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Via Webform: <https://publicinput.com/4033>

June 7, 2019

District of Columbia Public Schools
1200 First St. NW
Washington, DC 20002

RE: COMMENTS ON PROPOSED POLICY & PROCEDURES: SEXUAL MISCONDUCT AND SEX-BASED DISCRIMINATION AGAINST STUDENTS

To Whom It May Concern:

Thank you for the opportunity to comment on the DCPS proposed policy and procedures regarding sexual misconduct and sex-based discrimination against students. I am submitting these comments on behalf of Children's Law Center (CLC).¹ In the last year, CLC provided services to more than 5,000 low-income children and families, with a focus on children in foster care and children with special health and education needs. Many of the children we represent are enrolled in DC public schools. Our comments reflect on our experience representing these children and their families.

We acknowledge the many strengths of this policy and we support the school system in their efforts to protect students from sexual misconduct and sex-based discrimination. Nevertheless, we, like our partners at the [DC Coalition Against Domestic Violence](#), have various concerns about the lack of alignment between the proposed policy and [the School Safety Omnibus Amendment Act of 2018](#) (hereinafter School Safety Act).² Namely, the proposed policy does not address some explicit

¹ Children's Law Center fights so every child in DC can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to us to advocate for children who are abused or neglected, who are not learning in school, or who have health problems that cannot be solved by medicine alone. With nearly 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And, we multiply this impact by advocating for city-wide solutions that benefit all children.

² While this comment letter will not devote much time to this point, it is worth noting that the proposed policy does not address prescreening requirements for the hiring of staff. We are hopeful that DCPS's Human Resources policy will address this requirement of the School Safety Act and that staff, teachers, and parents receive notice of this condition of employment.

requirements of the School Safety Act including training for the school community³ and differentiation between misconduct by staff and that by students.⁴

Moreover, while the School Safety Act primarily deals with sexual abuse, the proposed policy fails to define which acts fall within the scope of sex-based discrimination. The policy explicitly defines the categories of *sexual misconduct* (including sexual harassment, sexual assault, and sexual exploitation), but fails to enumerate any relevant *sex-based discrimination* behaviors.⁵ Rather, the policy refers to Title IX, the DC Human Rights Act, and DCPS's Transgender and Gender-Nonconforming Policy Guidance (June 2015).

In addition to these specific weaknesses, our broader concerns arise in four categories: 1) greater emphasis on prevention and education; 2) minimizing the onus on survivors throughout the reporting and adjudication processes; 3) interagency reporting requirements; and 4) attention on the intersection of discipline and special education under the IDEA.

EMPHASIS ON PREVENTION & EDUCATION

First, the policy includes a vague list of preventative measures and plans to educate the school community about the policy and the issues to which it responds. However, the standard set by the School Safety Act requires a thorough policy for training staff and parents and the proposed policy does not meet that standard. The prevention of sexual misconduct and discrimination ought to be a distinct goal of this policy and the policy should delineate clear and enforceable steps that schools should take to achieve this goal. One of the necessary steps will include adequately training school staff, students and parents about prevention, broadly, and this policy, specifically. Therefore, DCPS's policy should also provide details about the training that schools must provide.

Regarding the prevention measures, the proposed DCPS policy includes a list of efforts that the district will undertake in an effort to prevent sexual misconduct. The proposed policy's list does not contain adequate specifics or details. It mentions neither timelines for implementation nor methods of accountability for follow-through. It fails to use an intersectional lens by ignoring the need for distinct education and prevention efforts to prevent sexual misconduct by staff against students. DCPS could also implement a yearly child protection registry check for all employees as an additional preventative measure. While it is critical to have procedures in place to respond to

³ *School Safety Act*, § 102(c)(2); § 302(b)(2)

⁴ Compare *School Safety Act*, § 102(a) with § 302(a)

⁵ This failure raises the question of whether it is appropriate to address both sexual misconduct and sex-based discrimination in the same policy. Clearly, both topics need enforceable policy, but these topics do not receive equally thorough attention in the proposed joint policy.

reports of misconduct, the efforts to educate the school community and prevent incidents in the first place ought to be a greater priority in this policy.

