Title IX Legal Update

Presented by:
Andrea L. Mooney

October 19, 2023

Title IX Legal Update

Andrea L. Mooney

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

TEXAS TITLE IX Administrator Conference

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

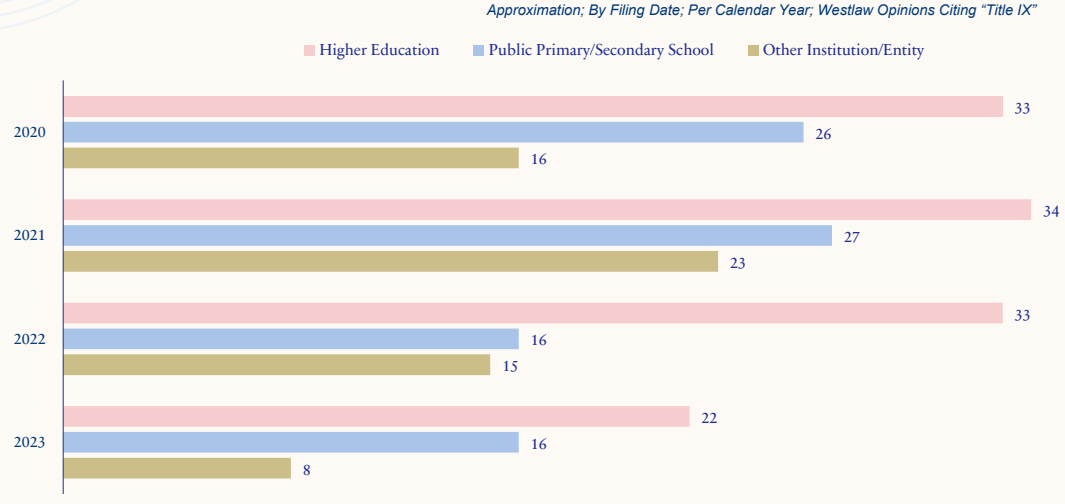
Winding It Down! Summary

DISCLAIMER: *This presentation contains accounts of sexual violence, abuse, and assault. All pictures, graphics, and any other visual media are for presentation purposes only and do not represent, 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.*

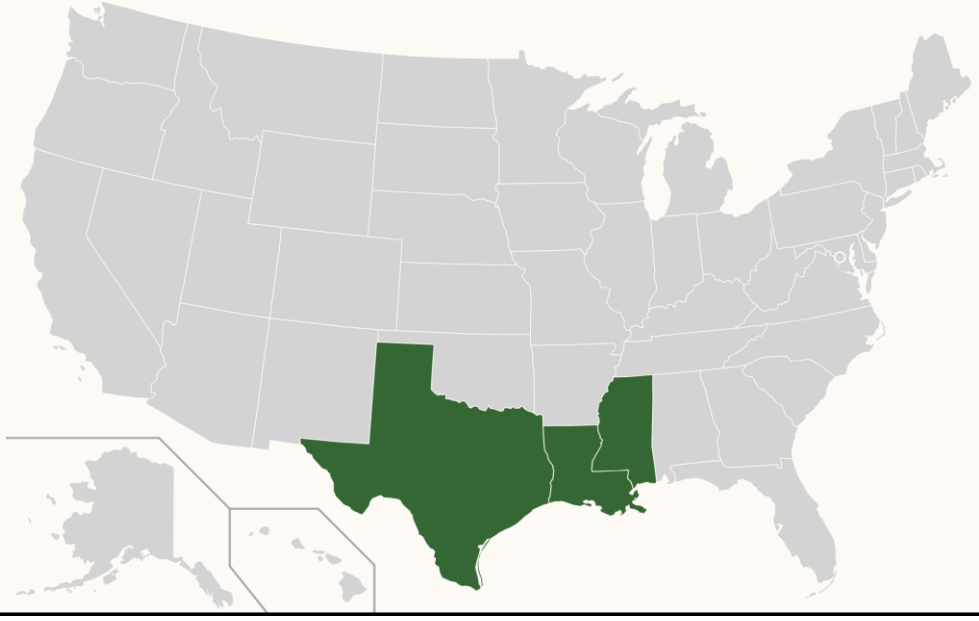
> *No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*

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.

