



Newsletter Co-Editors
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School Law Section

State Bar Section Report

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A MESSAGE FROM YOUR CHAIR

Dear School Law Section Members:

Thank you for giving me the opportunity to serve as Chair of the School Law Section. The collegiality shared among our section members makes us unique, and I believe it contributes positively to the section's programs and offerings. Included among those are this newsletter, the UT School Law Conference and the annual Section Retreat.

Our most recent Section Retreat was held at the Hyatt Hill Country Resort in San Antonio. We were honored to present the Kelly Frels Lifetime Achievement Award to two pillars in our community, Janet Horton and Jim Walsh. Their contributions to the Section have been invaluable and we were grateful to have the opportunity to acknowledge their careers and achievements. Many thanks to Fred Stormer, the immediate Past Chair, Jamie Turner and Ross Mitchell, the Program Chairs for the Retreat, the members of the 2016-2017 Executive Committee and all others who helped make the retreat a great success. This year's retreat will again be at the Hyatt Hill Country Resort on **July 26-28, 2018**. I hope to see you there.

This year the UT School Law Conference will be **February 22-23, 2018**, at the AT&T Conference Center in Austin. The planning committee has begun its work to put together an informative and engaging program, and I appreciate their efforts in that regard. The UT School Law Conference is a great opportunity to earn CLE that will be useful in your practice as a school law attorney. It is also a source of valuable training for school board members, administrators and education policy makers.

Finally, the School Law Section is pleased to produce this newsletter. Leticia McGowan has served as editor of the newsletter for many years, and this year Paige Williams will serve as co-editor. If you have ideas for future articles or would like to make a contribution to a future issue, please contact them at lmcgowan@dallasisd.org or legal@tcta.org.

As we began the 2017-2018 school year, our Gulf Coast communities were devastated by Hurricane Harvey. Many of our school districts were forced to delay the beginning of the school year and, as of the date of this message, some have yet to reopen. The recovery effort will be long and difficult. In an effort to assist those who have lost so much, the School Law Section has authorized a contribution of up to \$10,000 to match Section members' contributions to charitable organizations who are assisting with the rebuilding. Please contact me at legal@tcta.org for information about eligible contributions and how to claim matching funds.

It is an honor to serve as your Chair. If I can be of any assistance to you, please feel free to contact me at the above email address or call me at **1-888-879-8282**.

Best regards,
Julie D. Leaby
Section Chair 2017-2018

LEGISLATIVE UPDATE FROM THE 85TH LEGISLATURE

Joy Baskin

TASB Director of Legal Services

The regular session of the 85th Texas Legislature adjourned on May 29, 2017, with 1,211 bills having passed. Fifty of those bills were vetoed by Governor Greg Abbott. The Texas Association of School Boards identified 244 of the remaining passed bills as having an impact on public education. These bills are summarized in TASB's 2017 *Legislative Summary for School Officials* and will be incorporated into Update 109 to the TASB Policy Reference Manual.

Legislative efforts continued with a special session commencing on July 18, 2017. The results of special session legislation did not significantly impact school districts. Highlights of the regular session are described below.

Financial Matters

Very little regular-session legislation will affect school finance. Subject to appropriations, **House Bill 1081** increases the New Instructional Facilities Allotment for the first two school years after a new campus opens to cover operational expenses associated with a new or repurposed facility.

School districts may choose from several new options for authorized investments, with changes to available mutual fund options in **House Bill 1003** and changes to interest-bearing bank deposits, CDs, and federal obligations in **House Bills 2647** and **2928**.

Senate Bill 754 allows a school district and its depository bank to agree to extend a depository contract for three additional two-year terms. The bill further states that the contract may be modified as part of each two-year extension if both parties agree.

Finally, a trio of bills made substantial changes to the Teacher Retirement System. **House Bill 3976** eliminated any no-cost plan for TRS Care and requires retirees to choose one of three plans: a high deductible plan for retirees under 65, a Medicare advantage plan, or a Medicare prescription plan. Both the state and local district contributions have been increased. **Senate Bills 1663** and **1664** make further refinements to TRS, including clarifying when a rehired retiree is considered employed by a district during the 12 months after retirement, including working as an independent contractor or as a volunteer with an agreement to continue after the 12-month period.

