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**Sent:** Fri, 11 Jun 2021 19:54:52 +0000  
**To:** T9PublicHearing  
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**Subject:** Comments  
**Attachments:** FCPS T9 comments.pdf

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Attached please find our comments to the Title IX Rules.

Thank you  
Catherine

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June 11, 2021

TO: Department of Education, Office of Civil Rights - [T9PublicHearing@ed.gov](mailto:T9PublicHearing@ed.gov)

FROM: Catherine A. Carroll, Title IX Coordinator, Fairfax Public County Schools - [ccarroll@fcps.edu](mailto:ccarroll@fcps.edu)

RE: Comments to Title IX Regulations

With a student population of over 188,000, Fairfax County Public Schools (FCPS) is the largest public-school division in the Commonwealth of Virginia, and the tenth largest public-school system in the nation. It employs over 24,000 full-time employees and countless more part-time and hourly employees.

Below please find our comments to the Title IX rules.

### **I. Actual Knowledge Requirement**

The new rules say that in K-12, *any* employee who learns about or knows about a potential complaint of sexual harassment - as defined under the new rules, puts the school on notice legally of a potential complaint. The rules state that K-12 schools "stand in a special relationship regarding their students," and basically require that everyone is now a mandated reporter for Title IX as well as suspected child abuse and neglect.

The rule is simply overbroad and puts a much greater burden on K-12 schools than necessary. The Title IX Coordinator is the designated trained expert for the school to make decisions about whether the reported conduct falls under the new definitions - yet the rules also require every single employee to be making that decision with much less training and expertise by requiring them to report a *potential* Title IX complaint. This is even harder than reporting suspected child abuse or neglect. In those cases, you simply need to have a reasonable suspicion. Under these rules, we require every employee to make a determination about whether something is or is not potentially TIX and make a report. This is hard and it's not always clear; the person receiving the report may hear it and want to ask questions to get a better understanding of whether it is or is not Title IX - which can lead to other concerns. They may hear it second hand and have no ability to get more information. This obligation requires significant training for all employees and fails to acknowledge that we don't require such reporting for other types of discrimination. Title IX is a civil rights law - not a mandated reporting law. This overly burdensome requirement mandates that we treat TIX reports, i.e. specific allegations of sex discrimination, differently than other types of discrimination.

### **II. Separate Process**

The new rules require K-12 institutions to create separate processes from their existing student conduct processes, to facilitate Title IX complaints because the new rules do not align with existing K-12 student conduct processes which are governed by state laws. This overly burdens school systems and inherently creates inequities. Practically, this means that cases involving student complaints of sexual harassment receive additional due process protections above and beyond those already afforded to students through the state mandated conduct processes. The new processes are impractical and cumbersome, and so most school divisions have not elected to apply them to non-Title IX conduct. The new rules require a formal notice of investigation, notice of any amendment to the allegations, notice of rights (including right to attorney), notice of any

meetings/interviews with adequate time to prepare, notice of right to inspect draft investigation report, and the evidence relied upon and not relied upon in the investigation, with accompanying timeframes for inspection and opportunity to respond, (should be able to do so electronically) right to submit questions to the other party in writing after review of the report (with time frames) if no live hearing is offered. These are processes aligned with legal procedures and litigation and presume a level of knowledge and abilities that some parents may lack, and that many parents and the vast majority of students would not know how to navigate. The current student conduct processes in K-12 affords all students' due process; yet the new rules require we create, administer, and help parents navigate an entirely different formal process for Title IX cases. This creates confusion for parents, students and administrators and can deter complainants from participating in the process because it can be intimidating and overly cumbersome.

Because so much additional formal process is required in K-12, a case under the new rules can take up to 4 months to get through the final appeal process *before* any disciplinary action may be taken. In the K-12 environment this has a significant impact on the complainant and the respondent. These students are in the same buildings with one another day after day, often in the same class or classes, and certainly in the same common spaces. They are literally captive - school is compulsory and the space is limited. Many times you can't just simply move a student out of the class because there isn't another class to put them in, and additional uncertainty has been created around schools' ability to make classroom changes without "unnecessarily burdening" the respondent prior to case completion. When a case drags on for months it will have a detrimental impact. Children need more immediate resolutions to their problems based on their developmental state. Four months for a 3rd or 7th grader is much longer than it is for an adult.

We do not disagree that Respondents in Title IX cases should be afforded due process, but there should be a way to require that basic due process rights are met within recipients' current discipline processes. Forcing recipients to adopt inconsistent hearing procedures further interferes with the management rights in the school division to address discipline in a consistent manner.

### **III. TIX Sexual Harassment Definitions**

The definitions under the new rules of what constitutes a formal Title IX sexual harassment complaint are too narrow. Criminal definitions are for crimes and schools do not prosecute crimes. Under Title IX, schools should be concerned about harassing conduct of a sexual nature that is impacting a students' ability to learn and be safe in their school because of that conduct. Providing clear definitions of what that means is helpful, but should not be limited to criminal conduct, or the deliberate indifference standard. Currently the new rules require the conduct must be so severe, *and* pervasive *and* objectively offensive that it interferes with educational programming. This simply fails to appreciate the wider range of conduct that occurs at schools, and the age and development differences of students within our schools. Title IX is about interrupting sex discrimination, preventing its recurrence and remedying its effects. We would not say that race discrimination between students had to meet such narrow criminal definitions for the school to address it under the relevant discrimination laws. Why are we treating different forms of discrimination differently at all? It should be enough to say the conduct is severe enough or pervasive enough that it constitutes discrimination, whether based on race, sex, or another protected characteristic.