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January 29, 2019

Via Federal eRulemaking Portal (www.regulations.gov)

The Honorable Betsy DeVos
Secretary of Education
Mr. Kenneth Marcus
Assistant Secretary for Civil Rights
c/o Ms. Brittany Bull
U.S. Department of Education
400 Maryland Avenue S.W., Room 6E310
Washington, D.C. 20202

Re: **Docket ID ED-2018-OCR-0064 – Response to Notice of Proposed Rulemaking re Title IX of the Education Amendments of 1972**

Dear Secretary DeVos and Assistant Secretary Marcus:

The California State University (CSU) system submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register (FR) on November 29, 2018. The Proposed Rules (PR) clarify how a recipient of federal funds must respond to incidents of sexual harassment as that term is defined by Title IX of the Education Amendments of 1972.

The CSU is a public postsecondary institution that educates more than 480,000 students and employs more than 52,000 employees at 23 campuses across California. The safety and well-being of our highly diverse campus community is paramount, and we are deeply committed to ensuring a safe working, learning and living environment at every campus, in compliance with CSU policy and all applicable federal, state and local laws. A fair and workable institutional grievance process is central to this commitment.

Our comments about the Proposed Rules fall into four general subject areas: scope of Title IX, supportive measures, grievance procedures, and applicability to employees.

Scope of Title IX

The Proposed Rules define sexual harassment under Title IX more narrowly than under other federal and state laws (e.g., Title VII of the Civil Rights Act of 1964; California's Fair and Employment and Housing Act, Unruh Civil Rights Act and Education Code) and many, if not most, university policies. Illustrative examples are noted below.

- Unwelcome conduct (other than sexual assault as defined in 34 CFR §668.46(a)) that is "merely" severe ***or*** pervasive would not rise to the level of a violation of Title IX, whereas the same conduct could constitute sexual harassment as defined by other laws and policies.[1]
- The Proposed Rules do not include within the ambit of Title IX, sexual harassment by a student or employee that *does not actually take place* within an educational program or activity (i.e. an institution's operations), even if the consequences of such misconduct might "effectively den[y] a person equal access to the recipient's education program or activity." (PR 106.30.) For example, an allegation that a student sexually assaulted another student or an employee in a private house a few blocks off campus would not be investigated under Title IX, although such misconduct if substantiated would constitute a breach of the institution's student conduct code.[2]

[1] 42 USC § 200e (Title VII); Cal. Gov't Code § 12900, *et seq*. (FEHA); Cal. Civ. Code §51 (Unruh); Cal. Educ. Code § 11135, *et seq*. (non-discrimination in education). Whereas the Proposed Rules require that the "unwelcome conduct be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity," Title VII and state law consider unwelcome conduct that is "merely" sufficiently severe *or* pervasive … to constitute sexual harassment. (*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 2406 (1986) (Title VII); *Fisher v. San Pedro Peninsula Hospital*, 213 Cal.App.3d 590 (1989).) The proposed definition of rape (penetration without consent) as used in the FBI's UCR program also does not incorporate the broader notion of affirmative consent as required by California law. (Cal. Educ. Code § 67386.)

[2] We also note that the very same incident, were it to occur on campus, would be investigated under Title IX and could result in severe discipline. The off-campus incident, however, would not subject the accused to discipline and the complainant would be offered "nothing more" than non-disciplinary and non-punitive supportive measures. However, neither the NPRM nor the Proposed Rules themselves provide a satisfactory rationale for treating a student who was assaulted by another student differently depending on where the assault took place, nor do they address how to protect a student when the circumstances of the parties' living and learning environments are such that the institution cannot adequately "preserve access to the … education program or activity without unreasonably burdening the other party." (FR 61469.)

- Sexual harassment as otherwise defined by Title IX that occurs outside of the United States would not constitute a violation of Title IX (even if the misconduct occurred during a school program on property owned by the school) although those same facts would constitute unlawful conduct under state law and university policy.

We recognize that the Proposed Rules do not purport to define sexual harassment other than for purposes of Title IX enforcement. Therefore, the Proposed Rules would not apply to sexual harassment that does not "rise to the level" of Title IX harassment, nor would an institution's enforcement of other antidiscrimination laws and policies be regulated by the Proposed Rules. In other words, redefining sexual harassment under Title IX would narrow the scope of what the Department regulates, but would not narrow the scope of sexual harassment prohibited by other laws. Rather than redefining sexual harassment, the Proposed Rules merely redefine the Department's purview, which will require schools to prohibit two types of sexual harassment: "Title IX sexual harassment" and "sexual harassment," each governed by different institutional policies and rules. As such, we are concerned that any efficiencies contemplated by the Proposed Rules would be vastly overshadowed by the complex and confusing scheme of antidiscrimination policies and grievance procedures that schools would be required to design and enforce in order to comply with all other applicable federal and state laws. We suspect that the Department's well-intentioned effort to bring clarity to antidiscrimination laws, to ensure a prompt and fair remediation and resolution process, and to "empower students to hold their schools accountable" (FR at p. 61462) will actually have the opposite effect: confusion and frustration.[3]

Supportive Measures

The NPRM recognizes that a complainant's right to remediation (including supportive measures) is co-extensive with a respondent's right to fair process, but the Proposed Rules do not seem to account for the fact that these rights sometimes come into unavoidable conflict.

Supportive measures are defined as "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent … designed to restore or preserve access to the … education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the … educational environment; and deter sexual harassment." (PR 106.30.)

