**SB-493**

**COMMENT IN OPPOSITION**

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**INTRODUCTION**

Stop Abusive and Violent Environments (SAVE) strongly opposes SB-493.

In 2017, Governor Jerry Brown vetoed SB-169[[1]](#footnote-1). In his veto, Governor Brown stated the following:

‘[T]houghtful legal minds have increasingly questioned whether federal and

state actions to prevent and redress sexual harassment and assault –

well-intentioned as they are – have also unintentionally resulted in some

colleges’ failure to uphold due process for accused students.’[[2]](#footnote-2)

SB-169 was an effort by Senator Jackson to codify the 2011 “Dear Colleague Letter” into California law. Following Governor Brown’s veto, he promised “to convene a group of knowledgeable persons who can help us chart the way forward” and make balanced recommendations. This working group issued its recommendations in November 2018.[[3]](#footnote-3) The purpose of these recommendations was to provide guidance on “how best to address allegations of student sexual misconduct on college and university campuses in California.” The working group relied on federal guidance, commentary from legal experts/scholars, and recommendations from the American Bar Association (ABA).

Senator Jackson’s latest effort, SB-493 (Bill)[[4]](#footnote-4), completely ignores the working group’s recommendations and California court decisions. The Bill will undermine due process and basic fairness in campus sexual misconduct investigations.

**DISCUSSION**

The following section provides various problematic provisions that are contained in SB-493. Each provision is followed by recommendations from the working group or language from California courts that directly contradict the Bill’s language.

SB-493 proposes the following anti-due process provisions:

**I*. Proposed Sections 66281.8 (b)(2), (b)(4)(C), (b)(6)(A)-(B)***

These sections state that the gender equity officer, or any employee involved in the Title IX grievance procedure, shall receive training on “trauma-informed” and victim-centered best practices. Additionally, a school’s Title IX policies/procedures shall include a “trauma-informed” investigative approach. The above-mentioned sections fun afoul of various recommendations from the working group and California court decisions.

**A. *Working Group Recommendations:***

***Trauma-Informed Responses by Investigators and Adjudicators***

‘“Trauma-informed” approaches have different meanings in different contexts. 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.*

 **B. *Court Decisions:***

***Doe v. Regents of University of California[[5]](#footnote-5)***

In April 2018, the Superior Court of the State of California for the County of Alameda ruled in favor of an accused student after it was found that the Title IX investigator utilized a “trauma-informed approach.” The court found that the university “improperly permitted [the investigator] to base his evaluation of credibility on what [the investigator] understood to be the ‘trauma-informed approach.’”

**II. *Proposed Section 66281.8 (b)(4)(J)(vii)***

This proposed section states that both complainant and respondent shall not be subject to any form of direct, live cross-examination from the other party or the other party’s advisor. This is contrary to various California court decisions.

 **A. *Court Decisions:***

***Doe v. Regents of University of California[[6]](#footnote-6)***

In this case, an accused student (Doe) appealed the superior court’s decision to deny his petition for writ of administrative mandate. The Court reversed the superior court’s decision after it was found that Doe was denied the opportunity to adequately cross-examine witnesses. This deprivation, along with others, denied Doe a fair hearing.

The Court stated that Doe’s inability to cross-examine his accuser “impeded his ability to present relevant evidence in support of his defense.”

***Doe v. Claremont McKenna College[[7]](#footnote-7)***

Similarly, the Court in *Claremont McKenna* ruled in favor of an accused student (Doe) after it was found that he was deprived a fair hearing. The Court stated that “when a disciplinary determination turns on the complaining witness’s credibility, the accused student is entitled to a process by which the complainant answers his questions.”

The Court continued by stating that the university’s Title IX procedures “should have included an opportunity for the committee to assess [the complainant’s] credibility by her appearing at the hearing in person or by videoconference or similar technology; and by the committee’s asking her appropriate questions proposed by [Doe] or the committee itself.”

***Doe v. Kegan Allee (University of Southern California)[[8]](#footnote-8)***

In a recent decision, the Court stated the following:

 ‘USC’s student disciplinary procedure is fundamentally flawed, in that is provides

 no mechanism for a party accused of sexual misconduct to question witnesses

 before a neutral fact finder vested with power to make credibility determinations.’

The Court ruled in favor of the accused student and determined that his Title IX investigation and hearing lacked fundamental fairness.

**III. *Proposed Section 66281.8 (b)(2)***

This section explicitly states that the “gender equity officer” may also be the same individual as the school’s Title IX coordinator. The specific duties of the “gender equity officer” are not adequately described so it is very likely that an individual serving as both a “gender equity officer” and Title IX coordinator will run the risk of becoming a “single investigator.” A “single investigator” model allows for one individual to investigate allegations and determine responsibility.

The working group, along with California courts, have classified this “single investigator” approach as dangerous.

 **A. *Working Group Recommendations:***

***Investigator Independence***

‘The “single-investigator model,” lacking separation between investigator and adjudicator(s), rarely meets due process requirements. The investigator may or may not be the campus Title IX Officer. However, the investigation and adjudication must feature distinct persons and processes.7 We note that some schools have developed robust evidentiary hearing procedures that may have sufficient due process protections.’

***Investigator Obligation***

 ‘The Title IX Officer, or delegated investigator, must fully and impartially investigate all sides in a complaint.9 During the investigation, the Title IX Office must strive to be impartial and must not serve as an advocate on behalf of one party. 10 The Title IX Office should provide both complainants and respondents with information about other campus resources where support may be available, including but not limited to confidential counseling.’

 **B. *Court Decisions:***

***Doe v. Kegan Allee (University of Southern California)[[9]](#footnote-9)***

In this case, the Court ruled in favor of the accused student after it found that the university utilized a “single investigator” approach, among other things. Specifically, the court stated the following:

 ‘The factfinder may not be a single individual with the divided and inconsistent

 roles occupied here by the Title IX investigator in the USC system…Deficiencies…

are virtually unavoidable in USC’s system, which places in a single individual the

overlapping and inconsistent roles of investigator, prosecutor, factfinder, and

sentencer.’

**CONCLUSION**

For the above-stated reasons, SAVE encourages California legislators to OPPOSE SB-493. Lawmakers should strive to provide fair and equitable Title IX procedures designed to maximize the likelihood of reliable, impartial, and accurate decision-making.

1. <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB169> [↑](#footnote-ref-1)
2. <https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB169> [↑](#footnote-ref-2)
3. <http://www.ivc.edu/policies/titleix/Documents/Recommendations-from-Post-SB-169-Working-Group.pdf> [↑](#footnote-ref-3)
4. <http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB493&search_keywords=sexual> [↑](#footnote-ref-4)
5. <https://kcjohnson.files.wordpress.com/2018/04/uscb-attorney-fees.pdf> [↑](#footnote-ref-5)
6. <https://law.justia.com/cases/california/court-of-appeal/2018/b283229.html> [↑](#footnote-ref-6)
7. <https://law.justia.com/cases/california/court-of-appeal/2018/b281722.html> [↑](#footnote-ref-7)
8. <https://www.courts.ca.gov/opinions/documents/B283406.PDF> [↑](#footnote-ref-8)
9. <https://www.courts.ca.gov/opinions/documents/B283406.PDF> [↑](#footnote-ref-9)