



# TITLE IX ADMINISTRATOR CONFERENCE

## OCTOBER 19, 2022



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# **Title IX Legal Update and Proposed Regulations**

Presented by: Dennis J. Eichelbaum

October 19, 2022

## TITLE IX LEGAL UPDATE & PROPOSED REGULATIONS

Dennis J. Eichelbaum



EICHELBAUM WARDELL  
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### **ABBT V. CITY OF HOUSTON FIFTH CIRCUIT (MARCH 11, 2022)**

- Melinda Abbt was a firefighter for the Houston Fire Department
- In 2008, her coworker, junior Captain of the station Barrientes, somehow received an intimate, nude video Abbt made privately for her husband from Abbt's personal laptop\*
- Barrientes forwarded the video to District Chief Elliott, who watched the video multiple times over the years and told nobody of its existence



### **PRECEDENT**

- Will the Supreme Court uphold same sex marriage?
- Will the Supreme Court uphold that employers cannot fire someone for being gay?
- Will the Supreme Court uphold that states cannot make homosexuality a crime?



### **ABBT, CONT.**

- On May 18, 2017, Elliott confessed to Abbt's husband that he had seen the nude video of Abbt
- Abbt was later diagnosed with PTSD, took six months of unpaid FMLA leave, and eventually medically separated from the City and her employment ended in February 2019.
- Abbt sued for sexual harassment and retaliation.



**"[I]nescapable conclusion is that a right ... is not deeply rooted in the nation's history and traditions."**

- Historical analysis
  - Do we go back 5 years? 25 years? 50 years? 100 years? 200 years? More?
- "History" is never a legal test. History is only a justification.



### **ABBT, CONT.**

- The Court noted that the unwelcome harassment applied to multiple acts by Barrientes and Elliott: First, by stealing the video. And second for viewing the video repeatedly without Abbt's permission (which viewing was proven to have happened at work)
- Looking to "all the circumstances (citation omitted), a reasonable person could consider the repeated viewing of her intimate, nude video by her coworkers to be sufficiently severe to constitute sexual harassment."



### ABBT, CONT.

- The Fifth Circuit, “decline[d] to hold as a matter of law that a person must contemporaneously experience harassment for it to be actionable under **Title VII.**”
- “[T]he actual viewing of that video was a necessary prerequisite to Abbt learning of those viewings and suffering harm.”
- “[T]he pain the harassment caused is logically just as real and viscerally felt whether Abbt learned of the actions immediately (by, say, walking in on a viewing), days later, or decade later.”
- The 5<sup>th</sup> Circuit ruled for the City on the retaliation claim.



### PELTIER, CONT.

- “[W]e will reject sex-based classifications that “appear to rest on nothing more than conventional notions about the proper station in society for males and females.””
- “CDS cannot justify the skirts requirement based on the allegedly “comparable burdens” imposed by other portions of the dress code that are applicable only to male students.”
- “Here, the skirts requirement blatantly perpetuates **harmful gender stereotypes** as part of the public education provided to North Carolina’s young residents.”



### PELTIER V. CHARTER DAY SCH., INC. 2022 WL 2128579 (4TH CIR. JUNE 14, 2022)

- Charter Day School (CDS), a public charter school in North Carolina, requires female students to wear skirts to school based on the view that girls are “fragile vessels” deserving of “gentle” treatment by boys (the skirts requirement)
- The plaintiffs argued that this sex-based classification grounded on **gender stereotypes** violates the Equal Protection Clause of the 14th Amendment, and subjects them to discrimination and denial of the full benefits of their education in violation of Title IX



### PELTIER, CONT.

- “Based on the plain language and structure of the statute, we conclude that Title IX unambiguously encompasses sex-based dress codes promulgated by covered entities.”
- “If Congress had intended to exclude sex-based dress codes from the broad reach of Title IX, Congress would have designated such policies along with the other enumerated exceptions.”
- “For purposes of a claim of discrimination under Title IX, the plaintiffs are treated “worse” than similarly situated male students if the plaintiffs are harmed by the requirement that only girls must wear skirts, when boys may wear shorts or pants. Because the district court has not considered this question, we remand the Title IX claim for the district court to evaluate the merits of that claim in the first instance.”



### PELTIER, CONT.

- The Court found, “CDS operates a “public” school, under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state’s constitutional obligation to provide free, universal elementary and secondary education to its residents.”
- CDS implemented its dress code, including the skirts requirement, as a central component of the public school’s educational philosophy, pedagogical priorities, and mission of providing a “traditional school with a traditional curriculum, traditional manners[,] and traditional respect.” By CDS’ own admission, the skirts requirement directly impacts the school’s core educational function and, thus, directly impacts the constitutional responsibility that North Carolina has delegated to CDS.



### P.S., A MINOR BY & THROUGH HIS PARENTS & NEXT FRIENDS, JARETT AND MINTA STEPHENSON V. BROWNSBORO ISD, 2022 WL 3697965 (E.D. TEX. AUG. 25, 2022)

- Plaintiff was hazed and sexually harassed by older boys on the baseball team
- Pls’ allege that the head coach knew that there was a long-term and ongoing environment of harassment and sexual assault, that he had the authority to take corrective measures and he failed to, and that the superintendent and assistant sup knew of the behavior.
- The District’s second 12(b)(6) motion was denied because on its face the Plaintiffs have made a plausible claim of Title IX discrimination [**was there deliberate indifference?**]



## THE LEGAL DARWIN AWARD GOES TO...

We have a nominee!

## TITLE IX HOT TOPICS: DRESS CODES, HAIR CODES

Come mothers and fathers  
Throughout the land  
And don't criticize  
What you can't understand  
Your sons and your daughters  
Are beyond your command  
Your old road is  
Rapidly agin'  
Please get out of the new one  
If you can't lend your hand  
For the times they are a-changin'.

Come senators, congressmen  
Please heed the call  
Don't stand in the doorway  
Don't block up the hall  
For he that gets hurt  
Will be he who has stalled  
There's a battle outside  
And it is ragin'  
It'll soon shake your windows  
And rattle your walls  
For the times they are a-changin'.

## STATE OF TEXAS V. EEOC, ET AL. U.S. N.D. TEX. (AMARILLO), 10-01-22

- Texas sued the EEOC, HHS, Merrick Garland, and others stating that the June 15 and March 2 Guidances regarding LGBTQ employees should be deemed unlawful, vacated, and asked the court to enjoin Texas in enforcement or implementation of the guidance.
- The Court held that the non-discrimination holding in *Bostock* should only apply to homosexuality and transgender status, but does not extend to correlated conduct



## Re: Discriminatory Dress and Grooming Rules

May 7, 2022  
Title IX email  
Re: Discriminatory Dress and Grooming Rules

Dear Representative,

We are writing to express our concern about the dress and grooming rules that are being implemented by the Texas Department of Education (TDE) in response to the Supreme Court's decision in *Bostock v. Clayton County*. We believe these rules are discriminatory and violate Title IX of the Education Amendments of 1972.

The rules require students to wear traditional gender-specific clothing and prohibit students from wearing clothing that is not traditionally associated with their assigned sex. This includes requirements such as wearing skirts or dresses, wearing high-heeled shoes, and wearing makeup. These rules are discriminatory because they treat students differently based on their sex assigned at birth and their gender identity.

We believe these rules are also discriminatory because they are based on stereotypes and are not necessary for the safety or well-being of students. We urge you to take action to protect the rights of all students and to ensure that the Department of Education complies with Title IX.

Sincerely,  
[Name]  
[Address]  
[City, State, Zip]  
[Phone Number]  
[Email Address]

## STATE OF TEXAS V. EEOC, ET AL.

- "Plaintiff deduces that **"being"** means attraction (homosexual) and identification (transgender) expressly referenced in Justice Gorsuch's majority opinion – **but not necessarily all associated actions**, which remain subject to case-by-case Title VII analysis." [Emphasis added]
- The Court found that the June 15 Guidance is still acceptable, but that the March 2 Guidance is arbitrary and capricious
- The Court found that the EEOC violated Title VII and the APA by issuing these guidances because they are substantive, legislative rules

In summary, one cannot be discriminated against for *being* gay, but can be for *acting* gay.

### DRESS

Students should be dressed appropriately. The following specific regulations cover dress during the school day.

#### GIRLS

- Are to wear skirts, blouses or dresses.
- Shirt tails are to be tucked in.
- Extreme sun dresses or culottes are not to be worn and bare mid-ribs are not allowed.
- May not wear hair scarves, curlers, clips or other hair setting paraphernalia in the classroom.
- Socks or peds must be worn with sneakers.

#### BOYS

- Must wear shirts properly buttoned and long trousers.
- Belts are required if trousers have belt loops.
- All shirt tails must be worn inside trousers.
- Faces must be clean shaven.
- Extreme or unusual haircuts are not permitted.
- Socks must be worn.

## NO HOODIES, NO SKIRTS

### Dress and Grooming For All Students

The Forney Independent School District has a student dress code policy for all grades and all campuses. The dress code gives the district a positive and distinctive identity and reflects the values of the schools and community. All students are required to wear the appropriate dress each day except for those days designated as non-dress code days at the discretion of the school administrators.

The use of a school dress code is established to improve student self-esteem, bridge socio-economic differences among students, and promote positive behavior, thereby enhancing school safety and improving the learning environment.

## JOHN M. KLUGE V. BROWNSBURG COMMUNITY SCHOOL CORP., 2021 WL 2915023 (S.D. IN. JULY 12, 2021)

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



## CIRCUITS ON LGBTQ+ STUDENTS AT A GLANCE:

| 3d  | 4th   | 5th        | 6th  | 7th  | 9th   | 11th   |
|---|---|------------|--|--|---|--|
| May use bathroom consistent with gender identity  | May use bathroom consistent with gender identity  | No caselaw | May use bathroom consistent with gender identity                                 | Transgender students may bring claims of sex discrimination under Title IX                             | May use bathroom, locker room, and showers consistent with gender identity  | May use bathroom consistent with gender identity   |
| <i>Doe by &amp; through Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 548, 538 (3d Cir. 2018) | <i>Grimm v. Gloucester County Sch. Bd.</i> , 972 F.3d 986 (4th Cir. 2020), as amended (Aug. 28, 2020)<br>*SCOTUS declined to hear |            | <i>Dodd v. United States Dept't of Educ.</i> , 845 F.3d 232, 223 (6th Cir. 2016) | <i>Whitaker v. Kenosha Unified Sch. Dist. No. 2 Bd. of Educ.</i> , 858 F.3d 1034, 1055 (7th Cir. 2017) | <i>Parents for Privacy v. Barr</i> , 949 F.3d 1230, 1237–38 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7322653 (U.S. Dec. 7, 2020) | <i>Adams by &amp; through Kaiser v. Sch. Bd. of St. Johns County</i> , 3 F.4th 1299 (11th Cir. 2022) |

## JOHN M. KLUGE, CONT.

- Kluge identifies as a Christian and is an elder of Clearnote Church, which is part of the Evangelical Presbyterian Church.
- Serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader.
- the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination



## BOSTOCK V. CLAYTON COUNTY 140 S.C.T. 1731 (2020)

- Gerald Bostock, a gay man, worked for Clayton County Georgia's child welfare services. When he joined a gay recreational softball league he was fired from the department for "conduct unbecoming of its employees."
- The Court ruled that an employer who fires an individual employee merely for being gay or transgender violates **Title VII** of the Civil Rights Act of 1964.
- Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex—the very practice Title VII prohibits in all manifestations.



## LEGAL ISSUES – TITLE VII – RELIGIOUS ACCOMS

- Whether District was required to offer other accommodations?
- 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?
- Whether the last-names-only accommodation was an undue hardship on the district?



## 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.'"



## 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 has demonstrated ... it cannot accommodate Mr. Kluge's religious beliefs."

**District wins. Kluge's resignation was not coerced and there was no reasonable accommodation available.**



## 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 assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.



## MERIWETHER V. HARTOP 992 F.3D 492 (6TH CIR. 2021)

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



## LEGAL ISSUES – UNDUE HARDSHIP

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

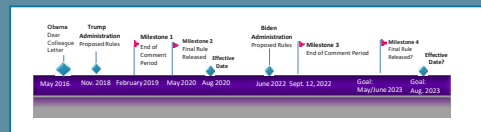
**Court:** Kluge established a prima facie case of discrimination based on failure to accommodate, so the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business."

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.

"The relevant costs may include not only monetary costs but also the employer's burden in conducting its business."



## HOW DID WE GET HERE?



## CRITICISM OF 2020 OCR RULES

- The 2020 grievance procedure
  - Unnecessarily adversarial
  - Retraumatizing
  - Chilling to students' willingness to report incidents
  - Not more effective than other means of determining whether a violation occurred
- The narrowed definition of "sexual harassment" allowed schools to ignore conduct that could limit/deny access to the learning environment based on sex.



## CURRENT RULES

- The 2020 Rules provides a grievance process only for "sexual harassment" complaints
- "Sexual Harassment"

## PROPOSED RULES

- The proposed rule would apply to all reports or complaints of sex discrimination
- "Sex Based Harassment" includes harassment based on sex stereotypes, pregnancy, sexual orientation, etc.



