



# MASSACHUSETTS COMMUNITY COLLEGES OFFICE OF THE GENERAL COUNSEL

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To: Constantia Papanikolaou, Chief Legal Counsel, Department of Higher Education

From: Njoki K. Williams, Assistant General Counsel, Office of the General Counsel, Massachusetts Community Colleges

Date: February 6, 2025

Re: Request for Reinstatement of Board of Higher Education Massachusetts Community College Policy on Affirmative Action, Equal Opportunity and Diversity issued in 2021 In Light of Recent Federal Court Decision and U.S. Department of Education Dear Colleague Letter

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As you are aware, on January 9, 2025, a decision from the U.S. District Court for the Eastern District of Kentucky (*State of Tennessee v. Cardona*, 2:24-cv-00072, (E.D. Ky.))<sup>1</sup> vacated the U.S. Department of Education's 2024 Title IX regulations which went into effect on August 1, 2024. In response, the U.S. Department of Education issued a Dear Colleague Letter on February 4, 2025<sup>2</sup> (attached), which reinstated the 2020 Title IX Rule and indicated that pending cases which fall under the 2024 Title IX regulations should be reoriented to comply with the 2020 Title IX Rule. Therefore, the Board of Higher Education Massachusetts Community Colleges Policy on Affirmative Action, Equal Opportunity & Diversity (PAA) which was updated to be in compliance with the 2024 Title IX regulations last summer, and issued after BHE approval, can no longer be used in its current iteration.

It is our understanding that the Massachusetts Department of Higher Education (DHE) is seeking proposals on how to address pending and future complaints prior to further revision, approval, and issuance of a newly-updated PAA. After careful review of our legal options, and consultation with our campuses and the DHE, we propose to reinstate the PAA previously issued on August 1, 2021, which fully complies with the 2020 Title IX Rule, for application to all pending and future PAA complaints, even if the prohibited conduct occurred between August 1, 2024 (the date of issuance of the 2024 PAA) and January 8, 2025 (day before the issuance of the *Cardona* decision).

The Massachusetts Community Colleges remain dedicated to providing a safe and inclusive environment for all students, faculty and staff consistent with current federal and state laws and believes that, as drafted, the 2021 PAA will allow for that. For example, the definitions section (pg. 18) contains a catchall provision that includes within the 2021 PAA any additional protected classes established under either state or federal law although not specifically listed. The prohibited conduct

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<sup>1</sup> <https://caselaw.findlaw.com/court/us-dis-crt-e-d-ken-nor-div-at-cov/116844509.html>

<sup>2</sup> The Dear Colleague Letter dated February 4, 2025 supersedes the Dear Colleague Letter dated January 31, 2025.

section (pg. 21) also provides that any additional actions or omissions which deny or have the effect of denying to any person their rights, although not specifically listed, will also be considered “Prohibited Conduct” that is actionable under the 2021 PAA.

Thus, while not specifically referenced, protections from recent federal and/or state laws will fall within and be incorporated into the reinstated 2021 PAA’s purview and include but are not limited to the following:

- Discrimination based on ethnic hairstyles is prohibited (An Act Prohibiting Discrimination Based on Natural and Protective Hairstyles (Massachusetts CROWN Act), Mass. Acts of 2022, c. 117);
- Discrimination based on genetic information is prohibited (Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. Sec. 2000ff);
- Discrimination based on pregnancy and/or parental leave is prohibited, which includes:
  - The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act (29 U.S. Code § 218d);
  - Pregnancy Discrimination Act (42 U.S.C. §§ 2000e et seq);
  - Reasonable accommodations for pregnancy (Mass. Acts of 2017, c. 54);
  - The Massachusetts Parental Leave Act ( M.G.L. c. 149, § 105D);
  - Massachusetts Paid Family and Medical Leave (M.G.L. c. 175M);
- Discrimination based on gender identity is prohibited (2021 PAA, pg. 17), which includes:
  - An Act Relative to Gender Identity, Mass. Acts of 2011, ch. 199; and
  - An Act Expanding Protections for Reproductive and Gender Affirming Care, Mass. Acts of 2022, ch. 127;
- Gender-based harassment, including unwelcome conduct based on gender identity/expression, is prohibited (2021 PAA, pg. 13), which includes:
  - An Act Relative to Transgender Anti-Discrimination, Mass. Acts of 2016, ch. 134;
- Sexual misconduct is prohibited, which includes:
  - An Act Relative to Sexual Violence on Higher Education Campus, Mass. Acts of 2020 ch. 337, (also known as the 2021 Campus Sexual Assault Law).

Accordingly, discrimination based on gender identity, gender expression, sex stereotypes, sex characteristics and sexual orientation, among other types of discrimination referenced above, are prohibited under the 2021 PAA.

Thank you in advance for DHE’s prompt review and response to our proposal as the Community Colleges have pending matters that need to be addressed. If you have any questions or require further information, please contact me.

Cc: Gina Yarbrough, General Counsel