

February 5, 2025

Via Email to OCR@ed.gov

U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Complaint Concerning Arlington Public Schools’ Violation of Title IX by Failing to Address Sexual Misconduct in a Girls’ Locker Room

To Whom It May Concern:

Pursuant to the discrimination complaint resolution procedures of the U.S. Department of Education’s (“Department”) Office for Civil Rights (“OCR”), we bring this federal civil rights complaint against Arlington Public Schools (“APS”) in Arlington County, Virginia, for discrimination on the basis of sex in education programs or activities that receive federal financial assistance in violation of Title IX of the Education Amendments of 1972 (“Title IX”).¹

One of the signers of this complaint submits it as a mother of two whose children previously attended APS schools and took swim lessons at APS facilities, including the Washington-Liberty Aquatics Center—the facility that is the focus of this complaint—after school hours, and who is strongly interested in ensuring the safety and privacy of girls and women who use these facilities now and in the future.

The other signer of this complaint submits it as an attorney with over 30 years of experience in trial and appellate litigation in state and federal courts across the country—including as counsel of record for the States of Louisiana, Montana, Mississippi, and Idaho in a lawsuit challenging the Biden-Harris Administration’s 2024 Title IX regulations that resulted in the first-in-the-nation preliminary injunction against implementation of those regulations in the plaintiff states.²

Both signers represent the Defense of Freedom Institute for Policy Studies (“DFI”), a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every

¹ 20 U.S.C. §§ 1681 *et seq.*

² *See Louisiana v. Dep’t of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024).



American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. Such rights include the right not to be excluded from equal opportunities in federally funded education programs or activities due to prohibited discrimination on the basis of sex, including sexual harassment and sexual misconduct in school programs and activities.

Accordingly, we request that OCR investigate the actions described below, consider potential sanctions against APS as authorized under Title IX,³ and put APS on clear notice that failure to comply with federal law in responding to the sexual harassment of students, staff, and others using its locker rooms and other intimate facilities will result in the withdrawal of federal funding.

Facts

APS is the “13th largest among Virginia’s 132 school divisions.”⁴ As a local education agency, APS is bound by the protections of Title IX against discrimination on the basis of sex.⁵

APS operates and maintains three aquatics centers: Wakefield Aquatics Center, Washington-Liberty Aquatics Center, and Yorktown Aquatics Center.⁶ APS maintains control of these pools and provides the rules governing the use of these facilities.

³ See 20 U.S.C. § 1682 (authorizing federal departments and agencies empowered to extend federal financial assistance to education programs or activities to effect compliance with Title IX “by the termination of or refusal to grant or to continue [such] assistance” or “by any other means authorized by law”).

⁴ Arlington Public Schools, *About APS*, <https://www.apsva.us/about-aps/> (last retrieved Jan. 29, 2025).

⁵ See 20 U.S.C. § 1681; 34 C.F.R. § 106.2 (defining a “recipient” to include “any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof [or] any public or private agency, institution, or organization . . . to whom Federal financial assistance is extended . . . and which operates an education program or activity which receives such assistance”); 34 C.F.R. § 106.31(a)(1) (generally prohibiting discrimination on the basis of sex in education programs and activities operated by recipients); <https://www.ed.gov/laws-and-policy/civil-rights-laws/frequently-asked-questions-sex-discrimination> (“All public school districts are covered by Title IX because they receive some federal financial assistance and operate education programs.”).

⁶ Arlington Public Schools, *APS Pools*, <https://www.apsva.us/aquatics/aps-pools/> (last retrieved Jan. 29, 2025).



The Washington-Liberty Aquatics Center is an indoor pool located inside Washington-Liberty High School.⁷ The pool is part of the high school facility.⁸ APS allows members of the public to enter the pool facilities.⁹ It restricts the locker rooms to school use while classes are in session, but allows the public to use them the rest of the time.¹⁰ Because APS operates swim classes for children as young as six months of age after school hours, these locker rooms are accessible to young children when high school is not in session.¹¹

In September 2024, community members began to complain to APS staff, including APS's Director of Aquatics Management Helen Machado, that a man (the "Suspect"¹²) was loitering in the girls' locker room and that his "penis, testicles and legs were fully exposed to anyone walking through the entrance."¹³ Other community members went to the front desk of the aquatics center to complain that the Suspect had been exposing himself to young children throughout the girls' locker room for over an hour in a time frame when "the locker rooms were packed with kids."¹⁴ According to one regular visitor of the Washington-Liberty High School pool, pool staff responded to her complaint about the Suspect by telling her that nothing could be done because the Suspect was claiming to be transgender.¹⁵

