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Via Federal eRulemarking Portal (www.regulations.gov)

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, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Ms. Bull:

Thank you for the opportunity to comment on the U.S. Department of Education's (Department's) proposed regulations implementing Title IX of the Education Amendments of 1972 (Title IX), as published in the *Federal Register* on November 29, 2018. We are pleased to submit this response on behalf of the University of California (UC).

UC benefits the nation through world-class educational opportunities, groundbreaking research, top-rated health care, and agricultural expertise. The UC system includes 10 campuses, five medical centers, and three national laboratories, and has 238,700 current students, 199,300 faculty and staff, and 1.7 million living alumni.

Sexual harassment can devastate individuals and communities, and it is critical that the Department and schools nationwide continue their efforts to combat it. UC has committed significant time, expertise, and resources to develop a sexual harassment complaint resolution process that is fair and humane, and results in just outcomes. Our process already includes many of the elements in the Department's proposed rules. For example, UC provides parties with detailed written notices at the beginning and conclusion of the process; the right to an advisor of their choice; the opportunity to identify witnesses and present evidence, review and respond to evidence gathered, and pose questions to the other party and witnesses; the ability to appeal; and services, accommodations, and other measures to ensure access to our programs and activities. Additionally, UC's investigators are well-trained to make credibility determinations based on careful analysis of the evidence, and to objectively evaluate all evidence.

UC believes all of these processes and protections are important, and generally supports their inclusion in the rules. However, we find that several aspects of the proposed rules undermine principles of equity, and conflict with the Department's stated interest in "both strongly condemn[ing]...sexual misconduct and ensur[ing] a fair adjudicatory process" (*Federal Register*, page 61464). UC has two fundamental concerns. First, UC is deeply troubled that, if issued in their current form, the rules will discourage reporting and participation in the resolution process, and hamper schools' efforts to prevent, investigate, and redress sexual harassment. Second, the rules are overly prescriptive. The Department would dictate to schools when their grievance processes can be invoked, the conduct to which they can apply, and the exact form they must take. Given the broad diversity in size, structure, culture, and resources of schools subject to Title IX, this degree of prescription is unworkable.

Nearly half a century after Title IX's adoption, these rules should reflect our nation's increased understanding of sexual harassment, the damage it wreaks, and how to counteract it—and our commitment to change. They do not.

UC's primary concerns with the proposed regulations include:

- Schools would have no obligation to respond to a sexual harassment report unless it cleared certain hurdles: it must be made to a specific school official, and allege sexual harassment occurring in a school program or activity, against a person in the United States. Sexual harassment is narrowly defined to exclude single incidents of verbal harassment and some physical harassment, regardless of severity. This would leave serious sexual misconduct unaddressed. When schools are obligated to respond, they need only do so in a manner not "deliberately indifferent"—an unacceptably low standard in this context. Section 106.44(a).

- Schools would be required to dismiss from their sexual harassment grievance process any formal complaint that did not meet these strict requirements. This mandate could actually prevent schools from effectively addressing serious misconduct affecting their community members. The Department suggests schools could instead address such behavior under their student conduct codes, but this approach is impractical and would likely lead to inconsistent and unjust processes and outcomes. Section 106.45(b)(3).

- The rules would require institutions of higher education (IHEs) to resolve formal complaints through live hearings conducted according to the Department's directives. This would deprive schools the freedom to structure their processes to their individual needs, resources, and communities, and compel them to abandon the alternative models they have deliberately and carefully developed over the course of years. Section 106.45(b)(3)(vii).

- At the required hearings, parties would be allowed to cross-examine each other and witnesses through their advisors. This is an intimidating prospect for both parties and witnesses, but will particularly deter potential complainants wrestling with the already

difficult decision of whether to come forward. Further, the rules do not safeguard against abuse of this process, or adequately contemplate its effective implementation. UC and others have designed alternatives to direct cross-examination that are effective and help mitigate harm to the parties—the Department would prohibit those approaches in favor of its own. Section 106.45(b)(3)(vii).

