an accusation, particularly one that is wrongful. A school employee who owes allegiance to the school is not normally bound by confidentiality laws and their participation is restricted during hearings and investigations. The absence of an experienced support person disproportionately prejudices the respondent in the collection and presentation of evidence.

9. ***STUDENT SUPPORT:*** *Academic and emotional support services must be provided to both parties.* Many schools provide support services for complainants even though wrongfully accused respondents have been shown to experience equivalent emotional trauma, such as PTSD, depression and suicidal ideation

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[54] ABA, note 20, *supra*, at p. 2.
[55] ABA recommends "provisions to protect all parties from retaliation." ABA, note 20, *supra*, at p. 2.
[56] See *Doe v University of Notre Dame*, note 48, *supra*, at pp. 25-26.
[57] ABA, note 20, *supra*, at p. 4; In *Doe v University of Notre Dame*, note 48, *supra*, at p. 14, 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."

-- a few wrongfully accused respondents have committed suicide. Respondents are also likely to 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, campus definitions of sexual-related offenses are broad, confusing and ill defined.

OCR has defined "sexual harassment" broadly to encompass rape, sexual assault, sexual misconduct, dating violence, domestic violence and stalking in addition to acts traditionally understood as sexual harassment. Under the terms "sexual misconduct" or "harassment" campuses codes also include a variety of conduct ranging from unwanted touching of a fully clothed body part to nine-second stares and repeated verbal requests for sex.

The proscription of sexual conduct while under the influence of drugs or alcohol is particularly problematic for the participants as well as for decision makers attempting to parse the interaction.

1) While conduct codes prohibit sexual encounters when one party is "incapable of giving consent," the threshold at which one becomes "incapable" is often inadequately defined. While some codes appropriately use the term "incapacitated," determining whether that threshold was reached is generally not within the capabilities of campus administrators.

2) Including both criminal and noncriminal conduct under the category "sexual misconduct" and conflating criminal terminology with non-criminal school conduct code violations also has serious repercussions:

    a) "Sexual misconduct" or "sexual harassment" can remain on a respondent's transcript, causing future schools and employers to grievously misinterpret the heinousness of the offense, and 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 given a term such as 'student conduct code violation,' or another not used for describing or implying criminal sexual conduct.

11. ***UNBIASED INVESTIGATION:*** *Party interviews should be conducted with the same procedural protections as hearings.*[58] The ABA recommends and FACE agrees in addition to being thorough and fair, there is no question that an investigator "should equally seek out both inculpatory and exculpatory evidence."[59]

- 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.[60]
- In case after case discovery in connection with a subsequent civil lawsuit has revealed significant evidence such as text messages, emails and other social media sources which exonerate a respondent, but was not produced during the campus proceeding because the investigator did not request or have access to such information.[61]

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[58] NCHERM, note 8, *supra*, at p. 18.
[59] ABA, note 5, *supra*, at p. 2.
[60] *See* discussion in Section 18., *infra*.
[61] *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 48, *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 and evidence, 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 or mistaken 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, use of a lower standard of evidence and other procedural protections normally employed in connection with that lower standard. [62]
- 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."[63] 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.* The ABA recommends this report be provided to both parties and "include information such as party statements, witness statements, and any inculpatory or exculpatory information collected during the investigation," and that the school "disclose a list of information obtained during the course of the investigation even if it was not considered relevant evidence for the decision-maker(s)."[64]

- The ABA also recommends both parties 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.[65]
- Due to confirmation bias, an investigator must be precluded from making responsibility conclusions and findings of fact.[66]

14. ***COMPLETE ACCESS TO EVIDENCE:*** *Students must have access to all evidence, whether it be compiled in an investigation report or provided separately.*

- 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 are:

    1) barred from contacting potential student witnesses,
    2) denied access to evidence or sufficient time to review records, [67] and

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[62] 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.

[63] 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 others studies examining the likelihood of false allegations), https://drive.google.com/file/d/0B0CTUnodV2_iSTBQNDNScDlVV2s/view?usp=sharing.

[64] ABA, note 20, *supra*, at p. 4.

[65] ABA, note 20, *supra*, at pp. 4-5; Stanford, note 6, *supra*, at pp. 9-10; NCHERM, note 3, *supra*, at p.18.

[66] Stanford, note 41, *supra*, at p. 12; see also Section 18., *infra*.

[67] 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

3) forbidden to photocopy or take detailed notes on investigation records and witness statements.[68]

- NCHERM, like the ABA, recommends all parties be given copies of reports and access to all evidence used in responsibility decisions.[69]

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

- Both parties should have the opportunity to present witnesses and other evidence. However, schools frequently limit questions and disallow 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. The ABA recommends such a witness appear in person to allow decision makers to better assess credibility.[70]

16. ***RIGHT TO BE HEARD:*** *Parties should be given an opportunity to be heard by decision makers.* Parties must be informed of and provided the right to fully and fairly defend against all allegations and respond to all evidence.

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

- Unfortunately, OCR provides no clarification with respect to the types of evidence which should be considered by campus decision makers, how the evidence is to be accessed or presented, the parties' rights to question evidence, rules for disclosure or sequestration, rape shield rules, etc.
- 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 generated 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."[71] . Even the victim rights organization Know Your IX's recently issued "State Policy Playbook" allows exclusion of only "one's own prior sexual history with persons other than the opposing party."[72]

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. ***SINGLE INVESTIGATOR-ADJUDICATOR****: an investigator serving as decision-maker must be prohibited.* FACE does not support this process, known as the single investigator model, and the ABA Task Force

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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 48, *supra*, at pp. 25, 15.)

