

# Title IX and the Future of Protection for Students

THE LGBT BAR ASSOCIATION 2019 LAVENDER LAW CONFERENCE AND CAREER FAIR  
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## Speakers

- ▶ Brad Domangue, New York University (NYC)
- ▶ Ashland Johnson, Point Foundation and the Equality Playbook (Washington, DC)
- ▶ Sharon McGowan, Lambda Legal (Washington, DC)
- ▶ Jessica Witte, Thompson & Horton, LLP (Austin, TX)

## Session Description

- ▶ Title IX, the federal law protecting K-12 and post-secondary students from discrimination based on sex, has become a political hot potato in recent years with changing federal guidance on who it protects and what it requires of educational institutions. There has been increasing public conversation and litigation about sexual assault and sexual harassment on campuses, as well as backlash on the application of Title IX protections to transgender students. As lawyers who are outside counsel or work directly for school districts, colleges, and universities, we will discuss the state of Title IX law and the future of its protections for straight-identified and LGBTQ students. Topics will include: interpretation of federal guidance on prevention and response to allegations of sexual assault or sexual harassment, implementation of Title IX requirements by K-12 and post-secondary institutions, challenges facing schools related to Title IX, proactive strategies to protect students, predictions for the future of federal guidance on Title IX, and trends in harassment complaints and investigations. We will also discuss Title IX protections specific to the LGBTQ community and trends in case law applying Title IX to transgender students, including in access to sex-segregated facilities.

## Title IX

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

20 U.S.C. § 1681(a)

## Title IX & The Office for Civil Rights

- ▶ The U.S. Department of Education Office for Civil Rights (OCR) has jurisdiction over educational institutions to investigate and review complaints under Title IX.

## What Issues Fall Under Title IX

OCR reviews and investigates:

- ▶ Compliance issues regarding a school district's enforcement of Title IX policy
- ▶ Athletic participation of male and female students
- ▶ Athletic financing of male and female athletic programs
- ▶ Any comments by employees or students that are based on gender stereotypes or based on the student's perceived sexual orientation
- ▶ Failure to accommodate transgender students



## Office of Civil Rights Under Trump

"All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The [DOE OCR] will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms."



## Office of Civil Rights Field Guide

Instructions to field offices regarding complaints involving transgender students, June 6, 2017:

"OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender."

## Updates to CPM

- ▶ In March 2018 and November 2018, DOE issued updates to the OCR Case Processing Manual
  - ▶ Expanded grounds for dismissal of complaints
  - ▶ Less proactive inquiry into issues not raised in complaint
  - ▶ Emphasis on faster voluntary resolution
  - ▶ Reinstating appeal rights for complainants (Nov. 2018)
  - ▶ Emphasis on First Amendment rights

## Facilities

### 34 C.F.R. Part 106.33

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

## Cases on Access to Facilities

- ▶ *Adams v. School Bd. of St. Johns County*, (No. 17-739, M.D. Fla.)
  - ▶ Jul 26, 2018: District court issues permanent injunction barring SJCSO from enforcing policy prohibiting plaintiff from using boys' restroom at school and awards plaintiff \$1,000 in compensatory damages. Court emphasized ruling is limiting to plaintiff, does not apply to any other student claiming transgender status.
- ▶ *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, No. 18-00037 (S.D. Ind. Filed Feb. 22, 2018)
  - ▶ Aug. 3, 2018: District court issues preliminary injunction ordering EVSC to allow J.A.W. to use the boys' restroom. The court concluded that the student had shown a reasonable likelihood of success on the merits of his Title IX and Equal Protection Clause claims. It also found that J.A.W. had no adequate remedy at law, that denial of injunction would result in irreparable harm to him, and the balance of harms weighed in J.A.W.'s favor.

