2023 TEXAS TITLE IX ADMINISTRATOR CONFERENCE

OCTOBER 18-19, 2023
AUSTIN MARRIOTT NORTH

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Title IX Coordinator Certification Course

Presented by:
Holly Boyd Wardell and Emma J. Darling

October 18, 2023
Before Title IX

- Some schools and universities had separate entrances for male and female students.
- Female students were not allowed to take certain courses, such as auto mechanics or criminal justice; male students could not take home-economics.
- Some medical and law schools limited the number of women admitted to 15 or fewer.
- Some colleges and universities required women to have higher test scores and better grades than male applicants to gain admission.

Before Title IX

- Women living on campus were not allowed to stay out past midnight.
- Women faculty members were excluded from faculty clubs and encouraged to join faculty wives’ clubs instead.
- After winning two gold medals in the 1964 Olympics, swimmer Donna de Varona could not obtain a college swimming scholarship. For women they did not exist.


Title IX: 1972

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.

Signed into law by President Richard Nixon on Friday, June 23, 1972.

Title IX: 1972

- Battle of the Sexes - Billie Jean King defeated Bobby Riggs in an exhibition tennis match
- First Title IX regulations adopted
- NCAA challenged the legality of Title IX in regard to athletics, was dismissed two years later
- Women students at Yale, two graduates, and a male faculty member became the first to sue over sexual harassment under Title IX in 1969.
- The Court of Appeals affirmed the dismissal of the complaint.
- Students can sue for sex discrimination (Compton v. Univ. of Chicago)
- Oversight for compliance was given to the Office for Civil Rights (OCR) in the U.S. Department of Education
- Employees can sue for sex discrimination
- Students can sue for money damages for discrimination by employees (Franklin v. Gwinnett County Public Schools)
-OCR issued “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (2001) which included the first explicit reference to “gay or lesbian students” as being covered by federal prohibitions against sexual harassment.
-OCR issued guidance allowing single-sex programs/schools.

Where are those new Title IX regulations?

Published Title IX Final Rule

- Expected Summer 2022

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What is your position?

Title IX Coordinators

- District’s policies and procedures
- Drafting and revising policies/procedures
- Collecting information
- Participation in subject areas, athletics
- Administration of school discipline
- Incidents of sex-based harassment
- Retaliation
- Aware of all T9 complaints
- Visible in the school community

Responsibilities and Authority of T9 Coordinator

- Training on Policies and Grievance Procedures

Relevant Policies and Procedures

- FB (LEGAL) Equal Educational Opportunity
- FB (LOCAL) Equal Educational Opportunity
- FFG (LEGAL) Student Welfare: Child Abuse and Neglect
- FFG (LOCAL) Student Welfare: Child Abuse and Neglect
- FFH (LEGAL) Freedom from Discrimination, Harassment, & Retaliation
- FFH (LOCAL) Freedom from Discrimination, Harassment, & Retaliation
- FM (LOCAL) Student Activities
- FNE (LEGAL) Pregnant Students
- FNE (LOCAL) Pregnant Students
- FNG (LEGAL) Student & Parent Complaints
- FNG (LOCAL) Student & Parent Complaints
- DAA (LEGAL) Equal Employment Opportunity
- DGBA (LEGAL) Employee Complaints
- DGBA (LOCAL) Employee Complaints
- EHAA (LEGAL) Required Instruction
- GF (LOCAL) Public Complaints
- GRA (LEGAL) Relations with Governmental Entities
  - State and Local Authorities
- GRA (LOCAL) Relations with Governmental Entities
  - State and Local Authorities

Responsibilities from 2020

Sexual Harassment Regulations
Have you ever conducted a full Title IX Investigation under the 2020 regulations?

T9 Coordinator Responsibilities

Under 2020 Regulations

- The 2020 regulations pertain to reports and formal complaints of sexual harassment.
- They do not affect responsibilities pertaining to equity in athletics, inequities, or discrimination in course selections, etc.

Title IX Coordinator Responsibilities

- Ensure policies reflect current information about Title IX Coordinator
- Ensure websites and publications contain proper notices
- For all reports of sexual harassment, contact alleged victims (complainant) to discuss the availability of supportive measures

*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.

Title IX Coordinator Responsibilities

- Decide whether to dismiss a formal complaint (or who should decide dismissal)
- Assist with emergency removal and administrative leave decisions
- Provide notice to parties of grievance process in case of formal complaints

*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.

Reporting sexual harassment...

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)...

Using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
Reporting sexual harassment...

Such report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

34 C.F.R. § 106.8(a).

Most of my district’s complaints are received

SCENARIO: Reporting sexual harassment...

Taylor and John used to date. John has “nudes” of Taylor. After they break up, John sends the pics to other students who show them around school. Taylor’s new boyfriend, Travis, finds out about this and “avenges” Taylor’s honor by punching John in the nose at school.

Both John and Travis play on the football team.

SCENARIO: Failing to Report

Relevant Policies: FFI/FFH - Employee report to appropriate official listed in policy

Action Needed: Students: 1) review policy – FFI or FFH?; 2) contact parents/student – offer info about TIX process; 3) offer supportive measures; 4) employee documentation/retraining

Documentation Required/Recommended: 1) supportive measures offered; 2) whether FC filed; 3) if FC filed...

Retention of Documentation: At least 7 years
### Dissemination of policy

- District does not discriminate on the basis of sex in the education program or activity that it operates
- It is required by Title IX to not discriminate in this manner
- Requirement not to discriminate extends to admission and employment
- Inquiries about the application of Title IX to the district may be referred to the Title IX Coordinator, the Assistant Secretary for Education (USDOE), or both

### Publications

Must promptly display Title IX Coordinator’s contact information:

- On district’s website
- In each handbook or catalog

### District must adopt and publish grievance procedures and provide notice of process including...

1. How to report or file a complaint of sex discrimination;
2. How to report or file a formal complaint of sexual harassment; and
3. How the district will respond.
The 2020 regulations...

Seek to create a separation between the investigation and decision-making of formal complaints (sexual harassment).

While it is best to separate roles...

- The Title IX Coordinator can also be the investigator and the informal resolution facilitator.
- The Title IX Coordinator cannot also serve as the decision-maker on a formal complaint or on appeal.
- All roles can be outsourced, except the Title IX Coordinator (e.g., investigator, decision-maker, informal resolution facilitator, appellate decision maker).

Remember that anyone serving as a Title IX Coordinator, investigator, decision-maker, or anyone designated to facilitate an information resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

**SCENARIO: Conflicts of Interest**

An employee files a Formal Complaint of sexual harassment against Justin (Employee). Selena is the Director of HR and the Title IX Coordinator for employee-related complaints. She usually serves as the investigator for Formal Complaints. Justin and Selena were previously romantically involved.

- Can she serve as the investigator?
- Can she serve as the Title IX Coordinator in this case?
The Title IX Coordinator must prompt contact the complainant to discuss the availability of supportive measures...consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without filing a formal complaint, and explain to the complainant the process for filing a formal complaint.”

- Respond to every report of sexual harassment
- Must not be deliberately indifferent
- For OCR purposes, actual knowledge is imputed to the district if any employee is aware of sexual harassment.

SCENARIO: Verbal reports

Taylor does not tell her parents, but another student reports the situation to her parents, who calls Principal Prime.

Principal Prime tells this parent that he is going to need her to put her concerns in writing, so he can address the situation.

This parent will not put her concerns in writing and wants to remain anonymous.

CONTACTING THE COMPLAINTANT

Regulations do not dictate the medium of contact.
CONTACTING THE COMPLAINANT

K-12 SETTING
- Phone call, followed by email/letter.
- In person parent conference, followed by email/letter.

Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FPH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited bases.

Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FPH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited bases.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

My most commonly offered supportive measure is...
Supportive Measures means...

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available
- Without fee or charge to the complainant or respondent
- Before or after filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the district’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment or deter sexual harassment

**Supportive Measures examples**

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

Keep documentation of supportive measures (e.g., no contact/communication agreements, log of counseling sessions, copies of social skills stories/trainings, summary of schedule changes, summary of campus escorts).

**SCENARIO: Emergency Removal**

If a Formal Complaint is filed, Principal Prime and Coach Reid cannot remove John from the team until the Title IX Investigative Process is completed and a determination of “responsibility” is made, unless the criteria for an “emergency removal” are met.
NOTICE TO PARTIES IF FORMAL COMPLAINT IS FILED

Investigation of Formal Complaint – Against Investigator and Decision Maker
Provide Notice to Parties: Simultaneous notice must be provided to all known parties that includes:
- Allegations of sexual harassment, known at the time, with sufficient detail to prepare before any initial interview
- Identifications of the parties involved
- Date, location of alleged incident(s)
- Statement that Respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process
- Statement that the parties have the right to an advisor of their choosing, who can be a parent/guardian or another individual who may, but is not required to be, an attorney and who may inspect and review evidence; and
- Statement that the Code of Conduct prohibits knowingly making false statements.
- An offer of informal resolution.

ASSISTING WITH EMERGENCY REMOVAL OR ADMINISTRATIVE LEAVE DECISIONS

SCENARIO: Locker Room Bums

Several of the school’s football players are annoyed by a new student, Jake, who has recently moved to the district from another country with different cultural norms (i.e., California). Jake is more direct when communicating with others and does not always appreciate the subtleties of local customs and relationships.

A handful of teammates decide to “take him down a notch” by holding him down and sticking something “up his bum.”
SCENARIO:

Relevant Policies: FFI/FFH

Action Needed: Students: 1) review policy – FFI or FFH? - both; 2) contact parents/student – offer info about FFH process; 3) contact law enforcement; 4) offer supportive measures; 5) determine whether immediate threat to physical health or safety of students

Documentation Required/Recommended: 1) supportive measures offered; 2) that reported to law enforcement; 3) whether FC filed; 3) if FC filed...

Retention of Documentation: At least 7 years (or 2 years passed 18)

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REPORTS TO CPS, LAW ENFORCEMENT, SBEC

SCENARIO: Reporting sexual harassment...

Taylor and John used to date. John has “nudes” of Taylor. After they break up, John sends the pics to other students who show them around school. Taylor’s new boyfriend, Travis, finds out about this and “avenges” Taylor’s honor by punching John in the nose at school.

Both John and Travis play on the football team.

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SCENARIO: Failing to Report

Relevant Policies: FFI/FFH - Employee report to appropriate official listed in policy

Action Needed: Students: 1) review policy – FFI or FFH?; 2) contact parents/student – offer info about TIX process; 3) offer supportive measures; 4) employee documentation/retraining

Documentation Required/Recommended: 1) supportive measures offered; 2) whether FC filed; 3) if FC filed...

Retention of Documentation: At least 7 years

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SCENARIO: Reporting sexual harassment...

After days of trying to avoid school, Taylor finally tells her mother about the photos and begs not to go to school. Taylor’s mother sends an email to Coach Reid to report that her daughter is being sexually harassed by his players. Coach Reid says he will handle it and has John and Travis run bleachers.

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SCENARIO:

Emergency Removal: The Title IX Coordinator/designee and the campus administration/HR will determine whether a respondent should be removed on an emergency basis. The District must first undertake an individualized safety and risk analysis to determine whether an immediate threat to the physical health and safety of others, arising from the alleged sexual harassment, justifies removal.

*Title IX does not modify the rights of students with disabilities regarding change of placement under the Individuals with Disabilities Education Act and Section 504 still apply.

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2023
SCENARIO:

What do about:
- John
- Travis
- Taylor

Relevant Policies: FFI/FFH

Action Needed: Students:
1) review policy – FFI or FFH? - both; 2) contact parents/student – offer info about FFH process; 3) contact law enforcement; 4) offer supportive measures; 5) determine whether immediate threat to physical health or safety of students

Documentation Required/Recommended:
1) supportive measures offered; 2) that reported to law enforcement; 3) whether FC filed; 4) if FC filed...

Retention of Documentation: At least 7 years (or 2 years passed 18)

DETERMINING WHETHER TO DISMISS A FORMAL COMPLAINT

My district has dismissed complaints the most due to:

The Title IX Coordinator is responsible for effective implementation of remedies.

34 C.F.R. § 106.42(b)(7)(ii)(A)
What are examples of remedies?

- Not defined in Title IX
- No list of examples in regulations
- Money damages were removed as possible remedy in final rules

Remedies - Purpose

Designed to restore or preserve the complainant's equal access to education

Remedies for Complainants

- Supportive measures
- Counseling
- Opportunity to make up work, retake exams
- Change of class, lunch period, campus
- Escort on campus
- Increase security
- Training efforts

Remedies for Complainants

- Disciplinary sanctions against respondent per the Student Code of Conduct (e.g., OSS, DAEP, expulsion)
- Removal of respondent from extracurricular activity/activities
- Unilateral no-contact order on respondent
- Other sanctions applicable to respondent

The Department believes that a complainant entitled to remedies should not need to file an appeal to challenge the recipient's selection of remedies; instead, we have revised [the rules] to require that Title IX Coordinator be responsible for effective implementation of remedies. This permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education.

Selection of Remedies

Not Appealable
Selection of Remedies
Not Appealable

Bases for Appeal of Decisions
- Procedural irregularity
- Bias or conflict of interest
- That affected the outcome

Written Determination must include
- any sanctions the recipient imposes on the respondent; and
- whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided to the complainant

REMEDIEST
- Shared with complainant – complainant’s remedies and respondent’s sanctions
- Shared with respondent – sanctions and whether remedies were provided to complainant (not details of the remedy, unless the sanctions overlap with remedies)

POSTING TRAINING MATERIALS

What to post:
- Notice of non-discrimination policy
- Title IX Coordinator’s contact information
- Links to FFH and DIA – LEGAL, LOCAL, EXHIBIT, REGULATIONS
- Training materials used to train T9 Coordinator, Investigators, Decision-Makers, Facilitators

Permission from the copyright holder should be obtained, but failure to obtain permission does not relieve a district from the requirement to post.
Where to post:

• Non-discrimination policy and Title IX Coordinator’s contact information must be prominently displayed.
• There is no requirement that the materials be on the homepage or linked to the homepage.

Where to post:

• There is no requirement to have a section of the website dedicated to Title IX requirements.
• There is no requirement that Title IX information be located on multiple pages of a district’s website.
• Title IX information could be added as a drop-down option in any of the following areas: Required Notices, Public Information, Departments, Students, Employees, Community

My district has had trouble displaying our training materials

RECORD KEEPING
The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.
Closing the Circle: Best Practices for Conducting Investigations

Presented by: Dr. Darwin Spiller, Richardson ISD

October 18, 2023
It is Day 2 of an investigation and the assistant principal is updating the principal on where he/she is in the investigative process.

The assistant principal shared that the last student interviewed revealed three (3) additional potential witnesses. The principal then asks to review the written statements that have been collected thus far.

The assistant principal shares written statements but does not have one from the complainant, who was distraught when first reporting the incident. She does, however, have notes that she took during the report.

The parent of the complainant has called the principal and is very upset about what the child has shared and is threatening legal action and police involvement. In addition, the principal has discovered that the parent’s story does not match the notes the assistant principal took from the complainant.

With your shoulder partner, discuss all things that should have happened and what the next steps should include.
Handling the Roles of Decisionmaker and Appellate Decisionmaker

Presented by:
Jennifer A. Powell

October 18, 2023
Handling the Roles of Decisionmaker and Appellate Decisionmaker

Jennifer A. Powell

ASSIGN A DECISION-MAKER

• Note that proposed regs would remove the hyphen and make it one word, i.e., decisionmaker.
• Someone other than Title IX Coordinator, Investigator, or Facilitator of Voluntary Resolution
  – Note that proposed regs would allow the Title IX Coordinator to be the decisionmaker.
• Central administrators
• Must have training - train more than one
• Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

IMPARTIALITY

• Unbiased, disinterested
• No conflict of interest: a real or seeming incompatibility between one’s private interests and one’s public duties

STANDARDS FOR RECUSAL OF JUDGES

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

28 U.S.C. § 455 (Disqualification of federal judge, justice, or magistrate).

DETERMINATION OF RESPONSIBILITY

34 C.F.R. 106.45(b)(7)

DECISION = DETERMINATION OF RESPONSIBILITY

- Decision-maker makes determination of responsibility on a formal complaint
- Must provide the written determination to the parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

DECISION BASED ON WHAT?

