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FACE.
Families Advocating for Campus Equality

OPPOSITION TO SB-493, "Sex Equity"

VIA PORTAL SUBMISSION

The Hon. Jose Medina, Chair, California Assembly Higher Education Committee
Legislative Office Building, 1020 N Street, Room 173
Sacramento, CA 95814

RE: Opposition to SB-493.

Dear Assemblyman Jose Medina and Honorable Members of the Higher Education Committee:

Families Advocating for Campus Equality (FACE) is a national nonprofit representing over a thousand families and students nationwide, over 70 of whom reside in California or whose students have attended California schools. FACE was created in 2014 to provide support to families of students wrongfully accused, suspended and/or expelled from their college and university campuses following inequitable, result-driven, or otherwise flawed campus sexual misconduct disciplinary proceedings.[1] FACE advocates on both the state and federal levels for equitable and balanced procedures in campus disciplinary processes

Schools must respond to sexual assault on campus as well as off campus when its effects contribute to a hostile campus environment that interferes with a student's access to education. However, effective sexual assault response and prevention measures must also prioritize fair and balanced disciplinary procedures that increase the reliability of decisions. As a Pennsylvania district court recently explained, schools have an "interest in securing *accurate* resolutions of student complaints … [its] educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses;" but, as the court also pointed out, a school's "mission is equally stymied, however, if [the school] ejects *innocent* students who would otherwise benefit from, and contribute to, its academic environment."[2]

Below we address proposed SB-493 as it was **amended effective May 17, 2019.** To assist your review, *all provisions of the bill are italicized* and cited by page numbers to the PDF format accessible online.[3]

California Courts Demand Fair Title IX Procedures.

Implementation of SB-493 without further amending it to comply with state and federal case law will continue to subject California schools to significant liability from civil actions filed by both complainants and respondents in Title IX proceedings. In the last several years, lawsuits nationwide filed by respondents against their institutions have multiplied to over 450, and resulted in a rapidly increasing number of court decisions in respondents' favor, over 140 at last count.[4] At least 130 schools have settled these lawsuits, often after

[1] Though most respondents are male and complainants female, FACE also has both female respondents and male complainants as well as LGBTQ and same sex parties.
[2] *Doe v. Pennsylvania State Univ.*, 336 F. Supp. 3d 441, 449 (M.D. Pa. 2018) (Court's emphasis).
[3] SB-493, http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200SB493
[4] Lawsuit Database, *Title IX for All*, http://www.titleixforall.com; KC Johnson and Stuart Taylor, Jr., Innocence Presumed, *The Weekly Standard* (Sept. 6, 2018), https://www.weeklystandard.com/k-c-johnson/title-ix-betsy-devos-seeks-to-restore-campus-due-process.

courts ruled against them.[5] California courts have awarded hundreds of thousands of dollars to accused students after finding schools subjected them to unfair and discriminatory processes.[6] Numerous California courts have determined that a school's failure to provide adequate procedural protections to respondents may constitute gender discrimination, a denial of due process, or breach of a school's contract with its students:

- Late last year California's Second District Court of Appeal criticized officials at UC Santa Barbara, finding it "ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy."[7]
- At San Diego State case a court found the school's process "enough to shock the Court's conscience."[8]
- A California appellate court justice interrupted oral argument "to express his concern with the basic unfairness of" UC San Diego's process; "two other judges quickly chimed in their agreement. Then he noted, 'When I . . . finished reading all the briefs in this case, my comment was, "Where's the kangaroo?'"[9]
- This past January, another California appellate court reversed University of Southern California's (USC) determination of guilt because its "disciplinary review process … denied Doe a fair hearing."[10]
- A Los Angeles superior court noted Doe had presented evidence that "Cal Poly Investigators were guilty of unprofessionalism" because they "failed to disclose all evidence" to the accused or provide any "opportunity to question witnesses directly or indirectly where credibility was an issue."[11]
- In a case against UC Davis, a northern California superior court judge found "due process has completely been obliterated by the University's failure to get this case adjudicated. Complete failure to do it."[12] The judge also faulted UC Davis's handling of the case for its impact on the alleged victim: "if anyone has failed the alleged victim in this case [it] is the University."[13]
- A court awarded an accused student over $250,000 in attorney's fees after Pomona College denied him a fair hearing, finding his lawsuit addressed an "important right affecting the public interest that college students accused of sexual misconduct in Title IX proceedings receive a fair hearing."[14]
- In another case USC was ordered to pay over $100,000 in attorney's fees in because it had abused its discretion and substantial evidence did not support it finding the accused responsible.[15]