UC's primary concerns are discussed in further detail in Section One, below. Additional concerns, recommendations, and questions about the specific proposed rules are set forth in Section Two. General comments are in Section Three. Finally, our responses to the Department's directed questions are in Section Four.

## I. Primary Concerns.

Recipient's response to harassment: Section 106.44.

*General—§106.44(a).* This provision states that a school "with actual knowledge of sexual harassment in an education program or activity…against a person in the United States must respond in a manner that is not deliberately indifferent." "Sexual harassment," "actual knowledge," and "deliberate indifference" are all defined in proposed Section 106.44(e). We have the following significant concerns with this provision:

- *Sexual harassment definition—§106.44(e)(1).* UC interprets the Department's proposed definition of sexual harassment to include relationship violence, sex-based stalking, and other gender-based harassment, which UC supports. UC also supports the inclusion of sexual assault, quid pro quo, and hostile environment. However, the proposed rule too narrowly defines hostile environment sexual harassment as unwelcome conduct that is "so severe, pervasive, **and** objectively offensive that it effectively **denies a person equal access** to the recipient's education program or activity" (emphasis added). This is far more limited than the definition the Department has used effectively for over two decades[1] and, if adopted, could leave students and others without recourse for serious misconduct—especially at schools that adopt the higher clear and convincing evidentiary standard, as the proposed rules also permit.

  The most significant problem is that single incidents do not appear to meet the definition of hostile environment sexual harassment because they aren't "pervasive." A professor blocking a teaching assistant's exit from a small office while haranguing them with sexual insults and gender-based slurs, or a supervisor's caress of a direct report's thigh while making sexually explicit comments at a staff meeting, would not constitute sexual

[1] **The Department's 1997 Sexual Harassment Guidance (available here) defined hostile environment sexual harassment more broadly as "conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment" (emphasis added). Its 2001 Revised Sexual Harassment Guidance (available here) affirmed that "the issue is whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex."**

harassment despite the severity, power differential, and threatening or humiliating circumstances. Although isolated incidents would be considered sexual harassment if they constitute sexual assault, this definition is also narrow. The rules define "sexual assault," by reference to the Clery Act regulations, as rape, fondling, incest, or statutory rape; fondling is "the touching of the private body parts of another person" without consent. This definition does not encompass, for example, a respondent forcing a complainant to touch the respondent's genitals, or a respondent touching a complainant's non-private body part (such as the face) with the respondent's genitals. Because such conduct would apparently not constitute sexual assault or hostile environment sexual harassment under the Department's proposed rules, schools would have neither the obligation, nor the ability (under Section 106.45), to address it using their sexual harassment grievance procedures. The Department wrote that narrowing the scope of misconduct covered by Title IX will "correct capturing too wide a range of misconduct resulting in infringement of academic freedom and free speech" (*Federal Register*, page 60484). Yet neither academic freedom nor free speech is implicated in the above examples. A statement that definitions must be interpreted consistent with these rights, which UC's policy includes, would better protect them.

Additionally, the rules would require that misconduct "deny" a complainant "equal access" to a program or activity, which is steeper than the current requirement that the conduct "limit" access. UC is concerned that the new standard means complainants must drop out of the program, or leave school altogether; this would ignore the more common scenario where complainants continue in the relevant program (such as a sport, lab, or class) despite the harassment, but only with significant struggle, or in a diminished fashion.

UC urges the Department to ensure serious misconduct is addressed by incorporating the hostile environment definition it has used for decades into the final rules, and by revising the definition of sexual assault to appropriately encompass other forms of severe sexual contact.

- *Actual notice requirement—§106.44(e)(6).* Pursuant to the proposed rules, a school need only respond to sexual harassment of which it has "actual notice," defined as notice to the Title IX Coordinator or other official "with authority to institute corrective measures." This is concerning because students are far more likely to report to a person of authority with whom they have a relationship, such as an advisor or professor. The proposed rule removes any obligation to respond to such reports. Further, an employee's failure to inform the Title IX Coordinator actually shields the institution from responsibility, creating a misguided incentive to withhold the information from the person best-positioned to respond. At UC, nearly all employees must report possible sexual harassment of a student to their Title IX Coordinator, who then informs the student of their rights and available resources. The Department's proposed provision would undermine such efforts by UC and others to ensure accountability. It will have even greater negative consequences at institutions with lesser expectations.

