



- Boston University
- Brandeis University
- Brown University
- California Institute of Technology
- Carnegie Mellon University
- Case Western Reserve University
- Columbia University
- Cornell University
- Dartmouth College
- Duke University
- Emory University
- Georgia Institute of Technology
- Harvard University
- Indiana University
- The Johns Hopkins University
- Massachusetts Institute of Technology
- McGill University
- Michigan State University
- New York University
- Northwestern University
- The Ohio State University
- The Pennsylvania State University
- Princeton University
- Purdue University
- Rice University
- Rutgers University – New Brunswick
- Stanford University
- Stony Brook University –
- State University of New York
- Texas A&M University
- Tufts University
- Tulane University
- University at Buffalo –
- State University of New York
- The University of Arizona
- University of California, Berkeley
- University of California, Davis
- University of California, Irvine
- University of California, Los Angeles
- University of California, San Diego
- University of California, Santa Barbara
- University of California, Santa Cruz
- The University of Chicago
- University of Colorado Boulder
- University of Florida
- University of Illinois, Urbana-Champaign
- The University of Iowa
- The University of Kansas
- University of Maryland, College Park
- University of Michigan
- University of Minnesota, Twin Cities
- University of Missouri, Columbia
- The University of North Carolina at Chapel Hill
- University of Oregon
- University of Pennsylvania
- University of Pittsburgh
- University of Rochester
- University of Southern California
- The University of Texas at Austin
- University of Toronto
- The University of Utah
- University of Virginia
- University of Washington
- The University of Wisconsin - Madison
- Vanderbilt University
- Washington University in St. Louis
- Yale University

September 7, 2022

Secretary Miguel Cardona
c/o Brittany Bull
U.S. Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, D.C. 20202

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

Dear Secretary Cardona,

In response to the Department’s July 12, 2022, notice of proposed rulemaking (“NPRM” or “proposed rule”) amending regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”), Docket ID ED-2021-OCR-0166, I write to provide comments on behalf of the Association of American Universities (AAU), an organization of America’s leading research universities. AAU membership includes 63 leading public and private research universities in the United States. AAU appreciates the opportunity to provide comments on the proposed changes to the Title IX Regulations, as it is critical that the higher education community and other relevant stakeholders be a part of shaping the rules for how colleges and universities respond to allegations of campus sexual assault, harassment, and sex-based discrimination.

AAU members take seriously their responsibilities to educate members of their communities about sexual harassment, sexual assault, and prevention; to encourage students to report sexual harassment and misconduct, including sexual assaults; to support all students impacted by sexual misconduct and sex-based discrimination, including sexual violence; and to ensure all students involved have access to support services and fair and equitable processes. We also are deeply committed to both 1) ensuring the safety and well-being of students, faculty, staff, and all those who enter our communities of learning, and 2) complying with federal civil rights laws. AAU member institutions are dedicated to supporting an environment in which students, staff, and faculty can fully participate in the campus community free from gender-based harassment, sexual harassment, and other sexual misconduct and in which the institution does not tolerate retaliation for reporting such misconduct or participating in the process to address it.

As part of this commitment, AAU has gathered information on the prevalence of sexual assault and misconduct on American campuses and the practices universities have used to combat it. In 2015, AAU administered a landmark survey assessing the prevalence of sexual assault and misconduct on campuses. More than 150,000 undergraduate and graduate students across 26 member universities participated, and the results provided much-needed insight into students’ experiences.¹ Then in 2017, AAU surveyed 55 of its member universities on the practices they use to prevent and respond to campus sexual assault and

misconduct and published a report detailing its findings.² Most recently, AAU conducted a 2019 Campus Climate Survey on Sexual Assault and Misconduct. A total of 181,752 students from 33 colleges and universities, including 32 AAU member institutions, completed the survey, the results of which will help AAU member institutions as well as other colleges and universities in their ongoing efforts to address the critical problem of sexual assault and other sexual misconduct.³ These efforts have given AAU's members a helpful perspective to better combat sexual harassment, including sexual assault on their campuses, and are further articulated by AAU's Principles on Preventing Sexual Harassment in Academia.⁴

Informed by this research and AAU members' experience administering campus sexual assault and sexual harassment proceedings, AAU offers the following comments on the Department of Education's ("the Department's") draft Title IX regulations. Please note AAU has also joined with the American Council on Education and other higher education organizations in joint comments on the proposed changes to the Title IX regulations.