## Facilities Backlash Cases

- ▶ *Students and Parents for Privacy v. U.S. Dep't. of Educ.*, No. 16-4945 (N.D. Ill. filed May 4, 2016)
  - ▶ A group of students and parents who reside in Palatine Township High School District 211 (PTHSD211), and who are represented by the Alliance Defending Freedom (ADF) and Thomas More Society (TMS), filed suit against the U.S. Department of Education (ED) and the District alleging that ED is illegally forcing local authorities to let children use facilities that correspond to their gender identity. The suit alleges that the federal government has violated students' fundamental right to privacy and parents' constitutional right to instill moral standards and values in their children.
  - ▶ Dec. 29, 2017 – court denied plaintiffs' motion for preliminary injunction seeking to bar the implementation of an inclusive policy
  - ▶ See also *Parents for Privacy v. Dallas Sch. Dist. No. 2*, No. 17-1813 (D. Ore. filed Nov. 13, 2017) (court dismissed all of plaintiffs' claims); *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113 (3d. Cir. filed Oct. 6, 2017) (denying preliminary injunction)

## Facilities Decisions

- ▶ Settlement agreements are common when these lawsuits are filed.
  - ▶ *Evancho v. Pine-Richland Sch. Dist.* No. 16-1537 (W.D. Pa. filed Oct. 6, 2016), preliminary injunction, a lot of press, then settlement
- ▶ More single-occupant restroom facilities.
- ▶ Increasing access to single-occupant facilities for any student, regardless of gender identity, who has privacy concerns in a public facility.
- ▶ See Township High School District 211, OCR Case No. 05-14-1055, Resolution Agreement.

## Facilities: Case-by-Case Determinations

- ▶ Dorms and overnight trips:
  - ▶ Working with individual students and parents can often resolve any concerns.
  - ▶ Students are often less concerned than parents about cisgender students rooming with transgender students.
- ▶ Locker rooms.
- ▶ FERPA protection of transgender students.



## Minnesota human rights department seeks to intervene in suit by transgender student alleging discrimination ☆

0 | RECOMMEND

According to a March 27, 2019 Associated Press (AP) report on [KARE 11](#), The Minnesota Department of Human Rights (MDHR) has filed a motion in Anoka County District Court to intervene in a suit brought by a transgender student alleging administrators at Coon Rapids High School violated the student's constitutional rights by not allowing him to use the boys' locker room as a member of the swim team. The student, identified as N.H., is being represented by the American Civil Liberties Union of Minnesota (ACLU-MN), which claims Anoka-Hennepin Public Schools' (AHPS) board singled out the student and forced him to use a separate changing room.

MDHR is asking the court to order the school district to train staff and school board members and impose a civil penalty paid to the state and monetary damages paid to the family.

N.H., joined the boys' swim team at Coon Rapids High School for the 2015-2016 school year and used the boys' locker room without issue. However, during the summer of 2016, the district built an "enhanced privacy" boys' locker room at the high school, which was entirely separate and segregated from the main boys' locker room. In 2017, the district and school board required N.H. to use the "enhanced privacy" boys' locker room, contrary to anti-discrimination provisions in the Minnesota Human Rights Act and N.H.'s wishes. The lawsuit says the district even threatened to discipline N.H. if he did not use the segregated locker room.

## School District Policies



Book	AAPS Policies & Regulations
Section	5000: Student
Title	Transgender and Gender Nonconforming Students
Code	5011
Status	Active
Adopted	December 5, 2018

### The purpose of this policy is to:

1. Foster an educational environment for all students that is safe, welcoming, and free from stigma and discrimination, regardless of sex, sexual orientation, gender identity, or gender expression;
2. Facilitate compliance with local, state and federal laws concerning bullying, harassment, privacy, and discrimination;
3. Ensure that all students have the opportunity to express themselves and live authentically.



## Dress Code

Male Students wearing skirts because of hot weather.