- *Program or activity requirement—§106.44(a).* Schools would be similarly both relieved of and restricted from responding to conduct that did not occur in a school program or activity. This too is concerning, because complaints of sexual assault in particular often stem from encounters that occur at private events or residences, yet negatively affect the complainant's participation in a school program or activity (for example, where the complainant and respondent are in the same graduate student cohort or class). Schools have an interest in addressing any hostile environment that may exist in their own programs and activities, and we urge the Department not to limit their ability to do so. Further, California state law requires that UC have a policy addressing sexual violence "involving a student, both on and off campus" (see CA Education Code § 67386). It would be confusing and burdensome for UC and schools with similar requirements to have separate policies for sexual harassment prohibited by Title IX, and sexual harassment prohibited by other laws.

- *Geographical requirement—§106.44(a).* The rules similarly limit schools' ability to respond to conduct unless it is against a person "in the United States." Many schools provide programs for students to learn in other countries. Thousands of UC students travel abroad every year through our Education Abroad Program. Even if Title IX does not apply extraterritorially, schools should not be prohibited by the Department from using their sexual harassment grievance procedures to respond to allegations stemming from those programs, if they so choose. This proposed limitation signals to would-be harassers that overseas programs are fair game.

- *Deliberate indifference standard—§106.44(a).* The proposed rules would require that schools respond to qualifying reports of sexual harassment in a manner that is not "deliberately indifferent," meaning "clearly unreasonable in light of the known circumstances." While this low expectation would not affect the diligence with which UC responds to reports, it will affect students at other institutions—including their readiness to align with UC's principles should they join our community. UC urges the Department to maintain the current "reasonableness" standard that it has effectively applied in its Title IX enforcement for decades.

Grievance procedures for formal complaints of sexual harassment: Section 106.45.

*Investigations of a formal complaint—§106.45(b)(3).* Here, the rules would prohibit schools from processing complaints under their grievance procedures unless they allege "sexual harassment" in the context of a "program or activity" against a person "in the United States." This is of significant concern because, as explained above, these requirements are extremely limiting. The Department wrote that schools remain "free to respond to conduct that does not meet [these requirements]...including by...investigating the allegations through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview" (*Federal Register*, page 61475). It is every school's ethical obligation to respond appropriately to all complaints

alleging sexual misconduct toward a member of its community, or a hostile environment in its program or activity, even if the Department writes the legal obligation out of Title IX. In California, many schools are also compelled to do so by state law (see, e.g., CA Education Code § 67386). Moreover, schools should have the ability to respond to such complaints using grievance procedures they develop specifically for this purpose. The proposed rules would actually prevent UC's campuses and locations from doing so, contrary to the Department's vows to provide schools more, not less, flexibility.

Further, the Department's suggestion that schools use their student conduct code to resolve such allegations is impractical. Under this approach, a complaint alleging a respondent touched a complainant's private body part without complainant's consent will entitle both parties to the rights and protections built into their school's Title IX grievance process. By contrast, a complaint alleging a student respondent forced the complainant to touch the respondent's private body part (the example from page 3), would entitle the respondent only to the same process provided if the allegation was theft, and likely provide the complainant no rights. Yet the nature and gravity of the conduct, and the stakes for the parties, are quite comparable. Further, UC's Sexual Violence and Sexual Harassment (SVSH) Policy covers conduct such as invasions of sexual privacy, indecent exposure, SVSH-related retaliation, and violations of SVSH-related no-contact orders; these would also presumably necessitate a separate process. This approach does not further the Department's stated interest in "assisting and protecting victims of sexual harassment and ensuring due process protections are in place for individuals accused" (*Federal Register*, page 61462).

