TEXAS TITLE IX Administrator Conference™

TITLE IX ADMINISTRATOR CONFERENCE

OCTOBER 20, 2021

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

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Co-sponsored by the Texas Association of School Personnel Administrators

Title IX Legal Update

DENNIS J. EICHELBAUM

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

Dear Colleague (May 13, 2016)

Paraphrase: Gender identification is how we should read the term sex in Title IX.

- Documents (Names?), Pronouns
- Activities
- Restrooms and Locker Rooms(have optional additional privacy)
- Athletics (UIL?)
- Single Sex Classes/Schools/Overnight accommodations

The Metamorphous for Schools

- May 13, 2016 - Obama Administration Dear Colleague Letter (defined sex as "Gender Identity")
- Aug. 3, 2016 – Supreme Court grants cert. for *G.G. v. Gloucester County Sch. Bd.*
- Aug 21, 2016 - Texas v. U.S. (Harrold ISD) injunction to stop enforcement (Administrative Procedure Act argument)

The Metamorphous for Schools

- Feb. 22, 2017 – DeVos issues Dear Colleague letter – leave it to the states
- March 6, 2017 – Supreme Court remands *G.G. v. Gloucester County Sch. Bd.*
- June 5, 2020 – Supreme Court issues ***Bostock v. Clayton Cty.*** (Title VII – protects LGBTQ)

The Metamorphous for Schools

- Aug. 14, 2020 - OCR new regulations for sexual harassment for K-12 and colleges/universities take effect (first issued 5/22/2020)
- Sept 22, 2020 – 4th Circuit rules for Grimm in *Grimm v. Gloucester County Sch. Bd.*

The Metamorphous for Schools

- January 20, 2021 - Executive Order – cannot discriminate based upon gender identity or sexual orientation
- March 8, 2021 - Executive Order on Establishment of the White House Gender Policy Council
- June 28, 2021 - Supreme Court denies cert. in *Gloucester Cty Sch. Bd. v. Grimm*.

The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. *Compare Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), and *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), with *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015). **How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.**

Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 20-1163, 2021 WL 2637992 (U.S. June 28, 2021)

The Metamorphous for Schools

- [Nov. Election – you may have heard about it]
- January 8, 2021 - OCR Memorandum on *Bostock* (Issued by Kimberly M. Richey, Acting Assistant Secretary of the Office of Civil Rights, not from the Secretary of Education)

Accordingly, unwelcome conduct on the basis of transgender status or homosexuality may, if so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity on the basis of their transgender status or homosexuality, constitute sexual harassment prohibited by Title IX. 34 C.F.R. § 106.30(a).

sex." Therefore, we believe the plain ordinary public meaning of the controlling statutory and regulatory text requires a recipient providing "separate toilet, locker room, and shower facilities on the basis of sex" to regulate access based on biological sex.

IX to mean biological sex, male or female.

Biden responds: Jan. 20 Exec Order

The head of each agency shall review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

- All Title VII and Title IX laws/rules and regs
- **"because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation for all laws.**
- Use required administrative procedures (Administrative Procedure Act)
- Within 100 days

Title IX and Sex Discrimination

U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202-1328
Revised August 2021

A recipient institution that receives Department funds must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including sexual orientation and gender identity.

Terminology Keeps Changing

- Victim
- Complainant
- Survivor

WOMEN				MEN			
Height Ft. In.	Frame Size Small	Med.	Large	Height Ft. In.	Frame Size Small	Med.	Large
4'10"	102-111	109-121	118-131	5'3"	120-128	124-132	128-136
4'11"	103-113	111-123	120-134	5'4"	124-132	128-136	132-140
5'0"	104-115	113-126	122-137	5'5"	128-136	132-140	136-144
5'1"	106-118	115-129	125-140	5'6"	132-140	136-144	140-148
5'2"	108-121	118-132	128-143	5'7"	136-144	140-148	144-152
5'3"	111-124	121-135	131-147	5'8"	138-145	142-150	146-158
5'4"	114-127	124-138	134-151	5'9"	140-148	144-152	148-160
5'5"	117-130	127-141	137-155	5'10"	142-151	146-160	150-164
5'6"	120-133	130-144	140-159	5'11"	144-154	148-164	152-168
5'7"	123-136	133-144	143-163	6'0"	146-157	154-168	161-184
5'8"	126-139	136-150	146-167	6'1"	148-160	157-172	164-188
5'9"	129-142	139-153	149-170	6'2"	152-164	160-174	166-192
5'10"	132-145	142-156	152-173	6'3"	155-168	162-176	170-196
5'11"	135-148	145-159	155-176	6'3"	158-172	167-182	176-202
6'0"	138-151	148-162	158-176	6'4"	161-176	171-185	181-207

What's Next?

May 2022 – Possible New Regulations

New Case Law

- Doesn't this past year feel like it has been a year of Mondays…?

S.P. v. Northeast Indep. Sch. Dist. W.D. Tex. July 30, 2021

- S.P. claimed that her 37-year-old teacher Rey Trevino attempted to groom her
- He invited her and a few friends to eat lunch in his classroom, he invited her to be along in his classroom during lunch and after school, and began flirting with her telling her that she was pretty

S.P. v. Northeast Indep. Sch. Dist. W.D. Tex. July 30, 2021

- S.P. claims that on multiple occasions, her principal walked in on S.P. and Trevino alone in the classroom.
- On her last day in ninth grade Trevino kissed her, and a sexual relationship began.
- The district's motion to dismiss was granted for failure to state a claim.

S.P. v. Northeast Indep. Sch. Dist. W.D. Tex. July 30, 2021

- The Court determined that while there is no set definition of "grooming behavior" that provides actual knowledge for the district of possible sexual misconduct, the example given in this case of the principal seeing one-on-one interaction with the student and the teacher behind closed doors is not enough evidence for actual notice.

Roe v. Cypress-Fairbanks ISD S.D. Tex. Dec. 1, 2020

- Roe met her boyfriend, Doe when the two were both in seventh grade.
- The two began dating, and her mother disapproved of the relationship when the two began being disciplined in school for tardiness, truancy, and inappropriate physical contact.

Roe v. Cypress-Fairbanks ISD S.D. Tex. Dec. 1, 2020

- The relationship was unhealthy as the two argued in hallways and were sometimes physically violent.
- The two would often go under the stairwell in the middle school to have sex because they believed there were not cameras there.

Roe v. Cypress-Fairbanks ISD S.D. Tex. Dec. 1, 2020

- After breaking up and getting back together several times, in eleventh grade Roe worried she was pregnant.
- Roe and Doe went under the stairwell and Doe violently attempted to end the pregnancy.
- Roe reported the sexual assault at the hospital the next morning, and the CFISD police department were called to investigate.

Roe v. Cypress-Fairbanks ISD S.D. Tex. Dec. 1, 2020

- The Court found no deliberate indifference by the district when the principal reviewed the footage of a sexual assault, called the police immediately upon a report of sexual assault being made, and changed the victim's class schedule to no longer have the same classes as her then-boyfriend.
- This case is currently on appeal.

Doe I on Behalf of Doe II v. Huntington ISD E.D. Tex. Oct. 5, 2020

- Doe II played on the baseball team during his freshman year
- The seniors on the baseball team allegedly had a "tradition" of "initiation" whereby seniors would grab freshmen's testicles and/or put fingers in their anuses.

Doe I on Behalf of Doe II v. Huntington ISD E.D. Tex. Oct. 5, 2020

- A mother reported to the school that the baseball team has a hazing ritual, and the Principal said he would look into it.
- During his freshman year, a senior on the baseball team forced a broomstick up Doe II's anus against his will.

Doe I on Behalf of Doe II v. Huntington ISD E.D. Tex. Oct. 5, 2020

- This case addresses the heightened risk standard under Title IX.
- Neither SCOTUS nor the Fifth Circuit has ever explicitly recognized the heightened risk claim.
- The Court ruled that the Board of Trustees is not the official who must be aware of the heightened risk; the principal is enough.

Doe I on Behalf of Doe II v. Huntington ISD E.D. Tex. Oct. 5, 2020

- "Consistent with courts in the Western District of Texas and elsewhere, this court reads *Davis* to suggest that the victim need not report every instance of post-report bullying. Instead, if a funding recipient has actual notice of an initially reported incident and fails to adequately respond, the recipient can be held liable for making the victim "vulnerable" to ongoing harassment—whether that harassment occurs or not."

Doe I on Behalf of Doe II v. Huntington ISD E.D. Tex. Oct. 5, 2020

- The coaches told students to report issues between them to the coaches first before going to the school, which amounts to a "code of silence."
- According to Doe I, after the incident his son left the baseball team, ate lunch alone, hid in teachers' rooms, received threats, received lower grades, withdrew from social activities, and transferred out of the high school altogether.
- This case was dismissed but gave Doe I a chance to replead.

I.M. by M.M. v. Houston ISD S.D. Tex. June 3, 2021

- I.M., an intellectually-disabled high school student, was sexually assaulted by student O. while using the restroom.
- His teacher was told to escort and supervise him between classes and going to the restroom under his IEP.
- I.M. allegedly told his teacher about the assaults, and no action was taken.

I.M. by M.M. v. Houston ISD S.D. Tex. June 3, 2021

- The assaults continued for several weeks until another teacher walked in on an assault. I.M. sued under Title IX, and his claim is allowed to continue.
- The Court held that a teacher is not precluded as a matter of law from being an "appropriate" employee with the authority to make HISD liable.
- This teacher was a SPED teacher who had authority over both I.M. and O.; controlled and supervised I.M.'s trips to the bathroom where the assaults took place; and "served on the committee that oversaw critical elements of I.M.'s education."

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- S.M. transferred to Sealy High School and began to play basketball.
- She alleged that two members of the girls' basketball team harassed her, threw her personal belongings onto the locker room floor, and took her Airpods.
- She told the basketball coach, and no action was taken.
- Later, rumors began spreading that S.M. engaged in oral sex with a male student in the band hallway. The rumors were untrue, but continued to circulate at the school.

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- S.M. told the band director about the rumors and harassment she received because of them, and he told her to speak with the assistant principal.
- The principal viewed the security tape of the band hallway, determined the oral sex rumors were false, and called S.M.'s parents to tell them the rumors were untrue.
- The harassment got worse, and S.M. complained to her basketball coach daily about the harassment she received due to the oral sex rumor.

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- A different male student took S.M. into a classroom and sexually assaulted her by forcing her to perform oral sex on him.
- A few days later, a girl on the basketball team told the entire team, in front of a coach, about a new rumor that S.M. performed oral sex on the boy who assaulted her.

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- After hearing the rumors, the Assistant Principal brought S.M. into her office to ask about the second rumor, and S.M. told her it was forced contact.
- The Assistant Principal immediately contacted Sealy ISD police who investigated.
- Both S.M. and the boy were suspended for 3 days and placed into DAEP for participating in sexual acts on campus. S.M. sued under Title IX claiming the school was deliberately indifferent.

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- Courts generally hold that a school district is deliberately indifferent to complaints of sexual harassment when it fails to confront the alleged harassers or institute corrective action.
- S.M. alleges that Sealy ISD did not report the alleged sexual harassment to the district's Title IX coordinator, confront S.M.'s harassers, institute corrective measures, or investigate the allegations beyond viewing a videotape.

S.M. v. Sealy Indep. Sch. Dist. S.D. Tex. Apr. 23, 2021

- Instead, after viewing the band-hallway videotape, Sealy ISD called S.M.'s parents and told them the rumors were false.
- These steps did not, and could not, remedy S.M.'s alleged harassment.
- Not reporting the incident to the Title IX coordinator, not confronting the harassers, no corrective measures, and no investigation into the allegations constitute deliberate indifference. Relying solely on law enforcement is not enough investigation.

M.E. v. Alvin Indep. Sch. Dist. 5th Cir. 2020

- J.E. suffered prolonged sexual abuse by her junior high school police officer.
- While the school knew that J.E. and Officer Tennard had a close relationship, nobody suspected abuse.
- J.E.'s mother, M.E., met with administration after her grades began to suffer, and requested that J.E. only confide in the school counselor or the assistant principal.

M.E. v. Alvin Indep. Sch. Dist. 5th Cir. 2020

- About a year after the first instance of rape, Graham discovered that J.E. had skipped class to visit Tennard.
- The assistant principal reminded J.E. that her mother did not want her spending time with Tennard and reported the incident to the principal.
- A few days later, M.E. found explicit text messages on J.E.'s phone, and contacted police.

M.E. v. Alvin Indep. Sch. Dist. 5th Cir. 2020

- Although M.E. expressed discomfort with the bond between her daughter and Tennard in her meeting with the assistant principal, there was no mention that anything of a sexual nature might be occurring.
- Rather, the meeting concerned J.E.'s struggles at school and her penchant for confiding personal matters in a school police officer and teacher instead of her school counselor or therapist.

M.E. v. Alvin Indep. Sch. Dist. 5th Cir. 2020

- All the meeting attendees other than Tennard testified that they did not suspect sexual abuse.
- Although the meeting put the district on notice that Tennard had become a trusted confidant for J.E., it did not provide notice of a substantial risk that sexual abuse was occurring.

