From: Pamela Davidson
Sent: Thu, 10 Jun 2021 20:57:28 +0000
To: T9PublicHearing
Subject: Written Comments: Title IX Public Hearing (overall comments on Title IX)
Attachments: AAU Title IX Comments 2021_FINAL.pdf

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Please see the attached written comments from the Association of American Universities (AAU), an organization of America's 66 leading public and private research universities. AAU is also a leader in researching sexual assault and misconduct across our campuses and the practices universities use to combat these behaviors. We appreciate this opportunity to provide these written comments on the review of the Title IX regulations by the Office for Civil Rights.

Please contact me with any questions. My contact information is below.

Best,
Pam

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June 10, 2021

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Ave, SW 6E310
Washington, DC 20202

Dear Ms. Goldberg:

The Association of American Universities (AAU), an organization of America's 66 leading public and private research universities, appreciates the opportunity to provide written comments on the review by the Office for Civil Rights of the Department of Education's existing regulations and other actions related to Title IX. This review is part of President Biden's *Executive Order on Guaranteeing an Education Environment Free from Discrimination on the Basis of Sex, including Sexual Orientation or Gender Identity* issued on March 8, 2021. It is critical that the higher education community and other relevant stakeholders have input into the rules for how colleges and universities respond to allegations of campus sexual assault and misconduct.

Every student has the right to an education free of harassment, and we recognize that harassment can prevent students from learning and receiving the high-quality educational experience they deserve. AAU and its member universities take seriously our responsibilities to provide a safe learning environment for all students, especially our LGBTQ students; educate members of our communities about sexual harassment, sexual assault, and prevention; encourage students to report any instance of sexual harassment and sexual assault; support all students affected by sexual harassment and sexual violence; and ensure that all students involved have access to support services and fair and equitable processes. AAU is encouraged that President Biden's executive order demonstrates his administration's commitment to protections for LGBTQ students, and we look forward to working with the administration to ensure our campuses are safe for all students.

AAU is deeply committed to complying with all federal civil rights laws and ensuring the safety and well-being of all students, faculty, staff, and others who enter our communities of learning. As a key part of that commitment, AAU is a leader in researching sexual assault and misconduct across our campuses and the practices universities use to combat these behaviors. In 2015, AAU administered a landmark survey[1] assessing the prevalence of sexual assault and misconduct on campuses. More than 150,000 undergraduate and graduate students across 27 universities participated, and the results provided much-needed insight into students' experiences. As a follow-up in 2019, AAU surveyed[2] 33 research universities on the incidence and longitudinal trends of sexual assault and misconduct as well as the practices institutions used to prevent and

[1] https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015
[2] https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019

respond to those incidents. In addition to these two major surveys, in 2017 we released a report[3] highlighting how campuses have changed and improved their response to sexual assault as a result of the findings in the 2015 report. Our efforts demonstrate our campuses' commitment to the prevention of all forms of sexual misconduct. These efforts have not only benefitted AAU members, but have provided universities across the country with actionable information and helpful perspectives to better combat sexual assault and misconduct.

In preparation for this comment letter, AAU worked closely with our member universities to capture their experiences in administering campus disciplinary proceedings under the two previous administrations. AAU also worked with our members to determine how the COVID-19 pandemic affected the implementation and impact of the current regulations, given that many students were not on campus and receiving virtual instruction. While our comments are informed by our research and AAU members' experiences, we encourage the department to include campus advocates for survivors of sexual misconduct as part of the conversation as it moves forward in this regulatory process.

- **Consistency in Title IX Regulations**
  We strongly encourage the department to find a middle ground between the Obama and Trump administration's different policies to provide colleges and universities consistency in administering and complying with Title IX regulations. The constant change in Title IX requirements by administrations is harmful to Title IX complainants who may not clearly understand their institution's current policies for filing a Title IX complaint. Additionally, the changes are costly to institutions of higher education in both staff time and resources. AAU encourages the department to 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.

- **The department's one-size-fits-all approach fails to account for the diversity among higher education institutions that helps make the American higher education system great.**
  The diversity of American institutions of higher education—in terms of size, mission, religious affiliation, and other characteristics—affords students and their families the opportunity to select a school that best fits their needs and educational goals. The current regulations impose one model for responding to sexual harassment[4] claims on all higher education institutions.

  Current regulations subject universities to a significant amount of federal control on how to investigate and adjudicate allegations of sexual harassment. For example, the current regulations mandate very prescriptive details on what precise information must be included in a notice of allegations; who must investigate such allegations and decide complaints; and how complaints must be adjudicated and appealed.