*Live hearing requirement—§106.45(b)(3)(vii).* The proposed rules would require IHEs to hold live hearings to resolve formal complaints, dictate how the hearings must be conducted, and prohibit the alternative models that UC and others have carefully and deliberately developed over years. This is overly prescriptive, and inconsistent with the Department's declared intent to move away from approaches that "removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources and educational community" (*Federal Register*, page 61464). Rather than requiring schools to abandon the processes in which they have invested so much time, thought, and resources—and which at UC reflect significant stakeholder engagement—we strongly urge the Department to defer to school officials' expertise in developing adjudication models that are fair and humane, align with state and federal law, and are appropriate for them given their individual circumstances.

*Cross-examination requirement—§106.45(b)(3)(vii).* At the live hearing, parties would be allowed to cross-examine each other and witnesses, including challenging credibility, through their advisors. While the right to pose questions is important, direct cross-examination by a party's representative (often an attorney) is an intimidating prospect, especially for complainants wrestling with the already difficult decision to come forward. It could also violate court-issued restraining orders prohibiting third-party contact. This provision, more than any other in these proposed rules, would discourage reporting. Moreover, it is unnecessary, because parties can effectively question each other through a neutral

intermediary—something many universities, including UC, already allow. We strongly urge the Department permit this approach, which better protects the parties' rights, and their well-being.

*Cross-examination; provision of advisor—§106.45(b)(3)(vii).* The Department's proposal to require that parties' advisors conduct cross-examination would also disadvantage parties without advisors, and parties whose advisors lack training and preparation to execute the adversarial questioning envisioned by the Department. To address this, the proposed rules provide, "if a party does not have an advisor…the [school] must provide…an advisor aligned with that party to conduct cross-examination." UC's largest campus conducted 38 formal investigations in 2017—far more than the Department's estimated "average of 2.36 investigations…per IHE per year" (*Federal Register*, page 61485); we expect schools of similar size that encourage reporting have similar numbers. With that volume, providing meaningful representation to parties would be extremely costly and burdensome. The rules would create an inequity, and then put the onus on schools to correct it. To prevent this, UC again recommends that a neutral person provided by the school conduct the cross-examination.

*Cross-examination; complainant's sexual behavior and predisposition—§106.45(b)(3)(vii).* The rule also provides that "cross-examination must exclude evidence about the complainant's sexual behavior or predisposition, unless…offered to prove that someone other than the respondent committed the conduct…or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent." To protect parties from unwarranted invasions of privacy, character attacks, and sexual stereotyping, we urge the Department to more carefully and narrowly define when and how such evidence may be considered. Specifically, the rule should: state that such evidence is never allowed to prove reputation or character; clearly and narrowly delineate the circumstances in which specific instances of sexual behavior may be relevant; allow such evidence only if a neutral evaluator determines in advance that it is directly relevant *and* that its probative value outweighs potential harm or prejudice to the complainant; require that a neutral person screen and ask questions; and require that schools inform complainants in advance if such evidence will be allowed. These changes will better align the provision with Federal Rule of Evidence 412, on which the Department stated it is modeled (*Federal Register*, page 61476).

*Cross-examination; separation of parties—§106.45(b)(3)(vii).* Schools would be required, upon request, to "provide for cross-examination to occur with the parties located in separate rooms[.]" We appreciate this provision, which acknowledges the intimidating nature of the proposed cross-examination. Schools may identify additional measures to mitigate harm during this process, such as allowing support persons to attend. Accordingly, the rule should state more broadly that schools will offer the parties reasonable mitigating measures, of which separate rooms is one example. This will provide schools greater flexibility to accommodate their individual community members.

*Cross-examination; screening of questions—§106.45(b)(3)(vii).* The rule indicates that decision-makers could "exclude questions as not relevant," provided they explain their decision. UC recommends this rule also give decision-makers the right to: exclude questions they determine are harassing or unduly repetitive; screen questions before cross-examination, not during, to reduce the likelihood that parties are harassed during questioning, and because school administrators are not trained judges; and exclude individuals who do not abide by their decisions from the proceeding.

