



**College and University Professional  
Association for Human Resources**

September 12, 2022

**SUBMITTED ELECTRONICALLY VIA [www.regulations.gov](http://www.regulations.gov)**

Under e-Docket ID number ED-2021-OCR-0166

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

**Re: RIN 1870-AA16; Proposed Rulemaking; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

Dear Secretary Cardona:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for the 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"), Docket ID ED-2021-OCR-0166.

CUPA-HR serves as the voice of human resources (HR) in higher education, representing more than 33,000 human resources professionals and other campus leaders at nearly 2,000 colleges and universities across the country, including 92 percent of all U.S. doctoral institutions, 76 percent of all master's institutions, 56 percent of all bachelor's institutions and over 550 two-year and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

CUPA-HR members are committed to diversity, inclusion, access and equitable practices as a means to achieving excellence in higher education. Our members have a strong interest in the proposed rule, as aspects of the NPRM could be read to impose specific process requirements on institutional responses to faculty and staff conduct, thereby inhibiting, and otherwise impacting, how higher education HR professionals manage policies and claims involving employment discrimination.

CUPA-HR joins and fully supports the comments filed by American Council on Education (ACE) and urges the Department to adopt in any final rule the changes proposed by ACE. CUPA-HR files these additional comments to bring further attention to the possible impact a final rule could have on how institutions address *employment discrimination*, to suggest changes that will enhance the rule's clarity and ease of implementation, and to urge the Department to work with the Equal Employment Opportunity Commission to provide specific guidance for institutions on navigating the intersection between Title IX and the employment discrimination provisions under Title VII of the Civil Rights Act of 1964 (Title VII) and similar state and local laws.

The proposed rule sets forth two sections including separate policies and procedures for addressing complaints of sex-based harassment involving employees: section 106.45, which includes grievance procedures for cases involving employee-on-employee sex-based harassment; and section 106.46, which includes grievance procedures for sex-based harassment involving an employee and a student, regardless of whether the employee involved is a complainant or respondent.<sup>1</sup> Though well-intentioned, the procedures under the proposed regulation as applied to situations where the respondent is an employee are unnecessarily prescriptive and will interfere with existing obligations, policies, and procedures already utilized by institutions who are required to handle such incidents of sex-based, employment discrimination under Title VII and state and local employment laws.

All CUPA-HR member institutions are subject to the provisions in Title VII that bar employment discrimination based on, among other things, sex. In addition, many of our members are subject to similar state and local anti-discrimination laws. These federal, state and local laws, related court cases, regulations and guidance create a regulatory framework detailing how employers should (1) address claims of discrimination and (2) create policies to proactively discourage employment discrimination based on sex and other characteristics. Institutions have spent decades developing, honing and implementing policies that comply with the

---

<sup>1</sup> Additional concerns arise when considering the appropriate procedures to be used in cases involving student employees. In the proposed rule, section 106.46(b) requires that, whether the student employee involved is a complainant or respondent, an institutions "must make a fact-specific inquiry to determine whether the requirements of this section apply," and in making the determination, the institution "must, at a minimum, consider whether the party's primary relationship with the postsecondary institution is to receive an education and whether the alleged sex-based harassment occurred while the party was performing employment-related work." While we appreciate the Department's effort to address the need to separate the status of student and employee in the context of the proposed grievance procedures to ensure the proper procedures are used, we believe the grievance procedures included in the proposal do not go far enough to address institutions' abilities to take possible adverse employment action against a student employee accused of sexual harassment when the job in question is not an integral part of the educational program and such adverse action would therefore not impact the student's equal access to education.

requirements of this regulatory framework and are designed to promote work environments free of harassment and unlawful discrimination.

The NPRM's grievance procedures listed in sections 106.45 and 106.46 appear, at times, inconsistent with these policies and widely accepted best practices for complying with the aforementioned regulatory framework and underlying laws. While the federal courts are split as to whether an employee can pursue a private right of action under both Title VII and Title IX, federal agencies are required to guard against creating duplicative or conflicting regulatory obligations.

If the grievance procedures outlined in sections 106.45 and 106.46 are incorporated into the final rule, colleges and universities would need to substantially revise employment policies and engage in extensive and time-consuming efforts to revise faculty handbooks and codes under a process of shared governance. Unionized employers would need to renegotiate collective bargaining agreements. Non-unionized employers, including those in states that recognize the doctrine of employment-at-will, would be subject to new, extensive and unduly burdensome procedural obligations when seeking to address allegations of sexual harassment currently governed by Title VII and state laws. Many of these institutions also may need to renegotiate contracts that contain specific disciplinary procedures. There will also be substantial costs related to making these changes and resulting from the confusion and related litigation over possible conflicts between the Title IX rules and employer obligations under Title VII and state and local laws.

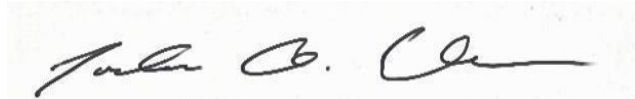
For these reasons, we ask the Department to exempt any sex-based harassment of employee respondents against a student complainant from the section 106.46 requirements, and to exempt all sex-based harassment claims where an employee is the respondent, regardless of whether the complainant is a student or an employee, from the section 106.45 requirements. Instead, we ask the Department to explicitly state in any final rule that, while an institution may have obligations informed by Title IX to effectively address sexual harassment allegations against employees, the NPRM's grievance procedures are not required to be applied in those contexts. Rather, such situations will be governed by Title VII and similar state and local laws.

If the Department cannot promulgate these exemptions, we believe it is incumbent on the Department to reconcile our concerns and work with other federal agencies with jurisdiction over discrimination law generally to rationalize the requirements instituted by the Title IX regulations, Title VII, and other statutes determining the requirements to address sex discrimination on campuses, including the Clery Act. Specifically, we suggest the Department consult with the Equal Employment Opportunity Commission and issue joint guidance on how to minimize potential conflicts between the obligations to claimants under Title VII and respondents under Title IX.

Thank you for the opportunity to provide comments on this NPRM. Like you, CUPA-HR members are committed to ending unlawful discrimination, including sexual harassment and sexual assault on campus. We appreciate the Department's efforts and request that you make

the changes proposed in these comments as well as the comments we joined that were filed by ACE. Please do not hesitate to reach out to me to discuss any of the issues we have raised in these comments or on other issues where we may be of assistance.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joshua A. Ulman", written on a light-colored, slightly textured background.

**Joshua A. Ulman**

Chief Government Relations Officer

[julman@cupahr.org](mailto:julman@cupahr.org)