



September 12, 2022

The Honorable Dr. Miguel Cardona
Secretary of Education
Care of: Alejandro Reyes, PCP-6125
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

By: Electronic Federal e-Rulemaking Portal Submission

Re: Docket ID: ED-2021-OCR-0166

Dear Secretary Cardona,

Thank you for the opportunity to submit comments regarding the Notice of Proposed Rulemaking to amend the regulations under Title IX of the Education Amendments of 1972, Docket ID: ED-2021-OCR-0166, published at 87 Fed. Reg. 41390. The Association of Public and Land-grant Universities (hereinafter “APLU”) is a signatory to the letter submitted by the American Council on Education and other associations but writes separately to emphasize certain points of specific interest to public universities.

APLU is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of 251 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU’s agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 212 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct \$48.7 billion in university-based research.

APLU appreciates many of the flexibilities provided in the proposed regulations, which allow public universities to meet the standards established in the Constitution and their states, while staying true to their appropriate policies. We hope that this approach, and continued efforts to seek common ground, will lead to a slowing of the dual pendulums of Title IX and state equity and response laws that have swung with increasing velocity over the last decade. We write to ask the Department for clarity and simplicity in the regulatory language (Proposed at page 41563). The requests include simplifying the adjudication processes for employees, sensibly modifying definitions, and clarifying training and response requirements for different types of employees. The requested clarifications and changes will enhance public university efforts to prevent and combat sex discrimination and appropriately respond in circumstances in which it occurs.

Specifically, in this letter APLU asks the following of the Department:

- Clarify the role of the Title IX Coordinator and clearly permit assignment of obligations to designees and other offices
- Collaborate with varied stakeholders to develop lasting regulations, avoiding ongoing confusion as policy and regulations are overhauled every few years
- Continue to acknowledge public institutions' obligations to protect Freedom of Speech under the First Amendment and provide due process consistent with the Constitution
- Revise the definition of "student" to be consistent with FERPA
- Provide definitional clarity and reasonable obligations for complaints by third parties
- Create more targeted training and reporting obligations for employees to reduce confusion and increase effectiveness
- Defer to employee processes covered by other federal and state laws, policies, and collective bargaining agreements when employees are accused of sex discrimination
- Designate as confidential any records related to pregnant and parenting students, shielding them from any possible release and appropriately limit required response to student-facing employees

Further, the Department should be mindful of the possible significant logistical efforts and investments colleges and universities will need to make to come into compliance with new regulations as it sets an implementation timeline.

The sections below are in the order consistent with the proposed regulations.

I- The Commitment of APLU Institutions to Gender Equity is Broad and Deep

APLU institutions have shown, in word and deed, their commitment to reducing sex discrimination in education, including sexual and interpersonal harassment and violence. Much more must be done though. Sexual and interpersonal violence and harassment affects millions of college and k-12 students each year. The impact does not fall equally as women, transgender and non-binary, and students from marginalized groups are impacted at higher rates and, critically, are also more likely to leave their educational path. The impact to these individuals is significant. The cost to society when these students do not complete their education in future foregone inventions, discoveries, innovations, and beyond is uncountable, but collectively has a critical impact on the nation's future. As public universities that collectively educate and employ millions of people and conduct billions of dollars in research, APLU institutions understand all too well that many are impacted, often severely, by harassment and violence. Public universities have a moral obligation to be societal leaders in building inclusive environments in which the contributions of all students are encouraged and fostered.

While the work is far from complete, many leading interventions in primary prevention, bystander intervention, and beyond originated with research and program development at APLU institutions. One need look no further than the University of Kentucky's Green Dot program, University of New Hampshire's Bringing in the Bystander, Cornell's Intervene, and Binghamton's 20:1 as examples of programs that are used not just at these institutions, but also critically, in use by public and private institutions of all sizes across the United States. Public

research universities have brought to bear both their education and research missions to innovate and adopt evidence-based solutions to combat sex discrimination.

APLU institutions have laid significant groundwork to comply with and exceed their Title IX and equity obligations; they provide nation-leading training and model policies, host accessible conferences, and share critical insights and techniques built upon research. As we move through the next phase of finalizing new Title IX regulations, public universities are eager to continue their role of moving the work—compliance and response, but also prevention—forward so all college and university students can benefit from the protections of Title IX, the related federal and state laws that protect students' equitable access to education, as well as the continuing institutional efforts to prevent and reduce harassment and violence.