Investigator will provide decision-maker with an investigative report that “fairly summarizes relevant evidence”

- Assume this will occur when the parties receive the report
- Which must be at least 30 days prior to a hearing (if a hearing is required under this section or otherwise provided, which we don’t recommend) or other time of determination regarding responsibility
- The parties have the opportunity to provide a written response to the report, which the decision-maker will also review.

HEARING V. QUESTIONS

Opportunity for Parties to Submit Questions

- Live hearing with live cross by party advisors required for higher ed, optional for K-12
  - We recommend no live hearing.

QUESTIONS

- With or without a hearing, after the investigative report has been sent and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

THE QUESTIONS

- Questions about a complainant’s prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

THE QUESTIONS

- Who asks the questions of the parties?
- Decision-maker must exclude questions that are not relevant.
- Proposed regulations would add a definition of relevant.
- If the decision-maker refuses to ask a question because it is improper or not relevant, he/she must provide written rationale to the party proposing the question why the question is being excluded.
THE QUESTIONS

• The decision-maker may not draw any inference from a party’s or witness’s refusal to answer the questions.

• Where a party or witness refuses to answer the questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences regarding responsibility based on the party or witness’s refusal to answer.

FOR EXAMPLE, WHERE A COMPLAINANT REFUSING TO ANSWER THE QUESTIONS BUT VIDEO EVIDENCE EXISTS SHOWING THE UNDERLYING INCIDENT, A DECISION-MAKER MAY STILL CONSIDER THE AVAILABLE EVIDENCE IN MAKING A DETERMINATION.

• The proposed regulations would allow the decisionmaker to ask their own relevant questions.

IT’S IMPORTANT NOT TO PRE-JUDGE THE FACTS UNTIL YOU HAVE SEEN ALL THE EVIDENCE!

STANDARDS OF EVIDENCE

• The degree or level of proof demanded in a specific case.

• District choice: preponderance of evidence, clear and convincing evidence

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the District and not on the parties.

PREPONDERANCE OF EVIDENCE

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.
**CLEAR AND CONVINCING EVIDENCE**

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

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**EVIDENCE: INculPATORY & EXculPATORY**

**Inculpatory evidence**: showing or tending to show one's involvement in a crime or wrong

**Exculpatory evidence**: tending to establish a person's innocence

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**EVIDENCE: DIRECT & CIRCUMSTANTIAL**

**Direct evidence**: Evidence that, if believed, proves the fact without inference or presumption.

**Circumstantial evidence**: Circumstantial evidence, on the other hand, refers to evidence that requires an inference to be made. Circumstantial evidence and direct evidence can be equally probative, and responsibility can be established by circumstantial evidence alone.

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**EVIDENCE: CREDIBILITY**

The investigator should provide information about the credibility of the parties and witnesses.

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**EVIDENCE: HEARSAY**

An out-of-court statement offered for the truth of the matter asserted

There are multiple exceptions, e.g., statement of then-existing state of mind.

This isn't a court, and the Rules of Evidence don't apply. But remember, hearsay may be less probative than a non-hearsay statement made directly to the investigator.

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**EVIDENCE: EXPERT WITNESSES**

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator
EVIDENCE: PRIVILEGED INFORMATION

Cannot be used unless the party agrees to waive the privilege

EVIDENCE: PERSUASIVENESS

Under the proposed regulations, the decisionmaker will be explicitly required to evaluate the relevant evidence for its persuasiveness.

Even without an explicit regulation, this is something that should be done.

ELEMENTS OF DECISION

The decision-maker must issue a written determination simultaneously to the parties addressing:

- Allegations
- Procedural steps taken
- Findings of fact
- Application of code of conduct to facts

ELEMENTS OF DECISION

The decision-maker must issue a written determination addressing:

- Statement of and rationale for result as to each allegation including:
  - Determination of responsibility
  - Any disciplinary sanctions
  - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
  - Procedures and permissible bases for either party to appeal.

FERPA – SANCTIONS AND REMEDIES

The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a Complainant, impact both parties and can (and should) be part of the written determination simultaneously sent to both parties. The Complainant should know what sanctions the Respondent receives because knowledge of the sanctions may impact the Complainant’s equal access to the school district’s education program and activity.
POSSIBLE REMEDIES

• Remedies are required after a Respondent has been determined responsible under the grievance process
• No list of appropriate remedies in regulations
• Left to discretion of educators
• Designed to restore or preserve the right to equal access to education
• Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

§ 106.45(b)(1)(i)

POSSIBLE REMEDIES

• Remedies may include the same individualized services described as “supportive measures.”
• Supportive measures: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures
• Other possibilities: tutoring for student, removal of student from class/team/campus, policy/procedure changes, staff or student training

§ 106.45(b)(1)(i)

APPEALS

34 C.F.R. 106.45(b)(8)

APPEALS - MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY, AND FROM A DISTRICT’S DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN ON THE FOLLOWING BASES:

• Procedural irregularity that affected the outcome of the matter;
• New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
• The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District.

APPEALS

• May offer for other reasons equally to both
• Must have a different decision-maker, but still cannot be investigator or Title IX Coordinator, and same rules about bias apply
• The proposed regulations say that any decisionmaker for an appeal must be trained on how to serve impartially, avoiding bias, conflicts of interest, and prejudgment of the facts
• Must give other party reasonable, equal opportunity to submit written statement
• Appellate decision-maker must issue decision in writing and provide simultaneously to both parties

The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District.
OCR REVIEWS

The Department assures schools that when enforcing these new regulations, it will refrain from second-guessing a school district’s determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

A WORD ABOUT DISMISSALS

• A recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
  – a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  – the respondent is no longer enrolled or employed by the recipient; or
  – specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
• So, a decision-maker could recommend dismissal if one of these circumstances is met.

QUESTIONS?

CONTACT US

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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Munoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.
An Overview of OCR’s Case Processing Manual and A Guide to Investigations

Presented by:
Dr. Vicky L. Sullivan

October 18, 2023
Dr. Vicky L. Sullivan
Senior Associate Attorney

An Overview of OCR's Case Processing Manual and A Guide to Investigations

▪ About the OCR Process for evaluation of a Title IX complaint?
▪ About how OCR decides which complaints it pursues or investigates and which it dismisses?
▪ About the OCR Mediation and/or Investigative Process?
▪ About the content of Resolution Agreements and what consequences or sanctions/actions a school district could face for non-compliance?
▪ About the process for conducting a thorough, complete school district investigation to avoid non-compliance?

Review: Case Processing Manual
• Logistics and Procedures
  • Evaluation of a complaint
  • Mediation
  • Investigation
  • Resolution Agreements
• Title IX Texas Complaint Data
• Teachable Moments: Title IX Cases w/ Resolution Agreements
  • Henderson ISD in Texas – Sexual Violence
  • Pflugerville ISD in Texas – Sexual Assault
• Tips to Conducting a Complete & Thorough School District Investigation

Have you ever wondered…

Title VI of the Civil Rights Act of 1964
Title IX of the Education Amendments of 1972
Section 504 of the Rehabilitation Act of 1973
Title II of the Americans with Disabilities Act of 1990
Boy Scouts of America Equal Access Act of 2001

OCE, OFFICE OF CIVIL RIGHTS (OCR)
COMPLAINT FORM

Department of education office of civil rights
Case Processing manual (CPM)
July 18, 2022
CASE PROCESSING EVALUATION

What is a complainant?

- Must be in writing
- Must have explanation of what happened
- Must identify person(s) or group injured by the alleged discrimination
- Must identify school or institution alleged to have discriminated

OCR will determine an allegation(s) for the following:

- Lack of subject matter jurisdiction
- Lack of information to determine if OCR has jurisdiction
- Allegation not timely filed, and a waiver was not requested or granted
- Allegation lacks sufficient detail
- Allegation involves non-federal entity
- Allegation has been filed (or referred) with another enforcement agency
- Allegation is currently pending before OCR
- Allegation is currently pending before a state or local enforcement agency
- Allegation is currently pending before a state or local civil rights enforcement agency
- Allegation has been filed by the complainant
- Allegation is currently pending with a state or local civil rights enforcement agency
- Allegation involves a state or local civil rights enforcement agency
- OCR is a neutral factfinder

OCR will issue a dismissal letter to the complainant explaining the reason for the dismissal.

OCR may close or dismiss an allegation(s) if:

- OCR determines that its ability to complete the investigation is substantially impaired by the complainant’s refusal to provide information that is reasonably accessible and necessary for the investigation
- OCR determines that an investigation is not feasible
- OCR transfers or refers the allegation(s) to another agency
- OCR must dismiss an allegation(s) involving the same recipient in a compliance review, directed investigation or an OCR complaint
- The complaintant withdraws the allegation(s) after OCR has opened it for investigation
- OCR transfers or refers the allegation(s) to another agency for investigation
- The allegation(s) is moot or unripe

WHETHER TO CLOSE OR DISMISS AN ALLEGATION(S) – SECTION 110

OCR will close or dismiss an allegation(s) if:

- The same allegation has been filed by the complainant (where the allegation(s) are currently pending or have been resolved), against the same recipient with another federal, state, or local civil rights or enforcement agency or through a recipient’s internal grievance procedures, including the process proceeding:
  - OCR anticipates allegation(s) will be investigated, the remedy obtained will be the same as the remedy as if OCR were to find a violation and that there will be a comparable resolution process:
  - OCR obtains credible information indicating the allegation(s) has been resolved and there is no systemic allegation(s).

WHETHER TO CLOSE OR DISMISS AN ALLEGATION(S) – SECTION 110

OCR may close or dismiss an allegation(s) if:

- OCR determines that its ability to complete the investigation is substantially impaired by the complainant’s refusal to provide information that is reasonably accessible and necessary for the investigation
- OCR determines that an investigation is not feasible
- OCR transfers or refers the allegation(s) to another agency
- OCR must dismiss an allegation(s) involving the same recipient in a compliance review, directed investigation or an OCR complaint
- The complaintant withdraws the allegation(s) after OCR has opened it for investigation
- OCR transfers or refers the allegation(s) to another agency for investigation
- The allegation(s) is moot or unripe

Alternative Resolution Process – Mediation Process – Alternative to the Investigative Process

Case Planning, Investigation, and Resolution

Case Processing Manual (CPM) - p.15-16
CASE PLANNING

- OCR addresses the following essential elements of case planning:
  - The allegation(s);
  - OCR’s jurisdiction over the subject matter and entity;
  - The legal standards, statutory and regulatory authority, and elements of proof;
  - The scope of the investigation;
  - The investigation strategy (i.e., what data and/or information necessary to resolve the case AND the means and methods OCR will employ to obtain the relevant data and/or information); and
  - The resolution.

The Investigation Process: Data Collection & Information Gathering

- OCR has the right of access to recipient’s facilities and information necessary to determine compliance state on the issues under investigation.
  - This includes recipient’s books, records, accounts, witnesses, etc. as may be relevant in OCR’s judgment, to ascertain compliance.
- OCR will have access to unmodified records.
- General investigative principles and practices include:
  - Obtain independent written documentation to corroborate oral statements;
  - Individual interviews and/or focused group interviews;
  - Undertake a robust outreach to the recipient community to increase access to relevant information;
  - Collect data resulting from any methods that OCR or recipients use to track and evaluate compliance with their legal responsibilities;
  - OCR’s Civil Rights Data Collection (CRDC);
  - Recipient public websites;
  - Other self-assessment tools.

Investigative Determinations

- Insufficient Evidence: OCR supports a conclusion the recipient failed to comply with the applicable statute(s) or regulations. OCR will issue a letter of findings explaining the reasons for its decision.
- Non-Compliance: The recipient agrees to implement corrective steps, that when implemented, will correct the alleged violations.
- Mixed Determination: is appropriate for complaints with multiple allegations where the allegations will be resolved in different ways.

Resolution Agreements

The allegation(s) under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegation(s) and OCR determines that it appropriate to resolve them because OCR’s investigation has identified concerns that can be addressed through a resolution agreement.

- This resolution process is voluntary.
- Resolution Agreements must be signed a person with authority to bind the recipient.
- Resolution agreement provisions must be supported by the evidence obtained during the investigation and must be consistent with the applicable statute(s) and regulation(s).

Monitoring Resolution Agreements

- OCR:
  - Will acknowledge receipt of interim and final monitoring reports and
  - Will evaluate each report and issue an appropriate response.
  - Will provide written notice to the recipient of implementation problems or any compliance deficiencies with the terms of the agreement and will request appropriate action to address such deficiencies.
  - May agree to modify (deadlines for submitting a report or completing a required action) or terminate a resolution agreement when it learns circumstances have arisen that substantially change, fully resolve, or render moot any or all of the compliance concerns or in response to changes in controlling case law, statutes, and regulations.
  - May address new compliance issues identified for the first time during monitoring.
  - Must approve modifications to the agreement including requests to change the substance of any provision in the agreement, or requests for extension of time to submit a report or to complete a required action.
  - Will conclude the monitoring of a resolution agreement when it determines the recipient has fully and effectively complied with the terms of the resolution agreement and is in compliance with the statute(s) and regulation(s) at issue in the case. Written notification will follow its determination.

Case Processing Manual (CPM) p. 16-18.
Case Processing Manual (CPM) p. 22-23.
INITIATION OF ENFORCEMENT ACTION

- When OCR is unable to negotiate a resolution agreement with the recipient, OCR will initiate enforcement action by:
  1. initiating administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance; or
  2. referring the case to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States.

- Enforcement Action Sections:
  - Enforcement for Denial of Access (Section 603)
  - Enforcement for Failure to Comply with OCR Agreement (Section 604)

Title IX: Texas Complaint Data

Data received from OCR Dallas Office pursuant to a Freedom of Information Act (FOIA) request submitted by our Firm regarding Title IX Texas data from January 1, 2021 - April 6, 2023.
Other Institution Complaint Issue Description

- Sexual Identity/Transgender & Sexual Orientation: 15%
- Discrimination Against Females: 22%, 20%
- Discrimination Against Males: 22%
- Gender Identity/Transgender & Sexual Orientation: 11%
- Family Status, Maternity, Pregnancy: 2, 20%

Total # Other Complaints: 10

Complaint Issue Description by Level

- Family Status, Maternity, Pregnancy: 36%
- Discrimination Against Females: 25%
- Discrimination Against Males: 32
- Gender Identity/Transgender & Sexual Orientation: 2

Title IX Complaint Resolution Description

- K-12: 304
- Higher Ed: 46
- Other Institution: 3

Texas Title IX DISMISSALS

- K-12: 107
- Higher Ed: 32
- Other Institution: 0

Texas Title IX DISMISSALS under 108 & 110

- 110 Dismissal Lack consent form: 11%
- 110 Dismissal Lack detail: 35%
- 110 Dismissal Not timely: 2%
- 110 Dismissal Failure to state a claim: 1%
- 110 Dismissal Lack jurisdiction: 1%
- 110 Dismissal Fails to state a violation: 3%
- 110 Dismissal Same Allegation filed with other agency: 2%
- 110 Dismissal Failure to state a violation: 3%
- 110 Dismissal Failure to state a claim: 1%
- 110 Dismissal Failure to comply with the requirements: 33%
- 110 Dismissal Lack consent form: 13%
- 110 Dismissal Lack detail: 13%
- 110 Dismissal Not timely: 1%
- 110 Dismissal Failure to state a violation: 1%
OCR Evaluation letter informed HISD that it was investigating the following issues:

- In this case, there is sufficient evidence that... rather, "Therefore, OCR has determined that there is sufficient evidence to..."

- "In this case, there is sufficient evidence that..."

- The Title IX Coordinator shall document the notification and any action taken.

- By September 1, 2012, the HISD will notify all HISD students and... required by Title IX reference in Action Item 1.

