

TITLE IX LEGAL UPDATE & PROPOSED REGULATIONS

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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?



“[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 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



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.



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 5th Circuit ruled for the City on the retaliation claim.



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.

- 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.



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, 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.”



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!

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*



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.

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'.*

July 7, 2022

Via E-mail

Re: Discriminatory Dress and Grooming Rules

Dear Superintendent:

We are writing to ensure that your school district's dress and grooming code does not discriminate against students in your district. In recent years, we have seen how certain dress code rules—such as requiring boys to wear short hair—have harmed Texas students, particularly Black, Indigenous, and LGBTQ+ students. Such policies often disproportionately target and penalize Black and Indigenous children for wearing their hair in culturally significant hairstyles, and LGBTQ+ students for not adhering to gender stereotypes. Such discriminatory treatment results in lost educational and extracurricular opportunities and, in certain instances, violates state and federal law. We ask that your

Re: Discriminatory Dress and Grooming Rules

...discriminate against students based on race or religion. Targeting students with culturally significant hairstyles constitutes discrimination based on race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI. Such practices also violate students' rights to freely express their hairitage, a time-honored religious belief protected by the First Amendment. As your school district updates its dress code and student handbook, it is critical to ensure that your district's policies do not lead to gender, race, or religious discrimination. Nothing in this communication prohibits a district from having a dress code as long as it is nondiscriminatory and serves an educational purpose.

Federal courts in Texas have repeatedly found in recent years that public school districts that impose gender-based dress codes on students likely violate the U.S. Constitution, Title VI, and Title IX. *Amadi v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 524 (S.D. Tex. 2020); *Gray v. Newville Indep. Sch. Dist.*, No. 4:22-cv-01245, 2022 WL 1488705, at *1 (S.D. Tex. May 4, 2022); *A.C.T. et al. v. Magnolia Independent School District*, Case No. 4:21-cv-03466, Ekt. 20 (S.D. Tex. Oct. 26, 2021), available at https://www.aclutx.org/sites/default/files/field_documents/ekt_20_-_temporary_restraining_order.pdf

2

DRESS

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

GIRLS—

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

BOYS—

1. Must wear shirts properly buttoned and long trousers.
2. Belts are required if trousers have belt loops.
3. All shirt tails must be worn inside trousers.
4. Faces must be clean shaven.
5. Extreme or unusual haircuts are not permitted.
6. 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.

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
Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 538 (3d Cir. 2018)	Grimm v. Gloucester County Sch. Bd., 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020) *SCOTUS declined to hear		Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016)	Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1055 (7th Cir. 2017)	Parents for Privacy v. Barr, 949 F.3d 1210, 1217–18 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020)	Adams by & through Kasper v. Sch. Bd. of St. Johns County, 3 F.4th 1299 (11th Cir. 2021)

BOSTOCK V. CLAYTON COUNTY

140 S.CT. 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.



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."



JOHN M. KLUGE, CONT.

- Kluge identifies as a Christian and is an elder of Clearnote Church, which is part of the Evangel Presbytery.
- 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



LEGAL ISSUES – TITLE VII – RELIGIOUS ACCOMS

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



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.



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."



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.

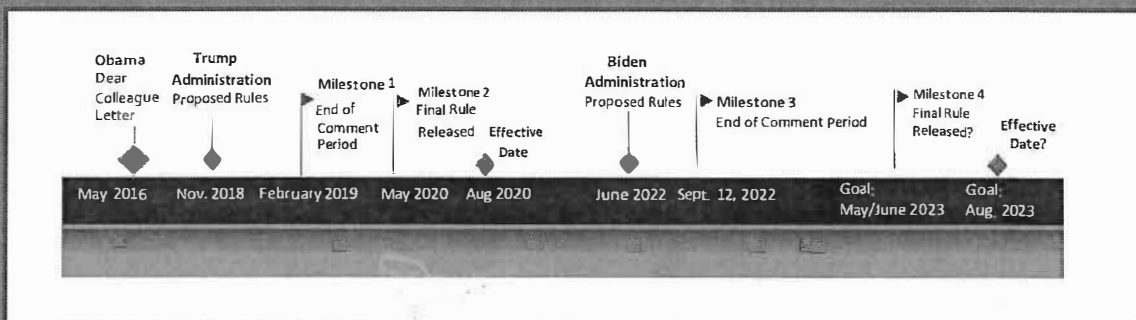


MERIWETHER V. HARTOP **992 F.3D 492 (6TH CIR. 2021)**

- 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



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.



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



SO, WHAT ARE THE PROPOSED DIFFERENCES?

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.



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



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: 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: 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.



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: 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



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.



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



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



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



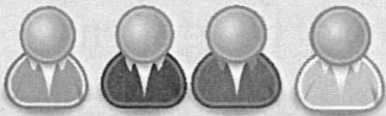
WHAT STAYS THE SAME

- 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”



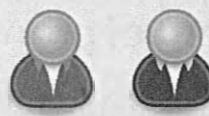
WHO'S WHO?

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



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*



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



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”



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.



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:

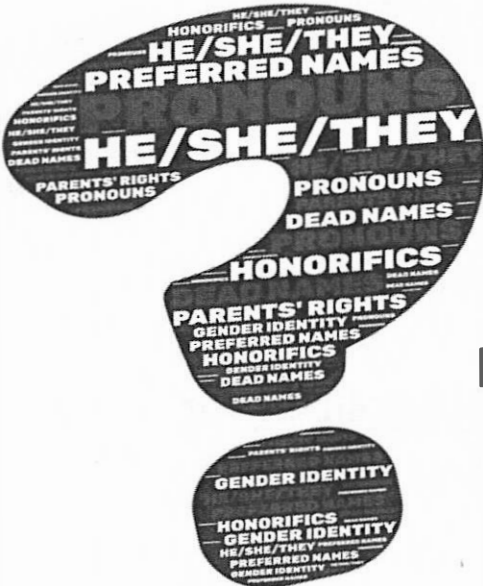
- Outcome of the complaint
- Determination of whether sex discrimination occurred
- Procedures & basis for appeal



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

Holly Boyd Wardell
October 19, 2022

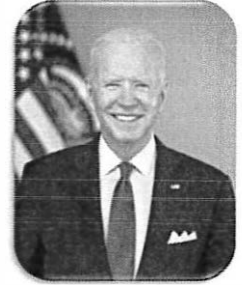
BIDEN ADMINISTRATION

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

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



EEOC: TITLE VII SEX DISCRIMINATION

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



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EMPLOYMENT DECISIONS

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



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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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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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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



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.

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.

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

WISCONSIN - Published November 18, 2021 5:40am EST

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](#)

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.

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

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.



Ingraham Angle May 17, 2022 05:09 CLIP

Middle school boy accused of sexual harassment over using wrong pronoun speaks out


[US](#)
[Crime + Justice](#)
[Energy + Environment](#)
[Extreme Weather](#)
[Space + Science](#)

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



By [Rebekah Riess](#) and Alaa Elassar, CNN

Published 4:45 PM EDT, Thu September 1, 2022

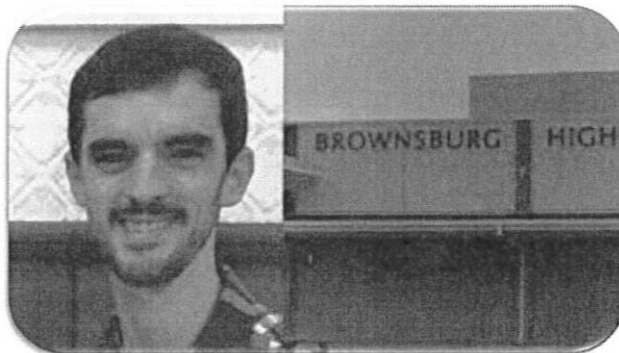
(CNN) — A Kansas teacher who argued she had a religious belief that prevented her from calling transgender or nonbinary students by their preferred names and pronouns reached a \$95,000 settlement with school district officials, according to a release from the teacher's attorneys.

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.

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).



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 - 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 – Christian/Church Elder

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



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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 – 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 – 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 – 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 – 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 – 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 – 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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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 – Title VII – Religious Accoms

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

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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.'"

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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 – 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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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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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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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 7th Circuit.

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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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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).



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

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

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

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

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

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

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

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

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

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 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

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

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 SPPO—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. Dep't 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.



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

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.

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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Educator Investigations Division

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

Title IX Administrator Conference



Wednesday, October 19, 2022

1



Educator Investigations Division

PRESENTERS

Tina Farrell - Sr. Manager, Investigations Unit

Daniel Berumen – Sr. Manager, Intake Unit

David Rodriguez – Executive Director of Investigations

2



Audience Participation

Who has referred a case to
Educator Investigations?