[68] 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 48, *supra*, at p. 14.)

[69] NCHERM, note 8, *supra*, at p. 18.

[70] ABA, note 20, *supra*, at p. 6.

[71] NCHERM, note 8, *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 48, *supra*, at p. 23.)

[72] Know Your IX, State Policy Playbook, p. 56 , https://www.knowyourix.org/statepolicy-playbook/

determined it "carries inherent structural fairness risks especially as it relates to cases in which suspension or expulsion is a possibility."[73]

- The ABA recommended a separate decision maker when such a process is used, to offset the potential for investigator bias. and the opportunity to hear the parties.
- The ABA also recommended a clear and convincing standard of proof to offset potential bias when investigator and decision maker roles are combined.

19. ***HEARING ALTERNATIVES:*** *Schools should be permitted to allow non-mediation alternatives if appropriate.* The ABA recommended alternative resolution be available when appropriate and both parties voluntarily agree to participate in any such process and be permitted to withdraw their consent at any time.[74]

20. ***PARTY SILENCE & PRESENCE:*** *Neither party should be required to participate in a disciplinary process.*

- The ABA states that, "In the interest of fundamental fairness … the respondent's silence should not be the basis of a finding of responsibility."[75] This is particularly important when a parallel criminal action is pending.
- A party who chooses to remain silent should still be able to present evidence or question evidence that is presented, but the ABA recommends a party's silence preclude him/her from offering a personal account, but not a general denial.[76]

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.*

- Decisions should be unanimous, in accordance with ABA recommendations.[77]
- '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.* The ABA recommends the parties not directly question one another or other witnesses directly, but that they be given an ongoing opportunity to offer questions to be asked through the decision-maker(s).[78]

- 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.[79]
- Respondents also are not permitted to question the investigator whose report is relied upon in determining guilt.
- The investigator should be available for questioning by the decision maker(s) and the parties.[80]

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[73] ABA, note 20, *supra*, at p. 3.
[74] *Id.*
[75] ABA, note 20, *supra*, at p. 5.
[76] ABA, note 20, *supra*, at p. 6.
[77] ABA, note 20, *supra*, at p. 8.
[78] *Id.*
[79] 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 48, *supra*, at p. 25.)

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. The ABA recommends the hearing be recorded or transcribed and reasonable care be taken to create a quality recording and minimize technical problems.[81]

25. ***REASONABLE STANDARD OF EVIDENCE & ADEQUATELY TRAINED DECISION MAKERS:*** *The standard of evidence must protect against life-altering consequences.*

FACE supports a clear and convincing standard of evidence in campus sexual misconduct disciplinary proceedings. However, the appropriateness of a standard of evidence cannot be discussed without also considering whether an accused student is entitled to a presumption of innocence.

Victim advocates believe eliminating the presumption of innocence equalizes the parties' burdens resulting in more fairness. The core of this argument is best illustrated by what we learned during the ABA Task Force meetings: *victim advocates believe a finding that an accused is not responsible is equivalent to finding the accuser is lying.*

Essentially, victim advocates see the campus decision making process as a zero-sum game, a contest where one party wins and the other necessarily loses. In application, this approach leaves no neutral position for a decision maker, much less a presumption of innocence; decision makers are effectively denied the opportunity to throw up their hands and say "I just don't know," a particularly important alternative when most of the cases they encounter are he said/she said with no evidence and just the word of each party.

We believe that being pressured to make such a win-lose choice, combined with OCR's punitive enforcement methods and internal political pressure, has been a prime factor in many decision makers' rulings against innocent accused students. Recognizing this, the ABA was very clear that if the evidence did not reach the required threshold, the finding must be for the accused student. Similarly, according to NCHERM, "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."[82]

Should the preponderance standard of evidence be required:

- Because it "is a fairly minimal standard," "it must be applied with steadfast rigor"[83] and FACE strongly recommends Stanford's and the ABA's requirement that a panel of three decision makers reach a unanimous decision of responsibility.
- Furthermore, we recommend ABA's suggestion that the term "preponderance" be avoided due to misconceptions concerning application of that standard.[84] Instead, decision-makers should be given instructions on how to properly apply the evidenciary standard. For example, decision makers must:[85]

    1) first evaluate the quality of the evidence;
    2) give more weight to higher quality or reliable evidence than to that of low quality;
    3) quantity of evidence alone does not support a responsibility finding; and
    4) a 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.

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[80] ABA, note 20, *supra*, at p. 6.
[81] *Id.*
[82] NCHERM, note 8, *supra*, at p.16.
[83] NCHERM, note 8, *supra*, at pp. 5, 18.
[84] Stanford, note 41, *supra*, at p. 18; ABA, note 20, *supra*, at pp. 7-8.
[85] These instructions are adapted from the ABA Recommendations, note 20, *supra*, at p. 8.

