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Sent: Fri, 11 Jun 2021 19:58:16 +0000
To: T9PublicHearing
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Subject: Written Comment: Title IX Public Hearing – California State University
Attachments: Written Comment Title IX Public Hearing – California State University - 6.11.2021.pdf

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The California State University (CSU) system appreciates the opportunity to submit the attached written comments in connection with the June 2021 Virtual Public Hearing held by the U.S. Department of Education's Office for Civil Rights.

The comments are submitted by Ms. Evelyn Nazario, Vice Chancellor for Human Resources and Dr. Fred E. Wood, Interim Executive Vice Chancellor for Academic and Student Affairs.

Thank you.

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MEMORANDUM

DATE: June 11, 2021

TO: US Department of Education
Office of Civil Rights

FROM: Evelyn Nazario, Vice Chancellor for Human Resources (b)(6)
Fred E. Wood, Ph.D., Executive Vice Chancellor for Academic and Student Affairs (b)(6)

SUBJECT: Public Comments on Title IX

The California State University (CSU) system appreciates the opportunity to submit comments in connection with the June 2021 Virtual Public Hearing held by the U.S. Department of Education's Office for Civil Rights. The comments shared today address issues the Department could consider in revising the Title IX regulations (the "Current Regulations") so as to ensure that all school environments are free from sexual harassment, including sexual violence, and that students who have experienced discrimination based on sexual orientation and gender identity have their rights fully met. We also look forward to the opportunity to comment on the proposed amendments to the Current Regulations during the upcoming rulemaking process.

About the CSU

The CSU is a public postsecondary institution that educates more than 480,000 students and employs nearly 56,000 employees at 23 campuses across California. The

CSU Campuses
Bakersfield
Channel Islands
Chico
Dominguez Hills
East Bay

Fresno
Fullerton
Humboldt
Long Beach
Los Angeles
Maritime Academy

Monterey Bay
Northridge
Pomona
Sacramento
San Bernardino
San Diego

San Francisco
San José
San Luis Obispo
San Marcos
Sonoma
Stanislaus

CSU is created by state statute, funded in part by state budget allocations, and is part of the State of California's public higher education system.

The CSU's mission is to advance and extend knowledge, learning, and culture, especially throughout California; to provide opportunities for individuals to develop intellectually, personally, and professionally; to prepare significant numbers of educated, responsible people to contribute to California's schools, economy, culture, and future; to encourage and provide access to an excellent education to all who are prepared for and wish to participate in collegiate study; to offer undergraduate and graduate instruction leading to bachelor's and higher degrees in the liberal arts and sciences, the applied fields, and the professions, including the doctoral degree when authorized; to prepare students for international, multi-cultural society; and to provide public services that enrich the university and its communities. (See <https://www2.calstate.edu/csu-system/about-the-csu/Pages/mission.aspx>.) Consistent with this mission, and with longstanding federal and state law, CSU policy prohibits discrimination against students and employees on the basis of sex and other protected statuses.

In 2015, the CSU launched Graduation Initiative 2025, its ambitious plan to increase graduation rates, eliminate equity gaps in degree completion and meet California's workforce needs. Through this initiative, the CSU will ensure that all students have the opportunity to graduate in a timely manner according to their personal goals, positively impacting their future while producing the graduates needed to power California and the nation. Since its launch in 2016, the initiative has already seen success in bringing completion rates to all-time highs in all categories and narrowing equity gaps between underserved students and their peers. In 2019-20, the CSU graduated 1,525 more students than the previous year. More information about Graduation Initiative 2025 can be found at <https://www2.calstate.edu/csu-system/why-the-csu-matters/graduation-initiative-2025/Pages/default.aspx>.

The CSU has conferred degrees on more than 3.9 million living alumni, and one in ten employees in California is a CSU graduate.

Grievance Procedures – Hearings

While the CSU strongly supports a fair and equitable process for all parties in university disciplinary proceedings, the Current Regulations create a highly prescriptive and complex courtroom-like procedure that is inconsistent with the university's educational mission, not to mention in conflict with existing state law. Illustrative examples are noted below.

- Requirement for Live Hearings.

The requirements for live hearings under the Current Regulations are extensive, complex, and legalistic, while at the same time, lacking the framework and protections available in a traditional legal setting, such as formal rules of evidence. Student parties are frequently confused and overwhelmed by the complicated complaint and hearing process, which, not surprisingly, often leads to experiences that are utterly antithetical to a university's mission to empower our students and give them agency. Courtroom-like hearings also drain and divert universities' limited human and economic resources, at great expense to our student's educational needs. These requirements also can create conflicts with models of student development which guide student conduct administration in higher education.

