



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

October 12, 2018

Scott Brabrand  
Superintendent  
Fairfax County Public Schools  
8115 Gatehouse Road  
Falls Church, VA 22042

RE: OCR Complaint No. 11-18-1277  
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 April 9, 2018 against Fairfax County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School). The Complainant alleges that the Division discriminated against the Student on the basis of sex and retaliated against the Complainant, during the 2017-2018 school year. Specifically, the complaint alleges the following:

1. During the XXXX semester, the Division failed to promptly and equitably respond to incidents wherein another student subjected the Student to sexual harassment, including but not limited to incidents in which sexually charged comments were directed towards her on or about XXXX and XXXX, thereby subjecting the Student to a sexually hostile environment.
2. On XXXX, in retaliation for the Complainant's sex-related advocacy on behalf of the Student, the School's principal prohibited the Complainant from XXXX.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) 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. Further, the laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Title IX.

During the investigation, OCR reviewed documents provided by the Complainant and the Division and interviewed the Complainant. Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint, pursuant to Section 302 of OCR's *Case Processing Manual*, by taking the steps set out in the enclosed Resolution Agreement.

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

Following is a summary of the relevant legal standards and a brief summary of information obtained by OCR during the investigation.

### **Background**

During the 2017-2018 school year, the Student was in XXXXX at the School. The Complainant XXXXX.

**Allegation 1:** During the XXXX semester, the Division failed to promptly and equitably respond to incidents wherein another student subjected the Student to sexual harassment, including but not limited to incidents in which sexually charged comments were directed towards her on or about XXXX and XXXX, thereby subjecting the Student to a sexually hostile environment.

### **Legal Standards**

A recipient's failure to respond promptly and effectively to sexual harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Title IX. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the recipient's programs, activities, or services. When such harassment is based on sex, it violates Title IX.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>, and OCR's *Revised Sexual*

*Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

### Analysis

OCR reviewed various documents and correspondence relating to the Complainant informing School staff that another student (Student B) was sexually harassing the Student.

#### *XXXX Incident*

OCR first reviewed the Division’s Bullying and Harassment Investigation Report (the Investigation Report), for the XXXX incident, a series of entries consisting of information regarding the allegation, subsequent investigation, and subsequent actions. According to the Investigation Report, the Complainant emailed the Student’s teacher (the Teacher) to report that Student B made explicit sexual comments to the Student.

The Teacher relayed the allegation to the Principal. On XXXX, the Principal met with the Student, the Teacher, and the Complainant. The Principal noted that the Student “without seeming uncomfortable and almost flippant, accuses [Student B] of saying the comments . . .” That same day, the Principal also met with Student B, and noted that Student B “refused to tell me or write down what he said but becomes emotional and states ‘I’m ashamed.’” After his parents arrived and were “upset by the accusation due to the graphic sexual nature” they asked that the Student “be held accountable for defamatory remarks about their son.” Later that day, Student B and his mother returned to the School and met with the Principal again, and he took responsibility for making inappropriate comments, although not the comments the Student alleged he said.

Also on XXXX, two female students (Witness 1 and Witness 2) provided witness statements. Witness 1 wrote that the Student was XXXXX. School staff followed up with Witness 1 on XXXX to clarify the “. . .” in her statement, and she wrote a second statement that Student B said XXXXX. Witness 2 described the conversation between the Student and Student B, as XXXXX. Witness 2 indicated that Student B made sexually charged comments, although not the comments the Student alleged he said. Per the Investigation Report, the Principal felt that the witness statements “do not support [the Student’s] allegation” and that Witness 1’s “second statement still doesn’t confirm the allegation.”

The Investigation Report reflects subsequent interactions between the Complainant and the Principal, including the Complainant XXXXX and an XXXX meeting regarding the Complainant’s XXXX, as described in Allegation 2 below.

Finally, the Investigation Report reflects that the Principal determined that the allegation was unfounded. Nevertheless, the School implemented certain actions including: XXXXX; classroom supervision during the transition between two classes and daily check-ins by the Teacher XXXXX; “ongoing, intermittent supervision in the lunchroom by administration and/or school counselor”; and, informal check-ins with the Counselor “on an unscheduled basis” for the

Student. It also notes that the Counselor had weekly scheduled check-ins with Student B XXXXX, and beginning in XXXX, individual sessions with Student B. XXXXX.