53 F.4TH 334 (5th Cir. 2022)

Roe v. Cypress-Fairbanks I.S.D. (cont.)

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

53 F.4TH 334 (5th Cir. 2022)

Roe v. Cypress-Fairbanks I.S.D. (cont.)

The Court AFFIRMS the lower court's decision that the District was not deliberately indifferent to "heightened risk" of sexual assault

- 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.

53 F.4TH 334 (5th Cir. 2022)

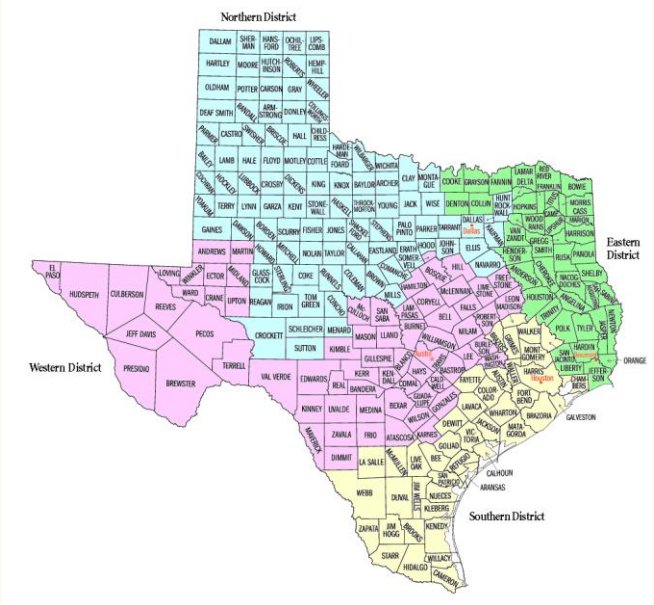
The Court REVERSES the lower court's decision that the District was deliberately indifferent in its response to the incident

Roe v. Cypress-Fairbanks I.S.D. (cont.)

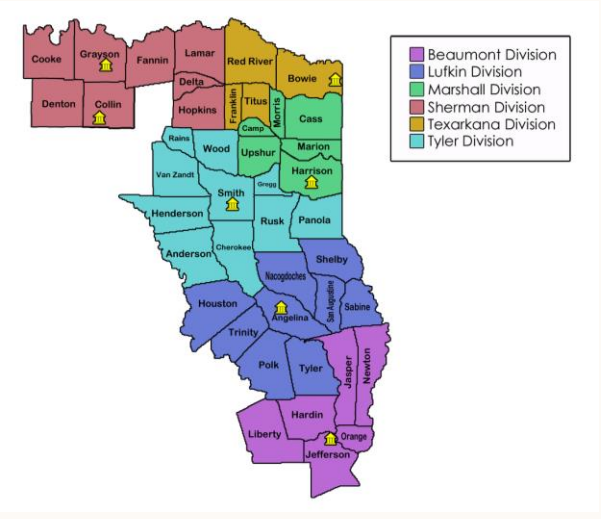
- For the **second** issue, the Appellate Court ruled that:
  - Appellate Court used a "totality of the circumstances" approach to determine if the response was inadequate.
  - The record showed a "severe, pervasive, and objectively offensive" string of harassments that hindered Roe's academic opportunities
  - 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."**

53 F.4TH 334 (5th Cir. 2022)

UNITED STATES DISTRICT COURTS IN TEXAS



UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS



Stephenson v. Brownsboro I.S.D. (E.D. 2022)

Flashback from Last Year!

- 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.
- Brownsboro objected that three of the five elements of student-on-student harassment—that must be established by plaintiff—were not satisfied.
- **In this decision, the District Judge adopted the Magistrate Judge's ruling and overruled Brownsboro I.S.D.'s objection.**

2022 WL 14151208 (E.D. Tex. Oct. 24, 2022)

Stephenson v. Brownsboro I.S.D. (cont.)