OVERARCHING CONSIDERATIONS

AAU applauds the proposed new definitions and explicit Title IX protections for individuals against discrimination based on gender identity, presentation, expression, and stereotypes as well as against discrimination based on pregnancy and marital status. We also appreciate the delineation of sexual harassment and sex-based harassment in the NPRM. AAU and its members have consistently upheld the principles of diversity, equity, and inclusion as essential to the mission of higher education, and we believe these proposed changes will advance those principles across the education landscape. We also applaud the proposal's expansion of definitions and protections to make Title IX more consistent with federal jurisprudence.

Additionally, we remain committed to free speech and academic freedom at higher education institutions in accordance with the First Amendment. It is vital that the Department recognize that institutions must comply with the First Amendment as well as fulfill their obligations under Title IX protections. This is especially important as it pertains to potential claims related to harassing comments and hostile environments.

The proposed changes to the Title IX regulations are significant in both scope and consequence. Consistency in Title IX regulations is an important factor to the safety and well-being of students. The change in Title IX requirements from one administration to another is harmful to Title IX complainants and respondents who may not clearly understand their institution's current policies for filing and responding to a Title IX complaint. The changes from administration to administration also create unnecessary implementation challenges as institutions strive to meet the letter and spirit of the changing requirements that are intended to help keep students and our communities safe and provide sufficient remedies. We urge that middle ground be found between past administrations' different policies and this administration's policy to provide institutions consistency in effectively administering and complying with Title IX regulations.

Recommendation: We strongly recommend that the Department review these issues carefully and to combine the best aspects of the previous policies, ensuring a less-disruptive transition and helping all institutions of higher education adapt practices and policies that best fit the needs of their students and campuses.

Effective implementation by institutions of changed Title IX regulations necessitates a significant on-ramp period. Campuses need time to review, revise, and update protocols, procedures, and training materials. They also need time to hire and train new staff; to retrain existing personnel; and to develop

and deliver updated communications, resources, and websites to students, their campus communities broadly, and the public. Implementation of the changes proposed in the NPRM requires significant lead time before the effective date of the updated rules. Effective implementation will be time-, resource-, and cost-intensive for institutions.

Recommendation: We strongly recommend that the effective date of the updated Title IX regulations be no less than the start of the academic year following one full calendar year after the publication of the final rule.

NPRM PROVISIONS THAT WILL ENHANCE TITLE IX PROCEEDINGS AND HELP INSTITUTIONS ADDRESS SEX-BASED DISCRIMINATION AND SEXUAL HARASSMENT

Several provisions in the NPRM are responsive to the specific feedback provided by colleges and universities during previous comment periods, as well as listening sessions with the Department. The provisions that provide greater flexibility to institutions in formulating grievance procedure policies in compliance with Title IX will also enhance an institution's ability to respond to Title IX complaints and to resolve them in an appropriate and effective manner.

Recommendation: AAU urges inclusion of the following proposed provisions in the final rule:

- The elimination of the requirement of a formal complaint to commence an investigation of allegations of sexual harassment or sex-based discrimination and institutional grievance procedures. This provision facilitates greater accessibility and will be beneficial to all parties in Title IX proceedings. In order to provide clarity for students and institutions alike, we recommend that the final rule require some form of written documentations of a complaint (short of the formal requirement in the current regulations) in order to require the commencement of an investigation.
- The flexibility granted to institutions proposed in 106.44(k) allows for informal resolution of complaints. This provision recognizes that complaints are not one-size-fits-all and will allow institutions to make individualized assessments as to the most effective and equitable path to resolution of a complaint. We also recommend that the final rule provide institutions with flexibility to define what is required for the complaint process to be initiated.
- The flexibility granted to institutions proposed in 106.45(b)(2) which allows for the decisionmaker in a complaint to be the same person as the Title IX Coordinator or investigator, also known as the single-investigator model. As with other flexibilities in this NPRM, this allows institutions to determine the appropriate path to resolution of a complaint and how resources devoted to Title IX should be allocated.