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[5] Lawsuit Database, *Title IX for All*, http://www.titleixforall.com. Some settlements are confidential and prohibit disclosure.
[6] Greg Piper, "Judge forces college that railroaded accused student to pay his attorney's fees," *The College Fix* (Mar. 20, 2018), https://www.thecollegefix.com/judge-forces-college-that-railroaded-accused-student-to-pay-his-attorneys-fees/ ($250,000); Kate Sequeira, "USC ordered to pay attorney fees after Title IX investigation was deemed unfair," *Daily Trojan* (July 18, 2018), https://dailytrojan.com/2018/07/18/usc-ordered-to-pay-attorney-fees-after-title-ix-investigation-was-deemed-unfair/ ($100,000); *Doe v. Ainsley Cary* (USC), No. BS163736, *Notice of Ruling and Statement of Decision on Petition for Writ of Administrative Mandate* (Los Angeles Sup. Ct., Dec. 17, 2017) p. 12 of court-filed opinion ("disingenuous to argue that USC's review process prevents bias" when Title IX official "expressed vitriol against [the accused]" and was to advise decision-makers); *Doe v. Regents of Univ. of Cal.* (UCSB), RG16843940, *Order Awarding Attorneys' Fees* (Alameda Sup. Ct., Apr. 18, 2018) ($30,000).
[7] *Doe v. Regents of University of California* (UCSB), 28 Cal. App. 5th 44, 61 (Cal. App. 2d Dist. October 9, 2018).
[8] *Doe v. Rivera* (SDSU) (2017) San Diego County Sup. Court Case No: 37-2015-00029558-CU-WM-CTL, Feb. 1, 2017 Minute Order.
[9] KC Johnson, At UCSD, "Where Is the Kangaroo?" Academic Wonderland, November 5, 2016, https://academicwonderland.com/2016/11/05/at-ucsd-where-is-the-kangaroo/
[10] *Doe v. Kegan Alee,* LA Superior Court Case No. BS157112, California Court of Appeal 2nd Dist, Div. 4 Case No. B283406, January 4, 2019, p. 3 of original court-filed opinion.
[11] *John Doe v Timothy White, Chancellor of the California State University* (Cal Poly), Los Angeles County Superior Court, Central Dist. Case No. BS168476 (July 12, 2018) (tentative ruling made final by Notice of Order pp. 1-2 and attached Decision at p. 18.)
[12] *John Doe v Donald Dudley, et al.* (UC DAVIS) (Yolo County Superior Court Case No. PT 15-1253 (Sept 22, 2015).
[13] *Title IX for All*, http://boysmeneducation.com/wp-content/uploads/2015/11/Press-Release-Werksman-Jackson-Hathaway-Quinn-University-of-California-Davis-case.pdf.
[14] Greg Piper, "Judge forces college that railroaded accused student to pay his attorney's fees," The College Fix, March 20, 2018, https://www.thecollegefix.com/judge-forces-college-that-railroaded-accused-student-to-pay-his-attorneys-fees/
[15] Kate Sequeira, "USC ordered to pay attorney fees after Title IX investigation was deemed unfair ," Daily Trojan, July 18, 2018, https://dailytrojan.com/2018/07/18/usc-ordered-to-pay-attorney-fees-after-title-ix-investigation-was-deemed-unfair/; *Doe v. University of Southern California,* 246 Cal.App.4th 221 (2016) (2nd Appellate Dist., Div. 4, Apr, 5, 2016).

SB-493's "Cross-Examination" is a Smoke Screen.

Many, if not most, campus sexual misconduct disputes present only the first-hand testimony of two parties, positioning credibility as the predominant issue. In these cases several California Courts of Appeal[16] have joined multiple federal and state courts[17] in concluding that some form of cross-examination must be provided.

> A case that "resolve[s] itself into a problem of credibility" cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high … One-sided determinations are not known for their accuracy.[18]

Cross-examination, the most effective method by which truth and credibility can be ascertained: (1) allows memories to be tested while identifying any errors or inconsistencies in testimony; and (2) provides to the fact-finder an opportunity to observe and assess a witness's demeanor while responding to questions.[19]

That proposed SB-493 section 66281.8 (b)(4)(F)(ii) requires schools to provide "*live cross-examination*" in campus hearings, seems, *on its face*, consistent with recent California decisions.

> *(ii) The live cross examination of either party and any witnesses shall be conducted indirectly, through the submission of written questions to the neutral adjudicator in advance and with an opportunity for the other party to object. The neutral adjudicator shall have the authority and obligation to discard or rephrase any question that the neutral adjudicator deems to be repetitive, irrelevant, or harassing. In making these determinations, the neutral adjudicator is not bound by, but may take guidance from, the formal rules of evidence.* [PDF p. 8]

However, the limiting conditions imposed by this section subvert the very purpose of cross-examination by: requiring that written questions be submitted in advance to a purportedly "neutral" decision-maker who is given the authority to discard, rephrase, or reject any questions; permitting the opposing party to view and object to the questions in advance; and by effectively prioritizing the interests of complainants over respondents in a laudable but misdirected effort to protect potential victims.

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[16] *John Doe v. Westmont College* (CA Court of Appeal 2d Dist., Div. 5, Apr. 23, 2019) Civil No. B287799; *John Doe v. Allee,* 30 Cal.App.5th at 1061, 1069, (p. 33 of original court-filed opinion) (parties must appear before decision-makers so they can observe their demeanor. And accused must be allowed to ask questions.); *John Doe v. Univ. of Southern California* (USC II) (2018) 29 Cal.App.5th 1212, 1232-1238 (p. 31 of original court-filed opinion) (accused must be able to pose questions to the witnesses and decision-maker must be able to see witness respond to questions); *John Doe v. Regents of Univ. of California* (UCSB), 28 Cal. App. 5th at 60, 61 (accused student was deprived of right to cross-examine complainant and to present his defense where committee allowed her to refuse to answer questions about the side effects of an antidepressant medication she was taking at the time of the alleged sexual assault on privacy grounds); *John Doe v. Claremont McKenna College* (CMC) 25 Cal.App.5th at 1057, 1070 (CMC should have required complainant to appear in person or by videoconference at hearing to allow decision-makers to ask questions.); *John Doe v. Timothy P. White, Chancellor of the California State Univ.* (Cal State Long Beach*)* (2018) Los Angeles Superior Court Case No. BS169451, p. 23 ("complaining witness must be before the fact-finder either physically or through video conference or similar technology where her credibility may be weighed in response to the fact-finder's questions or those of the accused … John Doe should have been permitted to ask questions of Roe through live testimony as part of the student disciplinary process.")