M.E. v. Alvin Indep. Sch. Dist. 5th Cir. 2020

- M.E. sued the district under Title IX.
- The Court ruled that red flags such as skipping class to see the perpetrator and a close confidant relationship do not amount to notice of substantial risk for sexual abuse.
- J.E. testified that she did not tell anyone about the abuse—not her family, not her friends, and not her teachers or counselors.

J.T. v. Uplift Educ. N.D. Tex. May 25, 2021

- M.L. was a kindergarten student at Grand Primary, an Uplift school, in 2019.
- M.L.'s teacher, Jamil Wazed routinely called certain children to his desk while showing movies to the class, asking them to perform sexual acts with him, kissing them, and rubbing his beard on their faces and necks.
- M.L. informed Uplift's Primary School Director about Wazed's acts on or by August 5, 2019.

J.T. v. Uplift Educ. N.D. Tex. May 25, 2021

- Uplift then conducted interviews with at least four children in Wazed's class "days after learning of the teacher's sexual behavior," and initially determined that Wazed should be allowed to continue teaching at Uplift.
- J.T. alleges that Uplift's investigative findings concluded that because Wazed's actions were not done out of malicious intent, he should be allowed to continue to work for Grand Primary after a formal meeting with the Leadership Team to layout clear and concise expectations regarding student and staff physical space and touch.

J.T. v. Uplift Educ. N.D. Tex. May 25, 2021

- Wazed was later terminated for improper touching of students.
- J.T. failed to plausibly plead that Uplift's response was so unreasonable as to cause M.L. further harassment.
- A school may not be liable for damages under Title IX unless the deliberate indifference "cause[s] students to undergo harassment or make[s] them liable or vulnerable to it."

J.T. v. Uplift Educ. N.D. Tex. May 25, 2021

- Regarding Uplift's training and supervision, the complaint does not allege any facts that enable the court to draw the reasonable inference that Uplift failed to adequately train and supervise its teachers.
- The complaint does not identify any training program, how it is insufficient, how Uplift failed to supervise its teachers, how the failure to train or supervise caused a violation of M.L.'s rights, or how the training and supervision amounted to Uplift's deliberate indifference to her rights.

Doe on Behalf of Doe v. Dallas ISD (N.D. Tex. Feb. 16, 2021)

- Sidney Bouvier Gilstrap-Portley was admitted to Hillcrest High School in DISD by claiming he was a seventeen-year-old homeless student.
- In reality, he was a twenty-five-year-old man. DISD did not conduct the mandatory home visit, which would have revealed Gilstrap-Portley living with his fiancée and their child.
- Gilstrap-Portley played basketball for the Hillcrest team, and began a relationship with Doe who was fourteen. Rumors are he was recruited to play basketball.

Doe on Behalf of Doe v. Dallas ISD (N.D. Tex. Feb. 16, 2021)

- As a result of Gilstrap-Portley's status as a winning basketball player, his relationship with Doe was well-known.
- Doe sued under Title IX, state-created danger, intentional infliction of emotional distress, and gross negligence against the principal in his individual capacity.
- Doe stated a claim under Title IX through her allegations that Hillcrest faculty and staff knew of Gilstrap-Portley's real identity, and therefore knew of the risk of sexual harassment of minors by an adult.
- Going to trial – survived MSJ.

Questions?

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HANSEN POWELL & MUÑOZ, P.C.

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

Title IX Legal Update: Caselaw

***S.P. v. Northeast Indep. Sch. Dist.*, SA-21-CV-0388-JKP-RBF, 2021 WL 3272210 (W.D. Tex. July 30, 2021)**
S.P. sued the district for discrimination under Title IX and violation of substantive due process because her 37-year-old teacher, Rey Trevino, attempted to groom her. He invited her and a few friends to eat lunch in his classroom, invited her to be along in his classroom during lunch and after school, and began flirting with her telling her that she was pretty. S.P. claims that on multiple occasions, her principal walked in on S.P. and Trevino alone in the classroom. On her last day in ninth grade Trevino kissed her, and a sexual relationship began.

The district's motion to dismiss was granted for failure to state a claim. The Court determined that while there is no set definition of "grooming behavior" that provides actual knowledge for the district of possible sexual misconduct, the example given in this case of the principal seeing one-on-one interaction with the student and the teacher behind closed doors is not enough evidence for actual notice.

***Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, CV H-18-2850, 2020 WL 7043944 (S.D. Tex. Dec. 1, 2020)**
Roe met her boyfriend, Doe, when the two were both in seventh grade. The two began dating, and her mother disapproved of the relationship when the two began being disciplined in school for tardiness, truancy, and inappropriate physical contact. The relationship was unhealthy as the two argued in hallways and were sometimes physically violent. The two would often go under the stairwell in the middle school to have sex because they believed there were not cameras there. After breaking up and getting back together several times, in eleventh grade Roe worried she was pregnant. Roe and Doe went under the stairwell and Doe violently attempted to end the pregnancy. Roe reported the sexual assault at the hospital the next morning, and the CFISD police department was called to investigate.

The Court found no deliberate indifference by the district when the principal reviewed the footage of a sexual assault, called the police immediately upon a report of sexual assault being made, and changed the victim's class schedule to no longer have the same classes as her then-boyfriend. This case is currently on appeal.

***Doe I on Behalf of Doe II v. Huntington Indep. Sch. Dist.*, 9:19-CV-00133-ZJH, 2020 WL 10317505 (E.D. Tex. Oct. 5, 2020)**
Doe II played on the baseball team during his freshman year. The seniors on the baseball team allegedly had a "tradition" of "initiation" whereby seniors would grab freshmen's testicles and/or put fingers in their anuses. A mother reported to the school that the baseball team has a hazing ritual, and the principal said he would look into it. During his freshman year, a senior on the baseball team forced a broomstick up Doe II's anus against his will.

This case addresses the heightened risk standard under Title IX. Neither SCOTUS nor the Fifth Circuit has ever explicitly recognized the heightened risk claim. The Court ruled that the Board of Trustees is not the official who must be aware of the heightened risk; the principal is enough.
"Consistent with courts in the Western District of Texas and elsewhere, this court reads *Davis* to suggest that the victim need not report every instance of post-report bullying. Instead, if a funding recipient has actual notice of an initially reported incident and fails to adequately respond, the recipient can be held liable for making the victim "vulnerable" to ongoing harassment—whether that harassment occurs or not."

The coaches told students to report issues between them to the coaches first before going to the school, which amounts to a "code of silence." According to Doe I, after the incident his son left the baseball team, ate lunch alone, hid in teachers' rooms, received threats, received lower grades, withdrew from social activities, and transferred out of the high school altogether. This case was dismissed but gave Doe I a chance to replead.

***I.M. by M.M. v. Houston Indep. Sch. Dist.*, H-20-3453, 2021 WL 2270271 (S.D. Tex. June 3, 2021)**
I.M., an intellectually-disabled high school student, was sexually assaulted by student O. while using the restroom. His teacher was told to escort and supervise him between classes and going to the restroom under his IEP. I.M. allegedly told his teacher about the assaults, and no action was taken. The assaults continued for several weeks until another teacher walked in on an assault. I.M. sued under Title IX, and his claim is allowed to continue.

The Court held that a teacher is not precluded as a matter of law from being an "appropriate" employee with the authority to make HISD liable. This teacher was a SPED teacher who had authority over both I.M. and O.; controlled and supervised I.M.'s trips to the bathroom where the assaults took place; and "served on the committee that oversaw critical elements of I.M.'s education."

***Doe on Behalf of Doe v. Dallas Indep. Sch. Dist.*, 3:19-CV-3081-S, 2021 WL 617000 (N.D. Tex. Feb. 16, 2021)**
Sidney Bouvier Gilstrap-Portley was admitted to Hillcrest High School in DISD by claiming he was a seventeen-year-old homeless student. In reality, he was a twenty-five-year-old man. DISD did not conduct the mandatory home visit, which would have revealed Gilstrap-Portley living with his fiancée and their child. Gilstrap-Portley played basketball for the Hillcrest team, and began a relationship with Doe who was fourteen. As a result of Gilstrap-Portley's status as a winning basketball player, his relationship with Doe was well-known. Doe sued under Title IX, state-created danger, intentional infliction of emotional distress, and gross negligence against the principal in his individual capacity. Doe stated a claim under Title IX through her allegations that Hillcrest faculty and staff knew of Gilstrap-Portley's real identity, and therefore knew of the risk of sexual harassment of minors by an adult. Her Title IX claim was allowed to proceed and survived a motion for summary judgment.

***S.M. v. Sealy Indep. Sch. Dist.*, CV H-20-705, 2021 WL 1599388 (S.D. Tex. Apr. 23, 2021)**
S.M. transferred to Sealy High School and began to play basketball. She alleged that two members of the girls' basketball team harassed her, threw her personal belongings onto the locker room floor, and took her Airpods. She told the basketball coach, and no action was taken. Later, rumors began spreading that S.M. performed oral sex on a male student in the band hallway. The rumors were untrue, but continued to disturb the school. S.M. told the band director about the rumors and harassment she received because of them, and he told her to speak with the assistant principal. The harassment got worse, and S.M. complained to her basketball coach daily about the harassment she received due to the oral sex rumor. A different male student took S.M. into a classroom and sexually assaulted her by forcing her to perform oral sex on him. A few days later, a girl on the basketball team told the entire team, in front of a coach, about a new rumor that S.M. performed oral sex on the boy who assaulted her. After hearing the rumors, the Assistant Principal brought S.M. into her office to ask about the second rumor, and S.M. told her it was forced contact. The Assistant Principal immediately contacted Sealy ISD police who investigated. Both S.M. and the boy were suspended for three days and placed into DAEP for participating in sexual acts on campus. S.M. sued under Title IX claiming the school was deliberately indifferent.

Courts generally hold that a school district is deliberately indifferent to complaints of sexual harassment when it fails to confront the alleged harassers or institute corrective action. S.M. alleges that Sealy ISD did not report the alleged sexual harassment to the district's Title IX coordinator, confront S.M.'s harassers, institute corrective measures, or investigate the allegations beyond viewing a videotape. Instead, after viewing the band-hallway videotape, Sealy ISD called S.M.'s parents and told them the rumors were false. These steps did not, and could not, remedy S.M.'s alleged harassment. Not reporting the incident to the Title IX coordinator, not confronting the harassers, no corrective measures, and no investigation into the allegations constitute deliberate indifference. Relying solely on law enforcement is not enough investigation.

***M.E. v. Alvin Indep. Sch. Dist.*, No. 20-20077, 840 Fed. Appx. 773, 776 (5th Cir. Dec. 18, 2020)**
J.E. suffered prolonged sexual abuse by her junior high school police officer. While the school knew that J.E. and Officer Tennard had a close relationship, nobody suspected abuse. J.E.'s mother, M.E., met with administration after her grades began to suffer, and requested that J.E. only confide in the school counselor or the assistant principal. About a year after the first instance of rape, a district official discovered that J.E. had skipped class to visit Tennard. The assistant principal reminded J.E. that her mother did not want her spending time with Tennard and reported the incident to the principal. A few days later, M.E. found explicit text messages on J.E.'s phone, and contacted police.

M.E. sued the district under Title IX. The Court ruled that red flags such as skipping class to see the perpetrator and a close confidant relationship do not amount to notice of substantial risk for sexual abuse. J.E. testified that she did not tell anyone about the abuse—not her family, not her friends, and not her teachers or counselors. Although M.E. expressed discomfort with the bond between her daughter and Tennard in her meeting with the assistant principal, there was no mention that anything of a sexual nature might be occurring. Rather, the meeting concerned J.E.'s struggles at school and her penchant for confiding personal matters in a school police officer and teacher instead of her school counselor or therapist. All the meeting attendees other than Tennard testified that they did not suspect sexual abuse. Although the meeting put the district on notice that Tennard had become a trusted confidant for J.E., it did not provide notice of a substantial risk that sexual abuse was occurring.

***J.T. v. Uplift Educ.*, 3:20-CV-3443-D, 2021 WL 2110897 (N.D. Tex. May 25, 2021)**
M.L. was a kindergarten student at Grand Primary, an Uplift school, in 2019. M.L.'s teacher, Jamil Wazed routinely called certain children to his desk while showing movies to the class, asking them to perform sexual acts with him, kissing them, and rubbing his beard on their faces and necks. M.L. informed Uplift's Primary School Director about Wazed's acts on or by August 5, 2019. Uplift then conducted interviews with at least four children in Wazed's class "days after learning of the teacher's sexual behavior," and initially determined that Wazed should be allowed to continue teaching at Uplift. J.T. alleges that Uplift's investigative findings concluded that because Wazed's actions were not done out of malicious intent, he should be allowed to continue to work for Grand Primary after a formal meeting with the Leadership Team to "layout clear and concise expectations" regarding student and staff physical space and touch. Wazed was later terminated for improper touching of students.