What was the outcome of the
TEA investigation?

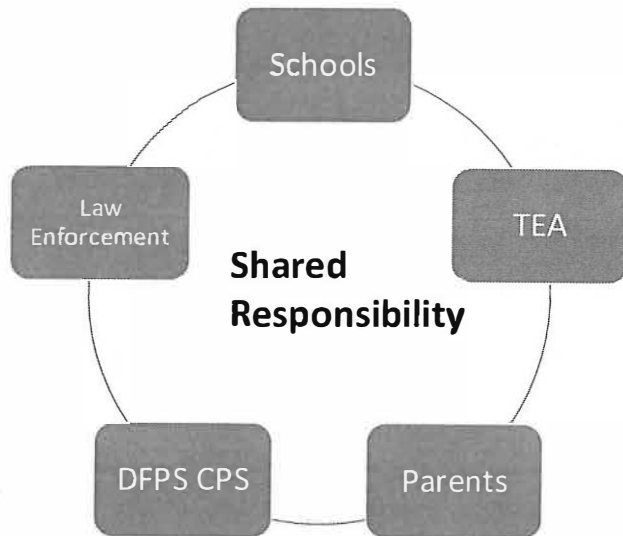
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Overview & Process





Student Safety



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

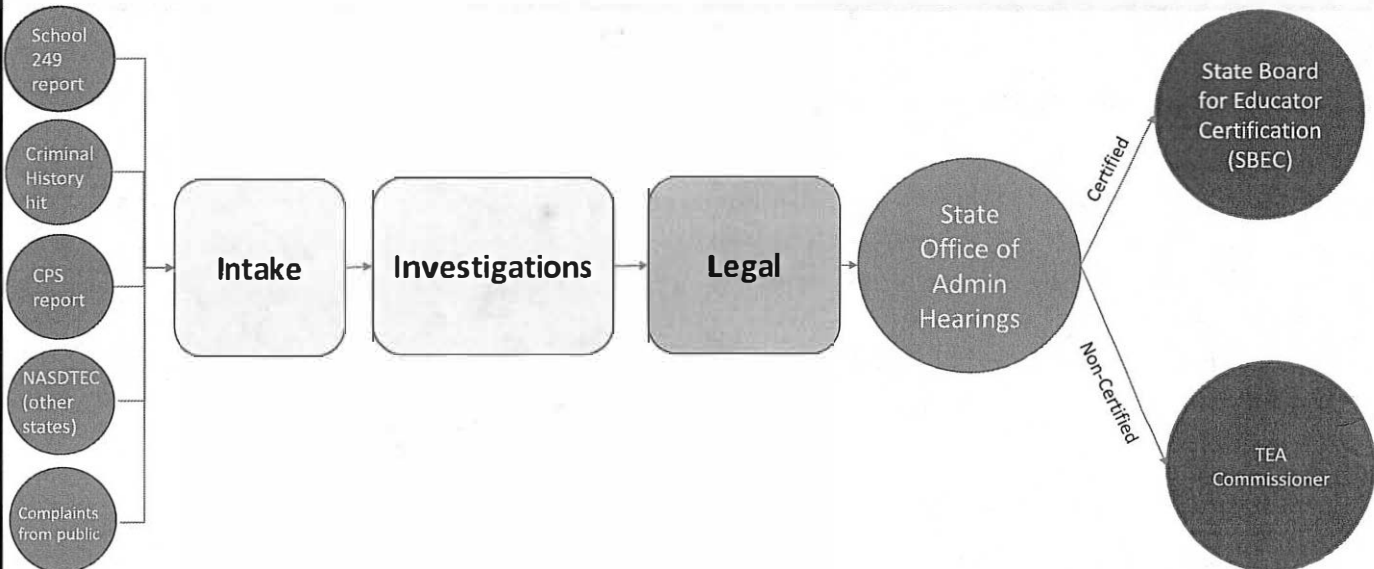
Provide customer support to Texas public and private schools and applicants for SBEC certification –Fingerprinting, Do Not Hire Registry, Misconduct Reporting Portal

Maintain IT applications- Do Not Hire Registry, Misconduct Reporting Portal, ECOS Fingerprinting and Enforcement workflow

7



Investigation & Litigation Process



8



Educator Investigations Division (EID)

Intake

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

Investigations

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

IT Applications and School Support

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

Agency Partnerships

Presentations to DFPS, law enforcement, and ESCs

Provided issue-resolution between DFPS and LEAs; identified constraints



Responsibilities of Administrators and Schools





Administrator and School Responsibilities

TEC Chap 21 and 22

Ensure employees are fingerprinted

Search the Do Not Hire Registry

Investigate allegations of misconduct

Report misconduct to TEA/SBEC

TEC Chap 38

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



11



Misconduct Reporting Portal

12



TEA Misconduct Reporting Portal

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



TEA Login (TEAL)

[Forgot your password?](#)
[Contact your administrator.](#)

[Help for Password Resets](#) | [Help for Account Activation](#) | [Help for Account Deactivation](#)



TEA **Misconduct Reporting Portal**
Texas Education Agency



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Misconduct Reporting Portal

SUBMIT REPORTS, REQUEST DISK, ETC.

Submit a Misconduct Report

MANIPULATIONS

your request must be submitted on official letterhead and should include the following information:

- [illegible]

For TPC 521 005, 521 042, and 521 048, results of female residents should be compared with (a) all females aged 15 and over next door after an employee was terminated or assigned from a different

How to Write a Report

1. Enter in the required information: first name, last name and e-mail
2. Select a file to upload
3. Click Upload
4. After a successful upload, an email confirmation will be sent to you

Please write the following:

- The maximum size is 256
- POC is the only accessible type
- SN should be 8 digit number within hyphens.
- SN should include leading zeros
- Both Date should be entered as MM/DD/YYYY

6394

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Abstract: The purpose of this study was to determine the effect of a 12-week training program on the heart rate (HR) and blood pressure (BP) of sedentary, middle-aged men. The subjects were divided into two groups: a control group and an exercise group. The exercise group performed a 12-week training program consisting of aerobic and resistance exercises. The HR and BP were measured at baseline and at the end of the 12-week program. The results showed that the exercise group had a significant decrease in both HR and BP compared to the control group. The HR decreased from 72 to 68 beats per minute, and the BP decreased from 120/80 to 110/70 mmHg. The control group showed no significant changes in HR and BP. The findings suggest that a 12-week training program can effectively reduce HR and BP in sedentary, middle-aged men.

Business Information

 $\frac{1}{2} \text{H}_2\text{SO}_4$

Birth Date

Change file: [huffa.cvs](#)

100

¹ Future research will clarify

Page 12 • *entrepreneur*

1	2	3	4	5	6	7	8	9	10
Year	First Name	Middle Name	Last Name	Suffix	Birth Date	Birth Place	Education	Unfiled Date	

This history repeats itself.

Showing 0 to 0 of 0 entries

Previous Next



Potential Outcomes: SBEC Sanctions and the Do Not Hire Registry

15



SBEC Sanctions

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

- Place a **warning** on the certificate during an investigation
- **Deny** certification or place restrictions
- Issue an **inscribed reprimand**;
- **Suspend** a certificate for a set term
- Accept a **voluntary surrender** of a certificate
- **Revoke** a certificate (through board decision or operation of law)
- Impose any **additional conditions or restrictions** upon a certificate as deemed necessary by the SBEC

16



What is the “Do Not Hire” Registry?

An online list of individuals who are not eligible for employment in a Texas public school based on misconduct or criminal history. The list can be accessed by schools through TEAL, or by the public through the TEA website.



In Statute

In Statute: Registry of persons not eligible for employment in public schools - TEC §22.092 as created by HB 3, individuals not eligible for employment - TEC §22.0832, §22.0833, §22.085 and §21.058(b)

17



Audience Participation

What questions do you have about sanctions or the Registry?