## WHAT'S NEXT?

- Earliest reasonable implementation date would be start of 2023-2024 academic year
- That is the equivalent Barry Allen for OCR
- We should at least remain using the current Title IX rules for the 2022-2023 academic year



## 2020 RULES: SEXUAL HARASSMENT

### The "Top Five"

1. Employee Quid Pro Quo
2. Sexual Assault
3. Domestic Violence
4. Dating Violence
5. Stalking

### The "Top Five"

Remain, with some slight changes in wording



## SO, WHAT ARE THE PROPOSED DIFFERENCES?

## HOSTILE ENVIRONMENT

### 2020 Rules

Unwelcome conduct determined by a reasonable person to be so:

- Severe **and**
- Pervasive **and**
- Objectively offensive **that**
- It effectively denies equal access to an education program or activity of the LEA

### Proposed Rules

Hostile Environment – Unwelcome conduct that is sufficiently

- Severe **OR**
- Pervasive
- that, based on the totality of the circumstances and evaluated subjectively and objectively
- denies **or limits** a person's ability to participate in or benefit from the LEA's education program or activity (i.e., creates a hostile environment).





## PROPOSED RULE: SEX-BASED HARASSMENT HOSTILE ENVIRONMENT FACTORS

- The degree to which the conduct affected the complainant's ability to access the LEA's education program or activity
- The type, frequency, and duration of the conduct
- The parties' ages, roles within the LEA's program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct
- The location of the conduct, the context in which the conduct occurred, and the control the LEA has over the respondent
- Other sex-based harassment in the LEA's education program or activity



## PROPOSED RULE: LGBTQI+ STATUS

"Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and **gender identity**"



## PROPOSED RULE: SEX DISCRIMINATION

- **Sex-Based Harassment**
  - Example: A complaint that a student was subjected to sexual texts by a fellow student in class.
  - Example: A complaint that a male student was repeatedly insulted for wearing fingernail polish.
- **Disparate Treatment Claims**
  - Example: A complaint that LEA's female students' sports do not receive similar funding to boys' sports.



## PROPOSED RULE: LGBTQI+ STATUS *WHAT THE RULES STILL DON'T DO*

- Address how that definition applies to single-sex facilities (bathrooms, locker rooms)
- Address how that definition applies to single-sex athletics teams



## PROPOSED RULE: SEX DISCRIMINATION

- **Disparate Impact Claims**
  - i.e.: A complaint that a grooming code (no hair beyond collar) disparately affects students of a particular gender.
- **Failure to Accommodate**
  - i.e.: A complaint that an LEA failed to accommodate a student-mom who needed to express milk.
- **Retaliation**
  - i.e.: A complaint that a student was denied a cheerleading spot due to retaliation for complaining about transgender issues.



## LOCATION & CONTEXT

- "Education program or activity" includes
  - locations, events, or circumstances over which the LEA exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs
- Must dismiss any complaint based on conduct that
  - did not occur against a person **in the U.S.**
- "Education program or activity"
  - Includes **conduct that is subject to the LEA's disciplinary authority**
  - LEA has an obligation to address a sex-based hostile environment under its education program or activity, **even if** sex-based harassment contributing to the hostile environment occurred **outside the LEA's education program or activity or outside the U.S.**



## PROPOSED RULE: NO MORE MANDATORY DISMISSALS

**May** dismiss a sex discrimination complaint because:

- The conduct, even if proven, does not constitute sex discrimination;
- The LEA cannot identify the respondent after taking reasonable steps;
- The respondent is not currently participating in the LEA's education program or activity and is not employed by the LEA; or
- Voluntary withdrawal by the complainant and the LEA determines that the remaining allegations in the complaint (if any) would not constitute sex discrimination even if proven.



## WHAT STAYS THE SAME

- Burden is on the LEA to gather sufficient evidence
- Standard of proof: preponderance of the evidence
  - Unless the LEA elects to use the clear & convincing standard in all other comparable proceedings, including those related to other discrimination complaints
- Notice of allegations required (but reduced requirements)
  - No anonymous complaints



## PROPOSED GRIEVANCE PROCEDURE: FFH+

### Basic Requirements – Section 106.45(b)

- LEA must adopt grievance procedures in writing
- Treat complainants & respondents equally
- No bias or conflict of interest with Title IX Coordinator, investigator, or decision-maker
- Presumption that respondent isn't responsible for alleged conduct until conclusion of grievance procedures
- Reasonably prompt timeframes for "major stages" of the process
  - Evaluation (determination of whether to dismiss or investigate), Investigation, Determination, and Appeal, if any



## WHAT STAYS THE SAME

- No discipline until completion of the grievance process
- EEs still protected from retaliation for refusing to participate in any manner in an investigation, proceeding, or hearing
  - Retaliation includes "intimidation, threats, coercion, or discrimination"



## PROPOSED GRIEVANCE PROCEDURE: FFH+

### Basic Requirements – Section 106.45(b)

- Reasonable steps to protect privacy of parties & witnesses
- Objective evaluation of evidence
- One track for all complaints of sex-based discrimination



## WHO'S WHO?

### 2020 Regulations



- 3-4 People Required
  - Investigator
  - Decision-Maker
  - Appellate Decision-Maker
  - Title IX Coordinator
    - Can be same as investigator only

### Proposed Regulations



- 2 People Required
  - Investigator, Decision-Maker and Title IX Coordinator can be same



## WHO'S WHO?



- Unchanged:
  - No bias/conflict of interest for grievance staff
  - Separate Appellate Decision-Maker



## RELEVANCE

### 2020 Regulations

- Relevant evidence not defined
  - Left to interpretation based on its "plain and ordinary meaning"

### Proposed Regulations

- Definition of "relevant"
  - "Related to the allegations of sex discrimination under investigation"
  - "Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred"
  - "Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred"



## NOTICE OF ALLEGATIONS

### 2020 Regulations

- Right to an advisor/attorney of their choice
- Right to inspect & review evidence
- SCOC provisions on knowingly giving false information during the grievance process

### Proposed Regulations

- Mostly same as 2020, but **not required**:
  - Right to advisor/attorney of their choice
  - Right to inspect & review evidence
  - SCOC provisions on knowingly giving false info during the griev. process
- Notice can be oral but best practice would be a written notice



## IRRELEVANT OR EXCLUDED EVIDENCE

### 2020 Regulations

- May Not Use
  - The C's **sexual predisposition**
  - The C's prior **sexual behavior**
    - Unless offered to prove that someone other than the R committed the alleged conduct or specific incidents are offered to prove consent
  - Information protected under a legally recognized privilege unless waived.

### Proposed Regulations

- Must exclude certain evidence, regardless of relevance
  - The C's **sexual interests**
  - The C's prior **sexual conduct** (Unless offered to prove the same things as 2020)
  - Protected by a privilege recognized under state or federal law unless waived.



## GRIEVANCE TIMEFRAMES

### 2020 Regulations

- Mandatory 10-day waiting periods
- Reality: 6 weeks minimum to investigate a complaint with all the "must wait 10 days to \_\_\_\_"

### Proposed Regulations

- Reasonably prompt timeframes for major stages
  - Major stages
    - Evaluation
    - Investigation
    - Determination
    - Appeal
  - Reasonable extension on a case-by-case basis for good cause, with notice to the parties



## WRITTEN DETERMINATION

### 2020 Regulations

- Written determination must include:
  - Allegations
  - Description of procedural steps from start to finish
  - Findings of fact supporting the determination
  - Conclusion applying the SCOC to the facts
  - Statement & rationale for the decision on each allegation
  - Determination of responsibility
  - Disciplinary sanctions imposed
  - Remedies provided
  - Procedures & bases for appeal

### Proposed Regulations

- Must give notice to the parties of:
  - Outcome of the complaint
  - Determination of whether sex discrimination occurred
  - Procedures & basis for appeal



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



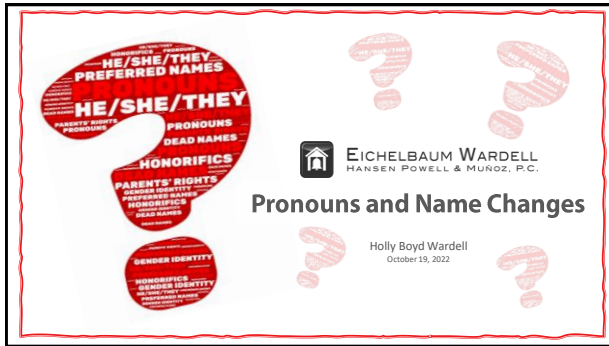
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# **Pronouns and Name Changes**

Presented by: Holly Boyd Wardell

October 19, 2022



"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)

## BIDEN ADMINISTRATION

- 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

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## EEOC: TITLE VII SEX DISCRIMINATION

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

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## BIDEN ADMINISTRATION

- June 15, 2022, President Biden
- Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals
- Secretary of Educ – develop sample policies for supporting students within 200 days (BY END OF 2022)

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## EMPLOYMENT DECISIONS

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

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## 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.

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## 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.

## 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.

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## Pennsylvania biology teacher suspended for refusing to follow pronoun policy, reinstated after backlash

At the meeting, the school board not only reinstated the teacher, but suspended the policy, with plans to rewrite it, according to WXPI.

South Side School District Superintendent Alan Fritz did not immediately respond to a request for comment from Fox News. However, he defended the decision to local paper Beaver County Times.

STATE OF TEXAS, Plaintiff, v. EQUAL EMPLOYMENT..., Slip Copy (2022)

2022 WL 4835346  
Only the Westlaw citation is currently available.  
United States District Court, N.D. Texas,  
Amarillo Division.

STATE OF TEXAS, Plaintiff,  
v.  
EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION, et al.,  
Defendants.

parties' briefing and the relevant law, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion and GRANTS IN PART and DENIES IN PART Plaintiff's Cross-Motion.

1. Defendants are the Equal Employment Opportunity Commission ("EEOC"), Charlotte A. Burrows, in her official capacity as Chairman of the EEOC, Merrick B. Garland, in his official capacity as Attorney General of the

Filed 10/01/2022

Some lawmakers have proposed bills to protect teachers who object to these requirements. Tennessee bill SB 2777 for instance, protects school employees and teachers from being sued or punished for addressing students with pronouns consistent with their biological sex.

[www.foxnews.com/media/pennsylvania-biology-teacher-suspended-refusing-follow-pronoun-policy-reinstated-backlash](https://www.foxnews.com/media/pennsylvania-biology-teacher-suspended-refusing-follow-pronoun-policy-reinstated-backlash)

## Wisconsin parents sue school district over gender pronoun policy

One set of parents said they had their child removed from the district after the school started using male pronouns for the student without their consent

[Wisconsin parents sue school district over gender pronoun policy | Fox News](#)

An [Ohio school district](#) recently informed teachers they have no obligation to inform parents if a transgender or transitioning student as young as 11 requests to be called by a different name or pronoun.

On Aug. 31, Mentor Public Schools Assistant Superintendent Timothy Hamman sent an email to [teachers in grades 6-12](#) saying they don't have to notify parents of a name or pronoun change if the student only requests it informally and does not ask for it to be changed in Google or the Infinite Campus parent portal.

"If a student shares with a teacher what preferred name they would like to be called, and the student does not want it changed in IC or Google, there really is no need to go any further," the email, obtained by Parents Defending Education (PDE) and shared exclusively with Fox News Digital, stated.

## Wisconsin parents sue school district over gender pronoun policy

One set of parents said they had their child removed from the district after the school started using male pronouns for the student without their consent.

A group of parents sued a [Wisconsin school district](#) on Wednesday over a policy that allows students to change their names and gender pronoun preference without their parents' consent while they're at school.

One student's parents said they had their daughter removed from the Kettle Moraine School District to "protect her [mental health](#) and preserve their parental role" after the student asked to be called a different name and go by male pronouns at school, according to WFRV-TV in Green Bay.

The parents claimed the school had violated their [constitutional](#) rights because parents have an "inherent right" to be the primary decision-makers in their children's lives.

## Teacher gets \$95,000 to settle lawsuit over refusal to use student's preferred name

By [Elizabeth Ring](#) and [Alisa Eissner](#), CNN  
Published 4:45 PM EDT, Thu September 1, 2022

(CNN) — A Kansas teacher who argued she had a religious belief that prevented her from calling [transgender or nonbinary students by their preferred names and pronouns](#) reached a \$95,000 settlement with school district officials, [according to a release](#) from the teacher's attorneys.

Pamela Ricard, who teaches math at Fort Riley Middle School, had been suspended for violating the Geary County Schools' Diversity and Inclusion Policy that requires educators to refer to students by their preferred names and pronouns. In the lawsuit, she said she refuses to use the preferred names and pronouns of transgender and nonbinary students [because it violates her religious beliefs](#).

## Ohio school district tells teachers they don't have to inform parents of students' name, pronoun changes

Teachers 'can just use those preferred pronouns/name with the student, and there is no need to share the info,' Mentor Public Schools advised

[Ohio school district tells teachers they don't have to inform parents of students' name, pronoun changes | Fox News](#)

## Ricard's Causes of Action

- Teacher – Preferred Names and Pronouns Policy
- Free speech
- **Free exercise** – preliminary injunction on this claim
- Due process claims
- School district settled with her - \$95,000



***John M. Kluge v. Brownsburg Community School Corp.***, 548 F.Supp.3d. 814 (S.D. IN. 2021).

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**FACTUAL BACKGROUND – Christian/Church Elder**

- Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbyterian.
- 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." "

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***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.

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**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."

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**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.

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**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.

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### 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.

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### 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.

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### 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."

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### 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.*

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### 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.

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### 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.

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## 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 he could either comply with the Name Policy, resign, or be terminated.

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## LEGAL ISSUES – Religious Accomms

### 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.’”

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## 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...*

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## 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.

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## LEGAL ISSUES – Title VII – Religious Accomms

- Whether District was required to offer other accommodations
- 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
- Whether the last-names-only accommodation was an undue hardship

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## 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).

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## 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.

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## 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.

This case is on appeal to the 7<sup>th</sup> Circuit.