J.T. failed to plausibly plead that Uplift's response was so unreasonable as to cause M.L. further harassment. A school may not be liable for damages under Title IX unless the deliberate indifference "cause[s] students to undergo harassment or make[s] them liable or vulnerable to it." Regarding Uplift's training and supervision, the complaint does not allege any facts that enable the court to draw the reasonable inference that Uplift failed to adequately train and supervise its teachers. The complaint does not identify any training program, how it is insufficient, how Uplift failed to supervise its teachers, how the failure to train or supervise caused a violation of M.L.'s rights, or how the training and supervision amounted to Uplift's deliberate indifference to her rights.

Investigating Educator Misconduct

WELCOME!

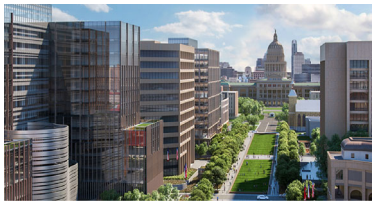
Please complete feedback questionnaires
Hold your questions until the end

Educator Investigations Division

David Rodriguez
Director

Deborah Owen
Investigator

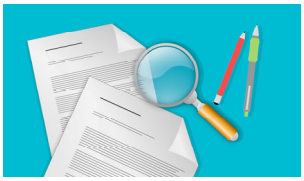
Tina Farrell
Manager



Objective and Purpose

Investigators from the TEA Educator Investigations Division will provide an overview of:

- The Division's responsibilities
- Requirements for reporting child abuse (DFPS/CPS) and educator misconduct
- Examine keys for conducting productive investigations
- Case studies



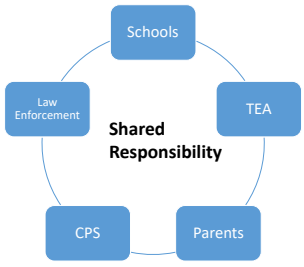
Mission Statement

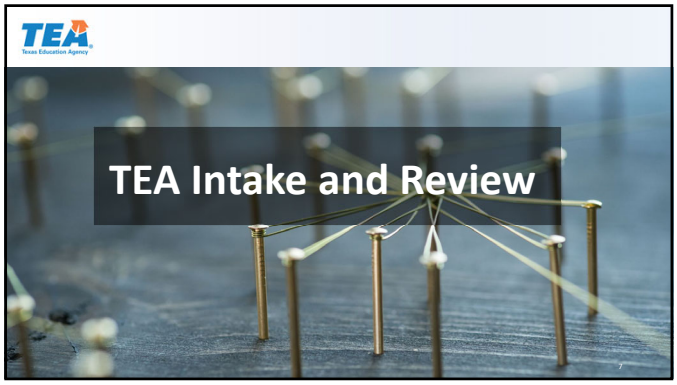
State Board for Educator Certification (SBEC) is dedicated to improving student achievement and ensuring the safety and welfare of Texas school children by upholding the highest level of educator preparation, performance, continuing education, and **STANDARDS OF CONDUCT.**

Educator Investigations: Responsibilities

- **Intake and Review reports** of misconduct and criminal histories
- **Conduct administrative investigations** of SBEC certified educators, non-certified educators, and school employees
- **Make recommendations** for sanctions; **settle matters** informally according to rules; **make referrals** for litigation
- **Provide customer support** to Texas public and private schools and applicants for SBEC certification –Fingerprinting, Do Not Hire Registry, Misconduct Reporting Portal
- **Maintain IT applications**- Do Not Hire Registry, Misconduct Reporting Portal, ECOS Fingerprinting and Enforcement workflow

Student Safety





How cases start at TEA…

- 249/153 School Report
  - Inappropriate Relationship
  - Sexual Misconduct
  - Violence
  - Fraud
- Criminal History
  - Felony Offenses
    - Sexual
    - Drugs
    - Violence
    - Fraud
- CPS Reports
  - Physical Abuse
  - Sexual Abuse
  - Ruled Out
- Non-Certified
  - Title V Offenses
  - Sex Offender
- Complaints Management
  - Bullying
  - Physical Abuse
  - Emotional Abuse
  - Fraud
  - Testing
  - Special Education

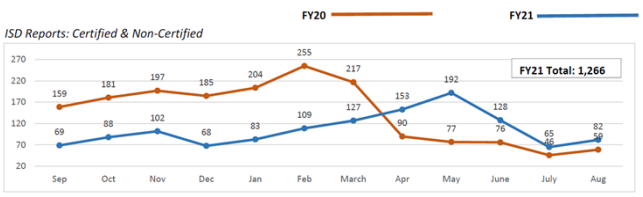
PCHE
Preliminary Criminal History Evaluation

Internal/External Agency Referrals

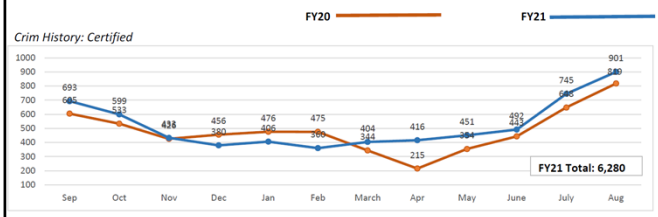
NASDTEC

Note: List is not all-inclusive

Superintendent Reports



Criminal History Hits



Intake and Review: Open Investigation or Close Review

- Preliminary Review of Information
  - No Investigation → Close Review and Archive Information
  - Open Investigation → Forwarded to Investigations

What is Grooming?

Multiple definitions:

- The act of deliberately establishing an emotional connection with a child in order to prepare the child for sexual abuse.
- Grooming involves building trust with a child and the adults around the child to gain access to and time alone with her/him.
- Sexual grooming is the preparatory process in which a perpetrator gradually gains a person's or organization's trust with the intent to be sexually abusive. The victim is usually a child, teen or a vulnerable adult.

References: Center for Missing and Exploited Children, American Bar Association(Daniel Pollack)

Delayed Outcry

The grooming process is part of the reason there is often no physical evidence of abuse at the time the abuse is reported.

The lack of physical evidence causes more than half of sexual abuse victims to delay the disclosing of sexual abuse for a year or more.

Tueller

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Seven Stages of Grooming

1. Identify and Target the Victim
2. Gain Trust and Access
3. Play a Role in the Child's Life
4. Isolate the Child
5. Create Secrecy Around the Relationship
6. Initiating Sexual Contact
7. Controlling the Relationship

Tueller

Identifying and Targeting the Victim

- Any child or teen may be a potential victim
- Attracted to children and youth with certain characteristics
- Target certain co-existing factors to facilitate the crime
- Grooming several potential victims at once

Tueller

Gain Trust and Access

- Vulnerable Child
  - Observes the child/youth and assess their vulnerabilities
- Gains trust of parent and child
  - Grooming of parent, other adults, as well as the child
  - *"if I can convince mom or girlfriend, I'm good"*
  - *"If their mom doesn't believe them, no one will"*
- Offers child special attention
  - Listening ear, car ride, special gifts

Tueller

Playing a Role in the Child's Life

- Manipulate the Relationship
- Exploit Youth's Empathy
- Convince child that he or she is the only one who understands them – The Perpetrator
- Reinforces that the perpetrator needs the child

Tueller

Isolating the Child

- The point is to gain access to the child alone away from any potential witnesses.
- Perpetrators have been successful in molesting victims without detection while other adults are in the room.

Tueller

Creating Secrecy Around the Relationship

- The suspect may reinforce the special connection with the child when they are alone or through private communications.
- Admonish victim against telling anyone (Shame and Guilt)
- Threaten victim with disclosure, suicide, physical harm to child or loved one
- Telling the student if they say anything, they could go to jail

Tueller

Initiating Sexual Contact

- May start with touching that is not overtly sexual (though the predator may find it sexually gratifying).
- Sexualized contact may appear to be casual (hugs, massaging, touching private areas over clothing).
- Removing inhibition and desensitizing the child (making sexual contact seem normal).

Tueller

Controlling the Relationship

- Utilize fear to manipulate the child
- Use shame to maintain secrecy
- Normalize the situation
- Threaten child

Tueller

Effects of Grooming

- Short and Long Term
- Child, Teen, Adult
- Self-Harm
- Anxiety & Depression
- Substance Abuse
- PTSD

Tueller

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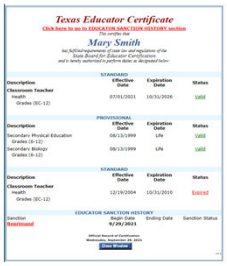
SBEC Sanctions and the Do Not Hire Registry

SBEC Sanctions

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

- **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

Reprimand


Texas Educator Certificate

Mary Smith

Suspension


Texas Educator Certificate

Joe Doe


Texas Educator Certificate

Jacob Smith

Voluntary Surrender


Texas Educator Certificate

John Doe

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)

Comparing Criminal to Administrative Investigations

CRIMINAL INVESTIGATION

ADMINISTRATIVE INVESTIGATIONS

Burden of Proof

Crimes vs. Misconduct

Conduct may not rise to level of criminal offense as outline in Penal Code, but may still be sanctionable violation under SBEC rules.

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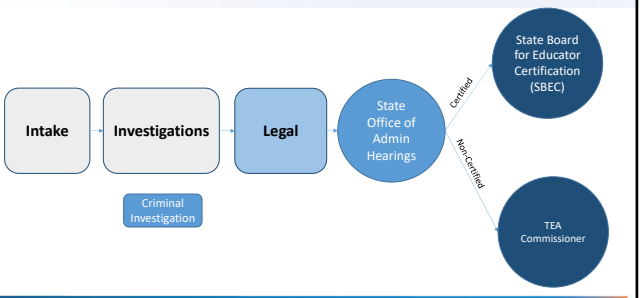
Investigation & Litigation Process



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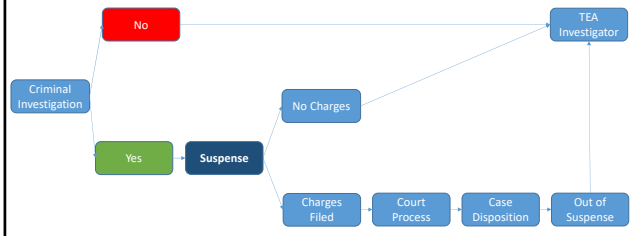
Pending Criminal Investigations



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Information Gathering

- Warnings to Virtual Certificate
- Show Cause
- Educator Response
- Educator response may conflict with information.
- Contact all agencies including ISD, Law Enforcement, CPS, Courts
- Subpoenas Issued

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Subpoena

Subpoenaed items may include

- Identity and contact Information: Reprimands, disciplinary measures, or allegations of misconduct
- Law enforcement records
- Employment documents
- Other documents
- Records relating to allegations of financial misconduct

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Review and Assessment

- Importance of Timelines
- Relevance of Prior Conduct and Reprimands
- Victim and witnesses are contacted for follow up

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Informal Conference

Investigator conducts the informal conference with the educator.

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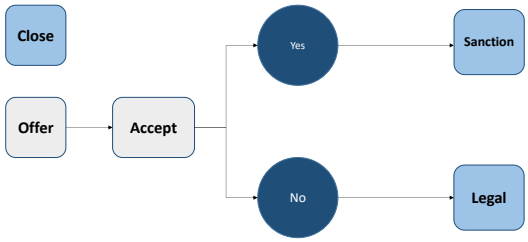
After the Informal Conference



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Case Discussion

- Educator introduces boyfriend
- Boyfriend engages in inappropriate communication, threats against students
- Investigation
- Voluntary surrender

When educators <u>introduce</u> the threat

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Keys to Productive Investigations

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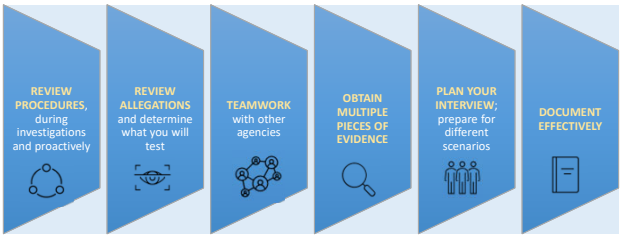
Keys to Productive Investigations



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Review Procedures

During investigations

Proactively

Think about potential allegations and create procedures.

Important if investigation process not often used (e.g. smaller districts)

Be aware of security camera policies

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Allegations

What are the alleged violations?

What will you be testing?

Are there multiple allegations in play?

e.g. Local district policies, Tx Penal Code, TAC §247, §249

What are "lesser included" allegations

44

Teamwork

What is the scope of each agency?

What are required timelines?

CPS

Law Enforcement

45

Gather Evidence

Seek multiple pieces of corroborating evidence

Safeguard against case falling apart and scrutiny

46

Interviewing

The single most determining factor in whether a case is successfully resolved is the information gathered from interviews with witnesses, victims and other subject

An interview is a conversation with a purpose, not a list of questions that when exhausted end the interview.

Interviewer must prepare prior to the interview- outline.

Is a particular question worth asking?

Avoid overload for the subject.

Work from general questions (5 w's) to specifics.