Regarding education, the DCPS policy would benefit from a disaggregation of the training and education to be provided, as modeled by Section 102(c) of the School Safety Act. The policy should specifically address training for at least three audiences: School Staff, Parents, and Students. The training provided to school staff must align with requirements the School Safety Act. The School Safety Act requires that D.C. schools begin training teachers and staff in the 2020-2021 school year. New staff must receive training on sexual misconduct at the time of hiring and at least once every two years thereafter. The Act includes a list of requirements of that training, few of which are reflected in the proposed policy:

- The scope of training staff will receive;
- The frequency of training (meeting at least the minimum standard established by the School Safety Act); and,
- The accountability measures to enforce staff training under the policy.

The proposed policy could simply mirror the language in the School Safety Act to ensure it meets all legal requirements. Additionally, the parallel [policy model provided by the DC Public Charter School Board](#) could serve as an example for how to incorporate the specific requirements of the Act into the language of the policy. DCPS should also consider including training for staff on the co-occurrence of sexual harassment and sexual misconduct, especially in the context of sexual exploitation.

DCPS must develop and include a more detailed plan for education of students and staff regarding the issues underlying sexual misconduct and sex-based discrimination. Such training should also include information about the prohibition on retaliation against survivors, reporters, and witnesses. It is important that reporters not only know that there are protections from retaliation, but what recourse they have if they suffer any sort of retaliation from staff or students.

Moreover, the School Safety Act requires schools to provide annual training and information to parents “regarding child abuse, sexual misconduct and student sexual abuse, including instruction on the following:

- A) Recognizing and reporting sexual misconduct, student sexual abuse, and child abuse;*
- B) Receiving disclosures of sexual misconduct, student sexual abuse, and child abuse in a supportive, appropriate, and trauma-informed manner;*
- C) Prevention, warning signs, and effects of sexual misconduct, student sexual abuse, and child abuse;*

D) *Effective, developmentally appropriate methods for discussing sexual misconduct, student sexual abuse, and child abuse; and*

E) *School and community resources available to assist with the prevention of, and response to, sexual misconduct, student sexual abuse, and child abuse.*"⁶

The proposed DCPS policy does not include any reference to training or information for parents. In order to comply with the School Safety Act, the policy and procedures must add details about this training for parents/guardians.

We also recommend that the proposed policy set expectations for the school's developmentally appropriate education on the issues of sexual misconduct and sex-based discrimination. This education plan for students should also include education on their rights as a reporter of sexual misconduct. Students need to know what information shall remain anonymous and confidential. Schools also need to make sure students are aware of their protections from retaliation. Moreover, students must be confident that the school will receive reports from witnesses and others with knowledge of incidents and that these individuals similarly receive protection from retaliation. By amending the policy to specify these education requirements, DCPS will ensure that students have the information necessary to recognize sexual misconduct and sex-based discrimination and to feel safe reporting these incidents.

ONUS ON SURVIVORS

Next, we recommend that the proposed policy address the significant reporting onus placed on survivors in the school context. Many sexual misconduct and discrimination policies place an onerous burden on survivors, and this proposed policy is no exception. The reporting requirement is a burden in all sexual misconduct policies; however, the school context adds extra complexities because the legal obligations that DCPS has to its staff is not the same as those it owes to its students. Moreover, there are different procedural requirements for both students and staff in roles as survivors/reporters or as the one accused of misconduct. It would be misguided to assume that a single set of procedures could address these various potentialities without imposing an unnecessary burden on the survivor and/or reporter of misconduct. To address the complex obligations held by the school district, it is necessary to delineate between staff-on-student misconduct and student-on-student misconduct. The important differences between these two circumstances will inform the procedures that the policy ought to include.