The Court OVERRULES Brownsboro I.S.D.'s objection to the Magistrate Judge's recommendation that BISD's motion to dismiss post-report Title IX claim be denied.

Flashback from Last Year!

- **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.

2022 WL 14151208 (E.D. Tex. Oct. 24, 2022)

Reagans v. Grapeland I.S.D. (E.D. 2023)

- 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.**

2023 WL 1781802 (E.D. Tex. Feb. 6, 2023)

Reagans v. Grapeland I.S.D. (cont.)

The Court GRANTS Grapeland I.S.D.'s motion for summary judgment since actual knowledge of sexual abuse cannot be established if officials did not suspect a relationship was sexual.

- 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**

2023 WL 1781802 (E.D. Tex. Feb. 6, 2023)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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."**

2023 WL 3937785 (N.D. Tex. June 9, 2023)

Normore v. Dallas I.S.D. (cont.)

- **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.

2023 WL 3937785 (N.D. Tex. June 9, 2023)

Normore v. Dallas I.S.D. (cont.)

The District Court GRANTS summary judgment for DISD on Normore's Title IX retaliation claim (and all other claims presented)

(2) She suffered an adverse employment action; and

- Court found it was **undisputed** that Normore suffered an adverse employment action.

(3) A casual connection exists between the two.

- Here, since there was no "protected activity," the Court did not need to determine if a casual connection existed.

- The District Court **granted** summary judgment to DISD for the Title IX retaliation claim (and eventually all the other claims presented)
- **TAKEAWAY: Plaintiff must meet all 3 prongs for Title IX retaliation. In this case, it was only important to determine if the terminated employee *actually* performed a "protected activity" before her termination.**

2023 WL 3937785 (N.D. Tex. June 9, 2023)

Doe v. Keller I.S.D. (N.D. 2023)

- 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.
  - Stated that the District did not "immediately" fire the teacher when his misconduct was uncovered and, instead, **he resigned three weeks later.**
  - Doe stated that the delay was deliberately indifferent as it allowed the teacher to continue to harass Doe.
  - She 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.**

2023 WL 2711629 (N.D. Tex. Mar. 30, 2023)

Doe v. Keller I.S.D. (Cont.)

The District Court DENIES the Plaintiff's Motion for Reconsideration on grounds that no material error of law or fact has occurred.

- The Court **denied** this Motion on the following grounds:
  - Doe knew about the Title IX coordinator's conflict of interest at the time of the District's Motion to Dismiss
  - Doe did not presented any newly discovered evidence that doesn't simply add more detail to facts already presented
  - The Court committed no factual errors in its analysis
  - The previous determination was not the result of a clerical error
  - Doe conceded that the Court had previously applied the law correctly.
- **TAKEAWAY: Claim for post-judgment relief—without any newly-discovered evidence—will be uphill battle to reverse dismissal under Title IX.**

2023 WL 2711629 (N.D. Tex. Mar. 30, 2023)

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**.
- Upon speaking with other students and the teacher, the school learned that while the teacher did kiss the students on the cheek as a reward for good behavior, no other misconduct had occurred in the classroom. The school drafted a disciplinary warning and recommendation for the teacher to return.
  - Upon sending these conclusions to the Uplift Education (the overseeing company of the charter school), Uplift directed the school to investigate further and prepare to terminate the teacher's employment.
  - Thereafter, the school terminated the teacher's employment for failure to maintain appropriate teacher-student relationships
- **In September of 2020 and after the teacher's termination with Uplift, Grand Prairie PD arrested the same teacher for aggravated sexual assault of a child during his tenure at the school and was sentenced to seven years in prison.**

2023 WL 4207462 (N.D. Tex. June 27, 2023)

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**.

2023 WL 4207462 (N.D. Tex. June 27, 2023)

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

- Actual Knowledge of Substantial Risk Claim
  - 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 law required 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 in the "administrative enforcement context." Furthermore, Title IX does not impose a similar requirement for conduct outside of administrative enforcement, as is here.