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## 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."

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- No Texas or Fifth Circuit authority yet, but...
- Federal agencies (EEOC & OCR) and many courts following Bostock reasoning – except N. D. Texas EEOC decision 10-1-22
- 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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## 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.

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## NAME/PRONOUN POLICY

### Remember:

In Texas, parents are partners in their children's education. Tex. Educ. Code §26.001.

Parents have the right to full information regarding their children's education. Tex. Educ. Code §26.008

## STATE LAW REQUIREMENTS

**Texas Education Code.** It is important that education records contain accurate information about the true identity of students enrolled in Texas public schools to thwart kidnappers and traffickers.

To assist in locating missing children, Texas law requires that a parent furnish a copy of a child's birth certificate or other "document suitable as proof of the child's identity" to enroll a student in Texas public schools. Tex. Educ. Code §25.002(a)(1). If a child is enrolled under a name other than the child's name as it appears in the identifying document or records, the school must notify the Texas Department of Public Safety's Missing Persons hotline at (800) 346-3243. *Id.* at §25.002(b); FD(LEGAL); §3.3.4 - 2022-23 Student Attendance Accounting Handbook (texas.gov). See also DPS – Missing Persons Clearing House materials at 14 ([texas.gov](https://texas.gov)).

## STATE LAW REQUIREMENTS

Any changes to the AAR must be dated, explained, and kept as part of the student's permanent file. *Id.* at §1.9. TEA has reportedly 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. See Q 7. Legal Issues Related to Transgender Students June 2022 (tasb.org).

## STATE LAW REQUIREMENTS

### **Student Attendance Accounting Handbook.**

Student Detail Reports, which may be requested by TEA in the event of an attendance audit, require that student data include a student's "legal first, middle, and last name" and gender, among other data. See §2.3.1 - 2022-23 Student Attendance Accounting Handbook (texas.gov).

## STATE LAW REQUIREMENTS

Accordingly, a student's name on the AAR and in PEIMS can be changed: 1) to correct a data entry error to reflect a student's true legal name from the birth certificate or other legal document; or 2) upon receipt of a revised birth certificate or other legal document. Any changes would have to be dated, explained, and the source documents kept as part of the student's permanent file in accordance with §1.9 of TEA's Minimum Standards for AARs (2012).

## STATE LAW REQUIREMENTS

### **Academic Achievement Record (AAR) Requirements.**

Texas school districts are required to permanently maintain an accurate academic achievement record (AAR), which is often referred to as the "transcript." The AAR must contain the student's "full legal name."

## STATE LAW REQUIREMENTS

In Texas, an individual can get a birth certificate changed through the Texas Vital Statistics office without a court order for typographical or spelling errors. General Information - Name Changes in Texas - Guides at Texas State Law Library. Otherwise, a certified copy of a court order is required to legally change a child's name on a birth certificate. See, e.g., Supporting Documentation for Changes & Corrections (texas.gov).

## PROCEDURAL CONSIDERATIONS

Under what conditions must records be amended to reflect a different student name/gender?

Records must be amended when the school is provided a copy of a final, signed court order requiring that official government records be changed to reflect the new name/gender. The AAR and PEIMS records may be amended only when the district is presented with an official, revised birth certificate or court order signed by a judge. Documentation justifying and explaining the change to these records must be maintained permanently.

## PROCEDURAL CONSIDERATIONS

What records cannot be changed without a revised birth certificate or court order? A student's legal name must be used for:

- PEIMS
- Academic Achievement Record/Transcript
- College exams (including but not limited to SAT/ACT/PSAT/TSI)
- College applications
- FAFSA/TAFSA
- College letters of recommendation
- Official college/university transcripts
- Texas State exams (STAAR, EOC, TX-KEA, ISIP, etc.)

## PROCEDURAL CONSIDERATIONS

Under what conditions may records be amended?

For records other than those listed below, a student's name and gender may be changed upon request of the parent, guardian, or adult student in accordance with procedures adopted by the District. See question below for the types of records that can and cannot be changed.

## PROCEDURAL CONSIDERATIONS

What records could be changed to reflect a student's preferred name, pronouns, and/or gender?

- Skyward (except for portions used for PEIMS/attendance reporting)
- Special Ed Manager or other special education software platform
- ID badges
- Class rosters
- Campus-based publications (e.g., yearbooks, athletic programs)
- High school diploma & graduation ceremonies

\*A student's legal name will still appear on transcripts, attendance, and other areas necessary for legal documentation and state/federal reporting.

## PROCEDURAL CONSIDERATIONS

Under what conditions may records not be amended?

The AAR and PEIMS records must reflect the student's legal name on the birth certificate and cannot be changed without a revised birth certificate or other legal document (i.e., court order).

## PROCEDURAL CONSIDERATIONS

Who can request a change?

Districts will need to decide whether students may request a change or whether parental/guardian consent is required. The Education Code explicitly requires that parents shall be partners with educators when it comes to their children's education. Tex. Educ. Code §26.001. And, parents have a right to "full information" regarding their children's school activities. Tex. Educ. Code §26.008. Given the strong public policy in Texas for parental involvement and the right to information regarding their children's school activities, any request for the use of a different or preferred name should require parental consent and a thoughtful process designed to reflect that this is a significant decision.

## PROCEDURAL CONSIDERATIONS

### When can a parent/adult student request that records be changed?

Nothing currently in state or federal law prescribes a deadline for changing a student's records to reflect a preferred name, pronouns, or gender-marker. Districts could consider and implement such requests at any time or could limit changes to records to the end of a grading period or semester for administrative purposes. The District may wish to consider a process that precludes students changing names/pronouns/gender on a frequent basis to prevent abuse of this process.

## PROCEDURAL CONSIDERATIONS

### What are the rights of former students under FERPA?

34 CFR § 99.3 defines "student" as "any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records." This definition includes former students. For our immediate purposes, §99.20 requires that "if a parent or eligible student (TPE—including a former student) believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's right of privacy, he or she may ask the educational agency or institution to amend the record. The District then has the choice to amend the record as requested and the student/parent may request a hearing under §99.21.

## PROCEDURAL CONSIDERATIONS

### How should the District implement such procedures?

If a district chooses (or is subsequently required by the U.S. DOE as a Title IX requirement) to implement a name change procedure, it would be advisable to develop a standard form, provide notice on the District's website, and provide training and direction to staff to ensure consistent practices.

See, e.g., Austin ISD's website [Student Information Changes | Austin ISD](#) and form (attached).

## PROCEDURAL CONSIDERATIONS

### What are the rights of former students under FERPA? (continued)

One could argue that a school's failure to correct a name to conform to current gender identity is a violation of a former student's privacy as described in §99.20—for example, a former student (post-transition) applying for a new job and the new employer requests high school records from when the former student was a different gender. See, e.g., *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) on the issue of amending student records for a transgender graduate. Grimm provided an amended birth certificate to his former school and the Board of Trustees refused to amend his school records on the basis of a technicality. The Fourth Circuit Court of Appeals ultimately held that this violated Grimm's rights under the Equal Protection Clause.

## PROCEDURAL CONSIDERATIONS

### Would the District be required to change the records of former students?

It is possible that a transgender adult may request that school records be changed to retroactively protect their privacy in the context of future inquiries by schools or employers. In a 1991 opinion letter regarding a former male student who had graduated and thereafter transitioned to female, the U.S. Department of Education's Family Policy Compliance Office (now SPPD—Student Privacy Policy Office), advised the FERPA did not require districts to amend former students' education records to reflect a name and gender other than that of the students' name and gender during their attendance, because the request was "not based on allegations that their records contain recordkeeping errors but on the students' desire to have their education records changed to reflect the results of a surgical gender change." *U.S. Dept of Educ., Family Policy Compliance Office, Letter from FPCO Director Leroy S. Rooker to Karol Johnson, Superintendent, Great Falls Public Schools (Nov. 13, 1991)*. Therefore, FERPA does not require a change in the record due to inaccuracy, but it also does not prohibit a district from deciding to change the record in the interests of protecting a current or former student's privacy. However, evolving case law in this area may impose an obligation to amend records based on an Equal Protection or Title IX claim.

Posted 09-27-2021 12:11:00 PM

REPLY

While there have been many lively discussions about using preferred pronouns for students and staff, I am curious if anyone has dealt with the actual teaching of pronouns in school curriculum in light of that. Grammar lessons typically teach pronouns which include masculine, feminine, and plural, but do not really account for non-binary application. Such grammar is taught at all levels, starting early in elementary school. Are schools adjusting their teaching of masculine/feminine to recognize non-binary individuals? I would be interested in any curriculum policies or changes that anyone may have worked on with their districts.

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



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# **TEA Educator Investigations**

Presented by: David Rodriguez, Daniel Berumen, and Tina Farrell


October 19, 2022

**Educator Investigations Division**


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


**Title IX Administrator  
Conference**

**Wednesday, October 19, 2022**



**Overview  
& Process**




**Educator Investigations Division**

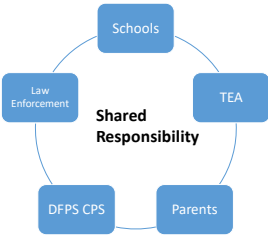
**PRESENTERS**


**Tina Farrell** - Sr. Manager, Investigations Unit


**Daniel Berumen** – Sr. Manager, Intake Unit

**David Rodriguez** – Executive Director of Investigations

**Student Safety**





**Audience Participation**


Who has referred a case to  
Educator Investigations?

What was the outcome of the  
TEA investigation?

**Division of Educator Investigations**



**Our Responsibilities**



Educator Investigations Division

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

7



Responsibilities of Administrators and Schools





Investigation & Litigation Process

School 249 report

Criminal History hit

CPS report

NASDTEC (other states)

Complaints from public

Intake

Investigations


Legal

State Office of Admin Hearings

State Board for Educator Certification (SBEC)

TEA Commissioner

8



Administrator and School Responsibilities

TEC Chap 21 and 22

TEC Chap 38

Ensure employees are fingerprinted

Search the Do Not Hire Registry

Investigate allegations of misconduct

Report misconduct to TEA/SBEC


Child abuse reporting and programs

Policies addressing sexual abuse

Participate in training and prevention efforts

Posters

10



Educator Investigations Division (EID)

Intake

Investigations

IT Applications and School Support

Agency Partnerships

30% increase in reports from school districts, complaints, and CPS reports  
FY 22 > 3,200 reports  
20% increase in criminal histories.  
FY 22 > 35,000 hits  
Some movement in criminal cases, but many pending in courts

24% increase in cases opened involving applicants, certified educators, and non-certified employees  
FY 22 = 1,656  
Increase in SBEC settlements and non-cert default orders.  
FY 22 = 580

Continued support to applicants and LEAs by phone and Help Desk.  
FY 22 > 23,000 tickets  
Provided multiple training presentations to HR personnel, ESCs, and stakeholders  
FY 22 > 20 presentations  
Continued improvements to IT applications; ease of use for LEAs and staff  
Compliance with DPS validation requirements

Presentations to DFPS, law enforcement, and ESCs  
Provided issue-resolution between DFPS and LEAs; identified constraints

TEA

11




Misconduct Reporting Portal

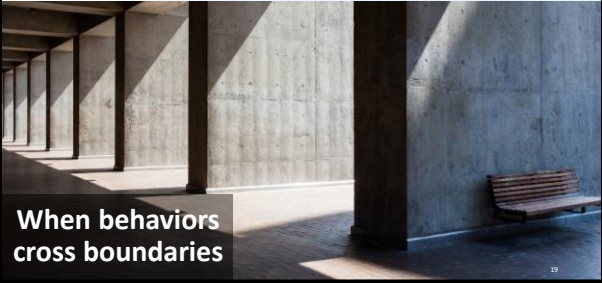


12





When behaviors cross boundaries





Potential Overlap with Title IX Cases




*Improper Communication or Solicitation of a Romantic Relationship*

**Non-Transparent Behaviors**

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

**Other behaviors**

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



Potential Overlap with Title IX Cases

Regardless of severity, TEA reviews allegations of misconduct that may fall under the following laws:

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



Listen for the behaviors.....



Student Outcry



Potential Overlap with Title IX Cases



*Improper Communication or Solicitation of a Romantic Relationship*

**Verbal Behaviors**

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

**Physical Behaviors**

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



Audience Participation

What types of behaviors are described in the recording?

What similar behaviors have you seen in your investigations?

Division of Educator Investigations

TEA / SBEC  
Case Studies

TEA  
Texas Education Agency

Audience Participation

Have you seen these types of allegations in your investigations?

What other evidence or factors did you consider?

TEA  
Texas Education Agency

Case Studies

- Educator engages in inappropriate communication via social media
- Student's parent prohibit communication
- CPS SXAB Case- R/O
- TEA Investigation
- Voluntary Surrender

Division of Educator Investigations

Cooperation  
TEA - LEA - DFPS

TEA  
Texas Education Agency


Case Studies

- Educator makes students uncomfortable
- Educator invades their space with incidental touching
- CPS SXAB Case- UTD
- Investigation
- Reprimanded with training

TEA  
Texas Education Agency

Requirement

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




### Ongoing Inter-Agency Discussions

**TEA ↔ DFPS**

- Statewide Intake
- Records Management
- CPS Special Investigations
- Human Trafficking

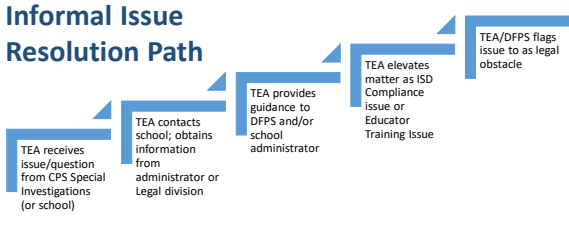
**Other**

- Office of Governor
- TEA Divisions
- Children's Advocacy Centers
- District Atty's Office
- School Police Depts.