In instances of misconduct by DCPS staff, it is necessary for school leaders to be clear on the steps taken to (1) prevent further harm to the student who is the subject of the report, and (2) minimize the risk of harm to all other children with whom staff

⁶ *Student Safety Act*, § 102(c)(2).

comes into contact. The policy ought to make clear to potential reporters what steps DCPS will take with staff accused of misconduct. Without clarity as to consequences, it will be more difficult for survivors or witnesses to report incidents because they lack assurances that they will not be required to continue interacting with the accused staff or will be forced to upend their own education in order to avoid the accused staff.

In instances of misconduct by a student, the legal obligation of the school district to educate both the survivor and the alleged aggressor will require a different set of procedures than when the alleged aggressor is staff. There is an obligation to educate both students pending the investigation and adjudication of the report. The policy is unclear as to when disciplinary measures will go into effect and how disciplinary measures will affect the interim supportive measures for the survivor. As with staff-on-student misconduct, this lack of clarity with regard to the procedural steps to follow a report will suppress reports.

The policy could alleviate the burden of reporting that often falls to survivors and witnesses by undergirding its protections from retaliation with clear procedural steps. For example, providing a clear timeline of interim measures to support reporters may help student-reporters feel comfortable reporting staff or peers. Additionally, the policy should outline a process for reporters to engage in if they suspect retaliation against themselves or the alleged victim.

Furthermore, we recommend editing the policy to clarify a possible contradiction between the interim measures to protect students involved in the report and the prohibition on retaliation against reporters. Specifically, the interim measures section currently states that, to support students who have reported incidents of misconduct or discrimination, staff may “modify[] class schedule(s) to minimize or eliminate contact with the responder [i.e. the accused].” While supporting victims by minimizing the chance that they encounter their aggressor is an important way to support survivors, the policy needs to clarify in the relevant section that the victim will not have to unwillingly leave classes or have their schedule changed because they reported an incident of misconduct or discrimination. In fact, the retaliation section requires such a clarification when it states that retaliation is unlawful and that an “unwanted change in class schedule” is retaliatory. These two sections could pose a conflict for those implementing the policy. Therefore, it is necessary for the final version of the policy to clearly state that the burden of rearranging or changing class schedules must not fall on the survivor or the reporter.

Moreover, the retaliation protections fall short of ensuring that procedures are in place to address retaliation. The section defines what retaliation is and clearly states that DCPS will not tolerate any retaliation against survivors, reporters, or witnesses. However, the section ends with a seemingly half-hearted promise that “DCPS will

respond promptly to address alleged retaliation.” We recommend expanding this section to outline the procedures that will occur following a report of retaliation, specifically addressing the following concerns:

- What sort of response will follow a report? Will any sort of investigation occur?
- Who will be responsible for investigating and adjudicating claims of retaliation?
- What interim measures will be available to protect reporters while retaliation claims are investigated and/or adjudicated?
- How will the policy hold students and staff accountable regarding the prohibition on retaliation? How will the procedures differ for retaliation by staff and retaliation by students? What sorts of disciplinary responses will result for staff? For students?

INTERAGENCY REPORTING REQUIREMENTS

Known or suspected incidents of the sexual abuse or child abuse not only trigger mandated reporting requirements in the School Safety Act, but also in laws elsewhere in DC Code as well as federal law. Specifically, mandated reporters have obligations to inform the DC Child and Family Services Agency (CFSA) or the Metropolitan Police Department (MPD). When dealing with instances of misconduct or discrimination, the school should always recognize these limitations, defer to the appropriate agency, and comply with the decisions thereof. The proposed policy does not include references to or procedures for this reporting process.

In cases of child sexual abuse, all persons who are 18 years of age or older are required to immediately report their reasonable knowledge or belief that a child is a victim of sexual abuse to the MPD or CFSA.⁷ The DC Code defines a mandated reporter as:

“Any person [...] who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity has been or is in immediate danger of being the victim of “sexual abuse” or “attempted sexual abuse” prohibited by Chapter 30 of Title 22”⁸

The proposed policy does contain a section regarding internal reporting procedures. However, we recommend adding language to this section to clarify the legal obligations

⁷ DC Code §§ 22-3020.51 (2) & 22-3020.52 (a).

