



September 12, 2022

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

Re: Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

The American Association of Community Colleges (AACC) welcomes this opportunity to comment on the Department's July 12, 2022, notice of proposed rulemaking ("NPRM" or "proposed rule") amending regulations implementing Title IX of the Education Amendments of 1972 ("Title IX"), Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Docket ID ED-2021-OCR-0166. AACC represents the nation's 1,043 community colleges and their students.

AACC has joined comments filed on the NPRM by the American Council on Education and other higher education associations (ACE Letter). These comments supplement ACE's more comprehensive comments, highlighting issues of particular interest to community colleges. AACC commends the Department's efforts to improve Title IX, and hopes that these regulations have a perceived validity, legitimacy, and workability that will stand the test of time.

For purposes of Title IX, there are important characteristics shared by most community colleges that differentiate them from other types of institutions. For one thing, community colleges are primarily non-residential institutions (only approximately 2% of students live on campus) and so the way that Title IX applies and impacts community colleges tends to be different than at residential institutions. In addition, community college students generally differ from their four-year counterparts as they are older, more likely to work, and are often raising children while attending classes.

Many community colleges are small to medium-sized institutions. Roughly 60% of community colleges have enrollments of fewer than 5,000 students. This has great significance for their administrative apparatus. These institutions do not have legions of staff to conduct their operations and Title IX coordinators often perform several important job functions.

On average, community colleges have fewer resources than other sectors. Less than one quarter (22.8%) of state higher education spending is used to support public two-year colleges. This all means that regulations requiring institutions to implement complicated new requirements will have an outsized impact on community colleges, inevitably drawing resources away from teaching and related activities. Consequently, Title IX regulations that afford institutions flexibility in how they respond to

instances of sex discrimination and that refrain from imposing unnecessarily heavy compliance burdens are especially important to community colleges. Such an approach will better enable community colleges to serve their students and address any sex discrimination on their campuses.

For the reasons set out in the ACE Letter, AACC appreciates many ways that the proposed regulations alter the current rules, particularly in affording institutions more flexibility in responding to possible incidents of sex discrimination. Our principal concern with the current regulations is the quasi-judicial grievance procedures required of institutions in their responses to formal complaints of sexual harassment. We greatly appreciate the NPRM's improvements in this area, while keeping in place a structure that seeks to treat all parties to a Title IX complaint fairly. Colleges strive to responsibly protect their students and allow all of them to fully participate in all activities, including those that extend beyond Title IX's purview. Over decades, they have developed procedures to do just that. We applaud the NPRM for providing some deference to institutions' best judgement in cases of sex discrimination, recognizing that, ideally, Title IX policies mesh with broader campus policies governing conduct.

That said, the proposed regulations are a sea-change from the current rules, particularly concerning their basic scope. The regulations would require far more employees to have greater Title IX responsibilities than at present. Unfortunately, in this recalibration of Title IX, the proposed rules introduce a substantial degree of vagueness and uncertainty in an area where the current regulations, despite their serious flaws, are clear.

Further, while many of the NPRM's changes are positive, they are changes nonetheless, and will require institutions to expend substantial time to comply, both initially and in subsequent implementation. This is the case even for changes that return to the status quo that existed via guidance issued prior to the current regulations. The comments below offer some specific suggestions on how to ameliorate this impact and ease implementation.

Beyond these suggestions, however, AACC urges the Department to be mindful of the burdens of regulatory compliance and revise the regulations wherever possible to provide the greatest degree of clarity and the lowest cost for colleges, while still achieving our shared goals. AACC also strongly urges the Department to allow institutions ample time to comply with a final rule to minimize the "whiplash" effect that institutions will inevitably experience because they so recently implemented the 2020 final regulations, which in turn deviated substantially from the prior guidelines. AACC supports the ACE Letter's recommendation to allow for at least an 8-month transition time between publication of the final rule and its effective date.

Recommendations Related to Grievance Procedures

106.45 and 106.46 – General Application. The regulations would require institutions to initiate grievance procedures in response to complaints of sex discrimination generally, with the more particular requirements of 106.46 being applicable in cases of sex-based harassment involving students. This will likely result in more cases being addressed through an institution's grievance

process than under current rules, even though informal resolution is an option in cases where it is desired by the parties — an approach that can benefit all parties.

