UNIVERSITY OF CALIFORNIA

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Via Federal eRulemaking Portal (www.regulations.gov)

Mr. Alejandro Reyes
U.S. Department of Education
400 Maryland Ave., SW
PCP-6125
Washington, DC 20202

Re: Docket ID ED-2021-OCR-0166, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Mr. Reyes:

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 July 12, 2022. 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, six academic health centers, and three national laboratories, and has more than 280,000 students, 227,000 faculty and staff, and 2 million alumni living and working around the world.

Discrimination on the basis of sex, including sexual orientation and gender identity, 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 developing policies and support services that affirm and acknowledge the fundamental dignity of all community members. Moreover, UC's complaint resolution processes are designed to be fair, trauma-informed, and result in just outcomes.

The University of California shares the Department's commitment to providing fairness for all parties, supporting complainants when they come forward with a claim of sex discrimination, and protecting freedom of speech and academic freedom. The proposed regulations would restore vital protections against all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity. UC also welcomes the requirement for schools to have clear grievance procedures for all forms of sex discrimination/misconduct, including an obligation to conduct a reliable and impartial investigation and explicit prohibitions against retaliation, a critical protection for the most vulnerable in our communities.

UC's comments in support of the proposed regulations are discussed in further detail in Section One, below. Additional feedback and requests for clarification or revision are set forth in Section Two. Finally, UC's responses to the Department's directed questions are in Section Three.

I. Comments in support of the proposed regulations.

Definitions: Section 106.2.

- *Sex-based harassment definition — §106.2.* UC supports the revised definition of sex-based harassment, which clarifies that Title IX's prohibition on sex-based discrimination includes protections against discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

  This definition provides welcome clarity that Title IX's prohibition on discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy, sexual orientation, and gender identity. UC welcomes the requirement for schools to have clear grievance procedures for all forms of sex discrimination, including an obligation to conduct a reliable and impartial investigation of all sex discrimination complaints and not only formal complaints of sexual harassment. The current regulations require schools to respond to a sexual harassment report only when it clears 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. The current regulation leaves serious sexual misconduct unaddressed by Title IX. Presently when schools are obligated to respond, they need only do so in a manner not "deliberately indifferent"—an unacceptably low standard in this context. For this reason, UC has adopted a broader definition of sexual harassment, addressing in separate procedures the conduct not covered by the current regulations. UC therefore supports this revised definition that returns to a broader definition that has long been recognized in prior Department guidance

Education programs or activities: Section 106.31.

- *General — § 106.31(a)(2).* UC appreciates the Department's recognition that barriers to participating in school consistent with students' gender identity can cause a range of serious academic, social, psychological, and physical harms. These proposed provisions closely align with supportive services and programs already in place for UC students, faculty, and staff, as well as UC's Gender Recognition and Lived Name policy ensuring that all individuals are identified by their accurate gender identity and lived or preferred name on university-issued documents and in UC's information systems. The proposed amendments to current regulations will help schools ensure that all persons have equal access to educational opportunities in accordance with Title IX's nondiscrimination mandate.

Action by a recipient to operate its education program or activity free from sex discrimination: Section 106.44.

- *Notification requirements — §106.44(c).* UC supports the Department's effort to clarify obligations regarding when and how employees, that are not confidential employees, must notify their institution's Title IX Coordinator when they have information concerning conduct that may constitute sex discrimination under Title IX. At UC, responsible 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 bolsters efforts to detect sex-based discrimination and ensure accountability.

- *Supportive measures — §106.44(g)(2).* Supportive measures to protect the parties or the University community, restore or preserve access to University programs and activities, or deter prohibited conduct are critical to UC's efforts to address sexual harassment. UC appreciates increased flexibility with respect to offering supportive measures and supports the consideration of additional consultation for students with disabilities.

- *Discretion to offer informal resolution in some circumstances — §106.44 (k).* UC supports the proposed regulations regarding informal resolution. UC currently implements an informal resolution process on our campuses and would appreciate increased flexibility to determine when informal resolution is appropriate. Providing institutions greater discretion to use informal resolution will allow UC to tailor our response to the specific needs of the parties involved in the complaint.

Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination: Section 106.45.