### School Investigations

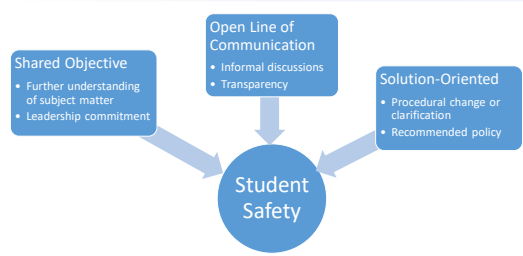
#### Informal Issue Resolution Path




```
graph LR; A[TEA receives issue/question from CPS Special Investigations (or school)] --> B[TEA contacts school; obtains information from administrator or Legal division]; B --> C[TEA provides guidance to DFPS and/or school administrator]; C --> D[TEA elevates matter as ISD Compliance issue or Educator Training Issue]; D --> E[TEA/DFPS flags issue to as legal obstacle];
```



### TEA / DFPS Collaboration



```
graph TD; A[Shared Objective<br/>• Further understanding of subject matter<br/>• Leadership commitment] --> D((Student Safety)); B[Open Line of Communication<br/>• Informal discussions<br/>• Transparency] --> D; C[Solution-Oriented<br/>• Procedural change or clarification<br/>• Recommended policy] --> D;
```



### Identified Issues

**Inter-Agency**


- Time between SI closes a case and TEA receives report
- Level of redaction in reports (images, details, redacted out of narrative)

**School District**

- Campus administrators not providing SIs with statements or records collected during initial ISD investigation
- Administrators and front-office staff are not familiar with investigation process/requirements
- Question on presentation of SI drivers' license


### School Investigations

## Known Issues and Guidance




### Known Issues & Current Guidance

| Issue  | Guidance   |
|--|--|
| Campus administration does not permit a CPS Special Investigator to interview students or staff at a school?           | Campus administration must permit the CPS Special Investigator to interview students or staff at a school. The investigator may determine the circumstances of the interview, including whether the interview is announced in advance and whether anyone may attend. Tx Fam Code<br><br>Tx Fam Code §261.302, 303, 409 / Op. Tx Atty Gen DM 0476 (198) / TASB Policy GRA (LEGAL) |
| A video of an incident is not made available to DFPS Special Investigator. Administrator states FERPA or HIPPA issues. | TEA advises that the CPS Special Investigator request to view the video on campus.   |



Known Issues & Current Guidance


| Issue   | Guidance  |
|---|---|
| Schools ask CPS Special Investigator to check-in or meet with administrator before interviewing parties | The CPS Special Investigator must request that the principal not alert the alleged perpetrator or others regarding the report until the investigator has first had an opportunity to interview the alleged perpetrator. (40 TAC §707.615) |



Educator Investigations Division

Further Develop TEA Webpage


- Additional guidance for reporting requirements
- Guidance for facilitation of DFPS investigations



Pending Issue

| Issue  | Guidance   |
|--|--|
| Can campus administration require CPS Special Investigators to provide drivers' license. | An investigator may be asked to show a state-issued ID badge. However, if the state-issued ID badge is shown, the district should not ask for personal ID. (TEA Letter-2008) |

What is your understanding of the requirement?




Audience Participation

How else can TEA help you and your school?




Audience Participation

What questions do you have around with DFPS (or TEA) investigations?



Questions







References

- Center for Missing and Exploited Children
- Texas Assoc. of School Boards (TASB)  
Child Welfare Issues in Texas Public Schools
- Seven Stages of Grooming and Delayed Disclosure,  
Thomas E. Tueller, LCSW , Tueller Counseling  
Services, Inc. Idaho Falls, Idaho
- 19 Texas Administrative Code, Ch. 247 and Ch. 249
- Texas Education Code, Ch 21 and Ch. 22



# **Lactation: Laws, Policy, and Best Practices in School Settings**

Presented by: Emma J. Darling

October 19, 2022

# Lactation

Laws, Policy, and **Best Practices**  
in School Settings



Emma J. Darling  
EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.

## Definition

**Lactation** is the process of producing and releasing milk from the mammary glands in your breasts. Lactation begins in pregnancy when hormonal changes signal the mammary glands to make milk in preparation for the birth of your baby.

# Laws

## Government Code § 619.002

“A district employee is entitled to express breast milk at the employee’s workplace.”

## Fair Labor Standards Act Section 7

An employer **shall** provide:

1. A reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express the milk; and
2. A place, **other than a bathroom**, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk

## Fair Labor Standards Act Section 7

- An employer shall not be required to compensate an employee receiving reasonable break time for any work time spent for such purpose
- An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.

## Texas Health and Safety Code § 165.002

“A mother is entitled to breast-feed her baby or express breast milk in any location in which the mother’s presence is otherwise authorized.”

## Lactation Spaces

- Employers are not required to create permanent, dedicated spaces for nursing mothers
- If creating a temporary space, it must be functional for the expression of breast milk, and must be available when needed in order to meet the statutory requirements

## Policy

### DG(LEGAL)

The district shall develop a **written policy** on the expression of breast milk by employees under Government Code Chapter 619. The policy must state that the district shall support the practice of expressing breast milk and make reasonable accommodations for the needs of employees who express breast milk

### DG(LEGAL)

A district shall provide a reasonable amount of break time for an employee to express breast milk each time the employee has need to express the milk. The district shall provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

### DG(LEGAL)

A district may not suspend or terminate the employment of, or otherwise discriminate against, an employee because the employee has asserted the employee’s rights under Government Code Chapter 619. Government Code Chapter 619 does not create a private or state cause of action against a district.

## Written Policy Examples

The District supports the practice of expressing breast milk and makes reasonable accommodations for the needs of employees who express breast milk. A place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk will be provided.

A reasonable amount of break time will be provided when the employee has a need to express milk. For nonexempt employees, these breaks are unpaid and are not counted as hours worked. Employees should meet with their supervisor to discuss their needs and arrange break times.

## Written Policy Examples

EMPLOYEE RIGHTS AND PRIVILEGES

DO  
(REGULATION)

This regulation establishes a "Mother-Friendly" employee worksite lactation support program in Austin ISD in accordance with Texas Health and Safety Code Section 165.003 and House Bill 786. The program:

1. Provides a work environment that is supportive of lactating mothers; and
2. Encourages breastfeeding of their children for up to one year or beyond following their birth.

The benefits of the program are:

1. Increased attendance due to less time lost for care of sick children;
2. Reduced cost of insurance claims for sick children and mothers;
3. Reduced losses of institutional knowledge and turnover as a result of a mother opting not to return to work in order to breastfeed; and
4. Increased morale.

## Written Policy Examples

### Facilities including Breast Milk Storage:

- Access to a safe water source and a sink within reasonable distance from the lactation space will be provided. The women's restroom and/or teachers' lounge/kitchen area has soap and water for cleaning pump equipment.
- Employees may store their expressed milk in their own personal coolers with ice packs or in the shared break room refrigerator space, if available. As with any personal food item, handling and supervision of the expressed milk is the sole responsibility of the employee.

# Best Practices

## Things to Consider: Breaks

- If the lactating mother is a coach, sponsor, or volunteer, breaks must be provided during extracurricular activities
- Breaks could also need to be worked out during field trips
- Accidents happen: prepare for additional coverage in cases of emergency

## Spaces Other than Bathrooms

- Nurse's Office
- Empty Classrooms
- Administrator's Office
- A cubicle with space away from other people
- Conference Room
- Coach's Office near locker room
- Counselor's Office
- Door with a lock

## After Expressing Milk

- Breastmilk is food, and must be handled in the same way other food is handled
- Coolers/space in a refrigerator
- Access to running water and soap to clean pumping parts
  - Perhaps access to a microwave
- A place to store pumping parts

# Looking Forward

## Title IX – Proposed Additions

- Proposed regulations apply specifically for **students** who are lactating.
- It may become the job of the Title IX Coordinator or appropriate designee to ensure the availability of a lactation space for students who are expressing breast milk or breastfeeding their child at school.
- Lactation space must be made available both during the school day and during extracurricular activities

## Legal Caveats

FLSA only covers mothers for “one year after the child is born.”

- What if mother wants to breast feed longer?
- If you extend this for some, you’ll have to for all

## Legal Caveats

Protections seem to begin only once the child is born

- Medications for women to lactate even if not pregnant
- Moms who *can* pump before birth
- Does this mean they use breaks for more than one year?

## Legal Caveats

We must provide “reasonable breaks”

- Can we cap the number?
- Is 15 minutes too short if the mother must walk to a lactation room across campus?
- Adjusting teacher conference times?

## Legal Caveats

Nothing in policy addresses storage

- Must we provide it?
- Is the school responsible if personal storage is destroyed or altered?
- What if our refrigerators go out?

## Questions

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



[www.edlaw.com](http://www.edlaw.com) | (800) 488-9045



# **Youth with Problematic Sexual Behavior**

Presented by: Catherine Henning

October 19, 2022





## Introduction to Problematic Sexual Behavior (PSB)

October 2022

## Children's Advocacy Centers of Texas

We are committed to ensuring that every child victim of abuse in Texas receives critical services to put them on a path towards safety, justice, and healing.



And we believe in a future free of child sexual abuse.

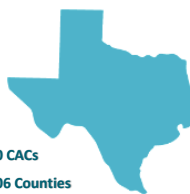


## Serving Texas' Children

### The CAC Multidisciplinary Team (MDT) Model



## Serving Texas' Children

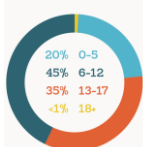


- OVER 1,400 dedicated CAC staff members
- OVER 1,000 law enforcement jurisdictions
- MORE THAN 230 district and county attorneys
- MORE THAN 300 medical and mental health professionals
- EVERY DFFE REGION IN THE STATE including Child Protective Investigations, Child Care Investigations, and Adult Protective Services



## Serving Texas' Children

### AGES SERVED: TYPES OF ABUSE:



- 67% sexual abuse
- 17% physical abuse
- 6% child witness to crime
- 6% neglect
- 2% sexual & physical abuse
- 1% fatality
- 1% other

IN 2021,

**68,018**

CHILDREN RECEIVED CRITICAL SERVICES AT A TEXAS CAC



## Understanding the Issue



## PSB Defined

Children who initiate behaviors involving sexual body parts that are developmentally inappropriate or potentially harmful to themselves or others.

Chaffin, Berliner, Block, Johnson, Friedrich, Louis, & Silovsky, 2008  
Kelley et al., 2019



When two children are involved

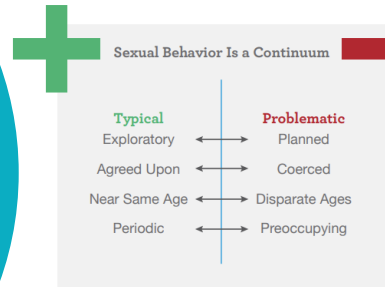


Image from NCA 2017-PSB-Fact-Sheet-Overview-3.pdf (nationalchildrensalliance.org)

Can include non-contact acts, such as:

Unwanted sexual references in conversation

Indecent exposure

Forcing another child to observe others' sexual behavior

Taking pornographic pictures or forcing another child to view pornography



## Youth with PSB are children first

Reasons they might engage in PSB include:

- History of abuse
- Lack of appropriate supervision
- Exposure to sex before developmentally appropriate
- Difficulty with self-regulation and impulse control



Up to 50% of CSA cases involve another child  
(Finkelhor, Ormrod, & Chaffin, 2009; Finkelhor et al., 2014)

Nationally 25% of all cases seen at CACs are youth-initiated PSB  
(2019 NCA Survey)

Sibling SA most common and least reported intrafamilial SA  
(Yates & Allardice, 2021)

## Prevalence



## Extremely High Desistance Rate

Research indicates that youth who have engaged in PSB with another child and receive evidence-based treatment have a 97%-98% desistance rate.

## Action Steps & Resources



## Continuum of Responses

- A continuum of behavior requires a continuum of responses.
- Normative behavior can often be redirected without additional intervention.
- If the behavior causes a suspicion of abuse, it must always be reported.
  - It is not a mandated reporter's job to determine if abuse has occurred.



## Responding to Sexual Behavior *In the Moment*

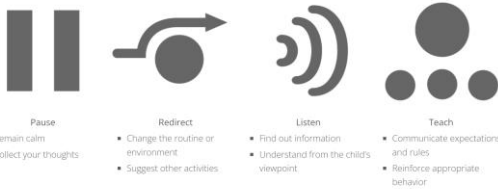


Image from [Responding to Sexual Behavior Challenges | Virtual Lab School](#)



## Responding to Sexual Behavior *After the Fact*



Image from [Responding to Sexual Behavior Challenges | Virtual Lab School](#)



## Reflection Questions

- Is the behavior random or infrequent?
- Is the behavior typical for the child's age and developmental ability?
- Is the behavior driven by curiosity, exploration, and playfulness?
- If other children are involved, is it mutual and good-humored?
- If other children are involved, do they know each other well and are they of a similar age and development (<2 years)?
- Is the behavior easily redirected?