Data Privacy

House Bill 2087 adds a new subchapter to the Texas Education Code to protect and restrict the use of personally identifiable student information gathered by operators of computer services that interact with school districts. The bill prohibits certain uses of personally identifiable information, including the use or sale of student information for the purpose of targeted advertising. Exceptions to the restrictions include using covered data to improve the functionality of the software, to comply with legal requirements, or for certain educational and research purposes.

Seat Belts

Senate Bill 693 requires a bus model year 2018 or later that is operated by or contracted for use by a school district for the transportation of schoolchildren to be equipped with a three-point seat belt for each passen-

ger, including the operator. However, a board of trustees can determine by a vote in a public meeting that the district's budget does not permit the district to purchase buses equipped with the required seat belts.

Construction

House Bill 3270 amends the criminal history background check requirements for contract employees by adding specific provisions applicable to public works contractors. Employees of a contractor or subcontractor who are not certified by SBEC must undergo a national criminal history record check if they are on a project to design, construct, alter, or repair a public work. Employees subject to this background check are not also subject to the checks for contractors under Texas Education Code section 22.0834.

In addition to extending to state agencies the same indemnification, duty to defend, and standard of care provisions previously applicable to local governmental agencies (including school districts), **House Bill 3021** removes the requirement that a local governmental contract for engineering or architectural services must require an engineer or architect to perform services with the skill and care provided by competent engineers or architects practicing *in the same or similar locality*. The bill adds a provision stating that nothing prohibits a governmental agency from including and enforcing conditions that relate to the scope, fees, and schedule of a project in a contract for engineering or architectural services.

Elections

Two bills changed the procedure for canvassing elections. **House Bill 929** changed the time period for the canvass in all elections except those held on the date of the general election for state and county officers (the November uniform date in even-numbered years). **House Bill 1001** requires the presiding officer of the canvassing authority to note the completion of the canvass in the minutes or recording required under the OMA.

Several bills made changes related to the preparation of ballots. Specifically, **House Bill 2157** requires a candidate's application for a place on the ballot to be signed and sworn to before a person authorized to administer oaths, such as a notary. **Senate Bill 44** establishes new procedures for challenging a candidate's application for a place on ballot. **House Bill 1661** allows an authority responsible for preparing ballots to omit a candidate from ballot (and in appropriate circumstances, cancel the election) if a candidate files a late, but otherwise valid, request to withdraw and the ballots have not yet been prepared. **Senate Bill 957** specifies the order in which propositions will appear and be identified on ballots, with constitutional amendments first, followed by statewide and local propositions.

Finally, **House Bill 25** will eliminate straight-party voting as of September 1, 2020, and **Senate Bill 5** is the Legislature's most recent version of a voter identification law. Voters must show either one form of specified photo identification or one form of other specified identification accompanied by a declaration of reasonable impediment.

Educator Misconduct

In addition to expanding the Texas Penal Code prohibitions of improper relationships between educators and students and online solicitation of a minor to cover more instances of misconduct, **Senate Bill 7** expands reports of potential educator misconduct and criminal history to include educators employed by or seeking employment by districts of innovation and charter schools. Existing law required superintendents to notify SBEC if an educator's termination or resignation was "based on" evidence of misconduct; now the required notification is triggered if the educator was terminated or resigned and "there is" evidence that the educator engaged in specified misconduct.

This bill requires principals to notify superintendents no later than seven business days after the date of an educator's termination or resignation following an alleged incident of misconduct and no later than seven days after obtaining information about an educator's criminal record. In addition to permitting SBEC to sanction the credentials of an educator who does not report potential misconduct as required by law, the bill creates an administrative penalty for educators who fail to file reports under this section. Failure to provide timely notice with an intent to conceal an educator's criminal record or alleged incident of misconduct is a state jail felony. Moreover, this bill authorizes SBEC to suspend or revoke a certificate, impose other sanctions, or refuse to issue a certificate if a person helps another person to get a job at a school district or charter school and the person knew that the other person had violated the law by engaging in sexual misconduct with a minor or student.