Below APLU details specific recommendations to improve the draft regulations in order to accomplish shared priorities of combatting sex discrimination.

II- The Department Should Allow Institutions to Designate Tasks to the Appropriate Person or Office

APLU commends the Department for its thoughtful process: seeking input in meetings with a broad spectrum of stakeholders, holding an open hearing, and inviting written comments from the community. The Department's willingness to hear what works (and what does not) has paid dividends in a proposed regulation that takes account of the differences between different types of educational institutions. We take note of a return to an approach to Title IX and due process that colleges and universities and their students, faculty, and staff were accustomed to since at least the late 1990's. Alongside the definitions and jurisdiction that institutions worked under prior to 2017, this includes a more flexible approach to due process that reflects a *Mathews v. Eldridge*, 424 U.S. 319 (1975) style balancing test (*See e.g.*, Proposed at pages 41456-41457; 41505; 41507; 41509). Such a test looks at the level of potential deprivation to the person accused of a violation, the gain in truth-seeking as to their responsibility for committing the violation that comes with additional process, and the cost of such additional process.

A return to such flexibility allows for a nuanced approach to responding to disclosures of sex discrimination in a manner that follows a path tread by court decisions. The changes reflected in §106.46, for instance, offers an approach far superior to a “one-size-fits-all” system that pulled all colleges and universities to the standards set by one Court of Appeals. The proposed system also allows institutions to continue to adjust with changing courts and state legislatures, resulting in fewer conflicts and the attendant preemption analyses.

However, with the allowance of flexibility in some areas, comes a range of obligations in the proposed regulations unduly tasked to the Title IX Coordinator. This has caused some concern among institutions that may have other administrators and offices better suited or resourced to conduct aspects of the work described in the proposed regulations. Inasmuch as Title IX applies to colleges and universities, not to any individual, we assume that references to Title IX Coordinator obligations (individually) are institutional obligations, and the institution is obligated to designate the task to the appropriate person or office (with possible coordination by the Title IX Coordinator). A simple sentence in §106.8 of the Final Regulations could allay

APLU's concerns, stating that "where in these regulations the assignment is to a Title IX Coordinator, this is to be read as an obligation of the institution, which may be performed by the Title IX Coordinator, designees, or others."

Recommendation: APLU requests that the Department specifically acknowledge that where the regulations seemingly assign a task to the Title IX Coordinator, colleges and universities may designate that obligation to a different person or office, so long as the Title IX Coordinator is aware.

III- The Department Should Develop Lasting Regulations That Will Be Widely Acceptable, Slowing or Ending the Swinging Pendulum of Guidance and Regulations

As we cross 50 years since Congress enacted the historic 37 words of Title IX of the Education Amendments of 1972, we have seen great progress towards equality on the basis of sex and gender in many aspects of higher education. Much work remains though. After four decades of a slowly evolving regulatory environment, pushed along by infrequent, but landmark court cases and guidance from the Department, the last eleven years have seen significant and rapidly developing changes in how higher education institutions comply with the requirements of Title IX. APLU appreciates the Department is well aware of the procedural posture of Title IX guidance and regulations and so will not restate it here. As public and land-grant institutions that range in size and complexity, with obligations to the federal government, diverse states, and their students and communities, APLU bemoans a system where faculty, staff, and especially students have a hard time tracking the current state of Title IX. When a civil rights pendulum swings so wildly, it can be hard for students to firmly grab hold of its protections.

In recent years colleges and universities have had to react to rapidly changing guidance and regulations, including thousands of pages in explanatory preamble, as each administration works to undo the previous one and implement a new approach. No one is well-served by this approach. We urge the Department to carefully consider comments across the ideological spectrum to try to find as much common ground as possible so that we do not have yet another drastic swing in policy the next time a different political party occupies the White House.

The federal approach to Title IX is not the only moving target. Compliance has been further complicated as states pass varied approaches to preventing and responding to violence and harassment differing based on the expressed goals of state leadership. While some state laws are aimed at enhancing federal obligations, others at least in part take aim at blunting the impact of the federal approach of the moment. We can expect that when the proposed regulations are finalized, if they are not seen as a compromise and best practice, we will see some states pass reactionary approaches to blunt aspects of the regulations they do not like. This reaction could cause confusion and complicate compliance in those states.