### *Prior Incident*

The Complainant also raised concerns regarding a separate incident involving Student B, during the meeting with the Principal held on XXXX. The Investigation Report notes that during the meeting, the Complainant reported to the Principal that Student B XXXXX. The Investigation Report notes that it was “never reported to [the Principal] and a student named as a witness to this incident [(Student C)] had nothing to report.” On XXXX, Student C’s parent sent an email to the Teacher that Student C confirmed that Student B had made the sexual comments, the Teacher forwarded the email to the Principal and asked “What shall we do now?” The Principal responded asking when the incident occurred, and whether she was informed of the allegation prior to the meeting with the Complainant on XXXX. The Teacher replied that it occurred two weeks prior, that it was discussed during the XXXX meeting, and that the Teacher spoke with Student C after the meeting and Student C “denied the incident”. XXXX, the Complainant reminded the Principal of the incident via email, that a witness corroborated the XXXXX incident, and inquired whether it was investigated and addressed by the School. OCR did not review any documentation that indicated whether the Principal responded, nor did the Division provide OCR with any documents related to the investigation of this incident. However, prior to completing our investigation, including interviewing Division and School staff with regard to both incidents, and before making a compliance determination, the Division requested to resolve this complaint, pursuant to Section 302 of OCR’s *Case Processing Manual*.

**Allegation 2:** On XXXX, in retaliation for the Complainant’s sex-related advocacy on behalf of the Student, the School’s principal prohibited the Complainant from XXXX.

### Legal Standard

The Title IX regulation, at 34 C.F.R. § 106.71, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Title IX or who files a complaint, testifies, assists, or participates in a proceeding under Title IX. When analyzing a claim of retaliation, OCR will consider: 1) whether the complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the recipient took an adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the recipient’s reason for its action is a pretext, or excuse, for unlawful retaliation.

### Analysis

OCR first considered whether the Complainant engaged in a protected activity, and determined that her sex-related advocacy on behalf of the Student earlier in the school year constitutes protected activities. OCR also determined that the Division engaged in an adverse action when it

prohibited the Complainant from XXXX. Finally, OCR considered whether the protected activity and the adverse action were causally connected, and determined that due to the temporal proximity between the Complainant's advocacy and the Principal's notification to the Complainant XXXX, that there is sufficient evidence of a causal connection. As these three elements are present, an initial, or prima facie, case of retaliation has been established.

Next, OCR examined the Division's legitimate non-retaliatory reason for XXXX, and whether that reason is a pretext for unlawful retaliation. The Division asserts that it took the action it did because XXXXX.

OCR reviewed correspondence and documentation provided by the Division, the Division's narrative response, and the Division's policy regarding XXXX. The Investigation Report regarding the incident on XXXX includes an entry describing that on XXXX, Student B's parents met with the Principal, teacher, Counselor, and Assistant Principal, and XXXXX, and describes that on XXXX, the Principal met with the Complainant and the Assistant Principal, and asked the Complainant XXXXX.

Correspondence reflects that the following day, XXXX, the Principal wrote to the Complainant, summarizing his "thinking", and described XXXXX. The Principal also mentioned the "ongoing sensitivity of the XXXX incident", and that XXXXX. He clarified that the Complainant could continue XXXX. Before completing our investigation, including conducting interviews with School staff and determining whether the Division's non-retaliatory reason for prohibiting the Complainant from XXXX is a pretext for unlawful retaliation, the Division requested to resolve the complaint, pursuant to Section 302 of OCR's *Case Processing Manual*.

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on October 10, 2018 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division has fulfilled the terms of the Agreement.

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. The Complainant 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 Shana Heller or Jeanette Tejada Bustos, the OCR attorneys assigned to this complaint. You may reach Ms. Heller at 202-453-6599 or [Shana.Heller@ed.gov](mailto:Shana.Heller@ed.gov) or Ms. Tejada Bustos at 202-453-6084 or [Jeanette.TejadaBustos@ed.gov](mailto:Jeanette.TejadaBustos@ed.gov).

Sincerely,

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

Enclosure

cc: Ellen Kennedy, Assistant Division Counsel