While, as noted above, the procedures required under the proposed 106.45 and 106.46 are an improvement over the current regulations, many institutions will still have to have procedures in place to address sex discrimination complaints that are different than those that apply to other areas of their conduct codes. Thus, it is imperative that the final regulations state as clearly as possible when these procedures must be used, and that they not be required when unwarranted.

The proposed grievance procedures essentially modify those currently in place, which apply only to cases of sexual harassment. The more formalized process - including requirements for how evidence is treated, rules concerning advisors, and other components - were originally designed for, and are particularly apt to, cases involving serious (and sometimes criminal) conduct. The protections afforded complainants and respondents are most applicable to cases between students. For the reasons stated in the ACE Letter, they are not well suited to cases involving employees.

Our principal recommendation, therefore, is that the grievance procedures detailed in 106.45 and 106.46 only be required in sex-based harassment cases involving student respondents. This is the cleanest and most appropriate way to resolve the many ambiguities and possibly unintended consequences of the regulations as proposed (see examples below). Limiting the use of the grievance procedures in this way will not change the basic requirement that institutions must address and remedy all sex discrimination in their educational programs and activities. It simply better aligns the more particular requirements in 106.45 and 106.46 to the subset of cases in which those procedures are most appropriate.

The examples raised below of inapt application of grievance procedures are situations that may be more frequent at community colleges than other institutions. Should the Department not modify the regulations as proposed above, AACC urges the Department to at least clarify and limit the application of those procedures in the types of cases below.

106.11 – Hostile Environment Resulting from Sex-Based Harassment Outside of an Educational Program or Activity. The regulations should clarify the situations in which an institution is responsible for responding to a hostile environment within its educational program or activity that is a result of sex-based harassment that occurred outside of its program or activity, and then, what specifically is required of the institution. Because community colleges are generally non-residential, they may face more of these occurrences than other colleges. The regulatory text should include an illustrative list of situations in which this requirement would apply, though such a list could never be exhaustive.

The most likely scenario, and the one cited most frequently in the preamble, is harassment that occurs outside the educational program or activity that creates a hostile environment on campus for the complainant due to the respondent's presence. But the proposed regulations seem to assume that the off-campus harassment and resulting on-campus hostile environment are contemporaneous. That will not always be the case, and when it is, the off-campus conduct itself will often fall under the school's "disciplinary authority" (though on this topic we share the concerns expressed in the ACE Letter).

An occurrence that happened long ago when one or both of the parties was neither a student nor an employee could give rise to a hostile environment in the present. This is most likely to happen at community colleges, where students often attend intermittently over long stretches of time.

In such an instance, if the recipient has an obligation to address a hostile environment that may exist in its education program or activity, as the regulations propose, it is not clear what form that action must take. Does the regulation require that the recipient utilize the grievance process detailed in 106.45 and 106.46 to address an occurrence that is both outside the educational program and the school's disciplinary authority? And that may have happened several years in the past? AACC thinks that it should not, and that the regulations should clarify that the grievance procedures are not applicable to such instances.

106.45 (a)(1) – Complaints About Policy or Practice: AACC recommends that the regulations clarify that complaints that a recipient's policy or practice is discriminatory do not trigger the obligation to institute the grievance process prescribed by 106.45. The regulations do make clear that the institution is not considered a respondent in such cases but fall short of saying the Title IX grievance process is not triggered at all. Yet, the grievance process seems to assume the existence of a respondent, and in fact allows institutions to dismiss cases where a respondent cannot be identified. So, the intent of the proposed regulations seems to be that 106.45 does not apply to complaints about policy or practice, but that intent should be stated more clearly.

Furthermore, the regulations should clarify that discrimination complaints against a particular respondent based on actions the respondent undertook *in accordance* with institutional policy or practice do not trigger the requirements of 106.45. Though a particular respondent is named in these cases, the complaint is really about the institutional policy itself, and should be handled similarly.

106.45 (a)(2)(iv) – Third Party Complaints. Because of their general openness and mission to serve their communities in a variety of ways, community colleges may be particularly affected by the proposed rule's requirement that grievance procedures be available to third parties participating or attempting to participate in a recipient's educational program or activity. Community colleges agree that recipients must not discriminate against anyone trying to access its educational programs and activities, even if they are not students or employees.