47

Interview

All Parties

Build Rapport

Ask questions in simple language, you don't have to be the expert

Ask questions in different ways

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Document Effectively

If it's not documented, it didn't happen

- Record the version that you received
- Remain objective
- Be transparent

Administrator and School Responsibilities

- Verify fingerprint status
  - Upload employees to TEA system to initiate fingerprinting
  - Superintendents certify compliance annually
- Check Do Not Hire Registry
  - Refuse to hire or terminate if on DNHR
  - Non-compliance carries penalties for charter schools and DOIs
- Investigate allegations against SBEC Certified / Non-Cert Employees
  - Investigate allegations of misconduct, despite resignation
  - Create procedures to ensure requirements are met
- Report misconduct to TEA/SBEC as required
  - Report through Misconduct Reporting Portal
  - Failure to report carries penalties

Public School Reporting Requirements

	Certified Educators	Non-certified Educators and Employees
What to report:	✓ Abused or otherwise committed an unlawful act with a student or minor ✓ Was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor	
	✓ Possessed, transferred, sold, or distributed a controlled substance ✓ Illegally transferred, appropriated, or expended school funds or property ✓ Attempted by fraudulent means to obtain or alter any certificate to gain employment or additional compensation ✓ Committed a criminal offense on school property or at a school-sponsored event	

Public School Reporting Requirements

	Certified Educators	Non-certified Educators and Employees
Principal requirement:	• Report to Superintendent within 7 business days of an individual being terminated or resigned	
Superintendent requirement:	• Report to TEA within 7 business days of learning that an individual was terminated or resigned • By mail, fax, or internet reporting portal. Do not submit through email.	

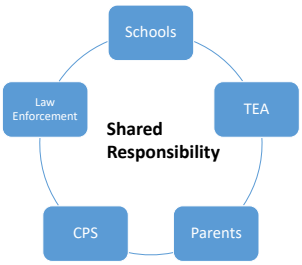
In Statute: Required reporting of allegations against SBEC certificate holders - TEC §21.006 / TAC §249.14, Exception to reporting requirement - TEC §21.006(b),(c), and (c-2) as amended by SB 1476, Required reporting of allegations against non-certified employees - TEC §22.093 as added by HB3, Internet portal - TEC §22.095

Reporting Child Abuse

TEC Chapter 38

- Child abuse reporting and programs
- Policies addressing sexual abuse
- Participate in training and prevention efforts
- Posters

Student Safety



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Questions

References

- Center for Missing and Exploited Children
- Seven Stages of Grooming and Delayed Disclosure, Thomas E. Tueller, LCSW , Tueller Counseling Services, Inc. Idaho Falls, Idaho
- Example phrases are taken from court cases (i.e., State v. Dunn, Morgan v. Morgan, State v. Leavitt, and State v. Goff)

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TEXAS TITLE IX Administrator Conference

TRANSGENDER

Holly Boyd Wardell
EICHELBAUM WARDELL HANSEN POWELL & MUÑOZ, P.C.
October 20, 2021

TRANSGENDER ISSUES

EMPLOYEES	STUDENTS
• Hiring Decisions	
• Bathrooms, Locker Rooms, Showers	• Bathrooms, Locker Rooms, Showers
• Pronouns, Names	• Pronouns, Names
• Dress Codes	• Dress Codes
	• Overnight Accommodations
	• Athletics

EMPLOYEES

- June 15, 2020, U.S. Supreme Court
- Bostock v. Clayton County
- Title VII – Civil Rights Act of 1964
- Sex discrimination includes discrimination against an individual on the basis of sexual orientation and transgender status.

"Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"

Bostock v. Clayton County, Georgia,
140 S. Ct. 1731, 590 U.S., 207 L. Ed. 2d 218 (2020)

EEOC: TITLE VII SEX DISCRIMINATION

Employment decisions made on the basis of sexual orientation, transgender status, failure to conform to gender norms or stereotypes

EMPLOYMENT DECISIONS

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotions
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

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. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

PRONOUNS AND NAMES

According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. 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.

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity | U.S. Equal Employment Opportunity Commission (eeoc.gov)

STUDENTS

- January 21, 2021, President Biden
- Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- *Bostock's* reasoning will apply to other discrimination laws, including Title IX
- 100-day review by each federal agency

TITLE IX – SEX DISCRIMINATION

June 16, 2021, OCR - USDOE

- Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.
- OCR's interpretation stems from the Supreme Court decision in *Bostock*, "in which the Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex."

- Title IX protects students from harassment who deviate from stereotypical gender norms.
- It does not matter whether or not a harasser is the same or opposite sex.
- A school district may be liable under Title IX for employee or student harassment of transgender students when there is notice of harassment, followed by deliberate indifference and a failure to respond appropriately.

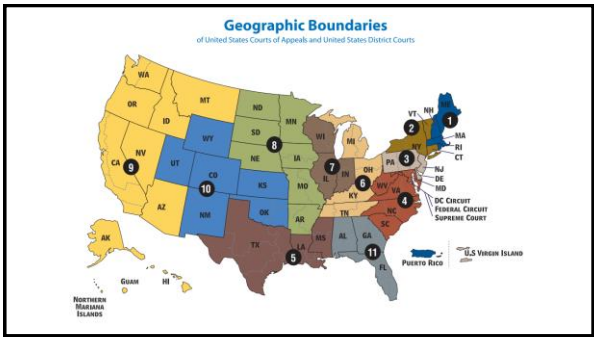
- Transgender and gender-nonconforming students face a heightened risk of bullying, violence, and discrimination.
- Bullying of a student because of the student's nonconformity with gender norms is a form of harassment based on sex in violation of federal law.

Legal Authorities

- **Supreme Court** decisions are authoritative on federal law and constitutional matters over all other federal courts & state courts handling constitutional issues
- **Circuit court** decisions are authoritative over all district courts *in that circuit*, are "persuasive" or "non-binding" authority in other circuits and districts
- **District court decisions** are binding in the individual case and provide precedential authority in that district
- **Federal agency regulations and enforcement actions** are binding per federal law but can be challenged in court
- **Federal guidance** is persuasive but not binding

Circuit Courts: Bathroom Cases

- Third, Fourth, Sixth, Seventh, Ninth, Eleventh Circuits have all ruled in favor of transgender students.
- Fifth Circuit has not yet ruled on this issue.



Texas v. United States, 201 F.Supp.3d 810 (N.D. Texas, 2016)

Background: Various states, state agencies, and school districts brought action against DOE, DOL< DOJ, challenging defendants' assertion that Title VII and Title IX require that all persons must be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs moved for a preliminary injunction.

Holdings: federal guidelines were final agency action subject to judicial review; guidelines were subject to notice and comment; and deference was not owed to agency interpretation of a Title IX implementing regulation.

Texas v. United States, 201 F.Supp.3d 810 (N.D. Texas, 2016)

- 2016 - Nationwide preliminary injunction granted.
- 2017 U.S. voluntarily dismissed the case

Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

- Nov. 11, 2014 - Gavin Grimm, then 15, addressed his local school board to explain why he was not a danger to other students when using the boys' restroom.
- He had used the boys' bathroom in public places throughout Gloucester County and had never had a confrontation. He told the board it was humiliating to be segregated from the general population.
- He had hoped that his heartfelt explanation would help those in a position of power in his community understand what that he was not a predator, but a boy, despite the fact that he did not conform to some people's idea about who or what a boy is supposed to be.

Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

- Board responded by adopting a policy that access to changing rooms and bathrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility"
- When he refused to use the girls' bathroom, Grimm was offered the use of some broom closets that had been retrofitted into unisex bathrooms. Grimm refused to use those as well, opting to use a bathroom in the school nurse's office.

Grimm v. Gloucester County Sch. Bd.

- Grimm began hormone therapy that altered his bond and muscle structure, deepened his voice, and caused him to grow facial hair.
- Obtained a Virginia state ID card listing sex as male
- Chest reconstruction surgery
- Obtained a court order legally changing his sex to male under VA law
- Obtained a new birth certificate reflecting his sex as male

Grimm v. Gloucester County Sch. Bd.

- Represented by the ACLU, Grimm sued the school district for discriminating against him in violation of the Equal Protection Clause and Title IX.
- Grimm claimed that the district's policy was degrading and stigmatizing and that it singled Grimm out as "unfit to use the same restrooms as every other students."
- Grimm also claimed it was discriminatory to not change his official records to reflect male status.

Grimm v. Gloucester County Sch. Bd.

- Initially, the Fourth Circuit (April 2016) ruled in favor of Grimm based on Obama administration policy related to Title IX protections.
- Then the Trump administration changed the underlying policy (Feb. 2017), forcing a pending hearing before the Supreme Court to be vacated and the case retried at the lower courts.

Grimm v. Gloucester County Sch. Bd.

- Due to recent case law, including the Supreme Court decision in Bostock v. Clayton County, the Fourth Circuit ruled again in favor of the student (Aug. 2020); the Supreme Court refused to hear the case (July 2021), allowing the Fourth Circuit's judgment to stand.
- The District settled with Grimm: $1.3 million in legal fees.

John M. Kluge v. Brownsburg Community School Corp.,
__F.Supp.3d. __, 2021 WL 2915023 (S.D. IN. July 12, 2021).

Kluge v. Brownsburg Community School Corp.

- John Kluge was a teacher for BCSC
- Forced to resign after refusing to refer to transgender students by their preferred names due to his religious objections to affirming transgenderism.
- Pursuant to Title VII, Kluge asserted two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation.
- Mr. Kluge filed a Motion for Partial Summary Judgment, seeking judgment in his favor on his failure to accommodate claim. BCSC filed a Cross-Motion for Summary Judgment, seeking judgment in its favor on both claims.

FACTUAL BACKGROUND - Teacher

- Hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS.
- Employed in that capacity until the end of the 2017-2018 academic year.
- Kluge taught beginning, intermediate, and advanced orchestra, beginning music theory, and advanced placement music theory, and was the only teacher who taught any sections of those classes during his time at BHS, which is the only high school in BCSC. Mr. Kluge also assisted the middle school orchestra teacher in teaching classes at the middle school.

FACTUAL BACKGROUND – Christian/Church Elder

- Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbytery.
- Church elder, meaning he is a member of the board of elders, which "exercise[s] spiritual oversight over the church" and is "part of the government of [the] church."
- Serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader.
- Religious beliefs "are drawn from the Bible," and his "Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues." "

FACTUAL BACKGROUND – Religious Beliefs

"Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that "he cannot affirm as true ideas and concepts that he deems untrue and sinful." As a result of these principles, Mr. Kluge believes that "it is sinful to promote gender dysphoria." In addition, according to Mr. Kluge, transgenderism "is a boringly old sin that has been repented for thousands of years," and because being transgender is a sin, it is sinful for him to "encourage[] students in transgenderism."

FACTUAL BACKGROUND – Faculty Mtg/Request

- 2016-17 school year, BHS staff members approached the H.S. Principal seeking direction about how to address transgender students.
- January 2017, faculty members gave a presentation to teachers on what it means to be transgender and how teachers can encourage and support transgender students.
- May 2017, 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."
- The letter specifically asked that BCSC staff not be required to refer to transgender students using their preferred pronouns and that transgender students not be permitted to use the restrooms and locker rooms of their choice.

FACTUAL BACKGROUND – Name Policy

- In response to competing concerns, BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name that appears in PowerSchool, a database that BCSC uses to record and store student information, including grades, attendance, and discipline.
- Transgender students could change their first names in PowerSchool if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change.
- Through the same process, students could also change their gender marker and the pronouns used to refer to them.

FACTUAL BACKGROUND – Restrooms, Dress Codes

- In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified.
- The three other teachers who initially expressed objections to "promot[ing] transgenderism" accepted the Name Policy, while Mr. Kluge did not.
- BCSC's practices regarding transgender students were based on BCSC's administrators' ultimate conclusion that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying" and that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being."

FACTUAL BACKGROUND – Three Options

In July 2017, Mr. Kluge informed the Principal that he could not follow the Name Policy because he had a religious objection to referring to students using names and pronouns corresponding to the gender with which they identify, rather than the biological sex that they were assigned at birth. The Principal called a meeting with Mr. Kluge and the Superintendent to discuss the situation. At the meeting, the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination. Mr. Kluge refused to either follow the Name Policy or resign, so he was suspended.

FACTUAL BACKGROUND – Last Names Only Accom.

The following week, on July 31, 2017, another meeting was held between the Superintendent, Director of Human Resources, and Mr. Kluge. Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach ("the last names only accommodation"), and the administrators agreed.

FACTUAL BACKGROUND – Last Names Only Accom.

Mr. Kluge signed a document that stated the following, including a handwritten notation initialed by the Director of HR:

You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana. We agree that John may use last name only to address students. You are also directed not to attempt to counsel or advise students on his/her lifestyle choices.

FACTUAL BACKGROUND – Equity Alliance Club

- After Mr. Kluge began referring to students by last names, some students and faculty members complained that this was dehumanizing.
- Mr. Kluge became a frequent topic of the student Equality Alliance Club.
- At least one student claimed that sometimes, Mr. Kluge would use honorifics like "Mr." or "Miss" when referring to cisgender students.

