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To Whom it May Concern,

The University of California CARE programs are respectfully requesting the following feedback to be considered regarding proposed changes to Title IX. As background, CARE is an independent, confidential office, located at each UC campus, which engages in prevention efforts, professional training, and survivor support and healing services for the campus community related to the areas of sexual assault, dating and domestic violence, stalking, and sexual harassment. CARE serves as the primary point of contact for those who are seeking advocacy and support following an experience of sexual assault, dating and domestic violence, stalking, and sexual harassment.

1. **Narrowing definition of harassment and sexual assault:** §§ 106.30, 106.44 (e) (1), 106.44 (e) (1) (iii), 106.45(b)(3) – We have concerns with the fact that it would only require schools to only investigate the most extreme forms of harassment and assault and only investigate when a survivor's access to their education is completely denied to them because of the harassment or violence, potentially after the impact is so severe it limits the survivor's ability to ever complete their educational goals. Many of our students, staff and faculty experience violence on the daily bases, this guidance especially would not allow universities to investigate the most pervasive forms of sexual harassment such as sexist jokes or comments and crude harassment and insults, or unwanted sexual attention and advances or even sexual coercion. Sexual harassment in its most minimal forms can lead to chronic anxiety and other symptoms that can debilitate someone's emotional safety in the workplace and classroom.

The proposed, significantly more narrow, definition of sexual harassment and assault as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.” is dangerous in that it would require schools to respond to only the most egregious cases of abuse. This would leave students unprotected from abuse and it could compel students to endure violence and other abusive behavior that did not rise to the new standard.

Sexual assault directly affects survivors' ability to function as students. It has negative impact on mental health thus creating an obstacle to access to education. Women who are sexually assaulted or abused are over twice as likely to experience PTSD, depression, and chronic pain following the violence as non-abused women (Woods et al., 2005). Moreover, an estimated 40% of rape victims suffer from severe emotional distress (requiring mental health treatment) (Miller, Cohen, & Rossman, 1993).

The new recommended definition is so limited it would cause some students to have to endure escalating abuse until it rose the level of the new much more narrow definition. This would impair physical safety and it would affect a student's ability to function in an academic environment. By the time, the abuse rose to the level of the new definition, the targeted student could already have suffered irreparable harm. They might fail a course, dropped out of school or experience physical harm. 34.1% of students who have experienced sexual assault dropout of college, higher than the overall dropout rate for college students (Mengo & Black, 2015) Instead of narrowing the definition, The Department should adopt a standard that incorporates the understanding that abusive conduct is a pattern of behavior that creates a hostile environment. The definition: "if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." from the Department of Education's own 2011 Dear Colleague Letter, recognizes schools' responsibility to protect students from violence and harassment that interferes with education and impairs physical and emotional safety.

The newly proposed definition also conflicts with the current definition in California State law. This new definition is also incredibly restrictive, given that the harassment would have to be severe and pervasive, which limits a campus ability to protect students and employees. While it's stated that the campus can address other sexual harassment under other codes of conduct, this practice will lead to inconsistencies in addressing sexual harassment, leaves campus community members vulnerable to harassment, and opens the door to litigation – leaving all parties uncertain of the process.

The proposed rules create an environment where Title IX must choose between protecting the individuals or the collective community, the previous guidance is all about community safety and standards but these new rules seem to point further to individuals as the focus point.

The definition fails to recognize state statutes that require affirmative consent standard already codified into law. The new definition of sexual harassment is so finite that it will continue to decrease the amount of people "allowed" to report, once again not providing the complainant with more autonomy, nor caring for community safety from repeat offender.

Deliberate indifference standard leaves all parties uncertain of how their campus will handle the allegations, no timeframes to rely on, and no way for the parties to hold their campus accountable without evidence of deliberate indifference. **Recommend** that campuses should still be required to respond in a "prompt and reasonable manner".

106.44 (e) (6) provision relies heavily on decreasing the number of officials on a campus who can have corrective action or authority. This presents challenges Title IX accommodations have to be made through the same person who does the official reports. This will limit the accommodations being made and the time spent in making sure the rights of both parties are being preserved, as far as their educational standard. Lastly, there is not quantified time frame for these processes, how is that fair and equitable when

a respondent can side step the process long enough to graduate and limit any adjudication possible

Recommendation: Allow universities the ability to apply the State definition of sexual harassment in their Title IX policies.

2. **Off-campus assault and harassment:** §§ 106.30, 106.45(b)(3) – The fact that schools would not be allowed to initiate an investigation or offer supportive measures to survivors who experienced sexual harassment, assault, dating/domestic violence, or stalking outside of the school setting or activities is very problematic due to the fact that MOST of our students at the university experience sexual assault at off campus locations. Many of our students reside in off campus and non-affiliated living facilities due to financial burdens, this guidance would completely void the need for the university to look at incidents where another student intentionally violates student conduct and policies and the university will not be obligated to provide on campus support for students. Would also leave our study abroad students very vulnerable in that students will be exposed to unsafe environments without having supportive resources and responses.