"This week, teenage boys at Isca Academy in Exeter, England showed up to school in the uniform of their female classmates, wearing kinky plaid skirts as a breezy statement against their school's pants-only dress code."\*

Vogue Magazine, June 22, 2017

\* <https://www.vogue.com/article/french-men-british-boys-protesting-in-skirts-during-heatwave-in-europe>

## Athletics



"CYPRESS, Tex. — A 17-year-old transgender boy completed an undefeated season on Saturday by winning a Texas state girls' wrestling championship — an accomplishment clouded by criticism from those who believe the testosterone he is taking as he transitions from female to male gave him an unfair advantage."\*

New York Times, February 25, 2017

\* <https://www.nytimes.com/2017/02/25/sports/transgender-boys-matches-with-girls-leave-all-unsatisfied.html>

## Athletics

- ▶ A lot of uncertainty that will need to be resolved by legislatures and courts.
- ▶ Texas University Interscholastic League (UIL) has a rule assigning students to sports teams based on sex listed on birth certificate.
- ▶ UIL has rules on steroid usage, but no random testing after losing state funding for it.

## Athletics, continued

- ▶ Transgender student athletes are part of a broader debate about transgender athletes in all types of competitions.
- ▶ K-12 students are less likely than an adult trans person to have changed the gender marker on their birth certificate.
- ▶ Debates among well-meaning people about purpose of Title IX to open athletic opportunities to female students.

## Forms – Inquiring about Gender

- ▶ To the extent possible, if a student is required to document their sex, permit them an opportunity to include what sex they identify as.
- ▶ Permit students and employees to identify themselves as they choose instead of providing only binary choices.
- ▶ Many educational institutions have implemented practices that permit employees and students to introduce themselves by their gender identities:
  - ▶ He, Him;
  - ▶ She, Her; and,
  - ▶ Their, Them.

## Sex Discrimination Under Title IX

- ▶ Review and Investigate:
  - ▶ **Sexual harassment;**
  - ▶ **Gender harassment;**
  - ▶ Discrimination;
  - ▶ Retaliation;
  - ▶ **Dating Violence;**
  - ▶ **Compliance Issues regarding a educational institutions enforcement of Title IX policy.**

## Sex Discrimination Under Title IX

- ▶ Any comments by employees or students that are based on gender stereotypes or based on the student's perceived sexual orientation, including,
  - ▶ Statements regarding what females or males can or cannot do based on their gender;
  - ▶ Statements regarding how a male is not acting "male" enough or acting "like" a female, or that a female is not acting "female" enough or acting "like" a male;
  - ▶ Statements degrading actual or perceived sexual orientation *whether or not* the student is gay, lesbian, bisexual, or straight.

## Title IX Issues to Investigate

Sexual harassment, violence, and discrimination that should be investigated includes:

- ▶ An inappropriate relationship between an employee and a student, including:
  - ▶ Sex between a student or employee no matter the age; and,
  - ▶ Any inappropriate communications with students, especially through social media.
- ▶ Any sexually inappropriate action by a student against another student, or employee against employee, including:
  - ▶ Exposing one's genitalia;
  - ▶ Inappropriately touching another student; and,
  - ▶ Making sexual comments to other students or about other students.



## What OCR Expects of Schools

School districts must react to each claim of sexual harassment with corrective action that is:

- ▶ reasonable
- ▶ timely
- ▶ age-appropriate
- ▶ tailored to the specific situation
- ▶ designed to
  - ▶ stop the harassment
  - ▶ eliminate any hostile environment
  - ▶ **remedy the effects** of the harassment on the student who was harassed



## What OCR Expects of Schools

School districts must also:

- ▶ take steps to prevent the harassment from recurring, including disciplining the harasser when appropriate
- ▶ conduct thorough investigations regarding any complaint that a student may have been discriminated against based on the student's sex or gender

**School districts are expected to know when a complaint is a possible sexual discrimination/harassment complaint, whether or not the complainant uses those words, and respond accordingly**

## Specific OCR Guidance

- ▶ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001)  
<http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>
- ▶ Title IX Resource Guide (Apr. 2015)  
<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>
- ▶ Dear Colleague Letter regarding Sexual Harassment (Jan. 2006)  
<https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>
- ▶ Q & A on Sexual Misconduct (Sept. 2017)  
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

## Title IX Lawsuit Claims

To state a claim, a plaintiff must show that:

