



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

December 21, 2020

*Via Email: [SuperintendentBrabrand@fcps.edu](mailto:SuperintendentBrabrand@fcps.edu)*

Scott Brabrand, Ed.D  
Superintendent  
Fairfax County Public Schools  
Gatehouse Administration Center  
8115 Gatehouse Road  
Falls Church, VA 22042

Re: OCR Complaint No. 11-17-1502  
Resolution Letter

Dear Dr. Brabrand:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on XXXXX against Fairfax County Public Schools (the Division). The Complainant filed the complaint on behalf of XXXXX (the Student), who attended XXXXX School (the School). The Complainant alleged that the Division discriminated against the Student, as well as other XXXXX students on the School's XXXXX team (the Team), on the basis of their sex, from approximately XXXXX through the XXXXX school year. Specifically, the Complainant alleged that the Division failed to promptly and equitably respond to his complaints, beginning in XXXXX, that the former Team XXXXX (the XXXXX) subjected the Student and other students on the Team to sexual harassment; and, as a result, the Student and other students on the Team were subjected to a sexually hostile environment.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving Federal financial assistance from the Department.<sup>1</sup> Because the Division receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

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<sup>1</sup> An amended Title IX regulation went into effect on August 14, 2020 and can be viewed [here](#). However, the Title IX regulation in effect at the time of the underlying events associated with the above-referenced complaint serves as the basis for OCR's determination in this matter, which is available [here](#). For more information about Title IX, including the new Title IX regulation and related resources, visit OCR's website at <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html>.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

### **Summary of Investigation**

OCR's investigation focused on whether the Division provided a prompt and equitable resolution of the Complainant's complaints alleging sexual harassment by the XXXXX. Although the Complainant filed his complaint on behalf of the Student and other students on the Team, the Complainant did not raise any specific allegations that the XXXXX sexually harassed the Student, and he did not provide OCR with signed OCR Consent Forms on behalf of any other students on the Team.<sup>2</sup>

During OCR's investigation, OCR reviewed information and documentation provided by the Complainant and the Division. OCR also interviewed the Complainant and current and former Division administrators and staff, to the extent possible.<sup>3</sup>

Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint. OCR determined that it would be appropriate to resolve the complaint pursuant to Section 302 of OCR's *Case Processing Manual*, because the investigation had identified issues that could be addressed through a Resolution Agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

### **Legal Standards**

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), states as follows: "Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance."

The Title IX regulation contains a number of procedural requirements, including a requirement that recipients adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any actions prohibited by Title IX and its implementing regulation. *See* 34 C.F.R. § 106.8(b). There is no fixed time frame to determine whether a resolution has been prompt; rather, OCR will evaluate a recipient's efforts under the circumstances. An equitable response requires a trained investigator to analyze and document the available evidence to support reliable decisions, and any rights or opportunities that a recipient makes available to one party during an investigation should be made available to the other party on equal terms.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.

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<sup>2</sup> As of the 2020-2021 school year, all students on the Team during the timeframe at issue in this complaint, including the Student (who has provided a signed OCR Consent Form), have since graduated from the Division.

<sup>3</sup> A number of potential witnesses were no longer employed by or had retired from the Division, so the Division could not make them available for interviews.

Under Title IX, a school has a responsibility to respond promptly and effectively to notice of sexual harassment. This includes taking appropriate steps to investigate or otherwise determine what occurred and taking immediate and effective action to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. It may be appropriate for a school to take interim measures prior to or during the investigation of a complaint. Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct. Interim measures include counseling, extensions of time or other course-related adjustments, modifications of class schedules, escorts between classes, restrictions on contact between the parties, increased security and monitoring of certain areas of campus, and other similar accommodations. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes, pending the results of the school's investigation. Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate.

In cases where an employee is engaged in sexual harassment of a student, a school may be held responsible under Title IX regardless of whether it knew or should have known about the harassment. Specifically, if an employee, in the context of carrying out his or her day-to-day job responsibilities for providing aid, benefits or services to students, engages in harassment that denies or limits a student's ability to participate in or benefit from the school's program, the school is responsible for discrimination, whether or not it knew or should have known about it. The following factors are considered in determining whether an employee has engaged in harassment in the context of the employee's provision of aid, benefits or services to students: 1) the type and degree of responsibility given to the employee, including both formal and informal authority, to provide aid, benefits, or services to students, to direct and control student conduct, or to discipline students generally; 2) the degree of influence the employee has over the particular student involved, including the circumstances in which the harassment took place; 3) where and when the harassment occurred; 4) the age and educational level of the student involved; and, 5) as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable to believe that the employee was in a position of responsibility over the student, even if the employee was not. The school is therefore also responsible for equitably remedying any effects of the harassment on the students, as well as for ending the harassment and preventing its recurrence. As noted above, this is true whether or not the school has "notice" of the harassment.

A school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems. In cases where the harassment is widespread, the school may need to provide training for the larger school community to ensure that individuals can recognize harassment if it recurs and know how to respond.