FACTUAL BACKGROUND – Ending the Accommodation

- January 2018, the Principal asked Kluge to resign effective at the end of the year, because he was continuing to receive complaints from students and did not like the tense situation.
- February, Kluge was informed that after the 2017-18 school year, he would no longer be allowed the "last names only accommodation." The Director of HR stated that this accommodation was not reasonable.
- March, Mr. Kluge was told her could either comply with the Name Policy, resign, or be terminated.

FACTUAL BACKGROUND – Kluge Resigns

April 2018

I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year when my contract is finished, i.e., early August 2018. I'm resigning my position because [BCSC] has directed its employees to call transgender students by a name and sex not matching their legal name and sex. BCSC has directed employees to call these students by a name that encourages the destructive lifestyle and psychological disorder known as gender dysphoria. BCSC has allowed me the accommodation of referring to students by last name only starting in August 2017 so I could maintain a "neutral" position on the issue. Per our conversation on 3/15/18, [BCSC] is no longer allowing this accommodation. BCSC will require me to refer to transgender students by their "preferred" name as well as by their "preferred" pronoun that does not match their legal name and sex. BCSC will require this beginning in the 2018-2019 school year. Because my Christian conscience does not allow me to call transgender students by their "preferred" name and pronoun, you have said I am required to send you a resignation letter by May 1, 2018 or I will be terminated at that time…

LEGAL ISSUES – Title VII – Religious Accoms

1. **Whether District was required to offer other accommodations**
2. **Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet**
3. **Whether the last-names-only accommodation was an undue hardship**

LEGAL ISSUES – Religious Accoms

1. **Whether District was required to offer other accommodations**

Court: The court ruled that BCSC's failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII.

"Title VII merely requires an employer to 'show, as a matter of law, that any and all accommodations would have imposed an undue hardship.'"

LEGAL ISSUES – Sincerely Held

2. **Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet**

Court: Perfection is not required. "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"

The court also noted that the sincerity of an individual's religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.

LEGAL ISSUES – Undue Hardship

3. **Whether the last-names-only accommodation was an undue hardship**

Court: Kluge established a prima facie case of discrimination based on failure to accommodate, so the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business."

In the Seventh Circuit, requiring an employer "to bear more than a *de minimis* cost" or incur more than a "slight burden" constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

"The relevant costs may include not only monetary costs but also the employer's burden in conducting its business." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001).

LEGAL ISSUES – Undue Hardship

3. Whether the last-names-only accommodation was an undue hardship

Court: BCBS argued that Kluge's failure to address transgender students by the names and pronouns reflected in PowerSchool created undue hardship related to interference with its mission to educate students. BCSC argued that the last names only arrangement created an undue hardship **by placing it on "the razor's edge of liability" by exposing it to potential lawsuits by transgender students** alleging discrimination. The court ruled that the undisputed evidence in this case demonstrated that the last names only accommodation resulted in undue hardship to BCSC as that term is defined by relevant authority in the Seventh Circuit.

LEGAL ISSUES – Heckler's Veto

3. Whether the last-names-only accommodation was an undue hardship

Court: The court pointed to the declarations of two transgender students to show that Mr. Kluge's use of last names only made them feel targeted and uncomfortable. One student dreaded going to orchestra class and did not feel comfortable speaking to Kluge directly. Other students and teachers complained that Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable. One student quit orchestra entirely. "Certainly, this evidence shows that Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students. BCSC was not required to allow an accommodation that unduly burdened its "business" in this manner."

LEGAL ISSUES – Most Students Excelled

3. Whether the last-names-only accommodation was an undue hardship

Court: In an attempt to show that his interference with BCSC's business did not rise above the *de minimis* level, Kluge repeatedly emphasized that many of his orchestra students were successful during the 2017-2018 school year in that they participated in extracurricular activities and won awards for their musical performances. He also submitted declarations from students and another teacher stating that they did not perceive any problems in his classes resulting from the use of last names only. The court noted that these facts may well be true, and were accepted as such, but they were deemed neither dispositive of nor relevant to the undue hardship question.

HOLDING

"BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only." BCSC presented evidence that two specific students were affected by Kluge's conduct and that other students and teachers complained.

Texas Education Code § 26.008. Right to Full Information Concerning Student

(a) A parent is entitled to full information regarding the school activities of a parent's child except as provided by Section 38.004.

(b) An attempt by any school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline under Section 21.104, 21.156, or 21.211, as applicable.

CHANGING STUDENT RECORDS

7. Should a district change school records to reflect a transgender student's preferred name and gender?

At least one federal circuit court has found that a school district's refusal to change a transgender student's records to reflect his male gender identity violated Title IX and the Equal Protection Clause.[12] While the Fourth Circuit case is not binding legal authority in Texas, it reflects a legal trend that may be persuasive in a Texas court. Texas law does not definitively resolve this issue, but a district does have some flexibility with regard to requests to change a student's name and gender.

- Legal Issues Related to Transgender Students July 2021 (tasb.org)

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.[13] 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.[14] 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.[15] Any changes in the AAR must be dated, explained and kept as part of the student's permanent file.[16] 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.

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.[17]

ATHLETICS

- **Fairness in Women's Sports Acts**
- **Labelled anti-trans legislation**

States that passed legislation in 2021

- Alabama (11th Circuit)
- Arkansas (8th Circuit)
- Florida (11th Circuit)
- Kansas (Vetoed) (10th Circuit)
- Louisiana (5th Circuit)
- Mississippi (5th Circuit)
- Montana (9th Circuit)
- North Dakota (Vetoed; Overridden) (8th Circuit)
- South Dakota (Vetoed) (8th Circuit)
- Tennessee (6th Circuit)
- West Virginia (4th Circuit)

- ***No Texas or Fifth Circuit authority yet, but…***
- ***Federal authorities (EEOC & OCR) and courts following Bostock reasoning***
- ***Transgender individuals – use restroom, locker rooms, showers, names, pronouns they want***
- ***Gender neutral bathrooms viewed as discriminatory***
- ***No medical dx or treatment required as a prerequisite***
- ***Religious accommodation standard under Title VII – undue hardship (more than de minimis or slight burden)***

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Transgender Issues

By Holly Boyd Wardell, Shareholder
October 20, 2021

EMPLOYEES

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*, which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status. 140 S. Ct. 1731 (2020).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) issued guidance declaring the following employment decisions to be in violation of Title VII if made on the basis of an individual's sexual orientation, transgender status, failure to conform with gender norms or stereotypes:

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotion
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

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. *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that

Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity). In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

Pronouns and Names: According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. 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.

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity | U.S. Equal Employment Opportunity Commission (eeoc.gov)

STUDENTS

BIDEN EXECUTIVE ORDER – JANUARY 20, 2021

President Joseph Biden released "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" on January 20, 2021. In this executive order, the Biden administration pronounced that *Bostock v. Clayton County* would also apply to other discrimination laws. The order states: "Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

The order mandated that, "[w]ithin 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to" the executive order. *Id.*

U.S. DEPT. OF EDUCATION – OFFICE FOR CIVIL RIGHTS – JUNE 16, 2021

On June 16, 2021, the Office for Civil Rights at the U.S. Department of Education issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity. OCR's explained that its interpretation stems from the landmark U.S. Supreme Court decision in *Bostock v. Clayton County*, "in which the Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex." U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity | U.S. Department of Education. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (Jun. 21, 2021) (to be codified at 34 C.F.R. chapter undef.).

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination," said U.S. Secretary of Education Miguel Cardona. "Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination." *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP'T. OF ED., (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity.

OCR further explicated that the Notice of Interpretation "continues OCR's sustained effort to promote safe and inclusive schools for all students, including LGBTQ+ students. This action is part of the Biden-Harris Administration's commitment to advance the rights of the LGBTQ+ community, set out in President Biden's *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* and the *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*." *Id.*

The Department of Education's Notice of Interpretation is available here.

Third Circuit (PA, NJ, DE, Virgin Islands)

The Third Circuit upheld a school district's policy that transgender students may use the bathroom consistent with their gender identity. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018). Cisgender high school students, by and through their parents and guardians, brought an action against the school district and school officials

alleging that the district's policy of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated their constitutional rights of bodily privacy, as well as Title IX and state tort law. According to the Third Circuit, the District Court correctly concluded that the appellants' attempt to enjoin that policy based on an alleged violation of their privacy rights and their rights under Title IX and Pennsylvania tort law is not likely to succeed on the merits. The Third Circuit also agreed with the District Court that an injunction was not merited, because the appellants would not be irreparably harmed.

Fourth Circuit (MD, NC, SC, VA, WV)

The Fourth Circuit ruled that a school district's policy requiring students to use bathrooms based on their biological sex, or birth-assigned sex, and its refusal to amend a transgender student's school records to reflect his gender identity violated Equal Protection Clause and constituted discrimination on the basis of sex in violation of Title IX. *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020).

> The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. Compare *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), and *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), with *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015). How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.
>
> *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

On June 28, 2021, the Supreme Court denied the school board's petition for a writ of certiorari.

Fifth Circuit (TX, LA, MS)

The Fifth Circuit has no caselaw that addresses transgender students. However, the Fifth Circuit has ruled that it will not adjust court documents to match the preferred name or pronouns of a transgender litigant after the case is decided. "If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court." *United States v. Varner*, 948 F.3d 250, 257–58 (5th Cir. 2020). The Court has often changed pronouns at the beginning of cases

to match the preferred designation by a litigant, but the court admitted this to be an uneven practice it does not intend to adjust.

Sixth Circuit (KY, MN, OH, TN)

The Sixth Circuit upheld an injunction against a school district that denied a transgender girl the ability to use the female restroom. The court stated: "However, the record establishes that Doe, a vulnerable eleven-year-old with special needs, will suffer irreparable harm if prohibited from using the girls' restroom. Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child." *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). This case was ultimately settled but not before the court noted that, "public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest." *Dodds*, F.3d 217, 222.

In 2021, the Sixth Circuit held that under the First Amendment a college professor may refuse to use a student's preferred pronouns for religious reasons. The court stated: "The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (citations omitted). The court continued: "The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern. . .it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law." *Id* at 510.

Seventh Circuit (IL, IN, WI)

The Seventh Circuit ruled that transgender students may bring claims of sex discrimination under Title IX, that these students are likely to succeed in their cases if brought under a theory of sex stereotyping, and that heightened scrutiny instead of rational basis applied to these sorts of cases. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017). "The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." *Id.*

John M. Kluge v. Brownsburg Community School Corp., __F.Supp.3d. __, 2021 WL 2915023 (S.D. IN. July 12, 2021). John Kluge was a teacher for the Brownsburg Community School Corporation ("BCSC"); he was forced to resign after refusing to refer to transgender students

by the names selected by the students, their parents, and their healthcare providers due to his religious objections to affirming transgenderism. Pursuant to Title VII, Mr. Kluge asserted two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation. Mr. Kluge filed a Motion for Partial Summary Judgment, seeking judgment in his favor on his failure to accommodate claim. BCSC filed a Cross-Motion for Summary Judgment, seeking judgment in its favor on both claims. In addition, a group of medical, mental health, and transgender youth support organizations filed a Motion for Leave to File Brief of Amici Curiae in support of BCSC's summary judgment motion.

FACTS: Mr. Kluge was hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS. He was employed in that capacity until the end of the 2017-2018 academic year. Mr. Kluge taught beginning, intermediate, and advanced orchestra, beginning music theory, and advanced placement music theory, and was the only teacher who taught any sections of those classes during his time at BHS, which is the only high school in BCSC. Mr. Kluge also assisted the middle school orchestra teacher in teaching classes at the middle school.

Mr. Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbytery. He serves as a church elder, meaning he is a member of the board of elders, which "exercise[s] spiritual oversight over the church" and is "part of the government of [the] church." In addition, Mr. Kluge serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader. Mr. Kluge's religious beliefs "are drawn from the Bible," and his "Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues." "Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that "he cannot affirm as true ideas and concepts that he deems untrue and sinful." As a result of these principles, Mr. Kluge believes that "it is sinful to promote gender dysphoria." In addition, according to Mr. Kluge, transgenderism "is a boringly old sin that has been repented for thousands of years," and because being transgender is a sin, it is sinful for him to "encourage[] students in transgenderism."

During the 2016-17 school year, BHS faculty and staff members approached the High School Principal seeking direction about how to address transgender students. In January 2017, faculty members gave a presentation to teachers on what it means to be transgender and how teachers can encourage and support transgender students. In May 2017, Mr. Kluge and three other teachers called a 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." The letter specifically asked that BCSC faculty and staff not be required to refer to transgender students using their preferred pronouns and that transgender students not be permitted to use the restrooms and locker rooms of their choice. In response to these various competing concerns, BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name that appears in PowerSchool, a database that BCSC uses to record and store student information, including grades, attendance, and discipline. Transgender students could change their first names in PowerSchool if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change. Through the same process, students could also change their gender marker and the pronouns used to refer to them. In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified. The three other teachers who initially expressed objections to "promot[ing] transgenderism" accepted the Name Policy, while Mr. Kluge did not. BCSC's practices regarding transgender students were based on BCSC's administrators' ultimate conclusion that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying" and that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being."