  AAU continues to recommend that the department allow institutions to determine what processes are best for their campus community. Different approaches are helpful as our institutions strive to create and improve policies and practices and identify and retire what is ineffective. These approaches also allow institutions to respect the different schools' values, student populations,

[3] https://www.aau.edu/key-issues/aau-campus-activities-report-introduction
[4] For the purposes of these comments, we assume that the use of the term "sexual harassment" in the current regulations encompasses both sexual harassment, sexual assault, and other forms of sexual misconduct. As such, this letter will only use the term sexual harassment.

community resources, and educational philosophies. Mandating that all schools address these issues in an identical manner will limit their ability to tailor their policies and procedures to their campus community and implement their individual educational missions. The department should ensure that the rights of all parties are protected with less prescriptive rules.

- **Current regulations require universities to run quasi-courts with "live hearings" and direct cross-examinations, something that is inconsistent with their educational missions.**
  The current regulations mandate that institutions of higher education use an adversarial, hearing-based procedure that imitates many features of our nation's criminal justice system. In doing so, the regulations ignore the fact that internal disciplinary processes at a college or university are separate and distinct from the adversarial procedures that govern the criminal and civil justice systems. While every university wants complainants and those accused of a Title IX violation to have a fair hearing, requiring courtroom-type hearings in Title IX investigations is problematic and will not create a fairer process for seeking the truth.

  AAU remains concerned that the current regulations open universities up to lawsuits based on a new theory of liability: that the advisor the institution may have appointed to assist either the complainant or the respondent was ineffective. Furthermore, this creates an inequitable system wherein students with greater financial means may be able to afford counsel, and students from modest or lesser means, including student survivors, may only be able to afford institutional representation. Additionally, the requirement that the institution provide all gathered records to both sides is broader than the discovery rules in courts, which do not require production of irrelevant and confidential materials. AAU continues to have concerns that institutions might not readily have the funds available to absorb the higher costs associated with the current regulation's prescribed quasi-court models. Such a system creates more and complicated new institutional burdens and may subject institutions to additional lawsuits over a court-of-law-like role that higher education institutions are not designed to fill. The current regulations undermine universities' educational missions. Existing university disciplinary proceedings and models are intended to be educational processes; they are not intended to be criminal or civil courts and do not have the infrastructure to operate as such. Moreover, many institutions of higher education are bound by their respective state laws. By requiring one federal standard, the current regulations ignore the differences in various state laws.

  As AAU's 2017 report shows, institutions have implemented several different effective strategies for responding to sexual harassment that make these requirements inadvisable. Under the current prescribed model for adjudication, schools are no longer free to opt for alternative investigation and adjudication models that avoid the potentially traumatic experience of participating in a quasi-judicial hearing. Also, mandating an adversarial hearing and other invasive investigation practices may discourage complainant from reporting their experiences of sexual misconduct for fear of further harm throughout the process, thus leading to underreporting of incidents. It may also discourage witnesses from participating in the process.

- **Definition of "Sexual Harassment" that is confusing and inconsistent with Title VII of the Civil Rights Act.**
  AAU's members are concerned that the definition of "sexual harassment" under the current regulations is too narrow and ignores incidents that occur outside of the United States, effectively ignoring incidents within study-abroad programs. Also, based on this narrow definition, there are concerns with the meaning of "substantial control" by the universities for events, locations, or

circumstances in which harassment occurs and to which the university must respond. Such matters have led to many schools developing two separate sets of guidelines and adjudication procedures: one for matters that fall under the narrow definition of Title IX; and one for matters that do not fall under the current Title IX definition. This discrepancy is costly to institutions of higher education and is confusing for students who want to report a violation. We believe that universities should retain the flexibility to investigate and punish behavior that falls outside of the current definition.

Also, it remains unclear about how, in practice, the term "sexual harassment" relates to Title VII of the Civil Rights Act regarding university employees. The department should consider clarifying what process it expects to be applied, in what scenarios, and why. For example, what applies to alleged employee-on-employee harassment and/or alleged employee-on-student harassment? As the regulations are currently written it is unclear if schools can investigate complaints under only Title IX, Title VII, or both. The department should clarify the interplay of the Title IX regulations and Title VII employment law. Without such clarification, the department may inadvertently hinder schools' ability to respond effectively to allegations of *sexual* harassment that is narrowly defined and *workplace* harassment that is defined far more broadly.

- **Insufficient flexibility for permitting institutions to choose evidentiary standard.**
  The current regulations provide insufficient flexibility to apply different standards to different types of campus disciplinary proceedings. Universities should have the flexibility to decide that certain processes are better suited to violations, especially since the evidence available in particular types of cases often greatly differ. There are similarly good reasons to permit different processes or standards of evidence for employees.

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. AAU appreciates the opportunity to provide these comments for consideration 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. Any revised regulations should also recognize that even small changes could have large consequences. As such, any new regulations should provide sufficient time for universities to implement the changes before the rule becomes effective.

We look forward to continuing to work with the department to provide more formal comments as this process moves forward.

Sincerely,

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Barbara R. Snyder
President, Association of American Universities