As you know, public institutions as Constitutional actors have additional considerations beyond these regulations and state laws. Such obligations include the due process need for notice and the opportunity to be heard before a neutral decisionmaker in cases where a property or liberty interest is at stake.

APLU requests that the Department explain how these regulations will interact with evolving federal circuit and state court decisions on the requirements of Constitutional due process, as well as how the regulations would interact with state laws that seek to regulate the same field. This is sometimes referred to as “the floor and the ceiling.” Federal obligations set a floor upon which state (and institutional) obligations can build. Institutions may choose to do more or may be required by state or local law to do so.

However, in an age of this dual pendulum swing, APLU members (and communities) might ask what exactly is “the floor” and what is “the ceiling?” When, if ever, is the Department’s stated standard meant to “cabin in” what institutions may do? The Department, in language surrounding the preemptive force of these regulations compared to state or local law, writes that a recipient’s obligation to comply with part 106 “is not obviated or alleviated by any State or local law or other requirement, and that nothing in the Department’s regulations would preempt a State or local law that does not conflict with these regulations and that *provides greater protections against sex discrimination*,” (Proposed at pages 41404, 41569, emphasis added), adding “nothing in the Department’s proposed regulations would preempt a State or local law that provides greater protections to students and does not conflict with these regulations.” (Proposed at page 41405). We appreciate that this is a facially neutral statement, seeking to strike a balance between covering the waterfront of Title IX, but going no further than the Department’s authority.

The challenge with such a neutral statement is how an institution should determine whether a potentially conflicting state or local law is preempted, that is to say, which ceilings and which floors should be analyzed? What does it mean to “provide[] greater protections against sex discrimination?” And greater protections for whom? Both the currently enforced Title IX regulations and these proposed regulations provide due process style protections for those accused of sex discrimination that in many cases exceed the Constitutional minimums. If a state adds due process requirements that have the effect of reducing the number of accused individuals found responsible, allowing them to return to the institution’s community without consequence, is that providing “greater protections?” What of a state or local government that requires institutions within its jurisdiction to take certain actions that can be seen to erode the due process style obligations in the currently enforced and proposed regulations? The Department and colleges and universities would be well-served by a longer explanation of how the Department would analyze such state and local requirements to determine first, whether they actually conflict with the regulations, and second, whether such conflict is preempted as providing “lesser” protections, or acceptable since it provides “greater protections.”

The request for a meaningful effort to slow the pendulum is not just a slogan. The Department has a unique opportunity to develop a federal approach that sets lasting regulations while accounting for concerns from across the political spectrum and striking a balance. If such an approach can engender some trust (and stop or slow the pendulum swing on the federal level) it is possible that states will slow or stop their lawmaking and regulations in response. We do not minimize the difficulty of this challenge, but we hope it is one to which this Department will rise in the remaining steps of the process.

If these potential conflicts are not clearly addressed in the final regulations, colleges and universities will continue to experience elevated levels of administrative and judicial litigation, as courts (and the Department) are asked to tease apart the relationship of various court decisions and state laws with these regulations. This litigation will diminish resources of the Department and colleges and universities that could otherwise be used for advancing our respective missions.

Recommendation: APLU requests the Department carefully consider feedback received to date and in this comment period to construct final regulations that are balanced, widely acceptable, and can be maintained in future administrations.

IV- Commitment to the First Amendment and Overlap with Harassment

As Constitutional actors, public colleges and universities must recognize First Amendment rights as defined by court decisions. The Department should continue to address harassment as defined by law, regulation, and court decisions in harmony with those public college and university speech obligations. The Department should also recognize that even the Constitutional obligations of public institutions concerning Freedom of Speech will vary among the Circuits.

APLU appreciates the clear statement of the Department in the preamble to the proposed regulations that the Department, “remains committed to [the] objective [of] respect for freedom of speech and academic freedom...” (Proposed at page 41432) and its “emphasi[s] that in cases of alleged sex-based harassment, the protection of the First Amendment must be considered if, for example, issues of speech or expression are involved, including academic freedom. Students, employees, and third parties retain their First Amendment rights, and the Department’s proposed regulations would not infringe these rights.” (Proposed at page 41415). Public universities are mindful of the primacy of the First Amendment, as interpreted by the judicial branch, in placing some limitations on institutional rules that cover students, faculty, staff, and third parties. This sometimes requires that public universities allow certain speech with which the institution firmly and deeply disagrees, because they sit as public entities subject to these Constitutional obligations. APLU appreciates and supports the Department’s intention to maintain the First Amendment primacy language of 34 C.F.R. §106.6(d) (Proposed at page 41415).

