



# 2023 TEXAS TITLE IX ADMINISTRATOR CONFERENCE

**OCTOBER 18-19, 2023**

**AUSTIN MARRIOTT NORTH**



**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

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# **Title IX Coordinator Certification Course**

Presented by:  
Holly Boyd Wardell and Emma J. Darling

October 18, 2023

**9<sup>TH</sup> ANNUAL TEXAS TITLE IX ADMINISTRATOR CONFERENCE**  
*Title IX Coordinator Certification Course*

**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.  
2023

**TEXAS TITLE IX ADMINISTRATOR CONFERENCE**

**DAY 1**  
8:00 AM – 5:00 PM

**Title IX Coordinator Responsibilities**

Holly Boyd Wardell, Managing Supervisor, Austin Office, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

Emma J. Darling, Senior Associate, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**Closing the Circle: Best Practices for Conducting Investigations**

Dr. Darwyn Spiller, Executive Director of Title IX Compliance and Investigations, Richardson ISD

**Decision Making and Appeals**

Jennifer Archibald Powell, Shareholder, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**OCR Processing Manual and Investigations**

Dr. Vicky Luna Sullivan, Senior Associate, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**Ask the Experts**

**DAY 2**  
8:00 AM – 5:00 PM

**Legal Update - 2022-23 Case Highlights**

Andrea L. Mooney, Shareholder, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**Disability Rights and Title IX**

Colleen Elbe Potts, Attorney, Disability Rights Texas

**SBEC Update**

Daniel Rodriguez, Director of Educator Investigations, Texas Education Agency

Daniel Burstein, Director of Inmate and Records, Texas Education Agency

Tina Farrell, Director of Investigations Unit, Texas Education Agency

**Administrative Leave... A Key Piece to Solving the Puzzle**

Dr. Tyrone Sylvester, Human Resources Director, Green Creek CSD

**Cyber Safety, Personal and Internet Safety, and Cyberbullying**

Sgt. Amy Gonzalez, Investigator, Office of the Texas Attorney General

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

Joe Parks, Attorney, The Law Office of Joseph L. Parks, PLLC

**Transgender Students and Staff Issues**

Emma J. Darling, Senior Associate, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**Transgender Athletics**

Tiger Hamner, Law Office of Tiger Hamner

Holly Boyd Wardell, Managing Supervisor, Austin Office, Eichelbaum Wardell Hansen Powell & Muñoz, P.C.

**FOUNDATIONAL PRINCIPLES**

**TITLE IX COORDINATOR RESPONSIBILITIES**

**COMMON SCENARIOS**

**FOUNDATIONAL PRINCIPLES AND THE CURRENT REGULATIONS**

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

**Title IX: 1972**

**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

Source: Report Card on Gender Equity, National Coalition for Women and Girls in Education, 1997.

## 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.

Source: Report Card on Gender Equity, National Coalition for Women and Girls in Education, 1997

## 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

- 1973: Battle of the Sexes - Billie Jean King defeated Bobby Riggs in an exhibition tennis match
- 1975: First Title IX regulations adopted
- 1976: NCAA challenged the legality of Title IX regarding athletics in a lawsuit; was dismissed two years later
- 1977: Three female students at Yale, two graduates, and a male faculty member became the first to sue over sexual harassment under Title IX (Alexander v. Yale). The cause of action failed on appeal.
- 1979: Three-prong test for compliance in athletics established.
- 1979: Students can sue for sex discrimination (Cannon v. Univ. of Chicago)
- 1980: Oversight for compliance was given to the Office for Civil Rights (OCR) in the U.S. Department of Education
- 1982: Employees could sue for sex discrimination
- 1992: Students can sue for money damages for discrimination by employees (Franklin v. Gwinnett County Public Schools)
- 1999: Students can sue for sexual harassment by students
- 1997: OCR issued "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" containing the first explicit reference to "gay or lesbian students" as being covered by federal prohibitions against sexual harassment

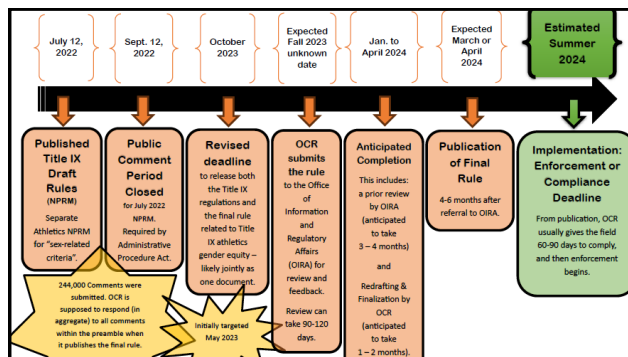


## Title IX: 1972

- 1998: Student could sue for teacher's sexual harassment only if the school had "actual notice" and acted with "deliberate indifference" (Gebser v. Lago Vista ISD)
- 1999: Title IX covers student-to-student harassment; damages available only if school had actual notice and acted with deliberate indifference (Davis v. Monroe County)
- 2001: OCR issued revised guidance on sexual harassment - Gebser and Davis did not apply to OCR enforcement actions
- 2005: Coaches and teachers have a right of action under Title IX for retaliation (Jackson v. Birmingham Bd of Educ.)
- 2006: OCR issued guidance allowing single-sex programs/schools
- 2014: Obama Administration OCR issued DCL saying transgender students should be allowed to use the bathroom or locker room that matches their gender identity
- 2018: Trump Administration OCR rescinded the 2014 Obama Guidance
- 2020: Second version of Title IX Regulations adopted - amended to address sexual harassment investigations
- 2021: Biden Administration - Exec. Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- 2022: Proposed Title IX Regulations Published



## Where are those new Title IX regulations?



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What is your position?

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Rescinded: This document has been formally rescinded by the Department and remains available on the web for historical purposes only.

### Title IX Coordinators

- Monitor outcomes
- Identify and address patterns
- Assess campus climate
- Educate school community on how to file complaint
- Promptly and appropriately resolve complaints
- Provide technical assistance on school policies
- Work with law enforcement



RESPONSIBILITIES AND AUTHORITY OF T9 COORDINATOR

### 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

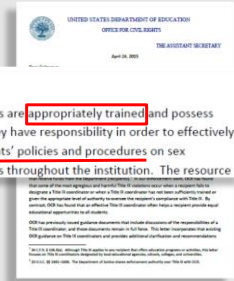


RESPONSIBILITIES AND AUTHORITY OF T9 COORDINATOR

### Title IX Coordinators

#### B. Training of Title IX Coordinators

Recipients must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out those responsibilities, including the recipients' policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the institution. The resource



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
- EHA (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

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

① Start presenting to display the poll results on this slide.

## 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.



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## Title IX Coordinator Responsibilities

- Ensure policies reflect current information about T9 Coordinator
- Ensure website and publications contain proper notices
- For all reports of sexual harassment, contact alleged victims (complainant) to discuss the availability of supportive measures
- Consider a complainant's wishes re supportive measures
- Inform complainants of the right to file formal complaint and right to supportive measures with or without a formal complaint
- Decide whether to file a formal complaint when the complainant does not

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

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## 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
- Post all training materials to district's website
- Ensure proper record keeping

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

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## All of these individuals must be informed of the Title IX Coordinators...



Name or Title

Applicants for admission and employment



Office address

Students and parents or legal guardians of elementary and secondary students



E-mail address

Employees



Telephone number

All unions or professional organizations holding collective bargaining or professional agreements with the recipient

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## 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.

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## 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).

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Most of my district's complaints are received

Start presenting to display the poll results on this slide.

## 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: 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: 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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Standard TASS Policy-A

### Reporting Procedures

#### Student Report

Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, school counselor, principal, other District employee, or the appropriate District official listed in this policy.

#### Employee Report

Any District employee who suspects or receives direct or indirect notice that a student or group of students has or may have experienced prohibited conduct shall immediately notify the appropriate District official listed in this policy and take any other steps required by this policy.

Standard TASB Policy-A	
<b>Definition of District Officials</b>	For the purposes of this policy, District officials are the Title IX coordinator, the ADA/Section 504 coordinator, and the Superintendent.
<b>Title IX Coordinator</b>	Reports of discrimination based on sex, including sexual harassment, gender-based harassment, or dating violence, may be directed to the designated Title IX coordinator for students. [See FFH(EXHIBIT)]
<b>ADA / Section 504 Coordinator</b>	Reports of discrimination based on disability may be directed to the designated ADA/Section 504 coordinator for students. [See FFH(EXHIBIT)]
<b>Superintendent</b>	The Superintendent shall serve as coordinator for purposes of District compliance with all other nondiscrimination laws.

Model EWHPM Policy/Regulation	
<b>Reporting Procedures</b>	Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, school counselor, principal, assistant principal, or the Title IX Coordinator/designee.
<b>Student Report</b>	
<b>Employee Report</b>	Any District employee who suspects or receives notice that a student or group of students has or may have experienced prohibited conduct shall promptly notify a campus administrator or the Title IX Coordinator.
<b>Definition of District Officials</b>	For the purposes of this regulation, District officials are the Title IX Coordinator/designee and campus administrators.
<b>Title IX Coordinator</b>	Reports of discrimination based on sex, including sexual harassment or gender-based harassment, may be directed to the designated Title IX Coordinator for students. [See FFH(EXHIBIT)]

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**TITLE IX GRIEVANCE PROCESS**  
For Reports, Complaints, Investigations, Appeals

*(District Report 14, 2022)*

<p><b>Final Assessment:</b> Conduct based on one that satisfies one or more of the following:</p> <ul style="list-style-type: none"> <li>Is an employee constituting an act, hostile, or service of the school on an individual's participation in sexual conduct.</li> <li>Is a student conduct that intentionally or recklessly causes gender harassment, sexual harassment, or dating violence to the extent that it effectively denies an individual equal access to a district educational activity.</li> <li>Is sexual harassment, dating violence, domestic violence, or stalking.</li> </ul> <p>Unsubstantiated individual who is alleged to be the perpetrator of sexual harassment, gender-based harassment, or dating violence, or the Title IX Coordinator or designee. Unsubstantiated individual who is alleged to be the perpetrator of sexual harassment, gender-based harassment, or dating violence, or the Title IX Coordinator or designee. Unsubstantiated individual who is alleged to be the perpetrator of sexual harassment, gender-based harassment, or dating violence, or the Title IX Coordinator or designee.</p> <p>Reporting: An employee must <b>immediately</b> report all instances of suspected sexual harassment to a campus administrator or the Title IX Coordinator or a Title IX Coordinator designee. The employee must report alleged sexual harassment and result in disciplinary action to be and possibly including termination.</p> <p>A student may report alleged sexual harassment to a teacher, school counselor, administrator, or other appropriate school personnel. These reports must immediately report alleged sexual harassment to a campus administrator.</p> <p><b>Child Abuse Reporting:</b> If the incident could be <b>child abuse</b>, the employee must report to CPS or the equivalent within 48 hours of learning of incident.</p> <p>Ask the witness reports to administrator may ask the individual to provide a written statement. For the reporter and required to get the report in writing. This District may require, but not require, a written report. If a report is made orally, an administrator will put the report in written form and provide to the Title IX Coordinator.</p>	<p><b>Sexual Harassment</b></p> <p><b>Final Definition of Sexual Harassment</b> 34 C.F.R. §106.30</p> <p><b>RESPONSIBILITIES</b> All employees (FFH(CSA)) (FFH(CSA))</p> <p>All employees must report suspected sexual harassment, but only if reported to the Title IX Coordinator or designee.</p> <p>All employees (FFH(CSA))</p> <p>All employees (FFH(CSA))</p>
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- Use the checklist.
- Red text = suggested procedures

## Dissemination of policy

- District does **not discriminate on the basis of sex** in the education program of 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

Applicants for admission and employment	Students and parents or legal guardians of elementary and secondary students	Employees	All unions or professional organizations holding collective bargaining or professional agreements with the recipient
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## Publications

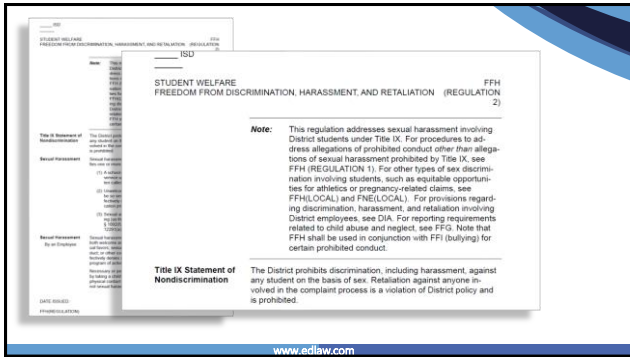
Must promptly display Title IX Coordinator's contact information:

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

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

- How to report or file a complaint of sex discrimination;
- How to report or file a formal complaint of sexual harassment; and
- 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 any person 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.**

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**My district has trouble finding people to serve in all 3-4 roles**

Start presenting to display the poll results on this slide.

### 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 promptly 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.

34 C.F.R. § 106.44(a).

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- 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.

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**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.

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**SCENARIO: Verbal reports**

	<p><b>Ask for written report:</b> An administrator may ask the individual to provide a written statement, but the reporter is not required to put the report in writing. This District may request, but not require, a written report. If a report is made orally, an administrator will put the report in written form and provide it to the Title IX Coordinator.</p>	FFH(LOCAL)
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My district has handled an anonymous complaint before

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**CONTACTING THE COMPLAINANT**

Regulations do not dictate the medium of contact.