18



**When behaviors
cross boundaries**

19



Potential Overlap with Title IX Cases

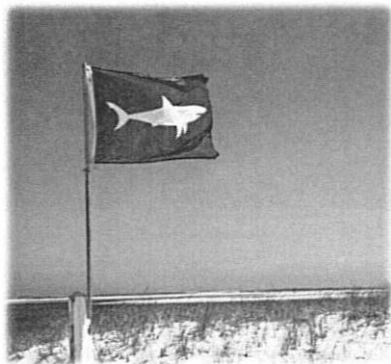
Regardless of severity, TEA reviews allegations of misconduct that may fall under the following laws:

- **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

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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

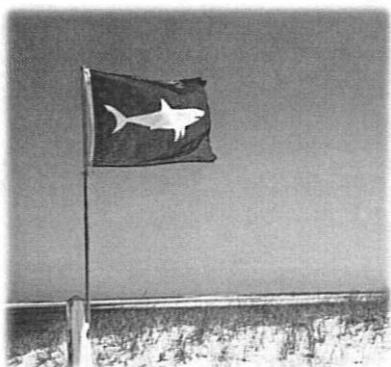
Physical Behaviors

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

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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

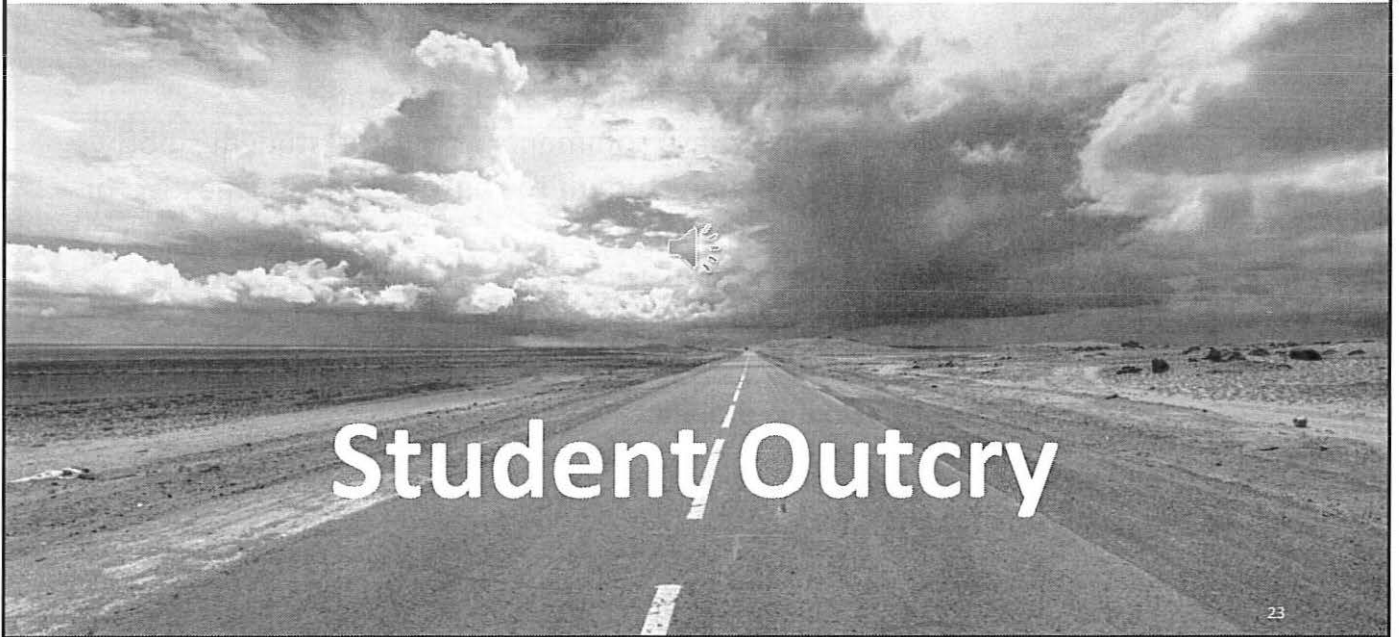
Other behaviors

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

22



Listen for the behaviors.....



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



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



Case Studies

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

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Audience Participation

Have you seen these types of allegations in your investigations?

What other evidence or factors did you consider?

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Division of Educator Investigations

Cooperation TEA - LEA - DFPS



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.

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TEA / DFPS Collaboration

Shared Objective

- Further understanding of subject matter
- Leadership commitment

Open Line of Communication

- Informal discussions
- Transparency

Solution-Oriented

- Procedural change
- Recommended policy

Student Safety

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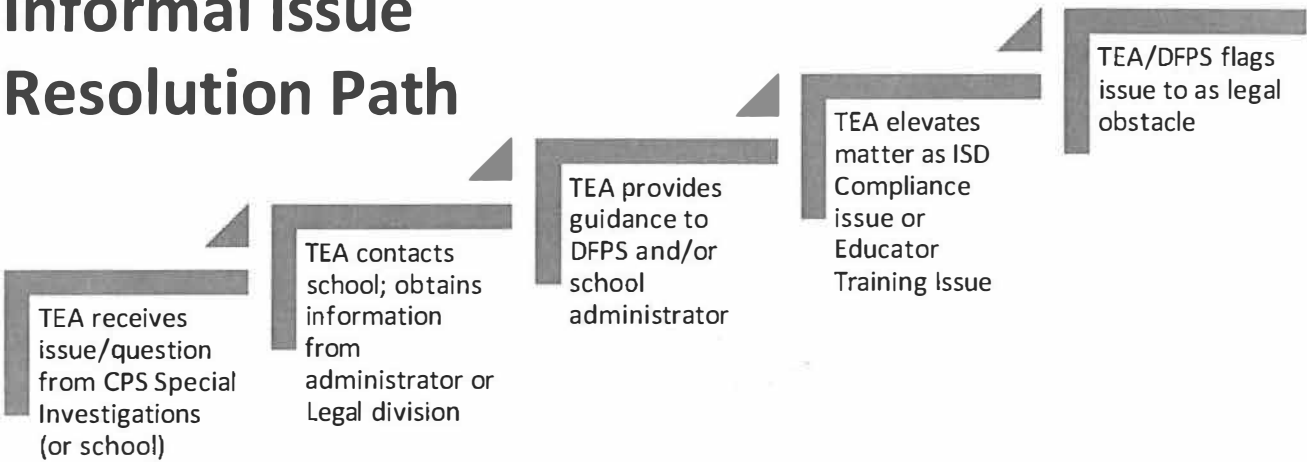
School Investigations

Known Issues and Guidance



School Investigations

Informal Issue Resolution Path





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

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Known Issues & Current Guidance

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

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Known Issues & Current Guidance

Issue	Guidance
Schools ask CPS Special Investigator to check-in or meet with administrator before interviewing parties	The CPS Special Investigator must request that the principal not alert the alleged perpetrator or others regarding the report until the investigator has first had an opportunity to interview the alleged perpetrator. (40 TAC §707.615)
Can campus administration require CPS Special Investigators to provide drivers' license	An investigator may be asked to show a state-issued ID badge. However, if the state-issued ID badge is shown, the district should not ask for personal ID. (TEA Letter-2008)

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Audience Participation

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

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Educator Investigations Division

Further Develop TEA Webpage

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

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Audience Participation

How else can TEA help you and your school?

40



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, Ch 22, and



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

DG
(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.



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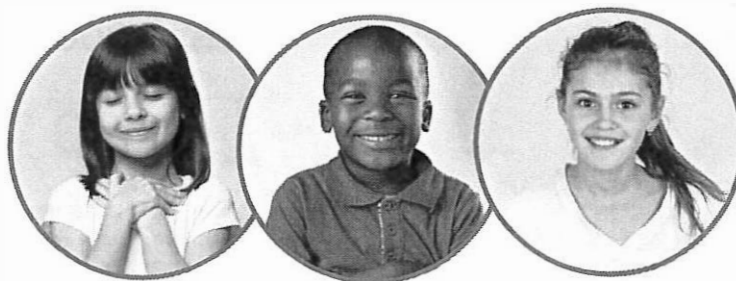
children's advocacy
centers™ of texas

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.

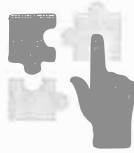


And we believe in a future free of child sexual abuse.