⁷ Nick Minock, *Sex Offender who Identifies as Transgender Exposes Himself to Kids Again at Va. School*, *Abc7 News* (Jan. 24, 2025), <https://wjla.com/news/local/virginia-arlington-county-public-schools-aps-washington-liberty-high-school-sex-offender-richard-kenneth-transgender-exposes-himself-girls-locker-room-prosecution-fairfax#>.

⁸ Arlington Public Schools, *A Message from the Superintendent* (Jan. 22, 2025), <https://www.parentsquare.com/feeds/45123127?s=eyJhbGciOiJIUzI1NiJ9.eyJ1c2VyX2lkIjoyNjQwNzU0MSwiZXhwIjoxNzQ1MzUzODI5LCJ1cmwiOiJodHRwczovL3d3dy5wYXJlbnRzcXVhcmUuY29tL2ZlZWRzLzQ1MTIzMTI3IiwibWV0aG9kIjoirR0VUliwicXVlcnkiOnt9LCJyZXF1ZXN0Ijp7fX0.-AI8NnH3bddoG0WerCeJZDIR7FuDN9VpzMG-WsPw1q4>.

⁹ Arlington Public Schools, *Community Swim Schedules & Fees*, <https://www.apsva.us/aquatics/community-swim-schedules-fees/> (last retrieved Jan. 29, 2025).

¹⁰ Arlington Public Schools, *Public Swim Schedule*, https://www.apsva.us/wp-content/uploads/sites/57/2024/09/School-Year-Schedule_2025.pdf (last retrieved Jan. 29, 2025).

¹¹ Arlington Public Schools, *Community Classes and Programs*, <https://www.apsva.us/aquatics/community-swim-classes/> (last retrieved Jan. 29, 2025).

¹² While police and media reports identify the individual accused of the sexual misconduct at issue in this complaint, in recognition of the fact that the individual has not yet been convicted of the crimes relevant to this complaint, we decline to identify him by name.

¹³ Arlington GOP Virginia, *Newsletter: What did APS know? When? Who's responsible?*, <https://arlingtongop.org/2025/01/23/newsletter-what-did-aps-know-when-whos-responsible/> (last retrieved Jan. 29, 2025).

¹⁴ *Id.*

¹⁵ *Id.*



Another woman complained to Machado that a man in the girls' locker room was staring at women and girls and was "taking his time being naked" during the busiest time of the evening when "little girls and teens" were present. According to that woman, Machado responded to her complaint by suggesting that she use a family changing room.¹⁶ At least one woman complained to the Arlington School Board in writing about the man in the girls' locker room in September, but the school board did not respond to her and took no action.¹⁷ Other women also complained in private text groups but did not complain to facility staff or APS due to fear of public scrutiny.¹⁸

On October 21, 2024, the Suspect exposed his genitals to yet another victim in the girls' locker room.¹⁹ Someone reported this incident to the police two hours later,²⁰ and the ensuing investigation resulted in the arrest of the Suspect, a tier three registered sex offender, on December 6, 2024.²¹ He is now facing multiple charges, including several counts of "intentionally making an obscene display of his private parts in a public place or in a place where others were present plus loitering within 100 feet of a high school after having been convicted of an offense prohibiting proximity to children."²²

The Suspect was identified among the Virginia Department of Corrections Most Wanted in 2020 and has a long record of sexual misconduct and inappropriate interactions with young children.²³ In 1992, he was charged with knowingly and intentionally exposing his genitals to a child under

¹⁶ *Id.*

¹⁷ Nick Minock, *Sex Offender who Identifies as Transgender Exposes Himself to Kids Again at Va. School*, Abc7 News (Jan. 24, 2025), <https://wjla.com/news/local/virginia-arlington-county-public-schools-aps-washington-liberty-high-school-sex-offender-richard-kenneth-transgender-exposes-himself-girls-locker-room-prosecution-fairfax#>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ ARLnow, *Police Investigating Indecent Exposure at Washington-Liberty HS Pool*, <https://www.arlnow.com/2024/10/23/police-investigating-indecnt-exposure-at-washington-liberty-hs-pool/> (last retrieved Jan. 29, 2025).