- Cross Examination by an Advisor (Provided by Recipient) (34 CFR §106.45(b)(6)(i))

The Current Regulations allow universities no deference or flexibility with respect to the manner of cross-examination during the hearing; it assumes that adversarial interrogation of the type conducted in a courtroom or deposition is the best and most effective way to discover the truth – and the only method to be used in a university hearing. As such, the Current Regulations limit campuses' ability to be trauma informed during the hearing process. The Department reasoned that “requiring questions to be asked by an advisor” avoids the “potential harm from personal confrontation between the complainant and the respondent,” and therefore achieves the right “balance.” (83 Fed. Reg. at 61476.) However, there is no basis for assuming that questioning by a party's surrogate would be any less harmful or confrontational. On the contrary, if the surrogate is a lawyer or parent (or both), the questioning is likely to be more aggressive and demeaning without increasing the likelihood of discovering the truth.

The sophistication of student parties and skills of their respective advisors vary greatly which can create inequities that are amplified in a courtroom-like hearing. Individuals with financial means often choose attorneys to serve as their advisors; others resort to parents, friends, or lay-advisors who lack appropriate training or experience to serve as advisors under the Current Regulations. In the absence of: detailed evidentiary rules; advisors who are committed to a fair and respectful process that is sensitive to complexities of sexual harassment cases; and a hearing officer's power to subpoena all witnesses, the “greatest legal engine ever invented for the discovery of truth” (83 Fed. Reg. at 61476) can become, in the context of a sexual harassment, sexual misconduct, dating or domestic violence, or stalking hearing, a license to interrogate and a tool for

personal attacks and intimidation that risks demeaning and devaluing the hearing process.

In addition, the requirement that cross-examination be conducted by the party's advisor conflicts with California law, specifically Senate Bill 493, which requires of the CSU and all other California postsecondary institutions that receive state financial assistance that "Any cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor." (Cal. Ed. Code § 66281.8 (b)(4)(A)(viii)(I) (emphasis added).)

Prior to the implementation of the Current Regulations, the CSU's Title IX hearing process achieved an appropriate balance of compassion and accountability in the search for truth by tasking the hearing officer with the responsibility to question and cross-examine. In the CSU's experience, such an approach has been effective, streamlined and fair, and much more likely to elicit the truth than adversarial interrogations by students' and employees' advisor-surrogates. Based on observations at these hearings, allowing for the hearing officer to ask all questions also obviates the need for complex and legalistic rules necessary to put reasonable limits on each party's right to ask "[a]ll relevant questions and follow-up questions including those challenging credibility." In addition, these hearing officers are trained by the CSU to understand the complexities inherent when the subject matter involves sexual harassment and sexual misconduct.

The CSU process requires that questions be submitted in writing to the hearing officer prior to, and during, the hearing. The hearing officer is then provided with an opportunity to review the questions for relevancy (amongst other things) and tone as well as to confer with the parties where the question is unclear or incomplete. The purpose of this process is to lessen the adversarial nature of the proceeding and (where students are involved) to maintain an educational component to the process, to ensure greater equity where one party is able to afford an attorney and the other is not, and to ensure that the parties are not unnecessarily subjected to demeaning, irrelevant questioning. The Current Regulations preclude the CSU from using this process for grievances that fall within the Current Regulations' parameters

- "Relevance" and the Exclusion of Questions by Hearing Officer
Under the Current Regulations, a Hearing Officer has limited discretion to exclude questioning. (34 CFR §106.45(b)(6).) This rule invites interrogation tactics that are more prejudicial than they are probative, and that needlessly prolong the hearing.

The preamble to the Current Regulations expressly prohibits “excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” (85 Fed. Reg. at 30248.) In contrast, the Federal Rules of Evidence expressly *allow* courts to exclude relevant evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” (Fed. Rule of Evid. 403.) In other words, the Current Regulations are even more absolutist – and rigid – than the rules that govern civil and criminal trials.

- No Consideration of Statements from Witnesses Not Present at Hearing (34 CFR §106.45(b)(6))

Another unjustified and unreasonable requirement imposed by the Current Regulations is the unconditional exclusion of prior statements by parties not present at the hearing. The result is that even where a witness provides crucial and compelling testimony during the investigation, and it has the indicia of reliability, the Hearing Officer is categorically precluded from considering the witness’s prior statements unless they appear at the hearing. This is, again, in contrast to civil and criminal trials, where many types of out of court statements are excepted from the hearsay rule or otherwise may be considered by the fact-finder.