⁸ DC Code § 4-1321.02 (e).

that all persons 18 years of age or older have to immediately report child sexual abuse to MPD or CFSA.⁹

Relatedly, Section 8 of the [Omnibus Public Safety and Justice Amendment Act of 2018](#) (which became effective on May 10, 2019) amends DC's mandated reporting law.¹⁰ This new amendment requires mandated reporters to immediately convey any knowledge or reasonable suspicion that a child is a victim of sex trafficking to MPD or CFSA. This requirement applies whether the child is being trafficked by a caregiver, school staff, or a peer. Teachers need to know about this distinct reporting requirement so that they can "...[communicate] with students and parents about reporting and preventing sexual misconduct, student sexual abuse, and child abuse," as envisioned by the School Safety Act.¹¹

Additionally, with regard to reporting of child sexual abuse, the policy must clarify their promised protections of reporter confidentiality to reflect the requirement of mandated reporters to identify themselves in their report to CFSA or MPD.¹² Reporters must know that DCPS cannot promise to maintain strict confidentiality of the identity of mandated reporters as defined above. Not only must the policy reflect this identification requirement, but the education and training improvements recommended above must also include explicit training for staff, parents, and students of the definition of mandated reporters and the limits of DCPS's promise to protect the confidentiality of reporters.

The proposed policy states: "student interviews will not be conducted without parent/guardian consent." However, DCPS can only promise that their Title IX Coordinator will not conduct such interviews without parent/guardian consent. We recommend editing the language in the policy to clarify that other investigatory entities, namely CFSA or MPD, may conduct such interviews. The policy must make clear to parents/guardians and students that the school must comply with any MPD and/or CFSA investigation arising from a report under this policy.

INTERSECTION WITH SPECIAL EDUCATION

At the intersection of sexual misconduct and discipline for students with disabilities is the concern that DCPS does not explain how the proposed policy will apply to students with Individualized Education Plans (IEPs) or plans under Section 504 of the Rehabilitation Act of 1973 (i.e., 504 plans). The Individuals with Disabilities Education

⁹ DC Code §§ 4-1321.02 (e) & 22-3020.52 (a).

¹⁰ DC Code § 4-1321.02 (a).

¹¹ *Student Safety Act*, § 102(c)(1)(D).

¹² DC Code § 4-1321.03 (b)(4).

Act (IDEA)¹³ is, of course, controlling in such a situation,¹⁴ but without reference to manifestation determination review in the policy, there is a significant possibility that those involved in the application and implementation of the policy will unknowingly violate the federally protected procedural due process rights of students with disabilities. In order to avoid this misstep, there must be an intervening step in the procedures for a manifestation determination review for students with disabilities accused of sexual misconduct. The IDEA requires this step before imposing disciplinary sanctions.

DC Regulations at [5-B DCMR § 2510](#) further codify the relevant procedural requirements of the IDEA. Specifically, it is important that the final policy account for the fact that manifestation determination reviews also have an appeal process that would further extend the adjudication timeline. These additional procedural steps could, under the relevant circumstances, lengthen the discipline process and extend the interim period during which survivors of misconduct will need protection and support. Both victims of sexual misconduct and students with disabilities are vulnerable in this context and it is important that the policy protect them both simultaneously. The proposed policy does not refer to the potential intersection of the IDEA and discipline responses to student-on-student sexual misconduct.

CONCLUSION

In conclusion, it is important that this policy is nuanced enough to address the complex and varied needs of students. This policy will not only affect the nearly 50,000 students enrolled in DCPS, but it could also serve as a model for the country in how schools can and should respond to sexual misconduct and sex-based discrimination suffered by children in school.

Thank you for considering these comments and concerns. We know that we all share the same goal of improving the safety of students and protecting them from additional harm following incidents of misconduct. If you have any questions about these comments, please feel free to contact me at (202) 467-4900 ext., 609 or at AEwards-Luce@childrenslawcenter.org.

Respectfully,



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¹³ *Individuals with Disabilities Education Act*, 20 U.S.C. § 1400 *et seq.* (2004).

¹⁴ 34 CFR 300.530-.537.

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