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September 12, 2022

The Honorable Miguel Cardona
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-2021-OCR-0166-0001

Dear Secretary Cardona:

Thank you for the opportunity to comment on the Department of Education's ("Department") proposed regulations governing institutional obligations to provide an educational environment free from sex discrimination, and to respond to incidents of sex discrimination under Title IX of the Education Amendments of 1972. (July 12, 2022 Federal Register Notice, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 FR 41390, Docket ID ED-2021-OCR-0166-0001). 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 82 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 of Higher Education, staffed by the Department of Higher Education, is 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 misconduct, 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 an institution's obligation to provide an educational environment free from sex discrimination, 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 to support anyone who is alleged to have been subjected to conduct that could constitute sex discrimination. 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 sex-based harassment, while ensuring timeliness and fairness for the students or staff involved. I appreciate the extensive work that has gone into developing the proposed regulations, and support the proposed changes addressed below.

First, I support the Department's revised definition of "sex-based harassment." The previous standard for "unwelcome conduct on the basis of sex" was too narrow, requiring behavior to be "so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to an education to constitute sexual harassment under Title IX. The current definition's use of the term "pervasive" also implies that only one or two incidents would be insufficient to trigger Title IX, thereby requiring a student who is being sexually harassed to submit to continuous or repeated harassment in order to meet the standard for a complaint to be investigated. The Department's proposed definition of "sex-based harassment" seeks to address this and strikes an appropriate balance by expanding the scope of Title IX to cover all forms of "unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."

Second, the Department's proposal that institutions apply the preponderance of the evidence standard of proof in determining whether sex discrimination has occurred in Title IX cases, unless an institution uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, appropriately ensures fairness to both complainants and respondents by giving equal weight to their respective accounts as to whether sex-based harassment occurred. The current regulations' requirement that institutions apply the same standard of evidence for formal complaints against students as for formal complaints against employees is unnecessarily restrictive and is especially burdensome for institutions subject to state labor laws, systemwide employee policies, and collective bargaining agreements that require standards of proof which differ from those set forth in an institution's student code of conduct. The Department's proposed language honors the diversity of institutions' student codes of conduct while guaranteeing equality of treatment for complainants and respondents, and also provides institutions subject to state labor laws, systemwide employee policies, and collective bargaining agreements more flexibility to be able to apply different standards of proof for student misconduct and employee misconduct as appropriate and required by state law.

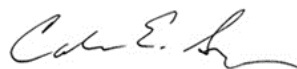
Third, I am pleased with the Department's proposed changes that allow additional flexibility for institutions that do not wish to include live hearings as a required component of their grievance process. The proposed changes allow for those institutions to instead provide complainants and respondents with a reasonable opportunity, outside of a live hearing, to review and respond to evidence and ask relevant and not otherwise impermissible questions, including questions challenging credibility, prior to the determination of whether sex-based

harassment occurred. 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, to ensure that both complainants and respondents are treated fairly. The flexibility afforded by the proposed regulations will ensure that institutions can establish processes that ensure fairness for both complainants and respondents.

Finally, I wish to comment upon the proposed regulations that overlap and align with *An Act Relative to Sexual Violence on Higher Education Campuses* (2020 Mass. Acts c. 337), the Commonwealth's campus sexual assault law that Governor Baker signed on January 12, 2021. In particular, the Department's proposed regulations expand and codify within the scope of sex-based harassment unwelcome harassment on the basis of sex, inclusive of gender identity and sexual orientation, consistent with Massachusetts' campus sexual assault law's broad definition of sexual misconduct which includes within its scope incidents of "gender-based violence, violence based on sexual orientation or gender identity or expression." (Mass. Gen. Laws c. 6, § 168E(a)). Additionally, the Department's proposed regulations include within the purview of Title IX an institution's obligation to address a sex-based hostile environment, even if the sex-based harassment contributing to the hostile environment occurred outside the education program or activity or outside the United States. This proposed change aligns with Massachusetts' campus sexual assault law's applicability to "incidents of sexual misconduct regardless of where the offense occurred." (Mass. Gen. Laws c. 6, § 168E(b)(i)). We appreciate these enhancements to the federal regulations, as they will help support the good work that is already underway in Massachusetts and will help clarify our institutions' roles and responsibilities in helping to ensure safe and inclusive environments for all students.

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 encouraging aspects of the proposal. Once again, thank you for your consideration of this comment and for your attention to this critical issue. I strongly urge you to continue to advance these provisions in the Department's draft regulations.

Sincerely,



Carlos E. Santiago
Commissioner