## Making a Report of Abuse

**Report suspected abuse to the 24/7 Texas Abuse hotline.**

**800.252.5400**

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

Texas Family Code § 261.303



**Provide basic information about the child and any known circumstances re: his/her home life.**

**Answer all questions thoroughly.**

**Provide a detailed description of the outcry.**

Texas Family Code § 261.304



## Resources

### **Virtual Lab School (VLS):** Sexual Development & Behavior in Children and Youth

- Specific to educators and includes guides and tools to support your responses, communication, and preparedness when you observe sexual behavior in children in your care
- Guides also available for families
- Specific to children 12 and under
- [virtuallabschool.org](http://virtuallabschool.org)

### **National Center on the Sexual Behavior of Youth**

- Resources for parents/caregivers and professionals
- [ncsby.org](http://ncsby.org)

### **Stop It Now!:** Children and Youth Struggling with Unsafe or Harmful Sexual Behaviors

- [stopitnow.org](http://stopitnow.org)



## Treatment Considerations

Evidence-informed treatment options are available at some CACs.

### **Commonalities across treatment**

- Required caregiver component
  - Supervision & safety
  - Behavior management strategies
  - Boundaries
  - Sexual behavior rules
- Teaching children about healthy relationships and boundaries
  - Self-control strategies & social skills
  - Sexual behavior rules



## Study on the "State of our State"

- Mixed Methods
- Interviews with key informants, focus groups, surveys
- MDT partners, as well as judges, probation officers, and guardians ad litem



PSB Guide for caregivers and professionals working with children

- Target date: Summer 2023

Children's Advocacy Centers PSB Advisory Group

- First meeting: October 20th

## Additional PSB Projects



## Thank You

Feel free to contact us!

Catherine Henning  
Strategy Development Manager  
[chenning@cactx.org](mailto:chenning@cactx.org)

Hannah Gibson-Moore, LCSW-S  
Strategy Development Principal  
[hmoore@cactx.org](mailto:hmoore@cactx.org)





# **Title IX and Athletics**

Presented by: Terri Gonzales and Lindsay Drennan

October 19, 2022



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620  
DALLAS, TX 75201-6810

February 28, 2018

REGION VI  
ARKANSAS  
LOUISIANA  
MISSISSIPPI  
TEXAS

Dr. Michael Hinojosa, Superintendent  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, TX 75204

OCR Ref. No. 06151216

Superintendent Hinojosa:

This letter is to inform you of the disposition of the above-referenced complaint filed against the Dallas Independent School District (DISD, the District), in Dallas, Texas, on January 30, 2015. In the complaint, the Complainant alleged that DISD discriminates against female students at W.T. White High School (WTWHS) on the basis of sex.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance, either from the Department or from an agency that had delegated investigative authority to the Department, are in compliance with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulations at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex. OCR has determined that DISD is a recipient of Federal financial assistance from the Department. Therefore, OCR has jurisdiction to process this complaint for resolution under Title IX.

Based on the allegations of the Complainant, OCR opened the following legal issues for investigation:

1. Whether the WTWHS provides equal athletic opportunities to participants of both sexes in its athletics program with regard to the provision of scheduling of games and practice time, in violation of Title IX and its implementing regulation at 34 C.F.R. § 106.41(c)(3).
2. Whether the WTWHS provides equal athletic opportunities to participants of both sexes in its athletics program with respect to the provision of locker rooms, practice and competitive facilities, in violation of Title IX and its implementing regulation at 34 C.F.R. § 106.41(c)(7).

The Title IX implementing regulation at 34 C.F.R. § 106.41(a) states, in relevant part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, interscholastic” athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. The provision of equal opportunities with respect to the opportunity to participate in interscholastic athletics is addressed in the Title IX implementing regulation at 34 C.F.R. § 106.41(c).

There are 13 major factors listed in the Title IX regulation and the 1979 Policy Interpretation that may be investigated by OCR. OCR has termed these 13 major factors ‘program components.’ Within these 13 program components, the Policy Interpretation lists specific factors to be investigated. The 13 program components are not considered to be a finite list. OCR may add factors if necessary. The 13 program components are:

34 C.F.R. 106.37(c)

Athletic Scholarships

*The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

|                        |  |
|------------------------|--|
| 34 C.F.R. 106.41(c)(1) | Accommodation of athletic interests and abilities                  |
| (2)                    | Equipment and supplies   |
| (3)                    | Scheduling of games and practice times                             |
| (4)                    | Travel and per diem allowance                                      |
| (5)                    | Opportunity to receive coaching and academic tutoring <sup>1</sup> |
| (6)                    | Assignment and compensation of coaches and tutors                  |
| (7)                    | Locker rooms, practice and competitive facilities                  |
| (8)                    | Medical and training facilities and services                       |
| (9)                    | Housing and dining facilities and services                         |
| (10)                   | Publicity  |

Policy Interpretation - Support Services  
Recruitment of student athletes

To assess whether a recipient is providing equal athletic opportunities to members of both sexes, OCR utilizes the Department's "Intercollegiate Athletics Policy Interpretation," issued December 11, 1979, and found at 44 Fed. Reg. 71413 et seq. (Policy Interpretation). The Policy Interpretation explains OCR's approach to determining compliance in intercollegiate athletics, which is generally applicable to interscholastic athletics. The Policy Interpretation specifically identifies factors for assessment in examining compliance for each program component. Pursuant to the Title IX regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities. With regard to this matter, OCR investigated two components: A) scheduling of games and practice times, and B) locker rooms, practice and competitive facilities.

The Title IX regulation at 34 C.F.R. § 106.41(c)(3) requires recipients to provide equal athletic opportunity for members of both sexes in the provision of scheduling of games and practice time. OCR considers the following five factors to be assessed in determining compliance of the recipient regarding scheduling of games and practice time:

- 1) The number of competitive events per sport;
- 2) The number and length of practice opportunities;
- 3) The time of day competitive events are scheduled;
- 4) The time of day practice opportunities are scheduled;
- 5) The opportunities to engage in available pre-season and post-season competition.

The Title IX regulation at 34 C.F.R. § 106.41(c)(7) requires recipients to provide equal athletic opportunity for members of both sexes in the provision of locker rooms, practice and competitive facilities. OCR considers six factors for OCR to assess in determining whether a recipient provides equal opportunities to males and females in the provision of locker rooms and practice and competitive facilities:

- 1) The quality and availability of the facilities provided for practice and competitive events;

---

<sup>1</sup> OCR has determined that the investigation and analysis of the coaching and tutoring program components are simplified significantly by combining the opportunity to receive coaching (106.41(c)(5)) and the assignment and compensation of coaches (106.41(c)(6)) into one investigative category and the opportunity to receive academic tutoring (106.41(c)(5)) and the assignment and compensation of tutors (106.41(c)(6)) into another investigative category.

- 2) The exclusivity of use of facilities provided for practice and competitive events;
- 3) The availability of locker rooms;
- 4) The quality of locker rooms;
- 5) The maintenance of practice and competitive facilities; and
- 6) The preparation of facilities for practice and competitive events.

Prior to the conclusion of the investigation, the DISD asked to resolve this complaint pursuant to Section 302 of OCR's *Case Processing Manual* (CPM). On February 27, 2018 the DISD submitted the enclosed signed resolution agreement (the Agreement) to OCR. When fully implemented, the Agreement will resolve the allegations in the complaint.

In light of the commitments the DISD has made in the Agreement, OCR finds that the complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will monitor the DISD's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may request additional information as necessary to determine whether the DISD has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issues raised.

If the DISD fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement or judicial proceedings to enforce the Agreement, OCR shall give the DISD written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint and should not be interpreted to address the DISD's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case.

This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. Please be advised that the DISD may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file a complaint alleging such treatment. The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this letter, please contact (redacted), Civil Rights Attorney, at (redacted) or (redacted), or me at (redacted) or (redacted).

Sincerely,

Paul Cox  
Supervisory Attorney/Team Leader  
Dallas Office



# U.S. Department of Education

[✕ Close Window](#)

## Requirements Under Title IX of the Education Amendments of 1972

U.S. Department of Education  
Office for Civil Rights  
Washington, D.C. 20202-1328

### INTRODUCTION

Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance. Athletics are considered an integral part of an institution's education program and are therefore covered by this law. It is the responsibility of the Department of Education (ED), Office for Civil Rights (OCR), to assure that athletic programs are operated in a manner that is free from discrimination on the basis of sex.

The regulation (34 C.F.R. Part 106) implementing Title IX contains specific provisions relating to athletic opportunities. It also permits individual institutions considerable flexibility in achieving compliance with the law.

To clarify the athletic requirements contained in the Title IX regulation, a Policy Interpretation was issued to provide colleges and universities with more guidance on how to comply with the law. The Policy Interpretation, which explains the standards of the regulation, clarifies the obligations of colleges and universities in three basic areas:

- student interests and abilities;
- athletic benefits and opportunities; and
- financial assistance.

While designed specifically for intercollegiate athletics, the general principles and compliance standards set forth in the Policy Interpretation will often apply to inter-scholastic athletic programs operated by elementary and secondary school systems, and to club and intramural athletic programs.

### STUDENT INTERESTS AND ABILITIES

The athletic interests and abilities of male and female students must be equally and effectively accommodated. Compliance with this factor is assessed by examining a school's: (a) determination of the athletic interests and abilities of its students; (b) selection of the sports that are offered; and (c) levels of competition, including opportunity for team competition.

#### Measuring Athletic Interests

Colleges and universities have discretion in selecting the methods for determining the athletic interests and abilities of their students, as long as those methods are nondiscriminatory. The only requirements imposed are that institutions used methods that:

- take into account the nationally increasing level of women's interests and abilities;
- do not disadvantage the underrepresented sex (i.e., that sex whose participation rate in athletics is substantially below its enrollment rate);
- take into account team performance records of both male and female teams; and
- respond to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex.

### **Selection of Sports**

A college or university is not required to offer particular sports or the same sports for each sex. Also, an institution is not required to offer an equal number of sports for each sex. However, an institution must accommodate to the same degree the athletic interests and abilities of each sex in the selection of sports.

A college or university may sponsor separate teams for men and women where selection is based on competitive skill or when the activity is a contact sport. Contact sports under the Title IX regulation include boxing, wrestling, rugby, ice hockey, football, basketball and other sports in which the purpose or major activity involves bodily contact.

Equally effective accommodation also requires a college or university that sponsors a team for only one sex to do so for members of the other sex under certain circumstances. This applies to contact and non-contact sports. For example, a separate team may be required if there is sufficient interest and ability among members of the excluded sex to sustain a team and a reasonable expectation of competition for that team. Also, where an institution sponsors a team in a particular non-contact sport for members of one sex, it must allow athletes of the other sex to try-out for the team if, historically, there have been limited athletic opportunities for members of the other sex.

### **Levels of Competition**

Colleges and universities must provide opportunity for intercollegiate competition as well as team schedules which equally reflect the competitive abilities of male and female athletes. An institution's compliance in this area may be assessed in any one of the following ways:

- the numbers of men and women participating in intercollegiate athletics are substantially proportionate to their overall enrollment; or
- where members of one sex are underrepresented in the athletics program, whether the institution can show a continuing practice of program expansion responsive to the developing interests and abilities of that sex; or
- the present program accommodates the interests and abilities of the underrepresented sex.

In considering equivalent opportunities for levels of competition, compliance will be assessed by examining whether:

- male and female athletes, in proportion to their participation in athletic programs, are provided equivalently advanced competitive opportunities; or
- the institution has a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by the developing abilities among the athletes of that sex

Colleges and universities are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team within the institution's normal competitive region. However, an institution may be required to encourage development of such competition when overall athletic opportunities within that region have been historically limited for the members of one sex.

Discriminatory rules established by a governing athletic organization, or league do not relieve recipients of their Title IX responsibilities. For example, a college or university may not limit the eligibility or participation of women based on policies or requirements imposed by an intercollegiate athletic body.

## **ATHLETIC BENEFITS AND OPPORTUNITIES**

In determining whether equal opportunities in athletics are available, the Title IX regulation specifies the following factors which must be considered

- accommodation of athletic interests and abilities (which is addressed separately in the section above);
- equipment and supplies;
- scheduling of games and practice time;
- travel and per diem allowances;
- opportunity for coaching and academic tutoring;
- assignment and compensation of coaches and tutors;
- locker rooms and other facilities;
- medical and training services;
- housing and dining services; and
- publicity.

The Title IX regulation also permits OCR to consider other factors in determining whether there is equal opportunity. Accordingly, the Policy Interpretation added recruitment of student athletes and provision of support services, since these factors can affect the overall provision of equal opportunity to male and female athletes.

The Policy Interpretation clarifies that institutions must provide equivalent treatment, services, and benefits regarding these factors. The overall equivalence standard allows institutions to achieve their own program goals within the framework of providing equal athletic opportunities. To determine equivalency for men's and women's athletic programs, each of the factors is assessed by comparing the following:

- availability;
- quality;
- kind of benefits;
- kind of opportunities; and
- kind of treatment.

Under this equivalency standard, identical benefits, opportunities, or treatment are not required. For example, locker facilities for a women's team do not have to be the same as for a men's team, as long as the effect of any differences in the overall athletic program are negligible.

If a comparison of program components indicates that benefits, opportunities, or treatment are not equivalent in quality, availability, or kind, the institution may still be in compliance with the law if the differences are shown to be the result of nondiscriminatory factors. Generally, these differences will be the result of unique aspects of particular sports or athletic activities, such as the nature/replacement of equipment and maintenance of facilities required for competition. Some disparities may be related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Difficulty in compliance will exist only if disparities are of a substantial and unjustified nature in a

school's overall athletic program; or if disparities in individual program areas are substantial enough in and of themselves to deny equality of athletic opportunity. This equivalency approach allows institutions great flexibility in conducting their athletic programs and maintaining compliance without compromising the diversity of athletic programs among institutions.