In July 2017, Mr. Kluge informed the Principal that he could not follow the Name Policy because he had a religious objection to referring to students using names and pronouns corresponding to the gender with which they identify, rather than the biological sex that they were assigned at birth. The Principal called a meeting with Mr. Kluge and the Superintendent to discuss the situation. At the meeting, the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination. Mr. Kluge refused to either follow the Name Policy or resign, so he was suspended.

The following week, on July 31, 2017, another meeting was held between the Superintendent, Director of Human Resources, and Mr. Kluge. Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach ("the last names only accommodation"), and the administrators agreed. Mr. Kluge signed a document that stated the following, including a handwritten notation initialed by the Director of HR:

> You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana. We agree that John may use last name

> only to address students. You are also directed not to attempt to counsel or advise students on his/her lifestyle choices.

Another handwritten note, also initialed by the Director of HR, further stated: "In addition, Angie Boyer will be responsible for distributing uniforms to students." Mr. Kluge understood the last names only accommodation to mean that he would refer to all students—not just transgender students—by their last names only, not use any honorifics such as "Mr." or "Ms." to refer to any student, and if any student were to directly ask why he used last names only, he would respond that he views the orchestra class like a sports team and was trying to foster a sense of community. He also understood that he would not be required to distribute gender-specific orchestra uniforms to students.

After Mr. Kluge began referring to students by last names, some students and faculty members complained that this was dehumanizing. Mr. Kluge became a frequent topic of the student Equality Alliance Club. At least one student claimed that sometimes, Mr. Kluge would use honorifics like "Mr." or "Miss" when referring to cisgender students. In January 2018, the Principal asked Mr. Kluge to resign effective at the end of the year, because he was continuing to receive complaints from students and did not like the tense situation.

In February 2018, Mr. Kluge was informed that after the 2017-18 school year, he would no longer be allowed the "last names only accommodation." The Director of HR stated that this accommodation was not reasonable. In March, Mr. Kluge was told her could either comply with the Name Policy, resign, or be terminated.

On April 30, 2018, Mr. Kluge sent an email to the Director of HR, which stated:

> I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year when my contract is finished, i.e., early August 2018. I'm resigning my position because [BCSC] has directed its employees to call transgender students by a name and sex not matching their legal name and sex. BCSC has directed employees to call these students by a name that encourages the destructive lifestyle and psychological disorder known as gender dysphoria. BCSC has allowed me the accommodation of referring to students by last name only starting in August 2017 so I could maintain a "neutral" position on the issue. Per our conversation on 3/15/18, [BCSC] is no longer allowing this accommodation. BCSC will require me to refer to transgender students by their "preferred" name as well as by their "preferred" pronoun that does not match their legal name and sex. BCSC will require this beginning in the 2018-2019 school year. Because my Christian conscience does not allow me to call transgender

> students by their "preferred" name and pronoun, you have said I am required to send you a resignation letter by May 1, 2018 or I will be terminated at that time.
>
> ***

LEGAL ISSUES: Mr. Kluge argued that BCSC discriminated against him by refusing to accommodate his sincerely held religious beliefs. Specifically, he asserted that his belief against promoting transgenderism by using a transgender student's preferred name and pronouns is religious in nature, is sincerely held, and was clearly communicated to BCSC. He further argued that BCSC discriminated against him based on that belief in three ways: (1) withdrawing the last-name only accommodation despite a lack of undue hardship; (2) refusing to offer or discuss any other accommodation; and (3) coercing his resignation letter through misrepresentation."

Failure to offer other accommodations: Mr. Kluge contended that BCSC failed to offer any accommodation after it withdrew the last names only accommodation, and even if the last names only accommodation was the only possible accommodation, BCSC could not show that use of that accommodation would cause undue hardship. He argues that students' "emotional discomfort" does not constitute undue hardship, and "[t]he fact that BCSC and [Mr.] Kluge agreed to an accommodation and used it successfully for a full semester establishes last-names only as a 'reasonable accommodation' for [Mr.] Kluge's religious beliefs, and also that there was no 'undue hardship' associated with that accommodation." The court ruled that BCSC's failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII. "Title VII merely requires an employer to 'show, as a matter of law, that any and all accommodations would have imposed an undue hardship.'"

Perfection not required: Regarding Mr. Kluge's occasional use of honorifics (Mr. or Miss) with cisgender students, the court held that "Title VII and courts . . . do not require perfect consistency in observance, practice, and interpretation when determining if a belief system qualifies as a religion or whether a person's belief is sincere, citing *Grayson v. Schuler*, 666 F.3d 450, 454-55 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"). The court also noted that the sincerity of an individual's religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.

Undue Hardship: Because Mr. Kluge established a prima facie case of discrimination based on failure to accommodate, the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business." 42 U.S.C. § 2000e(j). In the Seventh Circuit, requiring an employer "to bear more than a *de minimis* cost" or incur more than a "slight burden" constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)). "The relevant costs may include not only monetary costs but also the employer's burden in conducting its business." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001).

BCBS argued that Mr. Kluge's failure to address transgender students by the names and pronouns reflected in PowerSchool created undue hardship related to interference with its mission to educate students. BCSC argued that the last names only arrangement created an undue hardship by placing it on "the razor's edge of liability" by exposing it to potential lawsuits by transgender students alleging discrimination. The court ruled that the undisputed evidence in this case demonstrated that the last names only accommodation resulted in undue hardship to BCSC as that term is defined by relevant authority in the Seventh Circuit. The court pointed to the declarations of two transgender students to show that Mr. Kluge's use of last names only made them feel targeted and uncomfortable. One student dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly. Other students and teachers complained that Mr. Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable. One student quit orchestra entirely. "Certainly, this evidence shows that Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students. BCSC was not required to allow an accommodation that unduly burdened its "business" in this manner."

In an attempt to show that his interference with BCSC's business did not rise above the *de minimis* level, Mr. Kluge repeatedly emphasized that many of his orchestra students were successful during the 2017-2018 school year in that they participated in extracurricular activities and won awards for their musical performances. He also submitted declarations from students and another teacher stating that they did not perceive any problems in Mr. Kluge's classes resulting from the use of last names only. The court noted that these facts may well be true, and were accepted as such, but they were deemed neither dispositive of nor relevant to the undue hardship question. "BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only." BCSC presented evidence that two specific students were affected by Mr. Kluge's

conduct and that other students and teachers complained. "[G]given that Mr. Kluge does not dispute that refusing to affirm transgender students in their identity can cause emotional harm, this harm is likely to be repeated each time a new transgender student joins Mr. Kluge's class (or, as the case may be, chooses not to enroll in music or orchestra classes solely because of Mr. Kluge's behavior). As a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring a more than *de minimis* cost to its mission to provide adequate public education that is equally open to all Title VII does not require employers to provide accommodations that would place them "on the 'razor's edge' of liability."

Ninth Circuit (AK, AZ, CA, HI, Guam)

The Ninth Circuit upheld a school district's policy to allow transgender students to use the bathroom, locker room, and showers of their gender identity. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1217–18 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020). The Ninth Circuit ruled:

> "There is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex in violation of Title IX, and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender. We hold further that the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it. Finally, we hold that the school district's policy is rationally related to a legitimate state purpose, and does not infringe Plaintiffs' First Amendment free exercise rights because it does not target religious conduct."
>
> *Id.*

Eleventh Circuit (AL, FL, GA)

The Eleventh Circuit held that a school district's policy of requiring students to use the bathroom of the sex assigned at the time of their enrollment violated a transgender student's equal protection rights and Title IX. *See Adams by & through Kasper v. Sch. Bd. of St. Johns County*, 3 F.4th 1299 (11th Cir. 2021), rehearing *en banc* granted Aug. 23, 2021.

The gender stated at enrollment determined the bathroom the student could use. This meant that the policy not only treated transgender students differently from cis-gendered students,

it treated transgender students differently if they transitioned before versus after enrolling in school. According to the court, this further perpetuated gender stereotypes. The court noted, "[T]his policy presumes every person deemed "male" at birth would act and identify as a "boy" and every person deemed "female" would act and identify as a "girl." Based on these stereotypes, the School Board labeled Mr. Adams as a "girl" for purposes of his bathroom use, based solely on his sex assigned at birth." *Id.*

This opinion was recently vacated pending a rehearing *en banc* before the 11th Circuit. *Adams v. School Board of St. Johns County, Florida*, 9 F.4th 1369, 11th Cir.(FL.), Aug. 23, 2021. The rehearing will likely focus on the student's equal protection claim, specifically whether an individual's transgender status confers protection under the equal protection clause as a suspect class. The Circuit courts are divided on this issue.

- Fourth Circuit held that transgender status was at least a quasi-suspect class entitled to heightened scrutiny. *Grimm v. Gloucester County School Bd.*, 972 F.3d 586 (4th Cir. 2020).
- Seventh Circuit declined to decide whether transgender status was protected, instead falling back on "sex-based" classifications. *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

If transgender status is defined as its own protected class, it could have the same protections as sex-based classifications. "Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications…such as gender…or legitimacy…. On occasion intermediate scrutiny has been applied to review a law that affects 'an important though not constitutional right.'" *Ramos v. Town of Vernon*, 331 F. 3d 315, 321 (2d. Cir. 2003).

EQUAL PROTECTION CLAUSE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Const. amend. XIV, §1

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.). In Bostock v. Clayton County, 590 U.S. ___ (2020), the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation. (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 et seq.), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. Definition. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
January 20, 2021.

H.B. No. 25

AN ACT

relating to requiring public school students to compete in interscholastic athletic competitions based on biological sex.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that:

(1) historically, boys participate in interscholastic athletics at a higher rate than girls, and a noticeable disparity continues between the athletic participation rates of students who are girls and students who are boys in University Interscholastic League member schools;

(2) courts have recognized a legitimate and important governmental interest in redressing past discrimination against girls in athletics on the basis of sex and promoting equality of athletic opportunity between the sexes under Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.), a federal civil rights statute; and

(3) courts have recognized that classification by sex is the only feasible classification to promote the governmental interest of providing for interscholastic athletic opportunities for girls.

SECTION 2. The purpose of this Act is to further the governmental interest of ensuring that sufficient interscholastic athletic opportunities remain available for girls to remedy past discrimination on the basis of sex.

SECTION 3. Subchapter D, Chapter 33, Education Code, is amended by adding Section 33.0834 to read as follows:

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:

(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.

(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.

(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 any type of scrivener or clerical error in the student's biological sex.

(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). The rules must ensure compliance with state and federal law regarding the confidentiality of student medical information, including Chapter 181, Health and Safety Code, and the Health Insurance

Portability and Accountability Act of 1996 (42 U.S.C. Section 1320d et seq.).

SECTION 4. This Act applies to any interscholastic athletic competition sponsored or authorized by a school district or open-enrollment charter school that occurs on or after the effective date of this Act.

SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect on the 91st day after the last day of the legislative session.

_____ President of the Senate

_____ Speaker of the House

I certify that H.B. No. 25 was passed by the House on October 14, 2021, by the following vote: Yeas 76, Nays 54, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 25 on October 17, 2021, by the following vote: Yeas 76, Nays 61, 1 present, not voting.

_____ Chief Clerk of the House

I certify that H.B. No. 25 was passed by the Senate, with amendments, on October 15, 2021, by the following vote: Yeas 19, Nays 12.

_____ Secretary of the Senate

APPROVED: _____ Date

_____ Governor

Gender Stereotypes

Emma J. Darling

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

Sneaky Sexism in Marketing

- The old school pink and blue has been replaced with something that says floral, decorative and candy colors are still for her and strong, bold, powerful colors are for him.
- Women speak seven times less than men in commercials

Mattel Gender Neutral Doll

- The doll comes with long and short hair options
- The clothing for each doll comes with options for skirts, pants and dresses in neutral colors

Mattel's first promotional spot for the $29.99 product features a series of kids who go by various pronouns—him, her, them, xem—and the slogan "A doll line designed to keep labels out and invite everyone in."

Disney Princess Study

307 children completed questionnaires in preschool (back in 2012 and 2013), and then again five years later.

Children who watched Disney princess movies and played with princess toys were more egalitarian and said they felt men should show more emotion

Gender in Country Music

Researchers at the University of Southern California's Annenberg Inclusion Initiative released a study on the gender gap in country music

Not just Country Music...