*Cross-examination; exclusion of statements—§106.45(b)(3)(vii).* The Department proposes that, "if a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that [person] in reaching a determination[.]" Witnesses and parties may be unavailable for a variety of reasons unrelated to reliability of their statements. Additionally, complainants often decline to participate in processes initiated against their wishes (see Section 106.44(b)(2) and 34 CFR 106.44(e)), and this will be particularly true if the process includes live cross-examination by the respondent's representative. Respondents may decline due to a parallel criminal proceeding. The rules should empower decision-makers to assign appropriate weight to statements not subject to cross-examination, rather than dictating they entirely disregard them.

## II. Additional concerns, recommendations, and questions.

*Educational institutions controlled by religious organizations—Section 106.12.* Under the current Title IX regulations, schools controlled by religious organizations may claim exemption from Title IX requirements that conflict with their religious tenets (34 C.F.R. §106.12). Schools need merely submit a sufficient written request for exemption, and receive the Department's written assurance in response. Schools claiming the exemption commonly receive approval to discriminate based on gender identity, sexual orientation, marriage, sex outside of marriage, pregnancy, and abortion, in areas such as admissions, recruitment, housing, athletics, and employment (see the 2009-2016 Religious Exemptions Index, here). The Department now proposes eliminating even the minimal expectation that schools claiming the exemption seek the Department's written assurance that they qualify. Though it does not directly affect UC, we urge the Department to leave this expectation in place, and to continue publicizing the names of schools that request the exemption. Prospective and current students and employees have a strong interest in knowing if their institution discriminates based on sex. Further, the burden on schools to claim the exemption is minimal, particularly compared to the burden on students and employees who may unexpectedly experience discrimination for which they have no recourse except to withdraw or resign, potentially with significant financial consequences.

*University-initiated complaints—§106.44(b)(2).* This proposed subsection reads, "when a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent...the Title IX Coordinator must file a formal complaint." While it is important to UC that we honor complainants' wishes about whether to pursue a resolution process whenever possible, we also know that our Title IX Coordinators must sometimes

initiate an investigation unilaterally. This would be necessary in response to information suggesting an ongoing threat to the school community (such as where use of violence or a weapon is alleged), and when credible allegations of sexual harassment are in the public realm (such as reports in the news or social media). Accordingly, we request that the Department clarify that a Title IX Coordinator can initiate their school's grievance process in these circumstances as well.

*Formal complaint definition—§106.44(e).* A formal complaint, defined as a signed document, would be necessary to activate a school's grievance process. The rules should state that schools must offer reasonable accommodations to complainants who are unable to submit a written complaint due to, for example, a physical disability.

*Notice of allegations—§106.45(b)(2)(i)(B).* In a written notice sent at the start of investigation, schools would be required to inform parties of any code "that prohibits knowingly making false statements[.]" The Department's stated intent is "to emphasize the [school's] serious commitment to the truth-seeking nature of the grievance process and to incentivize honest, candid participation" (*Federal Register*, page 61474). While we share this interest in honesty, we are concerned that the threat implicit in the proposed admonition will outweigh its value. Parties' and witnesses' statements rarely neatly align. Inconsistencies stem from passage of time, effects of drugs or alcohol, general unreliability of human perception and memory, and other factors. School officials are rarely so certain a party is lying that they should pursue discipline, yet the proposed admonition suggests otherwise. The resulting fear is likely to discourage participation in the process and inhibit the candor the Department stated it is seeking. Further, parties may interpret the statement as their school's endorsement of harmful stereotypes about the prevalence of false sexual misconduct reports.

*Restrictions on parties—Section 106.45(b)(3)(iv).* We generally agree with the proposal to allow parties to be accompanied by an advisor "of their choice." In UC's experience, however, it is not appropriate for potential witnesses to serve as advisors, and we suggest the Department recognize this reasonable limitation.

*Choice of Advisor—Section 106.45(b)(3)(iii).* This provision would prohibit schools from restricting "the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence." We ask the Department to recognize reasonable limitations on this ability. For example, parties should not be allowed to intimidate witnesses or each other, obstruct the investigation, or otherwise engage in retaliatory conduct.