V- The Definition of Student Should Conform to FERPA

APLU supports including a definition of “student” because the proposed regulations delineate the rules and processes based on a person’s status, either as students, employees, or third parties (although only “student” is defined). Yet, as proposed, the definition results in a breadth that would create undue challenges and may be unintentional as it would cover individuals not covered by allied federal laws. We appreciate the Department’s specific request for feedback on the overlap of FERPA and these regulations (Proposed at pages 41404, 41544).

Section 106.2 defines a “student” as “a person who has gained admission.” As proposed, a person’s student status has no expiration, and individuals may indeed be “students” under this definition forever at a dozen or more institutions that they never attend. Logistically, it makes little sense to give non-matriculated individuals lifetime access to grievance procedures. These procedures are particularly robust and are meant to serve the needs of members of the campus

community. A non-matriculated former applicant has a very different relationship to an institution than an enrolled student. Further, institutions maintain application records for a limited time. Also, the remedies available to address complaints of members of the campus community are not readily available for those outside of the community.

Consider §106.45, which outlines grievance procedures for the resolution of sex discrimination other than sex-based harassment. Subsection (a)(2)(iv) lists who can make a complaint under this section: “any student or employee; or third parties ‘participating or attempting to participate in the recipient’s education program or activity when the alleged sex discrimination occurred.’” Notice that “students” need not be participating or attempting to participate in the education program or activity when the alleged sex discrimination occurred. As written, anyone who gained admission could file a complaint as a student. Section 106.46 provides the detailed procedures for complaints of sex-based harassment involving students. The process is so robust that it seems unfathomable that the Department would require institutions to provide it to parties who would not meet other federal definitions of student, but who had indeed “gained admission” at some point in the past.

Rather than creating a new definition for “student,” the Department should refer to the existing definition in the Family Educational Rights and Privacy Act (FERPA). FERPA and Title IX apply to the same group of recipients at the elementary, secondary, and postsecondary levels, so consistency makes sense. And further, for colleges and universities, the FERPA definition is in harmony with the Clery Act language in this area. FERPA defines “student” more narrowly as someone “who is or has been in attendance” and about whom the institution maintains records (20 U.S.C. §1232g[a][6]; 34 CFR §99.3[g]). The recordkeeping and disclosure rules in FERPA do not apply to those who simply “gain admission.” The Clery Act uses the term “enrolled students,” and a student who is enrolled “has completed the registration requirements...at the institution that he or she is attending” or, if in a program primarily by correspondence, “has submitted one lesson” (20 U.S.C. §1092[a]; 34 CFR §668.2).

Recommendation: APLU recommends the Department modify the definition of “student” to refer to the FERPA definition and modify the use of “student” and “students” with “current” as appropriate for purposes of jurisdiction and access to the grievance procedures.

VI- The Use of the Phrase “Third Party” Should Be Consistent

The definition of “complainant” in §106.2 includes a “person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient’s education program or activity when the alleged sex discrimination occurred.” This is seemingly the definition of “third party” used in the proposed regulations, without explicitly saying so. However, in sections of the preamble, including on pages 41519 and 41520, the term “third party” is used to mean a person “who does not have a legal right to act on behalf of the student.” On page 41440, the Department gives examples of a third party, “such as a friend, parent, or witness to sexual harassment.” It causes confusion for colleges and universities to refer to “third parties” and “third-party” reports or complaints—does that refer to a disclosure from someone other than the impacted party or what many campuses might call “non-affiliates?”

The Department should also add a clarifying statement that when it comes to obligations toward third-party (non-affiliate) complainants, the Department acknowledges that a recipient will be limited by the lack of relationship with that party. For example, the supportive measures that could be offered to affiliated complainants under §106.44(g) may not be available, for the most part, to an unaffiliated complainant. And, of course, what is available for student complainants (mental health counseling, medical services, course schedule adjustments) may be different from the supportive measures available to employees. Section 106.44(g)(1) includes a statement that “[s]upportive measures may vary depending on what the recipient deems to be available and reasonable.” Still, specific discussion about the limitations when it comes to third-party (unaffiliated) complainants could provide clarity to recipients.

Recommendation: If using the phrase “third parties” in different ways is unavoidable, the Department should acknowledge the two meanings and uses to provide clarity. The Department should also appropriately clarify expectations for supportive measures for non-affiliated third parties.