- There must be no gender-based presumptions or shifting of the burden of proof: OCR policies reinforce gender-biased decision making caused by state and campus affirmative consent policies under which campus fact-finders may:

    1) presume males initiate sexual encounters, even when evidence shows otherwise;
    2) penalize only an initiator for alcohol violations, even when a complainant's intoxication was self-induced;
    3) demand the initiator gauge the intoxication level of a complainant, particularly difficult in cases where the individual may appear entirelu lucid but be experiencing a blackout;[86]
    4) negate otherwise valid consent when it is later decided the respondent "*should have*" accurately gauged the complainant's intoxication;
    5) absolve a complainant from conveying objection to the sexual activity; and,
    6) sometimes transfer the burden of proof to the respondent to prove consent was obtained.[87]

- 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."[88]

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

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

> that a particular sanction should not be presumed or required. Instead, the Task Force proposes that sanctioning should be decided on an individualized basis taking into account the facts and circumstances including mitigating factors about the respondent, the respondent's prior disciplinary history, the nature and seriousness of the offense, and the effect on the victim and/or complainant as well as the university community. The Task Force believes that a presumption of expulsion may have unintended consequences such as discouraging reporting and a finding of responsibility.[89]

- 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.

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[86] Blackouts occur when a large quantity of alcohol is consumed over a relatively short period of time. The effect of a blackout is such that, despite a victim's outward appearance, the brain does not form memories; information "is simply not transferred into long–term storage." White, Aaron M. Ph.D., "What Happened? Alcohol, Memory Blackouts, and the Brain," *Published by NIH; National Institute on Alcohol Abuse and Alcoholism* (This work was supported by the National Institute on Alcohol Abuse and Alcoholism grant AA–12478 and the Institute for Medical Research at the VA Medical Center in Durham, North Carolina. Aaron M. White, Ph.D., is an assistant research professor in the Department of Psychiatry, Duke University Medical Center, Durham, North Carolina. http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm) This phenomenon is particularly concerning in the case of a young woman claiming nonconsent because a student in a blackout drunk state may outwardly appear "relatively fine," "conscious and awake," (Sammie Levin, "Blacking Out: Why It's More Dangerous Than You Think," *Her Campus*, Feb 27 2014 http://www.hercampus.com/health/physical-health/blacking-out-why-it-s-more-dangerous-you-think) "talking and even driving" (Lee H, Roh S, Kim DJ. Alcohol-Induced Blackout. *International Journal of Environmental Research and Public Health*. 2009; 6(11): 2783-2792. doi:10.3390/ijerph6112783) and other activities "events ranging from conversations to intercourse." (White, Aaron M. Ph.D., "What Happened?)

[87] 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/.

[88] Halley, Janet, note 10, *supra,* (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.")

[89] ABA, note 20, *supra*, at p. 9.

- Decision makers must consider all circumstances in adjudication and imposition of penalties, and sanctions should account for mitigating[90] 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.[91]

28. ***RIGHT TO APPEAL:*** *ABA recommends and FACE concurs that grounds for appeal 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) the conduct does not violate school policy.[92]

29. ***UNDERSERVED POPULATIONS:*** *FACE has witnessed OCR policies' disproportionate impact on minorities, first generation, financial aid students, and other similarly situated student populations.* Though the first sentence of the 2011 DCL states "Education has long been recognized as the great equalizer in America," OCR has ignored the fact that those most severely impacted by OCR's flawed "guidance" have been and continue to be students without financial resources to retain legal assistance, including first generation, minority, scholarship and other underserved student populations. In fact, these students may even be targeted due to the the Center for Disease Control's "risk factors" incorporated by reference into "[e]very federal policy statement describing prevention programs of which we are aware" are "that individuals from communities with poverty, unemployment, or a lack of institutional support from police -- poor black and Latino men -- are more likely to be perpetrators of sexual violence…" [93]

    The tragedy is that these ambitious students, in whom our country has invested significant time and money to ensure them opportunities for success equal to their more fortunate peers, are expected to face sophisticated lawyers and campus administrators who stand opposite them in disciplinary proceedings. They are denied access to the evidence, investigative reports and witness statements used against them, refused active assistance of an attorney or advocate, and their ability to ask questions is severely curtailed. Most have said they naively trusted their school to uncover the truth only to discover that the investigator sought only to establish their guilt. Outgunned, disillusioned and thwarted in their ability to clear their names, these traumatized and often suicidal students are left with the unimaginable burden to repay enormous college loans for which they have no diploma to show.

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 multiple shots of alcohol.*

31. ***PUBLIC V. PRIVATE INSTITUTIONS:*** *The DCL 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 standards of fairness and due process than private institutions.*

    - 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.[94]
    - Equality and fairness require due process and/or basic fairness for private as well as public school students.[95]

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[90] "John's depression … was not taken into account in the disciplinary process." *Doe v University of Notre Dame*, note 48, *supra*, at p. 24.
[91] Stanford, note 41, *supra*, at p. 26; NCHERM, note 8, *supra*, at p. 18.
[92] ABA, note 20, *supra*, at p. 5.
[93] Jacob Gersen & Jeannie Suk, "The Sex Bureaucracy," note 7, *supra*.
[94] ACTL, note 19, *supra*, at p. 2.
[95] ACTL, note 19, *supra*.

- NCHERM has recognized 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.' [96]
- 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.[97]

32. ***SCHOOLS NEED DUE PROCESS GUIDANCE:*** *OCR has not 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 the ABA, 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 through the APA notice and comment procedures, in consultation with those who possess expertise in various fields, including sexual violence, victim advocacy, law and education.

