

## APLU Principles for a New Title IX Regulation on Campus Sexual Misconduct

Our nation's public universities take a holistic approach to preventing and responding to sexual and interpersonal violence. We seek a safe community for learning, scholarship, and the infinite growth opportunities created for millions of students, employees, and community members. This includes appropriate response to sexual and interpersonal violence and harassment as well as efforts to prevent incidents before they occur. We do so within the context of a federal regulatory approach that has begun to swing wildly over the last decade, as well as Constitutional, state, student conduct code, and our moral obligations.

Response to reports of sexual and interpersonal violence requires a careful and thoughtful approach tailored to the facts of the disclosure. Cases are nearly always complicated. Simple, one-size-fits-all solutions are generally inadequate. We understand the long-term impact on all those who involved, complainants and respondents. Student participants may suffer long-term trauma, and employees may also experience second-hand trauma, regularly facing burnout. That complexity, however, should not lead to shying away, but lends to the argument that institutions have a moral obligation to respond appropriately.

We recognize and share a focus on this as an area of justice, civil rights, public health, and education equity. We urge the Biden administration to develop meaningful, balanced, and research-informed rules, able to be accessed and implemented by institutions of all sizes, types, and resource levels, that can stand the test of time and give surety to students, institutions, and the nation. To do so, we emphasize certain core principles that the Department of Education (ED) should consider in developing and implementing new regulations.

- The Department should invest significantly in the development and implementation of proven and promising prevention programs. The long-term health and safety of students and campus communities will be better served by a thorough and effective prevention strategy than by simply responding when incidents occur (no matter how effective and compliant that response may be). The Biden administration should work with Congress to invest significantly in prevention and to make such programs accessible to institutions of all size and type. Public universities are ready to help further research, test, develop, and implement prevention strategies, training, and programming. For example, research on the effectiveness of online prevention strategies, continued development of bystander intervention programs, and robust research into primary prevention strategies could make a meaningful impact on rates of violence and harassment on campus and in the community.
- Regulations should be developed in partnership with all relevant community members: public, private, and all other types of institutions of higher education, policy experts, and the students who are impacted by violence and harassment. We believe that incorporating more voices will lead to a better rule. The Department should consider creating a standing advisory group made up of representatives from diverse voices and sectors to help not only with consideration of policy issues for a new regulation, but also with the

long-term shared commitment of implementing the coming regulations in a successful manner. We understand the critical nature of this issue and the tendency to want to move quickly, particularly given the objectionable nature of many aspects of the existing regulation. We must balance this, however, against a goal of getting this right and carefully setting standards, subject to input from all quarters, that can guide higher education for years and decades to come.

- Consistent with Supreme Court case law on Title VII, the Department should make clear, in binding regulations, that the statutory language “sex” in Title IX offers protections on the basis of sex, sexual orientation, gender identity, and gender expression. It is critical that students and community members understand their protections, and that it not be subject to ready removal in a future Executive Order.
- The Department should develop a consistent and equitable approach to reviews of compliance across regional offices and Washington D.C. including clear and published timelines and expectations of how the Department will investigate and resolve investigations, compliance reviews, and other inquiries. At the same time, the Department should recognize that the academic calendar and different levels of complexity of fact patterns may require more or less time for a thorough investigation and ultimate resolution of reports of sexual misconduct.
- The Department should clearly delineate a separation between the enforcement and technical assistance staff of the Office for Civil Rights (OCR) so colleges and universities are able to seek feedback on their policies and procedures without fearing that a stray word will trigger an audit. The Department should also coordinate between OCR and the Clery division as it is inefficient for the two offices to conduct separate reviews with separate processes, rules, and timelines, over the same incident or complaint.
- The Department should work to harmonize Title IX regulatory obligations with the obligations of the Constitution, other federal statutes, as well as relevant state law and circuit court opinions. We recognize that campuses located in the Sixth Circuit are under different cross-examination expectations than those in the First Circuit, and these Constitutional standards should be taken into consideration in development of regulations. Laboratory states have made great progress in addressing violence and harassment, and these efforts and standards should be considered. This should also involve work to ensure institutions are able to meet their Title IX federal regulatory obligations as well as their obligations under both the federal and state constitutions, state and federal employment laws, and any applicable collective bargaining agreements.
- Public institutions have additional considerations as Constitutional actors. These obligations include the need for notice and the opportunity to be heard before a neutral decision maker in cases where a property or liberty interest is at stake. Private colleges are bound by the promises they make in policy (as well as statutory and regulatory requirements). The Department should take care to recognize the additional obligations the federal (and sometimes state) Constitution will place on public colleges and universities.