VII- The Number and Type of Employee Reporting Obligations and the Requirements for Training are Too Complex and Not Tailored to Effective Implementation

APLU appreciates the Department’s view that members of college and university communities should be trained on their role in implementing both the promise and the process of Title IX. This includes training for various types of employees and how they would respond to a disclosure, training as part of a response to sex discrimination, and training as a supportive measure (Proposed at pages 41428-41429; 41450; 41454-41455; 41570). The proposed regulations will require employees to be trained to respond precisely according to their individualized status on a matrix of roles and responsibilities. While easy to declare, the actual implementation is deeply challenging, and may not lead to more equitable access to educational programs and activities. APLU has identified five variations of reporting obligations based on employee role and the status of the impacted individual (student or employee), with slightly different obligations to provide information to those who disclose and/or to report to the Title IX Coordinator when someone discloses sex discrimination including sexual harassment, and/or that they are pregnant (Proposed at pages 41572-41573).

The five possible disclosure permutations leading to different actions are described below (the term “impacted” is used as a modifier below to mean that the impacted person [student, employee, third-party, individual] is the one who has been subjected to conduct that may constitute sex discrimination under Title IX, or who discloses that they are pregnant). Note that a disclosure may or may not come from the impacted person. We are providing the information below to underscore the confusing array of possible actions that an employee would have to take depending on sometimes shifting roles for what will be fairly rare disclosures for most employees.

Drawing brighter lines with fewer possible obligations will reduce inadvertent errors and allow for more efficient response to those who have experienced sex discrimination. APLU urges the Department to adopt clearer policy with fewer permutations so less resources are spent on

organizing compliance with confusing standards and more resources are spent on preventing sex discrimination.

1. Disclosures of sex discrimination to nonconfidential employees with the authority to institute corrective measures on behalf of the recipient. The impacted individual(s) is not described here, so this variant may apply whether the impacted person is a student, employee, or third-party. These employees are required to notify the Title IX Coordinator.
2. Disclosures of sex discrimination about an impacted student to nonconfidential employees who have responsibility for administrative leadership, teaching, or advising. Note that this disclosure may come from someone other than the impacted student; for example, a roommate or parent may report the conduct. These employees are required to notify the Title IX Coordinator.
3. Disclosures of sex discrimination about an impacted employee to nonconfidential employees who have responsibility for administrative leadership, teaching, or advising. Note that this disclosure may come from someone other than the impacted employee; for example, a friend or colleague may be the person reporting the conduct. These employees (the ones receiving the disclosure) must either (1) notify the Title IX Coordinator or (2) provide the disclosing person with the Title IX Coordinator's contact information and information about how to report sex discrimination.
4. Disclosures of sex discrimination to all other nonconfidential employees. The impacted individual(s) is not described in the Proposed Regulations, so this variation may apply whether the impacted person is a student, employee, or third-party. These employees must either (1) notify the Title IX Coordinator or (2) provide the disclosing person with the Title IX Coordinator's contact information and information on how to report sex discrimination.
5. Disclosures about a student's pregnancy to any employee. The employee is required to (1) promptly inform the person that the person may notify the Title IX Coordinator of the student's pregnancy or related conditions for assistance **and** (2) provide contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified. In this section, the word employee is not modified to exclude confidential employees, likely because there is no external reporting or notification requirement.

As the Department can see, this arrangement is complicated to briefly summarize in this letter, let alone implement on a campus with thousands or tens of thousands of employees. Employees' experience and comfort in responding to disclosures of sex discrimination will vary significantly, and such an expectation is unreasonable for staff with little to no student affairs or people management responsibilities. Consider an employee at an agricultural extension facility, or a groundskeeper, or a budget analyst. These employees should absolutely be *offered* training about how to identify sex discrimination, how to report it on their particular campus, and what the policies and processes look like at their institutions. However, the Department here is saying that these employees are required to respond in a certain way if they learn about sex discrimination, and failing to respond in that way will cause an institution to be out of compliance. The Department should require institutions to offer training to all employees about the institutions' policies prohibiting sex discrimination, including appropriate responses to disclosures of sex

discrimination, but the Department should only compel particular responses to disclosures if the disclosure is made to a narrower scope of employees, designated by the institution. Such employees might include supervisors and managers, as well as human resources and student affairs staff.