2023 WL 4207462 (N.D. Tex. June 27, 2023)

Appeal Filed!

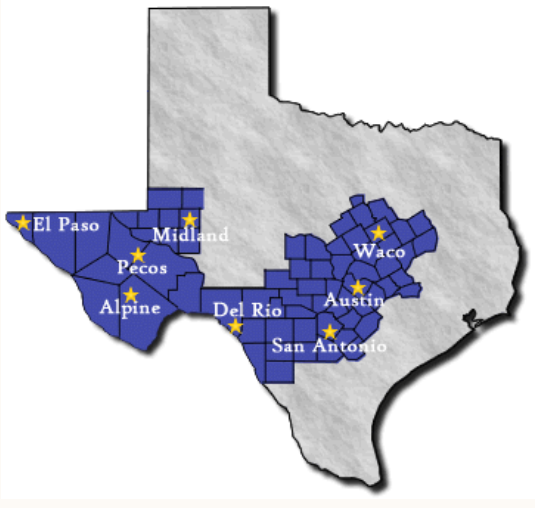
The District Court GRANTS the Defendant's Motion for Summary Judgment since they did not have actual knowledge and were not deliberately indifferent.

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

- 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."**

2023 WL 4207462 (N.D. Tex. June 27, 2023)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS



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**.
- Murphy was granted a leave to amend her complaint, but this second amended complaint was ultimately dismissed on May 3, 2023.

2023 WL 2060744 (W.D. Tex. Feb. 16, 2023)

Murphy v. Northside I.S.D. (cont.)

The District Court GRANTS NISD's motion to dismiss Murphy's claim of Title IX discrimination

- District Court found when a plaintiff seeks damages under Title IX, they **must allege "intentional discrimination.**" *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).
  - Test is whether the District *intended* to treat women differently on the basis of their sex.
- Court found Murphy **failed** to provide any evidence of the following:
  - That NISD failed to protect her **on the basis of her sex**
  - That any NISD failures were **intentional**
  - That the frog jumps were district **policy**
  - That a district official had **notice** of her cheer coach's utilization of frog jumps, as a means of punishment
  - That similarly situated males were even treated **differently**

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

2023 WL 2060744 (W.D. Tex. Feb. 16, 2023)

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.
  - 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.

No. SA22CV1051FBHJB, 2023 WL 5535656 (W.D. Tex. Aug. 4, 2023), report and recommendation adopted, No. SA-22-CV-1051-FB, 2023 WL 5540154 (W.D. Tex. Aug. 27, 2023)

Smith v. Comal I.S.D. (cont.)

The District Court GRANTS CISD's Motion to dismiss WITHOUT PREJUDICE Plaintiff's Title IX harassment claim

- In its opinion, the District Court **dismissed** the Plaintiff's claim on the following grounds:
  - While finding that the District **was** "in control" of the harasser and **was** aware of the harasser's previous inappropriate conduct, the harassment was **not based on the victim's sex** and the **Plaintiff has not shown how the purported action denied her equal access to education.**
  - Furthermore, the District Court **did** find for the Plaintiff on grounds that the District **was deliberately indifferent** by allowing the harasser to wander unsupervised around the school, despite her recorded history.
- The dismissal in this matter was "without prejudice" so the Plaintiff could amend her Complaint to establish the missing elements.

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.

No. SA22CV1051FBHJB, 2023 WL 5535656 (W.D. Tex. Aug. 4, 2023), report and recommendation adopted, No. SA-22-CV-1051-FB, 2023 WL 5540154 (W.D. Tex. Aug. 27, 2023)

T.F. v. Greenwood I.S.D. (W.D. 2023)

- 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.

2022 WL 17477597 (W.D. Tex. Dec. 5, 2022)

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

- 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 the 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**

2022 WL 17477597 (W.D. Tex. Dec. 5, 2022)

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

The District Court GRANTS GISD's Motion for Summary Judgment on grounds that GISD was not deliberately indifferent and did not have actual knowledge of the assault.