[17] *See Doe v. Baum* (6th. Cir. 2018) 903 F.3d 575, 578 ("[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 400, 399-402 ("In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.'"); *Doe v. Univ. of Michigan*, No.2:18-cv-11776-AJT-EAS, Docket 30 (S.D.MI. July 6, 2018); *Doe v. Alger* (James Madison University), 228 F. Supp.3d 713, 730 (W.D. Va. 2016); *Doe v. University of Mississippi*, Case No.3:18-cv-00138, (S.D. Miss. January 16, 2019); *Lee v. The University of New Mexico*, Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. 2018); *Doe v. University of So. Miss.*, No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018) ("It is at least plausible in this he said/she said case, that giving Doe an opportunity to cross-examine Roe could have added some value to the hearing under the second Mathews factor."); *Doe v. Penn. State University*, No. 4:18-CV-00164, 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018); *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS 136880, at *39, fn 10 (S.D. Ohio Aug. 25, 2017) ("A case that 'resolve[s] itself into a problem of credibility' cannot itself be resolved without a mutual test of credibility.")

[18] *Doe v. University of Cincinnati* (6th Cir. 2017) 872 F.3d 393, 400, 403 (citation omitted).

[19] *Doe v. Baum*, *supra,* note 16 at p. 581 (citations omitted).

1. There can be no "neutral" campus-affiliated decision-maker.

SB-493's requirement that "cross-examination" be conducted through the submission of written questions and asked by a "neutral" adjudicator is a procedure already used by many schools. The consequences of decision-maker-controlled questioning witnessed by FACE families and the hundreds of attorneys with whom we work are that submitted questions are rejected or rephrased rendering them useless, and follow-up questions ignored despite the fact that they may have revealed a critical fact, a faulty memory, or an inconsistency.

Realistically *any* school-affiliated official charged with determining responsibility cannot possibly be "neutral" because, as a school official, *he or she has an overarching obligation to protect the potentially vulnerable student complainant he or she is questioning.* The school official's questions may also be affected by fear of a lawsuit from a respondent for failure to ask the submitted questions, as written or from a complainant for allegedly traumatizing questions. Negotiating the tightrope between the opposing party's interests is a no-win choice.

Written questions additionally are not an effective substitute for live cross-examination because the process of cross-examination is inherently and necessarily flexible and cannot be scripted in advance.[20] Though one can prepare to conduct cross-examination, he or she will still "need to adapt to unexpected testimony on direct, objections and rulings, and the answers the witness gives you on cross."[21] This is why advocates must focus on "listening, adapting, and going with the flow,[22] rather than crafting detailed questions in advance.

Courts have found submitted written questions in campus proceedings inadequate. In *Gischel v. University of Cincinnati*, the Court found a viable procedural due process claim based on the hearing panel's refusal to ask entire categories of questions the plaintiff deemed critical to his defense. The plaintiff's questions included those concerning the complainant's "inconsistent or inaccurate statements about how much she drank, the last events she remembered, and whether she was drugged."[23] Similarly, in *Doe v. University of Notre Dame,* the court found the policy that required "all questions must be proposed in writing and are asked of witnesses only at the discretion of the Hearing Panel" did 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 stifle[d] [plaintiff's] presentation of his defense to the allegations.[24]

A California appellate court just last month addressed the impact of panel-controlled questioning on a party's ability to ask follow-up questions because witnesses were not recalled:

> John was unable to challenge the discrepancies he saw in the testifying witnesses' responses to the Panel's questions. (*Ibid.)* None of them, other than Jane, was recalled—notwithstanding Westmont's policy requiring witnesses to submit to follow-up questions.[25]

Conferring on a school-affiliated official the authority to ask, not ask, or rephrase, or ignore follow-up questions, interferes with the truth-seeking purpose of cross-examination. By increasing the risk of erroneous decisions, decision-maker-controlled-questioning also makes schools more vulnerable to court intervention.

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[20] *John Doe v. Baum,* 903 F.3d at 582 ("written statements cannot substitute for cross-examination."); *John Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, p. 25 (using original court filed version on May 8, 2017) (vacated by request of the parties after settlement in *John Doe v. Univ. of Notre Dame* (N.D.IN. Dec. 27, 2017) 2017 WL 7661416.

[21] Practical "Rules" for Cross-Examination**,** New York State Bar Association Young Lawyers Section Trial Academy, March-April 2017, p. 3, http://www.nysba.org/Sections/Coursebooks/Young_Lawyers/Vincent_Doyle_Complete_Materials_pdf.html

[22] *Id.*

[23] *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961, 978-79 (S.D. Ohio 2018).

[24] *Doe v. Univ. of Notre Dame,* No. 3:17CV298, 2017 WL 1836939, *11 (N.D. Ind. May 8, 2017).

[25] *John Doe v. Westmont College* (CA Court of Appeal 2d Dist., Div. 5, Apr. 23, 2019) Civil No. B287799.

2. Allowing a witness to craft responses in advance is not "cross-examination" in any form.

Presumably in an effort to mitigate potential trauma to the complainant, SB-493 requires and some schools allow opposing parties to review written questions posed by another party prior to a hearing. Obviously, this practice defeats the entire purpose of "cross-examination" by permitting witnesses to collaborate and craft responses in advance rather than answer spontaneously. Spontaneity is crucial to effective cross-examination and key to demonstrating credibility.