CONCLUSION

FACE appreciates your consideration of our 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 ensured 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 wrongfully accused respondents and their families.

Respectfully submitted, September 20, 2017

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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

[96] NCHERM, note 8, *supra*, at p. 19.
[97] *Id.*

FACE COMPARISON TABLE OF RECOMMENDED TITLE IX DUE PROCESS PROCEDURES[1]

	ABA TASK FORCE[2]	NCHERM WHITE PAPER[3]	ACTL WHITE PAPER[4]	STANFORD POLICY[5]	FACE RECOMMENDATIONS[6]
1. EQUITABLE & UNBIASED PROCESS ES	◆The ABA Task Force Report for fair Title IX disciplinary processes represents the collective judgment of Task Force members who, after extensive debate, discussion and compromise, unanimously approved the recommendations. In the process, members compromised their position on some provisions in order to obtain agreement on others of greater importance to them and reach unanimity. [1][7]	◆NCHERM is a leading provider of Title IX coordinator training throughout the country. ◆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]	**◆ACTL is a well-respected, invitation-only trial lawyer association.** ◆In expanding Title IX and mandating procedures, OCR has "involved itself" in school discipline protocols. This, and its power to require compliance through fines and funding, requires OCR to provide due process protections for accused students at both private and public schools. [12, 14]	◆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]	◆The Dear Colleague Letter (DCL) requires 'adequate, reliable and impartial investigations.'[8] ◆Due to their focus on complying with OCR mandates to avoid penalties and being listed on OCR's perpetual "List of Shame," combined with OCR's punitive approach and failure to provide basic due process-like guidelines, many schools choose to ignore the necessity, or do not understand the mechanics of providing adequate, reliable, equitable and impartial processes.
2. IMPORTANCE OF DUE PROCESS	◆Regardless of their perspective (victim or defense advocate, law professor or administrator), all Task Force members agreed both parties to a dispute needed and deserved a more reliable, consistent and transparent adjudicatory process.[CPG]	◆Parties have the right to a fundamentally fair process. [18] ◆'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]	◆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]	◆Parties should be provided a written 'Notice of Concern' providing sufficient detail regarding allegations and applicable school policies for the respondent to respond to & both parties to understand scope of the investigation. [9]	◆The DCL never mentions 'due process,' except to caution that a respondent's due process rights *should not be allowed to interfere with the process*.[9] ◆There are many due process-like procedures that do not interfere with protecting complainants, as shown by the ABA guidelines and STANFORD policy
3. PROMPT & DETAILED NOTICES	◆ Both parties should be provided with timely written notice that an investigation is beginning. Notice should include: date of the alleged incident if known; summary of the alleged facts and policy violation(s); how to access the policies; and information about right to an advisor. Notice should be provided before the investigation begins and before the responding party's interview with the investigator. [4]	◆Parties should be provided notice of the policies violated and detailed descriptions of the charges before an interview or hearing. [17, 18] ◆Parties should be provided timely notice of all meetings, including those with other parties, either before or soon thereafter. [18] ◆Parties should receive timely and regular updates on the status of investigations and resolutions. [17-18] ◆Parties should receive notice of the hearing and a copy of the investigation report with adequate time to prepare for the hearing. [18]	◆Respondents should have the right to be promptly provided with details of allegations and advised of the right to consult legal counsel. [13]	◆Policy provides for prompt written notices throughout the process, from the beginning of the investigation through appeals. [9-13, 17-18, 20]	◆Parties should receive prompt and adequate notice of all actions and decisions relevant to the allegations as called for by the ABA, STANFORD, ACTL & NCHERM. ◆FACE also supports ABA and NCHERM suggestions that prior to any interview, respondents be advised of a pending investigation and ithe factual details on which allegations are based. ◆FACE concurs with the ABA and NCHERM that all notices should be provided sufficiently in advance to allow both parties a reasonable time to respond. ◆Respondents also must be notified that their statements and other information acquired by or provided to the school can be used in criminal proceedings.

FACE COMPARISON TABLE OF RECOMMENDED TITLE IX DUE PROCESS PROCEDURES[1]

	ABA TASK FORCE[2]	NCHERM WHITE PAPER[3]	ACTL WHITE PAPER[4]	STANFORD POLICY[5]	FACE RECOMMENDATIONS[6]
4. PARTY IDENTITY	◆*Does not address*	◆Parties should be informed of the identity of the complainant and witnesses, unless there are verified significant safety concerns or the identity of witnesses irrelevant [18]	◆*Does not address*	◆Does not guarantee confidentiality but indicates it 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	◆Schools should determine whether a violation has occurred whether or not the conduct was criminal [2] ◆When a police investigation has begun, schools should cooperate with law enforcement to the extent allowed by state and federal law. [2]	◆*Does not address*	◆*Does not address*	◆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]	◆FACE agrees with the ABA that when a police investigation is pending, schools should cooperate if possible under state and federal laws, allowing at a minimum evidence collection and preservation. ◆When conduct is criminal, complainants should be *encouraged but not required* to file a police report and supported by the school in that effort, because reporting creates a record of repeat offenders.
6. NON-PUNITIVE INTERIM MEASURES	◆*Does not address*	◆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]	◆*Does not address*	◆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 because there has not been a finding, interim measures should be non-punitive and least restrictive needed. ◆FACE supports STANFORD's approach allowing a respondent's interests to be taken into account in implementing interim measures, if 'not inconsistent' with protecting a complainant.
7. ADVOCATES & ATTORNEYS	◆An advisor should have the same access to information as and a right to consult with the party during all proceedings. ◆School should provide a trained advisor to assist the party if necessary. ◆If an advisor is obligated to report to the school, the student should be informed of the potential conflict of interest. [4]	◆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: • may also be an attorney and accompany parties to hearing but must follow the same policies as party. • is only an advisor and may not speak or write on behalf of party. [7] ◆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; ABA, NCHERM, ACTL and STANFORD would allow parties to chose their advisor. ◆ABA suggests advocates be permitted to have the same access to evidence as the party they represent and the right to be present and confer with the party during all meetings and proceedings.