This would ultimately insulate perpetrators from an administrative process if they assault another member of the community off-campus and outside of a campus-sponsored program, or in a study abroad program, while still creating an educational impact for the victim. While it's stated that the campus can address sexual harassment/assault off-campus under other codes of conduct, this practice will lead to inconsistencies in addressing sexual misconduct, leaves campus community members vulnerable, and opens the door to litigation – leaving all parties uncertain of the process. Recommend that campuses should address conduct that has the potential to impact the campus community, regardless of where the assault/harassment occurs.

Instructing schools to address only the sexual violence that occurs within a school program or activity would effectively enable the white washing of most of the sexual violence their students experience and perpetrate. Students who are sexually assaulted in off campus apartments or while studying abroad have at least as great a need for support, protection, and intervention as those who are assaulted on campus. This rule would have grave consequences for the eighty-seven percent of college who live off-campus. Schools should be required to provide services to ALL students who suffer sexual assaults, not just that small minority who are assaulted on campus or during school activities.

In the University of California system, of the nine campuses who have undergraduate students an average of 60.22% or 128,440 students live off campus or outside of the education program or activity as defined in this section (refer to attached chart for data on UC housing). The changes under this provision will greatly reduce student access to the Title IX complaint process. Additionally, If both students are US students and abroad and one harms the other, there is no recourse available to them. This again shows the perspective of caring about an individual over the community, because what will happen when that respondent continues to harm when back in the US.

(Source: “Institutional Research and Academic Planning.” Campus Profiles. | UCOP, 2018, www.ucop.edu/institutional-research-academic-planning/content-analysis/campus-profiles/index.html.)

3. **Standard of proof:** § 106.45(b)(4)(i) - Most universities use a preponderance of the evidence standard, or “more likely than not” evidentiary standard, but under this proposed rule they can and may have to adopt the uncommonly used clear and convincing evidence standard. Title IX is meant to be an administrative process (like every other administrative process at the university level) it is not a criminal process or system. Please cite Student Conduct policies and processes where evidentiary standards for sexual violence deter survivors from coming forward. Title IX does not have the authority to compel witnesses to participate in the process (i.e. issue a subpoena), this would severely hinder their ability to gather evidence that would be the burden of clear & convincing.

Additionally there are concerns that requiring a complainant to sign a written statement documenting their allegations will have the effect of turning survivors away, in particular if the respondent is a faculty member or employee.

Evidentiary standard in investigation should be the same as any other policy violation, regardless of if employee/faculty disciplinary processes use a higher standard.

Recommendation: A complaint may be made verbally to the Title IX officer or in writing. Evidentiary standard should be the same as any other policy violation regardless of affiliation, and use of “more likely than not” preponderance standard.

4. **Cross-examination** § 106.45(b)(3)(vi)-(vii) – This would re-traumatize students and survivors in the process by requiring cross-examination at live hearings by each parties’ advisor of choice. Additionally, if any party or witness does not participate in cross-examination fully, all their statements, and potentially for survivors who do not participate in cross-examination even their initial Title IX complaint must be ignored and not taken into consideration by the decision maker(s). This directly opposed all research and practices about trauma and trauma-informed care. Noting that we are NOT in the criminal justice process, this is an educational/administrative process, allowing a survivor to have to be questioned (without parameters) from an attorney or non-trained staff would re-victimize and further traumatize students in the process seeking support. There are other ways to allow for cross-examination that do not include direct hearing panels/direct examinations. All students are allowed to review all material/be interviewed before the final decision, thus allowing a thorough and fair investigation. Survivors are already asked to participate for over 120 days in the investigation process, making their statement void for not participating is punitive and threatens the integrity and purpose of a student educational process. Again, this is not a criminal hearing or process. In addition, the requirement of a live hearing with cross-examination would pose significant legal

problems when a victim has a criminal restraining order in place against the alleged respondent.

These recommendations would require schools to allow cross-examination, during which an accused student's representative could cross-examine a complainant during a live hearing. A live cross-examination will cause additional harm and trauma to survivors and will have a chilling effect on reporting. This would allow abusers to use the administrative process itself as a way to exert power and control over survivors and to cause them additional harm. Cross-examination can cause additional trauma to survivors. Studies indicate cross-examination is often rooted in gender stereotypes and rape myths that contribute to a "victim-blaming" narrative (Zydervelt, 2016). This could mean the hearing becomes a vehicle for additional abuse and victim blaming.

Recommendation: Advisors must be provided to both parties. No direct cross examination should be allowed of respondent to complainant, or vice versa. Hearing officers must be required to disallow questions that are repetitive, unnecessary, argumentative, etc.