3. The interests of complainants and respondents must be balanced.

Complainants and respondents both have significant interests in accurate outcomes of Title IX sexual misconduct proceedings. The complainant's interests include not having to face his/her attacker on campus and the resulting difficulties it may cause in his/her ability to access educational opportunities. Respondents also have a "compelling" interest in their education[26] because an erroneous decision has grave, long-lasting emotional,[27] educational, and professional consequences.[28]

The California Court of Appeal has acknowledged the gravity of mistaken findings of guilt in this context:

> Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life … personal relationships might suffer … he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled … As the trial court stated, Doe's eligibility to return to USC is not "the only 'effectual relief that [he] can obtain in this action … [E]xpungment of an expulsion mark for sexual misconduct on [Doe's] USC transcript would make it far easier for him to transfer to a different university to continue his education. Expungement could also have a tendency to restore [Doe's] reputation, at least to some degree, in the public eye.[29]

Due to the tremendous negative consequences of an expulsion, our California legislature has determined it appropriate to require that *even K-12 students be provided the ability to have their advisor cross-examine their accusers* in such circumstances. Education Code section 48918(b)(5) allows a student's advisor to "confront and question all witnesses who testify at the hearing …"[30] Based on this provision, the California Supreme Court ordered expungement of a high school student's expulsion when that student had been denied the opportunity "for confrontation and cross-examination" of witnesses, recognizing the ineffectiveness of written questions:

> a reasonable person in the conduct of serious affairs will not rely solely on written statements but will demand that witnesses be produced so that their credibility may be tested, and their testimony weighed against conflicting evidence … [31]

Courts have rejected the argument that cross-examination should be denied because interaction between an accuser and accused will cause trauma. In *Doe v. Brandeis Univ*ersity the court explained the need to balance the interests of the parties where the respondent had been denied the opportunity "to confront or cross-examine [the accuser], either directly or through counsel."[32] The court surmised that, understandably, "the

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[26] *Doe v. University of Cincinnati*, *supra*, note 16, at p. 400 (compelling private interest in education.)
[27] Jonathan Taylor, "Accused Student Commits Suicide in Wake of Occidental's Title IX Investigation," March 10, 2019, *Title IX for All*, http://www.titleixforall.com/accused-student-commits-suicide-in-wake-of-title-ix-investigation/; Ashe Schow, "Texas student commits suicide after Title IX kangaroo court," April 10, 2017, *Watchdog,* https://www.watchdog.org/issues/education/texas-student-commits-suicide-after-title-ix-kangaroo-court/article_c16a55b7-0e53-5303-b39f-f5b4e4b834ae.html; For excerpts from FACE family accounts, please see FACE SB493 Testimony in Opposition June 2019, https://www.dropbox.com/s/3vdamiajmg7o7my/FACE%20SB493%20Testimony%20in%20Opposition%20June%202019.pdf?dl=0
[28] *Doe v. University of Cincinnati*, *supra*, note 16, at p. 400, quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893 (1976).
[29] *Doe v. Kegan Alee, supra*, note 10 at p. 33 (citations omitted), citing *Doe v. Baum* (6th. Cir. 2018) 903 F.3d 575, 582 (*Baum*); *Doe v. University of Cincinnati supra*, note 16, at 400.
[30] Education Code Title 2., Article 1., Suspension or Expulsion Section 48918(b)(5).
[31] *John A. v. San Bernadino Unified School District,* 33 Cal.3d 301, 307-308 (1982) (citations omitted).
[32] *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 604-605 (D. Mass. 2016).

purpose of that limitation was to spare [the accuser] the experience of being subject to cross-examination."[33] Nevertheless, the court found,

> While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection [as cross-examination] for the rights of the accused raises profound concerns.[34]

4. Reasonable accommodations will minimize any trauma.

There are two very important and reasonable accommodations to reduce the likelihood of any potential trauma caused by cross-examination: allowing parties the option to be located in separate rooms during cross-examination;[35] and requiring that questions be asked by the parties' advisors. According to a California appellate court decision in April of this year:

> "Recognizing the risk that an accusing witness may suffer trauma if personally confronted by an alleged assailant at a hearing, … mechanisms can readily be fashioned to `provid[e] accused students with the opportunity to hear the evidence being presented against them without subjecting alleged victims to direct cross-examination by the accused.'"[36]

The Sixth Circuit Court of Appeal similarly has rejected the argument that cross-examination should be denied due to the potential trauma it may cause. That court reasoned that any trauma could be mitigated by allowing "the accused student's agent to conduct cross-examination on his behalf;"

> After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.[37]

Questions asked by a party's advocate will also improve the effectiveness of questioning and lessen the chance parties' emotions will interfere with the desired outcome. And though victims' advocates claim attorney or advocate questioning will deter reporting, the fact is that schools have been forced to allow attorneys in campus disciplinary hearings since the reauthorization of the Violence Against Women Act in 2013. Even so, we have rarely, if ever, heard of a disruptive or unprofessional attorney aggressively questioning a complainant. On the contrary, until now, schools have precluded student attorneys from speaking at all during meetings and hearings or even conferring with their client, such that these attorneys are often referred to as "potted plants."

