

From: Suzanne Taylor
Sent: Fri, 11 Jun 2021 18:51:51 +0000
To: T9PublicHearing
Cc: Michael Drake;Rachael Nava;Chris Harrington;TITLEIXOFFICERS-L@LISTSERV.UCOP.EDU;Crystal Martinez;Jenny Kao
Subject: Written Comment: Title IX Public Hearing (2020 Amendments; Gender Identity and Sexual Orientation Discrimination)
Attachments: UC Written Comment Title IX Public Hearing.pdf

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Please see attached correspondence from the University of California.

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Systemwide Title IX Director
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June 11, 2021

Via T9PublicHearing@ed.gov

Ms. Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue S.W.
Washington, D.C. 20202-1100

Re: Written Comment: Title IX Public Hearing (2020 Amendments; Gender Identity & Sexual Orientation Discrimination)

Dear Ms. Goldberg:

Sex-based discrimination, including sexual harassment, can devastate individuals and communities, and the U.S. Department of Education (Department) and schools nationwide must continue their efforts to combat it. The University of California (UC) looks forward to renewed leadership by the Office for Civil Rights (OCR) on this critical issue, and appreciates the opportunity to comment on the Department's 2020 amendments to the Title IX regulations (2020 amendments) through the [public hearing](#) process. I made an oral statement on June 7, and UC graduate student Guadalupe Arellanes Castro made a statement representing UC's Title IX Student Advisory Board on June 9. I am pleased to also submit this written response on behalf of the UC.

The 2020 amendments are extremely prescriptive, mandating that schools respond to sexual harassment complaints using a specific resolution process. UC expressed serious concerns about some aspects of the amendments when the Department first proposed them in 2018. We advocated strongly for the Department to address the most problematic parts and to ensure they furthered the objectives of both condemning sexual harassment and ensuring a fair process. Many of our concerns were detailed in a January 28, 2019 letter to the Department (available [here](#)). It is disappointing that the Department under the previous administration largely disregarded the input it received – not only from UC, but from concerned Title IX professionals, students, advocates, and stakeholders from across the nation. It is particularly disheartening that the amendments adopt a narrow definition of sexual harassment that many warned could leave some serious misconduct unaddressed, undermine the work of UC and others to foster institutional trust by lowering the bar to which schools are held, and require investigation and adjudication processes—such as direct cross-examination by parties' advisors—that we know are not best practices.

The Department stated in its [April 6, 2021 letter](#) to students, educators and other stakeholders that feedback submitted through the public hearing process will supplement written comments it received during the rulemaking process. Accordingly, I point you to the still highly-relevant concerns detailed in UC's [January 2019 letter](#), and offer some additional insights below. UC strongly supports OCR's critical review of the 2020 amendments, and looks forward to providing input on revised regulations when the Department publishes them for comment. In the meantime, the UC system has deep expertise on sexual harassment prevention, detection and response, and we are available to collaborate with the Department as it reviews the regulations if that would be valuable.

Tension Between Legal Requirements and Non-Legal Policy Objectives

As UC develops sexual harassment policy, it is guided by important non-legal tenets and objectives that remain constant despite an ever-shifting legal landscape. Critically, we must encourage complainants to come forward, so they can access the resources they need to take full advantage of UC programs and activities, and so they understand their options for potential redress and can make informed decisions about whether to pursue them. We must also strive to ensure our resolution processes are both fair and kind. In a fair process, outcomes are based on substantial and reliable evidence gathered through a neutral and thorough fact-finding process in which both parties have meaningful rights. In a kind process, investigators and decision-makers treat parties compassionately, recognizing we ask them to share some of most intimate and, for some, most painful experiences of their lives—and that the stakes for both parties are very high. Though fairness and kindness are sometimes in tension, those who do this work must hold them equally close. We must also ensure our outcomes are just. This includes accountability for those who engage in sexual harassment, as accountability is essential for the protection of our campus communities.

In addition to pursuing values-based objectives, schools must also of course ensure their policies comply with applicable laws. This is difficult when legal requirements are in constant flux. It is also challenging when legal requirements do not align with our policy objectives—a problem that is particularly acute with the 2020 amendments.

As the Department considers revisions to the regulations, I recommend these goals be paramount: to balance fairness and kindness; to withstand future changes in administration, so schools have the chance to build best practices on the foundation the law provides; and to provide schools flexibility to align policy with institutional values.