NPRM PROVISIONS THAT REQUIRE CLARIFICATION FOR EFFECTIVE IMPLEMENTATION

As noted above, the NPRM provides more flexibility to institutions that will provide for more effective application of Title IX by institutions. This flexibility should be balanced with appropriate specificity so that institutions have guardrails in the following areas:

Retroactivity of complaints

The NPRM is silent on several critical questions about the timing of their application. For example, the regulations say nothing about whether the substantive definitions and standards – which are much broader than the prior regulations – would apply on a going-forward basis or whether they would apply retroactively, such that institutions would now be obligated to respond to conduct that was not covered explicitly by prior regulations. Retroactive application of the new definitions of sex-based harassment under the NPRM would open institutions to a potential flood of Title IX complaints, further burdening

campus Title IX offices. It may also create significant confusion among university community members, who will raise questions about why institutions are applying standards adopted in 2023 to conduct that was not prohibited by policy in 2020 or 2000. It may also subject institutions and the students involved in disciplinary proceedings to needless litigation about whether institutions have a legal right to punish students or employees found responsible for conduct that was not clearly prohibited by law or policy at the time.

Recommendation: To address these issues, AAU recommends that the Department include in the final regulations a clear statement that they apply only to conduct that occurs *after* the effective date of the rule. This bright-line rule would give institutions and members of their community the certainty of understanding when the new regulations will apply. It would also allow institutions to focus their resources on our shared goal of preventing and responding to sex-based harassment in our programs and activities, rather than devoting resources to conduct from years ago.

Also, the proposed regulations would allow complainants to file a complaint even after they are no longer engaged in the university's program or activity. This is a marked change from the current regulations, which require that the complainant be engaged in the program or activity at the time of filing the complaint to trigger the grievance procedures. This change could lead to a rush of complaints from years or decades ago. Such complaints are difficult to investigate and can be incredibly burdensome on schools, parties, and witnesses involved. Further, if the respondent has left a university, the available disciplinary remedies are sharply limited. Because of the passage of time, and potentially limited remedies, such matters often end in unsatisfactory outcomes for everyone involved, and thus they do little to further Title IX's objective of addressing sexual harassment in education programs and activities.

Recommendation: AAU recommends that, if the Department removes the requirement that a complainant be participating in the program or activity at the time of filing the complaint, this requirement should apply prospectively.

Additionally, the NPRM is silent on how institutions should deal with the tricky issue of which procedures to apply to complaints of sex-based harassment. When the Department finalized the 2020 Title IX regulations, institutions were faced with questions from students and employees as well as needless litigation over whether they were required to implement the new grievance procedures for complaints about conduct predating the effective date of the regulations. For example, they had to decide whether to apply the regulations to complaints that were pending but unresolved at the time of the regulation's effective date. Institutions also had to grapple with whether the regulations applied to a complaint filed after the effective date about conduct that occurred beforehand. Students and employees were confused, and several legal actions were filed contesting what was an otherwise good-faith effort by school administrators to apply the regulations as fairly as possible.

Recommendation: Having learned the lessons of 2020, AAU recommends that the Department be clear in the regulations about which procedures apply and when. On this point, clarity is critical and the most important outcome for AAU members. The regulations need to be clear about whether the new grievance procedures apply a) to complaints pending as of the effective date; and b) to complaints received after the effective date about conduct that predates the effective date.

Role of Title IX Coordinators in Monitoring Barriers to Reporting

Title IX compliance is an institutional responsibility and effective compliance cannot be achieved without institution-wide cooperation, effort, and support. Although the NPRM does state that others can perform duties that the regulations give to the Title IX Coordinator, placing so much emphasis on that role detracts from the institutional nature of Title IX compliance. The NPRM specifically proposes that

universities must require their Title IX Coordinator to monitor barriers in their education programs or activities to reporting information about conduct that may constitute sex discrimination. The university must then take reasonably calculated steps to address such barriers.

AAU strongly agrees with the rationale underlying this provision – that underreporting of sex discrimination to officials with authority to take corrective measures remains a concern and institutional efforts to prevent sex discrimination are extremely important. Indeed, providing clear information about how to report, encouraging everyone to report (irrespective of whether they have an obligation to do so under applicable laws or regulations), identifying barriers to reporting, and taking reasonable steps to address reporting barriers each are fundamentally important. Placing the responsibility on the Title IX Coordinator (versus the Title IX Coordinator coordinating and reviewing the manner in which the aforementioned functions are undertaken by institutional colleagues) undermines the importance of reporting on campuses across the country and places what should be an institutional obligation onto one individual.