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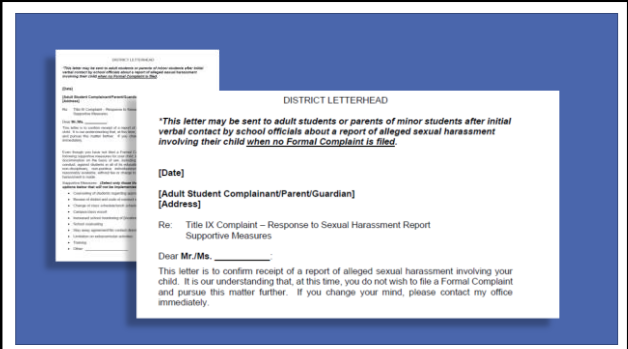


## CONTACTING THE COMPLAINANT

**K-12 SETTING**

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

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DISTRICT LETTERHEAD

*"This letter may be sent to adult students or parents of minor students after initial verbal contact by school officials about a report of alleged sexual harassment involving their child when no Formal Complaint is filed."*

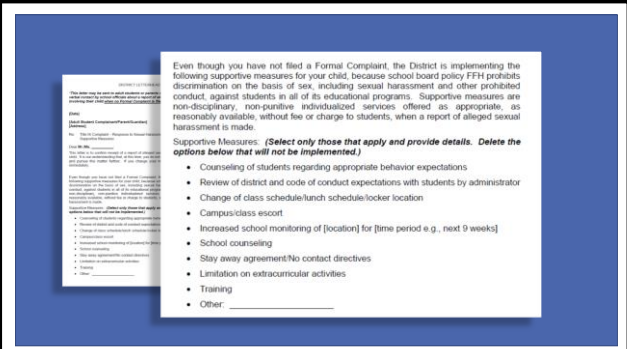
[Date]

[Adult Student Complainant/Parent/Guardian]  
[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report  
Supportive Measures

Dear Mr./Ms. \_\_\_\_\_:

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately.



Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FFH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited conduct, against students in all of its educational programs. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: *(Select only those that apply and provide details. Delete the options below that will not be implemented.)*


- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: \_\_\_\_\_



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

34 C.F.R. § 106.30.

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## SUPPORTIVE MEASURES

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My most commonly offered supportive measure is...

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## 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

34 C.F.R. § 106.30

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## 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

34 C.F.R. § 106.30

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- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling - # sessions
- No contact/no communication agreements
- No contact/communication directives
- Limitation on extracurricular activities
- Social Skills Training
- Staff Training
- Other: \_\_\_\_\_

Add the term of supportive measures (e.g., pending resolution of the grievance process; four weeks; end of semester; end of the school year).

## Supportive Measures means...

The recipient must maintain as confidential any supportive measures provided to the complainant or respondent—to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

34 C.F.R. § 106.30

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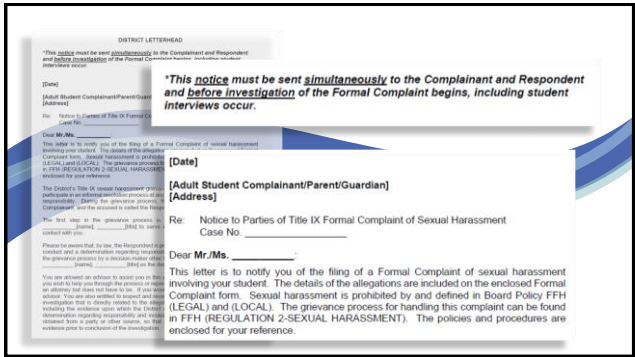
Keep documentation of supportive measures (e.g., no contact/communication agreements, log of counseling sessions, copies of social skills stories/trainings, summary of schedule changes, summary of campus escorts).

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## 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.

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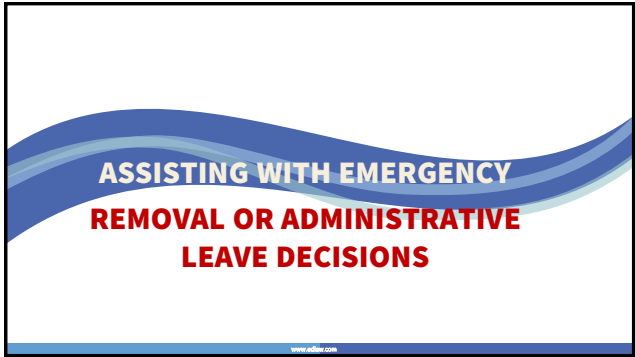


**SENT BY TITLE IX COORDINATOR or DESIGNEE**

**Investigation of Formal Complaint – Appoint 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;
- Identities 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**.



**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.

- Title IX Coordinator
- Campus Administrator
- Threat Assessment
- Personnel

**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.”

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## 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



**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.

• Title IX Coordinator  
• Campus Administrator  
• Threat Assessment  
• Personnel

## 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: 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: 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:

What do about:

- John
- Travis
- Taylor

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## 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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## DETERMINING WHETHER TO DISMISS A FORMAL COMPLAINT

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Title IX Discrimination Dismissal Form  
The IX of the Education Amendments of 1972 (20 U.S.C. § 1051c) is a federal law that provides procedures for the fair and equitable resolution of sexual harassment and sexual violence involving students. A formal complaint is a written statement filed by a complainant or a complainant's representative, or a written statement received by the district, that alleges sexual harassment or sexual violence involving students. A formal complaint may be dismissed if the complainant or the complainant's representative fails to initiate the complaint or any part of the investigation within the time period specified in the district or specific calculation or if the district has gathered evidence sufficient to reach a determination.

### COMPLAINANT

Complainant

Email

Complainant

Response

Complainant

Email

Response

Complainant

Email

Response

Complainant

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Response

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Response

**Dismissal Basis:** (Check all that apply)  
 Does not constitute sexual harassment  Did not occur in district program or activity  
 Did not occur in the U.S.  Dismissal requested by Complainant  
 Respondent no longer enrolled in district  
 Circumstances prevent the district from gathering evidence sufficient to reach a determination

**Reasoning for Dismissal:** Describe the reasoning behind the dismissal of this complaint.

Name

Title IX Coordinator/Designee

Date

Once signed, a copy of this dismissal form will be placed in the file for this complaint and sent to all parties involved.

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My district has dismissed complaints the most due to:

Start presenting to display the poll results on this slide.

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

34 C.F.R. § 106.45(b)(7)(iv).

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## 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

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## Remedies - Purpose

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

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## 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

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## Remedies for Respondents

- 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

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Some remedies my district has implemented include:

Start presenting to display the poll results on this slide.

*“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.”*

p. 940 = Commentary

## Selection of Remedies Not Appealable

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## Selection of Remedies Not Appealable

### Bases for Appeal of Decisions

- Procedural irregularity
- Bias or conflict of interest
- That affected the outcome

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### 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**

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## REMEDIES

- 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)



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## POSTING TRAINING MATERIALS

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### 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**

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

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## 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.**

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## 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**

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My district has had trouble displaying our training materials

Start presenting to display the poll results on this slide.

## RECORD KEEPING

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**DISTRICT LETTERHEAD**

Title IX Record Keeping Cover Sheet

All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

Date of Initial Complaint: \_\_\_\_\_

Date of Final Decision: \_\_\_\_\_

**DISTRICT LETTERHEAD**

Title IX Record Keeping Cover Sheet

\*All records related to a report of sexual harassment must be kept for a period of seven (7) years from the date of conclusion of the grievance process.

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**DISTRICT LETTERHEAD**

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Date of Initial Complaint: \_\_\_\_\_

Date of Final Decision: \_\_\_\_\_

- Initial Intake Report
- Response to Sexual Harassment Report – Supportive Measures
- Formal Complaint, if any
- Notice to Parties
- Emergency Removal, if applicable
- Administrative Leave – Personnel, if applicable
- Informal Resolution Paperwork
- Notices to Parties of Interviews
- Evidence Submitted to Parties, including witness statements, photographs, electronic communications
- Draft Investigative Report and Notice of Opportunity to Submit Response Sent to Parties
- Final Investigation Report
- Notice of Opportunity to Submit Questions
- Questions Submitted and Answers
- Determination of Responsibility
- Documentation of Supportive and Other Measures Imposed After Determination of Responsibility
- Appeals Documentation, if any
- Decision on Appeal

slido



## Audience Q&A Session

① Start presenting to display the audience questions on this slide.

*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.*



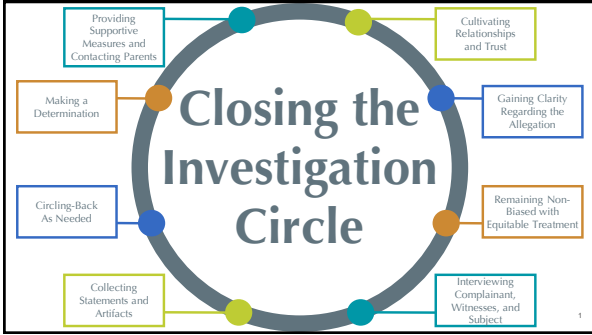
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# **Closing the Circle: Best Practices for Conducting Investigations**

Presented by:  
Dr. Darwin Spiller, Richardson ISD

October 18, 2023



**INCIDENT - INVESTIGATION FORM**  
FOR ALL STUDENT COMPLAINTS AND REPORTS FROM OTHERS

**Year:** \_\_\_\_\_ **For the student involved in and reported from (check):**

**WHO:** Name and ID number of student involved \_\_\_\_\_  
**WHO:** Who brought the allegation forward? \_\_\_\_\_  
**WHAT:** Allegation/Complaint - specify in present \_\_\_\_\_  
**When:** Date of allegation/complaint \_\_\_\_\_  
 When was school personnel notified? \_\_\_\_\_  
**Where:** On or off campus - specify in present \_\_\_\_\_  
**What occurred:** (If given account) \_\_\_\_\_  
 How was the situation resolved? \_\_\_\_\_  
**Witness Statements Collected:** \_\_\_\_\_  
 Date/Time Reported \_\_\_\_\_  
 All Witnesses \_\_\_\_\_  
 Discipline Manager \_\_\_\_\_  
 Name: \_\_\_\_\_ Address: \_\_\_\_\_ Phone: \_\_\_\_\_  
 Area Superintendent assigned: \_\_\_\_\_

**SCENARIO**

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 justice, judge, or magistrate).

## STANDARDS FOR RECUSAL OF JUDGES

*Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.*

*Rippo v. Baker, 137 S.Ct. 905 (2017).*

## 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 10 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.

## THE QUESTIONS

- For example, where a Complainant refuses 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

## STANDARDS OF 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.

## 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

## 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.

## EVIDENCE: CREDIBILITY

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

## 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.

## 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.

## FERPA – REMEDIES TO COMPLAINANT

The final decision must state whether remedies will be provided to the Complainant but not what remedies will be provided. Thus, the decision may note in the written determination only that a Complainant will receive remedies but should not note in the written determination that the district, for example, will change the Complainant's housing arrangements as part of a remedy. A Respondent should know whether the district will provide remedies to the Complainant because the Respondent should be aware that the Respondent's actions denied the Complainant equal access to the district's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility because due process principles require the district to provide a basis for its determination.

## 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.

## 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

## APPEALS

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



**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

[www.edlaw.com](http://www.edlaw.com)

(800) 488-9045

[information@edlaw.com](mailto:information@edlaw.com)

*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.*



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

Presented by:  
Dr. Vicky L. Sullivan

October 18, 2023

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

Dr. Vicky L. Sullivan  
Senior Associate Attorney



EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.

TITLE IX TEXAS  
Administrator Conference

## Have you ever wondered...

- 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?

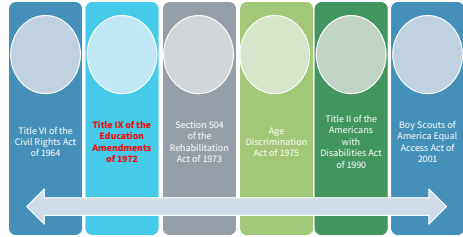


## AGENDA

- 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

## OCR SUBJECT MATTER JURISDICTION

PURSUANT TO THE FOLLOWING STATUTORY AND REGULATORY AUTHORITIES



Department of  
education office of  
civil rights  
Case Processing  
manual (CPM)

July 18, 2022

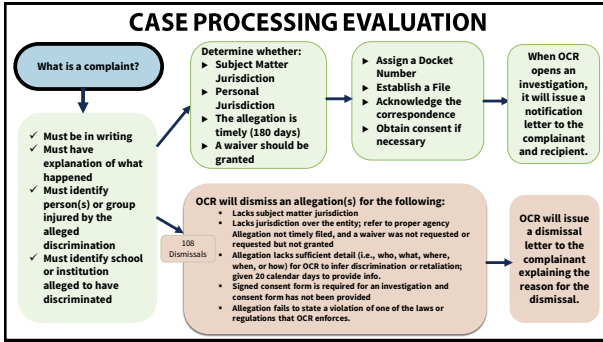
U.S. DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS



CASE PROCESSING MANUAL  
(CPM)

EFFECTIVE DATE: JULY 18, 2022

## DOE, OFFICE OF CIVIL RIGHTS (OCR) COMPLAINT FORM



## OPENING ALL INVESTIGATION

- Letters of Notification to the complainant and recipient:
  - OCR's jurisdiction with applicable statutory and regulatory citations.
  - The allegation(s) OCR will investigate.
  - A statement that OCR is a neutral factfinder.
  - Information about OCR's mediation process.
  - Contact information for the OCR staff person who will serve as the primary contact during the investigation and resolution of the allegation(s).
- Copy of OCR Complaint Processing Procedures

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

110 Dismissals

- 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 enforcement agency or through a recipient's internal grievance procedures, including due process proceedings; and
  - 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).

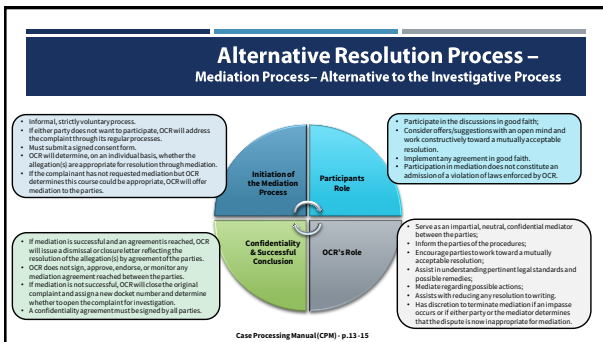
Case Processing Manual (CPM) - p.11-13

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

110 Dismissals

- 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 is necessary for the investigation.
  - Inability to contact the complainant in order to obtain information necessary for the investigation.
  - OCR has recently addressed or is currently addressing the same allegation(s) involving the same recipient in a compliance review, directed investigation or an OCR complaint.
  - The complainant 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.

