

SCHOOL LAW SECTION NEWSLETTER

July 2019 Edition



New Section Newsletter!

2018 Section Retreat Highlights

David Thompson: Kelly Frels
Lifetime Achievement Ward



Today's Hot Topic

Sarah Orman talks Title IX



Meet Your Chair!

Greetings from Mark Tilley

2019 Section Retreat

July 19th & 20th, 2019

Hyatt Los Pines Resort

See you
soon!

Editor

Meredith Prykryl Walker



Meredith Prykryl Walker is an experienced trial attorney for Walsh Gallegos in their Irving office. Meredith became the Newsletter Editor in late 2018 and recently served as the 2018 Retreat Planning Co-Chair for the School Law Section.

Interested in writing an article?

If you'd like to submit a piece for the Section Newsletter, we'd be happy to highlight you! We are always looking for important topics in school law and relevant news from across the state.

Please email Meredith at MWalker@wabsa.com if you are interested!



Refreshed Section Newsletter



Connecting our Section one edition at a time...

By Meredith Prykryl Walker



What a Year to Remember!

Meredith Prykryl Walker (Walsh Gallegos) with Amanda Moore (TSTA)

The 2018 School Law Section Retreat was another resounding success. I would venture to say that our retreat is unlike any other retreat in the State Bar of Texas as it brings together practitioners from both sides of the bar for great CLE with the added bonus of getting to know everyone's families. I also know that the collegiality evidenced each year at the School Law Section Retreat is something that our Section prides itself on. And I want this collegiality to spill over into the newsletter, but I need your help to make that happen!

In addition to highlighting a School Law Section member in each issue of the newsletter, we want to know what is happening with our Section members. Did you change firms? Open your own practice? Get married? Have a baby? If so, we want to know about it. We also want to know about your ideas for the newsletter moving forward. In addition, I want to give a special thank you to Christopher St. James for his time and effort in helping me get my first newsletter off the ground.

David Thompson

Winner of the 2018 Kelly Frels Lifetime Achievement Award

by Christopher St. James



There are few names in the School Law Section of the State Bar of Texas as recognizable as David Thompson, co-founding partner of the law firm Thompson & Horton LLP. You may know him for his decades-long contribution to legal issues concerning public education, but do you know what crop he would grow on his hypothetical farm; or what he would do with a superpower of his own choosing?

We caught up with Mr. Thompson at his office and he was more than willing to indulge us by answering our silly questions in a light-hearted interview. Our hope is that we could shed just a little light on a different side of one of our most well-known colleagues.

Tell us something about the most interesting small town in Texas you have visited.

DT – I always try to find time while travelling to get off the freeways and take the two-lane roads that go through town centers. I enjoy looking at communities and how they've grown over the years. Fort Davis sticks in my mind. It's in a very remote part of the state [150 miles southwest of Odessa]. You have to want to be there. It's just extraordinary country including Indian Lodge and the McDonald Observatory.

What sport would you play professionally if you had the talent?

DT – I would play golf. I still play, but it depends on the day whether I have any talent. [David paused to share with

me a recent gift he had received. A frame containing four majors flags, each from the 18th hole of their respective tournament: the 2017 Masters flag signed by winner Sergio Garcia, the 2017 U.S. Open signed by winner Brooks Koepka, the 146th British Open signed by Winner Jordan Spieth, and the 2017 PGA Championship signed by winner Justin Thomas. The prize was still wrapped in plastic because, David explained, he hasn't decided whether to put it on the wall in his office or at home.]

If you could be granted a superpower, what would it be?

DT – I would want the power to heal people.

What was the most important decision you ever made, that did not seem like a big decision at the time you made it?

DT – When I was a third-year law student I had never considered working at the state capitol as a career, but I thought it might be interesting before leaving Austin. I got a meeting with the speaker of the house to talk about part time jobs for law students. The Speaker gave me a choice to work on either Savings & Loan, or School Finance. I told the Speaker I would gladly do either, but if I had my choice I would probably rather do school finance. That's the decision that led to my now 40+ year career in school law.

If you were trying out for a singing reality show, name a song that you have memorized that you would sing?