Practically speaking, it would not be in the attorney's or the client's interest to antagonize school officials by acting inappropriately or badgering a witness. Nevertheless, we recognize this is always a possibility, and for that reason recommend amending SB-493 to include a provision like the Education Code's section that allows K-12 school officials to remove "a support person whom the presiding person finds is disrupting the hearing."[38]

Whether or not any form of live cross-examination will deter reporting by potential victims is not a given, but is a factor to be weighed in evaluating disciplinary procedures for their truth-seeking ability. And though some deterrence is possible, in balancing the respective interests we ask: if a complainant is unwilling to respond to questions posed by an intermediary about his or her allegations while located in a separate room by video feed, how can we justify destroying a potentially innocent student's future based upon those allegations?

More importantly, how can decision-makers assess credibility and reach accurate decisions without effective cross-examination?

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[33] *Id.*
[34] *Id.* at 604-05.
[35] EDC section 66281.8 (b)(4)(F)(i), PDF p. 8.
[36] *John Doe v. Westmont College* (CA Court of Appeal 2d Dist., Div. 5, Apr. 23, 2019) Civil No. B287799.
[37] *Doe v. Baum*, *supra,* note 17 at p. 583.
[38] Education Code Title 2., Article 1., Suspension or Expulsion section 48918(b)(5).

Trauma-Informed Theories and Presumptions of Guilt

Four provisions of SB-493 require trauma-informed practices: Section 66262.5(b)(4)(E) would require *"trauma-informed and impartial investigation of complaints"* [PDF p. 9]; 66281.8(a)(2) and 66281.8(b)(6)(A) would require *"training … on trauma-informed investigatory and hearing practices."* [PDF pp. 6, 13]; and 66281.8(b)(7) would require that *"residence life student and nonstudent staff … receive training on trauma-informed handling of reports."* [PDF p. 13]

Of the above provisions, only section 666281.8 (b)(7), providing for "*training on trauma-informed handling of reports,*" is appropriate. In fact, trauma-informed policies were originally developed to and used appropriately help officials minimize re-traumatization in interviews and encourage reporting of sexual offenses.[39] Sections 66281.8(b)(4)(E), (a)(2), and (b)(6)(A) inappropriately attempt to contaminate investigations and hearings with trauma-informed policies, the impact of which is that a respondent is not necessarily presumed innocent.[40]

The use of "trauma-informed" practices has led to assumptions antithetical to the fair and impartial process required by California case law.[41] Training on "trauma-informed" concepts has resulted in confusion and the tendency of investigators and decision-makers to disregard exculpatory evidence.[42]

For example, a court recently warned that trauma-informed training materials create "an assumption … that an assault occurred" by instructing campus investigators and decision-makers:

> "that `victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and `lie about anything that casts doubt on their account of the event'"; and
>
> "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault."[43]

Though decision-makers and investigators should be permitted to consider, as questions of fact, explanations of the *possible* effects of trauma, SB-493's designation that "investigatory" and especially "hearing practices" be "trauma-informed" goes too far; the very purpose of an investigation and a hearing is to determine whether there has been misconduct which caused the alleged trauma. As explained by district court Judge F. Dennis Saylor, "[w]hether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning."[44]

In order to be a fair and "impartial" process under CCP §1094.5(b), investigations and hearings must be free from preconceived opinions and beliefs. In a 2017 decision later affirmed by the California Court of Appeal, a superior court judge found the school's administrative process failed to comply with the law because "the [disciplinary committee] improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be the 'trauma-informed' approach."[45] Other courts have agreed that trauma-informed training

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[39] For a detailed discussion of these policies and a recent review of the research on the issue and the neurobiology of trauma, see Cynthia P Garrett, *Trauma-Informed Theories Disguised as Evidence*, May 2, 2019, https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5ccbd3c153450a492767c70d/1556861890771/Trauma-Informed+Theories+Disguised+as+Evidence+5-2.pdf; *see* also, Yoffe, Emily, "The Bad Science Behind Campus Response to Sexual Assault," *The Atlantic*, Sept. 8, 2017 https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/.

[40] Kaminer, Wendy, '"Believe The Victim"? Maybe — But Protect The Rights Of The Accused, Too,' *WBUR Boston*, February 4, 2014, http://cognoscenti.wbur.org/2014/02/04/campus-sexual-assault-wendy-kaminer.

[41] *Doe v. Regents of University of Ca.* (UCSB), Alameda Sup. Ct, Case No. RG16843940, "Notice of Order Awarding Attorneys' Fees," April 18, 2018, https://kcjohnson.files.wordpress.com/2018/04/uscb-attorney-fees.pdf; see also, *Trauma-Informed Theories Disguised as Evidence*, *supra*, note 9, pp. 4-5 and 9-12.

[42] Though EDC section 67386 (b)(12) already requires a "trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault," SB-493 goes even further, requiring not just general training in trauma-informed concepts, but that school officials to be *trained to apply these concepts in their investigation and adjudication* of complaints.

[43] *Doe v. University of Mississippi*, Case No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss, N.D. July 24, 2018).

[44] *Doe v. Brandeis Univ.*, *supra,* note 32 at at p. 573.

[45] *Doe v. Regents of University of California* (UCSB), *supra,* note 41.

caused investigators to not be "appropriately trained,"[46] decision-makers to ignore the context of the parties' relationship,[47] and "prejudiced [respondent's] ability to be heard."[48] Unfortunately, most Title IX officials have been subjected to similarly biased training.