Institutions with significant research programs, volunteer programs, and community outreach or land-grant programs may onboard and offboard hundreds of people in a few days. Many positions are cyclical or temporary. Employees may cycle in and out of the definitions provided by the Department as their roles change, they move from faculty to administration or back, take on projects, switch to grant funding, or any of a plethora of other possibilities that happen with regularity at APLU institutions. Colleges and universities already must provide training on their own policies, non-discrimination and harassment procedures, protection of minors on campus, financial rules and regulations, information technology and security, ethics, occupational and environmental health and safety, export controls, records retention rules, the dangers of drug and alcohol abuse, crime and safety, and many more topics. Providing Title IX disclosure reporting training (as well as de-training/retraining) and tracking the training status for all of these employees, on top of delineating and tracking their specific role (disclose to Title IX, offer confidentiality, provide reporting person with information on how to access Title IX) is a significant burden and it is not clear that this extremely complex matrix is more effective than requirements for Title IX notification and effective outreach to students and employees.

Of the thousands of employees (and some students) who could fit a role in the strategy envisioned by the proposed regulations, the vast majority will never use this training. We know from climate surveys, Clery Act data, state-level Title IX data, and other research that most people who experience sex discrimination do not report it. While APLU shares the hope (and our member institutions are working diligently to make changes so) that these numbers significantly improve, it is still the case that the typical college or university employee will receive zero disclosures of sex discrimination, including sexual harassment or violence, and zero requests to accommodate a pregnant or parenting student in the course of their entire career. Such employees may not offer full attention to a training on obligations for situations that are unlikely to come to pass. For those that receive even one or two disclosures, the likelihood that they will recall the precise requirements of their obligations which they were trained upon, perhaps years before at their employment orientation, is low. Offering this training annually for such employees who likely never receive such a disclosure is not the answer either, as it will collectively consume significant time and resources, while feeling like an irrelevant “check the box” exercise for such employees. The system carries a heavy burden of organization, training, and tracking, but it is not clear that it will effectuate the goals and could damage the work that the Title IX and allied offices are doing to raise the seriousness with which violations are taken.

Additionally, there is a growing area of research around the effectiveness of mandatory reporting regimes compared to offering some level of semi-confidentiality to employees receiving disclosures from students (*see e.g.*, Holland et al., *Mandatory Reporting is Exactly Not What Victims Need*, THE CHRONICLE OF HIGHER EDUCATION, July 22, 2022, collecting research). While research and best practice continue to develop, we urge the Department to offer flexibility to institutions to allow for some confidentiality or quasi-confidentiality among a larger group of employees than allocated in the proposed regulations.

The proposed regulations also set forth different obligations for employees who learn of sex discrimination depending on whether the disclosure is about a student or an employee. This distinction is confusing, unnecessary, and may lead to inadvertent failures to respond to sex discrimination in the manner required by the regulations. The Department depicts students as being “newly independent” and “learning to self-advocate” (Proposed at pages 41459, 41462, 41497) in distinguishing their abilities to participate in the process, but many students are non-traditional, often returning to colleges and universities after a full career, while countless employees still qualify as “teenagers.” The Department should simplify this matrix of roles and provide institutions with the flexibility to make the appropriate determinations.

Further, the impacted person may be a student, employee or non-affiliate. It will be difficult if not impossible for the employees described in number (4) above (non-confidential employees who are not Title IX personnel or those responsible for teaching, administrative leadership, or advising) to determine when their response obligations kick in regarding third parties. Will they analyze whether the reported sex discrimination took place in the context of the recipient’s program or activity? If not, will they risk failing to respond in accordance with obligations set out in 106.44(c)(2)(iv)? Simplicity here can lead to a better and more consistent response overall.

APLU understands the interest in creating a wider class of employees with obligations to bring forward disclosures in a way that is targeted at helping students who are otherwise limited in their access to education compared to the 2020 Title IX Rule. However, there are other, more targeted methods to better achieve this goal.

First, the Department can offer institutions flexibility to analyze employee roles to determine the likelihood that the role will receive at least one disclosure annually of sex discrimination, as defined by the regulations. If so, the Department can require that the employee in that narrower role receive annual training on their obligation (this would result in training offered annually versus just once, but would do so in a manner targeted towards effective implementation of the regulations). Other employees who do not meet the narrower standards can be offered training, but not required to complete it. The Department can partner with APLU institutions to develop resources for large and small recipients to help identify—through research—the types of roles that are likely to receive at least one disclosure in any given year.

