AICU | MASS
ASSOCIATION OF INDEPENDENT COLLEGES & UNIVERSITIES IN MASSACHUSETTS

5 Brighton Street, Belmont, MA 02478
617.742.5147 | FAX 617.742.3089 | www.aicum.org

September 12, 2022

Secretary Miguel Cardona
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202

Re: Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

On behalf of the members of the Association of Independent Colleges and Universities in Massachusetts (AICU Mass or the Association), I write to provide our comments in response to the Department's July 12, 2022, Notice of Proposed Rulemaking (NPRM) proposing to amend the regulations implementing Title IX of the Education Amendments of 1972 (Title IX), *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Docket ID ED-2021-OCR-0166.

AICU Mass is the leading voice on public policy issues affecting independent (private) higher education in Massachusetts. Comprising 59 degree-granting, accredited, nonprofit colleges and universities, these institutions collectively educate approximately 270,000 students annually and employ more than 100,000 people. These institutions also reflect the incredible diversity of America's colleges and universities, with varying sizes, missions, resources, student bodies and many with religious affiliations. All of AICU Mass's member schools receive federal funding and are subject to Title IX.

INTRODUCTION

Guided by foundational ideals of equal access and fairness, AICU Mass member institutions are committed to providing a learning and working environment free from discrimination and harassment, and we appreciate the NPRM's clarification of Title IX protections against all forms of sex-based discrimination in our diverse campus communities. As stated unequivocally in written comments submitted to the Department on January 23, 2019, the well-being of students, faculty and staff and the safety of everyone on campus remain our greatest priorities. This long-standing commitment arises not only as a matter of compliance with Title IX, other federal laws, and applicable state law, but also because it reflects the values of our campus communities.

AICU Mass and its member institutions greatly value this opportunity to share our comments with the Department. Our colleges and universities are continuously assessing the effectiveness of policies and procedures designed to prevent sex-based harassment, including sexual assault, and to respond promptly and fairly when allegations surface. We appreciate that the Title IX rule changes proposed by the Department's NPRM recognize this shared commitment and allow for reasonable discretion across a diverse group of institutions. This is not only critical in effectively tailoring campus procedures to meet the unique needs of a campus, but also in ensuring they are clearly communicated to the populations that they are intended to serve.

The Department's proposed updates will also help institutions navigate an increasingly complex landscape of federal, state, and case law related to the implementation of Title IX. Since the federal regulations were last changed in 2020, the Commonwealth's colleges and universities have worked to update their policies and procedures and devoted

additional resources to meet the requirements of a new Massachusetts state law that took effect on August 1, 2021. In enacting this new law, Massachusetts legislators incorporated into state law many of the Title IX protections and procedures that had been implemented during the Obama Administration. The Massachusetts law also requires institutions to complete a campus climate survey as a valuable tool in regularly assessing the experiences of its student and employee populations and to align campus resources accordingly. AICU Mass was proud to support this legislation as an important complement to Title IX.

As stated in our January 23, 2019, written comments, we urge the Department to consider the full range of experiences, expertise, comments, and perspectives voiced by the higher education community, including those of the many students who remain so deeply engaged in this important process. We also incorporate by reference the written comments submitted by the American Council on Education (ACE) on behalf of a number of higher education associations, including AICU Mass.

On behalf of its members, AICU Mass offers the following comments in response to the Department's proposed Title IX regulations.

GENERAL COMMENTS

AICU Mass appreciates the Department's recognition that flexibility is necessary for diverse institutions of higher education to address sex-based discrimination and harassment in a manner that is fair, effective, and appropriately tailored to their unique campus environment, culture, and resources. As indicated in the ACE letter, we strongly support the NPRM's efforts to provide for greater flexibility in investigation, decision-making and resolution procedures, and we endorse the specific sections referenced in that letter. For the sake of efficiency, AICU Mass will focus its comments below on six issues of particular concern to our members.

COMMENTS ON ISSUES OF PARTICULAR CONCERN

1. The final rule should not require recipients to consider challenges to interim supportive measures.

Section 106.44(g)(4) of the proposed rule would require recipients to provide parties "affected by a decision to provide, deny, modify, or terminate supportive measures with a timely opportunity to seek modification or reversal of the recipient's decision by an appropriate, impartial employee," who must be "someone other than the employee who made the decision being challenged [and who] must have authority to modify or reverse the decision." The proposed rule would further require that supportive measures that burden a respondent must be subject to challenge before the measure is imposed or as soon as possible after it takes effect, and that parties must also be allowed to submit such challenges "if circumstances change materially." It is difficult to overstate the unnecessary administrative challenges that would be posed by these requirements.