The post SB-169 Expert Report commissioned by former California Governor Brown also determined that trauma-informed practices are inappropriate when evaluating evidence, "incompatible with due process protections," and should be strictly limited to interviewing complainants:

> Trauma-informed training should be provided to investigators so they can avoid re-traumatizing complainants during the investigation. This is distinct from a trauma-informed approach to evaluating the testimony of parties or witnesses. The use of trauma-informed approaches to evaluating evidence can lead adjudicators to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent. Investigators and adjudicators should consider and balance noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings. [49]

We believe the California legislature can do more to ensure training of Title IX investigators and decision-makers is unbiased and doesn't rely on presumptions about conduct based on sex, or whether a party is a complainant or respondent. Use of "trauma-informed" practices must be restricted to interviewing to ensure they do not compromise objectivity, create presumptions of guilt, or cause the exclusion of relevant evidence.

Sexual Assault Statistics

Sections 1. and 3. of SB-493, which proposes to amend Section 66281.8 (b)(6)(B) of the Education Code, would have the legislature adopt controversial and unreliable sexual assault surveys that exaggerate the incidence of sexual assault on campuses. We question the appropriateness and necessity of citing sexual assault statistics, particularly when any sexual violence on campus should require a school's response.

SB-493 cites as authority for high rates of campus sexual misconduct an *American Association of University Women* (AAUW) survey whose own investigators "have warned that the numbers aren't necessarily nationally representative."[50] Social science surveys have produced a wide variance in estimates of sexual assault, illustrating the dangers of citing an inherently difficult-to-survey field. Methodologies, definitions and populations surveyed all vary considerably, making it nearly impossible to rely on results without carefully examining each survey's parameters. For example, a Stanford "campus-climate survey,"

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[46] *Doe v. Trustees of the University of Pennsylvania*, Dist. Court, ED Pennsylvania 2017, No. 16-5088 ("trauma to victims may result in fragmented recall, which may result in victims "recount[ing] a sexual assault somewhat differently from one retelling to the next")

[47] *Doe v. Brown University*, (D. RI. 2016) No. 16-017 S, Findings of Fact and Conclusions of Law, p. 36 original court-filed decision ("Rodriguez testified at trial that she did not consider any of Ann's post-encounter conduct, including the text messages and the testimony of Witness 1, as "evidence as to whether or not [Ann] had been sexually assaulted one way or another.")

[48] *Doe v. University of Mississippi*, Case No. 3:16-CV-63-DPJ-FKB, p. 13 (D. S.D. Miss, N.D. July 24, 2018) ("advise[s] the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and 'lie about anything that casts doubt on their account of the event,'" and (3) it explains that "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault.").

[49] "Expert Report," , at p. 3, http://www.ivc.edu/policies/titleix/Documents/Recommendations-from-Post-SB-169-Working-Group.pdf. This Report relied heavily on recommendation of an ABA Task Force comprised of various stakeholders including victims' advocates and campus administrators. American Bar Association Criminal Justice Section Task Force, Report on College Due Process Rights and Victim Protections: Recommendations for Colleges and Universities in Resolving Allegations of Sexual Misconduct, June 1, 2017, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf

[50] PDF p. 3; Emily Yoffe, "The Problem With Data on Campus Sexual Assault," *The Atlantic*, January 26, 2016, https://www.theatlantic.com/education/archive/2016/01/why-the-prevalence-of-campus-sexual-assault-is-so-hard-to-quantify/427002/; Alexandra King, "Campus rape statistics "misleading' says author of new book," *CNN*, January 28, 2017, https://www.cnn.com/2017/01/28/health/campus-rape-book-author-cnntv/index.html.

> found that just 2 percent of respondents had experienced sexual assault since starting their degrees at the university, while another 14 percent had been subject to another form of sexual misconduct.[51]

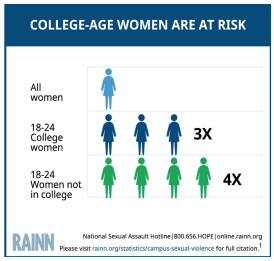
Using a definition of sexual assault that included "being often drunk or high during sex," EdSmart found that the highest reported rate of sexual assault was 3.33% at Reed College in Portland.[52] The averages were as follows:

Party Schools	0.20%	Least Religious Schools	1.04%
Stone-Cold-Sober Schools	0.03%	Most Religious Schools	0.04%

Conflicting estimates are also dependent upon the population studied;

> surveys are typically voluntary: representative of people who opt into them—those who've experienced sexual violence may, in theory, be more inclined to participate—and have nuanced interpretations of what different kinds of sexual violence entail.[53]

It has been shown repeatedly that it is *not the college environment*, but the *age of individuals* which makes them more vulnerable to higher rates of sexual assault. A *Bureau of Justice Statistics* (BJS) study compared sexual violence experiences of thousands of college students and non-students of the same age group, and found *non*-students 1.2 times more likely to experience rape and sexual assault than students in the same age range.[54] According to RAINN, "Female college-aged students (18-24) are 20% less likely than non-students of the same age to be a victim of rape or sexual assault," and its graphic on the right illustrates the higher incidence of sexual assault victimization for non-students.[55]



Even the oft-cited '1-in-5" 2007 Campus Sexual Assault Survey (CSA) showed higher incidences of sexual assault among students *before entering college*.[56] The CSA found that, of the 28.5% of students who were victims of attempted or completed sexual assault in their lifetime, over half, or 16%, had such an experience *before entering college*.[57] More significantly, the CSA study also found that women victimized before college, were up to three times more likely to be assaulted during college.[58]

Why use statistics?