- *Basic requirements for grievance procedures — §106.45(b)(7)(iii).* UC supports designating evidence that relates to the complainant's sexual interests or prior sexual conduct as impermissible unless offered to "prove that someone other than the respondent committed the alleged conduct or is offered to prove consent." UC appreciates the effort to protect parties from unwarranted invasions of privacy, character attacks, and sexual stereotyping, and supports the Department's efforts to carefully and narrowly define when and how such evidence may be considered.

Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions: Section 106.46.

- *Procedures for the decisionmaker to evaluate questions and limitations on questions —§106.46(f)(3).* UC welcomes continued discretion to limit the participation of advisors in proceedings involving students and the ability to establish rules of decorum.

- *Live hearing procedures — §106.46(g).* UC welcomes the removal of the mandate for a live hearing with cross examination for sex-based harassment proceedings. This requirement has created a chilling effect on the willingness of complainants and witnesses to participate in campus proceedings, increased

the potential for traumatization for those participating in the process, and exacerbated serious equity concerns that arise when one party is able to afford legal counsel while the other party may lack the financial means to do the same. UC supports the Department's recognition that institutions are in the best position to determine how to fashion fair and human adjudication processes that are consistent with state and federal law.

II. Concerns, feedback, and recommendations.

Parental, family, or marital status; pregnancy or related conditions: Section 106.40.

UC appreciates the Department affirming that discrimination relating to a student's parental, family, or marital status that is based on sex, and specifically discrimination based on student pregnancy or related conditions, violates Title IX. Additional clarification on which aspects of those characteristics are sex-based would be helpful, especially since parental and family status are not currently protected under state and federal law. For example, UC is unclear whether the proposed regulation would create an obligation to adjust class scheduling that accommodates a parent-student's childcare need. The potential expansion of considerations that could be required under these new criteria is significant, and clarification would be helpful.

UC is committed to ensuring that students and employees with pregnancy or related conditions can participate equitably in its educational programs and employment opportunities, respectively, and to providing and publicizing support and resources available to that end. UC has concerns, however, with several aspects of the proposed regulations relating to students and pregnancy and related conditions:

- *Pregnancy or related conditions; Requirement for recipient to provide information — §106.40(b)(2)*. UC is concerned that requiring employees who are "informed of a student's pregnancy or related conditions by the student" to provide the student with information about services provided through the Title IX office and how to contact the office could encourage gender stereotyping and inappropriate speculation based on physical appearance and infringe on student privacy. UC encourages the Department to reconsider the inclusion of this provision. An alternative to employees providing pregnant students with resource information would be to bolster existing efforts to enhance student awareness of university supports and assistance available to students experiencing pregnancy or related conditions (e.g. through easy-to-access websites, notices to incoming students, etc.).

- *Pregnancy or related conditions; Specific actions to prevent discrimination and ensure equal access — §106.40 (b)(3).* While UC is committed to continuing to provide the supports and assistance listed in 106.40(b)(3)(i)(A) to (F), the proposed requirement to affirmatively and individually notify each student whom Title IX coordinators learn has such a condition would be an administrative burden without proportionate benefit, given the existence of other effective means of communicating these obligations and resources. Further, regarding 106.40(b)(3)(ii), UC suggests that Title IX Coordinators should be responsible for ensuring, but not necessarily directly providing such accommodations, given the important role and expertise of other offices on campus (e.g., student disability).

- *Pregnancy or related conditions; Reasonable modifications for students because of pregnancy or related conditions — §106.40 (b)(4).* As noted above, UC suggests that while Title IX Coordinators can ensure such modifications, institutions should be given discretion to determine which of their offices is best positioned to implement and coordinate. UC is also concerned with the proposed requirement for Title IX Offices to document such accommodations, both in terms of student privacy and the potential added sensitivity of such information, which could include accommodations for the termination of pregnancies at a time when the legal risks of getting, or helping someone get, an abortion are fraught. UC acknowledges that these proposed regulations were published prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* and urge the department to reconsider this requirement.

<u>Action by a recipient to operate its education program or activity free from sex discrimination: Section 106.44.</u>

- *Title IX Coordinator requirements — §106.44 (f) and (g).* The proposed regulations state that the Title IX Coordinator must "offer" and coordinate supportive services. UC suggests that the proposed regulations be modified to require the Title IX Coordinator to oversee and coordinate, but not necessarily offer, supportive measures. Institutions often have other offices on campus that are integral to designing, offering, and implementing supportive measures, including confidential advocates, student conduct and academic affairs offices that work in support of students, and human resources and other university staff that work in support of employees.