- Only 10.4% of Grammy nominees between 2013 and 2019 were women
- 57% of Grammy nominated songs in 2019 did not credit a female songwriter
- Many male artists reinvent themselves by attaching to younger female artists

Gender Stereotypes in Food

An Italian study in August 2020 found that preschoolers associated different foods to be female versus male

- -Meat is for boys
- -Vegetables like salads are for girls

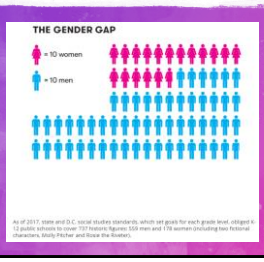
Gender Stereotypes Perpetuated by Teachers

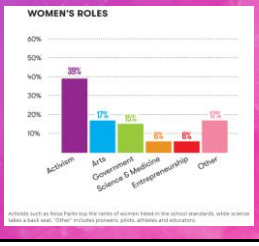
- ✔ Gender-Science Implicit Association Test (2019) saw if exposure to teacher stereotypes affects student achievement
- ✔ The most stereotypes are associated with girls and their math skills
- ✔ No statistical significance in literature stereotypes

Gendered Traits of Elementary School Teachers

- ✔ The Bureau of Labor Statistics (2014) states that only 13% of elementary school teachers are men
- ✔ Cooney and Bittner (2001) interviewed several men in elementary education and discovered they struggle with fear of being accused of improper physical contact with children
- ✔ Studies show that lack of exposure to talented male teachers may negatively impact gender stereotype formation and future career aspirations

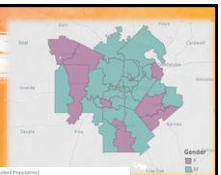
Gender Stereotypes in Curriculum

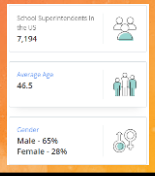


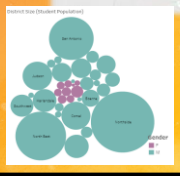


Gender Gap for Superintendents

According to TASB, 81% of Superintendents in Texas are male.







Questions?

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EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

www.edlaw.com

(800) 488-9045

information@edlaw.com

Top Ten Things You Need to Know About Sexual Contact Among Very Young Students

Jennifer Powell and Heather Rutland

Eichelbaum Wardell
Hansen Powell & Muñoz, P.C.

Background

The Barbie Doll Case

- Two kindergarten girls
- Nap time
- Vaginal penetration with Barbie doll
- Went to jury trial
  - District prevailed
  - But took a huge toll on the teacher and principal

The Kissing Game Case

- Kindergarten boy and girl
- During recess kids would go to restroom
- Teacher couldn't see that boy went in with girl
- Kissing game involved oral sex – boy's mouth on girl's breasts, vaginal area, and anus
- After report, boy went on to act in a sexual way toward two other students – slapped girl on bottom and was caught on playground with hands in girl's underwear
- District settled

Top Ten

1. Don't assume youngsters aren't capable of such conduct.

- Students may themselves be victims of sexual contact.
- Students may be acting out something they have seen in various media, e.g., movies, TV, magazine.
- Remember a young student cannot consent.
  - Not saying no doesn't change things.

2. Labels matter.

- In kissing game case, mom was incensed that the district labeled its investigation as one into inappropriate touching.
  - She wanted it labeled as sexual assault investigation.
  - Safe, and possibly more accurate, to label all as sexual harassment investigation.

3. Separate students on first report.

- Their young age doesn't make it more appropriate to leave them together.
- Don't wait until you have talked to them.
- Definitely don't wait until after you have fully investigated
- In smaller districts, make a plan to separate them even within same class.
- Document the efforts to separate.
  - Especially important if they are not successful.
  - Helps defend against deliberate indifference claims.

4. Handle parents carefully.

- There are no legal requirements about notifying parents.
- Policy or Operating Procedures may control.
- Earlier is better, but let law enforcement weigh in.
- Parent reactions may be due to student behavior revealing issues outside of school.
- FERPA applies so be mindful of sharing info about other students.

5.Investigate immediately, following grievance process for Title IX sexual harassment complaints.

- If victim doesn't want to file formal complaint this is a time when Title IX Coordinator should do it.
- Don't short circuit the process.

6. Make CPS Report.

- Doesn't matter that it is student-student.
- New Standard of "reasonable belief"
- Can't delegate to others.
- Whoever knows about it can get on a call together.

7. Call Law Enforcement.

- Even though you have called CPS, parents will expect call to law enforcement.
- Call even if you know they are too young to be criminally responsible.
- Let law enforcement be the one to tell you that and document it.

8. If allegations are sustained, move the perpetrator.

- May be limited with discipline, e.g.:
  - if under six can't send to DAEP;
  - below third grade can't get OSS unless conduct that contains the elements of a sexual assault
- But have options to move campuses if available
- At a minimum change classrooms
- If unable to change classrooms, make a plan for separation
- Document all efforts to separate

9. Stay away agreements may be difficult to enforce.

- Young children still want to be friends.
- Picture the playground.
- Should still use them, but just may not be as effective as when used with older students.

10. No gag orders.

No longer allowed under Title IX.

That may change but be aware of perception.

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EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.
www.edlaw.com | (800) 488-9045 | information@edlaw.com

Dealing with the Police, Subpoenas, and Law Enforcement Investigations

Dennis J. Eichelbaum
EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

FERPA and Education Records

- FL(Legal) and CFR Section 99.30–38
- Records, files, documents, and other materials that contain information directly related to a student and are maintained by an education agency or institution or by a person acting for such agency or institution

8. Health or Safety Emergency	Appropriate parties, including the student's parents, in connection with an emergency if the knowledge of the information is necessary to protect the health or safety of the student or other individuals. In making a determination, a district 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 district 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 U.S. Department of Education (ED) will not substitute its judgment for that of the district in evaluating the circumstances and making its determination. *34 C.F.R. 99.31(a)(10), .36*

5. Juvenile Justice Officials	State and local officials to whom such information is specifically allowed to be reported or disclosed by state statute if: 1. The allowed reporting or disclosure concerns the juvenile justice system and its ability to effectively serve, prior to adjudication, the student whose records are released; and 2. The officials and authorities to whom such information is disclosed certify in writing to the district that the information will not be disclosed to any other party except as provided under state law without the prior written consent of the parent of the student. *34 C.F.R. 99.31(a)(5)(i), .38* A school district superintendent or the superintendent's designee shall disclose information contained in a student's educational records to a juvenile service provider as required by Family Code 58.0051 [see GRAC]. *Education Code 37.084(a)*

What isn't an Education Record?

- Records created or received by a district after no longer a student in attendance and that are not directly related student's attendance
- Records made by district personnel that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to anyone other than a substitute of the maker

What isn't an Education Record?

- Records maintained by a law enforcement unit of a district that were created by that law enforcement unit for the purpose of law enforcement.
- Grades on peer-graded papers before they are collected and recorded by a teacher.

Some Information May Be Disclosed Without Consent

- Directory information is defined in FL(Local)
- Directory information may include: student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, dates of attendance, grade level, enrollment status, participation in recognized activities and sports, weight and height of members of athletic teams, honors and awards received, and the most institution attended

Responding to a Subpoena

- The district shall make a reasonable effort to notify the parents of the subpoena (so they may obtain a protective order)
- A district shall release student records in compliance with a judicial order, or pursuant to any lawfully issued subpoena, except when a parent is a party to a court proceeding involving child abuse and neglect and the order is issued in the context of that proceeding

Responding Without Consent

- A district may disclose FERPA information without parental notification if:
- A federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena not be disclosed

Responding Without Consent

- Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence not be disclosed
- An ex parte court order obtained by the United States attorney concerning investigations or prosecutions of an act of domestic or international terrorism

What Should the Written Consent Include?

- Signed and dated by the parent (via email will suffice)
- The consent must specify the records, state the purpose of the disclosure, and identify to whom the disclosure will be made
- The parent may request a copy of the disclosed records
- 34 CFR section 99.30

Recordkeeping

- Required to maintain a record of each request for access to and each disclosure of personally identifiable information from education records of each student

Scenarios

- What should I do if the police tell me not to investigate/interview employees accused of wrongdoing?
- What should I do if the police tell me not to interview someone who has made a Title IX claim?
- Will the police share their investigation with me?

Questions?

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www.edlaw.com

(800) 488-9045

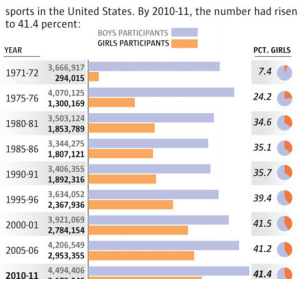
information@edlaw.com

EQUITABLE PARTICIPATION IN ATHLETICS

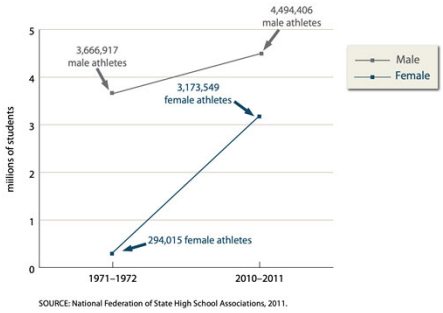
JENNIFER A. POWELL
EICHELBAUM WARDELL HANSEN POWELL & MUÑOZ, P.C.

TITLE IX
JUNE 23, 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."



- "Sports" or "athletics" not referenced in original law, but significant impact in this area
- Female high school sports participation grew from less than 300,000 to 1.3 million in 1974 (within 2 years of passage)



SOURCE: National Federation of State High School Associations, 2011.

WHAT TITLE IX PROVIDES FOR

- Equal Access to the program
- Equal Treatment once in the program

Title IX does NOT require an institution to provide:

- An athletics program
- A good athletics program – programs need to be equally good or equally pathetic for male and female students
- The same funding:
  - to the overall women's and men's programs
  - to men's and women's teams in the same sports (funding source cannot justify disparities)
- Specific benefits such as coaching, facilities, equipment
- Same number of teams or same sports for men and women
- Same benefits to men's and women's teams in the same sport
- Compete at a specific level or join a specific conference

Courtesy of: Valerie McMurtrie Bonnette, *Title IX and Interscholastic Athletics: How it all Works – In Plain English*

EQUAL ACCESS TO THE PROGRAM

- OCR addresses this by looking at accommodation of interests and abilities, which includes what is known as the three-part test.

THREE-PART TEST

Institutions must meet ONE of the following:

1. Test One – Proportionality
2. Test Two – Program Expansion – underrepresented sex
3. Test Three – Full Accommodation – underrepresented sex

TEST ONE - PROPORTIONALITY

- Provide male and female students with interscholastic participation opportunities at rates substantially proportionate to their respective rates of enrollment.

TEST ONE - PROPORTIONALITY

- Step one: Calculate the rate of enrollment.
- Example: A district has 74 students, 45 girls and 29 boys, so the girl's enrollment rate is .61.

TEST ONE - PROPORTIONALITY

- Step two: Calculate the rate of participation
- Who to count?
  - Anyone on the squad list as of the first countable contest, those who join after
  - Count the same individual more than once – once for each team
  - Count all levels of participation, not just varsity
  - If someone quits or is cut after first contest, they still count
  - Don't count academically ineligible
  - Don't count student managers
- Ex: there are 116 participants, 54 girls and 62 boys, so the girls' rate of participation is .47

TEST ONE - PROPORTIONALITY

- Step three: Compare the rate of participation to the rate of enrollment.
- Ex.: the girls' rate of enrollment compared to participation (.61 - .47) is a difference of .14

TEST ONE - PROPORTIONALITY

- Step four: Is the rate of participation substantially proportionate to the rate of enrollment?
- OCR will generally tolerate differences between two and five percentage points with the smaller differential tolerated for programs with the largest participation numbers.
- Ex.: 14 percentage points is not close enough – the rates are not substantially proportionate – girls are underrepresented so test one is not met.

TEST TWO – PROGRAM EXPANSION

- Must demonstrate a history of and continuing practice of program expansion for the underrepresented sex
- **Expansion is**:
  - adding teams that increases opportunities for participation
  - adding opportunities on existing teams
- **Expansion is not**:
  - increasing the rate of participation
  - improving benefits for existing team (equipment, scheduling, travel)

TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- Must show that you are fully and effectively accommodating the interests and abilities of the underrepresented sex.
- That means offering every sport and team for girls for which there is sufficient **interest** and **ability** for a viable team and sufficient interscholastic **competition** for that team in the school's normal competitive region.
- All three factors must exist before a school is obligated to offer a team under test three.

TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For interest – look at on-campus programs and off-campus programs.
- On campus
  - Participation in intramural sports, recreation programs, or elective PE courses can be evidence of interest on campus.
  - Surveys can be used to identify interest levels for a team not currently offered to the underrepresented sex.
- Off campus
  - Participation at other schools in the local community can be evidence of potential interest in that sport.
  - Participation in community and regional recreation programs can also be evidence of interest.

TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For ability OCR looks at students' athletic experience and accomplishments in on-campus and off-campus programs.
- However, at interscholastic level, lack of ability is unlikely to justify failure to offer a team.

TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For competition there must be sufficient interscholastic competition in the school's normal competitive region.
- Normal competitive region can be identified by looking at miles from campus or geographic area.
- Once the region is identified, all schools within that region offering interscholastic sports for girls that are currently not offered at the school should be identified.
- At that point you can analyze whether there is sufficient competition at an appropriate competitive level for that sport
- It can make sense to start with this analysis rather than interest and abilities because if there is not sufficient competition, then the school complies with test three regardless of interest or ability levels.

RELATED CONSIDERATIONS

- Financial constraints are not a justification for noncompliance with Title IX.
- In some situations, girls must be allowed to tryout for boys' teams:
  - no girls' team for the sport
  - noncontact sport
  - girls' athletic opportunities have been limited previously
- UIL sponsorship not required to add sports.