School boards must adopt policies providing notice to the parent of a student with whom an educator allegedly engaged in abuse or otherwise committed an unlawful act. School board policy must also include provisions designed to prevent improper electronic communications between school employees and students and must allow a school employee to elect not to disclose to students a personal telephone number or e-mail address. The policy must tell an employee how to notify appropriate local administrators when a student engages in improper communications with the school employee.

This bill requires applicants for licensed positions to submit a pre-employment affidavit disclosing a charge, adjudication, or conviction based on an inappropriate relationship with a minor. The required form will be developed by TEA.

The bill specifies additional related requirements for educator preparation and continuing education. TEA's subpoena authority is expanded, investigation records are made confidential, and the commissioner of education may conduct a special investigation when a school district fails to produce, at TEA's request, evidence or an investigation report relating to an educator who is under investigation by SBEC.

The bill revises provisions relating to ending Chapter 21 contracts following an educator's loss of credentials due to misconduct. Finally this bill provides that a person who is a former or current public school employee and an annuitant or member of the retirement system will be ineligible to receive a service retirement annuity from TRS if the retiree was convicted of one of several specified felonies and the victim was a student.

Certification

House Bill 2039 requires SBEC to establish an early childhood certificate to ensure that there are teachers with training focused on prekindergarten through third grade. This certification will not be required to teach in those grade levels, however.

School Board Governance

Senate Bill 1566 addresses a variety of topics related to local district governance. First, a board may require a district's chief business official, curriculum director, or person holding an equivalent position to appear at a closed session of the board or to testify at a public hearing of the board. Board members acting in their official capacity have an inherent right of access to district information, and a district must respond to a board member's request for records not later than the 20th business day after the date the district receives a board member's request, subject to a brief extension. If a district does not timely provide the requested information, a member may bring suit against the district for relief. A district must create a policy on board member visits to district facilities.

In addition to existing training requirements, this bill adds that a trustee must complete at least three hours of training every two years on evaluating student academic performance. This bill changes the process for public notice as to a board member's training. The minutes of the last regular meeting of the board of trustees held before an election of trustees (instead of the last meeting of the calendar year) must reflect whether each trustee has met training requirements. Minutes that reflect a deficiency must be posted on the district's internet website within 10 business days of the meeting and remain posted until the trustee meets the requirements.

This bill includes numerous provisions related to board oversight of student academic achievement. A school board or the governing body of an open-enrollment charter school must provide oversight regarding student academic achievement and strategic leadership for maximizing student performance. The commissioner may develop an optional board self-evaluation tool, and upon request of a district's school board, TEA shall create an internet website for board members' and campuses' review of campus and district academic achievement data.

Beginning with the 2017-18 school year, school boards must adopt policies requiring notice of lice by a public elementary school nurse and allowing a campus principal at the beginning of each school year to provide representatives of a patriotic society an opportunity to speak to students during regular school hours. However, under this bill, a school board is not required to address a complaint concerning a student's participation in an extracurricular activity that does not involve a violation of a right guaranteed by Chapter 26 or a claim under the Individuals with Disabilities Education Act.

A school district or charter school may not prohibit a person, including a school employee, who holds a Texas license to carry a handgun, from transporting or storing a handgun or other firearm or ammunition in a locked, privately owned or leased motor vehicle in a parking lot, parking garage, or other parking area provided by the district or charter school, provided that the handgun, firearm, or ammunition is not in plain view.

A school district designated as a district of innovation must post and maintain a copy of the district's current local innovation plan in a prominent location on the district's internet website.

Finally, the bill provides for the Dallas County Schools, which provides transportation services to many districts in North Texas, to be abolished unless continuation is approved at a November 2017 election held in Dallas County. If continuation is not approved, the bill provides for a dissolution process with operations to continue only through the 2017-18 school year.

Under **House Bill 2552**, a person is not eligible to serve as a school board member if the individual has been convicted of the offense of prostitution under Texas Penal Code section 43.02(b).

Open Meetings Act

Senate Bill 1440 adds that the definition of a meeting subject to the OMA does not include the gathering of a quorum of a governmental body at a *candidate forum, appearance, or debate to inform the electorate*, as long as no formal action is taken and any discussion of public business is incidental to the event.