²¹ Arlington County Sheriff's Office Inmate Query, <https://inmatewebquery.arlingtonva.us/NewWorld.InmateInquiry/VA0070000/Inmate/Detail/-1892777> (last retrieved Jan. 31, 2025).

²² Nick Minock, *Sex Offender who Identifies as Transgender Exposes Himself to Kids Again at Va. School*, Abc7 News (Jan. 24, 2025), <https://wjla.com/news/local/virginia-arlington-county-public-schools-aps-washington-liberty-high-school-sex-offender-richard-kenneth-transgender-exposes-himself-girls-locker-room-prosecution-fairfax#>.

²³ Arlington County Sheriff's Office Inmate Query, <https://inmatewebquery.arlingtonva.us/NewWorld.InmateInquiry/VA0070000/Inmate/Detail/-1892777> (last retrieved Jan. 31, 2025).



14 years old by going into a gymnasium, holding his penis, and masturbating in front of children.²⁴ At that time, he admitted in a letter to a judge that he was “aware that I suffer compulsions to expose myself in public places.”²⁵

The Suspect has been charged with or convicted of numerous serious offenses, including conviction of burglary in 1992,²⁶ conviction of possessing obscene materials with a minor in 2007,²⁷ conviction of failing to register as a sex offender in 2021,²⁸ and a charge of indecent exposure in a Planet Fitness women’s locker room in June 2024.²⁹

Despite being informed of the Suspect’s sexual harassment of girls and women by multiple parents and pool patrons, and the Suspect’s own local notoriety, it appears that APS and its employees did nothing to protect the children in their care or, for that matter, any girls or women using its pool facilities from being exposed to the Suspect’s genitals in private spaces reserved for females. Its “too little too late” actions included revising its pool rules to add language that does nothing to protect girls or women from men exposing their genitalia to others in girls’ locker room. This guidance merely states:

“Locker Room Rules and Etiquette

Effective immediately, all patrons are required to abide by the following rules:

Respect for Privacy and Space

Be considerate of others’ privacy. Please cover intimate body areas while using shared spaces.

Be mindful of your time while showering and close shower curtains.

Patrons who are not swimming must use the individual changing rooms located outside of the locker rooms.”³⁰

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Compare* Pool Rules and Regulations, <https://www.apsva.us/aquatics/pool-rules-regulations/> and Pool Rules and Regulations, <https://web.archive.org/web/20240720160928/https://www.apsva.us/aquatics/pool-rules-regulations/> (last retrieved Jan. 29, 2025).



On January 22, 2025, over six weeks after the Suspect’s arrest, APS Superintendent Dr. Francisco Durán finally released a statement about the incident that conflicted in various ways with the accounts of community members who actually witnessed the Suspect’s harassing and abusive conduct.³¹

First, Superintendent Durán states that “[i]mmediately upon discovery that the individual was a registered sex offender, APS personnel banned, prohibited the individual from using any of the Aquatic Centers.”³² But APS staff and school board members knew for months that there was an individual who was exposing himself to community members, including young girls and teens, and apparently did nothing to identify the Suspect or report his behavior to law enforcement, not even taking the time to do due diligence after being alerted to the problem. This is despite the fact that APS’s own Code of Conduct identifies “[e]xposing body parts, lewd or indecent public behavior” to be actions which “create unsafe conditions for students, staff, and visitors to the school.”³³

Second, Superintendent Durán claims that “[w]hen APS staff and members of the school board were contacted about the incidents, action was taken to address community concerns,” pointing to “[a]dditional signage” in aquatic centers and “guidance” to people using the facilities. Of course, according to the accounts above, the “guidance” provided to facilities users was simply to stop using the girls’ locker room and instead use a private changing facility. And the claim regarding additional signage is questionable given that at least one person claiming to be a regular user of the Washington-Liberty High School pool “NEVER saw the signs,” but did see the Suspect in the pool facilities.³⁴

Third, Superintendent Durán closes his statement with a concerning message whose tenor totally contradicts his claim that APS is committed to preventing future incidents: “[APS] will continue to foster an inclusive community for all, including those who identify as members of the LGBTQ+