The existence of any sexual violence on campus should require school prevention and response efforts. Though statistics can be a useful tool in predicting the likelihood of and developing programs to prevent and address unwanted conduct, social science research provides statistics which draw generalized inferences about the population as a whole, and the conclusions reached have "limited predictive success."[59]

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[51] Yoffe, The Problem With Data on Campus Sexual Assault, *supra*, note 47.
[52] College Sexual Assault Statistics of Top Ranked Schools, EDsmart, 2015, https://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#party-schools-vs-stone-cold-sober-schools
[53] Yoffe, The Problem With Data on Campus Sexual Assault, *supra*, note 47.
[54] United States Department of Justice's Bureau of Justice Statistics, "Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013," at p. 5, December 2014, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5176, *available at* http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf
[55] RAINN, Campus Sexual Violence: Statistics, https://www.rainn.org/statistics/campus-sexual-violence.
[56] THE CAMPUS SEXUAL ASSAULT STUDY (2007) (CSA), at p. xi, *available at https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf* (of the 5,446 women surveyed, 28.5% reported an attempted or completed sexual assault either before or since entering college.) Among its many shortcomings, the CSA study had a low response rate, used broad definitions of sexual assault which included such conduct as attempted "forced kissing," emphasized participants' subjective feelings, rewarded them with Amazon gift cards, and its authors characterized students' experiences as "sexual assaults," even when the students themselves acknowledged their own culpability.
[57] *Id.,* at pp. xi-xiii. And like the AAUW survey investigators, an author of the CSA, also did not "think one in five is a nationally representative statistic."[57]
[58] *Id.*, at pp. xv, xiv.
[59] Gutting, Gary, "How Reliable Are the Social Sciences?," New York Times, May 17, 2012, http://opinionator.blogs.nytimes.com/2012/05/17/how-reliable-are-the-social-sciences/?_r=0. This is because, in part, human beings

Finally, even if the authorities consistently reported that 50% of college students were in imminent danger of violence, it would still be unjust to assume one respondent acted in concert with survey estimates. As the *Brandeis* court explained, the facts need to be carefully considered by "an unbiased and neutral fact-finder," not decided on the basis "of unfair generalizations or because of social or other pressures to reach a certain result."[60]

The Minority Issue

SECTION 1. The Legislature finds and declares all of the following: . . . (e) Historically marginalized and underrepresented groups are more likely to experience sexual harassment than their peers . . . According to a National Women's Law Center (NWLC) report, students with disabilities are 2.9 times more likely than their peers to be sexually assaulted. [PDF, p. 3]

SECTION 3. Section 66281.8 of the Education Code is amended to read: . . . (b)(6)(A) It shall provide the mandatory training required pursuant to paragraph (12) of subdivision (b) of Section 67386 to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence, which shall include for these employees training on … the history of institutional racism, and racial inequities, both broadly and in school disciplinary processes. [PDF pp. 12-13]

While we appreciate the inclusion of these underserved populations, particularly those with disabilities, it is unclear whether section 66281.8(b)(6)(A) is intended to also acknowledge that minority students, particularly black males, are disproportionately respondents accused of sexual assault.

> Title IX guidance has resulted in exactly what the discipline guidance was trying to eradicate—disproportionate treatment of Black students. Let's acknowledge this and move on to better serving students and working to unravel injustice and racism in our schools and institutions of higher education.[61]

Further, disenfranchised, lower income, first generation and/or scholarship students are particularly vulnerable to unfair procedures, because they can't afford an attorney to help them protect their rights. Ill-equipped to defend themselves against experienced school officials, they are effectively *David* facing *Goliath*.

Notice and Access to Evidence.

SB-493 proposed section 66281.8(b)(4)(M) states both parties should receive information concerning their "rights," unless "it would impede an investigation." [PDF pp. 10-11] This would appear to give a school free reign to claim notice to a respondent is not required because it would "impede' the investigation. There must be a requirement of exigent circumstances to deny any student notice of his or her rights.

Additionally, SB-493 has no provision requiring a school to allow parties access to evidence. Currently parties are often denied such access, or, if allowed to review evidence, it must be in a security or other office during limited time increments, in addition, students often are forbidden to have or make copies, and sometimes even not permitted to take detailed notes. Students must have access to all inculpatory and exculpatory evidence collected by the school in order to effectively defend themselves. Hiding evidence is not the American way.

"are too complex: our behavior depends on an enormous number of tightly interconnected variables that are extraordinarily difficult to distinguish and study separately."

[60] *Doe v. Brandeis Univ*., *supra,* note 32 at p. 608.

[61] Erika Sanzi, "Black Men, Title IX, and the Disparate Impact of Discipline Policies," *supra*, note 6; see also Emily Yoffe, "The Question of Race in Campus Sexual-Assault Cases," September 11, 2017, *The Atlantic*, https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/ ; Jeannie Suk Gerson, "Shutting Down Conversations of Rape at Harvard," December 11, 2015, *The New Yorker* ("The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys.") https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school .

Sexual history exclusion.

SB-493 proposed section 66281.8 (b)(4)(J)(ii) provides: "*The institution shall include… a prohibition on the consideration of past sexual relations by themselves as probative of whether the alleged incident occurred*."[62]

This exclusion should not apply to a complainant's sexual behavior or predisposition with the *respondent* when it is offered to prove consent.[63] This is an important exception in cases where the parties have been involved in a long-term relationship and the accusation follows a breakup. For example, in *Doe v. Brandeis*, the university interpreted each sexual act between the two students as occurring in a vacuum, as if they did not know each other, rather than in the context of an existing, exclusive, long-term relationship.[64] Such evidence also should also be permitted to prove that someone other than the respondent committed the conduct alleged by the complainant. FACE has seen each of these scenarios repeatedly.