5. **Required Mediation:** § 106.45(b)(6) - Allow mediation and other forms of informal resolutions that could potentially adversely impact survivors seeking justice and protection, and could bar survivors from later asking for a formal investigation and resolution. There are concerns in regards to how or what will govern how mediation is facilitated. There is extensive training necessary to implement mediation responsibly and effectively. Noting that domestic violence/sexual assault case are complex all of them taking into account lethality and danger assessments, the impacts of an inefficient and irresponsible mediation can be life threatening. Please cite and refer to the John Hopkins Danger Assessment for Domestic violence for more information.
6. **Unspecified timeframes:** § 106.45(b)(1)(v) - As opposed to the previous rule that universities must make every effort to complete Title IX investigations within 60 days, the new rule removes any timeframe requirement. This means schools will be able to extend timelines for investigations for as long as they would like as long as they document a reason why they are doing so. There are several concerns in regards to how this would elongate and re-victimize survivors in the process. Noting that the process is already long within itself, there are possibilities and dangers of having a case pro-longed for months, even years. The chronic anxiety and dissociation that happens when cases are on standstill are seen in SVSH cases more than any other disciplinary cases in higher education.
7. **Mutual no-contact orders:** § 106.30- In 2001 the Supreme Court (*Bays v. Bays*, 779 So.2d 754) found that mutual or reciprocal protective or restraining orders should not be issued, except when each party files a request for the protective order and both are found to be primary aggressors and neither responding in self-defense. Requiring a mutual no contact order on college campuses would go against legal code in most states, has been

proven to undermine safety of survivors and increases the risk of violence for survivors. Without properly address/assessing lethality risk and danger assessments, the university is placing victims of violence in very dangerous situations. A mutual no-contact order would allow aggressors to manipulate and intimate victims of violence into either violating that no-contact and or using it as another aspect of control and power. I have seen victims become re-victimized by their aggressors having them possibly experience disciplinary actions.

These recommendations would require schools to issue mutual no-contact directives, which could cause additional harm to survivors and become yet another obstacle to access to education. Mutual no contact directives could discourage survivors from reporting if they know that reporting the harm they suffered will limit their access to places and activities necessary to further their education. Survivors feel penalized by mutual no contact directives. Mutual no contact directives are unfair. There are no grounds to restrict the movements and access of a survivor who has not been accused of harming anyone. Mutual no contact directives are very difficult to enforce and could result in the discipline of a survivor. Mutual no contact directives can be perceived as or can in fact be retaliatory. Abusers can exploit mutual no contact directives to continue to abuse and maintain control over the survivor. A mutual no contact directive could easily become another tool in the pattern of behaviors abusers use. The Office of Civil Rights acknowledges, “unduly restricting victims could create a retaliatory effect, and/or could result in the victims being deprived of access to campus programs and facilities, thus compounding the discriminatory effects of the underlying violence.”³.)

The proposed recommendations would remove a school’s ability to protect survivors with no contact directives unless the survivor wins an administrative proceeding. Because few survivors participate in administrative proceedings, this recommendation would limit the schools ability to protect most survivors. Most sexual violence and harassment occurs within the context of a relationship. According to the Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016, 75% of sexual assaults are perpetrated by someone known to the survivor. Survivors who are forced to be in the same space as their abuser will suffer additional harm. Forcing survivors to share space with abusers will create an additional obstacle to access to education. Survivors who are left unprotected will be compelled to withdraw from class, work, dorms, and social and academic activities. Interim protections ensure the survivor’s education is not further compromised by additional violence or fear of additional violence.

We ask that the proposed changes are delayed until viewpoints from survivors and victim advocates can be included in the conversation. For the reasons we have listed above, there are numerous conflicts with the proposed changes when attempting to strike an appropriate balance between the safety of survivors, respondent’s due process rights and the overall safety of campus community.

Respectfully,
University of California CARE Programs

References

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3. United States Department of Education, Office for Civil Rights. (2001). Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties. Washington, DC.
4. Woods, A., Page, G., O’Campo, P., Pugh, L., Ford, D., & Campbell, J. (2005). The mediation effect of posttraumatic stress disorder symptoms on the relationship of intimate partner violence and IFN- γ levels. *American Journal of Community Psychology*, 36(1), 159-175. doi:10.1007/s10464-005-6240-7
5. Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N. (2016). Lawyers’ Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s? *British Journal of Criminology*, 57(3), 551–569.

Undergraduate data: On-, and off-campus housing¹

	On %	Off %	On #	Off #	Total
Berkeley	25%	75%	7644	22931	30,574
Davis	25%	75%	7536	22609	30145
Irvine	61%	39%	17877	11430	29307
Los Angeles	48%	52%	14881	16121	31002
Merced	38%	62%	2803	4573	7375
Riverside	31.20%	68.80%	6262	13807	20069
San Diego	40%	60%	11435	17152	28587
Santa Barbara	38%	62%	8431	13755	22186
Santa Cruz	51.80%	48.20%	6515	6062	12577
San Francisco ²	-	-	-	-	-
Total	39.40%	60.60%	83382	128440	211822