Second, the Department can develop guidance documents and sample material aimed at providing hard copy, digital, and social media resources that clearly articulates rights, reporting options, limitations, and institutional policies, using research and best practice in information sharing. APLU member institutions stand ready to partner with the Department to help create resources and customizable materials that can clearly communicate critical information to those who experience sex discrimination.

Third, the rules around disclosing reports under Title IX and the Clery Act continue to circle each other, leading to significant confusion, improper application, and the need to de-train and re-train various classes of employees each time the units of the Department responsible for Clery Act and Title IX compliance change the standards. Some of these changes have come in regulations, others in guidance or handbooks issued and rescinded by the Department. APLU

understands that these are different laws with different goals, but in practice and on the ground, hundreds of thousands of employees across higher education are trained based on the confusing application of these laws to their work. APLU encourages the Department to conform the definitions and standards for reporting Clery Act crimes with Title IX violations, especially because the Clery Act crimes added in the 2013 Reauthorization of the Violence Against Women Act continue to be part of the definition of sexual harassment under these regulations. The Department should simplify the obligations under both laws and allow colleges and universities to train a narrower group of obligated employees (for instance, managerial and supervisory employees and those in student-facing roles) more often and more thoroughly to increase the level of service to those who experience harm.

If this requirement is not simplified and conformed with the Clery Act, institutions will struggle to provide various training content to employees who may shift roles, many of whom will not actually interact with students or employees disclosing sex discrimination. This may lead to a feeling that the training is simply for compliance, and not aiding in building equity.

It is more important that the people in management and student-facing roles are fully and competently trained to respond appropriately to sex discrimination than those who are highly unlikely to receive a report.

Recommendation: The Department should offer institutions flexibility to place employees into one of two categories, confidential or required to report (akin to the prior “responsible employee” title) with other employees offered training on bringing disclosures to Title IX or notifying reporters of how to access the Title IX Coordinator or office. The Department should conform this Title IX reporting requirement with the Clery Act Campus Security Authority requirement. Training should be tied to the role and likelihood that the employee will receive a report of sex discrimination.

VIII- Defer to Employee Processes for Sex-Based Harassment Complaints Against Employee Respondents

The robust process to adjudicate complaints involving students in §106.46 should only apply when the respondent is a student. As written, this section applies when either the complainant *or* the respondent is a student. Colleges and universities have longstanding processes to address sex discrimination and other employment violations governed by Title VII, state law, institutional policy and, in some cases, collective bargaining agreements. Every campus policy has a jurisdiction; the same conduct may constitute workplace violence under a human resources policy and a violation under a student code of conduct. The conduct itself is prohibited for all members of the college community, but different documents (and processes) are applied to students and employees. The Department should only require colleges and universities to use the student process in §106.46 when the respondent is a student.

Traditionally, processes across criminal, civil, and education systems generally “run with” the respondent. That is to say, the identity of the victim or victims of crimes or civil harms generally does not determine what process is used. Due process conventionally considers steps the government (including public colleges and universities) must take to allow a respondent to be on

notice and be heard so as to have the opportunity to oppose a deprivation of a right (in this case, generally property or liberty when reputation is at stake). In theory, these opportunities (which are balanced against the severity of the deprivation and the need for efficiency) aid in accuracy of a finding and reduce the chance of errors before taking someone's life, liberty, or property.

The language in §106.46 that applies additional process beyond §106.45 whenever a respondent *or* a complainant is a student is not in line with Constitutional due process and other relevant systems, is confusing, and can cause varied permutations where different processes are used depending on factors that differ significantly from the Constitutional building blocks of due (and for contract law, fair) process. For instance, two employees may receive different processes and varied outcomes for the exact same conduct simply because one disclosure came from a student and the other from an employee.

For many colleges and universities, collective bargaining agreements or employee handbooks govern employee respondents, and students are governed by a code of conduct or related document. While live hearings for adjudications involving student respondents have long been in place at many public institutions, employee matters are typically not resolved with live hearings. The Department should simplify the process and reduce the need for multiple policies (as currently apply based on geography, violations, and identities of the parties). APLU suggests that the Department apply the more significant process established in §106.46 where the respondent is a student, and otherwise apply the more efficient standard process established in §106.45, which is more appropriate to cases involving employee respondents.