**Evidence Obtained to Date**

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

The Complainant’s XXXXX Complaint

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

The Complainant’s XXXXX Complaint

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

The Complainant Emails to Request Investigation of the XXXXX

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

The Complainant’s XXXXX Complaint

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

**Analysis**

OCR found that the Complainant notified the XXXXX, by email dated XXXXX, about the XXXXX that the XXXXX had made to XXXXX students on the Team. The Complainant sent his email shortly after the XXXXX had resigned for XXXXX made to one student.<sup>4</sup> Nonetheless, upon notice of additional alleged XXXXX by the XXXXX, an investigation should have commenced to determine if those XXXXX created a hostile environment for which the Division needed to remedy the effects. Although the XXXXX communicated with the Complainant, OCR’s investigation to date has only documented that the XXXXX informed the Complainant that he would review the results of the XXXXX sent to Team parents, forwarded the Complainant’s email to the XXXXX, and provided Team parents an opportunity to discuss the students’ experiences during the XXXXX season. Thus, OCR has a concern that the XXXXX did not take appropriate action to investigate the Complainant’s allegation and the Complainant was forced to elevate his initial complaint to the Division in order to obtain a response under Title IX.

OCR also found that after the Complainant elevated his concerns and complained to the Division’s XXXXX on XXXXX, the Division initiated an investigation into the XXXXX alleged sexual harassment and the School’s response. Based on OCR’s investigation to date, however, it XXXXX, until XXXXX, for the XXXXX to interview relevant School administrators and obtain the names of student witnesses; then he did not return to interview the student witnesses until approximately a XXXXX later on XXXXX; and, finally, he took a XXXXX to complete an investigative report. Based on OCR’s investigation to date, the XXXXX considered whether the students required any interim/supportive measures and concluded that they did not, concluded that

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<sup>4</sup> OCR to date identified no evidence that the Complainant or XXXXX, the Student, identified any specific acts of harassment directed at XXXXX, or requested any interim or final remedial measures.

the XXXXX had made inappropriate XXXXX to several students on the Team, and documented in the XXXXX file that he was ineligible for rehire. However, OCR's investigation to date did not identify evidence indicating that the Division provided the Complainant with notice of the investigation outcome. On balance, OCR has a concern that the Division's investigation may not have been prompt, and that it may not have been equitable if the Complainant was not provided with notice of the investigation outcome.

Thereafter, OCR found that when the Complainant filed the complaint on XXXXX that reiterated his sexual harassment concerns and also challenged the Division's handling of his concerns, the Division initiated another investigation. Although OCR's investigation to date documented that the investigation may have been delayed, in part, due to the XXXXX, the Division did not meet with the Complainant to discuss his complaint until approximately XXXXX later on XXXXX; took XXXXX to conduct interviews; and, finally advised the Complainant about the investigation outcome on XXXXX. OCR notes that the Division interviewed over 30 relevant witnesses, including all witnesses identified by the Complainant. The Division sent the Complainant notice of the investigation outcome, confirming that the XXXXX had engaged in improper conduct. On balance, although OCR's investigation to date documented that the Division conducted an equitable investigation of the Complainant's complaint, OCR has a concern that the investigation may not have been prompt.

Finally, OCR also is concerned that though the Division investigated, it did not appropriately analyze Title IX obligations. Rather, after both investigations, the Division concluded the XXXXX acted appropriately, apparently because the XXXXX failed to report the allegations made by XXXXX to XXXXX. Both times, however, the Division appears not to have considered whether the XXXXX took appropriate steps after learning from Complainant about an employee's alleged XXXXX directed at students. As noted above, when an employee is engaged in the sexual harassment of students, a school is responsible for equitably remedying any effects of the harassment on the students, as well as for ending the harassment and preventing its recurrence, regardless of notice. Although the XXXXX had been separated from the students when the Complainant contacted the XXXXX about the alleged XXXXX, it does not appear the XXXXX took steps to investigate whether the XXXXX occurred, what impact they may have had on the students, and whether the students needed any supportive measures.

On December 18, 2020, the Division signed the enclosed Resolution Agreement (the Agreement) which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation.

The Agreement requires that the Division develop and provide training to all Division personnel responsible for responding to, investigating, or otherwise resolving reports of sexual harassment, as well as all School employees, regarding the obligations under Title IX, including to provide a prompt and equitable resolution with respect to reports of sexual harassment. The memorandum shall outline Title IX requirements that comply with the Title IX regulations promulgated by the Department on May 19, 2020, at 85 FR 30026, and will discuss, at a minimum, the obligations to: distribute information about the Title IX Coordinator's name and/or title, office address, email address, and telephone number, as well as information about the Division's grievance procedures

and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the Division will respond; respond whenever *any* employee of the Division/School has notice of sexual harassment or allegations of sexual harassment; consider whether supportive measures are required for the complainant(s) and respondent(s); assess as part of any investigation whether a hostile environment arose and, if so, whether any action is required to remedy its effects; provide a prompt response for all stages of the grievance process, and, if there is good cause for a temporary delay of the grievance process or the limited extension of the Division's designated time frames, to provide written notice to the complainant(s) and the respondent(s) of the delay or extension and the reasons for the action; and, provide simultaneous written notice of any investigation outcome to the complainant(s) and respondent(s). Please review the enclosed Agreement for further details. OCR will monitor the Division's implementation of the Agreement until the Division has fulfilled the terms of the Agreement.

### **Conclusion**

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. Complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that the Division must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions, please contact Abony Alexander, the OCR attorney assigned to this complaint, at [abony.alexander@ed.gov](mailto:abony.alexander@ed.gov).

Sincerely,

Letisha Morgan-Cosic  
Team Leader, Team II  
District of Columbia Office  
Office for Civil Rights

Enclosure

cc (Via Email): XXXXX, Counsel for the Division, [XXXXX](#)