OXY Occidental College

January 30, 2019

Via Electronic Submission (www.regulations.gov)

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue S.W., Room 6E310
Washington, D.C. 20202

Re: **Docket ID ED-2018-OCR-0064 – Response to Notice of Proposed Rulemaking re Title IX of the Education Amendments of 1972, 34 CFR Part 106**

Dear Ms. DeVos,

Occidental College ("Occidental") submits the following comment on the Notice of Proposed Rulemaking (NPRM) published in the Federal Register (FR) on November 29, 2018. The Proposed Rules clarify how a recipient of federal funds must respond to incidents of sexual harassment as that term is defined by Title IX of the Education Amendments of 1972. The Proposed Rules address issues that are critical to the orderly resolution of student misconduct. However, as discussed herein, the Proposed Rules impose conflicting obligations on colleges, particularly those in California, and require a hearing process akin to a criminal proceeding, which goes beyond what is necessary and appropriate to provide a fair investigatory proceeding at an educational institution.

Occidental College is a private, liberal arts college in Los Angeles, California with approximately 2,000 students. The safety and well-being of our community is critical. We are committed to ensuring a safe environment, in compliance with Occidental policy and applicable federal, state and local law. Occidental has policies and procedures in place for responding to complaints of misconduct, including but not limited to a sexual misconduct policy. Occidental has an important interest in ensuring that the hearing policies we follow are considered fair and thorough without resorting to the equivalent of criminal proceedings, which should not be required by law and which our institution does not have the resources to provide. The Proposed Rules will significantly deter victims of sexual misconduct from coming forward as well as upset the balance between providing access to a meaningful complaint process and procedures that afford participants a fair process.

As described herein, Occidental is primarily concerned that: (1) the proposed definition of sexual harassment is too narrow, which will limit Occidental's ability to protect its community and increase litigation regarding any student disciplinary actions taken outside the narrowed Title IX definition of sexual harassment; (2) the Proposed Rules do not provide the Title IX Coordinator with sufficient discretion to implement supportive measures; (3) requiring a live hearing with cross-examination by an advisor will have a chilling effect on reports and will not improve the accuracy of the investigatory outcome for any party; and (4) the Proposed Rules' application to

employees creates conflicting obligations under Title IX and Title VII and will vitiate at-will employment. Occidental also has responded to directed questions 2, 3 and 6 below.

1. THE PROPOSED DEFINITION OF SEXUAL HARASSMENT IS TOO NARROW

The Proposed Rules define sexual harassment under Title IX more narrowly than that term is defined under other federal and state laws (*e.g.*, Title VII of the Civil Rights Act of 1964; the California Fair Employment and Housing Act ("FEHA"), and the California Education code), as well as most college policies.

For example, the second prong of the proposed definition of sexual harassment states that sexual harassment is "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" (emphasis added).

In contrast, sexual harassment under Title VII has long been defined as unwelcome conduct that is sufficiently severe ***or*** pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Thus, unwelcome conduct (other than sexual assault as defined in 34 CFR 668.46(a)) that is "merely" severe ***or*** pervasive would not meet the definition of sexual harassment under the Proposed Rules, whereas that very same conduct could constitute sexual harassment as defined by other laws and policies.

In addition, the Proposed Rules do not include within 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 effects of such misconduct might "effectively den[y] a person equal access to the recipient's education program or activity." (PR 106.30.) Thus, an allegation that a student sexually assaulted another student in a private house directly across the street from campus would not be investigated under Title IX, although such misconduct, if substantiated, would constitute a breach of the institution's student conduct code. Further, sexual harassment as otherwise defined by Title IX that occurs outside of the United States would not constitute a violation of Title IX (even if the misconduct occurred during a recipient's study abroad program) although those same facts often would constitute unlawful conduct under state law and college policy.