## FINANCIAL ASSISTANCE

To the extent that a college or university provided athletic scholarships, it is required to provide reasonable opportunities for such awards to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics. This does not require the same number of scholarships for men and women or individual scholarships of equal value.

However, the total amount of assistance awarded to men and women must be substantially proportionate to their participation rates in athletic programs. In other words, if 60 percent of an institution's intercollegiate athletes are male, the total amount of aid going to male athletes should be approximately 60 percent of the financial aid dollars the institution awards.

Disparities in awarding financial assistance may be justified by legitimate, nondiscriminatory (sex-neutral) factors. For example, at some institutions the higher costs of tuition for out-of-state residents may cause an uneven distribution between scholarship aid to men's and women's programs. These differences are nondiscriminatory if they are not the result of limitations on the availability of out of-state scholarships to either men or women. Differences also may be explained by professional decisions college and university officials make about program development. An institution beginning a new program, for example, may spread scholarships over a full generation (four years) of student athletes, thereby, awarding fewer scholarships during the first few years than would be necessary to create proportionality between male and female athletes.

## ACHIEVING EQUAL OPPORTUNITY

Before the enactment of Title IX, most colleges and universities traditionally emphasized sports for male students, and the benefits and educational opportunities in athletic programs generally were limited for women. Title IX has helped focus attention on meeting the needs of women interested in athletics and helped education officials to recognize their responsibilities regarding the provision of equal athletic opportunity. The result has been increased involvement of girls and women in sports at all levels. OCR supports the efforts of education officials to comply with the requirements of Title IX by offering a program of technical assistance to institutions receiving Federal funds as well as to beneficiaries of those funds. OCR's technical assistance program is designed to provide education officials with the skills and knowledge necessary to apply the laws to their own circumstances and thereby facilitate voluntary compliance. OCR's principle enforcement activity is the investigation and resolution of discrimination complaints.

Anyone wishing additional information regarding the compliance and technical assistance program may contact the OCR regional office (<http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>) serving his or her state or territory. Copies of the Title IX law, regulation, and Policy Interpretation are available upon request.

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Last Modified: 01/10/2020



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

June 26, 2020

**VIA ELECTRONIC MAIL**

Dr. Matt Doyle  
Superintendent  
Vista Unified School District  
1234 Arcadia Ave.  
Vista, CA 92084  
XXXXXXX

(In reply, please refer to case no. 09-16-1494.)

Dear Superintendent Doyle:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Vista Unified School District (the District). The Complainant alleged that the District discriminated against students on the basis of sex. Specifically, OCR investigated the following issues:

1. Whether the District has failed to designate a Title IX coordinator; and
2. Whether the interscholastic athletic program at Rancho Buena Vista High School (the School) discriminates against female students in the following program components:
  - a. Effective accommodation of athletic interests and abilities
  - b. Equipment and supplies
  - c. Scheduling of games and practice times
  - d. Travel and Per Diem
  - e. Opportunity to receive coaching
  - f. Provision of locker room, practice, and competitive facilities
  - g. Medical and training facilities and services
  - h. Publicity

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The District is a recipient of financial assistance from the Department. Therefore, OCR had jurisdiction to investigate this matter under Title IX.

OCR gathered evidence by reviewing documents and correspondence provided by the Complainant and the District and by interviewing the Complainant. After careful review of the information gathered in the investigation, OCR concluded that the District did not violate Title IX with regard to Issue 1. Prior to OCR completing its investigation into Issue 2, the District voluntarily agreed to address the areas of concern identified by OCR with respect to the Issue 2. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

### **Issue 1: Whether the District has failed to designate a Title IX Coordinator.**

#### Legal Standards

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance. This provision further requires that the recipients notify all of its students and employees of the name (or title), office address, and telephone number of the employee(s) so designated.

#### Findings of Fact

The Complainant alleged that there was no Title IX Coordinator, and the School Athletic Director (Athletic Director) and Principal did not direct the Complainant to a Title IX Coordinator when he complained about the sex-based inequities in interscholastic athletic programs.

The District asserted it has a Title IX Coordinator and the information is posted on the District's Student Support Services website, as well as the School's Athletics website. The District also provided the names, titles, phone numbers, and email addresses for the Title IX Coordinators from the 2015-2016 school year through the current 2019-2020 school year.

OCR reviewed the District's website and found that it has designated a Title IX Coordinator, whose name, title, address, phone number, and email address are listed.

#### Analysis

OCR finds that the District has designated a Title IX Coordinator, whose name, office address, and telephone number are listed on the District's website. As such, pursuant to Section 303(a) of the OCR Case Processing Manual (CPM), OCR finds that the District did not violate Title IX with regard to this issue.

### **Issue 2: Whether the interscholastic athletic program at the School discriminates against female students in the following program components:**

- a. Effective accommodation of athletic interests and abilities
- b. Equipment and supplies
- c. Scheduling of games and practice times
- d. Travel and Per Diem

- e. Opportunity to receive coaching**
- f. Provision of locker room, practice, and competitive facilities**
- g. Medical and training facilities and services**
- h. Publicity**

### Legal Standards

#### *Interests and Abilities*

The Title IX regulations, at 34 C.F.R. §106.41(a), provide that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic athletics offered by a recipient school district, and no recipient school district shall provide any such athletics separately on such basis. Section 106.41(c) requires school districts to provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the regulations provides that OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of students of both sexes (34 C.F.R. §106.41(c)(1)).

As a means of assessing compliance under the regulations, OCR follows the Policy Interpretation issued by the Department on December 11, 1979, 44 Fed. Reg. 71413, et seq. (1979 Policy Interpretation). The 1979 Policy Interpretation states that, to effectively accommodate the interests and abilities of male and female athletes, school districts must provide the opportunity for individuals of each sex to participate in interscholastic competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.

#### *Other Athletic Benefits and Opportunities*

Pursuant Title IX and its implementing regulations, OCR examines the following areas of a recipient's athletic program: equipment and supplies; scheduling of games and practice times; travel and per diem allowances; opportunity to receive tutoring; opportunity to receive coaching; provision of locker rooms, practice and competitive facilities; and provision of medical and training facilities and services; housing and dining facilities and services; publicity; support services; and recruitment of student athletes.

In each of the areas, OCR examines whether the availability and quality of benefits, opportunities, and treatment provided were equivalent for members of both sexes. Equivalent is defined as equal or equal in effect. In accordance with the 1979 Policy Interpretation, OCR compares components of the men's program and the women's program on an overall basis, not on a sport-by-sport basis that would compare, for example, the men's basketball uniforms and the women's basketball uniforms. Where disparities are noted, OCR considers whether the differences are negligible. Where the disparities are not negligible, OCR determines whether they were the result of nondiscriminatory factors. Finally, OCR determines whether disparities resulted in the denial of equal opportunity to male or female athletes, either because the disparities collectively are of a substantial and unjustified nature or because the disparities in individual program areas are substantial enough by themselves to deny equality of athletic

opportunity. Nondiscriminatory differences based on unique aspects of a particular sport are considered.

#### Facts Gathered to Date

##### *a. Effective accommodation of athletic interests and abilities*

The Complainant alleged that the School is not providing equal opportunities for female students to play sports under Prong 1 of the Three Prong Test. Based on the Complainant's analysis of the School's enrollment and athletics participation data, the School needs to add 130 female athletes to reach proportionality.

The District asserted that it is compliant with Prong 2 of the Three Prong Test based on its continued expansion of athletic programs for female athletes. According to the District, the School has increased its female athletic teams since it was founded in 1987. Since 1987, the District has added girls' water polo teams at the freshman/sophomore, junior varsity and varsity levels to the School's interscholastic sport offerings to accommodate the interests and abilities of female students. In addition, during the 2014-2015 school year, the School added a girls' varsity wrestling team to accommodate the interests and abilities of female students. Furthermore, the School added a varsity girls' lacrosse team in the 2017-2018 school year, which started out as a club team in the spring of 2017 and went through a process of presenting to the Board of Education and receiving California Interscholastic Federation (CIF) approval to become a District-supported team.

In addition to adding girls' teams, the School also reinstated girls' teams. For instance, the School reinstated the girls' freshman soccer team in the 2017-2018 school year and the girls' freshman softball team in the 2018-2019 school year. Based on the participation data the District provided to OCR, there was a freshman girls' soccer team in the 2015-2016 school year, but it was cut in the 2016-2017 school year. Similarly, there was a freshman girls' softball team in the 2015-2016 school year, but it was cut during the 2016-2017 and 2017-2018 school years. According to the District, the School reinstated both teams after recruiting efforts by the soccer and softball coaches, including broadcast highlights and bulletin announcements encouraging interested students to attend informational meetings and try out.

The District stated that it will conduct athletic interest surveys to gauge student interest in sports that are not currently offered at the School beginning the 2016-2017 school year and each year thereafter. The District will consider the expansion of program offerings for female students based on, among other factors, the results of the athletic interest surveys.

OCR reviewed the participation data provided by the District, which contained the number of participants on each team in the School's interscholastic athletic program, by sex, since the inception of female athletic teams in the 1987-1988 school year. The District also provided the School's enrollment numbers, by sex, since the 1987-1988 school year. Based on the data provided, the underrepresented sex in terms of athletic opportunities has been females since the 1987-1988 school year. Additionally, based on the number of female students needed for exact proportionality and the average roster size of female teams, in all but one school year (2001-2002), there have been enough missing female athletes for new teams. The most recent data from



the District for the 2018-2019 school year indicates that there are 126 female athletes needed for exact proportionality, which is greater than the average team size of 13.25.

OCR also reviewed the participation data to see if the School added or cut teams since the 1987-1988 school year. The data shows the District cut girls' teams then added it back a year or two later. For instance, in the 1989-1990 school year, the School cut the varsity girls' cross-country, gymnastic, and JV gymnastics teams. In the 1990-1991 school year, the School added the girls' varsity cross-country team, and in the 1991-1992 school year, the School added the girls' gymnastics and JV gymnastics team. Though the two girls' gymnastics teams were added back in the 1991-1992 school year, the two teams were cut again, along with freshmen girls' soccer and softball. Then, in the 1993-1994 school year, the School added back the two gymnastics teams and the freshmen girls' soccer and softball, as well as the JV swim and dive team, while cutting JV tennis and varsity and JV volleyball. The following year, 1994-1995, the School added back JV tennis and varsity and JV volleyball and added freshmen girls' volleyball and basketball but cut girls' gymnastics and JV gymnastics team.

Throughout the 1990s, 2000s, and 2010s, other girls' teams experienced a similar cycle of cutting and adding, including varsity and JV cross country, JV swim and dive, varsity golf, and freshmen water polo. Based on the data provided, there were twelve school years when the total number of athletic opportunities for girls decreased from the previous school year (1992-1993, 1997-1998, 1998-1999, 2000-2001, 2003-2004, 2004-2005, 2006-2007, 2007-2008, 2009-2010, 2010-2011, 2013-2014, 2016-2017).

#### *b. Equipment and Supplies*

The Complainant alleged that the girls' wrestling team has not had adequate practice and/or competition equipment, supplies, and uniforms. Specifically, the Complainant described that the male-oriented singlet provided to a female wrestler burst open during a match because the thin material was not suited to a female wrestler's shape. According to the Complainant, a School student club purportedly dedicated to helping boys and girls on the wrestling team, did not provide donations to help female wrestlers obtain necessary equipment, supplies and uniforms, even when desperately needed. Additionally, the Complainant alleged that other female athletes had older uniforms in poorer condition in comparison to male athletes' uniforms and girls' soccer did not receive equipment, supplies and uniform equitable to the boys' soccer program.

The District asserted that it continually examines the quality, amount, suitability, maintenance, replacement, and availability of athletic equipment and supplies at the School to ensure equivalency for males and females. Specifically, each month, School site staff and District Athletic Department employees participate in a facilities meeting. During that meeting, the Athletic Director conveys facilities and equipment concerns to the District, including concerns regarding outdated athletic facilities, equipment, and supplies.

#### *c. Scheduling of Games and Practice Time*

The Complainant alleged that female wrestlers had fewer matches than male wrestlers, even though female wrestlers diligently attempted to arrange more opportunities to compete. The Complainant informed OCR that female wrestlers had fewer practice opportunities each week.

Additionally, the Complainant alleged that female soccer players had fewer opportunities to practice compared to male soccer players.

The District asserted that School teams follow the CIF San Diego Section (CIFSDS) guidelines for practices, pre-season, and post-season competitions, which dictates the number of competitive events per sport, the time of day competitive events are scheduled and the opportunities to engage in available pre-season and post-season competition. According to the District, the CIFSDS's Green Book provides the number of practices and hours per week allowed, which the School uses to schedule practice opportunities for all athletic teams, and School athletic teams abide by the CIFSDS master calendar of starting dates of practice for each sport.

The District also noted that the wrestling teams have different scheduled practice times per week and all teams practice in the same space, which accommodates up to 28 wrestlers at one time and use the same practice mats. The District informed OCR that the 2015-2016 varsity girls' wrestling team (12 athletes) practiced for 9 hours per week, the boys' varsity and junior varsity wrestling teams (35 athletes in total) practiced together for 10 hours week and the freshman/sophomore boys' wrestling team (13 athletes) practiced for 9 hours per week. Because the boys' varsity and junior varsity teams participate in a combined practice, the School offers them an additional hour of practice time per week than it offers to the boys' freshman/sophomore team and the girls' varsity team.

*d. Travel and Per Diem*

The Complainant stated that the School provided vans for male wrestlers to take to tournaments, whereas female wrestlers were required to provide their own transportation for all games and tournaments.