Under the OMA, school district that has a student enrollment of 10,000 or more must make a video and audio recording of reasonable quality for each regularly scheduled open meeting and must make available an archived copy of the video and audio recording on the internet. **House Bill 523** expands the video and audio recording requirement to an open meeting that is a work session or special called meeting if the board votes on any matter or allows public comment or testimony.

House Bill 3047 addresses confusion as to whether a meeting by videoconference under Texas Government Code section 551.127 may continue if the connection to a member attending by videoconference is lost or disconnected.

Senate Bill 564 expands a closed meeting exception that allowed the Department of Information Resources to meet in closed session to deliberate: security assessments or deployments relating to information resources technology; network security information; or the deployment or specific occasions for implementation of security personnel, critical infrastructure, or security devices. The exception is now available to any governmental body, including a school board.

Public Information

House Bill 3107 makes a number of procedural changes to how governmental bodies, including school districts, will respond to PIA requests. For example, a request that is more than 60 days old is considered to have been withdrawn if the requestor fails to inspect or duplicate the records by that time, and all requests received in one calendar day from an individual may be treated as a single request for purposes of calculating costs under the PIA. In addition, a governmental body may set reasonable monthly and yearly time limits for the purpose of recovering personnel costs from a requestor. The bill also clarifies how governmental bodies may respond when requestors fail to pay for requested information.

Accountability

House Bill 22 amends the current five-domain accountability system by reducing the domains to three: (1) student achievement; (2) school progress; and (3) closing achievement gaps.

The commissioner may study the feasibility of adopting an additional indicator that accounts for extracurricular and cocurricular student activity. Like the prior accountability system, this bill includes A-F letter performance ratings; however, a “D” rating will reflect performance that “needs improvement,” rather than being unacceptable. The commissioner will have rulemaking authority and set a transition plan. Each school year, the commissioner will provide each school district a simple, accessible document that explains the accountability performance measures and procedures. Finally, the commissioner will adopt rules for the approval of local accountability systems, in which up to half of a district’s performance ratings are assigned by the local school district or charter school.

Senate Bill 1882 allows a district to contract for the operation of a campus with either an open enrollment charter school or, with commissioner approval, an entity eligible to be granted a campus charter. If a district enters such a contract, the district will receive per-pupil funding for that campus’ enrollment at the higher calculation for a charter school. The campus will also be exempt for two years from any applicable accountability sanctions.

Assessments

Senate Bill 825 makes it optional for a district to administer a nationally norm-referenced preliminary college preparation assessment to students in the spring semester of 8th grade or to students in 10th grade. Students in the spring of the 11th or 12th grade may still select and take once, at state cost, a college preparation assessment as described in the Texas Education Code section 39.0261.

Under **Senate Bill 463**, individual graduation committees may continue to be used to determine eligibility for graduation for students who failed to meet the end-of-course assessment requirements for graduation.

This bill requires the commissioner to establish a procedure for students to qualify to graduate and receive a high school diploma if they entered ninth grade before the 2011-12 school year and did not perform satisfactorily on an assessment required for high school graduation. Effective September 1, 2019, this bill prohibits a school district from administering an assessment instrument required for graduation before September 1, 1999 (the TAKS test). **Senate Bill 1031** also called for the replacement of the TAKS test.

Instruction

House Bill 2442 repeals Texas Education Code section 25.082(a), which stated that a school day shall be at least seven hours each day, and modifies the law to provide that a district must operate (not provide instruction) for at least 75,600 minutes each year, including time allocated for instruction, intermissions, and recesses for students. The bill includes exceptions for half day programs, like pre-k, and certain specialized programs like DAEPs and dropout recovery schools.

Student Issues

Effective September 1, 2017, **Senate Bill 179**, also known as “David’s Law,” expands district jurisdiction for off-campus cyberbullying, requires school districts and charter schools to adopt certain practices and procedures to prevent and respond to bullying and cyberbullying, and establishes civil and criminal consequences for certain types of bullying. The bill adopts new, more comprehensive definitions of *bullying* and *cyberbullying*. The bill requires district policy to include procedures for a student to anonymously report an incident of bullying and to require notice of an incident of bullying to a parent or guardian of an alleged victim on or before the third business day after an incident is reported. The bill also permits a school district or charter school to place in DAEP or expel a student who engages in certain types of bullying, including “suicide baiting.”