- *Supportive measures — §106.44(g)(2).* UC appreciates that Section 106.2 defines supportive measures as measures that restore or preserve a party's access to institutional programs and activities, including measures that may burden the respondent if, among other things, they are "designed to protect the safety of the complainant or the recipient's educational environment." This proposed definition would acknowledge the important role of supportive measures in preserving the access and safety of an institution's community more generally. In contrast, however, Section 106.44(g)(2) states that supportive measures that burden a respondent can be "no more restrictive … than is necessary to restore or preserve the complainant's access to the recipient's education program or activity." UC requests that this section be amended to include reference to preserving access to the recipient's educational environment more broadly, consistent with the definition in Section 106.2.

  UC also recommends that supportive measures that burden a respondent be available, as appropriate based on the specific circumstances, in not only grievance procedures, but also informal resolution processes, and matters where neither process is proceeding. This recommendation is consistent with the proposed definition of supportive measures. Subsection (i) of the definition does not require either a grievance procedure or informal resolution to be pending for supportive measures to be available, and subsection (ii) refers to supportive measures during informal resolution. The complexity, severity of impact, and related potential need for supportive measures, including ones that burden the respondent, are no less in cases addressed through informal resolution than in cases addressed through grievance procedures under

Sections 106.45 and 106.46. For example, a change in respondent's housing may be equally appropriate in a case involving domestic violence, whether the parties are in a grievance process or informal resolution. Limiting the use of supportive measures in this way would arbitrarily constrain institutions' ability to preserve or restore the access of parties and the University community to its programs or activities, regardless of which procedures a party may choose to resolve their matter.

- *Supportive measures — §106.44(g)(4).* UC recognizes the need for, and value of, allowing both parties the opportunity to seek modification or reversal of an institution's decisions relating to supportive measures. UC currently engages in an interactive and ongoing process with both parties to determine what supportive measures to provide, as well as any modifications or reversals that may become appropriate, and has found this to be an effective approach.

  By contrast, the proposed regulations would establish a formal appeal process and require that someone who was not involved in the initial decision-making process determine the outcome of the appeal. Such processes will result in delays and hamper an institution's ability to nimbly respond to the parties' needs.

  The proposed regulations would also require that, if the supportive measure burdens the respondent, the respondent would be allowed to dispute the determination before the supportive measure can take effect. Delaying in implementing supportive measures that are reasonably necessary to ensure safety creates an unacceptable risk. UC believes that there are alternative ways to achieve the objective of providing respondents with a timely opportunity to make their concerns known. UC's current procedures for interim suspension of a student respondent from classes or campus areas not only require that restrictions must be to the minimum extent necessary, but also require a prompt hearing and review by the Chancellor within 24 hours of being imposed.

  In addition, UC suggests clarification about the degree of burden which would give a respondent the right to appeal in order to ensure administrative resources can support timely resolution of complaint processes.

- *Discretion to offer informal resolution in some circumstances — §106.44 (k)(3)(iv).* Section 106.44(k)(3)(iv). The Department should clarify that the Title IX Coordinator has discretion to initiate or resume a grievance procedure if the respondent fails to satisfy the terms of the informal resolution or the Title IX Coordinator determines that the informal resolution was unsuccessful in stopping the discriminatory conduct or preventing its recurrence. Currently, UC policy provides this discretion to Title IX Officers. The preamble to the proposed regulations acknowledges that such discretion is needed and anticipated. The following appears at page 242 of the preamble, "if a recipient learns that a party to an informal resolution agreement made a material misstatement of fact, or made fraudulent representations, that another party relied upon in reaching the agreement, then the recipient could decide to void the agreement and resume the grievance procedure or pursue other actions against that defrauding party." Thus, in drafting the regulations, the Department has recognized there are circumstances that would require a

recipient to initiate or resume a grievance procedure even if the parties previously agreed to a resolution.