- 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
  - The burden for a Plaintiff to prove discrimination for student-on-student harassment is higher
  - Even if the Court were to accept all allegations by T.F. as true, T.F. would still **fall short** of the deliberate indifference standard.
- The Court **granted** GISD's Motion for Summary Judgment on the first claim.

2022 WL 17477597 (W.D. Tex. Dec. 5, 2022)

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

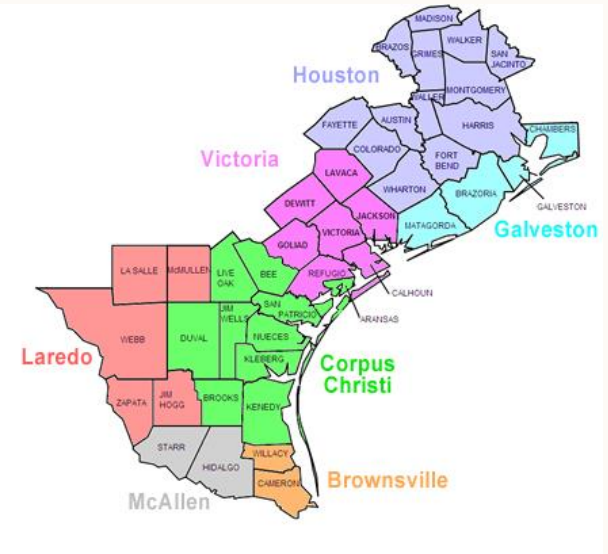
The District Court GRANTS GISD's Motion for Summary Judgment on grounds that GISD did not retaliate against T.F.

- 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.

TAKEAWAY: (1) The burden for a Plaintiff to prove discrimination for student-on-student harassment is *higher* and (2) Title IX *does not* afford remedies for any emotional damages suffered by Plaintiffs.

2022 WL 17477597 (W.D. Tex. Dec. 5, 2022)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS



Loera v. Kingsville I.S.D. (S.D. 2023)

- 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.

No. 2:21-CV-00031, 2023 WL 6130548 (S.D. Tex. Sept. 19, 2023)

Loera v. Kingsville I.S.D. (cont.)

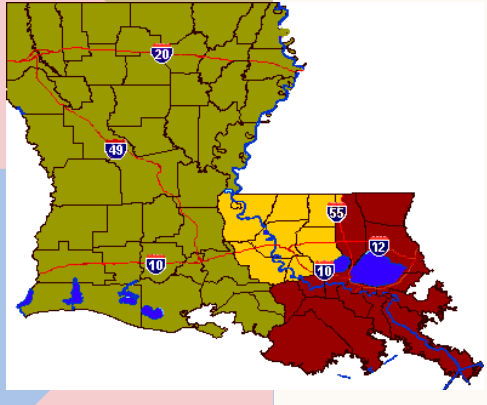
The District Court DENIES KISD's Motion to Dismiss on grounds of actual notice and deliberate indifference

- 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 failed to act, even though it knew that a teacher posed a **"substantial risk"** of harassing students **"in general." There only needs to be an "inference."**
  - Court found board discussions of the teacher's history within the district were sufficient to support that there was an inference the teacher could potentially harass another student.
- **(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 investigated the teacher's history with the district—or even 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.

No. 2:21-CV-00031, 2023 WL 6130548 (S.D. Tex. Sept. 19, 2023)

OTHER NOTABLE DISTRICT COURT DECISIONS WITHIN THE 5TH CIRCUIT



Kirkpatrick v. School Board of Lafayette Parish

United States District Court for the Western District of Louisiana ***[5th Cir. Aff'd 2023]***

- 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.**

2023 WL 2755579 (5th Cir. Apr. 3, 2023)

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

United States District Court for the Western District of Louisiana ***[5th Cir. Aff'd. 2023]***

The District Court GRANTS the Board's Motion for Summary Judgment since the Plaintiff's claims have little factual support.