Currently, it is the norm on college campuses to have many individuals among various departments and offices tackling issues relating to reporting at all levels of the institution. This includes executive leadership, communications, student life professionals, human resources (including academic human resources), departments of public safety and security (including campus police departments), confidential resources, as well as investigators, Title IX Coordinators, and institutional equity directors and other staff members. This collective institutional effort is often aided by the coordination, guidance, and review of the Title IX Coordinator.

But such effort is not – because it cannot be – the obligation of any one individual, because no one individual has the capacity, supervisory authority, or responsibility over all the individuals performing these critical functions. Simply put, the proposed regulations ask too much of Title IX Coordinators, many of whom are already overwhelmed with the scope of their responsibilities under the much narrower requirements of the current regulations.

Recommendation: Accordingly, AAU recommends that, where the proposed regulations state that a recipient will “require the Title IX Coordinator to...,” the language should be modified such that the requirement is placed on the recipient. Specifically, the language be modified to say “require the ~~Title IX Coordinator~~ recipient to...” Placing the obligation on the recipient is more consistent with the overall structure and purpose of the underlying statute, and it will provide needed flexibility for institutions to organize their compliance functions under the Title IX Coordinator consistent with their structure, culture, and resources. Because institutions vary dramatically, they should be afforded the flexibility to 1) decide what resources should be dedicated to identifying barriers to reporting, and 2) take reasonable steps calculated to eliminate those barriers.

Permitted Disclosures and Implications of Professional Licensure and Codes of Conduct

While we respect that privacy is of considerable importance to the parties involved and must already be maintained subject to FERPA (Family Educational Rights and Privacy Act), proceedings such as those under Title IX may be required to be disclosed to federal agencies, or institutions could face sanctions for non-compliance or ineligibility for federal grant funding. AAU requests additional exemptions regarding the disclosure of Title IX supportive measures and proceedings under proposed §106.44(g) and (h) where intersections with other legal compliance obligations exist. For example, the National Institutes of Health (NIH)⁵, the National Science Foundation (NSF)⁶, and the National Aeronautics and Space Administration (NASA)⁷ each have grant award terms and agency regulations that require reporting of administrative actions related to an allegation against grant award personnel of sex-based or sexual harassment. In fact, these types of policies and grant award terms serve similar goals as Title IX

regulations regarding sexual harassment, assault, and sex-based discrimination, by providing transparency to the awarding agencies and fostering a culture that protects individuals from the continuance of such conduct.

As currently drafted, the proposed regulations could create uncertainty for institutions that are obligated to comply with federal agency requirements to disclose varying levels of investigations, administrative actions, and misconduct. While the NPRM specifies that disclosures may be made “as required by law,” institutions would be left to infer that such a disclosure would be permissible under legal compliance obligations. This is an area where clarity is vital.

Additionally, disclosures of Title IX proceedings may be mandated at the state level by professional licensure accreditation bodies, whereby the institution must report conduct or activities that violate professional or ethical standards. For example, both the medical and legal professions are regulated at the state level by state medical boards and state bar associations. Upon graduation, institutions are often required to affirmatively represent that an individual has the requisite character and fitness to join those respective professions through examination, or to disclose any academic or ethical misconduct that justifies a refusal to make such a representation. As stated above, where such disclosures are required by regulations or policy, clarity is necessary for institutions to have certainty about appropriate disclosures pursuant to Title IX regulations.

Recommendation: We ask that the final rule provide a more comprehensive exemption in §106.44 (g) & (h) for applicable federal and state statutes, regulations, and agency policies where disclosure of misconduct, investigations, outcomes, and administrative actions is mandated by a government entity.

Expansion of “program and activity” to include off-campus, study abroad, etc.