Case Processing Manual (CPM) - p.11-13



## CASE PLANNING, INVESTIGATION, AND RESOLUTION

Case Processing Manual (CPM) - p.16-21



## 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 are necessary to resolve the case AND the means and methods OCR will employ to obtain the relevant data and/or information); and
  - The resolution.

Case Processing Manual (CPM) - p. 16.

## 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
    - Climate surveys
    - Other self-assessment tools

Case Processing Manual (CPM) - p. 27-31.

## Investigative Determinations

### Insufficient Evidence

- Preponderance of Evidence (POE) does not support a conclusion the recipient failed to comply with applicable statutes or regulations.
- OCR will issue a letter of findings explaining the reasons for its decision.

### Non-Compliance

- POE supports a conclusion the recipient failed to comply with the applicable statutes or regulations. OCR will issue a letter of findings explaining the reasons for its decision.
- The agreement must include action steps, that when implemented, will remedy both the individual discrimination at issue as well as any systemic discrimination.

### Mixed Determination

- A 'mixed determination' is appropriate for complaints with multiple allegations where the allegations will be resolved in different ways.

## RESOLUTION AGREEMENTS SECTION 302

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 is 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).

Case Processing Manual (CPM) - p. 16 - 18.

## RESOLUTION AGREEMENTS

### SECTION 304: CONTENTS OF RESOLUTION AGREEMENTS

The allegation(s) will be considered resolved and the recipient deemed compliant when the recipient complies with all of the terms of the resolution agreement and is in compliance with the statute(s) and regulation(s) that were at issue in the case.

- Resolution Agreements must include:
  - Specific action(s) the recipient will take to resolve the compliance concerns and/or violations;
  - Dates for implementing each action(s);
  - Dates for submission of reports and documentation;
  - Where appropriate, timeframes requiring the recipient obtain OCR's review and approval of submission of documents or other information;
- AND ... the following statements:
  - By signing the resolution agreement, the recipient agrees to provide data and other information as a timely manner in accordance with the reporting requirements of the resolution agreement. During the monitoring of the resolution agreement, if necessary, OCR may visit the recipient, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the recipient has fulfilled the terms of the resolution agreement.
  - The recipient understands that OCR will assess the monitoring of the agreement and each time as OCR determines that the recipient is in compliance with the terms of the agreement and the statute(s) and regulation(s) at issue in the case, and
  - The recipient understands that OCR may initiate administrative enforcement proceedings or refer the case to the Department of Justice (DOJ) for judicial proceedings in the event of breach. Before initiating such proceedings, OCR will give the recipient written notice of the allegations and 60 calendar days to cure the breach.

Case Processing Manual (CPM) - p. 20 - 21.

## 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 some 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 of its determination.

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)

Case Processing Manual (CPM) - p. 23-24

# Title IX: Texas Complaint Data

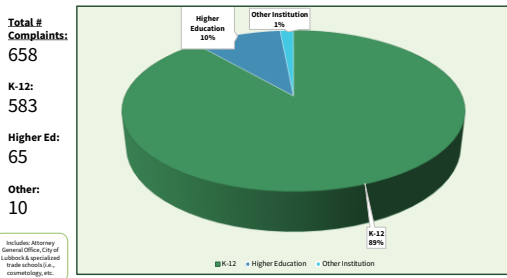
Data received from OCR Dallas Office pursuant to a Freedom of Information Act (FOIA) request submitted by our Firm requesting Title IX Texas data from January 1, 2020 - April 6, 2023.



EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.

## Title IX Texas Complaints Received by Level/Institution

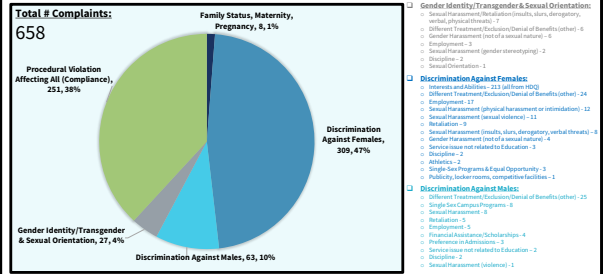
January 1, 2020 - April 6, 2023



Includes Attorney General Office, City of Lubbock & specialized trade schools (e.g., cosmetology, etc.)

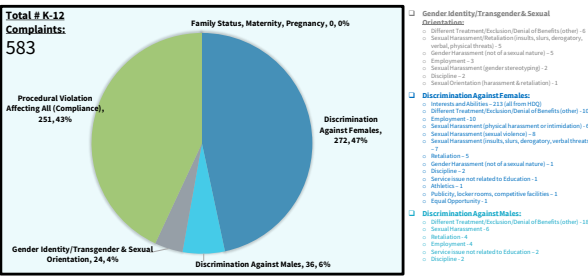
## Title IX Complaint Issue Description

January 1, 2021 - April 6, 2023



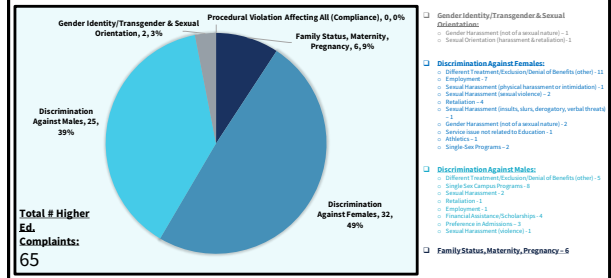
## K-12 Complaint Issue Description

January 1, 2021 - April 6, 2023



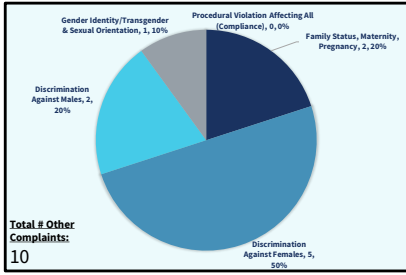
## Higher Ed. Complaint Issue Description

January 1, 2021 - April 6, 2023



## Other Institution Complaint Issue Description

January 1, 2021 – April 6, 2023

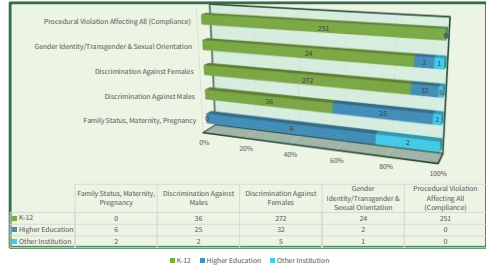


- Orientation:
  - Sexual Harassment/Retaliation (Insults, slurs, derogatory, verbal, physical threats) - 1
- Discrimination Against Females:
  - Differential Treatment/Exclusion/Oversight of Benefits (Other) - 3
  - Sexual Harassment (Sexual-Related) - 1
  - Service Issue not related to Education - 1
- Discrimination Against Males:
  - Differential Treatment/Exclusion/Oversight of Benefits (Other) - 2
- Family Status, Maternity, Pregnancy - 2

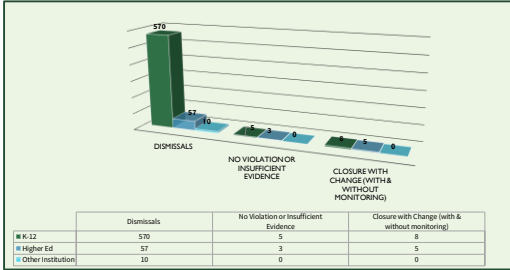
Total # Other Complaints: 10

## Complaint Issue Description by Level

January 1, 2021 – April 6, 2023

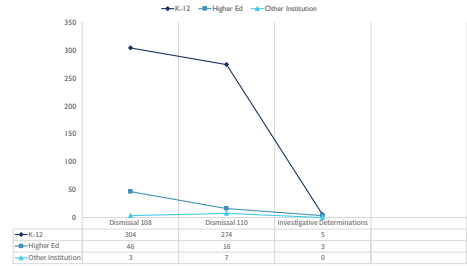


## Title IX Complaint Resolution Description



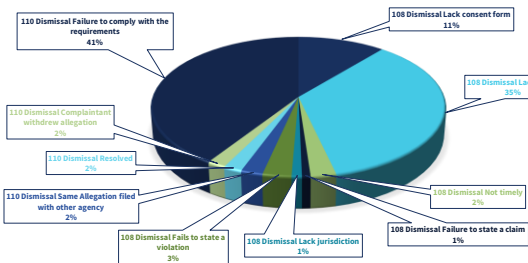
## Texas Title IX DISMISSALS

January 1, 2021 – April 6, 2023



## Texas Title IX DISMISSALS under 108 & 110

January 1, 2021 – April 6, 2023



## Office of Civil Rights Recent Resolution Search

<https://ocrcas.ed.gov/ocr-search>



## Henderson Independent School District in Texas

### Sexual Violence

**OCR resolved a complaint alleging discrimination on the basis of sex and retaliation**

## HENDERSON ISD IN TEXAS LETTER TO THE DISTRICT

- OCR Evaluation letter informed HSD that it was investigating the following issues:
  - Whether HSD discriminated against the student on the basis of sex by failing to take prompt and effective action to address a sexual assault conduct and subsequent harassing conduct, which was sufficient to constitute a hostile environment;
  - Whether HSD retaliated against student based on sex when, after the student reported the was sexually assaulted, she was placed at DAEF, in violation of Title IX.
- OCR's Findings of Fact:
  - Complainant alleged that a female student was sexually assaulted by a male student.
  - Female informed HSD staff of the alleged sexual assault occurring on the same day; staff did not take any action and failed to report it.
  - After being absent, female student returned to school and again reported it; she was taken to the office where administration, police, and the Title IX Coordinator were alerted.
  - Coordinator responded by asking if the police had been called.
  - No indication that an independent investigation had been conducted, aside from the police investigation.
  - Parent of female student met with Principal who notified that student would be placed at the DAEF with the student's alleged attacker.
  - OCR determined noncompliance with regard to issues investigated.

## HENDERSON ISD IN TEXAS LETTER TO THE DISTRICT

- "While police investigations or reports may be useful in terms of fact gathering, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve HSD of its duty to respond promptly and effectively."
- "Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."
- "In this case, there is sufficient evidence that HSD failed to take immediate and effective corrective action responsive to the harassment."
- "OCR's investigation demonstrated the student participated in a protected activity under Title IX, provided HSD with notice of same, ... an adverse action occurred when student [was placed at DAEF]."
- The HSD ... failed to conduct an independent investigation using preponderance of evidence standard as required under Title IX." Rather, the evidence shows HSD relied on the "XXX."
- "Therefore, OCR has determined that there is sufficient evidence to support a conclusion of noncompliance with Title IX and its implementing regulation" regarding both Issue 1 (discrimination) and Issue 2 (retaliation).

## HENDERSON ISD IN TEXAS RESOLUTION AGREEMENT

Item	Response	Response	Response	Response	Response
1	...	...	...	...	...
2	...	...	...	...	...
3	...	...	...	...	...
4	...	...	...	...	...
5	...	...	...	...	...
6	...	...	...	...	...

## HENDERSON ISD IN TEXAS RESOLUTION AGREEMENT

- Action Item 1:** By June 30, 2012, the HSD will review and revise its current policies/procedures to ensure that all complaints received, whether verbal or written, alleging discrimination on the basis of sex, including allegations of harassment on the basis of sex or sexual violence, are appropriately investigated and responded to as required by Title IX and its implementing regulations.
- Action Item 2:** Within 45 calendar days of written notification from OCR that the revised policies/procedures developed in accordance with Action Item 1 are consistent with Title IX requirements, the HSD will notify all HSD students and parents, via the HSD Student Handbook and posting on the HSD website, of the revised policies/procedures referenced in Action Item 1.
- Action Item 3:** By September 1, 2012, the HSD will ensure that the Title IX coordinator is apprised, immediately, of every student complaint or notification of any complaint of sexual harassment, including sexual assault that is received by any HSD employee. The Title IX coordinator shall document the notification and any action taken.

## HENDERSON ISD IN TEXAS RESOLUTION AGREEMENT

- Action Item 4:** By November 1, 2012, and annually thereafter for a period of 2 years, the HSD 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.
- Action Item 5:** By September 1, 2012, the HSD will designate one counselor at each school within the HSD to be "on call" to assist victims of sexual harassment or violence whenever needed during school hours.
- Action Item 6:** By November 1, 2012, the HSD 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.

## HENDERSON ISD IN TEXAS RESOLUTION AGREEMENT

### 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.

## HENDERSON ISD IN TEXAS RESOLUTION AGREEMENT

### 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) representative HISD administrators, faculty members and parents/guardians of HISD students; (3) representatives from any community-based organizations which provide services to the HISD related to sexual harassment/violence prevention; and (4) other individuals the HISD determines 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.

## WOULD HIRING AN OUTSIDE INVESTIGATOR RESOLVE INVESTIGATIVE CONCERNS?

**"NOT SO FAST  
my friends..."**

### Pflugerville Independent School District in Texas

#### Sexual Assault

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



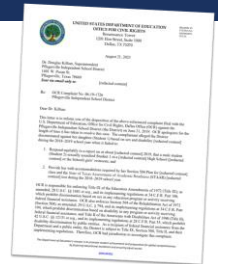
## PFLUGERVILLE ISD IN TEXAS LETTER TO THE DISTRICT

- Complainant alleged the District discriminated against her daughter based on sex and disability during the 2018-2019 school year when it failed to:
  - Respond equitably to a report that a male student sexually assaulted her in the girls' restroom at school.
  - Provide her with accommodations required by her Section 504 plan for class and STAAR test.