A principal or designee may make a report to law enforcement if, after an investigation, the principal has reasonable grounds to believe that a student engaged in conduct that constitutes an assault under Texas Penal Code section 22.01 or criminal harassment by repeated electronic communication under Texas Penal Code section 42.07.

The bill requires professional development, and TEA must establish and maintain a website to provide resources for school employees regarding working with students with mental health conditions, including information about grief and trauma-informed practices and building a supportive school climate. School counselors are to serve as impartial, non-reporting resources for interpersonal conflicts, including accusations of bullying, subject to mandatory reporting requirements.

Finally, the bill creates two new judicial remedies for bullying. Chapter 129A of the Texas Civil Practice and Remedies Code establishes procedures for obtaining a restraining order when a minor is the victim of cyberbullying. The bill also expands the definition of criminal harassment by electronic communication under Texas Penal Code section 42.07. While criminal harassment is typically punishable as a Class B misdemeanor, this bill creates a Class A misdemeanor offense for harassment of a minor by electronic communication with the intent that the child commit suicide or engage in conduct causing serious bodily injury to the child or for harassment by electronic communication when the actor has previously violated a cyberbullying court order.

Beginning with the 2017-18 school year, **House Bill 674** limits out-of-school suspension of a student in kindergarten through second grade and provides criteria for an optional positive behavior program for students in these grades. A district may still suspend a student in kindergarten through second grade if, while

on school property or attending a school-sponsored or school-related activity, the student commits an assault, a weapons offense, or misconduct involving drugs or alcohol.

Special Education

Responding to media and parental concerns about potential under-identification of students with special needs by districts trying to conform to a now-repealed TEA performance indicator, **Senate Bill 160** prohibits the commissioner or TEA from adopting or implementing a performance indicator in any agency monitoring system that measures a school district's aggregated number or percentage of enrolled students who receive special education services.

Senate Bill 1398 addressed implementation of a 2015 law on video cameras in special education classrooms. Beginning in the 2017-18 school year, this bill limits the classrooms in which a district is required to install video cameras upon request by a parent or staff member to a self-contained classroom or other special education setting in which the parent's child is educated or the staff member is assigned. This bill removes an individual trustee's right to request a video camera, but a board of trustees may request cameras for one or more campuses. This bill clarifies that the camera must be operated for the remainder of the school year in which the request was received, and requires parental notice before the cameras are turned off. District policy must require that cameras be operational within 45 days of an authorized request, unless TEA grants an extension. This bill also reduces the time period for retaining video recordings to three months. However, when a parent or employee involved in an alleged incident reported to the district requests access to a video recording, the district must retain the recording at least until the person has viewed the recording and a decision has been made as to whether an incident occurred.

Beginning with the 2017-18 school year, **Senate Bill 1153** requires a district to provide annual notice to the parent of each child in general education to whom the district or school provides assistance for learning difficulties, including intervention strategies. The bill also requires TEA to adopt rules for each school district and charter school to report annually through PEIMS the total number of students receiving intervention strategies. **House Bill 1886** requires screening or testing as appropriate, for dyslexia for every kindergarten and first grade student.

Safety

Senate Bill 1553 requires a registered sex offender to notify the administrative office of a school when the individual enters the premises of a school during the school's hours of operation. *Premises* includes not only the building, but also the grounds of the school. Exceptions include a student enrolled at the school or enrolled at another school but participating in an event at the school, or a person who has entered a written agreement with the school that exempts the individual from these requirements.

This bill also requires school districts to adopt and explain to the public new provisions regarding refusal of entry or ejection from district property, including the appeal process. The new provisions state that a school administrator or peace officer may eject an individual from, or refuse an individual entry to, property subject to the district's control if the individual refuses to leave peaceably upon request and either the person poses a substantial risk of harm to any person; or the person behaves in a manner inappropriate for the school setting, an administrator or officer issues the individual a verbal warning, and the individual persists in the behavior. The commissioner of education has rulemaking authority to implement this section, including to set an appeal process to the board of trustees for a decision to eject or exclude an individual.