We acknowledge that the Proposed Rules do not purport to define sexual harassment other than for purposes of Title IX enforcement. So, the Proposed Rules would not apply to sexual harassment that does not "rise to the level" of Title IX harassment. They also would not regulate a college's enforcement of other antidiscrimination laws and policies. Thus, redefining sexual harassment under Title IX would narrow the scope of what the Department regulates, but doing so would not narrow the scope of sexual harassment prohibited by other laws.

However, any potential efficiencies created by the Proposed Rules will be nullified by the conflicts and confusion that they create for misconduct that occurs outside of the narrowed Title IX realm. For example, the preamble to the Proposed Rules state:

> Importantly, nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity (or as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program).

(p.61468). However, Proposed Rule 106.45(b)(3) requires recipients to dismiss any formal complaint that, even if proved, would not constitute sexual harassment as defined in the Proposed Rules or did not occur within the recipient's program or activity. How can recipients reconcile these conflicting obligations?

If a student is the victim of a sexual assault that occurs off-campus and the student has a class with the assailant, this is likely to have an impact on the victim's access to their educational program. The victim may begin avoiding class to avoid the assailant. In this scenario, colleges ***should*** have an obligation to respond to ensure the victim has access to educational programs. However, the Proposed Rules provide conflicting statements regarding how a recipient should respond. Should the recipient dismiss the formal complaint simply because the assault occurred off campus? If the recipient dismisses the formal complaint and proceeds to investigate the incident under its standard student conduct proceedings, what form of investigation can be conducted and what discipline can be imposed? Can colleges use the single-investigator model to adjudicate the complaint and expel the alleged assailant for violating a code of student conduct?

Due to the conflicting statements in the Proposed Rules and the innumerable questions they raise rather than resolve, the Department's laudable effort to clarify antidiscrimination laws, to ensure a fair and thorough remediation process, and to "empower students to hold their schools accountable" (FR at p. 61462) will backfire. Further, the Proposed Rules are likely to result in increased litigation regarding investigatory procedures applicable to student misconduct outside of the narrowed Title IX realm.

2. THE PROPOSED RULES DO NOT PROVIDE THE TITLE IX COORDINATOR WITH SUFFICIENT DISCRETION TO ADOPT EFFECTIVE SUPPORTIVE MEASURES

The NPRM recognizes that a complainant's right to remediation (including supportive measures) is co-extensive with a respondent's right to fair process, but the Proposed Rules do not seem to account for the fact that these rights sometimes come into conflict.

Supportive measures are defined as "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or

the respondent … designed to restore or preserve access to the … education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the … educational environment; and deter sexual harassment." (PR 106.30.)

The important and complex task of identifying and implementing appropriate supportive measures is both art and science. Title IX Coordinators go to great lengths to understand the parties' needs and concerns, and to fashion interim and other supportive measures that reasonably protect without undue intrusion or burden to others. Students on college campuses reside, work, study, and play together in geographically close proximity. This frequently makes it nearly impossible to offer supportive measures that are not perceived by respondents as punitive. In addition, in order to preserve students' privacy, it is essential that students have the option to seek supportive measures from other campus partners in addition to the Title IX Office. A request for an academic accommodation that comes from the Title IX office automatically informs faculty that the student is involved in a sexual misconduct matter. The same request from the Dean of Students' office does not impart such private information. Therefore, there is a great need for the Department to explicitly acknowledge in the rules that Title IX Coordinators have discretion to balance the rights of all parties on a case by cases basis when implementing supportive measures, as well as allow administrative offices other than solely the Title IX Office to offer supportive measures.

