



## Massachusetts Department of Higher Education

---

MAIN OFFICE  
One Ashburton Place, Room 1401  
Boston, MA 02108  
TEL (617) 994-6950  
WEB [www.mass.edu](http://www.mass.edu)

OFFICE of STUDENT FINANCIAL ASSISTANCE  
75 Pleasant Street  
Malden, MA 02148  
TEL (617) 391-6070  
WEB [www.mass.edu/osfa](http://www.mass.edu/osfa)

Carlos E. Santiago  
*Commissioner*  
Chris Gabrieli  
*Board Chairman*

January 30, 2019

The Honorable Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

**RE: Comment on Notice of Proposed Rulemaking - Docket ID ED-2018-OCR-0064**

Dear Secretary DeVos:

Thank you for the opportunity to comment on the Department of Education's ("Department") proposed regulations governing institutional responses to sex discrimination and harassment under Title IX of the Education Amendments of 1972. (November 29, 2018 Federal Register Notice, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FR 61462, Docket ID ED-2018-OCR-0064). I am writing to you in my capacity as the Commonwealth's State Higher Education Executive Officer, the Commissioner of the Massachusetts Department of Higher Education, and the chief executive officer of the Massachusetts Board of Higher Education (Board).

With 29 public and 92 private higher education institutions within the Commonwealth, Massachusetts educates over 630,000 undergraduate and graduate students annually. In addition, next to health care and finance, higher education is one of the Commonwealth's largest industries, employing over 135,000 faculty, staff, and administrators. The Board and Department of Higher Education are the leading voice and advocate for post-secondary education in the Commonwealth, serving critical roles as the state's regulator of state authorization and consumer protection, and as the public higher education system coordinator and employer of record. I take seriously the issue of sexual harassment and sex-based discrimination in educational programs. I wish to emphasize that the safety and well-being of our students, faculty, and staff is our utmost concern in writing to you today.

I appreciate the Department's effort to update and formally codify in regulation the types of conduct that are subject to Title IX's provisions, as well as the rights of the parties and the responsibilities of institutions of higher education to deal forthrightly with these cases and support victims. As you well know, the issues surrounding this

important matter can be challenging to resolve in a way that enables efficient and effective responses by educational institutions to incidents of sexual harassment, while ensuring timeliness and fairness for the students or staff involved. Although I appreciate the difficulty of the task, I must raise several serious concerns with the Department's recommendations.

First, I believe the standard for "unwelcome conduct on the basis of sex" is too narrow, in that it requires behavior that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to an education. Particularly problematic is the term "pervasive," which implies that one or two incidents are insufficient to trigger Title IX protections, unless they actually cross the line into sexual assault. Additionally, requiring that harassment "denies" the victim equal access to an education to be actionable may also be too high a bar. Furthermore, limiting the regulations' scope to "unwelcome conduct on the basis of sex," without further clarification, may prevent certain complaints that relate to sexual orientation or gender identity from being investigated.

Second, the regulations propose that the standard of proof in Title IX cases at any given institution be consistent with all other comparable code of conduct violations for both students and staff. Institutions of higher education have developed student codes of conduct that reflect the mission, values, and philosophy of their respective communities; requiring a uniform standard of evidence on all student code of conduct violations may unduly interfere with an institution's control over student disciplinary matters unrelated to Title IX. Similarly, it is overly restrictive and impractical to require that such evidentiary standards also be consistent with state labor law, employee handbooks, and collective bargaining agreements.

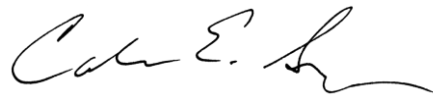
Third, I agree with the principle that incidents of sexual harassment must be handled in a manner that is fair to all parties. However, the new requirements in the proposed regulations for in-person live hearings at the post-secondary level, with opportunities for cross-examination by "advisors," including attorneys, establishes an overly legalistic and adversarial process that may deter many victims from coming forward. I welcome efforts to continuously assess and improve methods that public and private institutions of higher education use to investigate and address Title IX cases, in order to ensure that both complainants and respondents are treated fairly. Nevertheless, I feel that these regulations go too far and will ultimately be counterproductive, with unintended consequences that may impair student safety.

Finally, and relatedly I wish to address the Department's directed question regarding the applicability of provisions based on type of recipient or the age of the parties. Our public higher education institutions enroll substantial numbers of high school age students through the Commonwealth's Early College and dual enrollment programs. Last year alone, over 7,700 high school students participated in one of these programs, with the Commonwealth supporting the growth of these programs to include

tens of thousands of high school students over the next several years. Should an incident involve a high school student within an Early College/dual enrollment program, the proposed regulations would seemingly require the post-secondary grievance procedure to be used (*e.g.*, a live hearing and cross-examination) irrespective of whether one or potentially both of the individuals involved in the complaint could be under the age of 18. Rather than having different processes based on type of recipient or age of the parties, our preference would be to extend the same flexible protections and processes prescribed for elementary and secondary schools to post-secondary institutions as well. For example, K-12 institutions are allowed, though not required, to conduct live hearings and they are given the option to conduct cross-examination and investigation through written questions. Given that the ultimate disciplinary outcome in cases alleging harassment or discrimination on the basis of sex is often the same (expulsion) irrespective of setting, rather than having different processes based on the type of recipient or the age of parties, my preference would be to eliminate the possibility of live cross-examination during any complaint resolution process.

This letter is not intended to be an exhaustive analysis of how the proposed regulations would impact our public and private higher education communities within the Commonwealth. Instead, I have focused my commentary on some of the most troubling aspects of the proposal. Once again, thank you for the opportunity to comment and for your attention to this critical issue. I strongly urge you to reconsider these provisions in the Department's draft regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Carlos E. Santiago". The signature is fluid and cursive, with a long horizontal flourish at the end.

Carlos E. Santiago  
Commissioner