- 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, **she 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 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 provide 5th Circuit precedent to shield individuals from Title IX liability.**

2023 WL 2755579 (5th Cir. Apr. 3, 2023)

Thompson v. Pass Christian Public School District

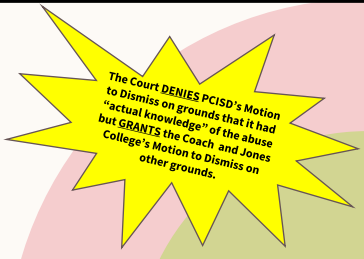
United States District Court for the Southern District of Mississippi

- Thompson alleged that their 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.**
- Thompson claims that Pass Christian P.S.D. should have known that their son was getting bullied. Thompson filed a Title IX claim against the head soccer coach, Pass Christian P.S.D., and Jones College.
  - Defendants filed a **Motion to Dismiss all claims**
- To be actionable under Title IX, harassment must be (1) so "severe, pervasive, and objectively offensive" that it "bars…to an educational opportunity," (2) "actual knowledge" by the school, (3) "deliberately indifference" by the school, and the school was both (4) in control of the harasser and (5) the harassment was based on the victim's sex.
- **Head Soccer Coach Title IX Claim (*Individually*)**
  - The Court held Title IX **does not permit lawsuits against individuals** and, therefore, this claim is **dismissed**.

2023 WL 2577232 (S.D. Miss. Mar. 20, 2023)

Thompson v. Pass Christian Public School District

United States District Court for the Southern District of Mississippi

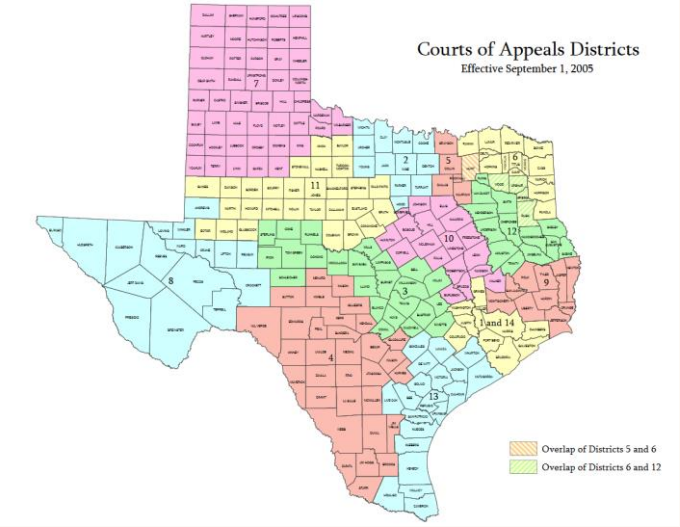


- **Jones College Title IX Claim**
  - While the Court followed 8th Circuit precedent and held that a student **does not need** to be a student of that institution to bring forth a Title IX claim, there was **no support that Jones College had any actual knowledge** of the harassment of Thompson's son. The claim against Jones College was, therefore, **dismissed**.
- **Pass Christian Public School District Title IX Claim**
  - Thompson's son had been harassed on numerous, prior occasions with the school's express knowledge through the GroupMe chain (which the Coach was included in) and on-campus activities yet did "little or nothing about it." **As a result, the Court denied PCPSD's Motion to Dismiss.**

TAKEAWAY: (1) Reaffirms that Title IX does not permit claims against individuals (*Plummer v. Univ. of Houston*), (2) a student *does not* need to be enrolled at a school to bring a Title IX claim against that school, and (3) school facilitated group chats that result in Title IX harassment can promote that a school had "actual knowledge" and/or was "deliberately indifferent" to abuse.

2023 WL 2577232 (S.D. Miss. Mar. 20, 2023)

TEXAS STATE COURT OF APPEALS DECISION(S) (*APPLYING FEDERAL 20 U.S.C.A. § 1681 (WEST), ALSO KNOWN AS "TITLE IX"*)



Garza v. Harlingen Consolidated I.S.D.