- ▶ The educational institution had actual knowledge of the "precise instance of abuse giving rise to the case at hand, or actual knowledge of substantial risk that such abuse would occur"
- ▶ The school had substantial control over both the harasser and the context in which the harassment occurred
- ▶ The harassment was based on the victim's sex or on gender stereotypes
- ▶ The harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit
- ▶ The educational institution was deliberately indifferent to the harassment

## Title IX Claims: Severe or Pervasive Sex-Based Discrimination

- ▶ Harassment/discrimination must be based on sex
- ▶ Harassment/discrimination must be either severe or pervasive
  - ▶ Severe – nature of the harassment
  - ▶ Pervasive – frequency of the harassment and length of time over which it has occurred
- ▶ Must deprive of educational opportunities



## Title IX Claims: Actual Knowledge

- ▶ A plaintiff must show the school had "actual knowledge"
- ▶ Negligence is not enough
- ▶ Constructive notice is not enough
- ▶ *Respondeat superior*/vicarious liability is prohibited

## Title IX Claims: Deliberate Indifference

- ▶ A "high bar"
- ▶ Must show the school's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances"
- ▶ Negligent action is insufficient
- ▶ The deliberately indifferent response must subject the student to further harassment (Note: this requirement is subject to much dispute and is currently evolving in various court opinions)
- ▶ Liability hinges on the entity's own lack of corrective action, not the actions of the perpetrator

## Where Can Sexual Harassment Take Place?

- Classroom
- Hallway
- Restroom
- Lunchroom
- Lockers
- Parking Lot
- Computer
- Field Trip
- Gym
- Playing Field
- Bus
- Before/After School
- Cell Phone

However, sexual harassment that occurs off-campus can still impact a student's on-campus educational opportunities

## Lawsuits Regarding Student-on-Student Sexual Harassment



## Jane Doe v. State of Hawaii

### \$5.75 Million Settlement Awarded to Deaf and Blind Students Sexually Assaulted by Gang at Hawaii Public School

**BY MALIA ZIMMERMAN** - A young girl is forced to perform oral sex on an older boy while he films her with his cell phone camera and students at their school look on; another young girl becomes pregnant after she is raped by a male student at her school; a young boy is sodomized in the bathroom by an older student, but school administrators don't penalize the perpetrator; another child is sexually assaulted by five boys on campus, and nothing is done to stop them or punish them after the fact.

These are not scenarios from an *NBC's Law & Order: Special Victims Unit* episode – they are actual events that parents say took place at the **Hawaii School for the Deaf and Blind**, the state's only public school for children with these disabilities.



Hawaii School for the Deaf and Blind

For more than a decade, some of the school's administrators and students covered up a terrible secret – young children between 12 and 16 years old were being terrorized - robbed, raped, sodomized and even gang raped on campus and on the school buses – not by employees, but by other children. There are just 80 children enrolled in the school, which is located on the edge of Waikiki, Hawaii's main tourism hub, and just across the street from the Honolulu Zoo.

One student heading a gang calling themselves the "Ringleaders" orchestrated the attacks, and students were ordered to participate as attackers or be retaliated against.

## Doe v. Forest Hills School District (W.D. Mich. 2015)

- ▶ Sophomore student was allegedly sexually assaulted in a band practice room
- ▶ The student reported the incident the next day
- ▶ The school did a brief investigation and then waited for police
- ▶ The alleged perpetrator was not immediately disciplined in any way and only suspended after he pled guilty to criminal charges almost a year later
- ▶ Another incident was reported with another student and the same perpetrator
- ▶ Subsequent retaliation, harassment and cyberbullying

## Doe v. Forest Hills School District (W.D. Mich. 2015)

Case should be tried by a jury/fact issues remained:

- ▶ A reasonable juror could find the District acted with deliberate indifference because of the continued harassment and the District's limited investigation
- ▶ A single instance of sexual assault can be sufficient to show severe and pervasive sex-based harassment and discrimination
- ▶ The Court could not find against the District at the summary judgment stage because the District did not ignore the complaints or completely fail to act, and did take some action and make some accommodations