PROTECTING PUBLIC SCHOOL STUDENTS FROM DISCRIMINATION, HARASSMENT AND RETALIATION

*John J. Janssen**
July 7, 2017

Introduction: Antidiscrimination law as promoting and protecting conditions for learning

This article seeks to (1) help identify unlawful discrimination, harassment or retaliation against students in public schools, (2) discern how public schools should respond to reports of discrimination, harassment or retaliation, and (3) explain what can happen if a discrimination, harassment or retaliation complaint is filed with the U.S. Office for Civil Rights (OCR). The primary objective here is to encourage proactive measures, aimed at helping reduce potential liability exposure for violations of civil rights law. But as a practical matter, attention to the process of preventing and properly responding to reports of discrimination, harassment and retaliation against students also should serve to promote the objective of reducing student exposure to such distracting, if not debilitating, conduct, so that they instead can focus on their academic programs and progress as students, and so that educators can do the same. This objective may resonate well with educators or administrators, as compared with framing the objective as merely a review of the legal implications of failing to take proper measures for reporting or responding to reports of discrimination or harassment.

As an introductory pedagogical exercise, Part I of this article consists of a review of several hypothetical scenarios, and is aimed at testing the reader's working knowledge of prototypical Texas public school antidiscrimination policy. Part II of the article focuses on the legal foundations of Texas public school policy, and what such policy requires in terms of reporting, investigating and otherwise responding to reports of discrimination, harassment or retaliation. Part III is a review of what can happen when a complaint is filed with OCR, including, but not limited to, the possible implications of OCR finding merit to a discrimination claim.

Part I: Testing working knowledge of antidiscrimination policy and law

The following are three hypothetical scenarios aimed at testing the practitioner's working sense of antidiscrimination law and policy. Following each scenario, some of the key points or lessons from each scenario, based on some general principles of antidiscrimination law, such as Title IX¹, Title VI², or Section 504³, and/or from the prototypical "FFH" policy in a Texas public school, are discussed. At Part II, key components of FFH policy and their legal underpinnings are detailed, which will provide greater insight as to how scenarios similar to those below should be handled.

Scenario #1:

At Anytown Texas Public School, Oliver consistently follows Vanessa through the hallways, commenting on her looks, making jokes about sex, and letting her know what he would do with her sexually if only she would let him. Vanessa tries to keep her distance from Oliver. She also does not want the attention that might follow if she reported Oliver's behavior. But the consistent comments and antics by Oliv-

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1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance).

2. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.

er have made it difficult for Vanessa to concentrate on her studies at times. Vanessa’s history teacher, Walt Watcher, notices that Vanessa seems disturbed by Oliver’s presence and antics, and has heard some of the sexually-charged comments. At one point, Mr. Watcher, concerned about how Vanessa appears in class (sad and forlorn), and knowing that Oliver has been teasing her, asks Vanessa if she’s okay. She says, “I’m fine. Thank you.” Vanessa continues to avoid Oliver when she can, and mostly ignores him. One day, Oliver increases the intensity of his comments and stays close to Vanessa as she walks to her Algebra class. Vanessa ignores most of his comments, but at one point, while he follows her down a stairwell, she firmly tells him, “Just quit it!” Oliver responds by forcibly groping her, telling her that he knows she wants him, and then running away. Mr. Watcher is on his way to his classroom and happens to hear the exchange. He sees Vanessa shaken up, and asks, “Are you okay? Do you need help?” Vanessa says, “I’m fine. Thank you.”