By definition, interim supportive measures are provided or implemented for a limited duration while an investigation and resolution process is pending, and the range of potential supportive measures is and should be broad. Supportive measures can be concerned with details such as when a party can use a library or cafeteria, or what path they should take when traveling to certain places on campus at certain times. Supportive measures should be determined, provided and, when based on reasonable feedback, modified on a dynamic, case-by-case basis that is responsive to the parties' needs and their changing circumstances. If every interim supportive measure is subject to an initial challenge, a further challenge where a party claims that circumstances have "change[d] materially," then yet a further challenge if the other party objects to a modification made, etc., recipients and parties could be engaged in a never-ending cycle of side disputes, while recipients simultaneously attempt to investigate and resolve the matter in an efficient and timely manner.

On a large campus where multiple investigations are usually pending simultaneously, an entire administrative structure that involves "supportive measure providers" and "supportive measure challenge reviewers" would need to be developed to comply with the proposed requirements. On a small campus where Title IX functions may be coordinated by only one individual, another official who has the authority to modify or reverse the decision would apparently have to be trained and involved in reviewing supportive measure decisions and related challenges. Because supportive measures are only in effect for a limited duration, a requirement that recipients must create a

new administrative structure and/or involve other campus personnel in supportive measure decisions is unjustified. Therefore, AICU Mass requests respectfully that the final rule not include the supportive measure challenge requirement.

2. <u>The proposed definition of "complaint" should be revised to eliminate the "oral request" provision</u>.

The proposed definition of "complaint" in section 106.2 provides that "[c]omplaint means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46." AICU Mass understands from the Preamble to the NPRM that the Department intends this change to eliminate the current distinction between a complaint of sex discrimination and a formal complaint of sexual harassment, and to remove a barrier for potential complainants to effectively assert their rights under Title IX. AICU Mass is supportive of those goals but is concerned that the proposed definition's suggestion that recipients have an obligation to initiate grievance proceedings based on oral requests will prove impractical and confusing for both complainants and recipients.

In our members' experience, ambiguity about whether an individual wishes to participate in a grievance process can be very harmful. On one hand, if a process is initiated and it turns out that the potential complainant actually did not want that to occur, that individual will likely be concerned about a loss of confidentiality and agency; on the other hand, if a complainant did want a process to be initiated but the recipient misunderstands their intentions, the complainant will likely be concerned about any resulting delay or perceived inaction on their complaint, and the recipient may have missed an opportunity to address the alleged conduct in a timely and appropriate manner. A requirement that requests to initiate a grievance process must be reduced to writing will eliminate these ambiguities and related risks. Such a requirement is also consistent with Section 101 of OCR's 2022 Case Processing Manual, which notes that "[o]ral allegations that are not reduced to writing are not complaints". To be clear, any barrier to participation related to a potential complainant's hesitancy about writing a narrative themselves, a disability-related barrier, or another barrier, can be eliminated by recipients engaging verbally with potential complainants to fully understand their wishes, and helping the complainant reduce to writing any request and narrative that is necessary to support initiating the grievance process. Further, recipients cannot practically give notice of charges to a respondent without at least an agreed-upon written description of the sex-based discrimination at issue that satisfies the notice requirements of proposed section 106.45(c)(1), so a written request to initiate the process will essentially be required in any event.

For these reasons, while AICU Mass has no objection to the elimination of the current rule's "formal complaint" language and the distinction between the prerequisites to initiating sex discrimination versus sexual harassment complaints, it submits respectfully that the final rule should not require recipients to initiate a grievance process based on simply oral requests.

3. <u>The definition of when recipients have "notice" of sex-based discrimination should be clarified</u>.

Section 106.44(c)(4) of the proposed rule provides that the employee notification requirements do not apply when the only employee with information about conduct that may constitute sex discrimination under Title IX is the employee-complainant. AICU Mass supports this change because it emphasizes the importance of survivor agency. It also recognizes appropriately that recipients should not be deemed to have notice of sex discrimination that they could not know about because the survivor chooses not to disclose the sex discrimination to the recipient.

Conspicuously absent from the proposed rule, however, is the provision in section 106.30(a) of the current rule to the effect that recipients will not be deemed to have actual knowledge of sexual harassment, or an obligation to respond to it, "if the only official of the recipient with actual knowledge is the respondent." While recipients are committed to discovering and taking action to address sex discrimination by employees, they should not be deemed to have knowledge of sex discrimination where the only individuals who know about it are the survivor (exempted from reporting obligations by the proposed rule) and the alleged respondent (who will presumably not disclose their own misconduct). Therefore, the Association suggests respectfully that proposed section 106.44(c)(4) be amended to add language parallel to the above-referenced portion of section 106.30(a) of the current rule.

4. Recipients should not be required to post training materials.

AICU Mass members strive to train their employees generally, and their Title IX-focused investigators, decision-makers, and coordinators specifically, at levels that are appropriate for their respective roles. They also understand the need to maintain records of their training efforts. The Association submits, however, that the requirement in proposed rule section 106.8(f)(3) that recipients must make training materials publicly available on their websites is unnecessary and would, ironically, diminish the quality of the training that recipients can provide to their campus communities.