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8. CONFIDENTIAL ADVISORS	◆*See Section 7;* the ABA does not specifically provide for a confidential advisor, but does require the student to be informed if information communicated to the advisor cannot be kept confidential.	◆Parties should have the right to access an advisor of their choice throughout the process. [17]	◆*Does not address*	◆Confidential school resource - individual exempted by law from obligation to report an allegation to the Title IX Coordinator or law enforcement. [4]	◆Both parties must have confidential advisors or advocates; respondents are often unaware of how to represent their rights, many are unable to afford counsel and the trauma they may suffer due to a wrongful accusation and their resulting isolation from support can interfere with their ability to defend themselves.
9. STUDENT SUPPORT	◆*Does not address*	◆*Does not address*	◆*Does not address*	◆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]	◆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, and assistance for missed classes and exams.
10. UNAMBIGUOUS & PRECISE MISCONDUCT DEFINITIONS	◆***Does not address***	◆Provides two examples of schools' inability to distinguish conduct code violations from acceptable sexual behavior. [7,10] ◆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] ◆Context is relevant: consent is contextual & 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] ◆Consent can be non-verbal, assumed and retroactive based on the parties' relationship. [10, 13] ◆Discomfort with a sexual experience should not be confused with experiencing non-consensual sexual conduct. [9]	◆*Does not address*	◆*Sexual Harassment*: unwelcome sexual advances, requests for sexual favors, sexual visual, verbal or physical conduct (beyond 'expression of views, words, symbols, or thoughts that some person finds offensive'); must be sufficiently severe, persistent, or pervasive to interfere with participation in school activities. [24] ◆Whether conduct creates a hostile environment is determined using both a subjective and objective standard. [24-25] ◆*Sexual Misconduct:* 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] ◆*Sexual Assault:* Sexual Misconduct with force, violence, duress, menace or inducing or knowingly taking advantage of incapacitation. [24] ◆Distinguishes intoxication from inability to consent due to incapacitation. [22]	◆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. ◆If a violation is not criminal, it should be called 'student conduct code violation,' or any other term not used for describing or defining criminal sexual conduct. ◆ All OCR guidance should use 'respondent' along with 'complainant' instead of 'perpetrator' and 'victim' or 'survivor' which hints of bias and imputes guilt.

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11. UNBIASED INVESTIGATION	◆ Investigator must conduct prompt, fair, and impartial investigation. both parties should have right to identify witnesses and relevant information, and should equally seek out both inculpatory and exculpatory evidence.[2]	◆Interviews of parties should be conducted with the same procedural protections as a hearing (because interview is an administrative hearing). [18]	◆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]	◆Parties have the right to participate in an investigation by identifying witnesses and providing relevant information. [9] ◆Parties are permitted to: submit information; a list of witnesses; and request Investigator collect information not accessible to the requesting party. [10]	◆FACE favors STANFORD & 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.
12. IMPARTIAL INVESTIGATOR	◆*See Section11. above*	◆Right to a process free of (sex/ gender/protected class etc.) discrimination. [18] ◆Right to competent and trained investigators and decision-makers. [18]	◆'OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students accused of sexual misconduct.' [3]	◆Title IX Coordinator assigns investigator who gathers information, may collect documents and other information and interviews parties and/or witnesses [10] ◆Investigator must attend the hearing and be available for questioning [17]	◆Must be impartial, fair, have no conflicts of interest and <u>objectively</u> <u>trained</u> on investigation techniques (*'believe the victim' training may favor complainants*.) ◆FACE supports STANFORD's provision requiring an investigator to be available at the hearing for questions regarding the investigation and the final report.
13. COMPREHENSIVE INVESTIGATION REPORT	◆Should create comprehensive investigation report including party and witness statements, inculpatory/exculpatory evidence, all information obtained even if not deemed relevant. A person other than investigator or decision-maker(s) should determine information included in final report, [4-5]	◆Parties should have the right to a COPY of the investigation report prior to its finalization and prior to any hearing. [18]	◆Parties should be given written findings of fact upon completion of the investigation, sufficiently detailed to permit meaningful appellate review. [14]	◆Parties may review the 'Hearing File.' [9] ◆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] ◆The investigator submits 'a Charge Letter' which summarizes investigation results but <u>does not contain conclusions or findings of fact regarding guilt.</u> [12]	◆As with the ABA, investigators should compile a comprehensive report identifying all evidence and allow parties time to suggest additions or exclusions. ◆Parties should be permitted to submit responses to the final report. ◆Due to risk of confirmation bias, FACE supports STANFORD policy <u>precluding investigator from making conclusions and findings regarding guilt</u>.
14. COMPLETE ACCESS TO EVIDENCE	◆Parties must have a reasonable opportunity to access and review investigation report with their advisor, and to request information be included or removed by the school from the final report. Parties and advisors should have right to provide a reasonable written response provided along with the final investigation report to the decision-maker(s) [4-5]	◆Parties should be given COPIES of all reports & access to other documents & evidence to be used in the responsibility determination, reasonably prior to the decision (may be in redacted form.) [18]	◆Parties should be given access to all evidence at a meaningful time and in a meaningful manner, so they can adequately respond. [2]	◆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] ◆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]	◆FACE favors STANFORD policy that someone other than the investigator decide information included in final report. ◆We strongly believe, as with ABA, STANFORD and NCHERM policies, the parties must have access to all inculpatory and exculpatory evidence, including reports, witness/complainant statements, written and electronically stored information, social media, etc.