- By November 1, 2012, the HISD will review its campus police records for the 2009-10 through 2011-12 school years for any complaint of sexual harassment or violence whenever needed during school hours.

- By November 1, 2012, the HISD will conduct a mandatory training session regarding the revised policy referenced in Action Item 1 for all employees so that they know to report harassment to appropriate school officials and that employees with the authority to address harassment know how to respond properly.

- By September 1, 2012, the HISD will designate one counselor at each school within the HISD to be "on call" to assist victims of sexual harassment or violence whenever needed during school hours.

- By September 1, 2012, the HISD will review its campus police records for the 2009-10 through 2011-12 school years for any complaint of sexual assault that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved.

- By August 1, 2012, the HISD will designate one counselor at each school within the HISD to be "on call" to assist victims of sexual harassment or violence whenever needed during school hours.

- By September 1, 2012, the HISD will conduct a mandatory training session regarding the revised policy referenced in Action Item 1 for all employees so that they know to report harassment to appropriate school officials and that employees with the authority to address harassment know how to respond properly.

- By November 1, 2012, the HISD will designate one counselor at each school within the HISD to be "on call" to assist victims of sexual harassment or violence whenever needed during school hours.

- By November 1, 2012, the HISD will review its campus police records for the 2009-10 through 2011-12 school years for any complaint of sexual assault that was treated solely as a criminal matter and/or where the Title IX Coordinator was not involved.
Individual Student Remedies:

- **Action Item 7:** By September 1, 2012, the HISD will XXXX Student’s XXXX from XXXX records.

- **Action Item 8:** By September 1, 2012, the HISD will make a written offer of XXXX services to Student to be provided at the HISD’s expense, not to exceed XXXX, for the assessment and/or treatment of the effects from the HISD’s failure to investigate Student’s allegation of sexual assault.

- **Action Item 9:** By October 1, 2012, if the Student accepts the HISD’s offer of non-district based XXXX for the assessment and/or treatment of the effects from the HISD’s failure to investigate Student’s allegation of sexual harassment, the HISD will provide, at its expense, the required non-district based XXXX.

Student-Focused Remedies:

- **Action Item 10:** By October 1, 2012, the HISD will create a Committee consisting of: (1) the HISD’s Title IX Coordinator; (2) representatives of the education service district’s Board of Trustees, the student’s parents or guardians, of HISD students; (3) representation from any community-based organizations which provide services to the HISD related to sexual harassment/violence prevention; and (4) other individuals for HISD determination appropriate, such as guidance counselors, school nurses or athletic coaches. The HISD will also invite at least six (6) high school and/or middle school student representatives to serve as advisors to the Committee in carrying out its responsibilities.

- **Action Item 11:** By January 31, 2013, the Committee referenced in Action Item 10 will develop strategies and materials for educating students, parents and employees about issues related to sexual harassment/violence.

- **Action Item 12:** By February 1, 2013, the HISD will conduct a climate check or series of climate checks with all enrolled students to assess the effectiveness of steps taken pursuant to this agreement or otherwise by the HISD, to ensure that HISD campuses are free of sexual harassment.

- **Action Item 13:** By June 1, 2013, the HISD’s Title IX Coordinator will conduct a review of all Title IX, sexual harassment/sexual assault complaints it has received and investigated for that school year.

OCR resolved a complaint where a female student reported she was sexually assaulted by a male student.

**Findings of Fact:**
- A student reported to the Counselor that she overheard that the female student was sexually assaulted by the male student in the school restroom.
- Counselor advised the School Social Worker (SSW) of the alleged sexual assault.
- SSW contacted two PISD SROs who interviewed the female student in the presence of the SSW.
- The day of the reporting, SROs and AP1 and AP2 met with the male student to explain what allegedly happened (i.e., why he and the female student were in the bathroom together) but did not inform him that the female student had accused him of sexual assault.
- According to AP1, law enforcement advised her to do one thing, namely to pinpoint the date of the alleged incident and not to let him know she was investigating a sexual assault.
- The SROs and AP1 interviewed the male student and two other student witnesses, including a student with whom the female student had discussed the incident immediately after it occurred.
- PISD administration took no further action while the PISD police department conducted its investigation.
Findings of Fact:

Action Item 2: Conduct Title IX Training for Relevant District Staff

OCR relayed that interviewing additional witnesses would have dragged out the investigation . They would not interview OCR determined the District’s failure to notify the male student of the OI did not believe the assault happened.

OI did not examine any video surveillance because the video had been taped over.

Upon completion of the law enforcement investigation, the Superintendent hired an outside investigator .

In conducting her review, the OI performed the following:

- Visited the school when it was closed.
- Walked the routes between the student’s classrooms, the attendance office, and the wing in which the bathroom was located, timing how long it would take to walk to each area, in her estimation, because the wing was not near the attendance office or the classrooms, none of the timings matched.
- Examined the school’s written incident report.
- Student’s records confirmed both students were tardy to classes on the day of the incident.
- Interviewed the female student with the complainant also present.

The District appropriately and timely responded to the report of the alleged incident; OI had not received training from the District to conduct Title IX investigations.

OI was not properly trained; discrepancy as to her role in the investigation; her reliance

During the time of the incident, the Coordinator served in another role

Coordination’s adoption of the OI’s findings as the final determination without

Student’s records confirmed both students were tardy to classes on the day of the incident.

Ultimately, the OI determined that:

- The District appropriately and timely responded to the report of the alleged incident;
- The District’s Title IX Coordinator adopted the OI’s findings and issued a notice of the outcome to only the complainant.
- The District’s Title IX Coordinator, as well as the District’s Title IX Coordinator in investigating the alleged sexual assault and failing to conduct an equitable Title IX investigation by not interviewing all relevant witnesses.

OCR identified serious Title IX compliance concerns in the investigation.

- Coordinator had other significant duties diverting from her Title IX responsibilities.
- OI was not properly trained; discrepancy as to her role in the investigation; her reliance on incomplete evidence.
- Coordinator’s adoption of the OI’s findings as the final determination without independent review.

OCR finds the District violated Title IX by failing to involve the Title IX Coordinator in investigating the alleged sexual assault and failing to conduct an equitable Title IX investigation by not interviewing all relevant witnesses.

OCR determined the District’s failure to notify the male student of the outcome constitutes a violation of Title IX and its implementing regulation.

Action Item 1: Title IX Coordinator

Examined the school’s written incident report.

- By her own admission, Coordinator’s only involvement with this complaint consisted of issuing the final notice of the outcome.
- During the time of the incident, the Coordinator served in another role for the district and as interim principal at an elementary school.

Action Item 3: Title IX Complaint Review

For the PISD – PD took over the case, District administration did not interfere with the law enforcement investigation;

Action Item 2: Title IX Training for Relevant District Staff

The District will provide Title IX training to all High School employees; each Title IX Coordinator; and all other District investigators to include decisionmakers, and any other person designated by the District (including third-party contractors, as applicable) to receive, process, investigate, and/or resolve complaints of sex discrimination, including sexual harassment.

The District will provide OCR with a listing or log of all written complaints of sexual harassment that were resolved or are pending.
**PFLUGERVILLE ISD IN TEXAS RESOLUTION AGREEMENT**

- **Action Item 4:** Climate Survey - By December 15, 2023 (1-45/60 days), the District will develop and conduct a climate survey to be distributed to students as relates to sexual harassment, including sexual assault. The information gathered in these surveys will be used to inform District actions with respect to its Title IX compliance, including whether any student or other training is needed to further improve the school climate.

- **Action Item 5:** Remedies Regarding Title IX Response to the Student’s Allegation - By September 15, 2023, the District will provide the complainant with written notice via certified mail offering an opportunity for the complainant and the student to meet with the Title IX Coordinator, the Principal and/or Superintendent and/or their designee(s) to discuss the handling of the sexual assault allegation made on behalf of the Student and ongoing effects (if any) resulting from the District’s response, or lack of response, to the allegations.
  - In the written notice, the District will also offer to reimburse the complainant for any out-of-pocket expenses up to $[redacted content] for counseling services received by Student in the 2018-19 and 2019-20 school years to address the effects of the District’s response to the alleged sexual assault, contingent upon submission of documentation of such counseling.

**DISTRICT IN TEXAS RESOLUTION AGREEMENT**

- **Action Item 6:** Maintaining Title IX Grievances and Compliance Records - By September 15, 2023, the District will develop and implement a record-keeping system and procedures that adequately and accurately document and preserve all complaints of sexual harassment, and the District’s responses to and investigations of complaints of sex discrimination, including any written documentation sent to or received in relation to the complaint, interview notes, witness statements, and any relevant correspondence.

- **Action Item 7:** Conduct Section 504/Title II Training for Relevant District Staff - By December 15, 2023, the District will provide Section 504 and Title II training to its Section 504/Title II Coordinator and all employees who are either responsible for ensuring the District’s compliance with Section 504 and/or Title II or directly involved in servicing individuals with disabilities.

**INVESTIGATIVE TIPS:**

**LESSONS LEARNED**

- Conduct an Administrative/Educational Investigation to see if discrimination has occurred, alongside the Criminal (law enforcement) Investigation when at all possible.
- Confer and share documentation/statements – for different purposes through...
- If instructed to halt by law enforcement, comply but establish & document weekly check-ins or follow-up.
- If halted, return to the Administrative/Educational Investigation as soon as possible for purposes of Title IX and potential Student Discipline Implications.
- The appropriate school official should apply the Student Code of Conduct and Texas Education Code, Chapter 37, when applicable.
- Do not rely or simply adopt law enforcement’s determination.
- Different Purposes AND Different Standards of Measure or Burdens of Proof:
  - Criminal = probable cause (higher standard)
  - Educational = preponderance of evidence (more likely than not)
- Conduct a complete, thorough investigation and apply Educational legal guidelines for both Title IX (discrimination) and Student Discipline.
  - Be able to defend your determination based on investigative evidence.

**PROCEDURAL STEPS TITLE IX INVESTIGATION**

- Review Formal Complaint and/or other written documentation.
- Confer with law enforcement to determine if there is an on-going criminal investigation.
- If needed, your investigation may be abated for a short time, but you must return and complete the educational investigation for purposes of Title IX and possible student discipline implications.
- Do not simply rely or adopt law enforcement’s determination.
- Different Standards of Measure or Burdens of Proof
  - Criminal = probable cause (higher standard); must have a victim or complaining witness for an initial assaultive offense charge
  - Educational = preponderance of evidence (more likely than not)
- Contact law enforcement on a weekly basis for status; document your contact and directions.

**CONDUCTING INVESTIGATIONS**

**TIPS TO CONDUCTING A THOROUGH AND COMPLETE INVESTIGATION FOR PURPOSES OF TITLE IX DISCRIMINATION MATTERS AND POTENTIAL STUDENT DISCIPLINE IMPLICATIONS**

- The appropriate investigating school official should follow all leads, leaving no stone unturned.
  - initiate a fact-finding process,
  - interview the Adult; Who; Where; When; and Why? – 5 key questions!
- Seek & Secure all relevant evidence.
  - Acquire and retain detailed accounts.
  - Review security video surveillance; if available document a play-by-play of relevant footage; review video.
- Conduct with professionals who are in their field known for their skills and expertise.
  - Law enforcement; consider any criminal charges and related investigative evidence; but that will not necessarily be determinative in your finding.
- Nurse; Counselor; or other Professionals.
- Developing a determination/finding only once you have completed the investigation.
  - Using ‘preponderance of evidence’ standard.

**TIPS ON CONDUCTING A COMPLETE & THOROUGH STUDENT DISCIPLINE INVESTIGATION**

- The appropriate investigating school official should follow all leads, leaving no stone unturned.
  - initiate a fact-finding process;
  - interview the Adult; Who; Where; When; and Why? – 5 key questions!
- Seek & Secure all relevant evidence.
  - Acquire and retain detailed accounts.
  - Review security video surveillance; if available document a play-by-play of relevant footage; review video.
- Conduct with professionals who are in their field known for their skills and expertise.
  - Law enforcement; consider any criminal charges and related investigative evidence; but that will not necessarily be determinative in your finding.
- Nurse; Counselor; or other Professionals.
- Developing a determination/finding only once you have completed the investigation.
  - Using ‘preponderance of evidence’ standard.

**PROFESSORS’ ADVISORY COUNCIL**

- The Appropriate Investigating School Official should follow all leads, leaving no stone unturned.
- Acquire and retain detailed accounts.
- Review security video surveillance; if available document a play-by-play of relevant footage; review video.
- Conduct with professionals who are in their field known for their skills and expertise.
  - Law enforcement; consider any criminal charges and related investigative evidence; but that will not necessarily be determinative in your finding.
- Nurse; Counselor; or other Professionals.
- Developing a determination/finding only once you have completed the investigation.
  - Using ‘preponderance of evidence’ standard.

**FINDINGS**

- All-inclusive, record-keeping, and documentation is vital.
  - Document your determination/finding, entering all key details & information, explaining how you arrived at your determination.
  - All-inclusive, record-keeping and documentation is vital.
  - Document your determination/finding, entering all key details & information, explaining how you arrived at your determination.

- The findings shall be entered into the District’s administrative record, and shall include:
  - All legal, factual, and investigatory information.
  - All inclusions of information received.
Conduct the interview process:
- Sent written notice of interviews to parties, including date, time, location, participants, and purpose of the meeting with sufficient time (3-5 days) for the party to prepare.
- Interview Complainant regarding facts and potential witnesses; parent/guardian and/or advisor may be present but cannot answer for complainant.
- Interview Witnesses identified by the Complainant; parties cannot be present, and no parent/guardian/advisor may be present.
- Interview Respondent regarding facts and potential witnesses; parent/guardian and/or advisor may be present but cannot answer for Respondent.
- Interview Witnesses identified by the Respondent; parties cannot be present, and no parent/guardian/advisor may be present.
- Re-interview your Complainant for clarification, as necessary.

Gather physical evidence: visit the incident site(s), view video surveillance if available, review discipline, and other relevant records of parties and witnesses.
- Review Expert Witness statements or reports, if any.
- Organize evidence to share with parties.
- Prior to the completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence gathered to the parties and parties’ advisors, if any.
- The parties must be provided 10 calendar days to submit a written response that the investigator must consider before completing the investigative report.

Prepare an investigative report summarizing relevant evidence and may include findings of fact.
- Send the investigative report must be sent to the parties at least 10 calendar days before the Decision Maker decides final determination or responsibility.
- The Decision Maker (who is not the Title IX Coordinator or the Investigator) is the individual who determines Responsibility.
- The Decision Maker must issue a comprehensive written determination regarding responsibility (i.e., whether sexual harassment occurred or not), complete the grievance process.
- The Decision Maker must include:
  - Identification of the allegations that constitute sexual harassment with rationale of each allegation;
  - Description of the investigative procedural steps;
  - Conclusions regarding District’s Student Code of Conduct, including disciplinary sanctions imposed on the Respondent;
  - Statement whether remedies to the Complainant have been designed to restore or preserve equal access to the District’s education program or activity; and
  - Information about the ability of the parties to appeal the decision.
- The Decision Maker must issue a comprehensive written determination regarding responsibility (i.e., whether sexual harassment occurred or not), complete the grievance process.

Questions?

Contact Us
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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.
Title IX Legal Update

Presented by:
Andrea L. Mooney

October 19, 2023
Title IX Legal Update

Andrea L. Mooney

Title IX

AGENDA

2022-2023 Texas Year-in-Review - Title IX

Around the Circuits! LGBTQIA+ and Title IX

In the News! Collegiate Matters

DOE Proposed Transgender Athletics Rule

Winding It Down! Summary

DISCLAIMER: This presentation contains accounts of sexual violence, abuse, and assault. All pictures, graphics, and media other than those for presentation purposes and the text herein pertaining to those persons, events, or issues are for presentational purposes only and do not include, portray, or intend to portray any figures, officials, or students in the provided cases. All similarities are pure coincidence, and all images, charts, or maps are duly obtained through creative commons.

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.