## PFLUGERVILLE ISD IN TEXAS LETTER TO THE DISTRICT

- 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 report, AP1 and AP2 spoke to the male student of 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 was not supposed to let him know she was investigating an alleged sexual assault.
  - Male student denied having sex with the female student; said the female student asked him to go into the restroom with her and they were playfully pushing and shoving each other.
  - SROs and Detective interviewed the male student and two other student witnesses, including a student with whom the female student had discussed the incident immediately after it reportedly occurred.
  - At the request of PISD PD, district administration took no further action while the PISD PD conducted its law enforcement investigation.



## PFLUGERVILLE ISD IN TEXAS LETTER TO THE DISTRICT

### Findings of Fact:

- Upon completion of the law enforcement investigation, the Superintendent hired an outside investigator (OI) to examine the matter because the Complainant reportedly did not trust the District.
- The OI reported she was hired to "review the administrative procedures followed in an alleged sexual incident," not to conduct a Title IX investigation.
  - The OI had attended workshops/conferences related to Title IX but received no training from the District. No one had oversight over her activities.
- 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.

## PFLUGERVILLE ISD IN TEXAS LETTER TO THE DISTRICT

- "The OI informed OCR that she believed the female's credibility went down based upon her responses to questions about whether she tried to scream during the alleged incident and her physical demeanor during the interview."**
- OI did not believe the assault happened.
- OI elected not to interview the male student.
- OI relayed that interviewing additional witnesses would have dragged out the investigation ... they would not interview the male student because "it was horrible."
- OI did not interview the two student witnesses either.
- OI did not examine any video surveillance because the video had been taped over.
- OI stated the video would have only shown the hallway outside and not inside the restroom.
- Ultimately, the OI determined that:
  - The District appropriately and timely responded to the report of the alleged incident;
  - Once the PISD PD took over the case, District administration did not interfere with the law enforcement investigation;
  - OI did not make a determination as to whether the incident occurred as alleged or whether the female student was subjected to a hostile environment.
  - OI was hired to conduct a review of administrative procedures, rather than to conduct a Title IX investigation.
  - OI had not received training from the District to conduct Title IX investigations.

## PFLUGERVILLE ISD IN TEXAS LETTER TO THE DISTRICT

- District's Title IX Coordinator adopted the OI's findings and issued a written notice of the outcome to only the complainant.
- Coordinator determined that the District could not substantiate that the sexual assault occurred.
  - Offered the student an opportunity to transfer to another school or a plan to minimize contact between her and the male student if she remained at the high school. Counseling and credit recovery were also offered.
- Student did not return to the District based upon her lost confidence in the District.
- 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.



## PFLUGERVILLE ISD IN TEXAS RESOLUTION AGREEMENT

- 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.



## PFLUGERVILLE ISD IN TEXAS RESOLUTION AGREEMENT

<p><b>Page 11 - Student A</b></p> <p>11. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>12. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>13. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>14. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>15. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>	<p><b>Page 12 - Student A</b></p> <p>16. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>17. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>18. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>19. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>20. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>	<p><b>Page 13 - Student A</b></p> <p>21. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>22. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>23. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>24. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>25. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>	<p><b>Page 14 - Student A</b></p> <p>26. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>27. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>28. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>29. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>30. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>	<p><b>Page 15 - Student A</b></p> <p>31. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>32. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>33. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>34. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>35. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>	<p><b>Page 16 - Student A</b></p> <p>36. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>37. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>38. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>39. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p> <p>40. The District will provide a copy of this Resolution Agreement to the complainant and the respondent.</p>
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## PFLUGERVILLE ISD IN TEXAS RESOLUTION AGREEMENT

- Action Item 1: Title IX Coordinator** - By September 15, 2023, the District will identify one employee as the Title IX Coordinator who is designated as having ultimate coordination and oversight responsibility of all Title IX complaints received by the District to ensure consistent practices and standards in handling complaints.
- Action Item 2: Conduct Title IX Training for Relevant District Staff** - 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 persons designed by the District (including third-party contractors, as applicable) to receive, process, investigate, and/or resolve complaints of sex discrimination, including sexual harassment.
- Action Item 3: Title IX Complaint Review** - For the 2021-2022 and 2022-2023 school years, 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 (+ 60/90 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.

## CONDUCTING INVESTIGATIONS

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



- Initiate a Fact-Finding Process.
- Determine the: What? Who? Where? When? and Why? – 5 Key question!
- ✓ **Seek & Secure all relevant witnesses.**
  - Acquire verbal/written detailed accounts.
  - Obtain written statements and/or document your interviews.
  - Examine video surveillance, if available; document a play-by-play of relevant footage; archive video.
- ✓ **Confer with Professionals and/or review relevant Expert Witness statements or reports.**
  - 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.
- ✓ **Develop a Determination/Finding only once you have completed the investigation.**
  - Using "preponderance of evidence" standard.
  - Apply Educational guidelines (District's SCC and TEC).
- ✓ **Preserve a Complete Investigative File.**
  - All-inclusive, record-keeping and documentation is vital.
  - Summarize your determination/finding outlining all key details & information, explaining how you arrived at your determination.
  - Able to withstand independent scrutiny.
  - File should contain all collected investigative evidence.

## 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 sharing documentation/statements - for different purposes though ...
- ✓ 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 & 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.

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

- ✓ The Appropriate Investigating School Official should follow all leads, leaving no stone unturned.
  - Determine the: What? Who? Where? When? and Why? – 5 Key question!
- ✓ **Seek & Secure all relevant witnesses.**
  - Acquire verbal/written detailed accounts.
  - Obtain written statements and/or document your interviews.
  - Examine video surveillance, if available; document a play-by-play of relevant footage; archive video.
- ✓ **Confer with Professionals and/or review relevant Expert Witness statements or reports.**
  - 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.
- ✓ **Develop a Determination/Finding only once you have completed the investigation.**
  - Using "preponderance of evidence" standard.
  - Apply Educational guidelines (District's SCC and TEC).
- ✓ **Preserve a Complete Investigative File.**
  - All-inclusive, record-keeping and documentation is vital.
  - Summarize your determination/finding outlining all key details & information, explaining how you arrived at your determination.
  - Able to withstand independent scrutiny.
  - File should contain all collected investigative evidence.

## PROCEDURAL STEPS TITLE IX INVESTIGATION



# TITLE IX

- ✓ 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 directives.

## PROCEDURAL STEPS TITLE IX INVESTIGATION



**TITLE IX**

- ✓ 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.

## PROCEDURAL STEPS TITLE IX INVESTIGATION



**TITLE IX**

- ✓ 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.

## PROCEDURAL STEPS TITLE IX INVESTIGATION



**TITLE IX**

- ✓ Prepare an investigative report summarizing relevant evidence and may include findings of fact.
- ✓ Send the Investigative Report:
  - ✓ To the Parties: the investigative report must be sent to the parties at least 10 calendar days before the Decision maker decides final determination or responsibility.
  - ✓ To Decision Maker (who is not the Title IX Coordinator or the Investigator).
- ✓ Decision Maker is the individual who determines Responsibility.
  - ✓ Decision Maker must issue a comprehensive written determination regarding responsibility (i.e., whether sexual harassment/assault occurred) & complete the grievance process.
- ✓ Decision Maker must include:
  - ✓ identification of the allegations that constitute sexual harassment with rationale of each allegation;
  - ✓ description of the investigative procedural steps;
  - ✓ findings of fact;
  - ✓ 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.
- ✓ Decision must be sent to the parties simultaneously.

**Thank you!**



*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.*

**Questions?**

**Contact Us**



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# **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.



## 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

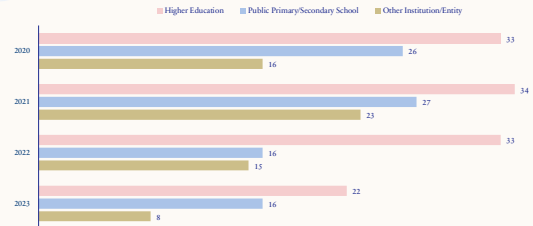
DISCLAIMER: This presentation contains accounts of sexual violence, abuse, and assault. All pictures, graphics, and any other visual media are for presentation purposes only and do not represent, portray, or intend to portray any figures, officials, or students in the provided cases. All similarities 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. ”

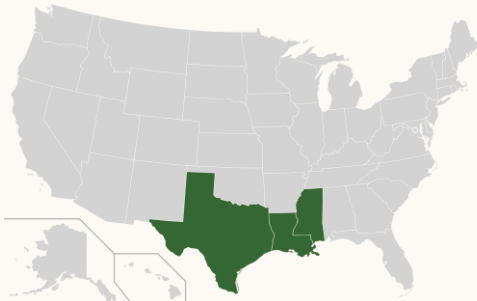
20 U.S.C.A. § 1681

## 5<sup>th</sup> Circuit Defendants in Title IX, '20-'23

Approximation: By Filing Date, Per Calendar Year, Westlaw Options Citing "Title IX"



## 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 deliberately indifferent to Plaintiff's 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)

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

The Court REVERSES the lower court's decision that the District was deliberately indifferent to Plaintiff's risk of sexual 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 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 'parrot[ing]' 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 14551208 (E.D. Tex. Oct. 24, 2022)

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

*Flashback from Last Year!*

**The Court OVERRULED Brownsboro I.S.D.'s objection to summary judgment and granted the plaintiff's motion to dismiss the District's motion to deny summary judgment.**

- **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 14152208 (E.D. Tex. Oct. 24, 2022)

## Reagens 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)

## Reagens v. Grapeland I.S.D. (cont.)

**The Court GRANTED Grapeland I.S.D.'s motion for summary judgment and actual knowledge of sexual abuse because the relationship did not exist.**

- 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 1793802 (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.)


- (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 2712629 (N.D. Tex. Mar. 30, 2023)



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

- 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 present 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 2712629 (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 4017462 (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 4017462 (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 4017462 (N.D. Tex. June 27, 2023)

Appeal Filed!

### 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.”**

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

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. 06, 2023)

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

- 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.**

The District Court GRANTS NISD’s motion for summary judgment.

2023 WL 2060744 (W.D. Tex. Feb. 06, 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. 5422CV1055FBR/B, 2023 WL 5338566 (W.D. Tex. Aug. 4, 2023), report and recommendation adopted, No. 54-22-CV-1055-FB, 2023 WL 5348154 (W.D. Tex. Aug. 27, 2023)

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

- 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.**

The District Court GRANTS CSD’s Motion to Dismiss Plaintiff’s Title IX Harassment claim.

No. 5422CV1055FBR/B, 2023 WL 5338566 (W.D. Tex. Aug. 4, 2023), report and recommendation adopted, No. 54-22-CV-1055-FB, 2023 WL 5348154 (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 GRANTED T.F.'s Motion for Summary Judgment on grounds that GISD has not demonstrated sufficient evidence for habeas relief regarding the assaults.

- 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 GRANTED T.F.'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)

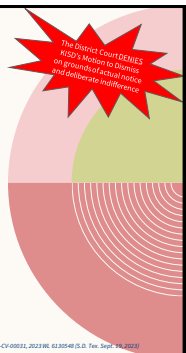
- In 2012, a Kingsville ISD teacher is rumored to have an improper relationship with a Kingsville ISD student, including moving in with the student upon graduation. The teacher thereafter **resigned** and was employed at another district.
- 3 years later, the same teacher regained employment with Kingsville 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. 18, 2023)

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

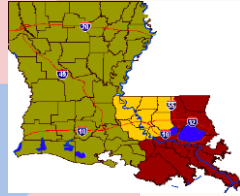
- The Court held—for a district to violate Title IX through teacher-student harassment—Plaintiff must show (1) **district's actual notice of the risk of abuse** and (2) **the district responded with deliberate indifference.**
- (1) For actual notice, Plaintiff **only** needs to show that the District 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. 221-CV-00031, 2023 WL 6130546 (S.D. Tex. Sept. 14, 2023)

## OTHER NOTABLE DISTRICT COURT DECISIONS WITHIN THE 5<sup>TH</sup> CIRCUIT



## Kirkpatrick v. School Board of Lafayette Parish

United States District Court for the Western District of Louisiana [5<sup>th</sup> 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 [5<sup>th</sup> Cir. Aff'd, 2023]

- 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 5<sup>th</sup> Circuit Court of Appeals **later affirmed** the District Court's judgment.
- TAKEAWAY: (1) Even in other states' District Court systems of the of the 5<sup>th</sup> Circuit, the burden of proving discrimination by a school district is a “high one,” and (2) Plummer v. Univ. of Houston continues to provide 5<sup>th</sup> 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...in 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. 26, 2023)

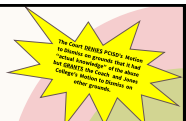
## Thompson v. Pass Christian Public School District

United States District Court for the Southern District of Mississippi

- Jones College Title IX Claim**
  - While the Court followed 8<sup>th</sup> 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. 26, 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 1698657 (Tex. App. Nov. 17, 2022)

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

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 1698657 (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

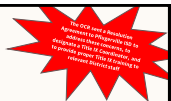
- Complaint by Student 1 alleged that District failed to respond equitably to a report that Student 1 was sexually assaulted by Student 2 in a school restroom.
- Staff members were able to pinpoint the date from attendance record that sexual assault had occurred but did not inform Student 2 of whom had 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

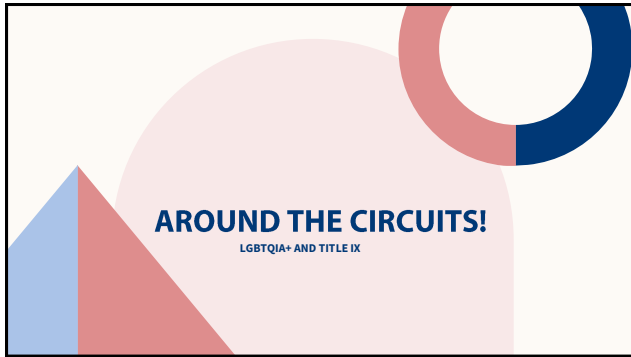
OCR RESOLUTION LETTER

**Pflugerville ISD**

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

**11<sup>TH</sup> CIRCUIT-  
AL, FL, GA**

Adams v. St. John's County: The proposal 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.