## Doe v. Forest Hills School District (W.D. Mich. 2015)

Failure to Train-42 U.S.C. §1983

- (1) Training was inadequate
- (2) Inadequacy was a result of deliberate indifference
- (3) Inadequacy was closely related or caused the injury

## Doe v. Forest Hills School District (W.D. Mich. 2015)

### Court found training was inadequate:

- ▶ Principal admitted that the District did not provide training to employees
- ▶ "Title IX coordinator did not have any significant training on how to handle sexual assault allegations. She noted that she attended a Title IX training five years prior to this incident, but it addressed only equal opportunities for women and she did not remember much of the training."
- ▶ "At [Title IX's Coordinator's] deposition she was unsure whether Title IX applied to case of [sex assault]."

## Doe v. Forest Hills School District (W.D. Mich. 2015)

### Court found training was inadequate:

- ▶ Assistant principal "did not know that Title IX applied to sexual assault follow up and he stated that he never attended training about how to respond to sexual assault allegations."
- ▶ "Even the superintendent did not recall having any training on Title IX, only general harassment issues, and didn't think that the assault was a Title IX issue."
- ▶ Clear that Superintendent received the DOE April 2011 letter regarding Title IX and training

## Doe v. Forest Hills School District (W.D. Mich. 2015)

### Court found deliberate indifference:

- ▶ "Because sexual assault claims arise frequently in the public high school context, it is certainly foreseeable that the failure to train school staff on how to handle such claims would cause disastrous results."
- ▶ "Just like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference."
- ▶ "the complex Title IX requirements virtually ensure that an investigation done without any formal training would be deficient."

## Doe v. Forest Hills School District (W.D. Mich. 2015)

- ▶ "If the school administrators had been adequately trained in the optimal methods of addressing sexual assault complaints . . . Plaintiff would not have suffered the injuries she alleges."
- ▶ "if the investigation had been done promptly or the school had addressed the issue among the student body or disseminated an appropriate sexual harassment policy...it is likely that MM and the other students would not have continued to harass Doe for the remainder of the school year based on speculation that Doe lied about the assault."

## Doe v. Forest Hills School District (W.D. Mich. 2015)

- ▶ If school personnel had been trained properly, they would not have waited or relied on a criminal investigation
- ▶ If school personnel had been trained properly regarding retaliation, it may have mitigated Plaintiff's emotional distress and social ostracization
- ▶ MSJ GRANTED IN PLAINTIFF'S FAVOR

## Charmichael v. Galbraith (5th Cir. 2014)

- ▶ The Carmichaels' son, Jon, was a thirteen-year-old student at Loftin Middle School, who committed suicide after allegedly being bullied by his fellow students
- ▶ Jon was bullied throughout "[t]he 2009-2010 school year"
- ▶ According to the complaint, "[o]n numerous occasions, Jon was accosted by a group of boys in the locker room — oftentimes having his underwear removed — while Defendant Watts observed"



## Charmichael v. Galbraith (5th Cir. 2014)

- ▶ During "[t]he last of these incidents . . . just before Spring Break — a few days before Jon took his life," members of the football team "stripped [Jon] nude and tied him up" and "placed [Jon] into a trash can" while calling him "fag," "queer," and "homo"
- ▶ As the complaint explains, "[a] number of students in the locker room observed this deplorable behavior," and one of these students "videotaped the attack and uploaded it to YouTube"
- ▶ Jon committed suicide in March 2010

## Charmichael v. Galbraith (5th Cir. 2014)

The Complaint alleged:

- ▶ Numerous school officials were aware of and deliberately indifferent to the bullying, including numerous teachers, the bus driver, the school counselor, and other staff
- ▶ Although the school district had policies in place for addressing bullying, those policies were allegedly ignored in Jon's case
- ▶ One teacher, after being told by another teacher that she was concerned about the bullying, "essentially replied that 'boys will be boys' and told the teacher to leave it alone"

## Charmichael v. Galbraith (5th Cir. 2014)

- ▶ District court dismissed the case and held that the sexual harassment alleged was not pervasive and the pervasive bullying alleged was not sexual harassment
- ▶ The Fifth Circuit reversed:
  - ▶ The Court agreed that a single incident of student-on-student sexual harassment is not enough, but "the removal of a person's underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character."
  - ▶ The Court held that it was irrelevant that both the victim and the harassers in were male because "it is settled law that '[s]ame sex sexual harassment is actionable under Title IX."