- *Discretion to offer informal resolution in some circumstances — §106.44(k)(3)(vii)*. The proposed regulations language restricting schools from using information obtained during informal resolution processes in a subsequent formal grievance process is inadvisable for several reasons. First, the Preamble acknowledges that information obtained through informal resolution could be shared with law enforcement. Specifically, the Preamble states, "the recipient could inform the parties that if someone makes an admission of criminal activity, that information could be forwarded to relevant law enforcement authorities." Such an admission would be similarly relevant for purposes of a Title IX investigation that could occur if informal resolution is unsuccessful. Second, those who facilitate the information resolution process are often housed in the same office as those who conduct formal investigations under Title IX. Maintaining an information wall between colleagues of the same office will be very difficult, as many share the same system to file and maintain records and collaborate on cases. Third, assuming a Title IX professional oversees the informal resolution process, UC believes that if the Title IX office has knowledge of an admission or other relevant information, the information should be shared with the investigator so that the University can be appropriately and responsibly investigate the complaint. Fourth, many schools have other means of completing confidential resolutions outside the Title IX process. UC's Ombuds Office provides a confidential informal resolution process that parties can utilize should they require complete confidentiality.

  UC prefers to continue to share information learned through a failed informal resolution process with investigators and respectfully requests an amendment to the proposed regulation to reflect this approach. In the alternative, UC requests language that does not restrict an investigator from independently obtaining information that was disclosed in a failed informal resolution.

<u>Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination: Section 106.45.</u>

- *Basic requirements for grievance procedures — §106.45(b)(4).* UC agrees that having set timeframes for investigation and adjudication is important to provide transparency and accountability. UC has established timeframes for the investigation, hearing, sanctioning, and appeal portions of the process. However, UC believes that establishing a timeframe for the evaluation process will likely cause significant distress for complainants and would have little or no impact on respondents, who are generally unaware of the allegations at this stage. The evaluation or initial assessment process typically involves considerable and iterative communication with the complainant. It is not unusual for a complainant to schedule an intake meeting only to reschedule the meeting multiple times. Complainants may delay prompt completion of the evaluation process for a number of legitimate reasons – they want to focus on preparing for exams, they need time to consult with confidential victim advocates or other confidential resources, they want to explore engaging the criminal process instead of, or before beginning, a Title IX process, and/or they are debating whether to continue engaging the Title IX process. Imposing a timeframe for the evaluation process will add stress to an already stressful process for complainants. Title IX offices would need to continually remind

complainants about deadlines for the evaluation process and will be forced to dismiss complaints when complainants do not meet the timeline set for evaluation. This would send the message that schools are not committed to reviewing concerns about sex discrimination and would ultimately chill complaints.

- *Basic requirements for grievance procedures — §106.45(b)(7)(ii).* While UC generally supports this provision and the underlying intent, UC believes that prohibiting universities from "access[ing], consider[ing], disclos[ing], otherwise us[ing]" a party's medical, psychological, or other treatment records during Title IX investigations and adjudications without the party's voluntary, written consent will unduly hinder an institution's ability to respond to allegations against university-employed physicians or other patient care providers working in Academic Medical Centers ("AMCs"). When a university health care provider is alleged to have engaged in sex discrimination, treatment records often prove essential to making a determination as to whether or not a policy violation occurred. Treatment records speak directly to the medical necessity of the treatment given, a critical indicator of the appropriateness of the health care provider's conduct. If a patient-complainant is unable to consent to the use of their treatment records in the Title IX grievance process, or the patient-complainant declines to participate in the process entirely, Title IX will likely be forced to close the matter without making a finding, which could adversely impact the institution's ability carry out its mandate to effectively respond to allegations of sex discrimination.

  Unlike a typical university campus, AMCs are subject to the Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations, a comprehensive privacy framework that is geared specifically to the patient care setting. This setting differs substantially from others and requires a different approach to protect patient safety. Section 106.45(b)(7)(ii) would overly complicate and impede University efforts to respond swiftly and adequately to allegations in the patient care context, and, if implemented, will subject a single record to two different – and inconsistent – standards. Therefore, we strongly urge the Department to revise this provision to state that Section 106.45(b)(7)(ii) would not apply in instances where HIPAA regulates the treatment record.

- *Dismissal of a complaint — §106.45(d)(1)*. Read in conjunction with Section 106.2, this section suggests a school would be required to proceed with the grievance process or informal resolution unless: the complainant did not request a process; complainant is neither an employee nor was participating or attempting to participate in a program or activity when the discrimination occurred; respondent is neither an employee nor participating in a program or activity when the discrimination occurred; respondent can't be identified; complainant withdraws allegations; or the conduct would not be sex discrimination under Title IX. This list suggests that a school must proceed even where it would otherwise determine that there is not a sufficient nexus between the conduct and the University. For example, when both parties are now affiliates but were not when the conduct occurred. UC's current Sexual Violence and Sexual Harassment Policy requires there be sufficient nexus between the conduct and the University's educational program or activity to carry out a resolution process. UC recommends that Section of 106.45(d)(1) indicate that the list of specific grounds for dismissal are not exhaustive, and

there may be other instances where dismissal is appropriate. Alternatively, dismissal for insufficient nexus could be added as a specific ground for dismissal.