Serving Texas' Children

The CAC Multidisciplinary Team (MDT) Model



Joint Investigation
Coordination



Forensic
Interviews



Family Advocacy
& Victim Support



Trauma-Focused
Therapy



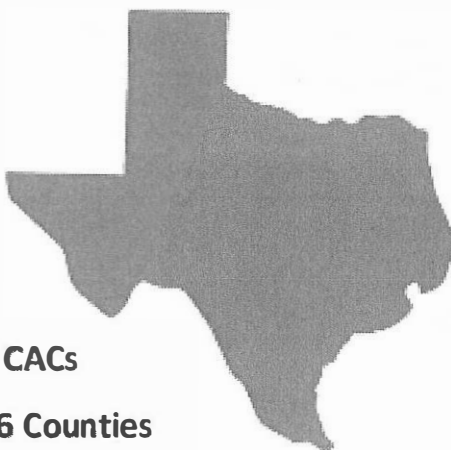
Medical
Evaluations



Multi-Disciplinary
Case Review



Serving Texas' Children



- ❖ 70 CACs
- ❖ 206 Counties
- ❖ 98% Texas population



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 DFPS
REGION IN
THE STATE including Child Protective
Investigations, Child Care
Investigations, and Adult
Protective Services



Serving Texas' Children

AGES SERVED:



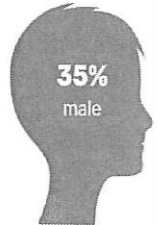
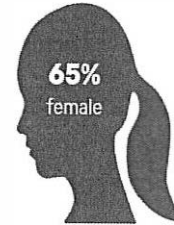
TYPES OF ABUSE:

- 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**



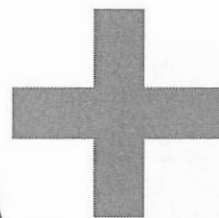
Understanding the Issue



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



Sexual Behavior Is a Continuum

When two
children are
involved

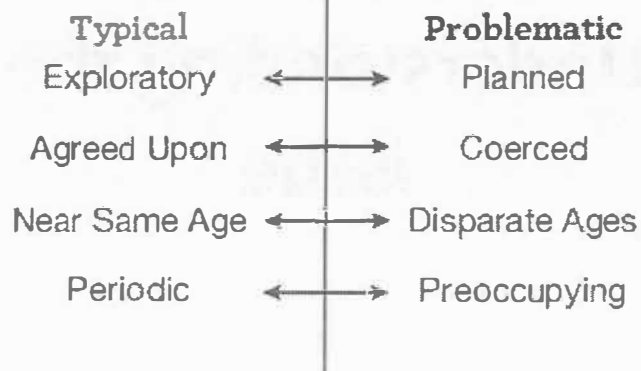


Image from NCA 2017-PSB-Fact-Sheet-Overview-3.pdf (nationalchildrensalliance.org)

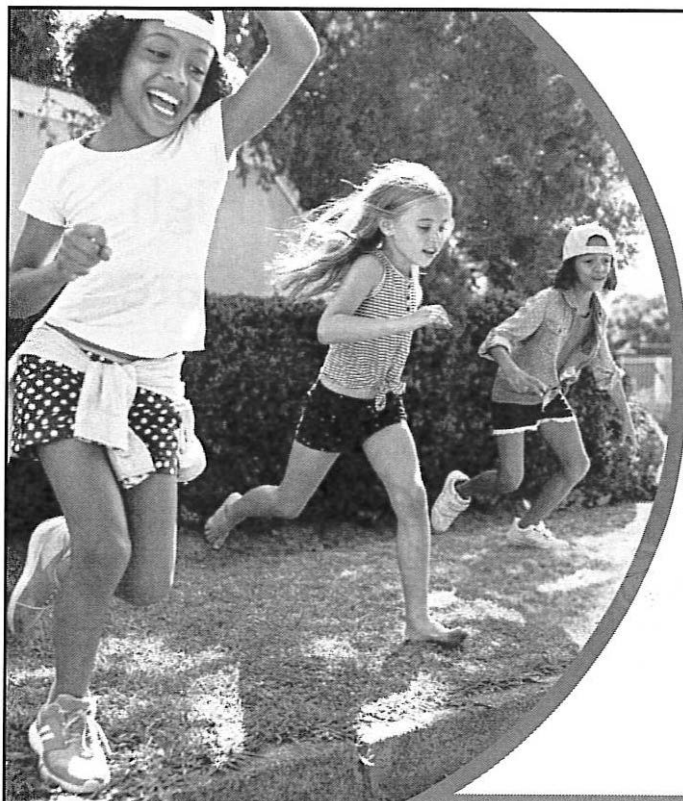
Can include
non-contact
acts, such as:

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 & Allardyce, 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

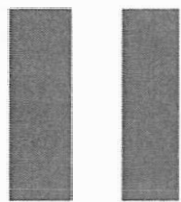


Continuum of Responses

- 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*



Pause

- Remain calm
- Collect your thoughts



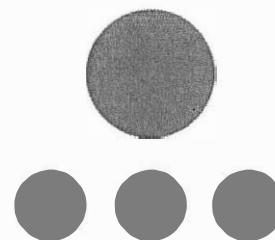
Redirect

- Change the routine or environment
- Suggest other activities



Listen

- Find out information
- Understand from the child's viewpoint



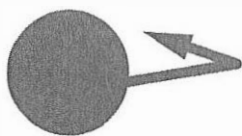
Teach

- Communicate expectations and rules
- Reinforce appropriate behavior

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

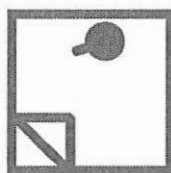


Responding to Sexual Behavior *After the Fact*



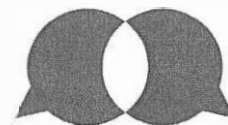
Reflect

- Consider all known information
- Determine the type of behavior



Prepare

- Know how to respond in the moment: *pause, redirect, listen, and teach*, in the future



Communicate

- Communicate with the teaching team
- Determine communication with families

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

Texas Family Code § 261.103



**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 § 261.104



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

National Center on the Sexual Behavior of Youth

- Resources for parents/caregivers and professionals
- ncsby.org

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

- stopitnow.org

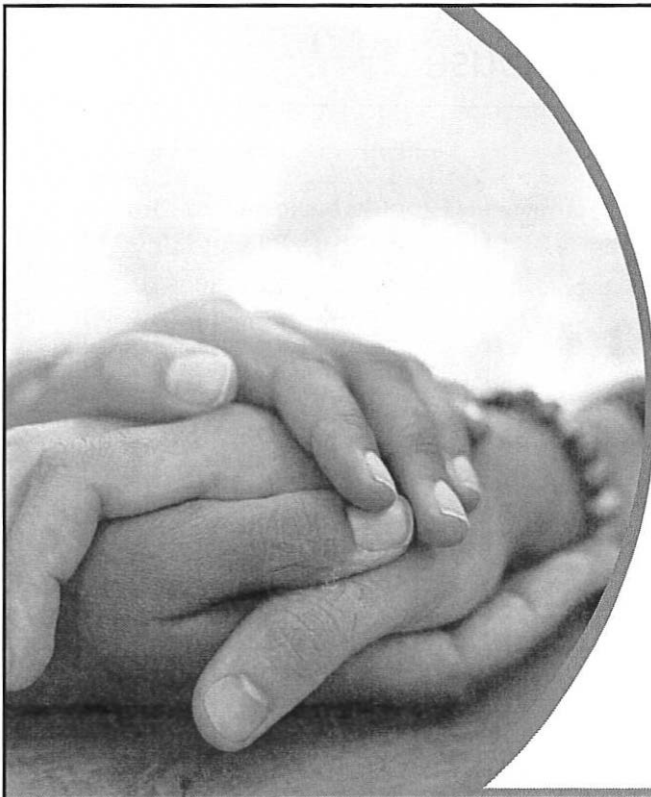


Treatment Considerations

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!



cactx

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Hannah Gibson-Moore, LCSW-S
Strategy Development Principal
hmoore@cactx.org



Catherine Henning

Children's Advocacy Centers of Texas



Catherine Henning is the Strategy Development Manager at Children's Advocacy Centers of Texas where she is responsible for supporting research, programmatic, and stakeholder engagement efforts in furtherance of the organization's vision of eradicating child sexual abuse. Ms. Henning previously managed volunteer and community engagement programs for Austin-based nonprofits and has experience working with organizations serving a variety of populations, including teens in foster care and adults experiencing chronic homelessness. Ms. Henning received a Bachelor of Science in Public Health from the University of Texas at Austin.



U.S. Department of Education Office for Civil Rights



Terri Gonzales, Esq. is a proud civil rights advocate, wife, and mother to twin boys and two cats. Terri knew from a young age that she wanted to become an attorney, and not just any attorney, but one who would serve the public interest. She began her career in Denver after having graduated from the University of Denver College of Law, appearing on behalf of plaintiffs in employment discrimination litigation. Later, she moved to New York to further her public interest law career. There, she engaged in criminal justice policy work, served as a public defender, and represented the largest school district in the country on special education matters. When a staff attorney position opened at OCR, it was Terri's dream come true. Upon joining OCR, she ascended through the ranks from staff attorney to Team Leader, and finally to her present position as Chief Regional Attorney. Terri was once fortunate enough to meet the late John Lewis and shares his affinity for "Good Trouble."



Lindsay Drennan, Esq., a first-generation lawyer, became an attorney because it combined two of her passions: helping others and reading for hours at a time. Lindsay began her legal career in her home state of New Mexico after graduating from the University of New Mexico School of Law. She started her practice as a defense litigator, representing people, companies and government entities facing lawsuits and even had the opportunity to represent the State of New Mexico's interests in briefing before the United States Supreme Court. She moved to Texas in 2017 to join a trial firm and continue her work representing clients in both lawsuits and appeals, eventually being promoted to partner. More recently, Lindsay jumped at the opportunity to join OCR and focus her practice more fully on public service. She lives in Dallas with her husband and a mischievous dog.