However, it does not necessarily follow that this end must be achieved through a grievance process, particularly one that is primarily designed to protect the interests of student complainants and respondents. Furthermore, third party cases are more likely to result from one-time occurrences rather than ongoing situations that would require changes in campus arrangements or more systemic interventions. The regulations should provide that discrimination complaints brought by third parties can be solely addressed through the general requirements of 106.44, and not the grievance procedures required by 106.45, unless a student respondent or the recipient opts for the grievance process.

Additional Comments and Recommendations

106.8(d) – Training: The proposed regulations will have nearly every college employee involved in implementing Title IX. This will pose serious administrative challenges to many, probably most, community colleges. This is particularly the case when it comes to training. Though the proposed training requirements are similar in many respects to prior guidance, colleges have dramatically altered their practices in response to the 2020 regulations. And the proposed regulations require more extensive training that will challenge even those colleges that continued with a wider internal reporting framework concerning sexual discrimination than the current regulations require.

The difficulty of this task is exacerbated by the fact that 79% of community college faculty members are adjunct professors. These faculty members often teach just one course at a given institution and many adjunct faculty simultaneously teach at more than one institution. In addition, community colleges' substantial non-credit course offerings further complicate the picture. These offerings are taught by a wide array of professionals in numerous educational settings, often at employers' worksites. They, too, will have to be trained under Title IX's requirements.

The fluid nature of community college faculty therefore greatly complicates efforts to train all employees, as required by 106.8. Given this, the training requirements alone necessitate a substantial transition time before the new regulations take effect (at least 8 months as recommended above).

106.40 (b)(4) – Reasonable Modifications for Students Because of Pregnancy or Related Conditions. The proposed regulation's new requirement that institutions provide reasonable modifications for students because of pregnancy or related conditions is of particular interest to community colleges because, as noted, on average community college students are older than those in other sectors. Campuses want to ensure that pregnancy does not interfere with academic success and are quite sensitive to the academic complications that pregnancy can present. Therefore, while community colleges strongly support the aim of the regulations in this area, in this context further clarification of the word "reasonable" is needed.

As proposed, the regulations imply that a modification is reasonable "unless the recipient can demonstrate that making the modification would fundamentally alter the recipient's education program or activity." The preamble poses a scenario of a student who wishes to receive credit for their senior year as an example of an unreasonable modification that would fundamentally alter the education program or activity.

However, there is a wide range of potential modifications that arguably do not fundamentally alter the program or activity, but nonetheless should not be considered "reasonable" because of the extreme burden or disruption they would impose. For example, the illustrative list of modifications contained in 106.40 (b)(4)(iii) includes "access to online or other homebound education." What if a course in which the pregnant student enrolled is not offered in an online or other format that allows the student to access it at home? Must the institution in that case create a new section or shift a current one to an online or hybrid format? Offering a course in a different format would arguably not fundamentally alter the program or activity, but nonetheless not be "reasonable" because of the cost and disruption it

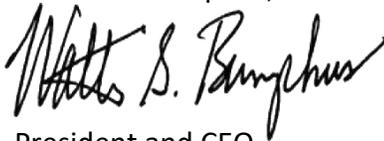
would entail. The regulations should clarify that modifications that impose excessive burden on the institution, whether or not they “fundamentally alter” the educational program or activity, are not considered to be “reasonable” modifications.

106.44 – Prompt and Effective Action. The regulations need to elaborate upon the requirement that a recipient must take “prompt and effective action” to end discrimination, prevent its recurrence, and remedy its effects. The proposed rules lay out a framework of what the Title IX coordinator is required to do in response to being notified of possible sex discrimination, including offering supportive services and an informal resolution process, and in some cases a prescribed grievance process. However, the preamble also states that unnamed, additional actions may be necessary for the institution to meet its Title IX obligations, without providing in the regulations themselves any illustration of what those actions might be. Consequently, an institution may be found by the Department to have violated Title IX even though it took all the actions specifically required in the rules themselves. Short of providing a “safe harbor” for institutions that assures them that they will be deemed in compliance if they take certain actions, the rules should provide more clarity as to what additional actions an institution may be expected to take to fulfill the sweeping obligations that the regulation requires.

AACC recognizes the great importance of effective regulation in this area, to attain commonly shared goals. Thank you for your consideration of these comments. Please let me know if you have any questions related to them.

Sincerely,

Walter G. Bumphus, Ph.D.

A handwritten signature in black ink that reads "Walter G. Bumphus". The signature is written in a cursive, flowing style.

President and CEO