*Evidence review—§106.45(*b)(3)(viii). This would provide the parties an "equal opportunity to inspect and review any evidence directly related to the allegations raised in a formal complaint, including evidence upon which the recipient does not intend to rely." UC suggests the Department make clear that this review need only occur at the proposed conclusion of the investigation. UC is concerned that requiring disclosure upon a party's request (as suggested in Section 106.45(b)(2)(A)) would disrupt investigations, create delays, and open the door to both witness tampering and retaliation. By contrast, allowing parties to review evidence at

the conclusion achieves due process and fairness without compromising the integrity of the investigation.

UC is also concerned that providing parties access to information deemed irrelevant by the investigator will lead to unwarranted invasions of privacy and retaliation. For example, a complainant may submit medical records that include both evidence that they sought treatment for sexual assault, and sensitive medical information not relevant to whether the conduct occurred. The Respondent is unlikely to have a legitimate interest in the sensitive medical information. Additionally, witnesses sometimes provide evidence of a party's perceived character, including sexual reputation. Trained investigators know that such evidence is rarely relevant, and typically would not consider it. Providing such information to parties can be hurtful to them, and makes witnesses vulnerable to retaliation for their participation in the investigation. In Directed Question Number Seven, the Department requested comment on whether to further regulate the phrase "directly related to the allegation." UC suggests the Department specify that the investigator must only share information upon which the investigator intends to rely.

*Determination regarding responsibility; evidentiary standard—§106.45(b)(4).* This provision would allow schools to choose either the preponderance or the clear and convincing evidentiary standard. In Directed Question Number Six, the Department requested comment on which standard is correct, and whether it should require schools to use the same standard for Title IX and similarly serious complaints. The preponderance standard is consistent with the fundamental principle of equity that underpins Title IX—it recognizes the parties have equal standing in the process. Further, as the Department noted in its discussion, preponderance is the standard used in civil litigation, and by the Department in its own Title IX investigations (*Federal Register*, page 61469). Under California state law, UC must also use preponderance for certain forms of sexual misconduct (see CA Education Code §67386(a)(3)). For these reasons, UC believes preponderance is the correct standard, intends to continue using it, and would object strongly to the Department imposing a higher standard. With respect to the second part of Question Six, the Department proposes prohibiting schools from using a lower standard for sexual harassment than for similar misconduct, while allowing them to use a higher standard. As justification, the Department cites the "heightened stigma associated with" sexual harassment complaints for respondents and the need to "ensure recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment." These rationalizations fail to acknowledge that the stakes in these cases are incredibly high for both respondents and complainants.

*Determination regarding responsibility; written notice—§106.45*(b)(4)(ii). Schools would be required to provide written notice of the outcome of complaints. UC generally supports this requirement. However, proposed subsection (E) would require the notice explain remedies provided to the complainant. Remedies are often personal, and should be kept as private as possible; they may include, for example, changes to a complainant's schedule, and medical, counseling, and academic support. While complainants have a legitimate interest in knowing a respondent's sanctions, as sanctions often help eliminate a hostile environment and prevent

recurrence, a respondent has little legitimate interest in knowing the complainant's remedies, and indeed could exploit such information in a retaliatory manner. UC requests that the Department clarify that schools should not provide this private information to respondents. This comment also applies to Section 106.45(b)(7), which specifies the records schools would be required to make available to parties.

*Appeals—§106.45(b)(5).* We appreciate the Department's proposal to require that parties have equal appeal rights. The proposed provision states that while a complainant may appeal on the basis that their remedies are insufficient, "a complainant is not entitled to a particular sanction against the respondent." UC allows either party to appeal on the basis that the sanction is disproportionate to the finding. We request that the Department confirm that the language in subsection (b)(5) does not preclude schools from allowing complainants to appeal on this basis.

## III. Other significant comments.

*Time to comply with regulations.* We urge the Department to provide schools ample time to comply with the regulations following their issuance. The Department wrote in its Regulatory Impact Analysis (RIA), "[w]e assume that all recipients will need to revise their procedures....At the IHE level, we assume that this would require the Title IX Coordinator devote 8 hours and a lawyer devote 32 hours." This is a gross underestimate of the time schools will need to thoughtfully revise their policies and procedures, particularly if the Department requires schools with an investigative model to transition to a hearing model. When UC developed its existing model, we convened a workgroup with stakeholder representation from across the UC system. Over several months, the workgroup reviewed practices of other universities and academic research; consulted with experts; engaged in careful deliberation; and sought and incorporated community feedback before finalizing its work. UC has continued to review and refine the model over time to reflect best practices and comply with law. Changing our model would require similar careful thought, consultation, and stakeholder engagement.