The District told OCR it does not provide transportation for athletics. However, the School has four vans for all academic departments and athletic teams to use. Because the vans are not always available to the School's Athletic Department, most athletic teams use private vehicles to travel to games. Some programs rent buses, which are paid from the program's budget or booster club funds.

*e. Opportunity to Receive Coaching*

The Complainant alleged that there was no fully dedicated girls' wrestling coach. According to the Complainant, during the 2015-2016 wrestling season, a coach was officially dedicated to female wrestlers, but the coach did not fully concentrate on female wrestlers and more often coached male wrestlers in practice and took male wrestlers to competitions. The Complainant informed OCR that due to a lack of coaching, female wrestlers were unable to attend a number of competitions.

According to the Complainant, the School had more teacher-coaches for male teams and a higher absolute number of coaches for male teams. In addition, the Complainant informed OCR that girls' teams more often had walk-on coaches without teacher privileges and thus, coaches of girls' teams lacked ready access to prime storage space and facilities.

The District asserted that the availability of full-time coaches, part-time coaches, and part-time assistant coaches across all School athletic teams is equal in effect for both male and female athletes. The District informed OCR it makes volunteer coaches available to all teams, so long as they are screened through the applicable District Volunteer Policy.

*f. Provision of Locker Rooms, Practice and Competitive Facilities*

The Complainant alleged that female athletes, including female wrestlers, lack adequate locker room facilities for changing into practice and competition apparel. Specifically, the Complainant informed OCR that male wrestlers were permitted to take over the entire wrestling room to change, while female wrestlers were forced to wait outside the wrestling room until the male wrestlers had completed changing. In addition, the Complainant alleged that the female wrestlers were not allowed to utilize the wrestling room for team meetings.

The District asserted that it offers high quality facilities both on and off-campus for use by School athletic teams and specific locations of the facility depend on the type of sport and whether off-campus facilities are better suited for the particular sport, such as for water polo. According to the District, a majority of the School athletic facilities have been renovated within the past three years.

The District informed OCR that in some cases, multiple School athletic teams require the use of the same facility and to accommodate periods of exclusive use for each team, the coaches for the respective teams coordinate their practice schedules to ensure that a team obtains exclusive use of the facility during the team's practice and competitive events. The coaches also collaborate with School Athletic Department staff to ensure that all facilities are properly prepared for the respective practice and competitive events.

The District asserted that all student athletes are eligible to receive a locker in the boys' or girls' locker room. For female varsity athletes, a team room is available in the girls' locker room. For varsity and junior varsity football players and varsity basketball players, a team room locker is available in the boys' locker room. The girls' team room facility and locker room provide more space for female varsity team members to hang their uniforms and store their equipment than the boys' locker and team rooms. All female varsity team members have access to a larger team room and any female varsity member can check out a team room locker upon request.

*g. Medical and Training Facilities and Services*

The Complainant alleged that the School's trainer provided male athletes with icing, taping and other services. However, every time the Complainant sent a female athlete to the training room for icing, the trainer would not be present or would send the female athlete away because the trainer was too busy to help her.

According to the District, the School has one certified trainer (Trainer) who is available for all sports teams. The School also utilizes adult volunteer trainers. The Trainer has a dedicated room in the athletic training room where athletes can receive services and supplies, such as athletic tape, Icy Hot, First Aid services, and a whirlpool.

*h. Publicity*

The Complainant alleged that female wrestlers and other female athletes received inferior promotion and publicity, including promotion of female competitive sporting events, individual players and their achievements, team-wide achievements, and overall support, in comparison to male athletes. Specifically, the Complainant informed OCR that female wrestlers at the School were very successful, proceeding to the highest levels of CIF competition in the state, winning the state championship, and proceeding to national-level competition. However, the Complainant alleged that during a Winter Sports Season rally, female wrestlers were not permitted to participate as featured athletes, yet the male wrestlers were recognized in front of the School and allowed to conduct a sports demonstration.

In addition, the Complainant alleged that there was not consistent and prominent web announcements on the School website or in hard-copy posters and banners displayed when female wrestlers took top honors, which were the manner in which male athletes were typically recognized. The Complainant also informed OCR that on the School's outdoor electronic marquee, male athletes and their teams were displayed more often than female athletes and teams.

The District asserted that as part of the Athletic Director's duties, each Monday, the Athletic Director emails a recap of the previous week's results for all School athletic teams to the Principal, who then includes these athletic updates in weekly updates to staff and parents. Further, the District informed OCR that the School holds one athletic pep rally for each season and all sports are involved in the rallies, and there is a marquee outside to keep the public updated on sporting events. Additionally, the School hosts a television news program, which highlights sports teams throughout the year. The District also informed OCR that the School's coaches submit athletic results and scores to the San Diego Union Tribune, a local newspaper, for consideration for publication.

Since filing the complaint with OCR in 2016, the Complainant continues to allege that the same sex-based disparities in the School's interscholastic athletic program persist. In letters from 2019 and 2020, the District told OCR it has taken steps to provide equal opportunities, benefits, and treatment for members of both sexes at the School with respect to the following program components: equipment and supplies; scheduling of games and practice times; travel and per diem; opportunity to receive coaching; provision of locker room, practice, and competitive facilities; medical and training facilities and services; and, publicity.

**Analysis**

The 1979 Policy Interpretation permits three alternate ways of assessing whether recipients are providing nondiscriminatory opportunities to participate in interscholastic athletics, commonly referred to as the "Three Part Test" or "Three Prong Test". The Three Prong Test is intended to allow school districts to maintain flexibility and control over their athletic programs. School districts can demonstrate compliance in any one of the following ways:

1. Interscholastic level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among interscholastic athletes, the school district can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes and the school district cannot show a history and continuing practice of program expansion, it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

In determining whether a recipient has demonstrated that the interests and abilities of the historically underrepresented sex have been fully and effectively accommodated by the present program, OCR considers whether there is: a) unmet interest in a particular sport; b) sufficient ability to sustain a team in the sport; and c) a reasonable expectation of competition for the team. If all three conditions are present, OCR will find that the District has not met Prong 3.

In this case, OCR finds that the District cannot currently demonstrate compliance with any of the three prongs. The District has not met Prong 1 because, since the inception of female athletic teams in the 1987-1988 school year, there has not been substantial proportionality between student enrollment and athletic participation by sex. OCR finds substantial proportionality when the number of athletes of the underrepresented sex needed to reach exact proportionality is less than the average team size for that sex. OCR does not require exact proportionality, sometimes referred to as “strict” proportionality, to find compliance with Prong I. Here, in the most recent school year for which the District provided data, the 2018-2019 school year, there are 126 female athletes needed for exact proportionality, which is greater than the average team size of 13.25. Therefore, the District cannot demonstrate compliance under the substantial proportionality criteria of Prong 1.

OCR also finds that the District is not meeting Prong 2 because the data does not demonstrate a history and continuing practice of program expansion for female students. Though the District has added female teams, such as varsity wrestling and varsity lacrosse, it has also cut several female teams. The participation data provided by the District shows that since the 1987-1988 school year, there have been twelve school years when the number of female athletic opportunities decreased as compared to the previous year. OCR also found that the School cut viable teams, as demonstrated by the fact that after cutting the teams, the School later added the teams back. This pattern of cutting teams viable teams occurred with gymnastics and JV gymnastics, JV tennis, varsity and JV cross country, JV swim and dive, varsity golf, and freshmen water polo. Based on this documentation of reducing athletic participation opportunities for the underrepresented sex, the District cannot demonstrate compliance under the history and continuing practice of expansion criteria of Prong 2.

Lastly, the District is not currently meeting Prong 3 because it cannot demonstrate to OCR that it has a fully and effectively accommodated female students’ interests and abilities in interscholastic athletics. The District has no current method to ensure that they know what female students’ athletic interests are or a way to ensure that the program is adapted to meet those evolving interests. According to the District, the School began gauging student athletic

interest in the 2016-2017 school year, after this complaint was filed with OCR. However, since that time, the District has not shared the survey results with OCR, so OCR is unable to review survey response rates, survey data, and how the District has responded to the survey data. Thus, based on the evidence provided to OCR thus far, the District has not demonstrated compliance with Prong 3.

Prior to the conclusion of the investigation of this issue, the District expressed interest in a voluntary resolution and OCR found such a resolution was appropriate to resolve the concerns regarding the eight program components under Issue 2.

In order to complete this investigation, OCR would need to gather additional data regarding: equipment and supplies; scheduling of games and practice times; travel and per diem; opportunity to receive coaching; provision of locker room, practice, and competitive facilities; medical and training facilities and services; and, publicity. OCR would also need to request additional information, including interviews with staff, coaches, and student athletes. Additionally, OCR would need to conduct a facilities inspection at the School.

## **Conclusion**

This concludes the investigation of this complaint.

To address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement (Agreement) which is aligned with Issue 2 and the findings and information obtained by OCR during its investigation. Under the Agreement, the District will conduct an objective assessment of the student body at the School to determine the existence and/or scope of any unmet athletic interests of the underrepresented sex, in the School's athletics programs. If the District identifies a sport or sports in which there is sufficient, but unmet interest and ability of the underrepresented sex to participate at the interscholastic level at the School, the District will add athletics opportunities at the School until such time as the School is fully and effectively accommodating the expressed interests and abilities of the underrepresented sex. The District will also develop a process or procedure for students or other interested parties, such as coaches or parents, to use in requesting the addition of new sports or levels of sports at the School. The Agreement further requires the District to address the concerns regarding sex-based disparities in the following program components: equipment and supplies; scheduling of games and practice times; travel and per diem; opportunity to receive coaching; provision of locker room, practice, and competitive facilities; and, publicity. The District will also review and conduct a full interscholastic athletic program evaluation to determine whether the School's athletic program is equivalent for girls and boys in terms of: equipment and supplies; scheduling of games and practice times; travel and per diem; opportunity to receive coaching; provision of locker room, practice, and competitive facilities; medical and training facilities and services; and, publicity. Lastly, under the Agreement, OCR will provide Title IX athletics training to key administrators from the District and School, including, but not limited to, the Title IX Coordinator, Athletic Director, and Principal, and all coaches of interscholastic and club teams at the School.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently. When

fully implemented, the Agreement is intended to address the concerns identified during OCR's investigation of Issue 2. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

The Complainant has a right to appeal OCR's determination of Issue 1 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Annie Lee, Civil Rights Attorney, at [annie.lee@ed.gov](mailto:annie.lee@ed.gov).

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosures (1): Agreement

cc: Tiffany Santos and Lori Chiu, counsels for the District (via email only)



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

REGION IX  
CALIFORNIA

December 6, 2016

Kris Munro  
Superintendent  
Santa Cruz City High School District  
405 Old San Jose Road  
Soquel, CA 95073

(In reply, please refer to # 09-16-1189.)

Dear Superintendent Munro:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Santa Cruz City School District (District). The Complainant alleged discrimination on the basis of sex in the District's interscholastic athletics program. Specifically, OCR investigated whether the District's interscholastic athletics program at the three high schools (Harbor, Soquel, and Santa Cruz) discriminated against female students by not providing benefits, opportunities, and services to female athletes that are equivalent to those provided to male athletes in the areas of: a) interests and abilities; b) availability of coaching; and c) provision of locker room, practice, and competitive facilities.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 et seq., and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The District is a recipient of financial assistance from the Department. Therefore, OCR had jurisdiction to investigate this matter under Title IX.

OCR began its investigation by reviewing documents and data provided by the Complainant and the District, and by conducting a preliminary analysis of that data. In addition, OCR interviewed the Complainant, several District staff, and conducted the first day of an on-site visit to Harbor High School (Harbor). Pursuant to Section 302 of OCR's Case Processing Manual, issues under investigation may be resolved prior to the conclusion of the investigation when the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve with an agreement during the course of an investigation. Prior to OCR completing its investigation, the District expressed an interest in voluntarily resolving this complaint and OCR agreed that a voluntary resolution was appropriate. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

**Legal Standards**



Title IX provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. A recipient which operates or sponsors interscholastic, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available OCR will consider, among other factors: whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; whether equal opportunities exist in the opportunity to receive coaching and academic tutoring and the assignment and compensation of coaches and tutors; and equal opportunity in the provision of locker rooms, practice and competitive facilities.

Further clarification of the Title IX regulatory requirements, including the “Effective Accommodation of Student Interests and Abilities” analysis, is provided by the Interscholastic Athletics Policy Interpretation, issued by the Department on December 11, 1979, 44 Fed. Reg. 71413, *et seq.* (1979) (1979 Policy Interpretation). Specifically, OCR will seek to determine if any one of the following parts of the three-prong test has been met:

1. Interscholastic level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among interscholastic athletes, the District can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes and the District cannot show a history and continuing practice of program expansion, it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Further clarification of the Title IX regulatory requirements, including analysis of other program benefits, is provided by the 1979 Policy Interpretation. Pursuant to Title IX and its regulatory guidance at 34 C.F.R. § 106.41, *et seq.*, OCR examines, as appropriate, the following areas of a recipient’s athletic program: equipment and supplies; scheduling of games and practice times; travel and per diem allowances; opportunity to receive tutoring; opportunity to receive coaching; provision of locker rooms, practice and competitive facilities; and provision of medical and training facilities and services; housing and dining facilities and services; publicity; support services; and recruitment of student athletes.