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 ¹
(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;

¹ 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,

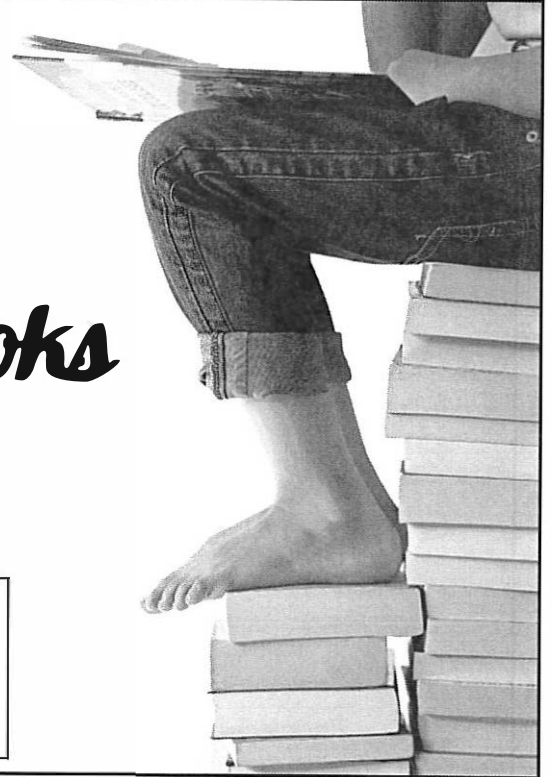
Paul Cox
Supervisory Attorney/Team Leader
Dallas Office

★ ★ ★ ★ ★ LGBTQ+ Themed Books in School Libraries

Holly Boyd Wardell
Oct. 19, 2022



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.



1:26



FOX 5 SPOTSYLVANIA COUNTY SCHOOL BOARD PULLS "SEXUALLY EXPLICIT" BOOKS
10:04 05" 2:37



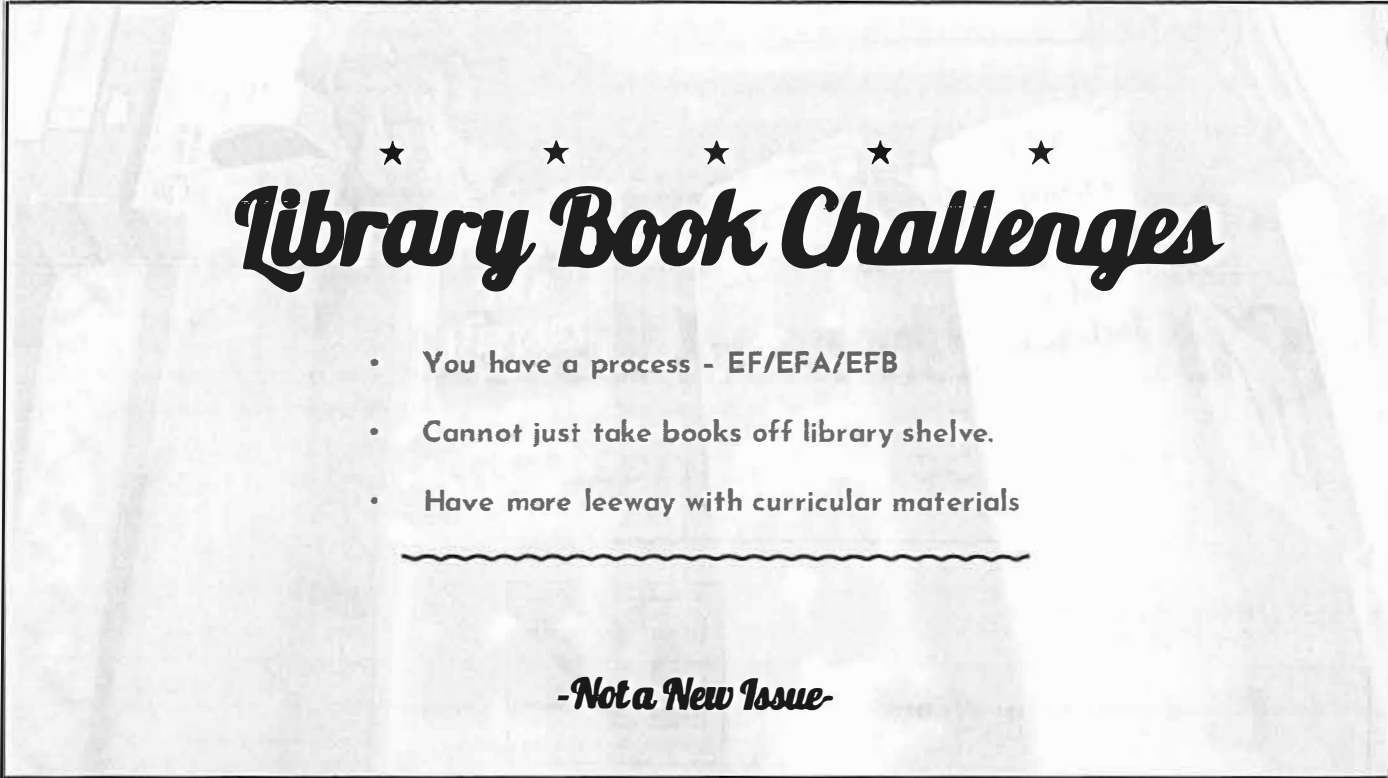
CBS
EVENING
NEWS
WITH NORAH O'DONNELL

2:09



46

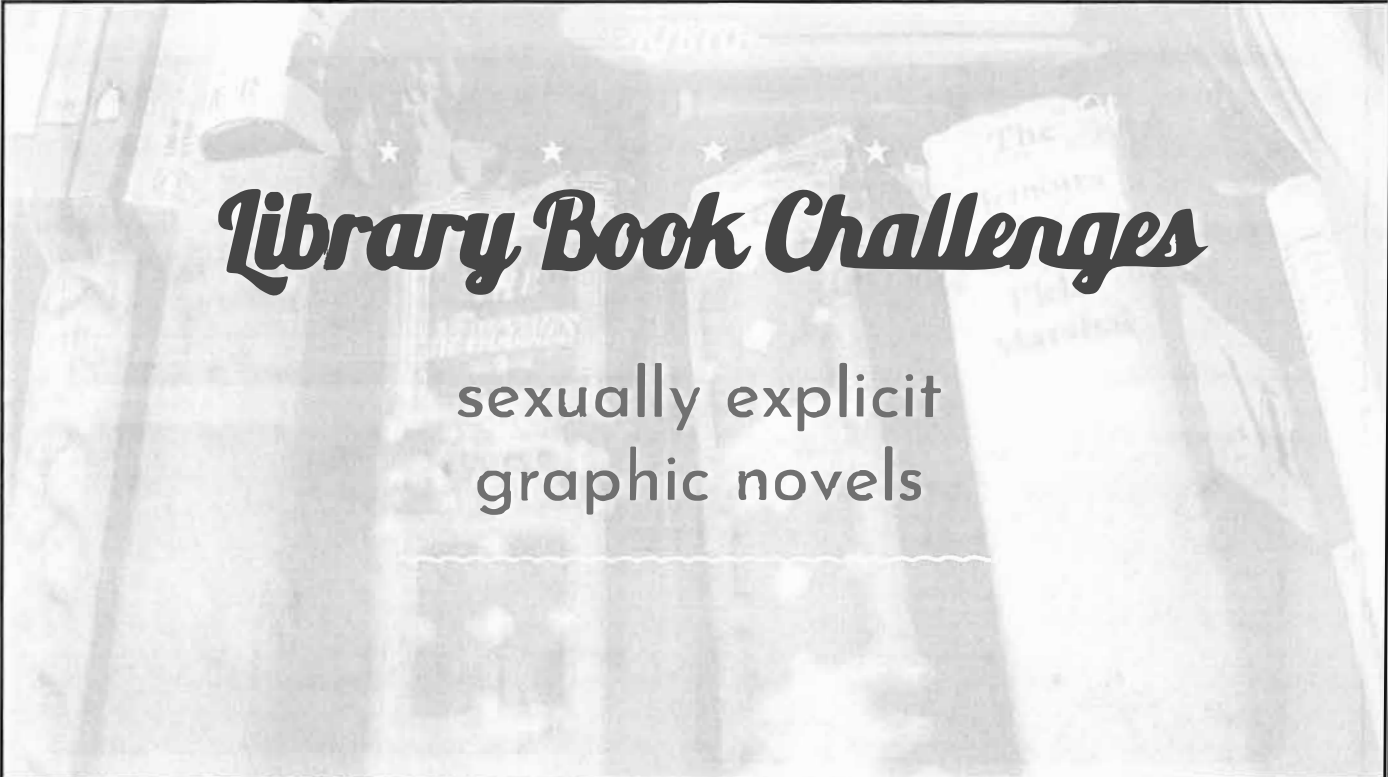
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★ ★ ★ ★ ★ *Library Book Challenges*