DT – Amazing Grace. [I asked him to

sing it for me and let me record it, but he declined. Respectfully.]

Describe a character from a movie that you most relate to.

DT – Like many lawyers, I relate to Atticus Finch from To Kill a Mockingbird, but I also relate to Harrison Ford from the original Indiana Jones movie, and a lot of Tom Hanks characters. He always just seems to play good, likeable people. [Who 'doesn't' relate to Forrest Gump, or Jimmy Dugan, from "A League of Their Own"?)

What is the most impressive physical feat you have ever completed?

DT – Right after law school, for a number of years, I would go off-trail hiking and backpacking for two weeks every summer. In one summer, we took a multi-day hike up and over the Tetons from Wyoming to Idaho. This was 30 miles or so, but quite a feat considering the very steep mountain pass terrain.

Do you have any advice for a young school lawyer?

DT – You've picked a wonderful area of practice. There hasn't been a single time in my life where I have not been happy about this practice. We work with wonderful clients who are trying to do great work to help society. We have so many outstanding colleagues on all sides. Keep learning! Even at this point in my life I still run into issues or questions on a regular basis that are brand new; issues that I have never heard about or through about before.

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Hot Topic!

Title IX

Sarah Orman



As school attorneys, you are, no doubt, aware that Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal funds. You probably also know that Title IX has revolutionized school athletic programs and applies to sexual harassment. But did you know that neither Title IX, nor its implementing regulations, contains the word “harassment”?

Our current understanding of how Title IX applies to sexual harassment stems not from legislation or formal rulemaking but from a series of decisions by the U.S. Supreme Court in the 1990s that defined how and when an educational institution could be held liable for sexual harassment in an educational program or activity. See *Gebser v. Lago Vista Indep. Sch. Dist*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

Take a look at today’s media, and you might think that Title IX applies exclusively to colleges and universities. But, in fact, with rare exceptions (such as rules for admission), Title IX applies to K-12 schools in the same way as institutions of higher education. *Gebser* and *Davis* involved K-12 schools, but these cases define standards for liability for colleges and universities as well as school districts. So, too, written

guidance from the U.S. Department of Education’s Office for Civil Rights (OCR) applies to both higher education and K-12 schools, but is often easier to implement in a higher education context.

For example, OCR’s Dear Colleague Letter on Title IX Coordinators advises, “Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role’s responsibilities.” U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter on Title IX Coordinators, (April 24, 2015) at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>. Of course, it is true that a full-time Title IX coordinator would be better equipped to handle all the responsibilities envisioned by OCR’s guidance, but it is rare to find a school district able to devote a full-time staff member to Title IX. For a more realistic depiction of how Title IX coordinators function in K-12 school districts, see “Title IX Coordinators as Street-Level Bureaucrats in U.S. Schools: Challenges Addressing Sex Discrimination in the #MeToo Era,” Meyer, E.J., Somoza-Norton, A., Lovgren, A., & Quantz, M., Education Policy Analysis Archives, Vol. 26, Num. 68 (2018) at <https://epaa.asu.edu/ojs/article/view/3690>.

On November 16, 2018, the U.S. Department of Education released new proposed regulations designed to clarify how Title IX applies to sexual harassment. In large part, the agency was motivated by litigation by male students in higher education alleging that OCR's prior guidance resulted in a lack of due process. See, e.g., *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) *reh'g denied* (requiring college procedures for adjudicating sexual misconduct to allow accused student to cross examine accuser where determination of responsibility rests on credibility). The proposed rules have prompted an outcry that may be unprecedented in the annals of federal notice-and-comment rulemaking. Has there ever been anything quite like Alyssa Milano's scathing, Dr. Seuss-inspired video, "A Story of #OneShIXttyGif"? This author has her doubts.

Milano and others are concerned that the substantive parts of the proposed regulations—establishing a legal duty to respond to sexual harassment only when a school has "actual knowledge of sexual harassment in an education program or activity" and finding liability when the school responds with "deliberate indifference"—will have a chilling effect on reporting sexual violence. Others believe that these changes would promote fairness and clarity by bringing OCR's standards in line with *Gebser* and *Davis*. While this debate plays out on the stage of public opinion, careful readers of the proposed regulations might develop a different set of concerns based not on substance but on procedure.