Recommendation: Apply §106.46 to matters where the respondent is a student; for other matters, apply §106.45.

IX- The Department's Requirements on Pregnant and Parenting Students Should Address the Post-*Dobbs* Environment and Protect Students and Employees from Prosecution or Penalties for Complying with the Department's Rules

APLU strongly supports the continued role of Title IX in requiring recipients to provide equitable access to education for pregnant and parenting students. We note two challenges in the regulations as currently written and ask the Department to consider our recommendations for a path forward that best serves students. APLU understands the proposed regulations were released prior to the decision in *Dobbs v. Jackson Women's Health Organization*.

The first and most critical concern relates to the changing landscape of abortion access. Following *Dobbs*, states are taking different and evolving approaches to the availability of, or criminalization of, termination, as well as varying responses to nonviable pregnancies and pregnancy loss. The requirements in the proposed regulations could inadvertently put some students and employees (who are following the regulations) at risk of civil or criminal penalties in some states.

APLU members are subject to state open records or sunshine laws. The Department should carefully delineate the records maintenance obligations for colleges and universities when employees receive a disclosure of pregnancy or related conditions, including but not limited to termination of pregnancy and pregnancy loss (Proposed at pages 41431, 41571). APLU requests

that the Department specify in the final regulations that such records (those related to pregnant and parenting students) must be kept confidential, and that such a requirement expressly preempts state or local open records laws, including exceptions for release to government agencies conducting investigations. The Department has already required a higher level of privacy for certain records and information under these proposed regulations (*See e.g.*, supportive measures, Proposed at pages 41451, 41574; participation in the process, Proposed at page 41453; certain information shared during informal resolution, Proposed at pages 41455, 41574).

Second, the requirement that every employee be trained to provide information to pregnant and parenting students is difficult and unduly burdensome, especially considering that few will receive these disclosures. Offering broad-based training makes sense so colleges and universities can raise employee awareness about the many services and supports available on campus. However, a rule that says that a non-student facing employee who does not provide such information is in fact a violation of Title IX is burdensome with little return. Most employees in a non-student facing role will never receive a pregnancy disclosure and yet under the proposed regulations would have to be trained, tracked, and potentially disciplined for failing to meet this obligation. Pregnancy is intimate, and the needs of pregnant students may be quite personal. Students may not feel comfortable discussing their pregnancy and related conditions with faculty and other employees and those employees, even if trained as required in the proposed regulations, may not have up-to-date or accurate information. Limiting this obligation to select employees in student-facing roles makes sense.

Further, it makes sense to limit the requirement to circumstances in which support is explicitly requested. Otherwise, this requirement presumes that every student who is pregnant requires and/or desires the aid and assistance of the Title IX Coordinator. Giving the student the agency to request or make statements that can be read to be requesting such assistance is more in keeping with the spirit of these regulations. APLU would also agree that services and policies for students who are pregnant or have related conditions should be clear and readily available to students.

Recommendation: The Department should carefully consider and provide analysis in the final regulations for obligations when a college or university learns a student is pregnant, including how records should be maintained and their level of confidentiality and how employees can comply with the regulations and state laws. The Department should apply the response requirements to employees who are student-facing and more likely to receive a pregnancy disclosure.

X- Closing and a Path Towards a Gentler Pendulum Swing

APLU opened the letter by asking for an end or a slowing to the pendulum, but how do we achieve that goal? In closing this letter, APLU reiterates our call again for the Department and Congress to invest significantly in the development and implementation of proven and promising prevention programs, as previously shared in APLU's "[Principles for a New Title IX Regulation on Campus Sexual Misconduct](#)." 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). One way to diminish the challenges of the Title IX regulatory pendulum is to provide educators with the tools to lower the impact of sexual and interpersonal harassment and violence on our students and community members. APLU appreciates the new research program authorized in the CHIPS Act of 2022, Subtitle D, towards the study of (among other things) sexual harassment prevention in STEM. This program needs to be appropriately funded.

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, 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 challenging nature of 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.

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 consequential impact on rates of violence and harassment on campus and in the community. As the Department once again completes a process of changing the regulations around compliance with Title IX, we ask that it take the long view, and partner with education institutions around meaningful prevention.

Thank you for the opportunity to provide comments on these regulations. APLU is eager to continue to serve as a resource in achieving our shared priorities of preventing and effectively responding to sex discrimination.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Becker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dr. Mark Becker
President
APLU