Implementation of the revised policies and procedures would require additional time. As partially acknowledged by the Department in the RIA, all parties responsible for implementing and supporting the revised policies and procedures must be trained on them. Again, this will be particularly important for schools changing to a hearing model, if that is required. The Department wrote, "[w]e assume that all recipients will conduct new or revised training aligned with these proposed regulations. We assume the training will take 16 hours for each Title IX Coordinator, the investigator, and a decision-maker at...the IHE level[.]" Actually, schools will need to train all of their Title IX staff, such as officers, investigators, response team coordinators, data managers, and administrative staff; staff of any offices that support complainants and respondents in the Title IX process (at UC, confidential advocates and respondent services coordinators); staff in offices involved in the adjudication process, such as student conduct, academic personnel, and human resources; the hearing panel (newly constituted for institutions like UC); and the advisors schools provide for parties, if that is

required. Additionally, schools must train their students on the revised policy and procedures, which they typically do at the start of the school year. Schools must also publish and disseminate the policies and, in institutions like UC, individual campuses must revise their local procedures to align with systemwide changes.

*Federal enforcement authority.* As discussed above, the proposed rules relieve schools of any obligation to respond to alleged sexual misconduct unless it occurs in the context of a university program or activity and is reported to an individual with specific authority to institute corrective measures. Further, schools would need only respond in a manner that is not "deliberately indifferent." UC believes schools' responsibilities extend beyond these minimal standards, and will not reduce protections for our own community members. However, we are concerned about the safety and well-being of individuals at institutions that take a different approach. UC understands that the Office for Civil Rights (OCR) will only investigate complaints alleging a school's failure to meet these very reduced standards, essentially eliminating enforcement of Title IX. We are concerned that the Department will make corresponding changes in other areas of OCR's jurisdiction, similarly reducing protections for students based on race and disability, even as harassment incidents nationwide are on the rise. UC urges the Department to rethink these actions to ensure enforcement of our nation's important civil rights laws.

*Retaliation.* The current Title IX regulations incorporate the prohibitions against retaliation codified in the procedural provisions of Title VI of the Civil Rights Act of 1964. Neither the existing Title IX regulations, nor the Department's proposed rules, directly address this prohibition. UC believes admonitions against retaliation, and assurances that schools take retaliation seriously, are important to encourage complainants and witnesses to come forward. This is particularly true with vulnerable populations, such as graduate students. UC urges the Department consider making the prohibition against retaliation explicit in the rules, to reassure the public of this protection. Further, schools should be permitted to address retaliation arising from a sexual harassment complaint using their sexual harassment grievance procedures. Finally, UC recommends the Department remove provisions from the rules that could invite retaliation, such as allowing parties to review evidence deemed irrelevant by the investigator, and while the investigation is pending (106.45(b)(3)(viii)), and providing respondents with information about the complainants' remedies (106.45(b)(4)(ii)).

*Regulatory Impact Analysis.* The Department wrote in the RIA that implementation of the proposed rules will result in savings for schools. Above, we note several instances where we believe the Department underestimated the impact of the proposed rules. UC's experience suggests the Department also underestimated the time required of school personnel to respond to formal complaints (*Federal Register*, page 61488). More importantly, we are concerned that any savings to schools will stem not from efficiencies, but from the Department's extreme winnowing of schools' Title IX responsibilities, and measures that discourage reporting.

## IV. Responses to Directed Questions.

*Directed Question Number One: Applicability of rule to elementary and secondary students.* As a university system, our comments focus primarily on how the proposed rules will affect IHEs. However, we note that many provisions, such as the cross-examination requirements, may be particularly problematic in the elementary and secondary context. UC encourages the Department to better understand the investigative and adjudicative processes and resources at the elementary and secondary level so that it can tailor the rules where appropriate.