20 U.S.C.A. § 1681

5th Circuit Defendants in Title IX, ’20-’23

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Roe v. Cypress-Fairbanks I.S.D. (5th Cir. 2022)

• Jane Roe alleged that she was sexually assaulted in a high school stairway by John Doe during their abusive relationship.
• As a result, Roe underwent two surgeries.
• Roe first said they were “just fooling around,” but later denied it.
• Roe happened to be pregnant at the time of the sexual assault.
• Prior to assault, Roe’s mother pleaded for school to change Doe’s schedule and school declined.
• After the assault, campus police turned over footage to the Harris County Sheriff’s Office.
• Conduct was deemed consensual by the Sheriff and Doe was not charged.
• The next day, Roe’s mother called and said she intended to press charges, due to school’s lack of an investigation and failure to produce written report.
School officials did not produce documentation that they interviewed Doe and stated that they deemed the encounter consensual “pretty early on.”

School official felt that if she punished Doe, she would have to punish Roe, as well. As a result, the school did not punish either.

School admitted that the communication with the Sheriff’s Office was sparse, never received a police report, and based decision on the outcome of the Sheriff Office’s decision.

Verbal altercations between Roe and Doe, harassment ensued by other students toward Roe, both in-person and over social media.

In June of 2015, Roe unsuccessfully attempted suicide and transferred school districts shortly thereafter.

Roe re-enrolled later, Roe’s mother unsuccessfully attempted—again—to change Doe’s schedule to avoid confrontations between the two students.

Roe’s Title IX Claims
• That the District was deliberately indifferent:
  • To her “heightened risk” of sexual assault; and
  • By their response to the abusive relationship, sexual assault, and eventual harassment by her peers.
• The District Court granted summary judgment for the District.

For the first issue, the Appellate Court ruled that:
• Even if the high school had a history of sexual assault and had failed in its “Title IX obligations” in the past, failures are not sufficiently connected to Roe’s assault to show that there was a “substantial risk.”
• Incidents that involve “neither the Title IX victim nor their aggressor” are insufficient to show a District’s actual knowledge of a plaintiff’s assault.

For the second issue, the Appellate Court ruled that:
• Appellate Court used a “totality of the circumstances” approach to determine if the response was adequate.
• The record showed a “severe, pervasive, and objectively offensive” string of harassments that hindered Roe’s academic opportunities.
• Despite differing opinions on the investigation and level of support given to Roe, a reasonable jury could find that the District was deliberately indifferent in its response to the sexual assault, abusive relationship, and harassment.
• “Fundamental was the District’s failure to produce any documentation of its own alleged investigation.

TAKEAWAY: “...while a school district may rely on a law enforcement office’s investigation, it may not rely on the prosecutor’s decision not to accept charges. Title IX requires more than just ‘parroting’ a prosecutorial decision.”

Plaintiff was hazed and sexually harassed by older boys on the baseball team.

Pl. alleged that the head coach knew that there was a long-term and ongoing environment of harassment and sexual assault, that he had the authority to take corrective measures and he failed to, and that the superintendent and assistant sup knew of the behavior.

As discussed at last year’s Title IX Conference, the Magistrate Judge denied Brownsboro I.S.D.’s motion to dismiss Plaintiff’s post-report Title IX claim.

In this decision, the District Judge adopted the Magistrate Judge’s ruling and overruled Brownsboro I.S.D.’s objection.
A plaintiff alleging student-on-student harassment must show that the District had:

1. Actual knowledge of the harassment;
   - Here, the baseball coach was an "appropriate person" to stop the abuse and had actual knowledge of the hazing. The Court overruled BISD's objection.

2. The harasser was under the District's control;
   - Not objected to by BISD.

3. Harassment was based on the victim's sex;
   - Not objected to by BISD.

4. The harassment was so "severe, pervasive, and objectively offensive" that it barred victim's access to educational opportunity; and
   - Court could not decide whether—as a matter of law—this element is established. The Court overruled BISD's objection.

5. The District was deliberately indifferent to the harassment.
   - Failure to respond to prior sexual assault incidents can be deemed deliberate indifference. The Court overruled BISD's objection.


- Reagan's son, B.E.J., was groomed and sexually assaulted by his fourth-grade teacher.
- District cited that there was a showing of intense favoritism between the student and the teacher due to a friendship between the teacher's son and the student/student's family. However, there was no evidence/observations by Grapeland I.S.D. staff that the relationship between the teacher and student was sexually abusive in any form.
- Reagan alleged that District intentionally violated Title IX by acting deliberately indifferent to numerous teacher's reports of a close relationship between the student and teacher. Furthermore, that the school's principal had actual knowledge of the alleged sexual abuse.
- Grapeland I.S.D. moved for summary judgment and the District Court granted the Motion.

The Court found there must be an "allegation" of sexual abuse for a district to have some degree of knowledge and that the law requires the district actually knew of the risk, not that it should have known of the risk.

- "Any contact between an adult and a child could be grooming, but that does not mean that all contact is sexual abuse under Title IX."
- Here, there was no allegations of sexual abuse observed by other teachers and, thus, no actual knowledge by the District or its officials.
- While the relationship between the teacher and student was strange, District was not on notice of sexual abuse knowledge/notice.

TAKEAWAY: Actual knowledge—by the school district—of teacher-on-student sexual harassment cannot be established if there are no allegations or suspicions of sexual harassment by the school district.

Normore v. Dallas I.S.D. (N.D. 2023)

- Dallas I.S.D. teacher (“Normore”) was terminated from her position as an Assistant Athletic Coordinator (AAC) for two incidents that occurred over the course of one school year (2016-2017): (1) using students to paint an unventilated high school classroom without authorization; and (2) punching another teacher in the chest at a school banquet in the presence of over 150 students, parents, and other school officials.
- Normore appealed the determination and requested an Independent Hearing Examiner (IHE). The IHE recommended that her DISD employment be terminated, and it was shortly thereafter.
- Normore filed suit for Title IX retaliation in part.
- DISD sought to dismiss all of Normore's claims through summary judgment.
- Normore stated that the Title IX retaliation was for "reporting gender inequalities in athletics at the high school."

The Court found Normore must show the following to establish a prima facie case of retaliation under Title IX:

1. She engaged in protected activity:
   - Here, the Court found:
     - (a) Normore did not "step outside her role" as the AAC;
     - (b) Normore did not engage in protected activity "adverse" to her employer;
     - (c) Normore did not "present" or "speak out" in the form of a report or presentation about gender inequalities at the school; and
     - (d) that the removing officials did not know or were not motivated to remove Normore because of her protected activity and that such gender inequality claims by Normore came after her termination.

- Jane Doe is a graduate of Keller I.S.D. and accused the District of violating Title IX by failing to protect her from a teacher who subjected her to a campaign of sexual harassment and other threatening behaviors.
- Doe stated that the District did not “immediately” fire the teacher when his misconduct was uncovered and, instead, he resigned three weeks later.
- Doe also cited a conflict of interest, since the District’s Title IX coordinator is also its general counsel.
- Court granted Defendant’s Motion to Dismiss and Doe filed a Motion for Reconsideration.

J.T. v. Uplift Education (N.D. 2023)

- Kindergarten student, J.T., came home from charter school and told her parent that her teacher had kissed her on the cheek. The mother of the child notified the school.
- One year earlier, the school had previously placed the same teacher on administrative leave/initiated an investigation after a similar complaint.
- J.T. presented many factual claims that officials had “actual knowledge” of sexual abuse, but none of the claims support any school official having actually observed the sexual abuse. Rather, the evidence only supported that a school official could have observed sexual abuse.
- Court stated that there were valid educational reasons for some of the evidence presented by J.T.
- Court stated that the district actually known of the abuse and not just should have known.
- After-the-fact Claim
  - J.T. argued that precedent—Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)—required the school to do whatever is deemed necessary to “remedy the violation.”
  - However, the Court found that this only applied to the “administrative enforcement context.” Furthermore, Title IX does not impose a similar requirement for conduct outside of administrative enforcement, as is here.

J.T. v. Uplift Education (cont.)

- J.T. filed suit, claiming Uplift Education violated Title IX (1) before-the-fact, (2) through possessing actual knowledge of the substantial risk of sexual abuse, and (3) after-the-fact. Uplift moved for summary judgment and the Court granted the motion for all three claims.
- Before-the-fact Analysis
  - An appropriate school official did not have actual knowledge of the sexual abuse and J.T. has not produced any evidence to otherwise prove actual knowledge.
  - J.T. claimed other teachers might have witnessed the abuse, but Court holds “constructive” knowledge by an inappropriate school official (the teachers were not considered “appropriate school officials” under applicable law) is not enough.
Finally, Fifth Circuit has held that a school is deliberately indifferent to a Title IX violation when it does “nothing.” When the school takes some kind of action—even imperfect ones—the school has been held not to be deliberately indifferent.

- Here, the Uplift took appropriate measures by investigating the matter, interviewing students, placing the teacher on administrative leave, and filing a report with SBEC and CPS.

- As a result, the Court granted Uplift’s Motion for Summary Judgment.

**TAKEAWAY:** (1) Even though a teacher could have observed sexual abuse, this does not mean they had actually observed the abuse to have “actual knowledge.” (2) A school’s response to a potential Title IX violation does not have to be “perfect,” just as long as they didn’t “do nothing.”

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**Murphy v. Northside I.S.D. (W.D. 2023)**

- Chloe Murphy—a former cheerleader for Northside I.S.D.—filed suit against NISD for relief under Title IX, alleging that NISD failed to provide female student athletes an equivalent level of funding, as compared to male athletes.

- Murphy and her teammate were forced to complete 150 frog jumps as punishment for tardiness.

- Murphy alleged that the team was not given any water or breaks during the 100° period and—when Murphy started to fall ill—no trainer was contacted.

- When Murphy got home from practice, she was taken to the hospital for dehydration and was placed there for a six-day stay.

- NISD moved to dismiss, and the District Court granted the motion.

- Upon finding out about the occurrence, the Plaintiff filed suit, claiming that her Title IX rights had been violated.

- The Plaintiff asserts that the District was at fault since it:
  1. Had knowledge of the harassment;
  2. The harasser was under the District’s control;
  3. The harassment was based on the student’s sex;
  4. The harassment was so severe that it barred the student’s access to an educational opportunity or benefit; and
  5. The district was deliberately indifferent to the harassment.

- The dismissal in this matter was “without prejudice” so the Plaintiff could amend her Complaint to establish the missing elements.

- Murphy alleged that the team was not given any water or breaks during the 100° period and—when Murphy started to fall ill—no trainer was contacted. When Murphy got home from practice, she was taken to the hospital for dehydration and was placed there for a six-day stay.

- NISD moved to dismiss, and the District Court granted the motion.

- Upon finding out about the occurrence, the Plaintiff filed suit, claiming that her Title IX rights had been violated.

- The Plaintiff asserts that the District was at fault since it:
  1. Had knowledge of the harassment;
  2. The harasser was under the District’s control;
  3. The harassment was based on the student’s sex;
  4. The harassment was so severe that it barred the student’s access to an educational opportunity or benefit; and
  5. The district was deliberately indifferent to the harassment.

- The dismissal in this matter was “without prejudice” so the Plaintiff could amend her Complaint to establish the missing elements.

**TAKEAWAY:** Under Title IX, a plaintiff must prove policy was intended to be discriminatory on the basis of sex.

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**Smith v. Comal I.S.D. (W.D. 2023)**

- A 4-year-old student—and the child of a Comal ISD employee—the Plaintiff—was left to wander around the school after school.

- Another 8-year-old student—with a history of inappropriate behavior—was also wandering around the school at the same time. She was participating in the District’s “afterschool program.”

- The 8-year-old inappropriately touched the 4-year-old student.

- Upon finding out about the occurrence, the Plaintiff filed suit, claiming that her Title IX rights had been violated.

- The Plaintiff asserts that the District was at fault since it:
  1. Had knowledge of the harassment;
  2. The harasser was under the District’s control;
  3. The harassment was based on the student’s sex;
  4. The harassment was so severe that it barred the student’s access to an educational opportunity or benefit; and
  5. The district was deliberately indifferent to the harassment.

- The School District’s “afterschool program” was also found to be discriminatory.

**TAKEAWAY:** Even if an instance of harassment occurs outside of school hours, if the harasser is in the District’s “supervisory control,” the District can still be held liable for a Title IX violation.

- A Greenwood I.S.D. male student, T.F., was assaulted by another male student on a middle school basketball bus trip. T.F. claims that the assaults occurred between November 2018 and January 2019. The assaults were first reported on January 17, 2019, and action was taken by GISD the next day.
  - Initial actions taken by GISD included: questioning the students involved and witnesses and suspending the school perpetrators, placing them in DAEP, and removing them from the basketball team for the remainder of the season.
  - Later actions taken by GISD included: placing the perpetrator and T.F. on separate basketball and football teams so the two didn’t share the same locker room, changing hotel arrangements to keep the two students separate, and the head coach assuring he would do everything to protect T.F.
  - No students harassed or confronted T.F. after these actions.
- The Assistant D.A. for Midland County did not press charges against the perpetrators.
- Finally, GISD discontinued business with Athletic Supply (a former family-owned business by T.F.’s family).
  - T.F. claims that this was due to the pending Title IX suit.
  - Ted F. (T.F.’s father) was not an owner in Athletic Supply nor a majority shareholder. He only owned stock in ASB Sports.
  - Ted F. has not suffered any financial impact due to GISD’s decision.
  - GISD did not cancel any invoices due to Athletic Supply.
  - Athletic Supply did not lose money for the year of GISD’s departure.
- T.F. brought two Title IX claims against GISD for (1) discrimination for allowing student-on-student harassment and (2) retaliating against T.F. by discontinuing business with Athletic Supply.
- GISD moved for Summary Judgment on both claims.

T.F. v. Greenwood I.S.D. (cont.)

- The student-on-student harassment claim into two subparts: (1) whether GISD has “actual knowledge” of the assaults and (2) whether GISD was deliberately indifferent to the assaults.
  - The Court found that GISD did not have “actual knowledge” since:
    - The standard isn’t “should” GISD have had knowledge, rather than “did” they have knowledge. T.F. failed to show any evidence that District did have actual knowledge of the assaults.
  - The Court found that GISD was not “deliberately indifferent” since:
    - There was no previous pattern for similar harassment
    - Even if the Court were to accept all allegations by T.F. as true, T.F. would still fail short of the deliberate indifference standard.
- The Court granted GISD’s Motion for Summary Judgment on the first claim.

T.F. v. Greenwood I.S.D. (cont.)

- The Court found that GISD did not retaliate against T.F. because GISD’s decision not to do business with Athletic Supply did not constitute a “materially adverse action.”
  - GISD had since started buying goods from a company owned by ASB Sports (the company that Ted F. had ownership in).
  - There was no negative financial impact on T.F.’s family.
  - Title IX does not afford remedies for “emotional damages.”
- Accordingly, the Court granted GISD’s Motion for Summary Judgment on the second claim.

T.F. v. Greenwood I.S.D. (cont.)

- In 2012, a Kingsville ISD teacher is rumored to have an improper relationship with a Kingsville ISD student, including moving in with the student upon graduation. The teacher thereafter resigned and was employed at another district.
- 3 years later, the same teacher regained employment with Kingsville ISD, despite two board members denying approval of contract (based on the prior relationship).
- The teacher later began entirely separate sequence of harassment of another Kingsville ISD student (the Plaintiff in this matter) and is arrested on felony charges.
- Plaintiff filed suit against Kingsville ISD on grounds that it violated Title IX by rehiring the teacher.


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- 3 years later, the same teacher regained employment with Kingsville ISD, despite two board members denying approval of contract (based on the prior relationship).
  - The teacher later began entirely separate sequence of harassment of another Kingsville ISD student (the Plaintiff in this matter) and is arrested on felony charges.
  - Plaintiff filed suit against Kingsville ISD on grounds that it violated Title IX by rehiring the teacher.
Loera v. Kingsville I.S.D. (cont.)