Scope of Title IX

The Current Regulations define sexual harassment under Title IX more narrowly than under other federal and state laws (e.g., Title VII of the Civil Rights Act of 1964; California’s Fair and Employment and Housing Act, Unruh Civil Rights Act and Education Code), as well as university policy

- Unwelcome conduct (other than sexual assault as defined in 34 CFR §668.46(a)) that is “merely” severe or pervasive does not rise to the level of a violation of Title IX, whereas the same conduct could constitute sexual harassment as defined by other laws and policies. The requirement that Title IX prohibits only conduct that is severe *and* pervasive *and* objectively offensive is extremely confusing to the CSU community that is also governed by other federal and state law and university policy that also prohibit severe “or” pervasive harassment.
- The Current Regulations also exclude from the ambit of Title IX, sexual harassment by a student or employee that does not actually take place within an

educational program or activity (i.e. an institution's operations), even if the consequences of such misconduct might "effectively den[y] a person equal access to the recipient's education program or activity." (34 CFR §106.30(a).) For example, an allegation that a student sexually assaulted another student or an employee in a private house a few blocks off campus would need to be dismissed under Title IX (34 CFR §106.45(b)(3)(i)), although such misconduct if substantiated would constitute a breach of the institution's student conduct code. While the Department has clarified that the Regulations allow for institutions to use their codes of conduct to address misconduct in these circumstances, the mandatory "dismissal" process (and the associated appeal process) required by the Current Regulations is complicated, and, in our experience to date, extremely confusing to students and employees.

- Sexual harassment as otherwise defined by Title IX that occurs outside of the United States does not constitute a violation of Title IX (even if the misconduct occurred during a school program on property owned by the school) although those same facts would constitute unlawful conduct under state law and university policy. Again, for an institution to address such conduct, the Current Regulations first require use of the "dismissal" process, causing delay and confusion from the outset of the matter.
- In addition, by narrowing the scope of the Department's purview with respect to sexual harassment, the Current Regulations exponentially increase the confusion and complexity on campus by requiring institutions to create and operate – and students to understand – *two* policies prohibiting sexual harassment that are governed by different grievance processes and different standards. The Current Regulations naively contemplate an "ideal" complainant who can perfectly articulate the nature of the conduct that occurred and understand that the geography and type of conduct will necessarily result in a separate process. There is little consideration that complainants and respondents are often unsophisticated young adults between the ages of 18 and 24, who do not have the resources to procure legal assistance or other support. Expecting students to understand how to navigate varying requirements depending on the type of conduct alleged and where it occurs is simply unreasonable and unrealistic.

Barriers to Reporting

Potential complainants uniformly express anxiety and concern about utilizing the Title IX process. Among the concerns expressed have been: the impact to the respondent; embarrassment and shame about the incident that occurred; concern about the impact

to their family; and fear about the difficulty and length of the process itself. The complexity and length of the grievance process, the fear of retaliation and retribution by peers (which ranges from social ostracization to coordinated personal attacks), as well as the knowledge that intimate details of their life will be discussed with strangers, are but a few additional reasons why students hesitate to report and fail to seek supportive measures or other resources. For male students (regardless of sexual orientation), filing a complaint brings additional stigma and potential for ridicule due to social attitudes and stereotypes about men and masculinity.

Although written complaints are encouraged at the CSU, many students prefer to report a complaint orally (at least in the first instance), because it is difficult for them to write about their experience, or because they feel that they will communicate more effectively face-to-face with a person they trust. This could include but is not limited to students for whom English is not their first language or students with a learning or other disability. The Current Regulations, however, require that complaints be made formally in writing with a request for investigation before an investigation can proceed, and be signed by the complainant, unless the complainant's identity can otherwise be discerned by the writing. (34 CFR §106.30(a).) This does not afford a culturally responsive or student-supportive approach. The Current Regulations also prohibit students from filing a complaint after they have left the university, even if the reason for the departure was the sexual assault, dating violence, stalking, or harassment that is the subject of the complaint. (Id.) Such procedural limitations serve no purpose other than to discourage or otherwise limit reporting and investigation of incidents by the CSU. These procedural limits, along with statements in the preamble create confusion when Title IX Coordinators proceed with a complaint investigation when "prohibited" by the Current Regulations, but required by other federal or state law, or university policy because, notwithstanding the Current Regulations, the university is required take prompt and equitable action to stop known harassment and assault on our campuses and prevent perpetrators for harming other students. The requirements of the Current Regulations are explicitly inconsistent with California Senate Bill 493, effective January 1, 2022, which states:

"Regardless of whether or not a complaint has been filed under the institution's grievance procedures, if the institution knows, or reasonably should know, about possible sexual harassment involving individuals subject to the institution's policies at the time, the institution shall promptly investigate to determine whether the alleged conduct more likely than not occurred, or otherwise respond if the institution determines that an investigation is not required." (Cal. Ed. Code § 66281.8 (b)(3)(C)(i).)

