UNIVERSITY OF CALIFORNIA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

SYSTEMWIDE TITLE IX OFFICE

OFFICE OF THE PRESIDENT
1111 Franklin Street,
Oakland, California 94607-5200

November 15, 2018

Ms. Sharon Mar
Senior Advisor to the Deputy Administrator
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Ms. Mar:

Thank you for meeting with representatives of the University of California on October 31, 2018, to discuss Title IX regulations that the Department of Education (ED) is expected to release for public comment. As noted during our meeting, I reviewed a version of the draft regulations that ED shared with the Department of Health and Human Services (HHS) via a letter dated September 5, 2018. Combatting sexual harassment, including sexual violence, is of utmost importance to the University of California (UC). Our country cannot achieve educational equity unless schools nationwide continue to treat this effort as critical. Because of UC's commitment to this issue, I expressed to you the following serious concerns about the September 5 draft regulations.

- Definition of Sexual Harassment. UC supports ED's inclusion of sexual assault, quid pro quo, and hostile environment in its definition of sexual harassment. However, the draft regulations too narrowly define hostile environment sexual harassment as unwelcome conduct that is "so severe, pervasive, **and** objectively offensive that it **denies a person access** to the recipient's education program or activity" (emphasis added). This is much more limited than the definition ED has used for over two decades[1] and, if adopted, will leave serious misconduct unaddressed – especially at schools that adopt the higher clear and convincing evidentiary standard, as ED recently permitted.[2]

  There are two significant issues with the proposed definition. First, single incidents of severe sexual misconduct will not constitute sexual harassment unless they meet ED's definition of sexual assault[3] because lone incidents cannot be "pervasive." For example, according to the proposed definitions, a respondent forcing a complainant to touch the respondent's genitals on one occasion would constitute neither sexual harassment nor sexual assault, despite the gravity of the behavior. An instructor verbally abusing a student in class with sexually-charged language and slurs would similarly not meet the definition, despite the severity, power differential, and humiliating circumstances. Second, the requirement that the misconduct "den[y] a

[1] DOE'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). DOE's 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."

[2] DOE's September 2017 Q&A on Campus Sexual Misconduct (available here) reads, "findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard."

[3] The draft rules define "sexual assault" by reference to regulations implementing the Clery Act, which define it as rape, fondling, incest or statutory rape. They define fondling as "the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim[.]"

person access" suggests that complainants must drop out of the relevant program or activity, or leave school altogether, to meet the "hostile environment" threshold. This ignores the more common scenario in which complainants continue in the relevant program or activity (e.g., a sport or class) despite the harassment, but only with significant struggle, or in a diminished fashion.

ED's current definition of hostile environment sexual harassment recognizes that there is a spectrum of misconduct and requires that schools stop and remedy only conduct at the more serious end of that spectrum; this definition has worked well for both schools and OCR through several administrations. It is unclear whether ED would require schools to adopt the new definition, or use it only for enforcement purposes. While the second option is preferable to the first, both would unfortunately leave many individuals who experience sexual harassment without recourse.

- Cross-Examination. The draft rules state that postsecondary institutions must "permit cross-examination of any party or witness if the grievance procedures provide for a hearing; or, if the grievance procedures do not provide for a hearing, permit each party to provide written questions for the investigator to ask…in a manner that effectively substitutes for cross-examination." UC agrees that it important that parties have the opportunity to pose questions to each other and to witnesses. However, it is unnecessarily intimidating for individuals who have experienced sexual harassment, particularly sexual violence, to be questioned by their harasser, or in an aggressive fashion. Direct cross-examination by parties in hearings and adversarial investigative interviews, if this is ED's intent, will discourage complainants from coming forward and will—much like the proposed definition of sexual harassment—leave serious conduct unaddressed. Whether schools use a hearing or investigator model, there are ways to ensure that the process is fair and due process is met without further distressing parties and witnesses.

- Demand for Evidence. ED's proposed rules state that schools must, "at the request of the complainant or respondent, promptly disclose to the requesting party any evidence obtained as part of the investigation, including evidence upon which the recipient does not intend to rely[.]" Requiring schools during a pending investigation to disclose evidence to parties upon request will disrupt investigations, create delays, and open the door to both witness tampering and retaliation. This will further discourage complaints. There are other methods of achieving due process and fairness without compromising the integrity of the investigation, such as allowing the parties to review relevant evidence and suggest additional investigation only near the conclusion of the process rather than at any time.

- Standards for Schools' Response. Under the proposed rules, schools need not 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 need only respond in a manner that is not "deliberately indifferent," holding them to an incredibly low standard.[4] 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. We understand the Office for Civil Rights (OCR) would only investigate complaints alleging a school's failure to meet these very reduced standards, essentially eliminating enforcement of Title IX. We are concerned that ED will make corresponding changes in other areas of OCR's jurisdiction, similarly reducing protections for students based on race and disability, even as would-be harassers are emboldened by current events, and incidents are increasing.

[4] Deliberate indifference is defined in the proposed rules as "clearly unreasonable in light of the known circumstances."

- Proposed Definition of Sex. The *New York Times* recently reported[5] on a memo in which HHS advocated for government agencies, including ED, to adopt a very narrow definition of sex. As reported, sex would be limited to male and female, immutable, and determined by genitalia at birth. We reject this definition, which seeks to erase the identity of transgender and non-binary individuals, contradicts both medical science and legal precedent, and directly conflicts with UC's values. We urge ED to do the same—anything less will encourage further discrimination against these already-vulnerable members of our community, facilitate a broader movement to unwind their recognition and protection, and create an outcast class.

Schools look to ED to provide leadership on critical issues affecting our nation's students. Yet these proposals suggest that ED has deprioritized combatting sexual harassment and other forms of discrimination. 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. UC will provide more extensive written input on the rules after they are released for public comment. In the interim, we urge the ED to reconsider these proposals. Do not hesitate to contact me to discuss the issues raised in this letter, or for any other reason. Thank you for your consideration.

Kind Regards,

Suzanne Taylor
Interim UC Systemwide Title IX Coordinator

cc: University of California President Janet Napolitano
Executive Vice President and Chief Operating Officer Nava
UC Federal Government Relations Associate Vice President Chris Harrington
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

[5] *'Transgender' Could be Defined Out of Existence Under Trump Administration*, New York Times (October 23, 2018) (available here).