- The Court held— for a district to violate Title IX through teacher-student harassment—Plaintiff must show (1) district’s actual notice of the risk of abuse and (2) the district responded with deliberate indifference.
- (1) For actual notice, Plaintiff only needs to show that the District was aware that harassment was occurring.
- The Court found that the Board was aware of the teacher’s history within the district.
- (2) Likewise, deliberate indifference includes decisions “where it is obvious that the likely consequences would be deprivation of rights (protected by Title IX).”
- Applied here, no evidence was given by the Defendant to support that the School Board acted at all.

TAKEAWAY: Failing to investigate a teacher’s history (yet acknowledging it) can be “actual notice” and/or acting “deliberately indifferent” to likelihood of the teacher’s subsequent actions.

Kirkpatrick v. School Board of Lafayette Parish

- Student K.G. at Lafayette Parish alleged that student G.E. inappropriately touched her during class, which G.E. later admitted.
- G.E. was given a one-day suspension, a “stay away” agreement, K.G.’s schedule was changed, and the only interaction between the students was to be passing in the hallway.
- K.G.’s parents (“Kirkpatrick”) sued the School Board and G.E.’s parent, individually, for violation of Title IX.
- Kirkpatrick argued that (1) the Board was deliberately indifferent, and (2) that the harassment was severe enough to establish a Title IX claim.
- The Board filed a Motion for Summary Judgment.

Kirkpatrick v. School Board of Lafayette Parish (cont.)

- The Court granted the Board’s Motion for Summary Judgment on grounds that:
  - The harassment was not “severe and pervasive” enough to constitute a Title IX claim, since there are no allegations that G.E. even spoke to K.G. again after the incident.
  - District was not deliberately indifferent since the Board initiated a thorough investigation promptly, required a “stay away” agreement, and even changed the student’s schedule.
  - Since G.E.’s parent did not receive federal funding under Title IX, he could not be individually liable.
- The 5th Circuit Court of Appeals later affirmed the District Court’s judgment.

TAKEAWAY: (1) Even in other states’ District Court systems of the 5th Circuit, the burden for proving discrimination by a school district is a “high one,” and (2) Plummer v. Univ. of Houston continues to preserve 5th Circuit precedent to shield individuals from Title IX liability.

Thompson v. Pass Christian Public School District

- Thompson alleged that her son was bullied by other members of the school soccer team on campus and during an overnight soccer camp at Jones College. The harassment was consistent over a prolonged period and often took place on the team’s “school facilitated” GroupMe message group.
- Defendants filed a Motion to Dismiss all claims.
- The Court held—Title II claims do not permit lawsuits against individuals and, therefore, this claim is dismissed.

Thompson v. Pass Christian Public School District (cont.)

- Jones College Title IX Claim
  - While the Court followed 5th Circuit precedent and held that a student does not need to be a student of that institution to bring Title IX claims, there was no support that Jones College had any actual knowledge of the harassment.
- Pass Christian Public School District Title IX Claim
  - Thompson’s son had been harassed on numerous occasions prior to the school’s express knowledge through the GroupMe chat (which the Coach was included in) and had spoken to the Coach about it.

TAKEAWAY: (1) Reaffirms that Title IX does not permit claims against individuals, (2) a student does not need to be enrolled at a school in order to bring a Title IX claim against that school, and (3) school facilities group cannot be an “educational opportunity” in a Title IX claim if the school had “actual knowledge” and/or was “deliberately indifferent” to the acts.
Garza v. Harlingen Consolidated I.S.D. (Cont.)

- The Garzas argue that HCISD may not retain immunity by virtue of signing a settlement agreement and that their immunity was waived under Texas A&M Univ.-Kingsville v. Lawson. See 87 S.W.3d 518 (Tex. 2002) (stating that an institution cannot claim immunity in a suit to enforce a settlement agreement).
- HCISD claims that Chapter 271 preempts the Lawson holding.
- However, the Court found no authority to support this claim.
- Governmental entity does not have immunity if— at the time of the settlement agreement— the Title IX claims had "adjudicative value in our court system."
- Here, the settlement agreement itself reflects that HCISD believed that the Title IX claims had "adjudicative value," and, therefore, they could not seek the Agreement to retain later immunity in case of breach.
- The appellate court sustained the Garza's issue and reversed the trial court's order.

United States Department of Education, Office of Civil Rights Complaint Resolution Letters

- Concerns/Resolutions Detailed in the OCR Letter:
  - District staff did not conduct all relevant interviews and did not timely notify the Title IX coordinator
  - The District wrongfully "abdicated" its Title IX responsibility to law enforcement and failed to conduct their own Title IX investigation
  - The Title IX coordinator did not conduct their own investigation and wrongfully relied on external investigations
    - The external investigator was not properly trained
    - The external investigator was not properly communicated with
    - Law enforcement and the external investigator relied on incomplete evidence (not interviewing the other relevant student)
  - OCR was concerned that District did not "actually have" a Title IX coordinator due to the Coordinator's other responsibilities at the time.
  - The OCR was also concerned that the "interim measures" to the student were not adequate.
In December 2017, Doe, a football player at Rice, engaged in several sexual encounters with another student, Roe. Doe disclosed to Roe that he had contracted an STD prior to beginning the sexual relationship. Later that month, Rice contracted as STD and, in February 2018, submitted a formal complaint with the University’s Student Judicial Programs (SJP). Rice also unreasonably attempted to press criminal charges.

Doe submitted a written response that explained the relationship with Roe was consensual and that his condition was disclosed prior to any sexual encounters. Doe was suspended, prohibited from stepping foot on campus for any reason, and a formal investigation was conducted by the school.

On April 27, Rice issued a decision letter that stated Doe failed to adequately notify Roe, the action was reckless, and that Doe was to only come on campus for academics. Doe was stripped of his football scholarship.

Doe appealed because Rice failed to interview another person who stated that he contracted an STD from Roe prior to Roe’s relationship with Doe and that the university failed to hold Roe accountable for her own reckless behavior.

As a result of losing his football scholarship, Doe had to withdraw from the University and filed suit.

Doe alleged that Rice violated Title IX by investigating and adjudicating a punishment in a way that was biased against him as a male through:

- Erroneous outcome
- Selective enforcement
- Archaic assumptions

The District Court granted the University’s motion for summary judgment.
April 6th Doe Proposed Rule

- A proposed rule that would prohibit institutional policies that categorically ban transgender students from participating or use designated teams consistent with their gender identity.
- Department of Education Office for Civil Rights intends to release final rule in October 2023.
  - Public Comment occurred during April
  - Would nullify high school athletic associations that would govern all institutions that receive federal funding.
  - Associated schools are expected to “communicate” their Title IX obligations to their overseeing athletic associations.

- It would allow schools to limit participation based on gender identity where such a limitation is “substantially related to the achievement of an important educational objective.”
- This could include ensuring “fairness” in competition or preventing “sports-related injury.”
- Conducted on a sport-by-sport basis, where a school considers:
  - Age of student-athlete
  - Nature of the sport itself
  - Differing levels of athletic skill required
  - If school maintains a policy that limits participation, then it must also require a school to “minimize harm to students whose opportunities to participate would be limited (due to their gender identity)”
- Schools that are controlled by religious organizations may exempt themselves from the rule

What Would the Department of Education Proposal Mean for Primary/Secondary Schools?

- This regulation would firmly acknowledge that different treatment on the basis of “gender identity” is “on the basis of sex” and prohibited by way of Title IX.
  - Commentary has suggested that the implications of prohibitory policy would be much more prevalent at the high school (and collegiate) level due to the physicality of sports.
  - Districts that enforce such a policy at the high school level would need to consider whether the rule’s policy mitigates its adverse effect on transgender athletes and whether other mitigating factors could permit participation.
  - Rule would conflict with the previously outlined Adams v. School Board of St. John’s County.
  - The proposed rule would preempt various state statutes that counteract its terms (such as TEC 33.0834).
- The current version of the rule is likely to be opposed in court; if remained unchanged.

Summary

- School must show that they did “something” rather than “nothing at all.”
- “Actual knowledge” of abuse continues to be required.
  - NOT “should have known.”
  - NOT just “student and employee are close” but that abuse is occurring.
- Districts cannot just “parrot” law enforcement’s investigation.
- No Title IX claims against individuals.
- We await more guidance on transgender issues from the Fifth Circuit and DOE.

QUESTIONS?

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Disability Rights and Title IX

Presented by:
Colleen Elbe Potts, Disability Rights Texas

October 19, 2023
The Intersectionality of Title IX and Students with Disabilities

Colleen Potts (she/her/hers)
Supervising Attorney
October 2023

Protecting and advocating for the rights of Texans with disabilities - because all people have dignity and worth.

Title IX Complaint Allegations Received by OCR in FY 2022

° Total Number of Complaints Raising Title IX Issues, FY 2022 = 9,498
  • Athletics = 4,387
  • Sexual/gender harassment/sexual violence = 1030
  • Different treatment/denial of benefits = 722
  • Retaliation = 508

The ADA and Rehabilitation Act

ADA
° “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of … services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

Section 504
° “No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance …”

Individuals with Disabilities Education Act
° IDEA is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children.
° The IDEA governs how states and public agencies provide early intervention, special education, and related services to more than 7.5 million (as of school year 2020-21) eligible infants, toddlers, children, and youth with disabilities.

Why is the intersection between Title IX and students with disabilities so important?

❖ Students with disabilities are almost three times more likely to be sexually assaulted than their peers.
❖ 12% of college students and 2% of girls ages 14-18 report sexual assault.
❖ Students with disabilities are six times less likely than their peers to report sexual assault.
❖ Sexual harassment will often lead to anxiety disorders, depression, post-traumatic stress, and self-harm.
❖ Students who report sexual harassment are often punished by their schools for engaging in sexual conduct on school property—even when the interaction was not consensual.
❖ More than 90% of all people with developmental disabilities will experience sexual assault.

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❖ More than 90% of all people with developmental disabilities will experience sexual assault.
How does ignoring the problem harm students?

❖ Complainant students may develop disabilities as a result of their experience, or pre-existing disabilities may exacerbate the impact of gender-based misconduct on their ability to recover and learn.

❖ A lack of interdepartmental cooperation can undermine the efficacy of a district’s approach.

❖ Students cannot learn where they do not feel safe.

What Procedures Are Needed

Protective Measures

❖ Every school must conduct a Title IX training for all staff.
❖ A policy against sex discrimination for your school should be in place.
❖ Have a Title IX Coordinator.
❖ Have and make known procedures for students to file complaints.

During the Investigation

❖ Supportive measure must be offered to both parties—the accused and the complainant.
❖ Supportive measures may include:
  • Counseling
  • Extensions of deadlines or other course-related adjustments
  • Modifications of work or class schedules.

Child Find

❖ Mandate that district’s identify, locate, and evaluate children with disabilities for special education and related services.
❖ Sexual harassment can cause students to experience anxiety disorders, depression, post-traumatic stress, and self-harm.
❖ Students who experience sexual violence are also more likely to have trouble studying, miss school, or get in trouble at school.
❖ Stages of emotional reactions over time.

Emergency removals

Title IX requirements

IDEA/504: MDE

IDEA/504: Change of placement

Tex. Educ. Code 37.019

Complainants with disabilities

❖ Are often punished by their school for engaging in so-called “consensual” sex acts, for defending themselves against their harassers, or for merely telling other people about the harassment in violation of a settlement agreement.

❖ Complainants with disabilities are even more likely than their counterparts without disabilities to be rehabilitated, ignored, or punished due to both sex- and disability-based stereotypes.

Respondents with disabilities

❖ They may sometimes be unfairly or unnecessarily disciplined because of ableism (and other unlawful stereotypes based on race, color, national origin, sexual orientation, and/or gender identity).
❖ Boys with disabilities are not more likely than their peers to be disciplined for sex-based misconduct (although they are more likely than their peers to be disciplined for general misconduct).
The student was verbally and physically abused by his classmates who called him homophobic slurs. After a delayed implementation of an IEP and persistent bullying, the student took his own life.

The parents successfully argued that “by failing to implement [the student’s] IEP or develop a plan to keep him safe in school, the school district denied him access to its educational programs and activities.”

The student was on an IEP due to PTSD, anxiety, etc. He was subjected to ridicule for having two gay parents, as well as being openly gay at school. The students called him homophobic slurs and mocked his gender identity. The student experienced heightened anxiety and stress to the point of suicidal ideation.

The court held that the plaintiffs survived a motion to dismiss on the issue of the school’s deliberate indifference when the administrators had extensive knowledge of the harassment and did little to nothing to address the issue. The parents were told many times that the comments were not bias-based and when addressing the IEP, bullying was not an appropriate topic in those meetings.

The student was on an IEP for difficulty reading and writing. As a result of pervasive bullying, she was diagnosed with anxiety and depression and had a decline in her academic ability.

The court granted the district’s motion to dismiss because the student did not properly allege causation between the disability and her struggles in class. The difficulty she had was due to the anxiety and depression she experienced rather than the alleged disability as stated in her IEP.

The student was verbally and physically abused by his classmates who called him homophobic slurs. After a delayed implementation of an IEP and persistent bullying, the student took his own life.

The parents successfully argued that “by failing to implement [the student’s] IEP or develop a plan to keep him safe in school, the school district denied him access to its educational programs and activities.”
Student with a disability was unable to communicate her objection to sexualized touching and was disciplined for engaging in lewd conduct.

District’s focus on consent exposed it to liability under equal protection principles.

The student was diagnosed with ADHD and anxiety, which qualified him for an IEP. The student was bullied based on his nonconformity with gender norms, which caused his heightened symptoms.

The student properly alleged the harassment was based on gender-based because the harassment tended to be due to his nonconformity with gender norms. Additionally, the student’s complaint was sufficient to survive a motion to dismiss through showing that the school officials knew of the bullying and its effects on the student and allowed it to continue.

Student eligible for SPED under SLD and OHI with diagnosis that involved symptoms of psychosis, sexually inappropriate behaviors, tic disorder, and OCD. Teacher caught student masturbating, the admin instructed the teacher not to tell the parent.

Student was denied a FAPE and reimbursement was warranted.

What Would You Do?

° A male high school student who had sexually harassed a female high school student via threatening and harassing texts, wanted to remain on the school's robotics team where the female student also participates.

° The male student has an IEP for his significant pragmatic speech disability

Practice Tips

° Communication between special education administration and Title IX coordinator
° List special education as a resource in any Title IX FAQ’s
° Consider accessibility in reporting process
MORE TIPS

* Stay up on case law and upcoming changes in regs
* Training for all students
* Training for all employees
* Accommodations for both complainants and respondents
* Amnesty for complainants
* Fair discipline for respondents
* Communication and collaboration with parents

Thank You

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SBEC Update

Presented by:
David Rodriguez, Daniel Berumen, and Tina Farrell
Texas Education Agency

October 19, 2023
Educator Investigations Division
Presentation for Eichelbaum Wardell Hansen Powell & Muñoz, P.C.
Title IX Administrator Conference
Thursday, October 19, 2023

TEA Investigations
- Investigations
  - EID Intake
  - EID Investigations
  - Special Investigations

Student Safety
- Schools
- TEA
- CAEs
- Law Enforcement
- DFPS
- CPS

Shared Responsibility

Educator Investigations Division (EID) – FY23
Intake & Investigations

Educator Investigations Division (EID) – FY23
Intake & Investigations
Responsibilities of Administrators and Schools

Administrator and School Responsibilities

Upload employees to TEA system to initiate fingerprinting
Supervisors certify compliance annually
Report misconduct to TEA/SBEC as required
Report through Misconduct Reporting Portal
Failure to report carries penalties

Investigate allegations of misconduct, despite resignation
Create procedures to ensure requirements are met
Create procedures to ensure requirements are met
Report misconduct to TEA/SBEC as required
Report through Misconduct Reporting Portal
Failure to report carries penalties

Verify fingerprint status
Check Do Not Hire Registry

Refuse to hire or terminate if on DNHR
Non-compliance carries penalties for charter schools and DOIs

Investigate allegations against SBEC Certified/Non-Cert Employees

Superintendents certify compliance annually

Misconduct Reporting Portal

• Application in TEAL; Accessed by authorized school staff and TEA Educator Investigations
• Most secure and expedient method for sending reports of educator misconduct.
• Reports received through the portal are processed through Intake/Review Unit
• Handoff between school district and Ed Inv

Currently, 49% of LEAs are using the MRP

What is the “Do Not Hire” Registry?