The NPRM recognizes that members of a university community who are not physically on campus may unfortunately experience sex-based harassment or sexual violence that could impact their educational experience, and thus expands the purview of Title IX protections to those individuals. While the NPRM is the first to expand protections outside of campus and other university-controlled spaces, many AAU institutions already apply Title IX to incidents beyond their campuses and protect students and faculty studying and researching abroad, campus visitors, and other affiliates in their institutional conduct policies.

We urge the Department to delineate the obligations of institutions to individuals over whom we have a limited scope of influence – such as those who are not enrolled in a course of study or employed by the institution. Such distinctions should recognize the challenges faced by institutions in providing supportive measures and the lack of institutional authority to compel non-university employees or students to participate in investigations and disciplinary procedures.

Supportive Measures

AAU is concerned that the proposed regulations could create confusion and uncertainty as institutions implement supportive measures. One of the strengths of the current regulations is they allow for institutions to provide tailored, context-specific supportive measures to complainants and respondents. Universities have developed clear and balanced processes to implement supportive measures. These processes work with all parties involved in the process to ensure supportive measures are implemented in as fair and equitable of a manner as possible.

First, by explicitly permitting supportive measures that “burden the respondent,” the proposed regulations threaten to undermine the careful processes that institutions have developed. Not only does the term “burden” raise a number of interpretive questions – what is a burden, how much burden is too

much – to name a few – it also sends the wrong message to our students and employees who engage in the Title IX process. The overarching principle that informs institutional Title IX policies and procedures is equitable treatment. Supportive measures, just like our grievance procedures, need to be guided by this principle to ensure that all parties are treated fairly. For years institutions have been operating under an equitable treatment standard and effectively implementing supportive measures that protect the educational opportunities of complainants *and* respondents. There is no need for the Department to upset that careful balance by explicitly permitting and inviting disputes over burdensome measures.

Recommendation: Remove the concept of “burdening the respondent” and replace it with language that requires institutions to make a fact-based, equitable inquiry into the appropriate supportive measures under the circumstances.

Second, we are concerned about the proposed language for appealing supportive measures. The NPRM preamble discusses a “fact specific inquiry” for determining whether an appeal of supportive measures can be allowed before or after any measures are imposed. However, the preamble does not provide any examples and is unclear as to what form this inquiry should take or what criteria sufficiently encompass findings under this inquiry.

Without further guidance, the proposed regulations appear to allow for an unrestricted number of appeals at any time, by either complainant or respondent, following the imposition of supportive measures. The parties could choose to continue to appeal throughout the proceedings, and each appeal would require a “fact-specific inquiry” and a decision to grant or deny each appeal. In practice, this would have a significant impact on the efficient and effective conduct of Title IX proceedings, in addition to causing delays to the proceedings overall. We believe that, while an appeal mechanism regarding supportive measures is a well-intentioned policy choice, we request that the Department articulate the standards to which institutions will be held and by which a challenge to supportive measures should be allowed and decided.

Recommendation: AAU recommends that the Department include in the final rule: 1) regulatory language limiting the number of appeals of supportive measures to a single instance for the complainant and respondent, 2) that the fact-specific inquiry completed by the institution in its determination is completed in writing, and 3) that the determination to grant or deny the appeal be resolved pursuant to a standard of material change in party circumstances that warrant a modification of the supportive measures imposed.

Employee Requirements Regarding Pregnancy and Related Conditions

The NPRM proposes a requirement that any employee of an institution who is informed of a student’s pregnancy must promptly inform that person of how they may notify the Title IX Coordinator of the student’s pregnancy or related conditions for assistance and must provide contact information for the Title IX Coordinator. AAU recognizes the challenges that students face in accessing education while experiencing pregnancy and related conditions, and we applaud the Department for taking steps to help pregnant students maintain access to education programs and activities. However, the proposed requirements may cause implementation challenges and cause confusion for institutional employees in carrying out their responsibilities under these provisions.

AAU member institutions have already received questions about what it means to be informed about a student’s pregnancy, and in particular, whether employees would be expected to approach a student who appears visibly pregnant to provide contact information for the Title IX Coordinator. Further, under the NPRM it can reasonably be expected that employees will be confused about their duty to report (after learning of possible sex discrimination) and their duty to inform (after being informed about pregnancy or a related condition). This could lead employees to report sensitive information about a student’s

pregnancy and related conditions to the institution and to documentation of a student's medical status outside of the student's wishes. While we recognize the importance of supporting students experiencing pregnancy and related conditions, it is also essential to protect student privacy and autonomy in determining how their medical information will be shared with an institution. There are other means by which students can be informed about their rights and available resources.