Additional Insights on 2020 Amendments

Before the 2020 amendments were issued, UC's process already included many of the elements the regulations now require. We provided parties with detailed written notices at the beginning and end of any resolution 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. Based on a January 2019 California appellate court decision, UC also provided the right to a live hearing in cases with student respondents. These procedures and protections are important to a fair process.

Our process did not include other now-mandatory components, because they actually undermine our policy objectives. Many of those are discussed in detail in UC's January 2019 letter. However, some were not clear until the Department issued the final 2020 amendments with their extensive preamble. Most notably, this includes the requirement that schools provide live hearings and appeals for employee respondents, which does not account for the extensive due process rights many school employees already have. At UC, for example, Senate faculty have the right to a hearing with the Privilege & Tenure committee before any discipline, and represented staff have the right to grieve any corrective action; these rights are codified in Academic Senate Bylaws and collective bargaining agreements that UC administration is not empowered to change. So as a result of the regulations, many employee respondents are now entitled to two hearings with possible cross-examination—one to comply with the regulations and one per other governing documents. This means it is now more difficult and will take longer to hold employees accountable for sexual harassment covered by the regulations than virtually any other type of misconduct.

Additionally, to understand the full extent to which the regulations undermine institutional policy objectives, the Department must consider the compounding effects of their many requirements operating together. For example, the 2020 amendments require that schools allow parties to cross-examine each other and witnesses through their advisors. While the right to pose questions is important, direct cross-examination by a party's representative is an intimidating prospect that will discourage some people from reporting at all, and others from participating in the hearing. Yet another provision states that the decision-maker cannot rely on any statement when deciding responsibility unless the person who made it submits to cross-examination. This could be interpreted to preclude reliance on admissions by the respondent, if they do not submit to cross-examination, as well as statements in police reports, SANE reports, and medical reports, if the report author does not testify. Likely most commonly, though, it could be interpreted to preclude

reliance on statements by complainants who are unwilling to be cross-examined by the respondent's representative, even when the complainant's credibility is not at issue. In conjunction then, these two provisions may result in fewer complainants reporting at all and, for those cases that do result in a resolution process, exclusion of important evidence from the decision-maker's consideration, making outcomes less reliable, reducing accountability, and hindering schools' prevention, detection and response efforts.

Time to Comply with Revisions to Regulations

Schools were given only 100 days to comply with the 2020 amendments. This was insufficient time to thoughtfully make policy and process changes of the intricacy and magnitude the regulations required. As the Department plans each stage of the rulemaking process, please consider that sexual harassment procedures are not only complex, but of great importance to school communities. School officials will need time to fully understand the regulations, consider compliance options alongside institutional values, revise policies and procedures, develop tools for effective implementation, identify resources to meet any new requirements, provide technical training, and engage and educate stakeholders across the campus community.

Protection Against Sexual Orientation and Gender Identity Discrimination

UC applauds President Biden's March 8, 2021 Executive Order making clear that Title IX protects individuals from discrimination based on both gender identity and sexual orientation. In 2017, the Department rescinded important OCR guidance to schools on how to guard against gender identity discrimination; this guidance addressed, for example, students' rights to access facilities and activities in accordance with their gender identity, and to be addressed by their lived names and pronouns. I urge OCR to codify Title IX's prohibition of gender identity and sexual orientation discrimination in the regulations, and to promptly and definitively affirm that Title IX requires schools to treat students according to their gender identity.

The UC system is committed to getting Title IX adjudication processes right. We know a fair process is crucial, yet of little value unless members of our community harmed by misconduct come forward. Whether they do hinges significantly on our ability to treat participants both fairly and kindly, and to provide outcomes that are just. We look forward to revised regulations that provide the foundation for us to achieve all of these objectives. Please feel free to contact me at suzanne.taylor@ucop.edu if I can answer any questions about this letter or UC's experience implementing the 2020 amendments, or if UC can support your work in any way.

I am grateful that schools can once again look to the Department for leadership on critical issues affecting our nation's students.

Sincerely,

(b)(6)

Suzanne Taylor

UC Systemwide Title IX Director

cc: University of California President Michael V. Drake
UC Executive Vice President and Chief Operating Officer Rachael Nava
UC Federal Government Relations Associate Vice President Chris Harrington
UC Title IX Officers