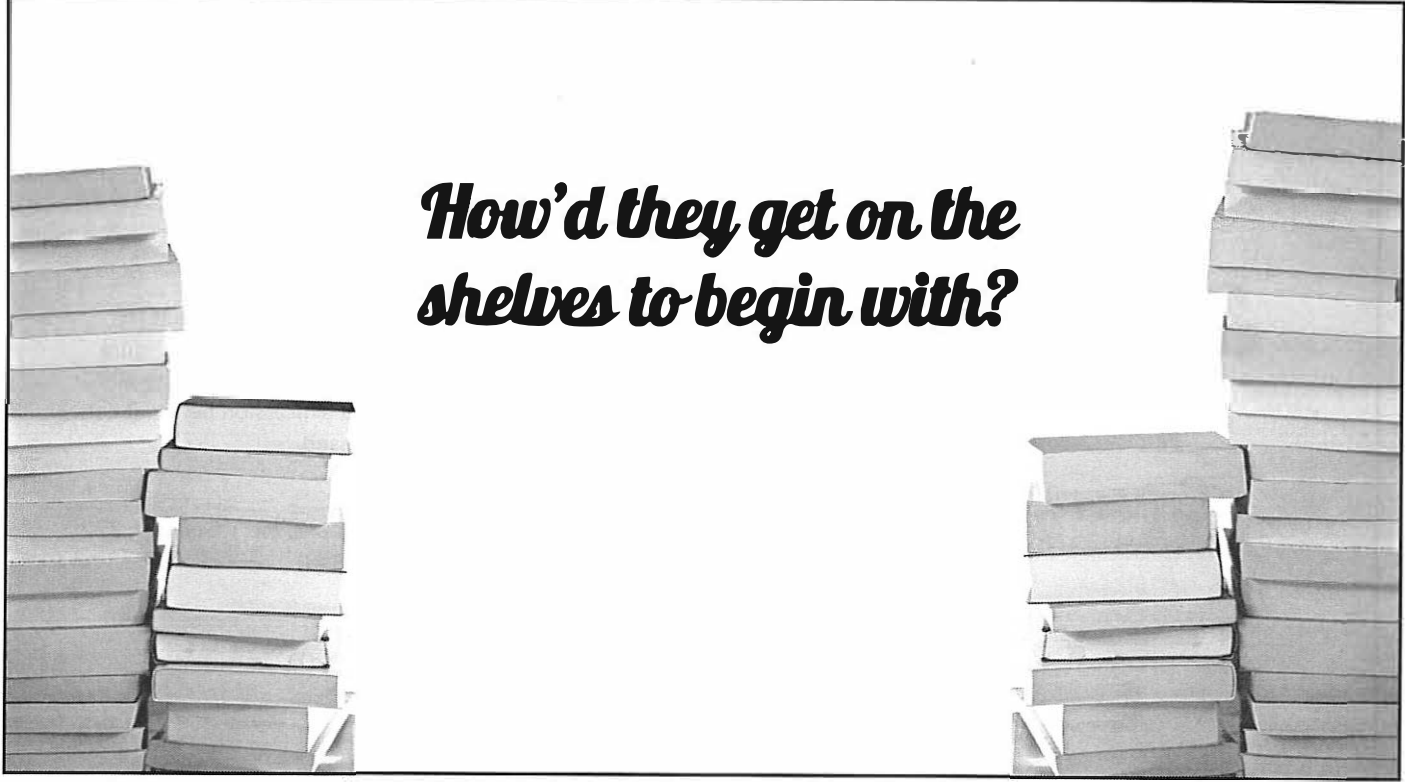
- You have a process - EF/EFA/EFB
 - Cannot just take books off library shelves.
 - Have more leeway with curricular materials
-

-Not a New Issue-

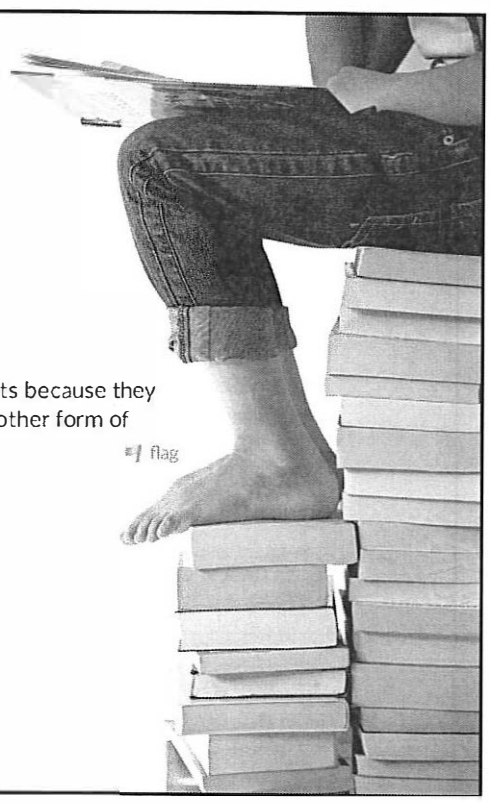


★ ★ ★ ★ ★ *Library Book Challenges*

sexually explicit
graphic novels



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



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."

#1 flag

SCOTUS

Reading Censorship



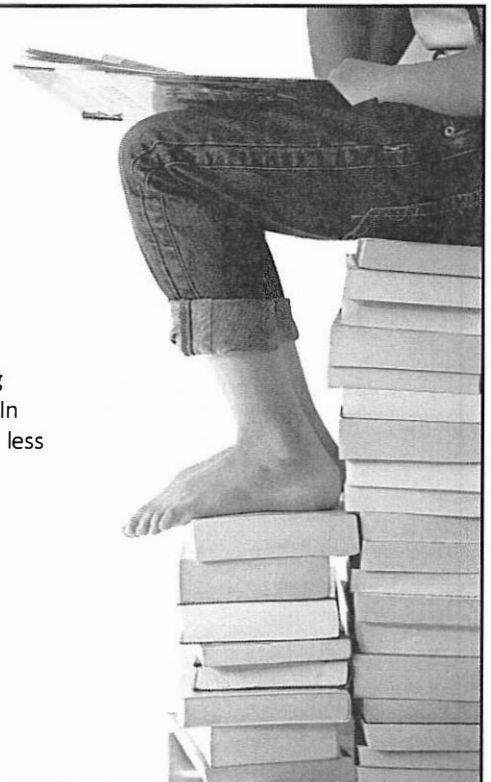
Supreme Court has held that the Constitution requires a procedure designed to critically examine all challenged expression before it can be suppressed.

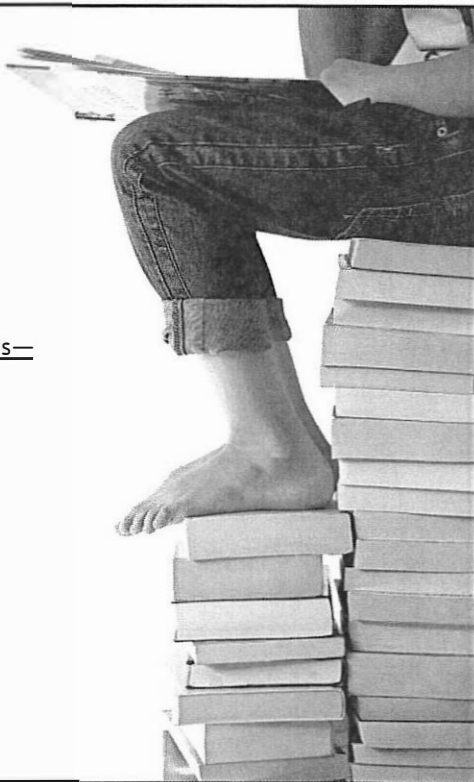
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)

★ ★ ★ ★ ★ *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."