An online list of individuals who are not eligible for employment in a Texas public school based on misconduct or criminal history. The list can be accessed by schools through TEAL, or by the public through the TEA website.

In Statute: Registry of persons not eligible for employment in public schools - TEC §22.092 as created by HB 3, individuals not eligible for employment - TEC §22.083, §22.085 and §21.058(b)

Potential Outcomes: SBEC Sanctions & the Placement on the DNHR
SBEC Sanctions

SBEC may take the following disciplinary actions against an educator’s certificate:

• Place a warning on the certificate during an investigation
• Deny certification or place restrictions
• Issue an inscribed reprimand;
• Suspend a certificate for a set term
• Accept a voluntary surrender of a certificate
• Revoke a certificate (through board decision or operation of law)
• Impose any additional conditions or restrictions upon a certificate as deemed necessary by the SBEC

Placement on the DNH Registry

If the Commissioner determines that person engaged in the following misconduct, the agency will add the person’s name to the REGISTRY OF PERSONS NOT ELIGIBLE FOR EMPLOYMENT IN PUBLIC SCHOOLS

(A) abused or otherwise committed an unlawful act with a student or minor; or
(B) was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor

Audience Participation

What questions do you have about reporting misconduct or potential sanctions?

See Supplemental Slides for more information

Investigation & Litigation Process

Intake - Investigations - Legal

State Office of Adverse Hearings

State Board for Educator Certification (SBEC)

Audience Participation

What questions do you have about the investigation process?
**Collaboration**

**TEA - LEA - DFPS**

---

**Requirement**

**Tx Edu Code §38.004 – TEA shall develop a policy for schools that provides for cooperation with law enforcement and DFPS investigations.**

---

**TEA / LEA Collaboration**

**Student Safety**

- **Shared Objective**
  - Further understanding of subject matter
  - Leadership commitment

- **Open Line of Communication**
  - Informal discussions
  - Transparency

- **Solution-Oriented**
  - Procedural change
  - Recommended policy

---

**TEA Facilitation of LEA-DFPS Communication Issues**

**DFPS School Investigations**

1. **TEA receives issue/operation from CPS Special Investigations (or school)**
2. **TEA contacts school; obtains information from administrator or Legal division**
3. **TEA provides guidance to DFPS and/or school administrator**
4. **TEA elevates matter as ISD Compliance issue or Educator Training issue**
5. **TEA/DFPS flags issue as legal obstacle**

---

**Audience Participation**

**How else can TEA Investigations help you and your school?**

*See Supplemental Slides for more information*

---

**When behaviors cross boundaries**
Regardless of severity, TEA reviews allegations of misconduct that may fall under the following laws:

- **Sexual abuse, Sexual assault** – Penal Code, Fam Code violations
- **Solicitation of a romantic relationship** – 19 TAC §249.3 (51)
- **Failure to maintain appropriate professional boundaries** – 19 TAC §247.2(3)(H)
- **Inappropriate communication** – 19 TAC §247.2(3)(l)
- **Sexual Harassment or Sexual Violence by Teachers** – Title IX

**Potential Overlap with Title IX Cases**

- **Verbal Behaviors**
  - Romantic or affectionate comments
  - Inappropriate comments about the student’s body
  - Encouraging student to share sexually-suggestive or private photographs
  - Asking about student’s sexual history or sexual preference

- **Physical Behaviors**
  - Inappropriate and repeated hugging or touching
  - Sexual contact; kissing
  - Staring at various parts of body

- **Non-Transparent Behaviors**
  - Counseling student when, educator’s job duties do not include counseling
  - Communicating in secret, attempting to conceal communication
  - Gift-giving to student, including providing access to non-school events

- **Other behaviors**
  - Patterns of exclusivity and attachment
  - Requesting to contact on social-media
  - Violating directives from LEA or authority

**Audience Participation**

**What questions or contribution do you have to this topic?**

*See Supplemental Slides for more information*
Report should include:
- Summary of facts;
- Names, identifiers and employment status of person being reported;
- Contact information for victims/witnesses;
- Law enforcement or other agencies involved with their contact information.

Examples of Online Display of Warnings and Sanctions:

- Investigative Warning
- Reprimand

Note: This individual is currently under review by the TEA Educator Investigations Division.
Suspension

A suspended certificate, as a result of disciplinary action by the SBEC, has been rendered invalid for a specific period of time or until reinstated by the board.

Voluntary Surrender

A voluntary surrender of a certificate occurs as a result of an educator’s voluntary relinquishment of a certificate, in lieu of disciplinary proceedings, and renders that certificate invalid.

Permanent Surrender as of 3/1/2023

A permanent voluntary surrender of a certificate(s) occurs as a result of an educator’s voluntary relinquishment of a certificate, in lieu of disciplinary proceedings, and renders that certificate permanently invalid without the opportunity to reapply for a new certificate(s).

Examples of Disciplinary Orders

Voluntary Surrender = Permanent Surrender.

Placement on DNHR.

Non-certified employee agrees to be placed on the DNHR.
Supplemental Slides
Guidance re DFPS Investigations Procedures

Known Issues & Current Guidance

<table>
<thead>
<tr>
<th>Issue</th>
<th>Guidance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Campus administration does not permit a CPS Special Investigator to interview students or staff at a school?</td>
<td>Campus administration must permit the CPS Special Investigator to interview students or staff at a school. The investigator may determine the circumstances of the interview, including whether the interview is announced in advance and whether anyone may attend. Tx Fam Code §261.302, 303, 409 / Op. Tx Atty Gen DM 0476 (1998) / TASB Policy GRA (LEGAL)</td>
</tr>
<tr>
<td>A video of an incident is not made available to DFPS Special Investigator. Administrator states FERPA or HIPPA issues.</td>
<td>TEA advises that the CPS Special Investigator request to view the video on campus.</td>
</tr>
</tbody>
</table>

- **Schools ask CPS Special Investigator to check-in or meet with administrator before interviewing parties:** The CPS Special Investigator must request that the principal not alert the alleged perpetrator or others regarding the report until the investigator has first had an opportunity to interview the alleged perpetrator. (40 TAC §707.615)
- **Can campus administration require CPS Special Investigators to provide drivers' license:** An investigator may be asked to show a state-issued ID badge. However, if the state-issued ID badge is shown, the district should not ask for personal ID. (TEA Letter-2008)
Administrative Leave:  
A Key Piece of Solving the Puzzle

Presented by:  
Dr. Tyrone Sylvester, Goose Creek CISD

October 19, 2023
Investigations are a lot like puzzles...

- The more pieces to the puzzle, the more complex and difficult the process
- Puzzles require time, patience, and attention to details
- You can’t FORCE puzzle pieces and MAKE them fit…
  - (Integrity > Convenience)
- You don’t want to risk the possibility of someone scattering the puzzle pieces that you’re trying to assemble

Why do we put employees on administrative leave?

- Protects the employee
- Protects the integrity of the investigation

*The employee remaining at work could interfere with or disrupt the investigation. It could create an uncomfortable environment for all parties involved.

Do we place them on administrative leave with pay or without pay?

In Goose Creek CISD, we always place employees on administrative leave with pay as advised by our counsel.

Administrative leave with pay is not required but I would advise you to seek guidance from your counsel regarding this process.

DFAA(LOCAL): Suspension/Termination During Contract

A probationary contract employee may be suspended with pay and placed on administrative leave by the Superintendent during an investigation of alleged misconduct by the employee or at any time the Superintendent determines that the District’s best interest will be served by the suspension.

*Applies to term and continuing contracts
The employee receives written communication

- The written communication notifies the employee of being placed on leave pending an investigation because it has been alleged that they have violated the District’s standards of conduct – Board policy DH(LOCAL) and DH (EXHIBIT).

- The written communication includes the following directives:
  - Do not contact or discuss the administrative leave with district personnel, students, or parents.
  - Must be available by phone during business hours. We’re paying them and we may have questions.
  - Must be available to come to work if called upon.
  - Do not come on any district property without appropriate approval. (But I have a student in the District and I need to pick them up)

- Bring two copies of the letter to the conference:
  - The District keeps copy that is signed or initialed and dated by the employee to signify receipt of the letter.
  - Other copy goes to the employee for their records.

Administrative Leave Conference

- We handle administrative leave conferences face-to-face.
- Record or not to record?
- Make sure the employee understands the allegations so that they can respond appropriately in their written statement.
- Communicate the timeline for the employee to submit their statement.
- Do not commit to an investigation timeline. We don’t know how long it will take.

Administrative Leave Letter Exemplar

Scan the QR code to access an exemplar letter.

Questions?

Thank you!
Information Sharing Between School Districts and Law Enforcement and Community Safety: A Two-Way Street

Presented by:
Joe Parks, The Law Office of Joseph L. Parks, PLLC

October 19, 2023
Information Sharing Between School Districts and Law Enforcement for School and Community Safety: A Two-Way Street

THE ECHELBAUM WARDELL HANSON POWELL & MUNOZ, P.C.

Texas Title IX Administrator Conference
October 19, 2023
Austin, Texas

Joseph L. Parks
Attorney | Consultant
Law Office of Joseph L. Parks, PLLC
Focus on school safety, workplace investigations and training

2010 to 2021
Executive Director of Safety and Security Services
Plano Independent School District – Plano, Texas
Directed all aspects of safety, security, emergency preparedness

2004 to 2010
Litigation Associate – Employment Law / Commercial Litigation
Bell Nunnally & Martin LLP – Dallas, Texas
Represented employers and commercial clients in wide variety of disputes

1986 to 2005
Police Officer / Sergeant / Lieutenant (Honorably Retired)
Plano Police Department – Plano, Texas
Patrol Services, Forgery/Fraud Unit, COP/NOPO Unit, SWAT/Tactical Unit

Introduction

A Little About Me
The Dreaded Disclaimer

- This presentation is for general informational purposes and should not be construed as legal advice.
- You should consult with your district’s legal counsel and leadership before taking any action relating to any topic discussed today or included in this presentation.
- No animals were harmed during the production of this presentation!

Why Information Sharing Is Critical to Student & Community Safety

...
From The Headlines...

School under investigation for failure to report sexual assault allegations against student: Maryland PD

Syracuse Public Schools approved new safety rule: Microphones will be added just prior to FBI review of school policy

Connecting the Dots

State report on Virginia Tech massacre reports: "Systems, processes need an upgrade" - and the need to close the gap in student information that separates high school from college

By Elizabeth Dobbs - Radar reporter

"They failed at every juncture": Grand jury report on how Loudoun Co. Public Schools responded to sexual assaults

The report from a special grand jury looking into Loudoun County, Virginia's response to two in-school sexual assaults by the same student in 2021 found the school system for a "failure of leadership," saying that administrators missed multiple chances to prevent the second assault from happening.

The grand jury issued no indictments in its report Monday, and said there was no "coordinated policies" between the school system and members of the school board.

Instead, they said, the board was kept in the dark about the reaction to the first assault and only found out that the same student committed both assaults from media reports.

But the report says "leadership is operating in silos" by school administrators and "a breakdown of communication" that included the Loudoun County Sheriff's Office, Court Services Unit and commonwealth's attorney's office, led to the second assault in October 2021 at Broad Run High School.

It happened after multiple people, including the assault’s own mother and grandmother, warned law enforcement about him.
School District Sharing Information With Law Enforcement (or others)

FERPA in a Nutshell:
1. Parental right of access
2. Confidentiality of education records

Personal Knowledge is Not An Education Record & Not Covered by FERPA:
- Personal Knowledge: Information obtained through a school official's personal knowledge or observation (but not from a student's education records) is not subject to the privacy protections of FERPA.
- Example: Teacher witnesses an assault and provides verbal or written statement to law enforcement regarding what she observed.
Practical Application of Important FERPA Exceptions
(In The Context of School and Community Safety)

School Officials With Legitimate Educational Interests

Campus Partnership with SRO:
- School Resource Officers (SROs) can be designated as "school officials"
- SRO’s “legitimate educational interest” is to promote school safety and physical security of students
- Cameras, schedules, discipline, etc.
- Generally, cannot re-disclose information unless another FERPA exception applies
- Make designation in district policy, ILA, MOUs
Directory Information

- Typically, basic information such as name, address, telephone number, date of birth, etc.
- Each district may designate by policy what constitutes “directory information” for that district
- Also, by board policy, districts may designate more than one category of “directory information” based upon who the requestor is
- Example: Directory information provided to requestors with a commercial purpose is more restrictive than if the requestor is law enforcement, juvenile justice or child welfare agency.

Sample: Directory Information Policy

FL (Local)

The District has designated the following categories of information as directory information: student name, address, telephone number, date of birth. Information regarding grades and school activities is not designated as directory information. When requested by a law enforcement, juvenile justice or child welfare agency for the purpose of conducting an investigation of the circumstances which may endanger a student, the District has designated the following information as directory information: name, address, telephone number.
Health or Safety Emergencies

"[Release of education records in connection with an emergency, to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"

Disclosure of Information in Health & Safety Emergencies (34 CFR 99.36)

- § 99.36 What conditions apply to disclosure of information in health and safety emergencies?
  - (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student or to a student, in connection with an emergency. Knowledge of the information is necessary to protect the health or safety of the student or other individuals.
  - (c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If an articulable and significant threat to the health or safety of a student or other individual is found, an educational agency or institution may disclose information from an education record to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

- Articulable + Significant Threat + Rational Basis = We Won’t Second Guess

Judicial Order or Lawfully Issued Subpoena
Non-Disclosure Language in Subpoena

- Ordinarily, school must make reasonable effort to notify the parent of the affected student in advance of compliance with a subpoena so that the parent has opportunity to object (quash) the subpoena.

- However, no notification to parent is required if the subpoena was issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

- Suggestion: Work with local DA's office in advance to ensure grand jury subpoenas include "magic language" when appropriate.

Law Enforcement Unit Records

34 CFR § 99.8

"Law enforcement unit records" are records:

- created by a law enforcement unit at the educational institution (ISD PD);
- created for a law enforcement purpose; and
- maintained by the law enforcement unit.

These records are not education records subject to the privacy protections of FERPA. As such, the law enforcement unit may refuse to provide a parent with access to the records unless the Texas Public Information Act required disclosure. Also, these records may be disclosed to third parties without the parent or student's consent.

Texas Education Code § 37.015(a):
- The principal (or designee) of a public or private primary or secondary school . . . shall notify any school district police department and the police department of the municipality in which the school is located . . . of the principal has reasonable grounds to believe that any of the following activities occur in school, on school property, or at a school-sponsored or school-related activity on or off school property, whether or not the activity is investigated by school security officers:
  1. conduct that may constitute an offense listed under Section 308.149, Gov’t Code (Murder / F1 Felonies);
  2. deadly conduct under Section 22.05, Penal Code;
  3. a terrorist threat under Section 22.07, Penal Code;
  4. the use, sale, or possession of a controlled substance, drug paraphernalia, or marijuana;
  5. the possession of any of the weapons or devices listed under Sections 46.01, Penal Code (firearms, etc.);
  6. conduct that may constitute a criminal offense under Section 71.02, Penal Code (Organized Crime); or
  7. conduct that may constitute a criminal offense for which a student may be expelled under Section 37.007.

New Transfer Student Disciplinary and Threat Assessment Records

House Bill 3: Sections 6-7 Disciplinary and Threat Assessment Info

Texas Education Code § 25.002(a):
- Upon enrolling student, parent or school district student most recently attended must furnish a copy of the child’s disciplinary record and any threat assessment involving the child’s behavior conducted under 37.115 (behavioral threat assessment team).