**2<sup>ND</sup> CIRCUIT  
CT, NY, VT**

**Soles by Stanesco v. Connecticut:** Transgender discrimination is not prohibited by Title IX. It is generally disallowed by federal law. Transgender athletes could compete with cisgender athletes.

**4<sup>TH</sup> CIRCUIT  
MD, WV, VA,  
NC, SC**

**Doeda v. United States Dep't of Educ.:** Students may use bathrooms consistent with their gender identity.

**5<sup>TH</sup> CIRCUIT**

**SB 15/TEC 51.980** (enacted 03/01/22): 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

**6<sup>TH</sup> CIRCUIT  
KY, MI, OH, TN**

**Battister 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.

**7<sup>TH</sup> CIRCUIT  
IL, IN, WI**

**Kilgus v. Brownsburg High School:** **PROPOSED** - refusing trans/gender student's request to use their chosen first names does not create Title IX liability.

**8<sup>TH</sup> CIRCUIT  
AR, IA, MO, MN,  
NE, SD**

**Religious Sisters of Mercy v. Boonville:** Applies Title IX "court-let" inclusion of "gender identity" to the religious exception and Title VII liability.

## IN THE NEWS!

5<sup>TH</sup> 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 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.)

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 6<sup>th</sup> 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 & MUNOZ, P.C.

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




*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.*



# **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

## 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 undercut the efficacy of a district's approach
- ❖ Students cannot learn where they do not feel safe

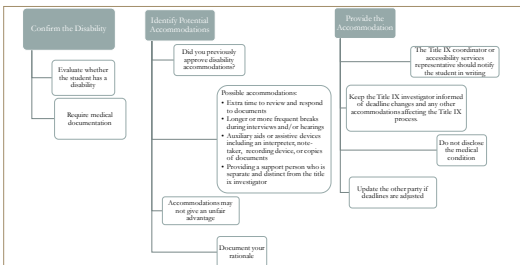
## What Procedures Are Needed

### 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: MDR
IDEA/504: Change of placement	Tex. Educ. Code 37.019

## Discipline

### Complainants with disabilities



- Are often punished by their schools 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 complainants without disabilities to be disbelieved, ignored, or punished due to both sex- and disability-based stereotypes

### Respondents with disabilities


- They may sometimes be unfairly or excessively 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).

## Sports And Disability


- Mental health
- Physical disability
- Trans issues


### *Spruill v. Sch. Dist. of Phil.* 569 E.Supp.3d 253 (E.D. Pa. 2021)




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."

### *Cianciotto v. New York City Dept. of Ed.* 2022 WL 124788 (S.D.N.Y. April 22, 2022)




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.

### *C.R. v. Novi Community Sch. Dist.* 2017 WL 526264 (E.D. Mich. Feb 9, 2017)




A student in the special education setting sexually assaulted another student while another recorded the incident. The staff determined that the boys had a mutual relationship, and the student could come back to school without a change in schedule.




The fact that the student's parents did not want him to return to school because they felt it was unsafe to allow their son to be near the other student was enough for a reasonable jury to conclude that the harassment was severe, pervasive, and objectively offensive.

### *D.M. v. East Allegheny Sch. Dist.* 122 LRP 39217 (W.D. Pa. Sept. 30, 2022)




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.

### *Doe v. Dallas Indep. Sch. Dist.* 941 F.3d 224 (5th Cir. 2019)




Two students with disabilities were supposed to have 1:1 aides at all times, including in the bathroom for safety and hygiene reasons. At lunch, male student takes female student to boy's bathroom. Both students found naked.




The exhaustion requirement applies only if the plaintiff seeks relief available under the IDEA, which is limited to a student's right to a FAPE. Because Doe did not seek relief on the basis of FAPE, she did not need to exhaust under IDEA. Look for actual knowledge discussion and the Title IX Coordinator's presumption of mutuality, despite the victim's developmental age of six.





*L.K.M. v. Bethel Sch. Dist.*  
121 LRP 217  
(W.D. Wa. 2021)

 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


*McCann v. York Sch. Dept.*  
365 F. Supp.3d 132  
(D. Me. 2019)

 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 him heightened symptoms.

 The student properly alleged the harassment was based 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.

*Stackelberg v. Chamberlain Sch. Dist.*  
122 L.P.R. 45919  
(D.S.D. Nov. 30, 2022)

 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

**What Would You Do?**

- A transitioning female to male high school student with muscular dystrophy was called names (including ableist slurs and sexual comments) at school and online. The comments centered around her having both male and female body parts.
- One morning, two students (one male and one female) blocked the wheelchair ramp during their verbal assaults regarding gender identity.
  - An Assistant Principal heard/saw this happened and came over to tell the aggressors to stop it
- Student filed a complaint 3 weeks after the blocked wheelchair ramp incident after continued harassment
  - Student's complaint was only about the blocked wheelchair ramp

**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

 [www.disabilityrightstx.org](http://www.disabilityrightstx.org)

 Online intake:  
[drtx.org/intake](http://drtx.org/intake)

 Email:  
[cpotts@drtx.org](mailto:cpotts@drtx.org)

 Intake: 1-800-252-9108  
My direct: 806-370-1445



# **SBEC Update**

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

October 19, 2023

**TEA** Educator Investigations Division

Presentation for Eichelbaum  
Wardell Hansen Powell &  
Muñoz, P.C.

**TITLE IX**  
Administrator Conference

**Title IX Administrator  
Conference**

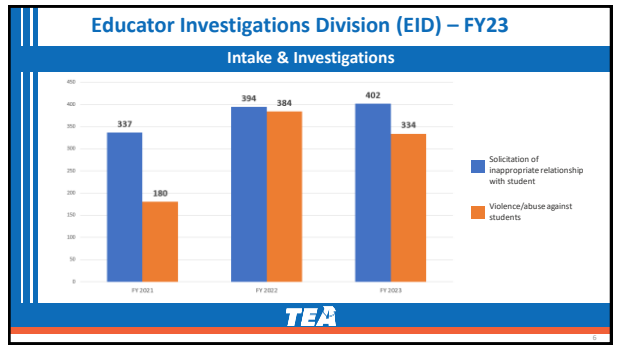
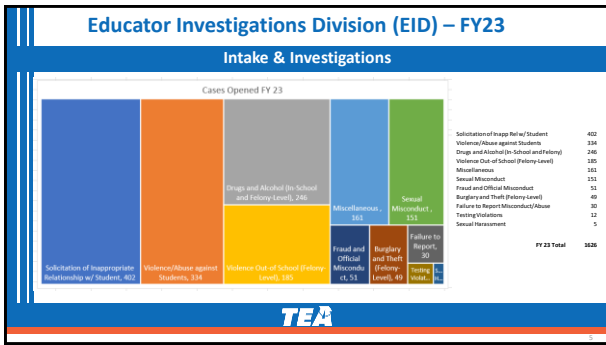
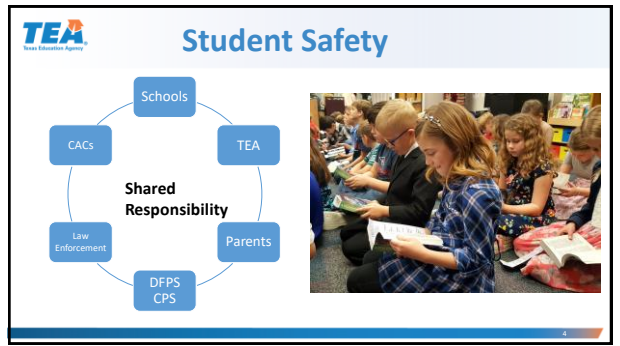
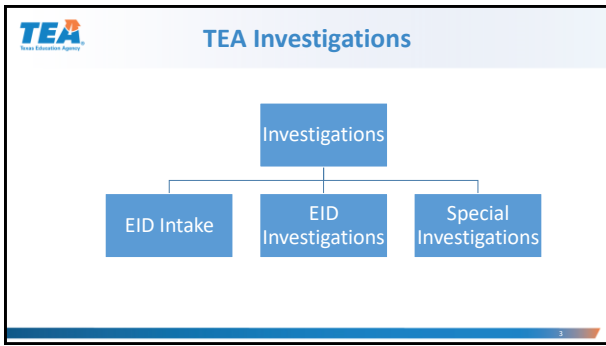
Thursday, October 19, 2023

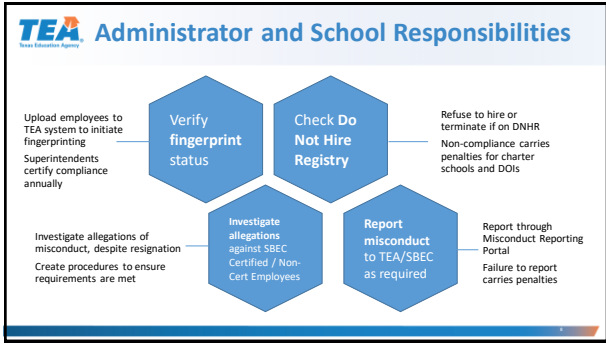
**TEA** Educator Investigations Division

**Tina Farrell**  
Director  
EID Investigations Unit

**Daniel Berumen**  
Director  
EID Intake and Review Unit

**David Rodriguez**  
Executive Director  
Division of Investigations



**Misconduct Reporting Portal**

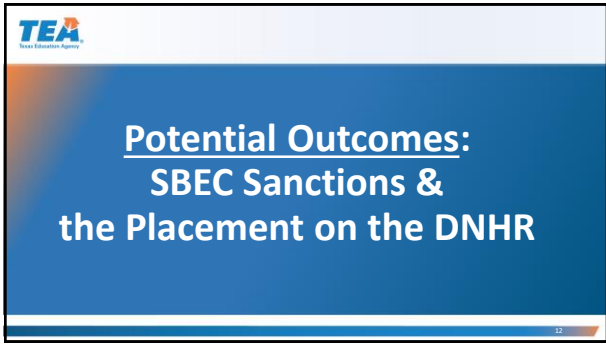
- Application in TEAL; Accessed by authorized school staff and TEA Educator Investigations
- Most secure and expedient method for sending reports of educator misconduct.
- Reports received through the portal are processed through Intake/Review Unit
- Handoff between school district and Ed Inv

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**  
 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 §22.0832, §22.0833, §22.085 and §21.058(b)



## TEA 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

13

## TEA 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

14

## TEA Audience Participation

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

*See Supplemental Slides for more information*

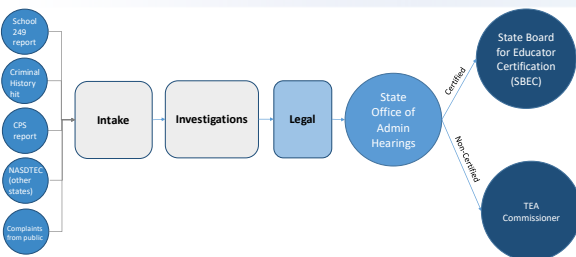
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## TEA

TEA /SBEC Investigation & Litigation Process

16

## TEA Investigation & Litigation Process



17

## TEA Audience Participation

What questions do you have about the investigation process?

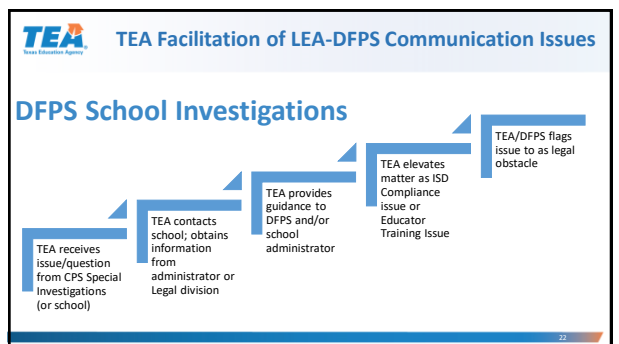
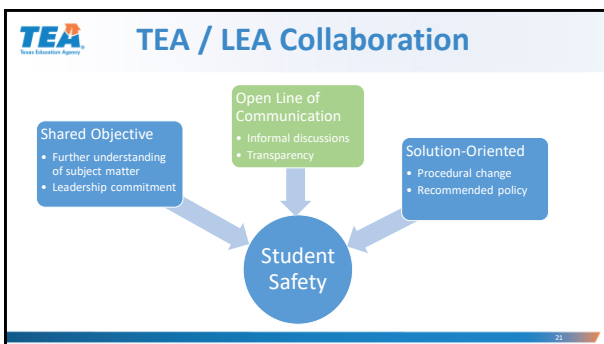
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**TEA** Division of Educator Investigations

# Collaboration TEA - LEA - DFPS

**TEA** Requirement

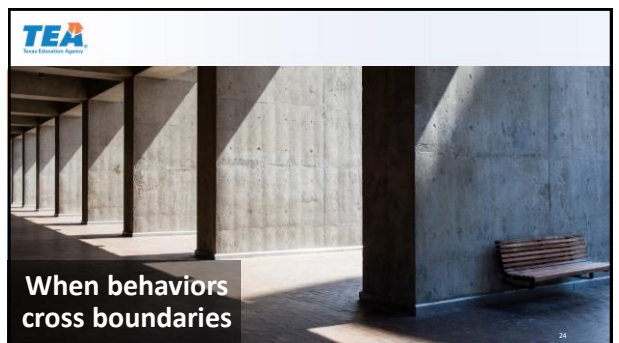
**Tx Edu Code §38.004 – TEA shall develop a policy for schools that provides for cooperation with law enforcement and DFPS investigations.**



**TEA** Audience Participation

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

*See Supplemental Slides for more information*





## Potential Overlap with Title IX Cases

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)(I)
- **Sexual Harassment or Sexual Violence by Teachers** – Title IX

25



## Potential Overlap with Title IX Cases



*Improper Communication or Solicitation of a Romantic Relationship*

### 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

26



## Potential Overlap with Title IX Cases



*Improper Communication or Solicitation of a Romantic Relationship*

### 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

27



## Audience Participation



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

*See Supplemental Slides for more information*

28



## Questions



## Supplemental Slides

User screens from Do Not Hire Registry and Misconduct Reporting Portal

30



## Do Not Hire Registry

### Public Registry Search

This registry contains a list of individuals who are not eligible for employment in Texas by a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center, or shared services arrangement.