3. DIRECTED QUESTION 2: THE GRIEVANCE PROCESS SHOULD BE CONSISTENT REGARDLESS OF THE TYPE OF RECIPIENT OR AGE OF THE PARTIES; REQUIRING LIVE CROSS-EXAMINATION BY AN ADVISOR WILL HAVE A CHILLING EFFECT ON REPORTS AT THE POSTSECONDARY INSTITUTION AND WILL NOT IMPROVE THE ACCURACY OF THE OUTCOME FOR EITHER PARTY

The Proposed Rules seek to ensure a fair grievance process in college disciplinary proceedings by requiring due process protections that are equal to, and in some respects greater than, those afforded to defendants in the criminal trial process. This amplified process will have a chilling effect on reports of sexual misconduct and is impractical and unnecessary. For example, Cross Examination at Live Hearing by Advisor (Provided by Recipient)(PR 106.45(b)(3)) will terrify college age complainants in the wake of often traumatic events, result in an uneven field at hearing even if a complainant is willing to move forward, and lead to inaccurate findings. A grievance procedure that allows for indirect cross-examination by an investigator or hearing officer provides an appropriate and fair process in college proceedings without traumatizing the parties or having a chilling effect on making reports of sexual misconduct in the first place.

The Department's rationale for allowing indirect cross-examination in grievances at K-12 institutions (PR 106.45(b)(3)(vi)) applies equally to grievances at postsecondary institutions. "Sensitivities associated with age and developmental ability" (FR at 61476) typically remain throughout the college years. This is especially true in cases requiring testimony about highly personal and intimate sexual details. Under these circumstances, questioning by an advisor-attorney would be traumatic for parties and witnesses. Indeed, it would be no less traumatic than permitting questioning by another student. (FR at p. 61476.)

Additionally, permitting cross-examination by an attorney-advisor is not necessary to a fair proceeding. With proper training (as described in PR 106.45(b)(1)(iii)), effective cross-examination may be undertaken by a fact finder. A hearing officer could take questions from advisors or attorneys and even ask them verbatim, allowing for the same leading questions, testing of credibility, and observation of demeanor by the ultimate decision maker, all without permitting typically older, experienced, aggressive trial attorneys from doing so.

Further, the Department should not discount the particular impact this Proposed Rule will have on a fair outcome due to the economic disparities between the parties. In many cases, one party will have an advisor who is a criminal defense attorney, who charges several hundred dollars an hour for their services, while the other party is unable to afford such representation and has a friend or victim's advocate who has no knowledge of, much less training in, cross-examination act as an advisor.

Requiring colleges to furnish the parties with an advisor "aligned with" the party's interests does not solve this problem. To the contrary, requiring small colleges to identify, train, and pay advisors will burden institutions with inappropriate duties and costs, and may give rise to conflict-of-interest claims. Smaller institutions that do not have an associated law school will have difficulty identifying advisors who are qualified and willing to conduct cross-examination.

Even if colleges had the resources to bring in trainers well versed in cross-examination to educate advisors on campus, the disparity in advisor training and resources may result in inaccurate outcomes. Further, if the college pays and trains the advisor, one or more of the parties may argue the advisor's interests are aligned with the college, not the party's interests. This will subject recipients to additional litigation.

The Proposed Rule that allows for No Consideration of Statements from Witnesses Not Present at Hearing (PR 106.45(b)(vii)) will also result in miscarriages of justice. The proposed unqualified exclusion of prior statements by parties not present at a hearing does not necessarily further the discovery of truth. To the contrary, it will make it more difficult for colleges to reach an accurate finding. Colleges cannot subpoena witnesses or otherwise compel witnesses (particularly third-party witnesses who are not part of the college community) to participate in a hearing. Student witnesses, who have already provided their recollections to an investigator, may be particularly unwilling to appear for a hearing, which would require them to take time away from their educational pursuits and to subject themselves to cross-examination by an attorney. If PR 106.45(b)(vii) remains as drafted, important, relevant, and possibly exculpatory information could be excluded from the fact-finding process simply because a witness who has previously provided a statement is unable or unwilling to appear for hearing. Even formal judicial processes allow for instances when out of court statements are considered for truth or state of mind purposes. The same should be true in student proceedings.