³¹ Arlington Public Schools, *A Message from the Superintendent* (Jan. 22, 2025) <https://www.parentsquare.com/feeds/45123127?s=eyJhbGciOiJIUzI1NiJ9.eyJ1c2VyX2lkIjoyNjQwNzU0MSwiZXhwIjoxNzQ1MzUzODI5LCJ1cmwiOiJodHRwczovL3d3dy5wYXJlbnRzcXVhcmUuY29tL2ZlZWRzLzQ1MTIzMTI3IiwibWV0aG9kIjoirR0VUliwicXVlcnkiOnt9LCJyZXF1ZXN0Ijp7fX0.-AI8NnH3bdoG0WerCeJZDIR7FuDN9VpzMG-WsPw1q4>.

³² *Id.*

³³ Arlington Public Schools, *APS Secondary Leveled Responses to Student Behavior by Category: Secondary Level*, <https://go.boarddocs.com/vsba/arlington/Board.nsf/Public#> (last retrieved Jan. 29, 2025).

³⁴ Arlington GOP Virginia, Newsletter: What did APS know? When? Who’s responsible?, <https://arlingtongop.org/2025/01/23/newsletter-what-did-aps-know-when-whos-responsible/> (last retrieved Jan. 29, 2025).



community. Our facilities are designed to be safe, welcoming spaces where our community can come to connect, engage and focus on their health and well-being.”³⁵ Thus faced with the arrest of a man for exposing his genitals to girls and women at an APS facility designated for girls, the APS Superintendent appears to use his message as an occasion to insult members of the LGBTQ+ community by referring to them in a message about a sex predator and to double down on the supposed rights of biological males to access the private, intimate facilities of girls and women. Far from being “welcoming spaces where our community can come to connect, engage and focus on their health and well-being,” sex-separated bathrooms, locker rooms, and changing rooms *must be* spaces where girls and women can change their clothes free from fear of being ogled by a man with his genitals exposed.

At a school board meeting on January 30, 2025, Superintendent Durán said that APS is “strengthening the security protocols for signing into our facilities” by requiring a “100% ID check against the sex offender database before anyone is allowed to enter any of our facilities,” including after school hours.³⁶ He said that the new system “will be in place no later than the end of February.”³⁷ Of course, this new system would fail to prevent predators who do not appear in the sex offender database from freely accessing APS locker rooms based on their claimed “gender identity.”

Law

Title IX and the Meaning of “Sex”

Title IX provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” subject to certain statutory exceptions.³⁸ The law includes a rule of construction specifying that “nothing contained herein

³⁵ Arlington Public Schools, *A Message from the Superintendent* (Jan. 22, 2025)

<https://www.parentsquare.com/feeds/45123127?s=eyJhbGciOiJIUzI1NiJ9.eyJ1c2VyX2lkIjoyNjQwNzU0MSwiZXhwIjoxNzQ1MzUzODI5LCJ1cmwiOiJodHRwczovL3d3dy5wYXJlbnRzcXVhcmUuY29tL2ZlZWRzLzQ1MTIzMTI3IiwibWV0aG9kIjoiR0VUliwicXVlcnkiOnt9LCJyZXF1ZXN0Ijp7fX0.-AI8NnH3bddoG0WerCejZDIR7FuDN9VpzMG-WsPw1q4.>

³⁶ Nick Minock, *Arlington Residents Say APS Failed to Protect Children After Sex Offender Exposed Himself*, ABC7 News (Feb. 3, 2025), <https://wjla.com/news/local/virginia-arlington-county-schools-aps-transgender-bathroom-policy-residents-sex-offender-exposed-himself-richard-cox-washington-liberty-high-locker-room-superintendent-francisco-duran-aquatic-facility#>.

³⁷ *Id.*

³⁸ 20 U.S.C. § 1681(a).



shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.”³⁹ Since the Department of Health, Education, and Welfare issued its first regulations implementing Title IX in 1975, Title IX regulations have permitted recipients of federal education funding to “provide separate, toilet, locker room, and shower facilities on the basis of sex” as long as “such facilities provided for students of one sex” are “comparable to such facilities provided for students of the other sex.”⁴⁰