Texas Thirteenth District Court of Appeals - Corpus Christi & Edinburg

- On February 22, 2018, the Garzas' minor son, A.G., died and the Garza presented HCISD with their potential claims. Both parties agreed to a "Settlement Agreement and Full and Final Mutual Release."
  - As a part of the Agreement, the Garzas agreed to release HCISD of all claims under Title IX and HCISD agreed to coordinate book donations for suicide/bullying prevention within 60 days of the Agreement date and the Garzas would be allowed to present their son's journey.
- Two years later, the Garzas present a petition for **breach of contract** against HCISD for its failure to comply with the Agreement (by breaching both of its terms)
- HCISD filed its "Plea to the Jurisdiction" and claimed that the breach of contract **did not invoke** Chapter 271's limited statutory waiver of immunity, and, therefore, HCISD **retained** its sovereign immunity. *See TEX. LOC. GOV'T CODE § § 271.151-271.160.* The trial court signed its order, granting HCISD's plea.

2022 WL 16986577 (Tex. App. Nov. 17, 2022)

Garza v. Harlingen Consolidated I.S.D. (Cont.)

The Appellate Court REVERSES the Trial Court's order granting HCISD's Plea to Jurisdiction, on grounds that HCISD cannot claim immunity after signing a Title IX Settlement Agreement

Texas Thirteenth District Court of Appeals - Corpus Christi & Edinburg

- 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** trial court's order.

2022 WL 16986577 (Tex. App. Nov. 17, 2022)

UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS COMPLAINT RESOLUTION LETTERS

OCR RESOLUTION LETTER

Pflugerville ISD

OCR Complaint No. 06-19-1726

- Complaint by Student 1 alleged that District failed to respond equitably to a report that Student 1 was sexually assault by Student 2 in a school restroom.
- Staff members were able to pinpoint the date from attendance record that sexual assault had occurred but did not inform Student 2 of whom had accused him of sexual assault. Student 2 denied allegations.
- After this interview, the District took **no action besides handing the matter to the school police department and an external investigator**
  - District police found **no corroborating evidence** of assault
  - The external investigator was **not qualified** or informed to conduct a Title IX investigation. Did not interview Student 2 and found no evidence.
- The District's Title IX coordinator adopted the investigator's findings
  - Title IX coordinator had another, **primary** position in the District
- Complainant filed Complaint with the Office of Civil Rights on June 21, 2019

OCR RESOLUTION LETTER

Pflugerville ISD

The OCR sent a Resolution Agreement to Pflugerville ISD to address these concerns, to designate a Title IX Coordinator, and to provide proper Title IX training to relevant District staff

OCR Complaint No. 06-19-1726

- 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 Students)
  - 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**

AROUND THE CIRCUITS!

LGBTQIA+ AND TITLE IX

Around the Circuits!

LGBTQIA+ AND TITLE IX

11TH CIRCUIT- AL, FL, GA

Adams v. St. John's County- For purposes of Title IX, "sex" is not meant to include "gender identity," in addition to "biological sex." No discrimination for transgender students prohibited from using restroom opposite to biological sex.

2ND CIRCUIT CT, NY, VT

Soule by Stanescu v. Connecticut- Transgender discrimination is not promoted by Title IX, is generally disallowed by federal law, transgender athletes could compete with cisgender athletes.

4TH CIRCUIT MD, WV, VA, NC,SC

Dodds v. United States Dep't of Educ.- Students may use bathrooms consistent with their gender identity

5TH CIRCUIT

SB 15/TEC 51.980 (enacted 09/01/23)- prohibits public college students from competing in sports opposite to biological sex. *See also* Tex. Educ. Code § 33.0834

Around the Circuits!

LGBTQIA+ AND TITLE IX

6TH CIRCUIT
KY, MI, OH, TN

Bannister v. Knox County- Absent showing that school actually knew about a gender non-conforming student's suicidal journal entry, parents cannot plead a Title IX claim

7TH CIRCUIT
IL, IN, WI

Kluge v. Brownsburg [VACATED AND REMANDED] [CONCUR] - refusing transgender student's request to use their chosen first names does not create Title IX liability.