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15. WITNESS TESTIMONY	◆Decision-makers can consider witness testimony if written and signed or recorded by an investigator, but should be cautious in considering second hand statements. A witness important to whether misconduct occurred, should appear in person, allowing decision-maker to better assess credibility . [6]	◆Parties should be permitted to suggest witnesses and questions to be asked of them (excluding solely character witnesses.) [18]	◆*Does not address*	◆Expert witnesses are allowed only when necessary. [15] ◆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]	◆If a witness is important for establishing misconduct, FACE agrees with ABA the witness should personally appear before decision-makers or by Skype (or similar). Live testimony aids credibility decisions. ◆We also appreciate the ABA's suggestion that members of the school community should have an obligation to provide relevant evidence if called upon.
16. RIGHT TO BE HEARD	◆The ABA Task Force recommends an adjudicatory hearing to determine whether the respondent committed sexual misconduct. [5]	◆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]	◆Parties should be given an investigation or hearing with consideration for any appearance of partiality. [12]	◆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]	◆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 and the decision-makers to see witnesses.
17. ADMISSIBILITY & RELEVANCY OF EVIDENCE	◆Evidence may be presented if relevant and a reasonable person would find it reliable.Evidence is relevant if it (1) bears on a fact of consequence, or (2) reflects on credibility of witness, and may be excluded if unfairly prejudicial or needlessly duplicative. Character evidence should be excluded from decision-making stage.Past sexual history of parties admitted only when compelling evidence on a disputed, relevant issue. [6]	◆Parties should have the right to have only relevant past history or records considered as evidence. [18]	◆*Does not address*	◆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] ◆A respondent's character evidence/past violations are not usually admitted during fact-finding process.[14] ◆Past sexual history between parties is relevant only when it concerns credibility or shows pattern of conduct or knowledge of wrongdoing [14]	◆Agree with ABA that evidence should be admitted if relevant, not too repetitious and a reasonable person would find it reliable. Evidence is relevant if it reflects on the credibility of a witness or relates to an important fact in dispute. Character evidence should be excluded from the fact-finding stage ◆Past sexual history *unrelated to the parties' relationship* should always be excluded unless it provides evidence on a disputed fact. *See* NCHERM Section 10 regarding relationship and context.
18. SINGLE INVESTIGATOR - ADJUDICATOR	**◆The single investigator model "carries inherent structural fairness risks," especially when suspension or expulsion is possible. Separate decision-makers offset potential for investigator confirmation bias. A clear and convincing standard should be required when investigator and decision-maker roles are combined. [3]**	◆*Does not address*	◆Notes heightened need for unbiased investigator if no separate adjudicator hears evidence or makes factual findings.[13] Also quotes one court: 'the dangers of combining these powers in a single individual, with few rights to appeal and review, are 'obvious.'" [10]	◆Policy does not provide for this process.	◆FACE and the ABA both strongly disapprove of an investigator also serving as decision-maker due to likelihood of confirmation bias; a separate decision-maker will offset the potential for bias, and better assess the parties' credibility. ◆FACE also supports ABA's recommendation for a higher standard of evidence when the investigator and decision-maker roles are combined.