It is beyond serious debate that, as used throughout Title IX, the word “sex” refers to a person’s biological sex—male or female—at birth.⁴¹ A slew of federal district courts and courts of appeals across the country recently confirmed this fact while blocking the implementation and enforcement of the Department’s unlawful Title IX regulations issued on April 29, 2024 (the “2024 Rule”), discussed below, which purported to redefine “discrimination on the basis of sex” in Title IX as referring to “discrimination on the basis of gender identity” and to force schools to permit biological males who identify as female to share bathrooms, locker rooms, and other sex-separated private facilities with women and girls.⁴²

On August 16, 2024, in denying an application for a stay of two of these preliminary injunctions issued by lower courts, a *per curiam* opinion of the U.S. Supreme Court confirmed this understanding of Title IX by noting that, “[i]mportantly, all Members of the Court today accept

³⁹ 20 U.S.C. § 1686.

⁴⁰ 34 C.F.R. § 106.33.

⁴¹ See *Louisiana v. Dep’t of Educ.*, Amended Complaint, No. 3:24-CV-00563-TAD-KDM, at 10 (May 3, 2024) (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *Sex*, *Webster’s Third New International Dictionary* 2081 (1966) (“one of the two divisions of organic esp. human beings respectively designated male or female”); *Sex*, *Webster’s New World Dictionary* (1972) (“[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions.”); *Sex*, *American Heritage Dictionary* 1187 (1969) (“a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated *male* and *female*, of this classification.”)).

⁴² See *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024); *Louisiana v. Dep’t of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024); *Arkansas v. Dep’t of Educ.*, No. 4:24-CV-636-RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024); *Carroll Indep. Sch. Dist. v. Dep’t of Educ.*, No. 4:24-cv-00461-O, 2024 WL 3381901 (N.D. Tex. July 11, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342 (N.D. Tex. July 11, 2024); *Kansas v. Dep’t of Educ.*, No. 24-4041JWB, 2024 WL 3273285 (D. Kan. July 2, 2024); *Tennessee v. Cardona*, No. 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Louisiana v. Dep’t of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024).



that the plaintiffs [challenging the 2024 Rule] were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity.”⁴³

Title IX, Response to Sexual Harassment, and the 2020 Rule

Since the early 1980s, the Department has interpreted Title IX to prohibit sexual harassment in education programs and activities as a form of discrimination on the basis of sex.⁴⁴ The Department has recognized that sexual harassment can deprive students of equal educational opportunities and has emphasized federal funding recipients’ obligations to ensure “nondiscriminatory, safe environments in which students can learn.”⁴⁵

The Supreme Court has likewise concluded that the sexual harassment of a student can be discrimination on the basis of sex in education programs and activities that gives rise in certain instances to the liability of a recipient in private damages lawsuits for violating Title IX.⁴⁶ According to the Supreme Court, sexual harassment of a student by another student (or, by logical extension, anyone other than an employee in the recipient’s education program or activity) is actionable when that harassment “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” and “the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.”⁴⁷ A recipient is responsible for responding to the harassment only when the conduct occurs “under” the recipient’s programs or activity—that is, when the recipient “exercises substantial control over both the harasser and the context in which the known harassment occurs.”⁴⁸

In 2020, the first Trump Administration issued an administrative rule (the “2020 Rule”) that for the first time recognized as a matter of the Department’s regulations implementing Title IX a duty on the part of recipients to respond promptly and equitably to complaints of sexual harassment with supportive measures for the complainant and due-process-protective grievance procedures

⁴³ *Dep’t of Educ. v. Louisiana*, No. 24A78, slip op. at 2 (U.S. Aug. 16, 2024).

⁴⁴ See U.S. Dep’t of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981).

⁴⁵ *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997).

⁴⁶ See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63-64, 75 (1992).

⁴⁷ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

⁴⁸ *Id.* at 645.



for all parties to a harassment complaint.⁴⁹ These regulations largely adopted in Title IX’s administrative enforcement context the Supreme Court’s definitions of actionable sexual harassment and of the scope of the recipient’s responsibility to respond to such conduct, with important modifications—including that a single instance of *quid pro quo* sexual harassment or sexual assault triggers a recipient’s obligation to address the conduct at issue.⁵⁰ In the case of elementary and secondary schools, these regulations trigger a recipient’s response obligations as soon as any employee of such a school receives notice of sexual harassment occurring in the school’s education programs or activities.⁵¹