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





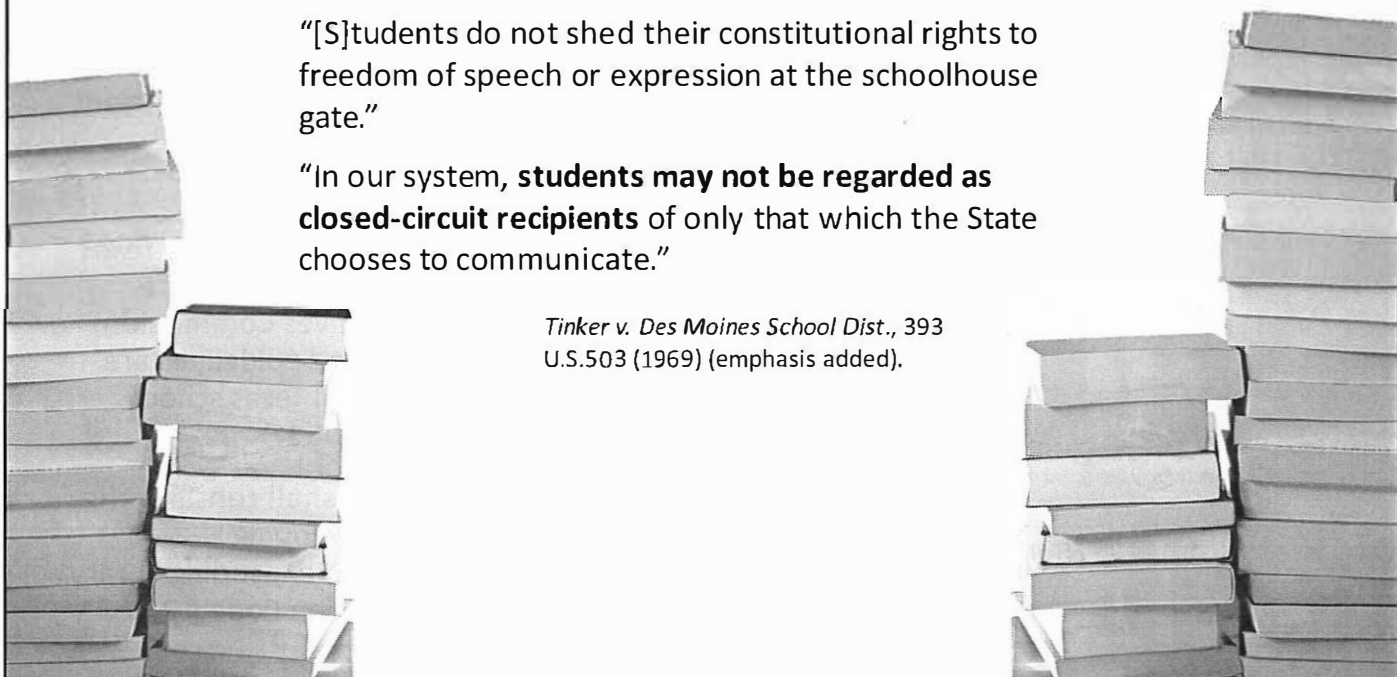
★ ★ ★ ★ ★

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)



"[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).

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."**

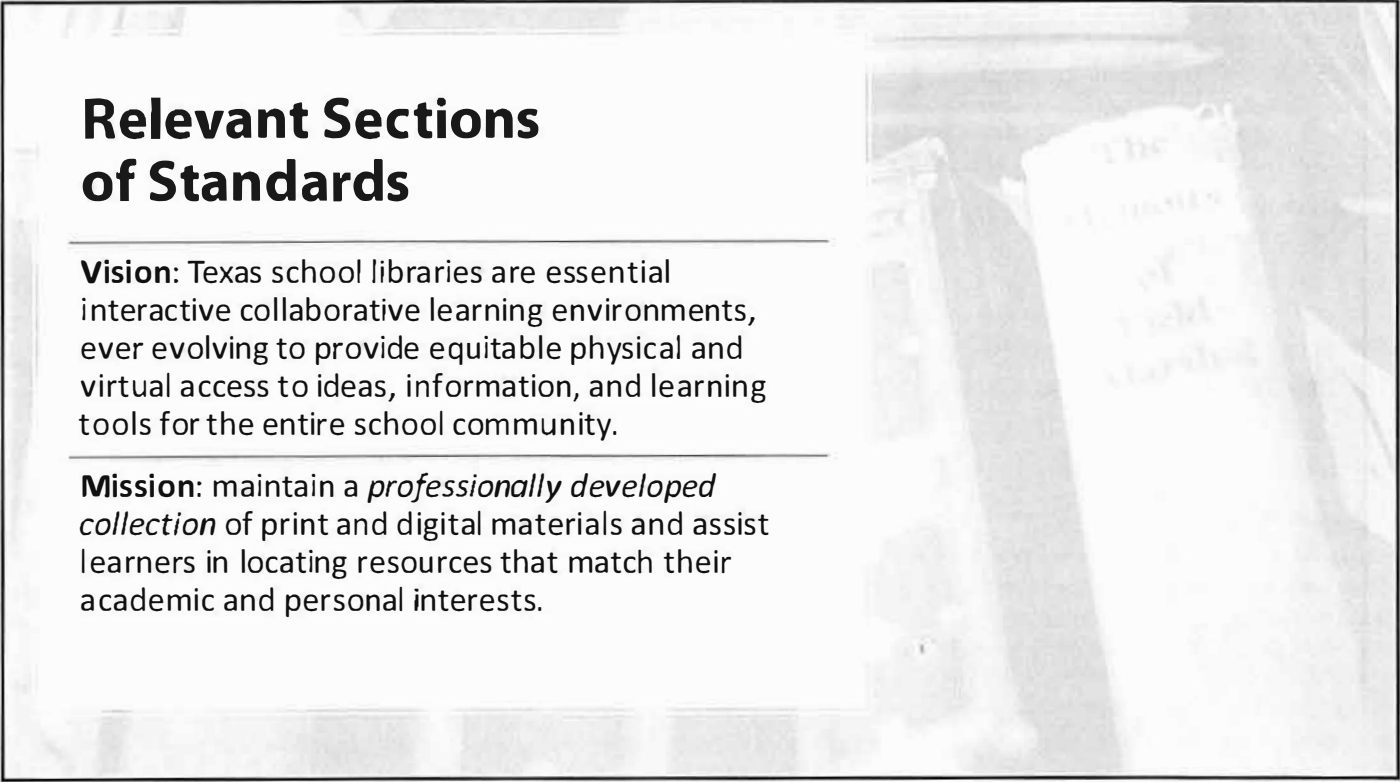
Board of Education v. Pico, 457 U.S. 853, 867-68 (1982)



Standards for School Libraries

Policy EFB (LEGAL):

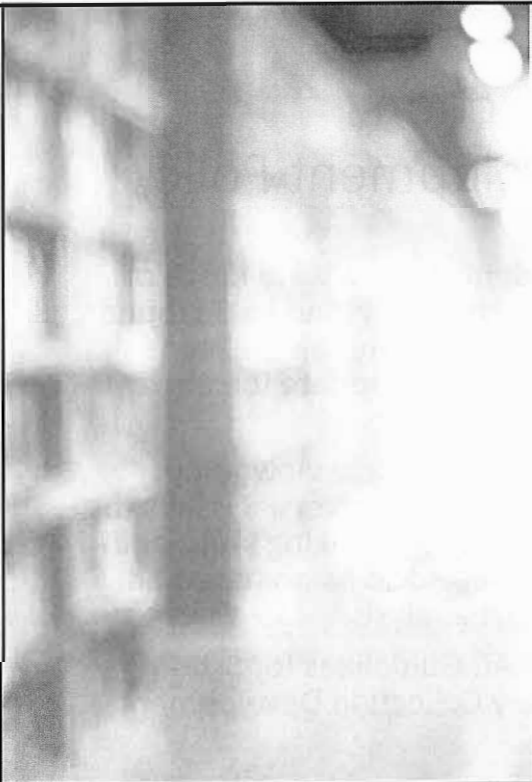
- *The School Library Programs: Standards and Guidelines for Texas* are adopted by the Texas State Library and Archives Commission. The standards and guidelines are applicable to local Texas school districts. 13 TAC 4.1
- A school district **shall consider** the standards in developing, implementing,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



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.



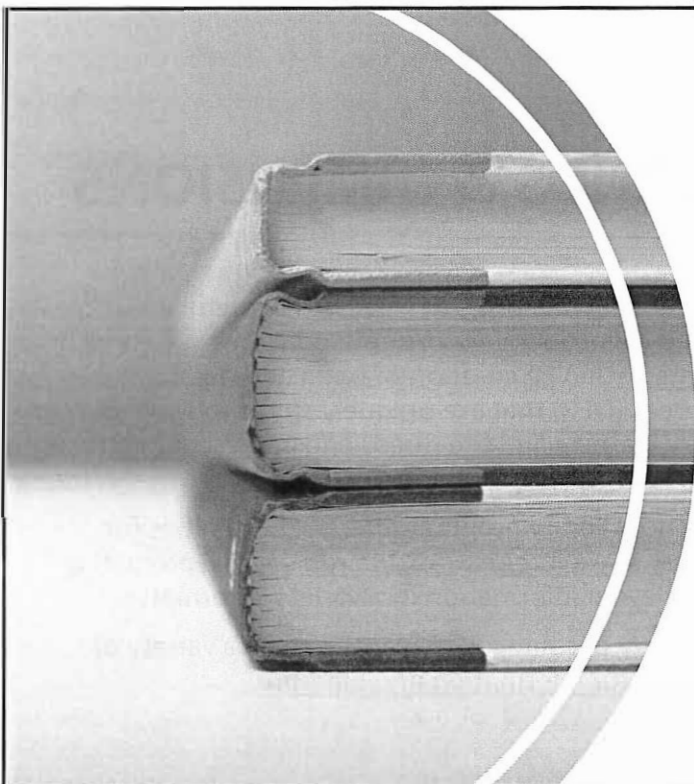
STRANDS & DIMENSIONS

- 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.