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19. HEARING ALTERNATIVES	◆The ABA encourages schools to consider non-mediation alternatives to resolving complaints, but only with the consent of both parties.[3]	◆*Does not address*	◆*Does not address*	◆Allows resolution without a hearing if all parties agree and the investigator determines it is appropriate. No appeal is allowed. [11]	◆We agree with the ABA and STANFORD that 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	◆A responsibility finding should not be based on a party's silence, especially with a pending criminal action. A party who remains silent may present or question evidence, but not offer a personal account, other than a general denial. [6]	◆*Does not address*	◆Suggests alternative ways to hear testimony: ◆ Recorded testimony ◆ Screen between parties ◆ Testimony via closed circuit television. [16]	◆Parties have the right to decline to give a statement about the allegations or attend a hearing. [9]	◆Neither party should be required to participate in a disciplinary process. ◆The ABA states that silence must not support guilt finding, especially with a criminal action pending. However, 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	◆'Fundamental fairness requires processes impartial and free of conflicts of interest. Investigator and decision-maker(s) should receive training on how to objectively investigate and adjudicate matters. Parties should be advised of the identity of the designated personnel in advance of decision-making so that they have sufficient time to raise concerns and avoid unnecessary delay and error.[5]	◆Parties should have the right to have decision-makers and decisions free of bias or conflicts of interest. [18] ◆Parties should have the right to advance notice of the identity of the decision-makers. [18] ◆Right to competent and trained investigators and decision-makers. [18]	◆Avoid 'any appearance of partiality,' including any arising from fact-finder's other responsibilities. [12] ◆Screen for and assign only those without actual or perceived bias. [13] ◆Consider using outside persons and organizations to serve as investigators and decision-makers. [13]	◆Provides a neutral Hearing Panel with three trained panelists who decide case using preponderance of the evidence and will not prejudge outcome. [9, 16-17] ◆Panel members must have no conflicts of interest, prior knowledge, relationship with either party, etc. A Hearing coordinator decides if conflict exists. [17]	◆We favor ABA and STANFORD policies requiring a unanimous decision of 3 panel members diverse in gender, race, age, sexual orientation and position, who have received 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 panel members' identity in advance.
22. LIMITED CROSS-EXAMINATION	◆The parties should not directly question one another or other witnesses directly, but should be given ongoing opportunity to offer questions to be asked through the decision-maker(s), who will determine whether to ask them. The investigator should be available for questioning by the decision-maker(s) and the parties. [6]	◆Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses). [18]	◆Parties should be allowed cross-examination in a manner the school deems appropriate to assess credibility [2, 13] ◆Questions should be submitted through a third party (hearing officer or investigator) [16]	◆Provides a break during hearing to allow for submission of follow-up questions [17-18]	◆ABA, ACTL and NCHERM all suggest parties not be permitted to directly question one another or witnesses. ◆ Parties should be given an ongoing opportunity to offer questions to be asked through decision-maker(s), including questions arising from testimony or statements at the hearing. ◆FACE believes a third party should deter-mine the propriety of any questions submitted by the parties.

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23. TIME LIMITS	◆*Does not address*	◆Right to clear timelines for resolution. [18]	◆*Does not address*	◆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]	◆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.
24. DETAILED RECORDS	◆Recommends the hearing be recorded or transcribed and reasonable care be taken to create a quality recording and minimize technical problems. [6]	◆*Does not address*	◆Parties must be given detailed findings of fact to permit meaningful appellate review. [14]	◆*Does not address*	◆FACE agrees with ABA recommendation that hearing be recorded or transcribed and NCHERM's requirement finding be detailed to allow for appeals and judicial or administrative review.
25. REASONABLE STANDARD OF EVIDENCE & ADEQUATELY TRAINED DECISION-MAKERS	◆Some Task Force members did not agree with the common interpretation of preponderance of the evidence as requiring a mechanical weighing in which a mere feather is enough to tip the scales towards a finding of responsibility. The decision-maker should first evaluate the quality of the evidence, giving more weight to higher quality or reliable evidence than that of low quality; quantity alone does not support a responsibility finding; decision-makers "should only find respondent engaged in misconduct if they are unanimously convinced there is sufficient, relevant, probable and persuasive evidence that outweighs any evidence that the alleged conduct did not occur; The testimony of a single party or witness may be sufficient to establish a fact. [8]	◆School bears the burden to prove a violation of policy and non-consent. [16, 18] ◆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] ◆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] ◆Cautions schools to 'separate less-than-ideal sexual experiences from those that are 'sexually transgressive.' [6] ◆Right to a finding that is neither arbitrary nor capricious. [18]	◆ 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] ◆'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]	◆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]	♦Although FACE prefers the standard to be higher than preponderance, the lower standard is less concerning when combined with ABA and STANFORD requirement that there be a unanimous panel decision, together with other due process procedures discussed here. ♦With any standard, decision-makers must be trained on how to apply that standard properly. A major difficulty with the preponderance standard is decision-makers' belief they must choose one party over the other - that there is no neutral position and a finding of not responsible is a finding *against* a complainant. It must be clarified that it is not required to choose one party or the other (they may be both credible, but the evidence still does not pass the threshold); the decision should rely on whether there is sufficient evidence to make the occurrence of the violation likely. NCHERM [16-18], ABA [7-8] ♦We also favor STANFORD's use of both subjective and objective standards in evaluating whether conduct is hostile, as well as excluding from hostile conduct 'expression of views, words, symbols, or thoughts' even though someone may find it 'offensive.'