The 2024 Rule

The Department’s 2024 Rule amended Title IX regulations in two ways that are pertinent here. First, as discussed previously, despite Title IX’s explicit rule of construction denying that the law has anything to do with sex-separated living facilities and the Department’s longstanding regulation permitting sex-separated bathrooms and similar private spaces, the 2024 Rule required recipients to allow any person to use whichever sex-separated bathroom or locker room corresponds with that person’s claimed gender identity.⁵²

Second, the Department dramatically expanded the scope of conduct to be considered what it now called “sex-based harassment” requiring a response from a recipient, defining such harassment as “[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).”⁵³ The 2024 Rule required recipients to respond to knowledge of any “conduct that *reasonably may* constitute sex discrimination,” including sexual harassment, within the scope of its “disciplinary authority.”⁵⁴ Any employee of an elementary or secondary school subject to Title

⁴⁹ *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (hereinafter “2020 Rule”).

⁵⁰ *Id.* at 30,574.

⁵¹ *Id.*

⁵² *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474, 33,887 (Apr. 29, 2024) (hereinafter “2024 Rule”); *id.* at 33,818 (denying “a transgender student access to a sex-separate facility or activity consistent with that student’s gender identity . . . would violate Title IX’s general nondiscrimination mandate”).

⁵³ *Id.* at 33,884.

⁵⁴ *Id.* at 33,886, 33,888 (emphasis added).



IX must “notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination” prohibited by Title IX.⁵⁵

The effective date of the 2024 Rule was August 1, 2024.⁵⁶

Vacatur of the 2024 Rule

On January 9, 2025, the U.S. District Court for the Eastern District of Kentucky vacated the 2024 Rule in full because, among other unlawful aspects of the rule, it misinterpreted the word “sex” in Title IX to apply to “gender identity”;⁵⁷ overruled Title IX’s explicit recognition that schools may separate certain facilities and programs on the basis of sex in the interest of safety, privacy, and equal opportunity;⁵⁸ was arbitrary and capricious in violation of the Administrative Procedure Act;⁵⁹ and violated the First Amendment to the U.S. Constitution with its overly expansive definition of “sex-based harassment.”⁶⁰

In light of the vacatur of the 2024 Rule, on February 4, 2025, the Department’s Acting Assistant Secretary for Civil Rights Craig Trainor issued a Dear Colleague letter (“February DCL”) announcing that OCR “will enforce Title IX under the provisions of the 2020 Title IX Rule, rather than the 2024 Title IX Rule.”⁶¹ Accordingly, Acting Assistant Secretary Trainor stated that “open Title IX investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and . . . preexisting regulations”⁶²

⁵⁵ *Id.* at 33,888.

⁵⁶ *Id.* at 33,474.

⁵⁷ *Tennessee v. Cardona*, No. 2:24-cv-00072-DCR-CJS, at 4–7 (E.D. Ky. Jan. 9, 2025).

⁵⁸ *Id.* at 7–8.

⁵⁹ *Id.* at 11.

⁶⁰ *Id.* at 8–9.

⁶¹ Craig Trainor, Acting Assistant Secretary for Civil Rights, United States Department of Education, Dear Colleague Letter, Feb. 4, 2025, at 1, <https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl> (footnotes omitted).

⁶² *Id.* at 2.



Analysis

Evaluation of the Sexual Misconduct Under the 2020 Rule

The behavior set forth above occurred at APS’s pool facilities, in a setting where APS “exercises substantial control” of its students and others with access to its facilities. Thus, the harassing behavior occurred under the education program or activity of APS.⁶³

At the time APS employees and school board members received and failed to take action with regard to multiple reports that the Suspect was loitering in the girls’ locker room of Washington-Liberty Aquatics Center and exposing his genitals to girls and women—in September and October 2024—APS and Washington-Liberty High School were subject to the clearly unlawful 2024 Rule, as no preliminary injunction prevented the Department’s implementation of those regulatory amendments to the Commonwealth of Virginia or specifically with respect to Washington-Liberty High School.⁶⁴

But as the February DCL rightly recognizes, the 2024 Rule has no force of law, and in fact, it was so plainly in violation of the binary, biological meaning of Title IX that it can carry no weight moving forward, including in open investigations launched under the regime of the 2024 Rule. In other words, any supposed obligations APS had under the 2024 Rule to allow biological males claiming to be females to access its girls’ locker rooms were invalid, and it cannot rely on such asserted obligations to justify having allowed the Suspect to repeatedly expose himself in the girls’ locker room at Washington-Liberty Aquatics Center.