## Ayala v. Houston Independent School District (S.D. Tex. 2018)

- ▶ A female student was on campus for a program for incoming students. She claimed that a male student placed his hand inside her pants when they were alone in a practice room
- ▶ After spotted crying, school counselor spoke with I.L. and informed the principal and assistant principal about the incident
- ▶ Both students' parents were informed and came to school where they spoke to HISD police
- ▶ Before HISD police arrived, the counselor, principal, and assistant principal question the male student, investigated text messages between the students, and hallway security video that captured the incident
- ▶ Due to some uncertainty regarding whether the encounter had been consensual, it was decided to wait for HISD police to complete its investigation

## Ayala v. Houston Independent School District (S.D. Tex. 2018)

- ▶ School officials insured the male student had no contact with I.L. during the investigation. The assistant principal also informed I.L. that she was available to talk. The school also worked with I.L.'s parents after the incident regarding her academic and attendance issues
- ▶ The student filed a Title IX lawsuit against HISD arguing that HISD should have conducted a more thorough investigation independent of HISD's police department's investigation and taken more severe action against the male student
- ▶ The Court granted HISD's summary judgment stating HISD's response was not clearly unreasonable as a matter of law

## Lawsuits Regarding Employee-on-Student Sexual Harassment



## Salazar v. South San Antonio ISD (5th Cir. 2017)

- ▶ Michael Alcoser, a vice principal, was accused of molesting a student. At first, Alcoser would take the student and his brother into his office for gifts and games. Then, Alcoser would buy the student's lunch, which they shared in Alcoser's office behind closed doors. Alcoser eventually molested Salazar. The abuse continued through the student's fifth-grade year and at a district-sponsored summer camp
- ▶ During the student's sixth-grade year, when he attended a middle school, Alcoser persuaded the student's parents to drive him to the Alcoser's new elementary campus, so that Alcoser could "tutor" the student
- ▶ The family discovered the abuse the following year, while their son was in the seventh grade

## Salazar v. South San Antonio ISD (5th Cir. 2017)

- ▶ The case proceeded to trial
- ▶ Uncontroverted testimony at trial established that as a vice-principal, and later a principal, of elementary schools within the District, Alcoser had corrective authority to address gender discrimination and sexual harassment
- ▶ The parties stipulated before trial that Alcoser, the perpetrator, was the only District employee or representative who had actual knowledge of the abuse at the time it occurred and that the abuse violated the District's policies
- ▶ A jury in the Western District of Texas awarded the plaintiff \$4.5 million, which was upheld by the Court

## Salazar v. South San Antonio ISD (5th Cir. 2017)

- ▶ The United States Supreme Court in *Gebser v. Lago Vista Independent School District* held that the wrongdoer's knowledge of his or her own misconduct is not sufficient to meet the actual knowledge requirement under Title IX
- ▶ But what about when the "wrongdoer" is the "appropriate official" who can correct misconduct?
- ▶ "The abuse that Salazar suffered is heart-wrenching, and Alcoser's conduct and breach of trust is despicable. But requiring a recipient of Title IX funds to respond in damages when its employee sexually abuses a student and the only employee or representative of the recipient who has actual knowledge of the abuse is the offender does not comport with Title IX's express provisions or implied remedies. We therefore REVERSE the district court's judgment and RENDER judgment for the District."