**Instructions:** Enter a First Name (minimum 2 characters) and Last Name (minimum 3 characters) of the person to search. Click "Search" to begin the lookup. Click "Clear" to clear the first name and last name fields for a new search.

First Name \*

Last Name \*

Registry Search Results

The Registry Status definitions are as follows:

**Not Eligible For Hire** - The individual is not eligible to be employed by a public school and may not be hired in any role.

**Under Investigation** - Pursuant to TEC §21.026, a non-verified employee is currently under investigation by TEA based on allegations that the individual abused or was involved in an inappropriate relationship with a student or minor. The notation means the matter is ongoing and the individual's eligibility for employment has not yet been determined.

**Date on Registry** - Represents the date an individual was found to be not eligible for employment in a public school. The earliest date listed will be January 2, 2020, which was the date the Registry was launched.

**Approximate Age** - Calculated as the number of years between the current year and the person's birth year.

<https://realprod.bea.state.tx.us/DNH/Public/SearchPerson>

## Misconduct Reporting Portal

### Misconduct Reporting Portal

Report should include:

- Summary of facts;
- Name, identifiers and employment status of person being reported
- Contact information for victims/witnesses
- Law enforcement or other agencies involved with their contact information

## Do Not Hire Registry

### Public Registry Search

This registry contains a list of individuals who are not eligible for employment in Texas by a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center, or shared services arrangement.

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**Approximate Age** - Calculated as the number of years between the current year and the person's birth year.

First Name	Last Name	Approximate Age	Registry Status	Date On Registry
john	dow test	32	Under Investigation	

<https://realprod.bea.state.tx.us/DNH/Public/SearchPerson>

## Supplemental Slides

### Examples of Online Display of Warnings and Sanctions

## Investigative Warning

### Texas Educator Certificate

Click here to see an **EDUCATOR SANCTION HISTORY** example.

**John Doe**

The Affiant represents to the Board the end registration of the Texas Board for Educator Certification and a timely submission to perform duties as assigned herein.

Description	PROFESSIONAL			Status
	Effective Date	Expiration Date	End	
Elementary Self-Contained Grade (1-5)	08/09/2015	LTA	10/01	10/01
Generic Special Education Grade (PK-12)	09/29/2015	LTA	10/01	10/01

Description	PARAPROFESSORIAL			Status
	Effective Date	Expiration Date	End	
Educational Aide III	09/24/2014	LTA	10/01	10/01

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

## Reprimand

### Texas Educator Certificate

Click here to see an **EDUCATOR SANCTION HISTORY** example.

**Mary Smith**

Description	EDUCATOR			Status
	Effective Date	Expiration Date	End	
Elementary Teacher Grade (PK-12)	01/05/2011	01/01/2018	10/01	10/01
Secondary Physical Education Grade (PK-12)	09/23/2019	LTA	10/01	10/01
Secondary Social Studies Grade (PK-12)	09/23/2019	LTA	10/01	10/01
Elementary Teacher Grade (PK-12)	03/08/2014	01/01/2018	01/01	01/01

Sanction	EDUCATOR SANCTION HISTORY		
	Begin Date	Ending Date	Sanction Status
Reprimand	9/29/2021		

**Inscribed Reprimand:**

An inscribed reprimand is the Board's formal, published censure appearing on the face of an educator's certificate. A reprimand does not affect the validity of an educator's certificate.

### TEA Suspension

**Status:** Suspended

**Suspended:** 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.

Sanction	Begin Date	Ending Date	Sanction Status
Suspended	9/29/2021	09/29/2024	Active

### TEA Voluntary Surrender

**Status:** Voluntary Surrender

**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.

Sanction	Begin Date	Ending Date	Sanction Status
Voluntary Surrender	9/29/2021		

### TEA Permanent Surrender as of 3/1/2023

**Status:** Permanent Surrender

**Permanent Surrender:** 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).

Sanction	Begin Date	Ending Date	Sanction Status
Permanent Surrender	03/07/2023	Ongoing	Active

## Supplemental Slides

### Examples of Disciplinary Orders

### TEA Voluntary Surrender = Permanent Surrender.

### Placement on DNHR.

IN THE MATTER OF: [Redacted] BEFORE THE STATE BOARD FOR EDUCATORS CERTIFICATION STATE OF TEXAS

**DISCIPLINARY ORDER**

The undersigned, [Redacted], Texas Education Agency, acting in its official capacity, hereby orders that [Redacted] be placed on the Non-Certified Employee List (DNHR) effective [Redacted].

By signing this Voluntary Surrender, Respondent waives the right to a Speed Hearing and the right to any judicial review of this Voluntary Surrender.

Respondent hereby agrees to the entry of her name on the registry of persons not eligible for employment in public and charter schools under Texas Education Code §25.002.

SIGNED this 20th day of December, 2021.

\_\_\_\_\_  
 Director of Education Investigation  
 Texas Education Agency

### TEA Non-certified employee agrees to be placed on the DNHR

IN THE MATTER OF: [Redacted] BEFORE THE COMMISSIONER OF EDUCATION STATE OF TEXAS

**AGREEMENT FOR PLACEMENT ON THE REGISTER OF PERSONS NOT ELIGIBLE FOR EMPLOYMENT**

[Redacted] hereby agrees to be Respondent, has been ordered by the Commissioner for the reasons set forth herein, and in testimony, under the jurisdiction of the Commissioner under Texas Education Code §25.002.

The undersigned hereby orders that Respondent be placed on the registry of persons not eligible for employment in public and charter schools under Texas Education Code §25.002.

Respondent, by the signing below, hereby waives the right to a Speed Hearing, and any right to judicial review of this disciplinary order.

By signing this agreement, Respondent agrees that Respondent is a Respondent, and any right to judicial review of this disciplinary order is hereby waived.

SIGNED this 20th day of January, 2022.

\_\_\_\_\_  
 Director of Education Investigation  
 Texas Education Agency



# Supplemental Slides

## Guidance re DFPS Investigations Procedures

43



# Known Issues & Current Guidance

Issue	Guidance
Campus administration does not permit a CPS Special Investigator to interview students or staff at a school?	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
	Tx Fam Code §261.302, 303, 409 / Op. Tx Atty Gen DM 0476 (198) / TASB Policy GRA (LEGAL)
A video of an incident is not made available to DFPS Special Investigator. Administrator states FERPA or HIPPA issues.	TEA advises that the CPS Special Investigator request to view the video on campus.

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# Known Issues & Current Guidance

Issue	Guidance
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)


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# **Administrative Leave: A Key Piece of Solving the Puzzle**

Presented by:  
Dr. Tyrone Sylvester, Goose Creek CISD

October 19, 2023



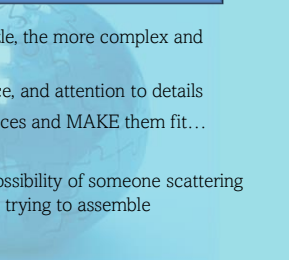
Eichelbaum Wardell  
Hansen Powell & Muñoz, P.C.

**Texas Title IX  
Administrator Conference**



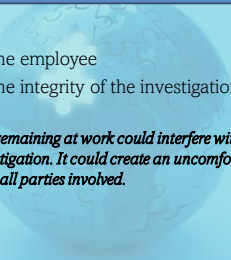
**Administrative Leave:  
A Key Piece to  
Solving The Puzzle**

Dr. Tyrone Sylvester,  
SPHR, SHRM-SCP, pHCLE  
Human Resources Director  
Goose Creek CISD



**Investigations are a lot like puzzles...**

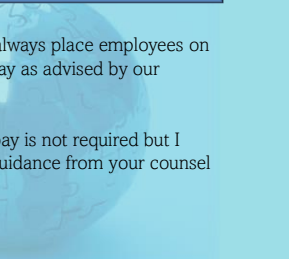
- The more pieces to the puzzle, the more complex and difficult the process
- Puzzles require time, patience, and attention to details
- You can't FORCE puzzle pieces and MAKE them fit...
  - (Integrity > Convenience)
- You don't want to risk the possibility of someone scattering the puzzle pieces that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



**Why do we put employees on administrative leave?**

- Protects the employee
- Protects the integrity of the investigation

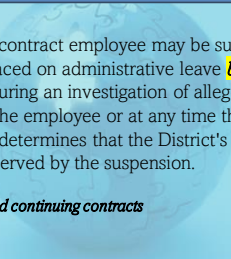
*\*The employee remaining at work could interfere with or disrupt the investigation. It could create an uncomfortable environment for all parties involved.*



**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 employee receives written communication

- 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)

### The employee receives written communication

- 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 EICHELBAUM WARDELL HANSON POWELL & MUNOZ, P.C.  
**Texas Title IX Administrator Conference**

October 19, 2023  
Austin, Texas

**JOSEPH L. PARKS**  
ATTORNEY CONSULTANT  
SCHOOL SAFETY | WORKPLACE INVESTIGATIONS | TRAINING  
THE LAW OFFICE OF JOSEPH L. PARKS, PLLC  
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**Introduction**

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**A Little About Me**

**Present**  
**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/NPO Unit, SWAT/Tactical Unit



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### 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!



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### Why Information Sharing Is Critical to Student & Community Safety



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PROTECTING AMERICA'S SCHOOLS  
 A U.S. SECRET SERVICE ANALYSIS  
 OF TARGETED SCHOOL VIOLENCE



- **Most attackers had a history of school disciplinary actions, and many had prior contact with law enforcement:** Most attackers had a history of receiving school disciplinary actions resulting from a broad range of inappropriate behavior. The most serious of those actions included the attacker being suspended, expelled, or having law enforcement interactions as a result of their behavior at school. An important point for school staff to consider is that punitive measures are not preventative. If a student elicits concern or poses a risk of harm to self or others, removing the student from the school may not always be the safest option. To help in making the determination regarding appropriate discipline, schools should employ disciplinary practices that ensure fairness, transparency with the student and family, and appropriate follow-up.
- **All attackers exhibited concerning behaviors. Most elicited concern from others, and most communicated their intent to attack:** The behaviors that elicited concern ranged from a constellation of lower-level concerns to objectively concerning or prohibited behaviors. Most of the attackers communicated a prior threat to their target or communicated their intentions to carry out an attack. In many cases, someone observed a threatening communication or behavior but did not act, either out of fear, not believing the attacker, misjudging the immediacy or location, or believing they had dissuaded the attacker. Students, school personnel, and family members should be encouraged to report troubling or concerning behaviors to ensure that those in positions of authority can intervene.

2019

U.S. DEPARTMENT OF HOMELAND SECURITY  
 UNITED STATES SECRET SERVICE  
 National Threat Assessment Center

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In this most recent study, *Averting Targeted School Violence: A U.S. Secret Service Analysis of Plots Against Schools*, NTAC examined 67 disrupted plots against K-12 schools from 2006-2018. The key findings of the study are clear and consistent: Individuals contemplating violence often exhibit observable behaviors, and when community members report these behaviors, the next tragedy can be averted. The Secret Service encourages its educational, medical and public safety partners to review the information within, and use it to guide best practices for maintaining a safe and healthy learning environment for all children.

**KEY FINDINGS AND IMPLICATIONS**

- Targeted school violence is preventable when communities identify warning signs and intervene. In every case, tragedy was averted by members of the community coming forward when they observed behaviors that elicited concern.
- Schools should seek to intervene with students before their behavior warrants legal consequences. The primary function of a threat assessment is not criminal investigation or conviction. Communities should strive to identify and intervene with students in distress before their behavior escalates to criminal actions.

2021

**Averting Targeted School Violence**  
A U.S. SECRET SERVICE ANALYSIS OF PLOTS AGAINST SCHOOLS

U.S. DEPARTMENT OF HOMELAND SECURITY  
OFFICE OF THE SECRET SERVICE  
NATIONAL THREAT ASSESSMENT CENTER

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From The Headlines . . .

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

**Spokane Public Schools approved new safety rule discouraging calls to police just prior to FBI review of district policy**

**How the FBI botched tips about the Parkland school shooter**

**NEWS STUDENTS AND VIOLENCE**

**Connecting the Dots**

State report on Virginia Tech massacre exposes broad failures to share information - and the need to close the gulf in student information that separates high school from college.

By Elizabeth Redden • Published August 31, 2017

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**'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 faults the school system for "a stunning lack of openness," adding 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 coverup" between the school system and members of the school board. Indeed, 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 "adherence to 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 assailant's own mother and grandmother, warned law enforcement about him.

