



September 9, 2022

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

Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona:

ED-2021-OCR-0166-0001

Thank you for the opportunity to provide comments to the Department of Education (ED) on its notice of proposed rulemaking (NPRM) amending the regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

For over 100 years, the Association of Governing Boards of Universities and Colleges (AGB) has empowered boards and their members to govern with knowledge and confidence. We work with approximately 40,000 board members, chief executives, and leadership team members, representing more than 2,000 colleges, universities, and related foundations.

We appreciate your continued leadership and ED's dedication to improving colleges and working together with the higher education community on Title IX and other important issues. AGB has signed on to the community comments originating from the American Council on Education (ACE) on this matter. The intent of this letter is to share additional perspective from governing boards regarding Title IX and sexual discrimination in education programs.

Higher Education Governing Boards Recognize the Importance of Title IX

AGB would like to reiterate that governing boards understand the importance of addressing sexual discrimination at institutions of higher education and creating a welcoming environment for everyone on campus to be safe and successful. Board members are accountable, as fiduciaries, to ensure their institutions meet all federal standards that regulate them.

This includes maintaining academic quality and financial stability while providing a safe and supportive learning environment, such as appropriately responding to sex-based discrimination by establishing and maintaining systems that fairly respond to the needs of all parties. We appreciate that ED is also dedicated to implementing procedures that accomplish this goal.

AGB Appreciates the Department's Approach

We would also like to thank ED for acknowledging many of the higher education community's concerns, including AGB's, from the previous rulemaking. AGB remains supportive of giving institutional leaders greater freedom to exercise good faith judgment when it comes to effectively complying with Title IX. Under the prior regulation, governing boards oftentimes lacked clarity and flexibility to determine how their institutions could ensure the best and most just way to proceed with each sexual harassment case.

For example, the previous regulation mandated a quasi-judicial system within institutions of higher education, which was difficult to uphold and did not serve the best interests of students. Many colleges and universities lack the necessary infrastructure to establish the required procedures, such as cross-examination and live hearings. Additionally, these policies tended to be expensive to implement and sometimes required hiring additional staff. This was especially cumbersome to smaller institutions that were already struggling under the financial strains of the pandemic.

Additionally, AGB was concerned about the requirement for institutions to choose either "preponderance of evidence" or the more stringent "clear and convincing evidence" and apply that standard to both students and employees. This created a one-size-fits-all model that lacked flexibility to address each instance on a case-by-case basis. We appreciate that the new proposed rule is crafted with flexibility and allows institutions to address each individual's personalized need.

Colleges and Universities Need Stable Guidance

While we are encouraged by many provisions in this proposed rule, AGB would like to reiterate that the constant change in procedures takes a significant toll on institutions. The turnover in regulatory requirements has led to confusion among governing boards, institutions, and students. It takes time and resources to overhaul systems every couple of years, and because of the changes and the lack of clarity, there is the potential for undermining the legitimacy of the procedures put in place.

It is imperative to have processes that are consistent and aligned to the goals of the institutions so that all parties understand the expectations and how misconduct is addressed. AGB strongly believes that it is necessary to have transparency to create a positive, safe, and well-functioning campus

community. We urge ED through this regulatory process to adopt policies that are durable for the foreseeable future.

Colleges and Universities Need Technical Assistance in Implementing Any Final Rule

As ED finalizes this rule and gets ready for implementation, AGB requests that ED provide technical assistance to aid colleges and universities in compliance and support their ability to provide direction for students, faculty, and staff. Governing boards and institutions need ED's help to ease the implementation burden of these new regulations. As mentioned above, changes in procedures require time and resources, including new training for staff. This process can be quite burdensome, especially for institutions that are small or under-resourced. We urge ED to develop sample policies, training materials, and compliance checklists, and provide webinars that are adaptable to each institution's needs. We also urge ED to strongly consider an adequate transition period for colleges to have time to implement the new requirements of any final rule.

We thank you again for allowing us, and the larger higher education community, to provide comments on the Title IX NPRM. We would like to reiterate our support for ACE's community letter and look forward to continuing AGB's partnership with ED to ensure Title IX reflects the needs of all parties involved.

Respectfully submitted,

Henry Stoeber



President and CEO
Association of Governing Boards of Universities and Colleges