## A.W. v. Humble ISD (S.D. Tex. 2014)

- ▶ Plaintiffs allege that between 2009 and 2011 while A.W. was a student at Humble High School, A.W. was sexually molested on multiple occasions by her female dance teacher, Feenstra
- ▶ Plaintiffs allege Feenstra instructed A.W. to remain quiet
- ▶ Plaintiffs allege that while the abuse was occurring, A.W.'s grades changed, A.W. withdrew from her classmates and dance teammates, and that A.W. went to live in Feenstra's home

## A.W. v. Humble ISD (S.D. Tex. 2014)

- ▶ Plaintiffs also allege that Feenstra spent excessive amounts of time with A.W. behind closed doors, and that Feenstra took A.W. on personal trips during the school day and on out-of-town trips during which she and A.W. would share a room and a bed
- ▶ Plaintiffs allege defendant "School Officials" observed these signs of sexual abuse but did nothing

## A.W. v. Humble ISD (S.D. Tex. 2014)

### CASE DISMISSED

- ▶ "School districts are not liable . . . for teacher-student [sexual] harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."
- ▶ No actual knowledge of actions: "Plaintiffs' complaint contains no allegations of facts capable of proving that while A.W. was a student at Humble High School that any specific person apart from Feenstra, had actual knowledge that she and A.W. had a sexual relationship."
- ▶ No actual knowledge of risk: the complaint only alleged that A.W.'s parents complained of unusual relationship, not sexual relationship and no prior history



## Doe v. Northside ISD (W.D. Tex. 2012)



- ▶ Sarah Doe was a middle school student. Nora Martinez was a teacher
- ▶ On January 23, 2011, Sarah Doe's parents discovered that Martinez was having an inappropriate relationship with Sarah
- ▶ The next day they went to the school and relayed their concerns and showed school administrators the cell phone text messages that they discovered
- ▶ Ms. Martinez admitted to an improper relationship and resigned her employment

## Doe v. Northside ISD (W.D. Tex. 2012)



- ▶ Plaintiffs alleged that as early as 2006, Ms. Martinez was using school district computers to communicate with students via My Space and Facebook in violation of NISD policy
- ▶ Plaintiffs alleged that on November 12, 2010, department coordinator Donna Rogers "observed and raised concerns about Ms. Martinez having students in her classroom and behind her desk after 4:00 p.m."
- ▶ Sometime in late October or November 2010, Rogers also counseled Ms. Martinez about sending texts to students



## Doe v. Northside ISD (W.D. Tex. 2012)



- ▶ Plaintiffs also alleged that in November or December 2010, a student informed school administration staff that an inappropriate relationship existed between Ms. Martinez and Sarah Doe
- ▶ Plaintiffs further alleged that in November or December 2010, NISD officials reviewed a “surveillance video of Ms. Martinez and Sarah Doe exhibiting inappropriate physical contact after school hours and on school premises”

## Doe v. Northside ISD (W.D. Tex. 2012)



- ▶ The school district argued it had no suspicion that Sarah Doe was being abused by Martinez until January 24, 2011, the date her parents arrived at the school with cell phone in hand
- ▶ Plaintiffs argued that based upon all the acts that took place since 2006, the District knew that Martinez was a child predator

## Doe v. Northside ISD (W.D. Tex. 2012)



- ▶ “This case is very tragic. An educator abused her position, befriended a vulnerable child, deferred acting until she gained the child's trust, and then took advantage of her. The law, however, only allows for recovery of damages from a school district if the school district had actual notice of the harassment and responded with deliberate indifference.”
- ▶ The Court held that as a matter of law NISD did not have actual notice given the summary judgment evidence submitted by both sides
- ▶ No deliberate indifference

## Legal Concerns: the Accused

- ▶ Defamation claims; breach of contract claims; due process concerns
- ▶ Title IX – erroneous outcome claims
- ▶ Deliberate indifferent standard applies
- ▶ Erroneous outcome claims are occurring more frequently
- ▶ DOE has rescinded 2011 “Dear Colleague” letter regarding sexual assault and 2014 FAQs
- ▶ DOE seems to be increasing scrutiny with respect to the rights of the accused

## Proposed Title IX Rule

In November 2018, DOE released proposed rule regarding schools' responses to sexual harassment and assault reports

### Key provisions:

- ▶ Defines "sexual harassment" and denotes triggers for school's obligation to respond
- ▶ Emphasizes supportive measures to preserve/restore student's access to education programs/activities
- ▶ Requires schools to apply certain due process protections for students
- ▶ Prohibits schools from allowing a single investigator to be the decision-maker