Requiring that cross-examination be conducted by advisors (who are often not skilled in discussing highly personal and intimate matters), that written and signed complaints be a pre-condition to initiating a grievance about a traumatic experience, and severely limiting the type of conduct considered to “rise to the level of” sexual harassment, will only serve to further discourage reporting. When students and employees fail to come forward, they lose out not only on the grievance process, but also on the supportive measures that the university would otherwise provide. It is neither reasonable nor realistic to expect college students (many of whom are not yet 20 years old) and employees to understand (and remember during a crisis) that they are entitled to supportive measures even if they choose not to make a formal grievance.

Students and employees will understandably view the Current Regulations’ courtroom-like processes and narrower definitions of prohibited conduct as creating unnecessary and painful hurdles, and this will discourage them from coming forward and getting help.

Applicability to Employees

Policies and processes relating to anti-discrimination laws as applied to CSU employees are set forth in CSU’s ten collective bargaining agreements and the programs and guidelines governing unrepresented (at will) management and other personnel. The Current Regulations substantially change the terms and conditions of employment for all employees (including those who are represented), by among other things, significantly complicating and prolonging the process by which employee complaints are investigated and employees are disciplined for misconduct in the workplace.

The Current Regulations require grievance procedures that are at odds with the notion of at-will employment and in tension with Title VII and other laws governing employees. In cases involving represented employees, the Current Regulations would also seem to unnecessarily intrude in an arm’s-length process that the parties specifically negotiated. For example, represented CSU employees (other than faculty) challenge disciplinary action in an evidentiary hearing with live witnesses before the California State Personnel Board. CSU faculty (also represented) choose from three alternative forums, each of which includes live witnesses: private arbitration, evidentiary hearing before the California State Personnel Board, or informal hearing before a faculty committee.

The vast majority of CSU’s non-management employees are guaranteed, as a matter of state law, extensive fair process rights any time formal discipline is contemplated against them based on alleged misconduct. This is true whether the alleged misconduct takes the form of sexual harassment or assault, sexual misconduct or any other form of misconduct. Formal discipline in this context includes termination,

demotion and any duration of unpaid suspension (even a single workday). Some of these protections are triggered when a sanction is merely proposed (pre-deprivation) and some apply only after the sanction is imposed (post-deprivation). The protections are set forth in the California Education Code, sections 89530 through 89546, and they supplement other significant protections afforded to employees accused of misconduct, including rights provided by other state laws, applicable CBAs, and California judicial decisions (such as the California Supreme Court's *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, which guarantees a pre-deprivation hearing when the sanction is proposed).

Among other things, represented employees are entitled to a full, live evidentiary hearing similar to a trial, which includes pre-hearing discovery, law and motion practice, the right to submit witnesses and documentary evidence at the hearing, and the right to cross-examine all witnesses presented by the university. The hearing is administered by an independent state agency, the California State Personnel Board (SPB), and typically lasts multiple days. An administrative law judge oversees the hearing and makes a recommendation to the full SPB Board. The "burden of proof" is on the State, the university pays all costs associated with the hearing, and after the hearing concludes, the SPB renders a decision "affirming, modifying, or revoking" the discipline. (Cal. Educ. Code § 89539(b).) This decision is the final word on the subject (absent action by a court, which intercedes only under limited circumstances). A summary of the rules provided by the SPB is provided at:

http://www.spb.ca.gov/content/appeals/Hearing_Pamphlet.pdf. The complete rules governing hearings and appeals before the SPB can be found at: [https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I4B4ACC10C1C711DF82C3D10E5CD2C51C&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I4B4ACC10C1C711DF82C3D10E5CD2C51C&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1).

The Current Regulations effectively require the CSU to create and provide – and pay for, directly and indirectly – an additional live evidentiary hearing in all instances where an employee is accused of Title IX sexual harassment, unnecessarily prolonging the process.

A Need for Certainty

The CSU would welcome regulations that create certainty for students, employees, and Title IX practitioners, including a grievance process that is designed to be educational, logical, and flexible, while promoting accountability and growth. The need for clarity and a commitment to developing procedures that are responsive to the needs of an education community, as opposed to court room environment, cannot be overstated.

We thank the Department of Education for the opportunity to provide the above comments. We hope that our input brings value to this important work. We would be happy to answer questions or provide additional information.

c: Dr. Joseph I. Castro, Chancellor
Mr. Steve Relyea, Executive Vice Chancellor and Chief Financial Officer
Mr. Andy Jones, Executive Vice Chancellor and General Counsel
Mr. Larry Salinas, Vice Chancellor, University Relations and Advancement
Mr. Vlad Marinescu, Vice Chancellor and Chief Audit Officer