- *Dismissal of a complaint — §106.45(d)(3)*. Institutions would be required to notify all parties that a dismissal of a complaint may be appealed, however, Section 106.45(d)(2) would require that a respondent be notified of the dismissal only in cases where the respondent has been notified of the allegations. As written, the Department would require that institutions notify respondents of the right to appeal a dismissed complaint, even in cases where the respondent did not know there were allegations made against them. It seems most appropriate to only notify a respondent of their right to appeal in cases in which they were notified of the allegations. UC requests clarification of this language.

  Additionally, Section 106.46(d)(1) provides "[W]hen dismissing a complaint alleging sex-based harassment and involving a student complainant or a student respondent, a postsecondary institution must: (1) Provide the parties, simultaneously, with written notice of the dismissal and the basis for the dismissal, if dismissing a complaint under any of the bases in § 106.45(d)(1)." This provision also conflicts with Section 106.45(d)(2), as described above. UC similarly requests language clarifying that notice of the dismissal is only required in cases where the respondent has been informed of the allegations.

  Determination of whether sex discrimination occurred — §106.45(h). The proposed regulations require that the Title IX Officer provide and implement any appropriate remedies. While it is important for the Title IX Officer to have responsibility for ensuring any necessary remedies are provided and implemented, other campus departments are often better equipped to make the necessary accommodations. For example, if the remedy is related to a party's academic program, the Title IX Office will need to rely on the academic program to provide and implement the remedy. If the remedy is related to athletic participation, the Title IX office will need to rely on the athletic program to provide and implement the remedy. The role of the Title IX Officer in these examples is to ensure that the appropriate remedies are provided and implemented, but the Title IX Officer does not have a role in the actual provision and implementation of the remedy. UC asks that this language be clarified accordingly.

<u>Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions: Section 106.46</u>

In cases where the complainant is a student, Section 106.46 could be interpreted to require institutions to use the same procedure for certain cases involving non-student respondents. UC urges reconsideration of this principle. While UC's Sexual Violence and Sexual Harassment policy covers all members of the UC community and investigation procedure are largely the same for students and employees, the process for determining responsibility and discipline depends on whether the respondent is a student, staff, faculty member, or non-faculty academic appointee. This is because each population has different rights and interests and is covered by different institutional policies. Some members of the UC community are also union-represented and covered by a collective bargaining agreement.

In California, state caselaw requires institutions to provide a live hearing to student respondents in certain sexual harassment cases and UC will continue to comply with this requirement for student respondents even if the Title IX regulations no longer require a live hearing. However, a live hearing does not align well with the existing rights of staff, faculty, and non-faculty academic appointees, who generally already have a right to a hearing or other fact-finding process. Senate faculty with tenure, for example, have the right to a hearing before a faculty committee before discipline is imposed. Staff employees 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 after discipline is imposed. If the University were required to continue to provide a live hearing, prior to making a determination of responsibility in all cases, this would add an additional layer of process for such cases involving student complainants, further extending the time for final case resolution. This is the UC's practice consistent with current regulations and makes recommendation against continuing this requirement for the reasons stated above.

- *Evaluating allegations and assessing credibility; Process for evaluation allegations and assessing credibility — §106.46(f)(1).* As currently drafted, Section 106.46(f)(1)(i) appears to allow a decisionmaker to ask questions during a live hearing, while 106.46(f)(1)(ii) implies that if an institution chooses to have a live hearing, the institution is required to allow questioning by the parties' advisors. Allowing parties to cross-examine each other and witnesses through their advisors is an intimidating prospect for both parties and witnesses. This may deter potential complainants. UC and other institutions have designed alternatives to direct cross-examination that are effective and help mitigate harm to the parties. For example, UC's current policy, cited in OCR 2021 Q&A, Page 46, provides that each party will prepare their questions for the other party and witnesses, including any follow up questions, and provide them to their advisor. The advisor is only permitted to ask the questions as the party has provided them and may not develop or ask their own questions. We strongly urge the Department to permit this approach, which better protects the parties' rights and their wellbeing.