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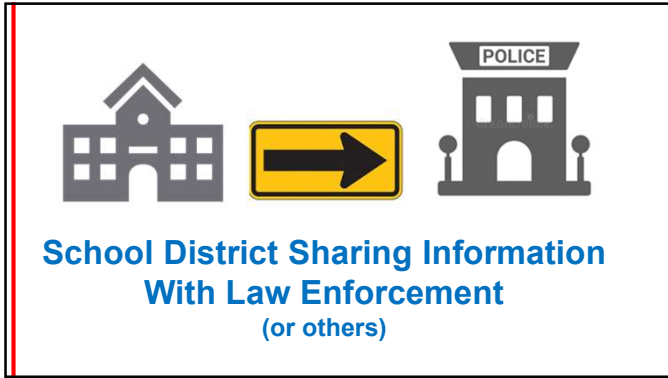
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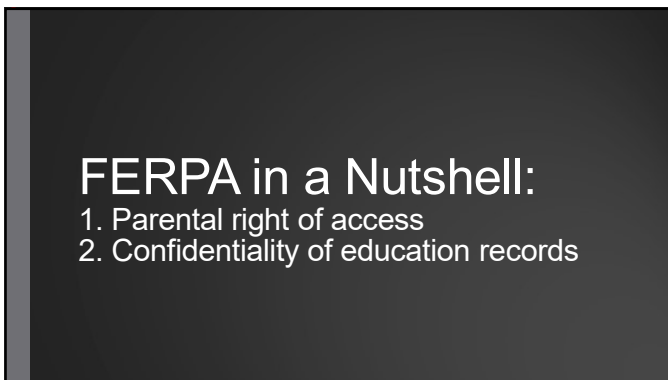
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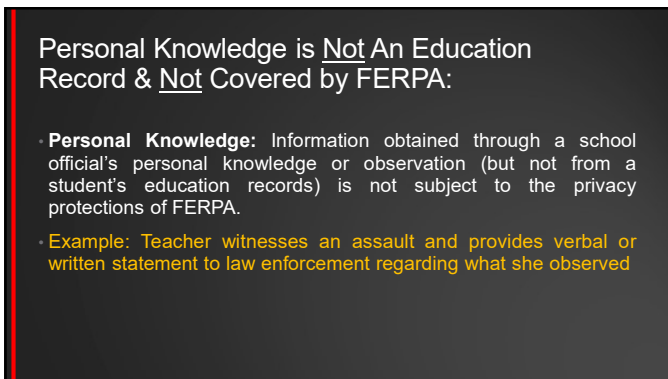
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# Practical Application of Important FERPA Exceptions

(In The Context of School and Community Safety)

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# School Officials With Legitimate Educational Interests

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## 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

The diagram consists of two overlapping circles. The left circle is green and contains an icon of a school building with the text 'School Official Duties' below it. The right circle is blue and contains an icon of a police station with the text 'Law Enforcement Duties' below it. The overlapping area in the center is shaded.

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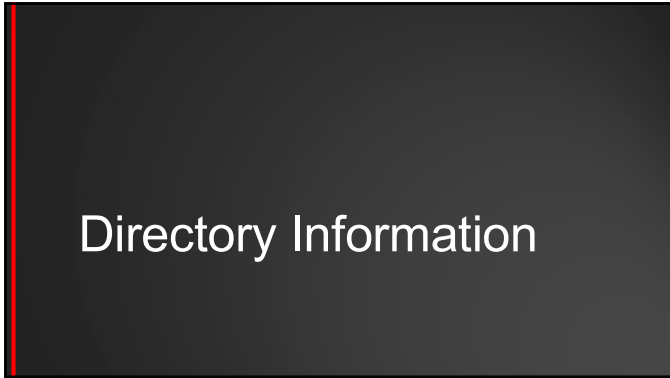
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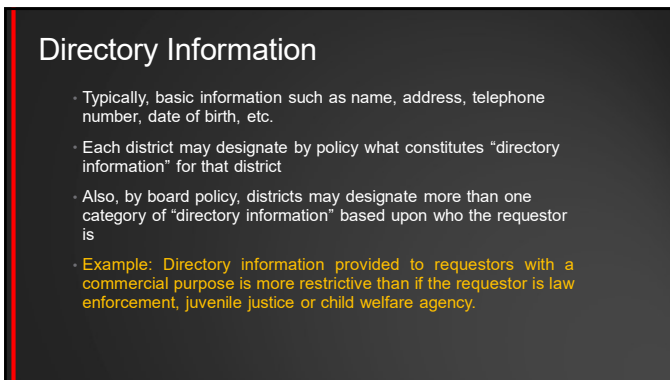
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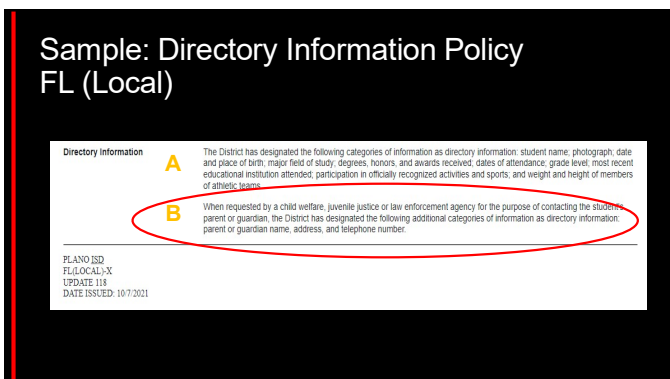
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Seven horizontal lines for notes.



17

Seven horizontal lines for notes.



18

Seven horizontal lines for notes.

# 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"

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# 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, in connection with an emergency if 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 the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records 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

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# Judicial Order or Lawfully Issued Subpoena

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## 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

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## 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.

Example: Offense Report completed by ISD police department vs. School Incident Report completed by teacher.

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## Mandatory Reports to Local Law Enforcement

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### 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 . . . if 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 508.149, Gov't Code [Murder / F1 Felonies];
- (2) deadly conduct under Section 22.05, Penal Code;
- (3) a terroristic 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

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## New

# Transfer Student Disciplinary and Threat Assessment Records

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## 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).

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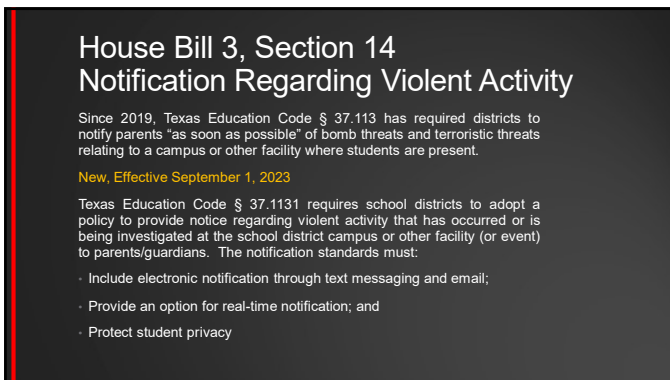
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### Notice of Arrest or Referral of Student (Art. 15.27 CCP)

- 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)

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### Information for Threat Assessment or School Safety Plan "NEW-ISH"

- SB 2135 (2019) added Art. 15.27(k-1) Tex. Code Crim. Proc.
- 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".

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### 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

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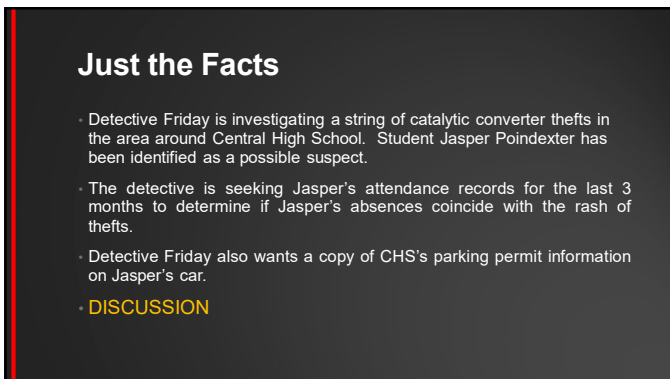
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# Fast Times at Central High School

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## Fast Times at Central High School

- 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.

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# Drop It Like It's Hot

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### 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. . .

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### Just In Time

- CHS student Justin Taylor has history of depression known to school. Justin's 3<sup>rd</sup> 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 rec'd 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 8<sup>th</sup> 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?

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**Questions & Discussion**  
Thank You for Your Attention!

*Joseph L. Parks*  
Attorney | Consultant |  
SCHOOL SAFETY | INCIDENTS | INVESTIGATIONS | TRAINING

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**“Tomorrow’s News”**

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Tomorrow's N...

When news breaks about yet another school

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# Speaker Biography

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**Joseph (Joe) Parks**  
SCHOOL SAFETY | WORKPLACE INVESTIGATIONS | TRAINING

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.

**Present**  
**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/NPO Unit, SWAT/Tactical Unit*

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# Resources

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FERPA EXCEPTION	USC or CFR Section	BOARD POLICY	COMMENTS
School officials with legitimate educational interests	34 CFR 99.31(a)(1)(i)(A)	FL (Legal) FL (Local)	School Resource Officers (SROs) can be designated "school officials"
"Directory Information"	20 USC 1232g(a)(5) 34 CFR 99.31(a)(11) 34 CFR 99.37	FL (Legal) FL (Local)	Consider local policy with 2 categories of "directory information".
Health or Safety Emergency	20 USC 1232g(b)(1)(I) 34 CFR 99.31(a)(10) 34 CFR 99.36	FL (Legal)	To "appropriate parties" in connection w/ emergency if knowledge of information is necessary to protect the health or safety of students or others
Judicial Order or Lawfully Issued Subpoena	20 USC 1232g(b)(1)(J)(ii) 34 CFR 99.31(a)(9)	FL (Legal)	"Magic language" re: law enforcement purpose and directive to not disclose

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### Resources – Federal

(All sources hyperlinked)

[2019 U.S. Secret Service Report – Analysis of Targeted School Violence](#)

[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](#)

[FERPA – Code of Federal Regulations 34 CFR Part 99](#)

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### Resources - Texas

(All sources hyperlinked)

[Texas SB 2135 – Revision to Art. 15.27 Code of Criminal Procedure](#)

[Notification to Schools Required – Tex. Code of Criminal Procedure, Art. 15.27](#)

[Reports to Law Enforcement; Liability – Tex. Educ. Code § 37.015](#)

[Report to Law Enforcement - Assault or Harassment; Liability – Tex. Educ. Code § 37.0151](#)

[TEA Model Standards for Parental Notification of Violent Activity](#)

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### Sample MOU Language: Investigation of Social Media Threats

**Incident** – 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, threatens or infers the individual will bring or use weapons at 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 assist the SRO or other officers in attempting to identify and locate the person(s) who are the origin of the threat, the source of the posts or communications, or witnesses. The investigation should not be limited to determining whether the elements of a criminal offense are present, but should also consider whether a threat to the campus or others may exist, 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 seriousness of the conduct involved, it may be appropriate for officers to interview students or parents at their homes (or elsewhere) at any time of day to determine a student's intent and/or access to firearms or other weapons. Where the incident suggests an identifiable student has threatened to bring a firearm to school, the investigating officers or a Department supervisor may determine that the investigation should include a search at the student's residence or other location, if lawful to do so. The decision to conduct a search or the manner in which the investigation is conducted will be at the discretion of the senior officer involved in the response or investigation. Because widespread social media posts suggesting a threat to a campus often cause significant disruption to the affected campus, officers will, when possible, attempt to complete the investigation prior to the next school day so that appropriate information about the credibility of a 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.

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# 2023 Transgender Update

Presented by:  
Emma J. Darling

October 19, 2023

2023  
**Transgender Update**

EMMA J. DARLING, Senior Associate  
EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.

# Agenda

- 01 STUDENT UPDATE
- 02 EDUCATOR UPDATE
- 03 MISC. CASELAW AND LAWS

# 01 Student Update

## OCR Toolkit Updated June 2023

**HATE CRIME THREAT GUIDE**

In 2021, 2 out of 5 students experienced emotional distress.

LGBQ students were 5X more likely to attempt suicide during the pandemic.

Source: Adolescent Behaviors and Experiences Survey, 2021

## OCR Toolkit – OCR v. the Courts Updated June 2023

- Protecting LGBTQ+ students from book bans that create a hostile environment in violation of Federal civil rights laws.
  - Did you know? Book bans may violate Federal civil rights laws, depending on the facts and circumstances. OCR can investigate whether students have experienced a hostile environment at school based on sex, race or disability. OCR has a webpage with [Resources for LGBTQ+ Students](#) which includes a wide range of legal and other resources and information about how to [file a complaint](#) with OCR for students who believe they may have experienced discrimination, including harassment, at school.
- Designating at least one staff member who is knowledgeable about issues related to sexual orientation and gender identity who school community members can approach to discuss their challenges, experiences, or questions.
- Adopting policies that recognize and respect all students and implementing policies to safeguard student privacy. The Department's Student Privacy Policy Office has a [Know Your Rights resource](#) on the Family Educational Rights and Privacy Act (FERPA)'s protection for student health records.

## OCR Toolkit on GSAs

- 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:

3d	4th	5th	6th	7th	9th	11th
May use bathroom consistent with gender identity	May use bathroom consistent with gender identity	No caselaw	May use bathroom consistent with gender identity	Transgender students may bring claims of sex discrimination under Title IX	May use bathroom, locker room, and showers consistent with gender identity	May NOT use bathroom consistent with gender identity
<i>Doe by &amp; through Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 518, 538 (3d Cir. 2018)	<i>Grimm v. Gloucester County Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020) *SCOTUS declined to hear		<i>Dodds v. United States Dep't of Educ.</i> , 845 F.3d 217, 221 (6th Cir. 2016)	<i>Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.</i> , 858 F.3d 1034, 1055 (7th Cir. 2017)	<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210, 1217-18 (9th Cir. 2020), cert. denied, 20-82, 2020 WL 7132263 (U.S. Dec. 7, 2020)	<i>Adams by &amp; through Kasper v. Sch. Bd. of St. Johns County</i> , 3 F.4th 1299 (11th Cir. 2022)

## The New Hot Topic: Privacy

## Circuits on Name Changes and Privacy

1st	4th	5th	7th	9th	10th
Pending: Court currently upheld practice of sharing information on a student's identity with their parents only if the student consents	Parents cannot challenge district policies against telling parents if a child identifies as transgender or gender non-conforming	Schools cannot keep information regarding their children from parents, including gender identity	Case pending	Can't make up their mind	District employee shall respond to any minor student's parent's inquiry regarding their requested name or pronoun
<i>Foote v. Town of Ludlow</i> , 2022 WL 18356421, at *1 (D. Mass. Dec. 14, 2022)	<i>John and Jane Parents 1, et al. v. Montgomery County Board of Education, et al.</i> , 4th U.S. Circuit Court of Appeals, No. 22-2004	No caselaw – only Texas AG guidance	<i>B.F. et al v. Kettle Messine School District</i> Circuit Court, WI	Various cases	<i>Willey v. Sweetwater City Sch. Dist. No. 1 Bd. of Trustees</i> , No. 20-CV-099-SWS, 2023 WL 4237186, at *26 (D. Wyo. June 30, 2023)

### Foote v. Town of Ludlow 2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

- 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) complied 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.