In addition, this rule when taken along with the Proposed Rule that requires institutions to move forward in cases in which there are multiple reports regarding the same respondent (106.44(b)(2)) is untenable. How can a case move forward to a live hearing under such circumstances if the victims are unwilling to participate in a hearing with live cross-examination

but their prior statements cannot be considered? These Proposed Rules, taken together, put institutions in an untenable position without further guidance from the Department. Further, forcing colleges to pursue formal investigations without the active participation of complainants violates the privacy rights of the complainants and potentially puts them at risk for harm.

In short, the Department should adopt the same grievance process at colleges as for K-12 institutions and should not mandate a live hearing or cross examination to ensure *all* parties have equal access to the process and the outcome is fair and accurate.

4. DIRECTED QUESTION 3: THE PROPOSED RULES SHOULD NOT BE APPLICABLE TO EMPLOYEES

The Proposed Rules should not be applicable to employees for many reasons.

If applied to employees, the Proposed Rules would be contrary to well-established guidance regarding how to investigate and resolve sex discrimination complaints under Title VII and FEHA. An investigator-based model for such cases is well established under the law. (*See* EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at https://www.eeoc.gov/policy/docs/harassment.html; EEOC, Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors, available at https://www.eeoc.gov/policy/docs/harassment-facts.html; DFEH, California Department of Fair Employment and Housing Workplace Harassment Prevention Guide for California Employers (July 2017), available at https://www.healthemploymentandlabor.com/files/2017/07/guide.pdf.) The Department lacks the authority to regulate under Title VII by mandating that employee investigations involving sexual harassment that overlap with Title IX be subject to live hearings.

Furthermore, the definitions of sexual harassment under Title VII and the Proposed Rules cannot be reconciled. Sexual harassment under Title VII has long been defined as unwelcome conduct that is sufficiently severe ***or*** pervasive to alter the conditions of the victim's employment and create an abusive working environment. PR 106.30 is at odds with this definition and could create an untenable inconsistency when an employee is accused of sexual harassment that is severe but not pervasive. Under Title VII, colleges would have an obligation to investigate such harassment. But under the Proposed Rules, harassment that is severe but not pervasive would not meet the definition of sexual harassment and an employee may argue Proposed Rule Proposed Rule 106.45(b)(3) mandates that the formal complaint and investigation be dismissed. Again, these inconsistencies create confusion and would subject recipients to increased and unnecessary litigation.

Further, the live hearing and cross-examination requirement – while unnecessary in connection with allegations by and against students – is particularly inappropriate and unnecessary in connection with allegations made by students against employees due to disparities in the power dynamic. Imposing a live hearing and cross-examination requirement in these cases will have a significant impact on reporting and limit Occidental's ability to address inappropriate employee behavior.

Last, but not least, the live hearing requirement under Title IX, if applied to employees, would vitiate the presumption of at-will employment in California and other jurisdictions without authority to do so. Pursuant to California Labor Code section 2922, employment in California is presumed to be at will. Thus, in managing their businesses, recipients – particularly private recipients in California – may terminate most employment relationships at will. Applying the live hearing requirement to employees will undermine this statutory presumption and grant at-will employees legal rights to which they are not otherwise entitled. This will hinder Occidental's ability to protect its community where necessary and manage its business. It will also subject recipients in California to additional litigation.

In short, the Proposed Rules should not apply to complaints made by or against employees. Instead, the Department should allow recipients to manage their business relationships with their employees in a manner consistent with existing state and Federal law, internal policies, and their business needs.

5. DIRECTED QUESTION 6: SCHOOLS SHOULD BE PERMITTED TO USE THE PREPONDERANCE OF THE EVIDENCE STANDARD

California Education Code section 67386 requires most colleges to use the preponderance of the evidence standard to evaluate sexual harassment complaints made against students. Occidental supports using this standard, which is consistent with state law and strikes the right balance between the parties' rights and ensuring an accurate outcome.

Occidental College thanks you for the opportunity to provide public comment for your serious consideration.

Sincerely,

Samantha Sandman

Samantha Sandman
General Counsel