For example, the proposed rules would require district policies for investigating claims of sexual harassment to include: a formal complaint; written notice of the allegations to the respondent, provided in enough time to prepare a response before an initial interview; equal opportunity for both parties to present witnesses and

evidence and have an advisor of their choice; and a requirement that a written investigative report be shared with the parties before the district holds a hearing or issues a final determination. The rules would also prohibit using a "single-investigator" method, requiring a decision-maker who is not the same person as the Title IX coordinator or the investigator. While holding a live hearing would only be required in higher education, the remainder of these requirements would apply to K-12 schools.

Attorneys on both sides of the school law bar have reason to get ready for the changes that might be coming. Notably, the proposed rules would provide that actual notice of sexual harassment could be based on knowledge by: (1) the Title IX coordinator; (2) any official who has authority to institute corrective measures on behalf of the district; or (3) with regard to student-on-student sexual harassment in K-12 schools, a teacher.

While the future of the Title IX regulations is unknown, it appears certain that K-12 schools are, once again, caught up in a maelstrom of litigation and political controversies that prompted OCR's shift to encourage greater due process, even at the risk of discouraging victims of sexual harassment from coming forward. School districts and their employees may have to learn a new set of rules when many were struggling to apply the previous ones. As another Hollywood actress once said, "Fasten your seatbelts, it's going to be a bumpy night."

Sarah Orman is a Senior Attorney at TASB Legal Services, where she advises school district officials on a variety of legal issues. Sarah is also a frequent presenter at state and national conferences on a variety of topics, including Title IX, school safety, student privacy, special education, and student discipline.



Meet Your Section Chair,

Mark Tilley

Welcome to the School Law Section of the State Bar of Texas. I am happy to be a member of the Section and honored to serve as its Chair for 2018-19. The School Law Section is comprised of a wide range of legal practitioners who represent parents, students, employees, institutions, governing bodies, state agencies, and education-related associations. Despite this diversity of interests, the School Law Section is unique in its collegiality and the professional cooperation among its members. I believe this arises from the fact that, despite our differing constituencies, we all understand the importance of education. While we may at times be adversaries, we are all focused on the greater good of doing what is best for the children of Texas.

To that end, this section is dedicated to providing its members with information on the legal issues that arise in public schools, junior colleges, and universities

in Texas. We do that in a variety of ways, including the annual School Law Conference and the Section's Annual Summer Retreat. The Summer Retreat is scheduled for July 19 and 20 at the Hyatt Lost Pines Resort in Bastrop - hurry and register while space is available!

In addition to our continuing education conferences, the section publishes this newsletter as a forum for providing information on school law topics to our members. If you would like to contribute an article, have ideas for topics to include, or want to be involved in the production of this publication, please contact Meredith Walker. If you want more information on the School Law Section or how to get involved you can visit our website or contact any officer or director of the section.

- Mark

We Want to Hear From You!

If you have someone you want to highlight in the Section, news to share with your fellow members, or suggestions for content or fun items you would like to see, please email Meredith Walker at MWalker@wabsa.com

David Thompson continued...

If you had a time machine and could travel back to any date in history, what would it be? Why?

DT – I would go to April 1865. I would travel to the Ford Theater in Washington D.C., and I would do whatever I could to stop John Wilkes Booth. I love history and I am an admirer of Abraham Lincoln for obvious reasons.

What food could you not live without?

DT – It's a hard choice between Mexican Food (favorite Molina's) and Barbecue (Pappas BBQ). Oh, and then there's also Whataburger!

Tell me three facts about you. Two true. One lie.

- 1. I have been married to Tamara for 38 ½ years*
- 2. I have two wonderful daughters who are both school teachers*
- 3. I have never made a mistake in my life.*

[It says something that David Thompson took this approach to this question. Instead of reveling in the opportunity to stump the interviewer and the reader with a devious lie, he took the opportunity to express pride in his family. David went on to tell us that he met Tamara after law school at University Avenue Church of Christ in Austin. David's parents were married in this church, as was his brother Mark, and ultimately David and Tamara tied the knot here as well.]