This proposed requirement was derived, obviously, from the identical requirement in section 106.45(b)(10) of the current rule, which the Department added, according to the Preamble to the current rule, "so that a recipient's approach to training Title IX personnel may be transparently viewed by the recipient's educational community and the public, including for the purpose of holding a recipient accountable for using training materials that comply with these final regulations." Preamble to May 2020 Regulations at 30254. Recipients understand that their training materials will be reviewed in the event of an Office for Civil Rights investigation into, or a dispute that implicates, the quality and content of their training programs. That understanding alone encourages recipients to provide training that is fair, balanced, and avoids sex stereotypes. However, the notion that scrutiny of training materials by the general public is also necessary to "police" the content of those materials has no cited basis in fact or anecdotal experience; the posting requirement is therefore unnecessary and unjustified.

Further, the training materials posting requirement would diminish the quality of the training that recipients can provide to their campus communities, in three ways. First, the requirement effectively precludes recipient personnel from attending high-quality third-party interview, investigation and other training programs, if the third-party training providers are unwilling to have the intellectual property in their training materials compromised by unrestricted public posting. Second, some recipients would like their training programs to include impactful video testimonials from individuals who are willing to share their experiences with sex-based discrimination and/or the Title IX process within the campus community, but few would be willing to have their experiences published on a website that is open to the general public. Third, recipients would also like to tailor their training offerings as necessary on a program-by-program basis; the administrative burden imposed by a requirement that every variation in a training program be posted publicly would discourage such innovation.

For these reasons, AICU Mass submits that the training material posting requirement is unnecessary and would diminish the quality and effectiveness of Title IX-related training programs, and requests respectfully that the final rule not include this requirement.

5. The final rule should not require Title IX-specific procedures for resolving sex-based discrimination involving employees.

In the context of employee-employee complaints, detailed procedural requirements in the May 2020 regulations unnecessarily involve the Department of Education in the relationship between recipients and their employees, because workplace sex discrimination and sexual harassment issues are addressed by the requirements of Title VII. Title VII has for decades afforded recipients the flexibility to respond to such workplace misconduct through procedures long established by existing staff and faculty handbooks and collective bargaining agreements. The current rule, by contrast, requires recipients to adopt procedures that conflict with long-standing employment procedures. There is no substantive reason why workplace sex discrimination and sexual harassment issues need to be addressed differently than other types of discrimination covered by Title VII, especially since Title VII currently covers sex-based discrimination and sexual harassment, and the Department recognizes in Section 106.6, that Title IX does not alter the obligations imposed by other Federal laws, including Title VII. Department of Education rules applied in the context of employee-employee sexual harassment matters represent a solution in search of a problem and an unnecessary complication.

AICU Mass recognizes that the proposed rule would, in contrast to the current rule, allow recipients to address sex-based discrimination complaints that involve employee-complainants and employee- respondents through the relatively less proscriptive procedures outlined in proposed section 106.45. Nonetheless, AICU Mass submits that the final rule should not require that employee-employee complaints be addressed through the procedures outlined in proposed section 106.45, because those procedures still conflict with existing collective bargaining agreements,

the provisions of recipients' staff and faculty handbooks, and the procedures generally applied in the Title VII context. The proposed rule would therefore have the effect of requiring recipients to maintain one set of procedures for sex-based discrimination issues, and another set of procedures for issues that involve discrimination on other bases. In doing so, recipients facing allegations of a discriminatory workplace must parse the complaint and apply the appropriate procedure, while remaining vulnerable to later attacks that they chose the wrong approach and therefore deprived a party of the appropriate process. This is especially challenging where employees allege discriminatory treatment on the basis of multiple protected characteristics. Moreover, these varied complaint processes would offer those alleging or subject to sex-based allegations of discrimination or harassment with different procedures than are provided under Title VII. The resulting administrative burden, procedural complexity, confusion, and differential treatment are unjustified, especially where Title VII adequately addresses workplace discrimination and harassment issues.

The detailed procedural requirements in proposed section 106.45 are also inconsistent with the concept of at-will employment and the flexibility and efficiency necessary to effectively manage a workplace. Under that concept, recipients or employees can decide to part ways without particular procedures or prior notice, and agencies and courts are careful not to intrude as super-personnel departments. Recipients should have the same discretion as other employers to decide to end an at-will employment relationship where an employee is reasonably determined to have engaged in discrimination or harassment on the basis of sex, race, religion, national origin, etc., or other misconduct. Title IX's prohibition on discrimination because of sex should not be read to require at-will employers to continue to employ an individual who is creating a discriminatory workplace so that it may comply with detailed procedural protections to employees who are reported to have engaged in one particular type of misconduct.