Instead, OCR should investigate APS’s failure to act in response to complaints about the Suspect’s behavior under the framework of the 2020 Rule requiring schools to respond to “unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”⁶⁵ If any circumstances justify the Department’s consideration of a school’s reliance interests on the 2024 Rule in pursuing enforcement of Title IX’s guarantees,

⁶³ See *Davis*, 526 U.S. at 645; 2020 Rule at 30,574.

⁶⁴ *Supra* note 42; Moms for Liberty, *M4L Title IX Lawsuit*, <https://www.momsforliberty.org/title9-lawsuit/> (last retrieved Jan. 31, 2025) (containing lists of schools subject to the U.S. District Court for the District of Kansas’s preliminary injunction against implementation of the 2024 Rule under the tab labeled “I am afraid that my child’s school district will adopt policies on its own that mirror the Biden Administration’s Title IX rewrite. What can I do to protect my child?”).

⁶⁵ 2020 Rule at 30,574.



APS’s failure to respond to multiple complaints about the indecent exposure of a convicted sex predator in its girls’ locker room is not such a circumstance.

Under the 2020 Rule’s framework, little analysis is required to come to the conclusion that APS’s response to multiple complaints about a nude man in its girls’ locker room were wholly deficient in light of its compliance obligations under Title IX.

First, as noted above, APS had no obligation to admit the Suspect, a biological male, into its girls’ locker room facilities under the 2020 Rule.

Second, the Suspect’s behavior within the girls’ locker room was “severe” in that he committed a crime of exposing his genitals to children and to women attempting to use a sex-separated, private facility;⁶⁶ “pervasive” in that he did it multiple times within at least a two-month window; and “objectively offensive” in that any reasonable observer would consider a man exposing his genitals to unsuspecting girls and women to be far outside the norms of conduct for a civilized society. His presence in the girls’ locker room “effectively denie[d]” girls and women equal access to the pool facility—which, as a facility located on one of its high school campuses, was part of APS’s “education program or activity”—because, unlike the boys and men using the facility, they were unable to access their sex-separated locker room without being subject to the Suspect’s harassing behavior.

Third, when its employees and school board members received notifications of this conduct on multiple occasions, APS responded with deliberate indifference to the actual knowledge of the sexual harassment that was taking place within its school facilities. As set forth above, the general response of APS staff to these notifications was that there was nothing to be done and that the women and girls who complained of the Suspect’s conduct should use a different changing room. This kind of response, which does nothing to alleviate a hostile (and dangerous) environment in APS’s pool facilities, is the epitome of “deliberate indifference” that violates the 2020 Rule’s response obligations. And while APS claims that its employees posted signs in its facilities to address the harassing behavior, this claim is disputed, and it is not clear what the signs actually said or how anything such signs said could have possibly addressed the Suspect’s determination to expose his genitals to girls and women. Finally, APS’s revision of its pool rules and regulations to plead with facilities users to “be considerate of others’ privacy” is a far cry from any meaningful action protecting girls and women from indecent exposure and potentially being subjected to violence by a sex predator.

⁶⁶ See Va. Code Ann. § 18.2-387 (prohibiting indecent exposure).



Fourth, there is no evidence that any APS employee who received notice of the sexual harassment in the girls' locker room reported this behavior to APS's Title IX Coordinator, as required by both the 2020 Rule and the 2024 Rule. If APS's Title IX Coordinator did receive any such reports, there is no evidence that he took any actions to offer supportive measures to the victims of the Suspect's indecent exposure or address this harassment in any way.

A reasonable response to discovering that the Suspect was exposing himself in the girls' locker room would have been to immediately expel the Suspect from the pool facilities, report him to law enforcement, and ban him from accessing these facilities in the future. Instead, whether due to lack of training on Title IX's requirements or due to utter disregard for the safety of its patrons, APS acted with deliberate indifference to numerous complaints of sexual harassment in its girls' locker room and thus violated Title IX's nondiscrimination guarantee.

Evaluation of the Sexual Misconduct Under the 2024 Rule

Even if OCR considers APS's failure to respond to reports of the Suspect's indecent exposure in the girls' locker room under the framework of the 2024 Rule, which we believe it should not, it is clear that he was engaged in blatantly harassing behavior in the confines of a room set aside for girls and women to undress and change and that, therefore, APS was required to address his behavior.