- Outside of one Circuit, courts across the country have recognized that cross examination, conducted in a trauma-informed manner through the panel or hearing officer, where questions are submitted in writing and asked, modified, or not asked (with explanation) meets Constitutional due process obligations. The 2020 Final Rule went beyond this requirement for public and private colleges. This should be modified to return to the Constitutional standard of the relevant Circuit.
- As Constitutional actors, public colleges and universities must recognize First Amendment rights as defined by court decisions. The Department should continue an approach of seeking to harmonize those public college speech obligations with an ability to meaningfully address harassment as defined by law, regulation, and court decision. The Department should also recognize that the constitutional obligations of public institutions concerning the Freedom of Speech will vary among the Circuits.
- When a student, employee, or community member discloses violence or harassment, they should, in short order, be directed to professional, highly-trained officials in Title IX, campus or external law enforcement, student conduct, housing, and/or human resources to efficiently relate their information without having to unnecessarily repeat their disclosure. Relevant staff should be trained to efficiently and clearly explain the process and options. Except in rare cases of child abuse, continuing danger, weapon use, or danger to the community, the reporting person should drive the process and their level of comfort participating without pressure to participate or not participate at any stage.
- Institutions are not made in a cookie cutter and neither are students. The Department should provide institutions with flexibility to conduct formal and informal processes, with the consent of the students or parties involved, without being overly prescriptive in a way that reduces students' agency in these cases. At the same time, the Department, in coordination with institutions and other stakeholders, should develop and promulgate guidance and best practices for conducting informal processes in a way that is efficient, meaningful, fair, trauma-informed, and fully respects the constitutional rights of both complainants and respondents. Such guidance should offer a safe harbor to institutions that use it while clearly allowing for institution-specific approaches that meet general standards but are better customized to reducing the impact of violence at that institution.
- The Department went through a thorough Negotiated Rulemaking process to implement the VAWA amendments to the Clery Act and should consider applying the reasonable, balanced, and flexible approach of the VAWA regulations to Title IX's requirements.
- Investigation and adjudication requirements should be aligned with other federal law requirements such as the Clery Act, which have clear but balanced policy and process requirements. Requirements should also be flexible to account for public or private status and state law, to recognize the varied roles of the student conduct and Title IX offices on campus, and to provide reasonable flexibility in institutional approach, while of course not sacrificing Title IX protections for students.
- In order to encourage students to both report and pursue resolutions of allegations of violence or harassment, the Department should clarify that a student's disclosure and any

subsequent investigation are considered “education records” under FERPA.

- We share the Department’s interest in well-trained, professionalized staff in Title IX, Student Conduct, Housing, Law Enforcement/Public Safety, and Human Resources addressing any accusation of sexual and interpersonal violence or harassment in a trauma-informed, compliant approach and would maintain and expand on the present regulation’s training floor. APLU institutions are committed to training and professionalizing these roles in partnership with ED.

While there are very different views on how to accomplish the goal of reducing and responding to violence and harassment, APLU members stand ready to contribute and to lead in this shared commitment. We believe that a process that fully listens to and considers many different viewpoints, even ones with which we firmly disagree, will ultimately result in a set of regulations that will stand the test of time and end the cycle of a swinging Title IX pendulum. In this way our students, employees, institutions, and all whom we serve will have surety, consistency, and reasonable flexibility in responding to, and preventing, violence and harassment on our campuses and in our communities.

#### About the Association of Public and Land-grant Universities

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