## Concerns in K-12 on new Rule

- ▶ New guidelines assume complainant and respondent of equal status – ignores cases with young children or children with special needs
- ▶ Assumes school districts can appoint a separate decision-maker, investigator, and coordinator with no conflicts – not feasible in small and rural school districts
- ▶ Directs schools to dismiss complaints about conduct that doesn't meet severe and pervasive standard or didn't occur in a district program or activity – ignores other obligations under state bullying laws or other types of harassment policies
- ▶ Assumes that a finding of sexual harassment will result in expulsion – compulsory education and due process considerations in K-12
- ▶ NSBA submitted comments on the proposed rule encouraging the department to define "on the basis of sex" to include gender identity

## Due Process Rights of the Accused

- ▶ Students accused of sexual assault have filed over 100 lawsuits alleging violations of their due process rights during their campus sexual assault investigations.
  - ▶ Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. L. & PUB. POL'Y 533, 550 (2017)
- ▶ Several elements of the 2011 Dear Colleague letter proved particularly controversial in the due process context:
  - ▶ requiring schools to use the "preponderance of the evidence" standard
  - ▶ encouraging schools not to allow parties to question or cross-examine each other, and
  - ▶ requiring the availability of appeals to both parties, not just to a student found responsible for sexual assault.

## Due Process Rights of the Accused

- ▶ New guidance:
  - ▶ More limited definition of sexual harassment
  - ▶ Limit Title IX responsibility to only incidents that occurred on campus or during a school program
  - ▶ Presumption of innocence for the accused
  - ▶ Higher evidentiary standard to substantiate a claim
  - ▶ Give parties equal access to evidence
  - ▶ Interim measures that don't unduly disadvantage either party
  - ▶ Gives accused right to cross-examine their accuser
  - ▶ Reinstate mediation option

## Due Process Cases

- ▶ *Doe v. Baum*, 903 F.3d 575 (6<sup>th</sup> Cir. 2018), reh'g denied.
  - ▶ Title IX requires that an accused student be able to cross-examine an accuser
- ▶ *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6<sup>th</sup> Cir. 2017)
  - ▶ Weighed the pros and cons of allowing cross-examination, concluding that some credibility challenge short of physical confrontation is required
- ▶ *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)
  - ▶ Male plaintiff won appeal overturning MTD on TIX claim of gender bias against men in TIX proceedings
  - ▶ See also *Doe v. George Washington Univ.*, 2018 WL 6700596 (D.D.C. 2018), *Rossley v. Drake Univ.*, 2018 WL 5307625 (S.D. Iowa 2018), *Doe. V. Univ. of Mississippi*, 2018 WL 3570229 (S.D. Miss. 2018)

## But See

- ▶ *Doe v. Trustees of Boston Coll.*, 892 F.3d 67 (1<sup>st</sup> Cir. 2018)
  - ▶ Male accused school of reaching a biased erroneous outcome in sexual assault case
  - ▶ The First Circuit pronounced itself to be “unmoved” by the plaintiff’s “conclusory and meritless” arguments, observing that “[t]he gender of the students accused of sexual assault is the result of what is reported to the University, and not the other way around,” and determining that no explanation had been offered for how the 2011 “Dear Colleague Letter reflects or espouses gender bias.”
- ▶ *Doe v. Columbia Coll. Chicago*, 299 F.Supp.3d 939 (N.D. Ill. 2017)
  - ▶ The court said it found nothing discriminatory in the college’s “legitimate preventative education programs” nor its compliance with “the Department of Education’s instructions and ensuring that [it] protects victims of sexual assault.”

The New York Times

## *As DeVos Eases Sexual Assault Rules, Her Old High School May Provide a Test Case*



Students at Holland Christian School in Holland, Mich. The school receives federal funding through its participation in the National School Lunch Program. Rachel Woolf for The New York Times

By Erica L. Green

April 1, 2019



# Thank you!