### Foote v. Town of Ludlow 2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

- 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.

### Foote v. Town of Ludlow

2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

- 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.

### Foote v. Town of Ludlow

2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

- 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.

### Foote v. Town of Ludlow

2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

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 II was dismissed

### Foote v. Town of Ludlow

2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

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.

### Foote v. Town of Ludlow

2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022)

This case involves a difficult and developing issue; schools, and society as a whole, are currently grappling with this issue, especially as it relates to children and parents. See *Martinez*, 608 F.3d at 66 ("[W]hether behavior is conscience-shocking may be informed ... by the nature of the right violated."). While the court is apprehensive about the alleged policy and actions of the Ludlow Public Schools with regard to parental notification, it cannot conclude the decision to withhold information about B.F. and G.F. from Plaintiffs was "so extreme, egregious, or outrageously offensive as to shock the contemporary conscience," given the difficulties this issue presents and the competing interests involved. *DePoutot*, 424 F.3d at 119. As conscience-shocking conduct is a necessary element for a substantive due process claim, the court ends its analysis here, without assessing whether Plaintiffs have adequately identified their protected rights and established they were offended under these facts.

### John and Jane Parents 1, et. al v. Montgomery Cty Board of Education, et. al 4th Cir., August 14, 2023

- 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 unresponsive.
- Parents sued under the 14<sup>th</sup> Amendment, however the Court decided the case under standing grounds

**John and Jane Parents 1, et. al v. Montgomery Cty  
Board of Education, et. al  
4th Cir., August 14, 2023**

- 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.”

**John and Jane Parents 1, et. al v. Montgomery Cty  
Board of Education, et. al  
4th Cir., August 14, 2023**

- “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.”

**John and Jane Parents 1, et. al v. Montgomery Cty  
Board of Education, et. al  
4th Cir., August 14, 2023**

- 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 those 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.

**B.F. et al v. Kettle Moraine School District  
Circuit Court, WI**



- 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.

**B.F. et al v. Kettle Moraine School District  
Circuit Court, WI**

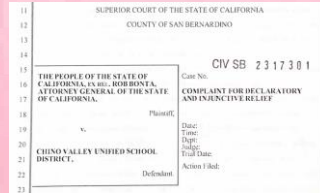
- The parents requested that the District refer to their child with a female name and pronoun, and the District replied that they would not under policy.
- After withdrawing the student, the student told her parents she no longer wanted to go by different pronouns.
- Case is still pending

**Bonta v. Chino Valley Unified School District  
Superior Court of CA, August 28, 2023**

- On July 20, 2023, Chino Valley USD adopted a policy which mandates that District employees to 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.

**Bonta v. Chino Valley Unified School District  
Superior Court of CA, August 28, 2023**

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



**Mirabelli v. Olson**

2023 WL 5976992, at \*2 (S.D. Cal. Sept. 14, 2023)

- 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 v. Olson**

2023 WL 5976992, at \*2 (S.D. Cal. Sept. 14, 2023)

The school's policy is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children. And finally, it harms plaintiffs who are compelled to violate the parent's rights by forcing plaintiffs to conceal information they feel is critical for the welfare of their **students** -- violating plaintiffs' religious beliefs.

**Mirabelli v. Olson**

2023 WL 5976992, at \*2 (S.D. Cal. Sept. 14, 2023)

- Mirabelli and West's injunction against EUSD's policy was granted
- EUSD's motion to dismiss was denied
- This litigation will likely continue

**Wiley v. Sweetwater Cnty. Sch. Dist. No. 1  
Bd. of Trustees**

2023 WL 4297186, at \*26 (D. Wyo. June 30, 2023)

- 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.

### Willey v. Sweetwater Cnty. SD No. 1 Bd. of Trustees

- 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—when two of the Student's teachers at Black Butte disclosed—that the Student was being referred to by a male name and male pronouns at school, and had been for the entire school year.

### Willey v. Sweetwater Cnty. SD No. 1 Bd. of Trustees

- 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.

### Willey v. Sweetwater Cnty. SD No. 1 Bd. of Trustees

- 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.

### Willey v. Sweetwater Cnty. SD No. 1 Bd. of Trustees

- 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

### Willey v. Sweetwater Cnty. SD No. 1 Bd. of Trustees

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 lie 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 Names Policy, a consideration of the factors does not support the granting of a preliminary injunction and it will be denied.

[A]bsent 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.

### Texas AG Opinion Tex. Atty. Gen. Op. KP-0100 (2016)

- 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).



## Texas AG Opinion Tex. Atty. Gen. Op. KP-0100 (2016)

- 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.**

## Current Parent’s Rights Laws

SECTION 26.001  
TITLE 26, SUBTITLE B  
CHAPTER 26, SUBCHAPTER B  
ARTICLE 26.001, SECTION 26.001

(a) A parent has the right to inspect and review the student's education records as they relate to the student's education. The school district shall make arrangements to comply with the request as soon as practicable. The school district shall not charge a parent a fee for such access.

(b) The school district shall not disclose to the parent information that is confidential under the Education Code, including information that is confidential under the Texas Health Code, unless the parent provides written consent to the school district.

(c) The school district shall not disclose to the parent information that is confidential under the Texas Health Code, including information that is confidential under the Texas Health Code, unless the parent provides written consent to the school district.

(d) The school district shall not disclose to the parent information that is confidential under the Texas Health Code, including information that is confidential under the Texas Health Code, unless the parent provides written consent to the school district.

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## CHANGING STUDENT RECORDS

In contrast to permanent school records, however, teachers and other school district employees often informally address students by, and have non-permanent school records that reflect, **preferred names or nicknames** that are not a student’s legal first name. A school district should apply this practice equally with transgender students. For example, the transgender student’s preferred first name and gender should be used in speaking with the student and for class rosters, identification badges, awards, and any other similar purpose. OCR and DOJ’s 2021 guidance cites a failure to address a transgender student by the student’s chosen name and pronouns as an example of sex-based discrimination within the agencies’ enforcement authority under Title IX.<sup>17</sup>

## CHANGING STUDENT RECORDS

Texas Education Code section 25.0021 requires that a student be identified by his or her legal surname, or last name, as that name appears (1) on the student's birth certificate or other document suitable as proof for the student's identity, or (2) in a court order changing the student's name. However, Section 25.0021 does not address students' first names or genders.

## CHANGING STUDENT RECORDS

In general, a student's legal name is used on permanent records, especially when required by state or federal laws and regulations. For example, Texas school districts are required to complete and maintain permanently the academic achievement record, or "AAR" of high school students (often referred to as a "transcript"), including full legal name and gender.<sup>13</sup> Following guidelines developed by the Texas commissioner of education, the AAR must have the complete name from the student's birth certificate or other legal document, without use of nicknames or abbreviations.<sup>14</sup> The student's legal name, the name submitted to Public Education Information Management System (PEIMS) at the Texas Education Agency (TEA), and the name recorded on the AAR must be identical.<sup>15</sup> Any changes in the AAR must be dated, explained and kept as part of the student's permanent file.<sup>16</sup> TEA has informally stated that it will accept the student gender that a district reports through PEIMS, including a report that changes the student's gender following a student and/or parent request to alter the record.

## 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
- 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.

## Department of Education – Confronting Harassment

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

1. Notify a teacher or school leader (for example, a principal or student affairs staff) immediately, if you don't get the help you need, file a formal complaint with the school, school district, college, or university. Keep records of your complaint(s) and responses you receive.
2. Write down the details about what happened, where and when the incident happened, who was involved, and the names of any witnesses. Do this for every incident of discrimination, and keep copies of any related documents or other information.
3. If you are not proficient in English, you have the right to ask the school to translate or interpret information into a language you understand. If you have communication needs because of a disability, you have the right to receive accommodations or aids and services that provide you with effective communication.
4. Counseling and other mental health support can sometimes be helpful for a student who has been harassed or bullied. Consider seeking mental health resources if needed.
5. Consider filing a complaint with the Civil Rights Division of the U.S. Department of Justice at [civilrights.justice.gov/](https://civilrights.justice.gov/) (available in several different languages), or with the Office for Civil Rights at the U.S. Department of Education at [www.ed.gov/ocr/complaintintro.html](https://www.ed.gov/ocr/complaintintro.html) (to file a complaint in English) or [www.ed.gov/ocr/docs/howto.html](https://www.ed.gov/ocr/docs/howto.html) (to file a complaint in multiple languages).

## O2 Employees Update

Elaborate on what you want to discuss.

## 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?

## Preferred Names and Pronouns

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**.

## Over the summer, John came back as Jane...

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

## BATHROOMS, LOCKER ROOMS, SHOWERS

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.



## *Bostock v. Judge Kacsmaryk*

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*.

## EEOC v. T C Wheelers, Inc. (1:23-cv-00286) District Court, W.D. New York, March 2023



- 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.

## EEOC v. T C Wheelers, Inc. (1:23-cv-00286) District Court, W.D. New York, March 2023

- Gambino, who worked as a cook at T.C. Wheelers, complained repeatedly to management
- TC Wheelers failed to protect Gambino by not addressing the almost daily harassment from all levels of staff, including owners, managers, and line employees.
- 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."

**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

**03  
Other Unique Cases  
and Laws**

**Tatel v. Mt. Lebanon Sch. Dist.,  
637 F. Supp. 3d 295 (W.D. Pa. 2022),  
clarified on denial of reconsideration, No. CV 22-837, 2023 WL  
3740822 (W.D. Pa. May 31, 2023)**

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.

### Tatel v. Mt. Lebanon Sch. Dist.

- 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.

### Senate Bill 14

#### 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?



**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

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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.*



# Transgender Athletics

Presented by:  
Holly Boyd Wardell and  
Tiger Hanner, Law Offices of Tiger Hanner

October 19, 2023



**TEXAS**  
**TITLE IX**  
**ADMINISTRATOR CONFERENCE**

**TRANSGENER 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.

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

### 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

[Save Girls Sports | Family Policy Alliance](#)

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



"Women have fought for 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 woman or girl athlete the right to compete on a level playing field, and to be the best in their sport.

"We 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."

[www.edlaw.com](http://www.edlaw.com)

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



Sec. 33.0834. 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:

[www.edlaw.com](http://www.edlaw.com)

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



(1) the student's official birth certificate, as described by Subsection (c); or

(2) if the student's official birth certificate described by Subdivision (1) is unobtainable, another government record.

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



(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.

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



(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:  
(1) entered at or near the time of the student's birth;  
or  
(2) modified to correct a clerical error in the student's biological sex.

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



(d) The University Interscholastic League shall adopt rules to implement this section, provided that the rules must be approved by the commissioner in accordance with Section 33.083(b).

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Notice of Language Assistance  
Notice of Proposed Rulemaking  
Title IX of the Education Amendments of 1972  
April 6, 2023

- 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.

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Notice of Language Assistance  
Notice of Proposed Rulemaking  
Title IX of the Education Amendments of 1972  
April 6, 2023

- Comment period ended May 15, 2023
- Over 150,000 persons or entities commented
- 1 Paragraph change at 106.41(b)(2)

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Notice of Language Assistance  
Notice of Proposed Rulemaking  
Title IX of the Education Amendments of 1972  
April 6, 2023

If a recipient [of federal funds] adopts or applies sex-related criteria that would **limit or deny a student's eligibility** to participate on a male or female team **consistent with their gender identity**, such **criteria** must, for each sport, level of competition, and grade or education level:

- (i) Be substantially related to the achievement of an **important educational objective**, and
- (ii) **Minimize harms to students** whose opportunity to participate on a male or female team consistent with their **gender identity** would be limited or denied.

Emphasis added.

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 Notice of Proposed Rulemaking  
 Notice of Proposed Rulemaking  
 Title IX of the Education Amendments of 1972  
 April 6, 2022

## 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


[www.edlaw.com](http://www.edlaw.com)


## NOT VALID EDUCATIONAL OBJECTIVES

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

From NPRM

[www.edlaw.com](http://www.edlaw.com)



 Notice of Proposed Rulemaking  
 Notice of Proposed Rulemaking  
 Title IX of the Education Amendments of 1972  
 April 6, 2022



## CRITERIA

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

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**Texas v. Cardona**
Case 4:23-cv-00004-O Document 1 Filed 06/14/23 Page 1 of 16 PageID 1

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF TEXAS  
 FORT WORTH DIVISION

THE STATE OF TEXAS,  
 Plaintiff,  
 v.  
 MIGUEL CARDONA, in his official capacity as Secretary of Education; United States Department of Education; MERICK B. GARLAND, in his official capacity as Attorney General of the United States; and UNITED STATES DEPARTMENT OF JUSTICE,  
 Defendants.

No. 23-cv-\_\_\_\_\_

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**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.

This Notice on Texas, Plaintiff,  
 MIGUEL CARDONA, in his official capacity as Secretary of Education; United States Department of Education; MERICK B. GARLAND, in his official capacity as Attorney General of the United States; and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.  
 COMPLAINT  
 1. On June 22, 2023, the United States Department of Education published a Notice of Interpretation of Title IX of the Education Amendments of 1972 in connection of prohibited sex-based harassment, which prohibits, the secretary role, and implementing regulations, the Act, A. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Prohibited Sexual Harassment (Prohibited Sexual Harassment) in Light of Bostock v. Clayton County, 403 U.S. 832 (2021).  
 2. The Department's Notice expands Title IX's prohibition against discrimination "on the basis of sex." 20 U.S.C. § 1681(a), to encompass discrimination based on sexual orientation and gender identity based on gender identity. See 40 Fed. Reg. 32,837-01. In making the Notice, the Department has not, in Title IX, which explicitly refers to sexual orientation and gender identity, as required by 40 Fed. Reg. 32,837-01.

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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.*



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