As a means of assessing compliance under the regulations, OCR follows the 1979 Policy Interpretation. In each of the areas, OCR examines whether the availability and quality of benefits, opportunities, and treatment provided were equivalent for members of both sexes. Equivalent is defined as equal or equal in effect. In accordance with the 1979 Policy

Interpretation, OCR compares components of the men's program and the women's program on an overall basis, not on a sport-by-sport basis that would compare, for example, the men's basketball uniforms and the women's basketball uniforms. Where disparities are noted, OCR considers whether the differences are negligible. Where the disparities are not negligible, OCR determines whether they were the result of nondiscriminatory factors. Finally, OCR determines whether disparities resulted in the denial of equal opportunity to male or female athletes, either because the disparities collectively are of a substantial and unjustified nature or because the disparities in individual program areas are substantial enough by themselves to deny equality of athletic opportunity. Nondiscriminatory differences based on unique aspects of a particular sport are considered.

In assessing compliance for the opportunity to receive coaching, OCR considers three components: (1) the relative availability of coaches, assistant coaches, and graduate assistants; (2) the training, experience, and other professional qualifications of coaches; and (3) the compensation of coaches for men's versus women's programs. Of these three factors, OCR's primary focus is on the availability of coaches.<sup>1</sup>

In analyzing the availability of coaching in interscholastic athletics, OCR separates women's from the men's program, determines the full-time equivalence (FTE) of coaches in each program, computes the ratio of the FTE of coaches to the number of participants in each program, and finally compares the ratio between men's and women's programs to determine any inequity. For co-ed programs, OCR counts the men and women on the team and accords them proportional percentages.<sup>2</sup>

In regards to the provision of Locker Rooms and Practice and Competitive Facilities, OCR examines the quality and availability of the facilities provided for practice and competitive events; exclusivity of use of facilities provided for practice and competitive events; the availability and quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events.<sup>3</sup>

### **Facts Gathered to Date and Preliminary Analysis**

The Complainant alleged that the District refurbished the Harbor High School (Harbor) baseball field at the same time the District closed Harbor's softball field, and disbanded the girls' softball team. Further, the Complainant alleged that the baseball team was provided with adequate coaching staff, while the softball team lacked adequate coaching.

OCR requested and received athletics information for each of the three District high schools, and data specific to Harbor. This information included athletic squad lists and coaching information for each school team, and general athletics information for each of the three high

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<sup>1</sup> 34 C.F.R. §106.41(c)(5)-(6) and 1979 Policy Interpretation.

<sup>2</sup> 34 C.F.R. §106.41(c)(5)-(6) and 1979 Policy Interpretation.

<sup>3</sup> 34 C.F.R. §106.41(c)(7) and 1979 Policy Interpretation.

schools. OCR began a preliminary review of this information, particularly with regard to analyzing the Harbor's athletic squad lists to determine if it was meeting the athletic interests and abilities of its students.

#### *Interests and abilities*

OCR's preliminary analysis of the 2014-2015 academic year athletics participation numbers at Harbor show that 169 female students comprised 40.5% of its total athletes and 248 male students comprised 59.5% of all athletes. Student enrollment for the same year indicated that 461 female students constituted 47.3% of its total student enrollment while male students constituted 52.7%. OCR's preliminary analysis showed that female students are the underrepresented sex at Harbor HS and that Harbor HS would need to add a significant number of athletic opportunities for females to reach compliance with Prong 1 of OCR's three prong test.

Harbor utilized an informal process for determining the viability of adding sports to its athletics program which involved a parent, coach or potential coach approaching the Athletic Director to state an interest in adding a sport or team. Harbor also generally required: (1) a 'critical mass' of interest; (2) the availability of facilities; (3) Central Coast Section sanctioning; (4) approval from the District and school site leadership; (5) fundraising plans in place; and (6) a coach hired and a schedule set. OCR's preliminary analysis found that the informal process utilized by Harbor to determine its athletes' interests and abilities raised compliance concerns regarding Prong 3 of OCR's three prong test because the District's process does not adequately capture the full accommodation of interests and abilities of its student-athletes.

In order to complete the investigation regarding interests and abilities under prong one of the three prong test, and make a compliance determination, OCR would need to interview Harbor High School's head coaching staff to confirm the accuracy of the athletic participation numbers.

In order for OCR to complete its investigation under Prongs 2 and 3, OCR would need to review any formal written policies on the addition of sports and levels of sport at all three high schools, and interview school and district administrators regarding policies and practices. Further, in order to complete this investigation, OCR would also need to conduct a complete interests and abilities investigation at Soquel and Santa Cruz High Schools.

#### *Provision of locker room, practice, and competitive facilities*

The Complainant alleged that the Harbor baseball field underwent significant renovation and improvement, while, at the same time, the Harbor softball field was closed. On October 17, 2016, OCR representatives visited Harbor to review athletic facilities. OCR's on-site visit observations and preliminary analysis show that the athletics facilities are largely shared between male and female teams, with the exception of baseball, softball, and wrestling

facilities. OCR saw that the softball field was now open and available to athletes; however, OCR noted that while the baseball field had been renovated the softball field had not received similar renovation. OCR did not complete its review and analysis of the athletic facilities because the District indicated its interest in resolving the complaint; however in order to complete its investigation of this program component and make a compliance determination, OCR would need to examine all facilities at Harbor HS to determine if disparities exist. Similarly, OCR's investigation would have examined and analyzed facilities at Soquel and Santa Cruz High Schools as well.

### *Coaching*

The Complainant told OCR that the Harbor baseball team was better staffed with more experienced coaches than the softball team. OCR reviewed the lists provided by the District with the names and titles and contact information for all of the coaches at Harbor and Soquel. In order to complete its investigation of this program component and make a compliance determination, OCR would need to: 1) obtain information regarding the coaching qualifications and length of experience for coaches from all three schools, 2) interview the coaches, and 3) assess the availability of coaches with respect to the teams for both sexes.

### **Summary and Resolution**

OCR has not completed its investigation and has made no finding as to the allegations in this complaint. However, the allegations raised and initial facts gathered to date raise concerns regarding the District's compliance with the Title IX with respect to interests and abilities and the athletics program components that were subject of the complaint.

Prior to concluding its investigation and to address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement, which is aligned with the complaint allegations and the information obtained by OCR during its investigation. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the agreement until the District is in compliance with Title IX and its implementing regulations.

Under the agreement, the District will provide training for staff responsible for Title IX compliance and athletic responsibilities. In addition, at all three high schools, the District will conduct a full self-assessment of interests and abilities utilizing the three prong test which, when completed, will ensure all athletes who choose to participate in the District's athletics program will have an equal opportunity to do so. Regarding coaching, the Resolution Agreement will ensure all District athletic teams have adequate and equitable coaching. Finally, the Resolution Agreement will ensure all District high school's practice and competitive facilities are equitable for athletes by providing a plan for addressing any inequities. OCR will review and approve all District analysis and proposed changes throughout the monitoring of the Resolution Agreement.

This concludes OCR's investigation of this complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing this complaint as of the date of this letter and notifying Complainant concurrently.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact David Howard at (415) 486-5523 or via email at [david.howard@ed.gov](mailto:david.howard@ed.gov).

Sincerely,

/s/

Mary Beth McLeod  
Team Leader

Enclosure



# **LGBTQ+ Themed Books in School Libraries**

Presented by: Holly Boyd Wardell

October 19, 2022

# ★ ★ ★ ★ ★ **IGBTQ+ Themed Books** in School Libraries

Holly Boyd Wardell  
Oct. 19, 2022



EICHELBAUM WARDELL  
HANSEN POWELL & MUÑOZ, P.C.



*How'd they get on the shelves to begin with?*

# ★ ★ ★ ★ ★ **Library Book Challenges**

- You have a process - EF/EFA/EFB
- Cannot just take books off library shelf.
- Have more leeway with curricular materials

*-Not a New Issue-*

## Texas School Books – Rep. Matt Krause

List of 850 books targeted by Texas State Rep. Matt Krause (R) for all school districts because they contain materials that "might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex."

EF Bkg

# **Library Book Challenges**

sexually explicit  
graphic novels

## **SCOTUS**

*Reading  
Censorship*

Supreme Court has held that the Constitution requires a procedure designed to critically examine all challenged expression before it can be suppressed.

*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)

## ★ ★ ★ ★ ★ *Info to minors...*

"Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."

*Erznaznik v. City of Jacksonville*, 422 U.S. 205 (1975)

## *Pico* *Decision*

School board attempted to remove books from a school library. The school board's action did not restrict minors' own expression, but the Supreme Court rejected the removal because "**the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom**" and made clear that "**students too are beneficiaries of this principle.**"

*Board of Education v. Pico*, 457 U.S. 853, 867-68 (1982)

## ★ ★ ★ ★ ★ *Harmful to minors*

Determination must be made by reference to the entire population of minors—including the oldest minors. Some lower courts have upheld restrictions on displays only if the restrictions did not prohibit the display of materials that would be appropriate for older minors.

*Am. Booksellers Assn. v. Virginia*, 882 F.2d 125 (4th Cir. 1989)  
*Am. Booksellers Assn. v. Webb*, 919 F.2d 1493 (11th Cir. 1990)

## Standards for School Libraries

Policy EFB (LEGAL):

- *The School Library Programs: Standards and Guidelines for Texas* are adopted by the Texas State Library and Archives Commission. The standards and guidelines are applicable to local Texas school districts. 13 TAC 4.1
- A school district **shall consider** the standards in developing, implementing, or expanding library services. Education Code § 33.021

"[S]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

"In our system, **students may not be regarded as closed-circuit recipients** of only that which the State chooses to communicate."

*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (emphasis added).

## Relevant Sections of Standards

**Vision:** Texas school libraries are essential interactive collaborative learning environments, ever evolving to provide equitable physical and virtual access to ideas, information, and learning tools for the entire school community.

**Mission:** maintain a *professionally developed collection* of print and digital materials and assist learners in locating resources that match their academic and personal interests.



## STRANDS & DIMENSIONS

- The school library program includes a carefully curated collection of current materials in a variety of formats, including curation of open educational resources (OER) that are uniquely suited to support inquiry learning and the needs and interests of all users.
- The school library program offers opportunities for learners to explore real world problems by interacting with relevant information in a variety of formats.
- The library encourages students to read a variety of literature for information and pleasure.

## SCOTUS – Student Speech

School officials ... have greater discretion in the classroom and in the context of planned school events.

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 267 (1988)

"[P]erfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."

*Bethel Sch. Dist No. 403 v. Fraser*, 478 U.S. 675 (1986)

## STRANDS & DIMENSIONS

- Library materials reflect diversity, student choice for leisure reading, and reading for information as well as the needs of the curriculum and the state standards (emphasis added).
- The library program actively provides an equitable, diverse, and open collection of digital and print resources, ..., which support the academic and personal needs of students (emphasis added).

## 5<sup>th</sup> Circuit – Removing Library Books

"[T]he key inquiry in a book removal case is the school officials' substantial motivation in arriving at the removal decision."

*Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1993)

## Collection Development Policy

"Students have a wide range of ability, maturity, and backgrounds, and not all materials will appeal to, or be appropriate for, all students."

"Present multiple viewpoints related to controversial issues to foster critical thinking skills, and encourage discussion based on rational analysis."

-- TSLAC Guidelines for School Library Collection Development

## 5<sup>th</sup> Circuit – Removing Library Books

School Board's decision to remove the Book must withstand **greater scrutiny** within the context of the First Amendment than would a decision involving a curricular matter.

*Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1993) (emphasis added)

## 5<sup>th</sup> Circuit – Removing Library Books

“[I]n light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the school board’s non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to ‘strangle the free mind at its source.’”

*Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1993) (emphasis added)

## SCOTUS – “Educationally Unsuitable”

School officials have significant latitude if the removal is based objectively on a finding that the material is “**educationally unsuitable**” rather than on an official’s **subjective disagreement with or disapproval** of the content.

The determination of whether material is “educationally unsuitable” is a **fact-based** inquiry that will generally require the testimony of educational experts.

*Pico*, 457 U.S. at 871.

## D. Kan. – Removal from Open Shelves

Removal of a library book is unconstitutional where a “substantial motivation” behind the library removal was the officials’ disagreement with the views expressed in the book.

*Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).

## Curriculum

“In matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity.” But the court noted that the challenged books remained in the library.

*Virgil v. Sch. Bd. of Columbia Cnty*, 862 F.3d 1517 (11th Cir. 1989)

## D. Ark. – Removal from Open Shelves

The removal of books from open shelves, rather than an outright removal from the library, also raises First Amendment concerns. *Harry Potter* series was removed from the open shelves of a school library and available only with parental permission. The court held that the minor’s **rights were violated by the removal** of the books from the open shelves because the books were “stigmatized.”

*Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003).

*Sund v. City of Wichita Falls*, 121 F.Supp.2d 530 (N.D. Tex. 2000) – Gay Themes

***Sund v. City of Wichita Falls,***  
121 F.Supp.2d 530 (N.D. Tex. 2000) – Gay Themes

City council resolution gave library card holders the right to censor children's books by having books removed from children's area of library to adult section.

- (1) resolution violated patrons' First Amendment rights to receive information;
- (2) public library was a "limited public forum";
- (3) resolution was an improper delegation of governmental authority to private citizens under Texas law; and
- (4) patrons' First Amendment right to receive information would be irreparably injured if denied permanent injunction.

## ★ ★ ★ ★ ★ **LG<sup>BTQ+</sup> Themed Books**

### **FOLLOW THE PROCESS**

- ❖ First Amendment Cases: the facts matter
- ❖ The reason for removal must withstand First Amendment scrutiny
- ❖ Cannot eliminate whole category of topics
- ❖ Cannot remove simply because school officials disagree with the views
- ❖ Can move/remove books if they are educationally unsuitable
- ❖ Can remove if they are "harmful materials" or "obscene" as defined in the Texas Penal Code

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



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