While the 2024 Rule's access requirements for sex-separated facilities were unlawful and ill-advised, certainly it is reasonable to interpret them so as not to require schools to allow adult men who enter girls' locker rooms to sexually harass every minor girl or woman who enters the room by exposing his genitals in full view of everyone in the facility. The 2024 Rule's preamble "strongly agree[d] that recipients have a legitimate interest in protecting all students' safety and privacy," and maintained that "a recipient can make and enforce rules that protect all students' safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity."⁶⁷ Thus, though the 2024 Rule was unlawful and wrongheaded, it appears that not even the Department officials who issued it would have considered APS's failure to address the Suspect's behavior in its girls' locker room to be consistent with Title IX's mandate to address sexual harassment.

As the 2024 Rule recognized a much broader scope of behavior that constituted "sex-based harassment" recipients must address in their education programs or activities than did the 2020 Rule—"severe *or* pervasive" conduct that merely "limits" anyone's ability to participate in a

⁶⁷ 2024 Rule at 33,820.



program or activity⁶⁸—there is no doubt that, under that framework, the Suspect’s behavior in the girls’ locker room constituted such harassment that APS was required to remedy. It did not do so, and in not doing so, its employees ignored the fact that they were violating APS policy, which, as discussed above, prohibits “[e]xposing body parts” and other “lewd” behavior.⁶⁹

Ongoing Violation of Title IX

Further, whether APS’s response is considered under the framework of the 2020 Rule or the 2024 Rule, it appears that APS continues to fall short of its Title IX-based duty to address the criminal activities of the Suspect and the hostile environment this harassment created.

Superintendent Durán’s January 22 letter fails to address the fact that APS employees knew a man was exposing himself to girls and women in a girls’ locker room but failed to take any action for several weeks to stop his conduct or report him to the police, and it points to (ineffectual) signage that may never have existed in the first place. And the Superintendent’s statement announces no changes in APS policy regarding access to bathrooms and locker rooms that would have *any* impact in preventing a future occurrence of similar behavior.

Worse, the statement advertises that APS facilities—presumably including its sex-separated intimate facilities—are “inclusive” and “welcoming” to all. To put it mildly, this message does nothing to make women and girls feel safe to continue to use APS’s sex-separated locker rooms and thus benefit on equal terms with men and boys from APS’s education programs and activities. Compliance with Title IX means that APS must do more to address the sexual harassment that occurred in this case and ensure that the girls and women participating in its education programs and activities feel safe, once again, using its locker rooms and other private, sex-separated spaces.

Superintendent Durán’s January 30 announcement that APS pool staff will check everyone’s ID against a sex offender database before allowing them access to the pool facilities almost totally misses the mark regarding what was problematic about APS’s response to the Suspect’s sexual misconduct. Certainly, APS should focus on excluding convicted sex offenders from its facilities, but in this case, APS staff did not need to know that the Suspect was a convicted sex offender to know that he was engaged in criminal activity in the girls’ locker room that they should have reported immediately to law enforcement. Under this new policy, it appears that any man who identifies as female will still be free to enter a girls’ locker room and engage in conduct that is similar to that of the Suspect—so long as he does not appear in a database of convicted sex offenders. This is not a sufficient response to the Suspect’s sexual harassment of girls and women

⁶⁸ *Id.* at 33,884 (emphasis added).

⁶⁹ *Supra* note 33.



or to APS staff's inadequate response in this case, and it falls woefully short of addressing the hostile environment that has developed as a result of APS's failings.

Conclusion

APS employees and school board officials were aware that the Suspect was exposing his genitals to girls and women in a locker room designated for females for several weeks and failed to take action beyond throwing up their hands and requesting that complaining women and girls change their clothes elsewhere. This is not only an unacceptable betrayal of the trust of the APS community; it is a clear and, because APS continues to fail to address the issue of the security of girls' locker rooms, ongoing violation of Title IX's nondiscrimination guarantee.

Accordingly, we urge OCR to investigate the allegations in this complaint and ensure that APS complies with Title IX, as well as provide other appropriate relief.

Thank you for your prompt assistance. Please feel free to contact us with any questions related to this request.

Sincerely,

/s/ Virginia Gentles

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