RELATED CONSIDERATIONS

- "Roster management" may be used to achieve compliance with Test One.
  - Can avoid the expense of adding a girls' team and the difficulties of eliminating a boys' team.
  - It involves boys' teams cutting participants while girls' teams retain more participants.

RELATED CONSIDERATIONS

- Cheerleading and dance teams generally don't count.
  - OCR considers them extracurricular activities, not athletic teams.
  - OCR will recognize a competitive cheer team if they schedule enough contests to form a reasonable competitive schedule and don't perform at events for other sports.

TWO-PART TEST – LEVELS OF COMPETITION

- Schools must meet ONE part:
  - Equivalently Advanced Competitive Opportunities
  - Continuous Upgrades of Competitive Opportunities

TEST ONE – EQUIVALENTLY ADVANCED COMPETITIVE OPPORTUNITIES

- This test involves calculating the percentage of female and male participants competing at each level such as varsity, junior varsity, and freshman levels and comparing those percentages.
- As a general rule, differences within five percentage points are not significant.

TEST TWO – CONTINUOUS UPGRADES OF COMPETITIVE OPPORTUNITIES

- Must demonstrate a history and continuing practice of upgrading of opportunities.
- This means that opponents from higher competitive levels have been scheduled more over time.

OTHER ATHLETIC BENEFITS AND OPPORTUNITIES

1. EQUIPMENT AND SUPPLIES
2. SCHEDULING OF GAMES AND PRACTICE TIMES
3. TRAVEL AND PER DIEM ALLOWANCES
4. TUTORING
5. COACHING
6. LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES
7. MEDICAL AND TRAINING FACILITIES AND SERVICES
8. HOUSING AND DINING FACILITIES AND SERVICES
9. PUBLICITY
10. SUPPORT SERVICES
11. RECRUITMENT OF STUDENT-ATHLETES

REVIEW OF COMPONENTS

- Analyze compliance in the overall program, not by comparing individual sports.
- Offsetting benefits are recognized.
  - Where students of one sex are provided an advantage in some aspect of the program, while students of the other sex are provided an advantage in a different aspect of the program.
  - If the benefits are of equivalent weight or importance, they may offset each other or provide a balance of benefits.

EQUIPMENT AND SUPPLIES

- QUALITY
  suitability, replacement schedules
- AMOUNT
  number of items
- MAINTENANCE
  storage
  professional and student managers
  laundry

SCHEDULING OF GAMES AND PRACTICE TIMES

- Number of competitive events
- Time of day of competitive events
- Number and length of practices
- Time of day of practices
- Opportunities for pre-season and post-season events
- Length of season
- Season of sport
- Number of sports per season

TRAVEL AND PER DIEM ALLOWANCES

- Modes of transportation
- Housing and dining furnished during travel
- Length of stay before and after competitive events
- Per diem allowances

COACHING

Opportunity to receive coaching:

- Availability of coaches
- **Number of coaches per team**
- Length of contract
- Association with school - **on-campus versus off-campus**

Assignment of Coaches:

- Qualifications
- Years of experience
- Success as coach

Compensation of Coaches:

- Total dollars proportionate to participation

LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES

Practice and Competitive Facilities

- Quality
- Availability
- Exclusivity
- **Focus on facilities used by just one gender**
- **Calculate proportions using each facility**

Locker Rooms

- Number of Locker Rooms
- Quality of Locker Rooms
- Exclusivity

MEDICAL AND TRAINING FACILITIES AND SERVICES

- **Medical Personnel and Assistance**
- **Qualifications/Availability of Trainers**
- **Training Rooms**
- **Weight Rooms**
- **Insurance**

PROBLEMS WITH MONEY

- Booster Clubs
  - Any benefits provided by booster clubs are subject to Title IX.
  - If booster club provides benefits that create a disparity under Title IX, then the school is responsible for offsetting that disparity.
  - Example: If a booster club's contributions provide football athletes with benefits superior to those provided to all female athletes, the school may reallocate the funds it would have spent on football to girls' teams as necessary to provide equivalent benefits and achieve compliance.
- Donations
  - It is not the money itself that Title IX is concerned with; it's the benefits that money buys.
  - If the benefits are disparate, look at ways to offset the disparities.

PROBLEMS WITH MONEY

- Fundraising
  - No specific Title IX requirements
  - Opportunities cannot be limited or imposed discriminatorily.
  - Priority for more lucrative fundraisers cannot be based on sex.
  - Giving benefits to boys' teams that girls' teams must pay for through fundraisers creates compliance problems.
  - Athletes may not receive lesser benefits on the basis of sex because of their coach's inability to fundraise.
  - Disparate benefits on the basis of sex cannot be the result of coaches' differing abilities to fundraise.
  - Funds raised by the students themselves don't have to be offset.

QUESTIONS?

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

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

LITIGATION TRENDS

Alleged violations of IDEA, Section 504 and Title IX are being increasingly brought as claims stemming from the same set of facts.

One event or series of events can serve as the basis for multiple causes of action so you must be prepared to defend your district on several fronts.

A SpEd Due Process complaint is no longer the worst case scenario…FAPE violations come in all shapes and sizes.

FAPE

Failure to provide FAPE underlies all IDEA and § 504 claims:

Free

Appropriate

Public

Education

FAPE is demonstrated by a student making appropriately ambitious progress.

- Plaintiffs work from a place that all harassed students will/have failed to make progress
- That failure to make progress violates a student's right to FAPE
- Almost a de facto finding of FAPE violation if student has been harassed/assaulted.

TITLE IX

Elements of a Title IX Claim:

Plaintiff must show that

1) The sexual harassment was so severe and pervasive and objectively offensive that it can be said to have deprived the student access to the educational opportunities or benefits provided by the school;
2) The district must have actual knowledge of the sexual harassment;
3) The district must have been deliberately indifferent to the harassment.

Davis v. Monroe Cty Bd. of Educ., 526 U.S. 629 (1999).

TITLE IX

KNOW YOUR POLICIES!!

Contained in Board Policy FFH (addresses sexual harassment of students).

Make sure your Special Ed staff members are aware of how their actions (or inaction) can later serve as fodder for a lawsuit.

SPECIAL EDUCATION CONCERNS

Investigation Complications

- The victim and/or the harasser may be unreliable
  - Time, place, details are harder than usual to determine
    - Story may change unintentionally (memory deficits)
  - May be completely made up; reality versus make-believe
  - Often even more susceptible to parental influence
  - SpEd students may be more traumatized by the investigation than the alleged act

Consent Between Students Especially Cloudy

- Does student have the ability to consent?
  - SpEd students often more "persuadable"
  - Reading "social cues" often a deficit
- Student version versus Parent version
  - Implications of "bad" and "good" especially powerful

SPECIAL EDUCATION CONCERNS

- SpEd students are more vulnerable to harassment of all kinds
  - Seen as easy targets by other students
  - Less likely to fight back or resist
  - Less likely to report
  - More likely to be re-victimized
  - Easier to intimidate
  - ***May not realize they are being harassed or were assaulted***
  - ***May not understand the implications/consequences of actions***

SPECIAL EDUCATION CONCERNS

Harm From Harassment is Often Magnified

- Special ed students may be impacted in different and more severe ways than their Gen Ed peers
  - Current disabilities manifest more severely
  - New disabilities develop
  - Re-evaluations may be necessary
  - Revised IEPs required to ensure educational benefit

SPECIAL EDUCATION CONCERNS

Educational benefit easily derailed

- District is already working hard to ensure progress for SpEd students
  - A team of experts has developed a plan, which has to be revisited/revised
  - "Progress" for many students is already a precarious proposition

The "optics" are especially ugly

Psychologically, it is often easier to meet the "objectively offensive" standard when the recipient is SpEd.

SPECIAL EDUCATION CONCERNS

Special Ed staff are not always trained to recognize, investigate, or address incidents giving rise to Title IX claims.

Title IX implicates how you investigate claims, and what you do with the information you find.

- Any Special Ed student will likely require a new/revised Behavior Intervention Plan (BIP) and Individualized Education Plan (IEP)
- Additional evaluations likely required and ARD Committee should meet, but now parent trust is low(er)
- Discipline under Student Code of Conduct; MDR trigger
- Criminal charges possible against perpetrator

SPECIAL EDUCATION CONCERNS

Implications for Discipline

- Manifestation Determination Reviews (MDRs) required for disabled students accused of harassment
- May find harassing behavior was function of disability so not able to discipline legally
  - May find harassing behavior the result of district failure to implement IEP, so no discipline
- Very difficult to explain this to parents and staff
- Must revise BIP and/or conduct Functional Behavior Analysis (FBA)
- Even if not a Title IX violation, still SCOC…

SPECIAL EDUCATION CONCERNS

Failure to Protect claims

- "Failure to supervise" claims common – for both students
- Harassment may be result of inappropriate BIP or failure to implement BIP/IEP
- Did school have any prior knowledge of the aggressor?

Parent trust may never be restored

Sex education especially difficult issue for SpEd students

- Biology versus social mores
- Cognitive roadblocks to understanding
- Struggle to appreciate consequences
- Social cues, impulse control, sensory issues…

SPECIAL EDUCATION CONCERNS

Student-on-student harassment has become a Special Ed matter.

- The Due Process Claim under IDEA is the typical starting point
  - Can be an early opportunity to settle
    - Settlement ask often factors in "loss" of any Title IX recovery
  - Each side can access the discovery process; see evidence before get to federal court
  - Admin HO will likely find for parents under IDEA if go to hearing
    - Will have to litigate whether harassment occurred in an administrative proceeding
    - Loss means approx. $50k-70k in district fees – *plus* parent fees
    - Still vulnerable to federal Title IX claim
- No longer is the issue purely one of a single student's behavior
- Even if does not rise to level of Title IX, both students involved should have their individual programs re-evaluated

SPECIAL EDUCATION CONCERNS

SpEd Hearing Officers cannot hear Title IX claims

Federal court is the only place to address Title IX claims

Significant money damages are possible under Title IX

A federal lawsuit is more expensive and often more public.

Plaintiff attorneys will use Title IX as leverage in administrative Due Process hearings

- And will use Due Process findings as evidence in Title IX trials

RECOMMENDATIONS

Take all complaints and allegations seriously.
- Do not dismiss the source of any outcry

All employees should know who the district Title IX coordinator is and what triggers an investigation.

Be ready to take action to stop the alleged harassment that also comports with all IEPs.
- Separating students can end up violate their IDEA rights

RECOMMENDATIONS

Secure Title IX training for SpEd staff.
- Even if they are not conducting the investigation, they should know what's important and whom to contact.

Develop a plan for the student(s) involved during an investigation.
- Moving students may not be as easy as in Gen Ed
  - Disruptions of any kind can have negative impact
- Must still comply with student's IEP
  - If change in placement occurs, ARD required; pay attention to timelines and "10-day" rule
- Deliberate indifference can be a problem at this level
- At the very least, increased supervision should occur

Ensure that your Special Ed staff knows the circumstances that could trigger a Title IX investigation, and what to do *during* the investigation.

RECOMMENDATIONS

Be prepared to contact law enforcement, CPS, etc.

Continue to assure students and parents that you take all allegations seriously.

Maintain confidentiality and follow district policies and procedures throughout investigation process.

Be mindful of what ends up in writing; contact your attorney for help in this regard.
- Carefully document your efforts after the claim to avoid deliberate indifference allegations.
- Plan on Plaintiff's counsel serving you with discovery in IDEA Due Process.

INVESTIGATION FINAL…NOW WHAT?

Take appropriate actions depending on your findings.
- This includes revising BIPs, conducting FBAs, and revisiting IEPs.

Lack of evidence of sexual harassment *doesn't mean it didn't happen.*
- The student(s) may each be impacted by the experience of an allegation in ways that require changes to IEP and/or BIPs
- Student (and parent) versions of the truth may be all that matters
- Student discipline still possible

Keep close eye on both accuser and accused for future behaviors of concern.
- This is where many districts get into trouble
- Students who want to be together will find a way
- Failure to supervise primary complaint – if it happened, you failed.

NEXT STEPS…

Notify parents immediately and keep them informed.

- Special Ed parents are often used to more communication
- An ARD may be required; send notice promptly
- Parents may need help understanding legal nuances depending on findings

Even lame ideas can be seen as "taking action," as long as you do not end up placing a student in future peril.

Keep the legal requirements for Title IX in mind:

- **Must deprive the student of educational opportunity.**
- ARD Committee actions and data collection efforts can make or break a defense
- If can show student continues to progress it weakens damages claims

TAKEAWAYS

Title IX violations can result in a denial of FAPE, exposing district to several lawsuits.

Prevention is ultimate goal – adequate student supervision required.

- Both in the plan AND the execution

SpEd staff must be able identify and take steps when possible Title IX violation, and then make decisions and revisit IEPs based on findings of any investigation.

Deliberate indifference – take prompt action in keeping with IEP right away, and make plans after the investigation as appropriate.

QUESTIONS?

Contact Us

EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

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