Texas Education Code § 25.036(c):
- In the case of a student transferring schools, the child’s school district of residence shall provide the receiving district with the child’s disciplinary record and any threat assessment involving the child’s behavior conducted under 37.115 (behavioral threat assessment team).
New Required Parental Notifications

House Bill 3, Section 14 Notification Regarding Violent Activity
Since 2019, Texas Education Code § 37.113 has required districts to notify parents "as soon as possible" of bomb threats and terrorist threats relating to a campus or other facility where students are present.

New, Effective September 1, 2023
Texas Education Code § 37.1131 requires school districts to adopt a policy to provide notice regarding violent activity that has occurred or is being investigated at the school district campus or other facility (or event) to parents/guardians. The notification standards must:
- Include electronic notification through text messaging and email;
- Provide an option for real-time notification; and
- Protect student privacy

Law Enforcement Sharing Information With School District

Information Sharing Between School Districts and Law Enforcement – Joseph L. Parks
Notice of Arrest or Referral of Student (Art. 15.27 CCP)
- Law enforcement agency required to provide verbal and written notice to school if student arrested (or referred to juvenile court) for most offenses by the earlier of 24 hours or before next school day.
- Must include details of any assaultive behavior or violence, and of any weapons used or possessed during the offense or conduct.
- School officials required to notify teachers and other staff with responsibility for supervision of student (Suggestion: print out, allow teacher to review and initial – don’t indiscriminately email to staff).
- Police chief, superintendent and other school officials may have their respective credentials sanctioned for failure to comply with notice requirements (TCOLE / SBEC).

Information for Threat Assessment or School Safety Plan
- In addition to the information provided in the Notice of Arrest of Student, the law enforcement agency shall provide to the superintendent or superintendent’s designee information relating to the student that is requested for the purpose of conducting a threat assessment or preparing a safety plan relating to that student.
- School board and law enforcement agency may enter into a Memorandum of Understanding regarding exchange of information.
- If no MOU, the information requested by the superintendent or the superintendent’s designee shall be considered relevant.
- Also added Sec. 58.008(d)(5) Tex. Family Code to allow inspection/copying of law enforcement records by school district “CEO”.

Considerations and Cautions
- Compartmentalize / “need to know” – most info at issue here is confidential by law.
- Dangers of disclosing reporting parties, witnesses or tipsters who may face retaliation – don’t get someone hurt.
- Details that could jeopardize the investigation or result in destruction of evidence.
- Preservation of Video, etc.: preserve video (or other info) of serious incidents that may roll off server, etc., while court order or subpoena is being obtained.
Scenarios

Detective Friday is investigating a string of catalytic converter thefts in the area around Central High School. Student Jasper Poindexter has been identified as a possible suspect.

Detective Friday is seeking Jasper's attendance records for the last 3 months to determine if Jasper's absences coincide with the rash of thefts.

Detective Friday also wants a copy of CHS's parking permit information on Jasper's car.

DISCUSSION
Local police are investigating reported drug activity at CHS. Police have obtained social media posts suggesting drug sales by student Carley Cannibas to several other CHS students.

Detective contacts CHS principal, requests information regarding Carley and the other students, including: identifying information, contact/address info, school schedules.

**DISCUSSION**

But wait, there’s more!: Detectives contact CHS principal on Friday afternoon and state that they have a reliable source who has advised Carley Cannibas has received a new shipment of vape oil that is laced with fentanyl and that detectives are aware of an overdose death related use of fentanyl-laced vape oil.
Drop It Like It’s Hot

Principal Jones of CHS receives Notice of Student arrest on student Carlos Casanova, indicating Carlos was arrested the previous evening for misdemeanor Unlawfully Carrying a Weapon – a pistol, at Collin Creek Mall.

Under CHS Code of Conduct, a misdemeanor, off campus arrest is not usually subject to disciplinary action.

Principal Jones notifies Carlos’ teachers of the arrest and learns that Carlos has had a number of run-ins with other CHS students that seem to be escalating – all stemming from Carlos’s girlfriend dropping him for another boy.

Principal Jones requests additional information from Central PD regarding Carlos’ arrest.

DISCUSSION

Arrest report reveals: Carlos was in car with 3 other CHS students, 2 handguns and 2 baseball bats in car, looking for “new friends” (who are also CHS students) of Carlos’ ex-girlfriend.

Just in Time

CHS student Justin Taylor has history of depression known to school. Justin’s 3rd period teacher reports to the office that Justin went to restroom during class, never returned, and left his belongings on his desk.

The SRO locates security video showing Justin leaving school after retrieving a small bag or package from his hall locker.

A few moments later, Justin’s girlfriend, Bobbie Trendy, reports to the office and shows staff a text message she just received from Justin. In this message, Justin blames 3 people for his breakup with Bobbie: 1) Bobbie’s father; 2) the CHS counselor; and 3) an 8th grader at Central Middle School.

His message is very angry and includes the statement that he will “end” these 3 people this weekend, which would have been his 6 month anniversary with Bobbie.

He also says he’s at his buddy “Dookie’s” house and that Dookie is ready to help.

DISCUSSION

Information to locate Justin? Dookie? Warnings to intended victims?
Questions & Discussion
Thank You for Your Attention!

“Tomorrow’s News”

When news breaks about yet another school
Speaker Biography

Joseph (Joe) Parks is a Texas attorney and consultant whose practice focuses on school safety, workplace investigations and training. He served more than a decade as the Executive Director of Safety and Security for one of Texas' largest school districts and is an honorably retired command-level peace officer with over 20 years diverse public safety experience. A licensed attorney since 2004, Joe has experience in employment law, school law, commercial litigation, and open government law. He is a TEA Registered Provider of CE training for school boards, a Registered Consultant listed in the Texas School Safety Center Registry, and holds certificates as an Instructor and Master Peace Officer from the Texas Commission on Law Enforcement (TCOLE). He is a regular speaker/presenter on topics involving school safety and security, law enforcement, workplace investigations and HR/compliance related topics.

Law Office of Joseph L. Parks, PLLC
Focus on school safety, workplace investigations and training
2010 to 2021
Executive Director of Safety and Security Services
Plano Independent School District – Plano, Texas
Directed all aspects of safety, security, emergency preparedness
2004 to 2010
Litigation Associate – Employment Law / Commercial Litigation
Bell Nunnally & Martin LLP – Dallas, Texas
Represented employers and commercial clients in wide variety of disputes
1986 to 2004
Police Officer / Sergeant / Lieutenant (Honorably Retired)
Plano Police Department – Plano, Texas
Patrol Services, Forgery/Fraud Unit, COP/NPO Unit, SWAT/Tactical Unit

Resources
School Resource Officers (SROs) can be designated “school officials” under FERPA.

- **Directory Information**
  - FL (Legal)
  - FL (Local)
- **Health or Safety Emergency**
  - FL (Legal)
  - FL (Local)

Consider local policy with 2 categories of “directory information”:

- 20 USC 1232g(a)(5)
- 34 CFR 99.31(a)(1)(i)(A)
- 34 CFR 99.37

School officials with legitimate educational interests

Consider local policy with 2 categories of “directory information”:

- 20 USC 1232g(a)(5)
- 34 CFR 99.31(a)(1)(i)(A)
- 34 CFR 99.37

Consider local policy with 2 categories of “directory information”:

- FL (Legal)
- FL (Local)

“Magic language” re: law enforcement purpose and directive to not disclose

- To “appropriate parties” in connection w/ emergency if knowledge of information is necessary to protect the health or safety of students or others.
- To “appropriate parties” in connection w/ emergency if knowledge of information is necessary to protect the health or safety of students or others.

**Resources – Federal**

(All sources hyperlinked)

- 2021 U.S. Secret Service Report – Averting Targeted School Violence
- FAQs - U.S. Department of Education / Student Privacy Policy Office
- Guidance Document - School Resource Officers, School Law Enforcement Units and FERPA

**Resources - Texas**

(All sources hyperlinked)

- Texas SB 2136 – Revision to Art. 15.27 Code of Criminal Procedure
- Notification to Schools Required – Tex. Code of Criminal Procedure, Art. 15.27
- TEA Model Standards for Parental Notification of Violent Activity
Sample MOU Language: Investigation of Social Media Threats

**Purpose:** A parent, student or [district] staff member reports social media posts or electronic communications involving a serious threat towards a campus, or which reasonably raise concerns for the safety of a campus (e.g. photos posing with firearms, threatening to kill others, or threats to bring weapons to school the next day, etc.).

**Guidelines:** The incident will be immediately reported to an SRO during school hours, or the Department if after school hours. Campus administrators will contact the SRO (or other officers if attempting to identify and locate the person(s) who are the origin of the threat, or who are the target of the post or communication, as relevant). The investigation should be the limited to determining whether the threat exists and whether action needs to be taken by the school or the Department to mitigate a threat or a fearful reaction by parents, students or others. Depending upon the information developed and the circumstances of the contact incident, it may be appropriate for officers to interview students or parents at their home (or elsewhere) at any time of day to determine a student's intent and access to firearms or other weapons. Where the incident suggests an identifiable student has threatened to bring a firearm to school, the investigating officers may determine that the investigation should include access to the student's residence or other location. Officers may interview students, parents, and other witnesses as necessary to complete the investigation. Based on the information developed, officers may interview students, parents, and other witnesses as necessary to complete the investigation. Because widespread social media posts suggesting a threat or a campus often cause significant disruption to the affected campus, officers will make efforts to complete the investigation prior to the next school day so that appropriate information about the credibility of the threat can be provided to the district and/or parents and students.

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Sample MOU Language: SROs Designated as School Officials

[The district] designates SROs as “school officials” for purposes of access to student information governed by the Family Educational Rights and Privacy Act (FERPA) 20 USC 1232g. Student education records and personally identifiable information under the maintenance and control of [the district] may be accessed by school officials only for a legitimate educational purpose. The legitimate educational purpose for which an SRO may access or use educational records is to promote school safety and the physical security of students. An SRO shall not access education records or personally identifiable information of students for any other purpose except in compliance with FERPA.
2023 Transgender Update

Presented by:
Emma J. Darling

October 19, 2023
GSAs now refer to “Gender and Sexuality Alliances” and sometimes antiquatedly called “Gay-Straight Alliances.”

“A public secondary school that allows at least one noncurricular student group to meet on its premises during noninstructional time (e.g., at lunch, before or after school) must allow students to have a fair opportunity to conduct group activities, such as forming a GSA or other similar groups.” 20 U.S.C. § 4071

School officials are permitted under the Equal Access Act to have rules for student groups that maintain order and discipline on school premises, protect the well-being of students and faculty, and assure that attendance of students at meetings is voluntary. Courts have made clear that those rules must be applied to all student groups and school officials cannot censor groups because they express unpopular viewpoints.
Attire

- A legal right exists to the extent that a court is likely to conclude that dressing in accordance with a student’s expression of gender or sexual orientation is a form of protected expression.
- Courts in the Fifth Circuit* have found that wearing gender-nonconforming clothing may be protected by the First Amendment as free speech, by the Fourteenth Amendment with regard to equal protection, and by Title IX.
- *While not in Texas, this case is widely cited and is regarding a lesbian student wearing a tuxedo to prom.

Circuits on Student Bathroom usage at a Glance:

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<th>3d</th>
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<th>5th</th>
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<tr>
<td>May use bathroom</td>
<td>consistent with gender identity</td>
<td>No claim</td>
<td>May use bathroom</td>
<td>consistent with gender identity</td>
<td>Transgender student may bring claims of discrimination under Title IX</td>
<td>May use staff room, locker room, and showers consistent with gender identity</td>
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Circuits on Name Changes and Privacy

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<tbody>
<tr>
<td>Parents cannot challenge district student’s request for name change</td>
<td>Parents cannot challenge district student’s request for name change</td>
<td>School can change student’s name</td>
<td>Court pending</td>
<td>Court make-up</td>
<td>Child claims 42 U.S.C. § 1983 and state law</td>
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The New Hot Topic: Privacy

The New Hot Topic: Privacy

- Stephen Foote and Marissa Silvestri ("Plaintiffs") have alleged that during the 2020-2021 school year, staff employed by Ludlow Public Schools:
  1. spoke about gender identity with two of their children, who were then eleven and twelve years old and students at Baird Middle School;
  2. compiled with the children’s requests to use alternative names and pronouns; and
  3. did not share information with Plaintiffs about the children’s expressed preferences regarding their names and pronouns.

- Plaintiffs allege these actions, and inactions, violated their fundamental, parental rights protected by the Fourteenth Amendment to the United States Constitution. They filed this action pursuant to 42 U.S.C. § 1983 to seek redress for their alleged injuries.

- Early in the 20-21 school year, school librarian Jordan Funke gave students in B.F.’s sixth grade class an assignment to make biographical videos. Funke invited students to include their gender identity and preferred pronouns in their videos. The students also received instruction about language that is inclusive of students with different gender identities.
- In December 2020, B.F. spoke with a teacher and asked for help talking to Plaintiffs about concerns about depression, low self-esteem, poor self-image, and possible same-sex attraction. The teacher emailed Mom, who replied that they were seeking help for their child and not to speak with their child about this anymore.
On February 28, 2021, B.F. sent an email to several teachers, identifying as genderqueer and announced a new preferred name, one typically used by members of the opposite sex, and a list of preferred pronouns.

Foley met with B.F. and, after their meeting, sent an email stating that B.F. was “still in the process of telling” Plaintiffs about B.F.’s gender identity and instructed school staff that they should not use B.F.’s new preferred name and pronouns when communicating with B.F.’s parents.

Foley’s position was consistent with a policy sanctioned by the School Committee, pursuant to which school personnel would only share information about a student’s expressed gender identity with the student’s parents if the student consented to such communication.

After Foley sent her email, teachers at Baird Middle School began using B.F.’s new preferred name and pronouns.

On March 18, 2021, Principal met with Plaintiffs. During their meeting, Plaintiffs asserted that Defendants had disregarded their parental rights by not complying with the December 2020 request that staff not engage with B.F. regarding mental health issues and by failing to notify them about their children’s use of alternate names and pronouns.

Plaintiffs also conveyed their belief that school staff were acting improperly by affirming B.F.’s and G.F.’s self-asserted gender identities. Monette refused to discuss the issues raised by Plaintiffs and ended the meeting abruptly.

COUNT II: the right to make medical and mental health decisions for their children

Plaintiffs have not alleged Defendants’ actions were undertaken as part of a treatment plan for gender dysphoria or explained how referring to a person by their preferred name and pronouns, which requires no special training or skill, has clinical significance when there is no treatment plan or diagnosis in place. Similarly, there are no non-conclusory allegations that social transitioning was actually occurring or includes supportive actions taken by third parties, as opposed to actions a person takes to understand or align their external gender presentation with their gender identity. Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society generally, and, more specifically, in Massachusetts public schools where discrimination on the basis of gender identity is not permitted.

Plaintiffs did not provide medical evidence of an in-place medically-recognized diagnosis and treatment plan

Count It was dismissed

COUNT I: the right to direct the education and upbringing of their children

COUNT III: the right to family integrity

Plaintiffs assert the Ludlow Public Schools adopted and implemented a policy that went beyond the DESE Guidance and rigidly prohibited any communication with parents about a student’s gender identity unless the student consented and this policy shocked the conscience, at least when applied to students in middle school.

However, even if Defendants’ policy was imperfect and contrary to the non-binding Guidance, the alleged policy was consistent with MA law and the goal of providing transgender and gender nonconforming students with a safe school environment.

The Montgomery County Board of Education adopted Guidelines for Gender Identity for 2020–2021 that permit schools to develop gender support plans for students.

The Guidelines allow implementation of these plans without the knowledge or consent of the students’ parents. They even authorize the schools to withhold information about the plans from parents if the school deems the parents to be unsupportive.

Parents sued under the 14th Amendment, however the Court decided the case under standing grounds
The guidelines provided that “all students should feel comfortable expressing their gender identity, including students who identify as transgender or gender nonconforming.”

They called for “gender support plans,” in which, “The principal (or designee), in collaboration with the student and the student’s family (if the family is supportive of the student), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school.”

“Each plan should address identified name; pronouns; athletics; extracurricular activities; locker rooms; bathrooms; safe spaces, safe zones, and other safety supports; and formal events such as graduation.”