8TH CIRCUIT
AR, IA, MO, MN, NE, SD

Religious Sisters of Mercy v. Becerra- Applies Title IX "court-led" inclusions of "gender identity" to the religious exception and Title VII

IN THE NEWS!

5TH CIRCUIT HIGHER EDUCATION

- *Overdam v. Texas A&M University*
  - District Court decision is affirmed. Gender bias by university administrators—against male student in connection with disciplinary proceedings—could not be inferred
- *Glass v. Sul Ross State University*
  - Defendant's Motion to Dismiss is granted as to Title IX discrimination claim asserted against Sul Ross and Board of Regents.
- *Doe v. Texas Christian University*
  - Appeal is dismissed (2023), as to 2022 District Court decision that found TCU is enjoined from enforcing a suspension based on gender bias

Non-Primary/Secondary Education Decision

Doe v. William Marsh Rice University

United States Court of Appeals, Fifth Circuit

- 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, Roe contracted an STD and, in February 2018, submitted a formal complaint with the University's Student Judicial Programs (SJP). Roe also unsuccessfully 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 17, Rice issued a decision letter that stated Doe failed to adequately notify Roe, that the action was reckless, and that Doe was to only come on campus for academics. **Doe was stripped of his football scholarship.**

67 F.4th 702 (5th Cir. 2023)

Non-Primary/Secondary Education Decision

Doe v. William Marsh Rice University (cont.)

United States Court of Appeals, Fifth Circuit

- 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.
  - Rice issued a decision denying the appeal
  - 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

67 F.4th 702 (5th Cir. 2023)

Non-Primary/Secondary Education Decision

Doe v. William Marsh Rice University (cont.)

United States Court of Appeals, Fifth Circuit

- The Fifth Circuit agreed that a rational jury could find that Rice's "one-sided" procedures result in an "anti-male bias" through an erroneous outcome, selective enforcement, and archaic assumptions
- (1) Erroneous Outcome Analysis
  - Doe continuously questioned why the school had not asked Roe "how many other students that she had unprotected sex with"
  - The school had—on many occasions—admitted that Roe was not being entirely transparent
  - **Questions of material facts remained**. The record showed:
    - Doe had informed Roe about his history before the sexual encounter
    - Roe could have contracted the STD prior to the two's relationship
    - Rice's student code did not require disclosure of STD condition
    - Roe consistently made misrepresentations during the investigation

67 F.4th 702 (5th Cir. 2023)

Non-Primary/Secondary Education Decision

Doe v. William Marsh Rice University (cont.)

The Appellate Court REVERSES the District granting of summary judgment, on grounds that the record "clearly indicates issues of material fact still remain in dispute."

United States Court of Appeals, Fifth Circuit

- (2) Selective Enforcement
  - Despite Doe telling the school that Roe did exactly what Doe was being accused of, the school took no action towards Roe
  - The school refused to investigate the possibility that Roe had the STD prior to her relationship with Doe. **Therefore, material issues of fact remained**.
- (3) Archaic Assumptions (based on attitudes about gender roles)
  - The school's enforcement against Doe supports an assumption that "a woman is incapable of understanding the risks of sexual intercourse without a male explaining them to her."
  - Per the record, Roe was probably more educated about the risks of STDs than Doe was. **A material issue of fact still stands.**
- **The Appellate Circuit held District Court erred in granting summary judgment.**

67 F.4th 702 (5th Cir. 2023)

April 6th Doe Proposed Rule

- A proposed rule that would **prohibit** institutional policies **that categorically ban transgender students** from participating on sex-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
- Wouldn't govern high school athletic associations but 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-athletes
  - 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) **athletic level** due to the physicality of HS sports.
  - Districts that enforce such a policy at the high school level would need to consider whether the enforced policy **minimizes 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?

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

www.edlaw.com
(800) 488-9045
information@edlaw.com