The proposed rule's requirement that cases involving student-complainants and employee-respondents be handled through the procedures outlined in proposed section 106.46 is even more problematic. All of the problems identified above would be posed by that requirement, and the relatively more detailed procedural requirements of proposed 106.46 are even more likely to conflict with the employee discipline procedures outlined in long-standing staff and faculty handbooks and collective bargaining agreements, and with the discretion that recipients would otherwise have to end at-will employment relationships.

AICU Mass noted the Department's observation that student-complainants would benefit from working with an advisor in sexual harassment cases (see Preamble to the NPRM at 41459). AICU Mass suggests as a compromise that if the Department has deemed this necessary to promote fairness in student-complainant/employee-respondent cases, the final rule could simply add a requirement that recipients will allow complainants and respondents to work with an advisor in any processes used in such cases, without imposing upon recipients all the procedural requirements outlined in proposed section 106.46.

AICU Mass appreciates the Department's statement at page 41459 of the Preamble that a recipient's "prompt and equitable" grievance procedures "must function well alongside the procedures it uses to implement Title VII and, to the extent not inconsistent, other laws and collective bargaining agreements that govern the employment relationship," but submits respectfully that requiring recipients to apply proposed sections 106.45 and 106.46 to employees will often not "function well", or be "prompt". For example, unions may not agree to accept the findings of a Title IX hearing panel or internal investigator against a respondent-union/unit member. In that case, the union can force the institution to "re-litigate" the underlying Title IX investigation and/or hearing before an arbitrator and can require the Title IX Coordinator to testify at an arbitration about the underlying investigation and/or hearing. This essentially reopens the internal resolution process which can prevent the parties from healing and moving forward, prevents the efficient resolution of sex discrimination matters, and extends the time for resolution of sex discrimination matters by many months, thereby requiring even more resources to be devoted by and to the parties and the institution. Similarly concerning scenarios can play out where faculty de-tenuring procedures established by faculty handbooks must be followed after a Title IX investigation occurs. Sex discrimination matters can be handled promptly and equitably through collectively bargained-for procedures and faculty handbook procedures if those are the only procedures that recipients need to apply, but if those procedures need to be preceded by a process that complies with proposed sections 106.45 and/or 106.46, that may not be possible.

For these reasons, AICU Mass suggests respectfully that the final rule should not require Title IX-specific procedures for resolving sex-based discrimination involving employees.

6. <u>The final rule should eliminate uncertainty regarding applicability to establishing an effective date that affords recipients sufficient time to engage all stakeholders when revising and implementing changes to their policies and procedures.</u>

For colleges and universities in Massachusetts, the regulatory changes proposed through the Department's NPRM will mark the third time in less than three years that recipients will be required to review and revise, as necessary, policies and procedures that had been thoughtfully developed to prevent and address sexual harassment and discrimination on their campuses and to comply with prior iterations of Title IX regulations. This continuous shift in the regulatory landscape creates uncertainty on campus, undermines the effectiveness of such policies and procedures and forces recipients to spend significant time and resources – that could otherwise be deployed to address sex-based discrimination and sexual harassment – to develop and implement new policies and to educate the campus community on yet another round of changes. It is our hope that the Department will use the final rule as an opportunity to provide much-needed clarity and time.

Specifically, we respectfully request that the Department:

- Provide clarity as to the prospective application of the final rule. Much like the 2020 final rule, the proposed rule is silent regarding whether it applies retroactively or only prospectively. All members of the campus community will greatly benefit from the Department explicitly stating that the new rules will apply prospectively to conduct occurring after the effective date of the final rule. The Department must also clarify which procedures will apply to matters still pending at the time of the final rule's effective date as well as any complaints filed after the effective date regarding conduct that allegedly occurred before that date.

- Set an effective date for the final rule that will give recipients sufficient time to fully engage their campus communities in the process of revising their current policies and procedures. The final rule will require each recipient to thoroughly assess the changes that will need to be made to existing policies, procedures, and training programs. For institutions in Massachusetts, this process will also entail reconciling those changes with the requirements of the recently-enacted state law. This will be time-consuming work that is likely to include at minimum, campus-wide dialogues, needs assessments, student and employee outreach, and a variety of trainings – critical work that cannot be rushed. Moreover, this process will be particularly challenging for institutions with fewer resources and less staff to devote to this important work. For those reasons, we respectfully request that the Department set an effective date that gives each recipient a reasonable amount of time to meet the burdens of implementation.

<u>CONCLUSION</u>

In sum, AICU Mass appreciates the increased flexibility afforded by the proposed rule and submits respectfully that if the proposed rule is modified as suggested to address the six issues identified above, the final rule will promote the ability of the Association's members to effectively and fairly address sex-based discrimination and harassment on their campuses.

Sincerely,

Robert J. McCarron, President