Recommendation: AAU recommends the removal of the requirement for employees to directly share the contact information for the Title IX Coordinator in all cases and that the final regulation instead allow for information related to support for students experiencing pregnancy and related conditions be shared through other means such as a syllabus statement or dedicated webpage. Should the requirement for employees to directly share the contact information for the Title IX Coordinator remain, we recommend that the final rule clarify what it means for an employee to be informed of a student's pregnancy or related condition.

NPRM PROVISIONS THAT UNDERMINE INSTITUTIONS' EFFORTS TO ADDRESS SEXUAL ASSAULT, SEXUAL AND SEX-BASED HARASSMENT

Expansion of mandatory reporting and related training

The NPRM significantly expands mandatory reporting requirements to include nearly all university personnel. This expansion includes confidential employees, non-confidential employees, and student-employees. Notably, reporting requirements differ based on whether the conduct involves a student or employee experiencing the potential sex discrimination and they differ based on the category of employee receiving the information. We understand and appreciate that the Department is attempting to balance the importance of complainant autonomy with the competing view that the limitation to report to employees with actual knowledge is too narrow. To this end, we applaud the Department's efforts in attempting to identify the types of employees who would have reporting obligations. Nevertheless, in trying to compromise between a broad or narrow reporting structure, we have significant concerns that the resulting nuanced reporting structure that will be created will be so confusing – even with the required training and education – as to lack clarity and undermine the Department's goals, particularly with respect to complainant autonomy.

Under the proposed reporting requirements, it will be difficult if not impossible for potential complainants – even after a robust training – to easily determine who must report potential sex discrimination. As a result, potential complainants will be unable to make an informed choice about whether to: share their experiences with an employee thereby triggering reporting, speak only with a confidential employee, speak with a resource external to the university, or disclose at all. Research by the National Academy of Sciences regarding the effects of mandatory reporting has demonstrated that such reporting requirements remove the ability of survivors to consent to reporting and investigations and interferes with university teaching on personal experiences with sexual violence and misconduct as well as research on such topics.⁸

Moreover, the NPRM is silent with respect to the scope of the employees' reporting obligations and does not state whether employees with reporting obligations are only required to report information they receive in the scope of their employment or if the reporting obligations apply more broadly. For example, a professor with teaching responsibilities is at a summer barbeque with close friends, only to learn that the friend's child, who is also a student in the class of the professor, recently experienced a sexual assault on campus. Under such circumstances, does the professor have a reporting obligation? Similarly, if a dean whose child attends the university learns from that child that the child recently experienced sex discrimination, does the dean have a reporting obligation? AAU respectfully requests more clarity around these questions.

We also have concerns about the considerable implications for Title IX staffing, institutional resources, and training for all Title IX officials and the proposed expanded training for all mandated reporters. Institutions will need time to identify and train personnel, as well as to identify funds and other institutional resources to this end.

Recommendation: AAU requests that the final rule allow for institutional discretion and provide flexibility to institutions to identify the personnel that should be trained for Title IX compliance purposes and to provide greater clarity to better address the needs of complainants.

CONCLUSION

As noted in our letter in 2021, AAU is deeply committed to complying with all federal civil rights law and ensuring the safety and well-being of all students, faculty, staff, and others who enter our communities of learning. We appreciate the opportunity to provide these comments as the Department works to revise the current Title IX regulations. Any changes to the current regulations should respect the autonomy and educational missions of America's institutions of higher education, while allowing them to tailor their sexual harassment proceedings to effectively protect the rights of all students, faculty, and staff members. AAU member institutions remain committed to free speech and academic freedom in accordance with the First Amendment. It is vital that the Department recognizes that institutions must continue to balance this commitment with Title IX protections. The revised regulations should recognize that even minor changes could have large consequences for all parties and the effective implementation of Title IX processes and protections. As such, the revised regulations should provide sufficient time – delaying the effective date to the start of the academic year at least one year after the publication of the final rule – for institutions to implement the changes.

Sincerely,



Barbara R. Snyder, President