[3] We also expect that the added administrative burdens and financial costs required by the Proposed Rules (including retaining advisors for cross-examination, and procuring cloud-based software to allow for "view only" inspection of evidence and technology at all hearings that will enable the "decision-maker and parties to simultaneously see and hear the party answering questions" in separate rooms) will far overrun any economies yielded by the jurisdictional and definitional limitations in the Proposed Rules.

The important and complex task of identifying and implementing appropriate supportive measures is both art and science. Title IX Coordinators go to great lengths to understand the parties' needs and concerns, and to fashion interim and other supportive measures that reasonably protect without undue intrusion or burden to others. That students study and often live and work together in close quarters, however, sometimes makes it virtually impossible to identify supportive measures that are not at least perceived by the respondent as punitive. For this reason, the rules should explicitly acknowledge that Title IX Coordinators shall reasonably balance the rights of all parties as determined by the Title IX Coordinator under the particular circumstances of each case when implementing supportive measures and performing other complex duties.

Grievance Procedures

The Proposed Rules seek to ensure a fair grievance process in school disciplinary proceedings by requiring due process protections for respondents that are akin to, and perhaps even greater than, those afforded to defendants in a criminal trial. This is impractical and unnecessary, and also at odds with other administrative and extra-judicial processes (such as arbitrations). Illustrative examples are noted below.

- Cross Examination at Live Hearing by Advisor (Provided by Recipient)(PR 106.45(b)(3).) A grievance procedure that allows for indirect cross-examination (e.g., by an investigator, hearing officer or other fact finder) provides appropriate and fair process in a school proceeding. The Department's rationale for allowing indirect cross-examination in grievances at K-12 institutions (PR 106.45(b)(3)(vi)) applies equally to grievances at postsecondary institutions. "Sensitivities associated with age and developmental ability" (FR at 61476) remain a consideration with young adults. This is especially true in cases requiring testimony about highly personal and intimate details of a sexual nature. Under these circumstances, questioning by an advisor-attorney – rather than another student – would hardly be less traumatic for parties and witnesses, contrary to the Department's hope in that regard.[4] (FR at p. 61476.) Although cross-examination may indeed be the "greatest legal engine ever invented for the discovery of truth" (*id.*) engines are made in different shapes and sizes for a reason. With proper training (as described in PR 106.45(b)(1)(iii)), effective and appropriate cross-examination is undertaken by hearing officers and other neutral fact finders in myriad administrative processes.

- No Consideration of Statements from Witnesses Not Present at Hearing (PR 106.45(b)(3)(vii).) The proposed unqualified exclusion of prior statements by parties

[4] We note that the proposed rules appropriately require coordinators, investigators and decision-makers to receive training on the definition of sexual harassment and other relevant topics, but they do not require that advisors receive training. (PR 106.45(b)(1)(iii).)

not present at a hearing seems draconian (especially in the absence of subpoena power in student disciplinary matters) and does not necessarily further the discovery of truth. Even the most formal judicial processes allow for some instances when out of court statements are considered for truth or state of mind purposes.

- Required Technology (PR 106.45(b)(3)(vii) & (viii).) The Proposed Rules *require* that all institutions procure sophisticated and costly technology that enables parties to review evidence prior to the hearing on a "view-only" basis[5] and that allows remote cross-examination while "enabling the decision-maker and parties to simultaneously see and hear the witness." (PR 106.45(b)(vii) & (viii).) Economics aside, even if all institutions had access to all such technology, factors outside the school's control might justify the use of other methods that achieve comparable results. For example, some students do not have access to computers or other devices that enable them to view (sometimes voluminous) evidence electronically. Some disabilities make the use of such technology difficult or even impossible. Likewise, internet functionality on campus can be unpredictable, and could interfere with a hearing if remote cross-examination (rather than a dividing screen in the same room, for example) is required. Expectations rather than rigid mandates might be more realistic and equitable.

Directed Question: Applicability of Rule to Employees

With respect to the Department's directed question about the applicability to employees, the Proposed Rules would seem to require grievance procedures that are at odds with the notion of at-will employment and in tension with Title VII and other laws governing employees. In cases involving represented employees, unless the grievance procedures in the Proposed Rules mirror the procedures negotiated in the applicable collective bargaining agreement -- which at the CSU include live hearings -- the Proposed Rules would also seem to unnecessarily intrude in an arm's-length process that the parties specifically negotiated. For example, represented CSU employees (other than faculty) challenge disciplinary action in an evidentiary hearing with live witnesses before the California State Personnel Board. CSU faculty (also represented) choose from three alternative forums, each of which includes live witnesses: private arbitration, evidentiary hearing before the California State Personnel Board, or informal hearing before a faculty committee. These procedures are well-established under California law and regulations and are inconsistent with the Proposed Regulations in important respects.

[5] At present, we understand that "view-only" technology does not, in any event, prevent a viewer from preserving evidence (e.g., through screenshots).

I thank you for the opportunity to provide public comment, as do the 23 presidents of the California State University system identified below on whose behalf I also sign this letter. We hope that our input brings value to this important work. We would be happy to answer questions or provide additional information.

Sincerely,

Timothy P. White
Chancellor

Dr. Lynnette Zelezny, President, California State University, Bakersfield
Dr. Erika D. Beck, President, California State University Channel Islands
Dr. Gayle E. Hutchinson, President, California State University, Chico
Dr. Thomas A. Parham, President, California State University, Dominguez Hills
Dr. Leroy M. Morishita, President, California State University, East Bay
Dr. Joseph I. Castro, President, California State University, Fresno
Mr. Framroze M. Virjee, President, California State University, Fullerton
Dr. Lisa A. Rossbacher, President, Humboldt State University
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Dr. Adela de la Torre, President, San Diego State University
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