- *Evaluating allegations and assessing credibility; Refusal to respond to questions related to credibility — §106.46(f)(4).* The Department proposes that, "if a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position." Witnesses and parties may be unavailable or otherwise not respond to questions related to their credibility for a variety of reasons unrelated to the reliability of their statements. Complainants often decline to participate in processes initiated against their wishes, (particularly if the process includes live cross-examination by the respondent's advisor), while respondents may decline due to a parallel criminal proceeding. Section 106.46(f)(4) is overly broad and would exclude, for example, consideration of statements made by a complainant during the investigation if complainant does not participate in the hearing, even when credibility is not at issue. If the complainant's credibility is not important to determining whether a policy violation occurred, their nonparticipation may not be an obstacle to making that determination. For example: if the key issue is complainant's incapacitation, and there are other witnesses who testify at the hearing about their direct observations of complainant's demeanor, level of intoxication, and functioning at the relevant time (as compared to, for example the complainant's statements about their

level of intoxication), that evidence may be weighed along with respondent's account even if complainant does not testify. By way of further example, if respondent admits the key allegations of the complaint, complainant's credibility is not important. Similarly, respondent's own description of their conduct could render the credibility of complainant and other witnesses not crucial. Decisionmakers should be empowered to assign appropriate weight to statements not subject to cross-examination and not be required to entirely disregard certain information.

- *Appeals — §106.46(i)(1)(iii).* The proposed regulations would require that institutions allow respondents in proceedings covered by Section 106.46 to appeal on certain grounds, including that "the Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome of the matter." UC agrees that bias or conflict of interest on the part of the decisionmaker should be a ground for appeal and currently allows for this as a type of procedural error. Only the bias or conflict of interest of a decisionmaker could have an impact on the outcome. UC recommends limiting the appeal ground to the decisionmaker and eliminating reference to the Title IX Coordinator and investigator. Bias or conflict of interest of other people stewarding the resolution process is also of concern, but if it resulted in procedural irregularity, that would be the more direct ground for appeal, and if it did not, it could be addressed more appropriately through processes other than an appeal.

III. Responses to Directed Questions.

1. *Interaction with Family Educational Rights and Privacy Act (FERPA) (proposed §106.6(e))*

   UC does not have any comment on this question.

2. *Recipient's obligation to provide an educational environment free from sex discrimination (proposed §§106.44-106.46)*

   Please refer to comments above.

3. *Single investigator (proposed §106.45(b)(2))*

   Please refer to comments above.

4. *Standard of proof (proposed § 106.45(h)(1))*

   Pursuant to both UC policy and California state law, UC's Title IX Officers apply the preponderance of the evidence standard to determine whether a policy violation occurred. The preponderance standard is consistent with the fundamental principle of equity that underpins Title IX as it recognizes that 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 evaluating allegations of discrimination under all the laws it enforces. For these reasons, UC believes preponderance is the correct standard to apply to sex discrimination complaints. Should the Department decide to maintain section 106.45(h)(1) in its current form, UC intends to continue using

the preponderance standard for allegations of sex discrimination. Moreover, we feel strongly that schools should apply the same evidentiary standard in all sex discrimination complaints, regardless of the parties' affiliation with the University (i.e., student, faculty, or staff).

The Department's proposed regulations seek to advance Title IX's goal of ensuring that no person experiences sex discrimination in education, that all students receive appropriate support as needed to access equal educational opportunities, and that school procedures for investigating and resolving complaints of sex discrimination, including sex-based harassment and sexual violence, are fair to all involved. The University of California appreciates the Department's leadership in including explicit prohibitions against retaliation, a critical protection for the most vulnerable; providing express protection for students and employees who are pregnant or have pregnancy-related conditions; including protections for LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics; and calling attention to our responsibility to ensure meaningful access to and participation in the Title IX process for people with disabilities.

If you would like to discuss any of the issues raised by the University of California, please contact me. I can be reached at Isabel.Dees@ucop.edu or (510) 987-9545.

Sincerely,

Michael V. Drake, MD
President

Isabel Alvarado Dees
Interim Systemwide Title IX Director

cc:
U.S. Secretary of Education, Miguel Cardona
U.S. Assistant Secretary for Civil Rights, Catherine Lhamon
U.S. Assistant Secretary for Strategic Operations and Outreach, Suzanne Goldberg
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