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).



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

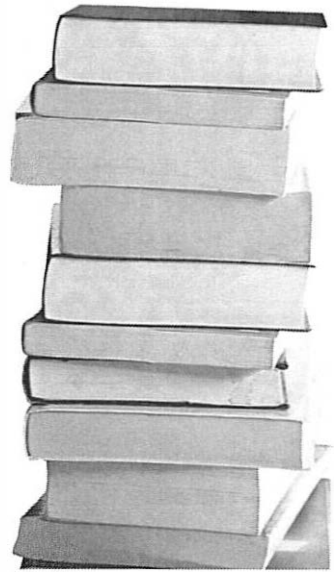
SCOTUS – Student Speech

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)



VOODOO & HOODOO



205 x 300

JIM HASKINS

5th 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)



5th 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.

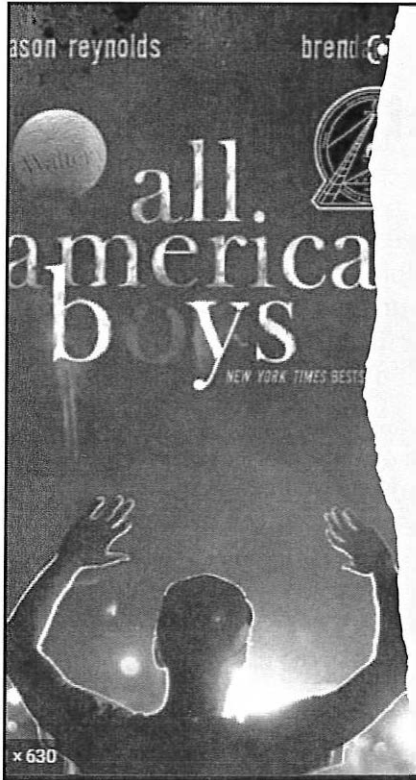
Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184 (5th Cir. 1993) (emphasis added)



5th 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'."

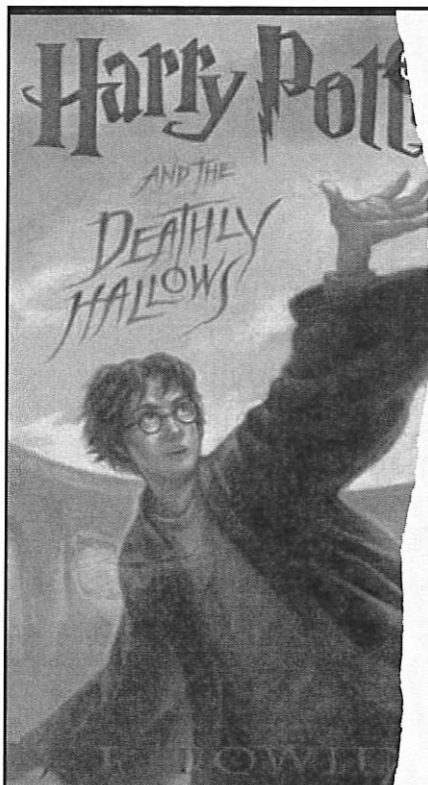
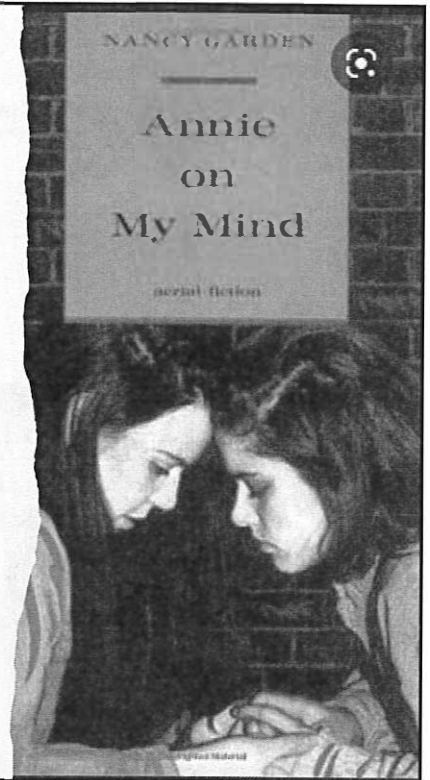
Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184 (5th Cir. 1993) (emphasis added)



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).

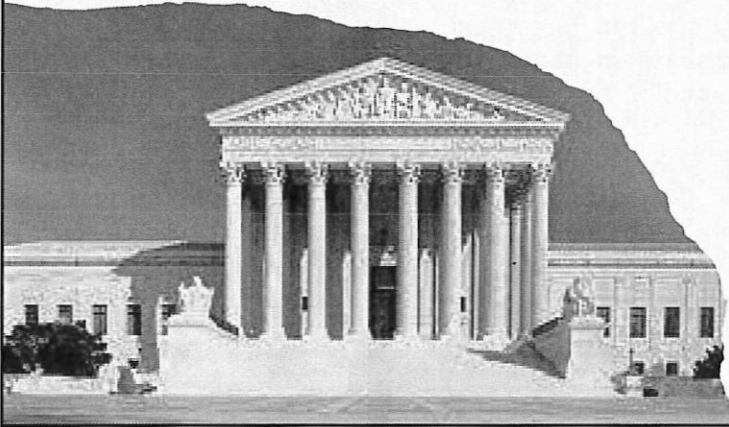


D. Ark. – Removal from Open Shelves

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).

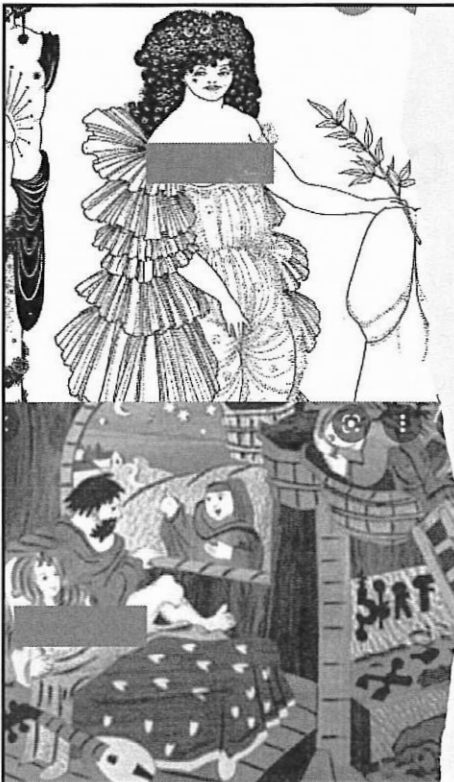
SCOTUS – “Educationally Unsuitable”



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.

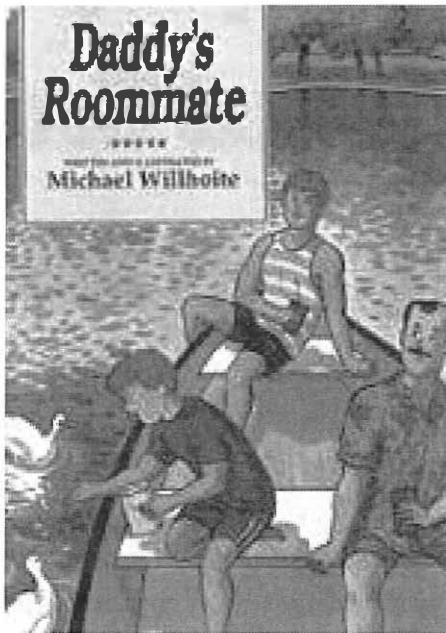
Pico, 457 U.S. at 871.



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)



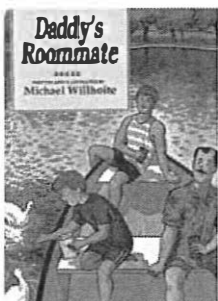
Sund v. City of Wichita Falls,
121 F.Supp.2d 530 (N.D. Tex.
2000) – Gay Themes



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.



★ ★ ★ ★ ★ **LGBTQ+ 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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