“Prior to contacting a student’s parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either receives or anticipates receiving from home.”

Schools are to “support the development of a student-led plan that works toward inclusion of the family.”

But the school may withhold information about a student’s gender support plan “when the family is nonsupportive.”

The Fourth Circuit held the Parents did not have standing because, “[t]he parents have not alleged that their children have gender support plans, are transgender or are even struggling with issues of gender identity.”

“allegations of possible future injury are not sufficient” to support standing.

“The parents’ claims likewise depend on a speculative fear, the occurrence of which requires guesswork as to actions of others.” Regardless of whether the District “hides this information” plaintiffs must allege imminent or substantially likely harm.

Simply put, the parents may think the Parental Preclusion Policy is a horrible idea. They may think it represents an overreach into areas that parents should handle. They may think that the Board’s views on gender identity conflict with the values they wish to instill in their children. And in all these areas, they may be right. But even so, they have alleged neither a current injury, nor an impending injury or a substantial risk of a future injury. As such, these parents have failed to establish an injury that permits this Court to act. Or, to use Douglass’ language, the jury box is not available to them. These parents must find their remedy at the ballot box.

Two sets of Wisconsin parents filed suit against the Kettle Moraine School District to challenge its policy that allows minor students to change their name and gender pronouns at school without parental consent.

In December of 2020, T.F. and B.F.’s daughter, then twelve years old, began questioning her gender identity. After some counseling, she expressed to her parents and District staff that she wanted to adopt a new male name and male pronouns when she returned to school. Her parents disagreed.

The parents requested that the District refer to their child with a female name and pronoun, and the District replied that they would not under policy.

After withdrawing the student, the student told her parents she no longer wanted to go by different pronouns.

Case is still pending.
On July 20, 2023, Chino Valley USD adopted a policy which mandates that District employees tell parents whenever the student asks to be identified or treated as a gender “other than the student’s biological sex or gender listed on the student’s birth certificate or any other official records.”

The policy also requires forced disclosure whenever a student requests to use a different name than their legal name or to use pronouns “that do not align with the student’s biological sex or gender listed on the student’s birth certificate or other official records.”

And requires staff members to notify parents or guardians whenever the student requests to access “sex-segregated school programs and activities,” including asking to join a sports team or use a different bathroom.

California Attorney General, Rob Bonta, filed a temporary restraining order and lawsuit against the District under the California constitution.

Escondido Union School District created a policy that a teacher ordinarily may not disclose to a parent that a student identifies as a new gender, or wants to be addressed by a new name, gender, or pronouns that are different from the birth name and birth gender of the student during the school day.

Under the policy at issue, accurate communication with parents is permitted only if the child first gives its consent to the school.

A teacher who knowingly fails to comply is considered to have engaged in discriminatory harassment and is subject to adverse employment actions.

Mirabelli and West, Plaintiffs, are longtime teachers. Olson is the board president.

Mirabelli and West’s injunction against EUSD’s policy was granted.

EUSD’s motion to dismiss was denied.

This litigation will likely continue.

The district created a policy which provides that district personnel “must use a student’s preferred/chosen name or pronoun in verbal, written, and electronic communications. Staff must respect the privacy of all students regarding such choice.

District personnel are advised that violations of this procedure may constitute discrimination based on sex, and may result in discipline.
At the beginning of the 21-22 school year, despite being born biologically female, the Student told teachers that the Student wanted to be treated as a male and be referred to by male pronouns.

The Willeys were unaware of the Student’s request at that time, and were not informed or advised of the Student’s request.

On March 29, 2022, while participating in a district-wide training, Mrs. Willey asserts that for the first time she discovered—that the Student was being referred to by a male name and male pronouns at school, and had been for the entire school year.

Upon learning this Mrs. Willey informed the Student that they were “too young to make such decisions” and the conduct at school needed to stop.

That same day, Mrs. Willey sent emails to staff at the High School and to Principal Blake, reflecting her position that the Student was too young to make such life changing decisions.

Mrs. Willey’s emails directed staff to refer to the Student by her given birth name and female pronouns only, and threatened to take the issue to central admin should anyone defy her instructions.

In response Principal Blake advised that he had reached out to HR concerning her request for further clarification and would be in touch.

Following Mrs. Willey’s email directive, the Student changed course and requested to be called by the Student’s given name and female pronouns.

The District both respected the Student’s initial wishes to be called by a male name and pronoun, and the Student’s subsequent request to be referred to by the Student’s given female name and pronoun.

Mrs. Willey alleges that in a meeting in 04/22, Ms. Bolton told Mrs. Willey that if the Student came back to and requested to be called by a male name and pronoun the staff would do as the Student requested, regardless of Mrs. Willey’s directions. In addition, Ms. Bolton stated they would not tell Mrs. Willey of the Student’s request.

The Willeys allege as applied this policy violates: (1) their Fourteenth Amendment fundamental substantive due process right to direct the upbringing of their children; (2) their Fourteenth Amendment fundamental substantive due process right to familial privacy; and (3) their First Amendment right to free exercise of religion.

Additionally, in her capacity as a teacher for the District, Plaintiff Ashley Willey (“Mrs. Willey”) alleges the Policy violates: (1) her First Amendment right to free exercise of religion; and (2) her First Amendment right to free speech.

As set forth above, absent a reasonable concern of physical harm or abuse, to the extent the Student Privacy Policy would prevent a school district employee from responding to a minor student’s parent inquiry or require the school district employee to be about the student’s request to be called by a different name or pronoun, this Court finds that the factors weigh in support of a preliminary injunction as to this aspect of the Policy only. The Court finds as to the Preferred Name Policy, a consideration of the factors does not support the granting of a preliminary injunction and it will be denied.

Texas AG Opinion

In 2016, Ken Paxton opined on whether Ft. Worth ISD’s Transgender Guidelines were an “effort to keep student information from parents.”

“Far from creating a partnership between parents, educators, and administrators regarding their children’s education, the Guidelines relegate parents to a subordinate status, receiving information only on a “need to know basis.” Limiting parents’ access to information in this way impairs their ability to “actively participate” in the children’s education, contrary to state law. See TEX. EDUC. CODE § 26.001(a).

Absent a reasonable concern of physical abuse or harm, the District is hereby enjoined from precluding a school district employee from responding to any minor student’s parent’s inquiry regarding their requested name or pronoun or from requiring a school district employee to lie about a student’s request to be called by a different name or pronoun.
Furthermore, the provision requiring school personnel to “work closely with the student” to determine to what extent, if any, a parent will be involved in the student’s transitioning suggests that employees could, pursuant to these restrictions, encourage some children to withhold information from a parent. See Guidelines at 6.

Such action is both against state law and grounds for discipline under the Education Code. See TEX. EDUC. CODE §§ 26.001(c), 26.008(a)-(b). Thus, to the extent that the Guidelines limit parental access to information about a parent’s child and operate to encourage students to withhold information from their parents, they violate chapter 26 of the Education Code.”

Attempts to encourage a child to withhold information from his or her parents may be grounds for discipline. To the extent that the Transgender Student Guidelines adopted by the FWISD superintendent limit parental access to information about their child and operate to encourage students to withhold information from parents contrary to the provisions in chapter 26, they violate state law.
As of 2021-2022, the Education Department’s Civil Rights Data Collection includes a non-binary option to the male/female data categories. The DOE has stated this change is to ensure that the data, “captures accurate and inclusive information about all student identities and student experiences, where the data are available.” The department defines “nonbinary students” as those “who do not identify exclusively as male or female,” and said this definition does not apply to transgender students who identify exclusively as either male or female.

The DOE has issued guidance specifically to students regarding how to handle harassment.

**Data Collection by the Federal Government**

- As of 2021-2022, the Education Department’s Civil Rights Data Collection includes a non-binary option to the male/female data categories.
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**Department of Education – Confronting Harassment**

The DOE has issued guidance specifically to students regarding how to handle harassment.

- Identify a teacher or school leader, or a trusted adult, as a safe person to talk to. If they don’t feel safe, they can talk to a trusted adult, such as a counselor or school counselor. Identify a safe person who can help them get in touch with a family member or friend.
- If the safety issue is not resolved, it is important to review with the Civil Rights Division of the U.S. Department of Education, or a similar state-level or district-level unit.
- Know that all students have the right to learn in a safe and respectful environment. If they are experiencing harassment, they have the right to file a complaint with the Civil Rights Division of the U.S. Department of Education, or a similar state-level or district-level unit.

**Over the summer, John came back as Jane…**

- Are we required to change their name?
  - In their contract
  - On our website
  - In the yearbook
- Do we tell parents?
In its decision in Lusardi v. Dep’t of the Army, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Would we get in trouble for changing their assignment?
– Removing coaching duties?

The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.

Judge Matthew Kacsmaryk, a Trump-appointed district court judge for the Northern District of Texas, on October 1, 2022, found that Title VII prohibits employment discrimination against an individual for being gay or transgender, “but not necessarily all correlated conduct,” including use of pronouns, dress and bathrooms. He struck down the EEOC guidance in Texas v. EEOC.

According to the EEOC, T.C. Wheelers, Inc., which operates T.C. Wheelers Bar & Pizzeria in Tonawanda, New York, violated federal law when management and employees harassed an employee because of his gender identity.

Beginning in January 2021, one of T.C. Wheelers’ owners repeatedly harassed Quinn J. Gambino, a transgender male, including telling Gambino that he “wasn’t a real man,” asking invasive questions about his transition, and asking, “Does she have female parts?”

T.C. Wheelers’ owners also intentionally misgendered Gambino by using female pronouns (such as “she” or “her”) and stood by as employees and customers did the same.

Eventually, Gambino had no choice but to resign to escape the harassment, the EEOC charged.
**EEOC v. T C Wheelers, Inc. (1:23-cv-00286)**
District Court, W.D. New York, March 2023

- The EEOC attempted to use their reconciliation process before filing suit
- EEOC sued under Title VII

**John M. Kluge v. Brownsburg Community School Corp.**

- Hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS.
- BCSC implemented a policy (“Name Policy”) for all their teachers to address transgender students with their chosen names and pronouns
- Mr. Kluge and three other teachers requested meeting with the Principal, during which they presented a signed letter expressing their religious objections to transgenderism and other information supporting their position that BHS should not “promote transgenderism.”

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**Other Unique Cases and Laws**

**John M. Kluge v. Brownsburg Community School Corp.**

- On July 31, 2023, the Seventh Circuit Court of Appeals revived the case thanks to the SCOTUS ruling in *Groff v. DeJoy*, which raised the burden on employers to claim that a religious accommodation causes an undue hardship under Title VII.
- The Seventh Circuit vacated the decision granting summary judgment to the school on the teacher’s claim the school failed to accommodate his religious beliefs/practices, agreeing the school was unable to accommodate the teacher’s religious beliefs and practices without imposing an undue hardship.

**Meriwether v. Hartop**
992 F.3d 492, 503 (6th Cir. 2021)

- A college professor, who taught theology, refused to refer to a transgender student in their class by their preferred pronouns
- Instead he used only the student’s last name with no Mr. or Ms. before it to address them
- Sixth Circuit held that under the First Amendment the professor may refuse to use student’s preferred pronouns for religious reasons

**Tate v. Mt. Lebanon Sch. Dist.**

Parents of first grade children brought § 1983 action against teacher, principal, school district, and members of school board, alleging that teacher taught children about gender dysphoria and transgender transitioning without giving them opportunity to opt children out of instruction in violation of their constitutional rights.
The Third Circuit has recognized that the fundamental right of parents to raise and nurture their children may sometimes conflict with a public school's policies, but explained: “when such collisions occur, the primacy of the parents’ authority must be recognized and should yield only where the school’s action is tied to a compelling interest.” Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000).

The parents have been allowed to continue their claim, as the Court denied the district’s MTD.

Texas healthcare workers may not:

- Perform any surgery on a child (under 18) for purposes of gender transition which by result sterilizes them, or perform a mastectomy
- Provide, prescribe, administer, or dispense certain prescription drugs that induce transient or permanent infertility

These laws do not apply to those born as intersex, or the prescription is part of a continuing course of treatment that the child began before June 1, 2023, and the child attended 12 or more sessions of mental health counseling or psychotherapy during a period of at least six months before the date the course of treatment described by began

Questions?

The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.
Transgender Athletics

Presented by:
Holly Boyd Wardell and
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October 19, 2023
TRANSGENDER ATHLETICS

Holly Boyd Wardell
Tiger Hanner
October 19, 2023

ARGUMENTS FOR TRANSGENDER PARTICIPATION

- Proponents of anti-trans sports bans are relying on stereotypes that have sexist implications.
- Transgender youth are a small part of the overall population.
- Just like other you, transgender youth will have varying degrees of physical ability and attributes that may/may not lend themselves to success in the sport of their choice.
- Playing sports comes with well-known academic, emotional, mental, and social benefits. Transgender youth should not be shut off from these opportunities.

ARGUMENTS AGAINST TRANSGENDER PARTICIPATION

- Sports are competitive, and like any competition should be played on a fair and level playing field.
- There are divisions, age brackets, and weight classes for a reason. Female sports should be for female athletes.
- Unfair advantage: males have higher cardiovascular capacity, greater bone density, and more muscle mass.
- Privacy issues

Get the Facts about Transgender & Non-Binary Athletes - Human Rights Campaign (hrc.org)

SB 3 – Texas Fair Sports for Women and Girls Act (2021)

“Women have fought for the equality in sports for decades, and they have achieved enormous success along the way. It is not fair to allow boys to compete in girls’ sports because, statistically, boys run faster, jump higher and throw farther. In Texas, we refuse to deny any women or girl athlete the right to compete on a level playing field, and to be the best in their sport.”

“Women cannot allow our women to be pushed out of athletic scholarships and out of sporting excellence. This is the fourth time we have passed this bill out of the Senate this year, and we will continue passing this bill until it finally becomes law in Texas.”

SB 3 – Texas Fair Sports for Women and Girls Act (2021)

Sec. 33.0934. INTERSCHOLASTIC ATHLETIC COMPETITION BASED ON BIOLOGICAL SEX. (a) Except as provided by Subsection (b), an interscholastic athletic team sponsored or authorized by a school district or open-enrollment charter school may not allow a student to compete in an interscholastic athletic competition sponsored or authorized by the district or school that is designated for the biological sex opposite to the student's biological sex as correctly stated on:

- the student's official birth certificate, as described by Subdivision (1); or
- if the student's official birth certificate described by Subdivision (1) is unsuitable, another government record.
(b) An interscholastic athletic team described by subsection (a) may allow a female student to compete in an interscholastic athletic competition that is designated for male students if a corresponding interscholastic athletic competition designated for female students is not offered or available.

$\text{(c)}$ For purposes of this section, a statement of a student’s biological sex on the student’s official birth certificate is considered to have correctly stated the student’s biological sex only if the statement was:

(i) entered at or near the time of the student’s birth; or

(ii) modified to correct a clerical error in the student’s biological sex.

Based on two years of input from stakeholders

To provide “needed clarity,” in response to questions from stakeholders, on how recipients can ensure that students have equal opportunity to participate on male and female athletic teams as required by Title IX.

Prohibits a one-size-fits-all policy that categorically bans transgender students from playing on sports teams consistent with their gender identity.

Comment period ended May 15, 2023

Over 150,000 persons or entities commented

1 Paragraph change at 106.41(b)(2)
IMPORTANT EDUCATIONAL OBJECTIVES

• Prevention of sports-related injury
• Fairness in competition

*Is there a way to achieve this objective without excluding a transgender student?

From NPRM

NOT VALID EDUCATIONAL OBJECTIVES

• Excluding transgender students from sports
• Disapproval of transgender students
• Adherence to stereotypes
• Administrative convenience

From NPRM

CRITERIA

Criteria must be specific to each sport, level of competition, and grade or education level.

Texas v. Cardona

Alleges that the U.S. Department of Education’s guidance and proposed rules applying Bostock to Title IX is flawed and seeks a ruling that Title IX does not bar discrimination on the basis of sexual orientation or gender identity.

No ruling has been made to date.