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26. DETAILED FINDINGS	◆*See Section 25. above*	◆Parties have the right to receive the outcome/final decision in writing as per VAWA §304 [18] ◆Parties should have the right to a detailed rationale for both the finding and sanctions. [18]	◆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]	◆FACE favors STANFORD & NCHERM requirement for findings to be specific and provide a rational basis for a decision ◆FACE also strongly supports STANFORD's allowance of educational and training remedies when justified by the facts.
27. PROPORTIONATE SANCTIONS	◆A particular sanction should not be presumed or required but decided on individual basis taking into account facts and circumstances including mitigating factors, prior history of discipline, the nature and seriousness of the offense, and effect on the complainant and university. [9]	◆Sanctions imposed should be proportionate to severity of the violation and cumulative conduct record of the respondent. [18]	◆*Does not address*	◆The sanction phase is separate and parties can submit aggravating/mitigating facts. [18] ◆Expulsion is the 'expected sanction' for Sexual Assault [*which is criminal under the policy*]. [26] ◆Panel must impose sanctions reflecting the seriousness of the incident and harm to the complainant and community. [26] ◆Available remedies include educational counseling and training. [29]	◆As with the ABA, it is FACE's position that no one sanction should be presumed or required; a presumption of expulsion or suspension or expulsion may discourage reporting. ◆FACE favors ABA, STANFORD and NCHERM policies allowing sanctions to account for mitigating factors, prior conduct history,the nature and seriousness of the offense and the impact on the complainant and school community.
28. RIGHT TO APPEAL	◆Both parties should be able to appeal; grounds limited to new information not known/available; material procedural error-includes improperly excluding/including evidence); disproportionate sanction; or (4) conduct didn't violate school policy. [5]	◆Parties should have the right to appeal on limited, clearly identified grounds. [18]	◆Need for meaningful appellate review and written findings of fact ade-quately setting forth basis for the decision [14], sufficiently detailed to permit meaningful appellate review.[12]	◆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] ◆Appeal can be de novo. [20] ◆Expulsion is reviewed by provost. [20]	◆FACE concurs with ABA that grounds for appeal should be limited to new evidence 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.
29. UNDERSERVED POPULATIONS	◆*Does not address*	◆*Does not address*	◆*Does not address*	◆*Does not address*	◆Though the first sentence of the 2011 DCL states "Education has long been recognized as the great equalizer in America," OCR has ignored the fact that its policies have had a disproportionate impact on minorities, first generation and financial aid students, and other similarly-situated populations who cannot afford attorneys.
30. ALCOHOL ABUSE	◆*Does not address*	◆*Does not address*	◆*Does not address*	◆*Does not address*	◆In a campus culture where students 'pre-game' before a party by taking shots, schools must develop education and other policies designed to reduce the incidence of sexual conduct violations associated with alcohol and drug abuse.

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31. PUBLIC V. PRIVATE INSTITUTIONS	◆*Does not address*	◆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] ◆OCR's Wesley Resolution 'makes the case for Title IX-derived due process rights at a private college' for a respondent, and reflects the concept that Title IX focuses on equity for both parties, not just the reporting party. [19]	◆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] ◆OCR and its guidance have left institutions 'uncertain as to their obligation to provide due process protections.' [8]	◆*Does not address*	◆Title IX and OCR do not distinguish between public and private schools, ignoring a significant discrepancy in the rights of students attending *public schools*, which by law are held to higher fairness and due process standards, and *private* schools which are not. We agree with ACTL that equality and fairness require OCR to require due process-like procedures for private as well as public school students.
32. SCHOOLS NEED DUE PROCESS GUIDANCE	◆The strength of the ABA recommendations arises from the fact that Task Force Chair Andrew Boutros and Reporter, Law Professor Tamara Lave, populated the Task Force with individuals from diverse backgrounds and perspectives on the issue of campus sexual assault. All Task Force members possessed expertise in the fields of sexual violence, law and/or education, and represented victim rights, those who advocate for accused students as well as campus Title IX administrators. A list of the particpants can be found at the end of the ABA Report.	◆Higher education continues to veer off-course in resolutions of college sexual violence allegations. [4] ◆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] ◆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]	◆'Under the current system everyone loses:' • respondents are deprived of fundamental fairness; • complainants' experiences are undermined by the unreliability of decisions; • schools are trapped between the two and facing lawsuits and potential funding loss. [18] ◆ACTL believes its recommendations will enhance procedural justice and ensure the confidence of participants and the public in the fairness of Title IX investigations. [15, 18]	◆*Does not address*	◆Although OCR has instructed schools to develop grievance procedures, OCR has never provided adequate guidance on specific due process procedures necessary to protect and treat both parties equally and to ensure decisions are accurate. Adding these suggested due process provisions will improve both parties' experience because decisions will be more credible and trustworthy. ◆FACE's experience along with the concerns expressed by the ABA, ACTL and NCHERM, confirm that our schools need specific instruction on identifying, implementing and applying equitable grievance procedures for sexual offenses on campuses.

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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1. While many refer to these as "due process" procedures, the phrase "due process" is a technical legal term referring to a government's obligation to treat its citizens with fairness and equality when abridging their constitutional rights. In the campus context, due process would be relevant only in the public school context and courts have ruled it necessary on a limited basis, generally requiring just notice and a hearing.
2. Cynthia P. Garrett, FACE Co President, was a member of an American Bar Association Task Force which in June 2017 issued "Recommendations for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct." The ABA Recommendations and a list of Task Force members can be found at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf
3. The 2017 NCHERM Group White Paper; Due Process and the Sex Police, p. 4, https://www.ncherm.org/wordpress/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf
4. 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
5. Stanford Student Title IX Investigation & Hearing Process, February 2016 https://stanford.app.box.com/v/student-title-ix-process
6. 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.
7. Numbers in brackets refer to page numbers of the various reports. Provisions of the ABA Task Force Report, NCHERM and ACTL White Papers and Stanford Policies are paraphrased or summarized unless otherwise indicated.
8. *Dear Colleague Letter*, U.S. Department of Education, Office for Civil Rights, *Ed.gov*, April 2011 (2011 DCL), page 9, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html
9. *Id.*,at page 12.