*Directed Question Number Two: Applicability of provisions based on type of recipient or age of parties.* It is appropriate for the rules to distinguish between IHEs and elementary and secondary schools, as proposed, rather than between adults and minors. The latter approach would require schools to implement two different processes, which would be both burdensome and confusing—particularly where one party was an adult, and the other a minor.

*Directed Question Number Three: Applicability of the rule to employees.* Proposed Section 106.8(c) states that schools will use grievance procedures to resolve "student and employee complaints." It is unclear whether "employee complaints" includes complaints made by employees, against employees, or both. At UC, our SVSH Policy covers all members of our community, and the investigation procedures are largely the same for students and employees. However, the process for deciding responsibility and any resulting discipline differs depending on whether the respondent is a student, faculty member, or non-faculty employee. Each population has different rights and interests, and the adjudication process is therefore also different. Senate faculty with tenure, for example, have the right to a hearing before a faculty committee before discipline is imposed. Non-faculty employees, after the imposition of discipline, may have the contractual right to invoke a grievance process pursuant to the applicable collective bargaining agreement or otherwise seek redress under the applicable complaint resolution process. Further, the live hearing contemplated in the rules does not align well with the existing rights of faculty and non-faculty employees, who generally have a right to a hearing or other fact-finding process after discipline is imposed. The requirement to provide a live hearing prior to the imposition of any discipline would be burdensome, and likely result in duplicative processes and conflicting outcomes. California schools have well-developed bodies of state and federal law related to employment-based sexual harassment. For these reasons, we think these rules should not apply to employees, and that it is appropriate for schools to have separate adjudication processes for employee and student respondents.

*Directed Question Number Four: Training.* UC believes the requirements included in the proposed rule are adequate to ensure recipients provide necessary training to the appropriate individuals.

*Directed Question Number Five: Individuals with disabilities.* UC appreciates this question, and the Department's acknowledgement of the rights of individuals with disabilities in numerous places in the proposed rules. Please see our suggestion regarding Section 106.44(e)(5), above. Similarly, UC suggests the rules acknowledge that disability-related

accommodations may be necessary for any part of the proceeding that requires use of technology (such as the evidence review (§106.45(b)(3)(viii)) and testimony provided via video (§106.45(b)(3)(vii)) and consider how allowing parties to review even evidence the investigator deems irrelevant (Section 106.45(b)(3)(viii)) could result in disclosure of private disability-related information.

*Directed Question Number Six: Standard of evidence.* This comment letter addresses this question in our discussion of Section 106.45(b)(4), above.

*Directed Question Number Seven: Potential clarification regarding "directly related to the allegations language."* This comment letter addresses this question in our discussion of Section 106.45(b)(3)(viii), above.

*Directed Question Number Eight: Appropriate time period for record retention.* UC does not have any comment on this question.

Schools look to the Department to provide leadership on critical issues affecting our nation's students. Yet these proposals suggest the Department has deprioritized combatting sexual harassment. If realized, they will reverse decades of well-established, hard-won progress toward equity in our nation's schools, unravel much-needed protections for vulnerable members of our educational communities, and undermine the very procedures designed to ensure fairness and justice. The University of California urges the Department to carefully reconsider these proposals in the ways recommended in this letter.

If you would like to discuss the issues raised in this letter, or for any other reason, please do not hesitate to contact the co-author of this letter, Interim Systemwide Title IX Coordinator Suzanne Taylor. She can be reached at Suzanne.Taylor@ucop.edu or (510) 987-9161. Thank you for your consideration.

Sincerely,

Janet Napolitano
President

Suzanne Taylor
Interim UC Systemwide Title IX Coordinator

cc: UC Executive Vice President and Chief Operating Officer Rachael Nava
UC Federal Government Relations Associate Vice President Chris Harrington
UC Chancellors
UC Title IX Officers
U.S. Secretary of Education Betsy DeVos
U.S. Assistant Secretary for Civil Rights Kenneth Marcus
U.S. Assistant Secretary for Strategic Operations and Outreach Candice Jackson