The exclusion of evidence concerning the complainant's sexual relationship with either the respondent or other parties also can be problematic when a respondent seeks to prove the complainant had a motive to fabricate or conceal a sexual interaction. The Federal Rules of Evidence 412 permit this evidence "if its probative value substantially out-weighs the danger of harm to any victim and of unfair prejudice to any party."[65] Motivation issues arise when there is evidence the complainant sought to lie or cover up his/her willing engagement in the alleged interaction, such as, for example, when a religious parent, boyfriend or friend discovers the sexual interaction, as alleged in complaints in *Doe v. Swarthmore College* and *Doe v. Johnson & Wales University*.[66] In these cases the specifics of the complainant's sexual relationship with another would not be necessary, but the relationship itself would be critical to a respondent's defense to establish the existence of a relationship, because preserving that relationship could provide a motive to falsely allege misconduct by the respondent.

Prohibition on mutual no contact orders.

SB-493 proposed sections 66281.8 (b)(4)(J)(xi)(III)-(xii)[67] provide that an "*institution shall not issue a mutual no-contact directive when an allegation of harm has been made against only one of the parties*." [PDF pp. 12-13]

This provision ignores the reality that on-campus disputes are often attributable to the conduct of both parties. FACE has many cases in which a complainant purposefully attends a specific school event to force the respondent to violate a no contact order, or to avoid the event entirely.

Attorney Assistance.

SECTION 3. Section 66281.8 of the Education Code is amended to read: . . . (b)(4)(M)(vii)(I) The notice shall advise student parties of their right to seek the assistance of an attorney at <u>any stage</u> of the process if they wish to do so. [PDF pp. 10]

The above section allowing an attorney "at any stage" seems to conflict with the following section which allows attorneys "during key stages," and should be amended to "any stage" to be consistent.

SECTION 3. Section 66281.8 of the Education Code is amended to read: . . . (b (4)(M)(vi) To have a support person or adviser accompany a student party <u>during key stages</u> of the investigation and hearing processes, if requested. [PDF p. 10]

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[62] SB-493 proposed section 66281.8 (b)(4)(J)(ii) p. 9, lines 23-26. Initially, it is not clear what the inclusion of "by themselves" is intended to convey: with each other? with others? both?

[63] See, for example, *Doe v. Trustees of Boston College*, where the university improperly encouraged favorable treatment of the student that Doe claimed actually committed the sexual assault. 892 F.3d 67 (1st Cir. 2018).

[64] *Doe v. Brandeis University*, *supra,* note 32 at p. 573. The reason for the exclusion is the oft-repeated warning that just because two parties are in a relationship does not mean an assault cannot occur. Of course this is true, but rather that excluding the evidence all together, we believe impartial administrators will be able to discern the difference.

[65] Fed. R. Evid. 412, https://www.law.cornell.edu/rules/fre/rule_412.

[66] *Doe v. Swarthmore College* complaint, No. 2:14-cv-00532; *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018).

[67] SB-493 proposed section 66281.8 (b)(4)(J)(xi)(III)-(xii) p. 11, lines 1-8.

Conclusion: We *Can* Do Better

SB-493 in its present form will cause California public and private institutions of higher education to be subjected to more lawsuits by students who say they were treated unfairly, inequitably, and without the due process necessary in proceedings with such potentially grave consequences. Every party has an interest in accurate decision-making, but by ignoring California courts' carefully reasoned instructions, our schools' resources will be wasted on unnecessary lawsuits.

When deciding whether to support or oppose SB-493, please keep in mind that despite the fact that up to 30% of campus decisions are likely to be wrong,[68] the transcripts of "responsible" students are forever imprinted with a disciplinary notation; for them there is no "ban the box," even though they've been found "responsible" (not guilty) for conduct that, if it occurred, most often is not criminal, in a decision unaccompanied by rules and procedures normally used with the preponderance of evidence standard and pursuant to a disciplinary "process" conducted by administrators and professors who euphemistically call the experience "educational."

California, of all states, needs to lead the way. Though other states may be legislating fair and equitable disciplinary procedures,[69] let's not forget that California has always been at the forefront of protecting human and civil rights.

Please, take off your political hat and open your eyes to what's happening to innocent students who could be your sons and daughters – because doing what's right no longer protects you in this scary 'accusation = guilt' world – teenagers and young adults who've lost faith in our justice system, entire families who are emotionally destroyed,[70] and their lives permanently and irrevocably changed because of a process with a 30% likelihood of error.

Be the heroes who open their eyes to help stop this madness.

TOGETHER WE *CAN* DO BETTER

Respectfully submitted,

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[68] John Villasenor, "A probabilistic framework for modelling false Title IX 'convictions' under the preponderance of the evidence standard," *Law, Probability and Risk*, Volume 15, Issue 4, December 2016, pp. 223–237, https://doi.org/10.1093/lpr/mgw006

[69] NC House Bill 305, https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H305v1.pdf; SC Bill H3804 https://www.scstatehouse.gov/sess123_2019-2020/prever/3804_20190130.htm.

[70] For excerpts from FACE family accounts, please see FACE SB493 Testimony in Opposition June 2019, https://www.dropbox.com/s/3vdamiajmg7o7my/FACE%20SB493%20Testimony%20in%20Opposition%20June%202019.pdf?dl=0