Immediate analysis: First, notice that Oliver’s actions, even before the physical conduct, are unwelcome conduct based on gender, and those actions are making it difficult for Vanessa to focus on her studies. These actions are within the ambit of all law and policy aimed at protecting students from sexual harassment in the schools, e.g., Title IX and FFH policy. Second, that Vanessa declines assistance from Mr. Watcher does not absolve Mr. Watcher of his responsibility to take action under the school’s policy for protecting students from discrimination, harassment or retaliation. Mr. Watcher’s employment status and whether the school could face some liability exposure may turn on whether Mr. Watcher takes action or instead does nothing. Third, the physical assault by Oliver raises this matter to a new level of seriousness. There are greater disciplinary consequences for Oliver, possible law enforcement implications, and possibly a greater negative impact on Vanessa. Again, that Vanessa declines assistance from Mr. Watcher does not absolve Mr. Watcher or the school of responsibility of taking appropriate action. The typical FFH policy in a Texas public school defines various forms of harassment, including sexual victimization, and has a provision that reads:

Any District employee who suspects or receives notice that a student or group of students has or may have experienced prohibited conduct shall immediately notify the appropriate District official listed in this policy and take any other steps required by this policy.

Part II of this article will examine who should receive notice within and what types of actions should be taken.

Scenario #2:

At Anytown Texas Public School, Tim likes to tease fellow students about various personal characteristics. He does this with friends and also with those who are mere acquaintances or passersby in the hallways. Many of the students think the comments are funny and not meant in a mean or pejorative way. But Johnny takes things a little differently and more personally. He is African-American and also has a speech impediment, and does not think the teasing is particularly funny. On any given day, Tim may make a comment to Johnny about his race or color in ways that some people reasonably would regard as a racial slur. Tim might also tease Johnny about his speech impediment at the same time. Tim keeps his distance. But because Tim is on the drama club and tennis team, and the faculty sponsor and coach, respectively, do not call Tim out on his teasing of students, Johnny stays away from both drama and tennis, two activities he would like to participate in. Johnny confides in his parents that Tim’s comments bother him, and that he wishes he could participate in drama or tennis, but does not want to have to be around Tim. Johnny’s parents contact the school campus, letting them know they have concerns about the teasing of their son in regards to ethnicity and disability and wanting to speak with someone about the situation. The Principal’s assistant provides them with the FNG (Local) complaint form.

Immediate analysis: Tim’s inappropriate comments may be taken as funny by many students, but how they may negatively impact some students is important—and part of the liability analysis if the school’s

responsive actions are the subject of a claim. That there has not been a sufficient number of complaints to give an administrator pause does not mean that Tim has the right to create a hostile environment for another student or students. The discriminatory nature of the comments, insofar as tolerated by the school, creates a potential liability issue for the school. Where Johnny complains, the school has to take appropriate action, and FFH (Local) or a comparable counterpart should serve as guidance. Even if Johnny or his parents did not complain to the school, the matter may yet take the form of an OCR complaint filed by the parents without prior notice to school. If the school were to fail to take appropriate action in regard to the racial epithets or teasing in regard to disability, moreover, the inaction might be viewed by OCR as evidence of conscious indifference toward Johnny's rights—and that would put the school even more sideways with the parents and possibly give them findings that they could incorporate into a private cause of action. For the campus to provide Johnny's parents with the general FNG (Local) complaint form, moreover, shows unfamiliarity with pertinent policy, and would not reflect well in an OCR review (or internal review) of the school's response or from within the prism of litigation. FFH (Local), that is, is school district policy that governs this situation, and complaints of racial or disability harassment do not proceed through FNG (Local) initially. Rather, they initially proceed through the FFH (Local) reporting and investigation procedure. FNG (Local) comes into the picture only as an appeal to action taken under FFH.

Scenario #3:

At Anytown Texas Public School, math teacher Bob is generally well-regarded by colleagues and students. Bob actively supports student activities, and is popular among many students. Some colleagues see him as a prominent administrator in the making. One of his teacher friends, Phil, consistently refers to Bob as a “stand-up guy.” But on a couple of occasions, Phil has noticed a female student going into Bob's classroom when there is not a class in session, and the door closes behind her. Phil does not recognize the student as one who is in any of Bob's classes, although she might be in one of the clubs Bob sponsors. Phil goes on about his job, but after the second instance in which he sees the student go into Bob's classroom and close the door, he later tells Bob that it is not a good idea to be alone in a classroom with a student with the door closed, and reminds Bob that the campus Principal has discussed this matter with the faculty. Bob says, “No worries. She's the daughter of a friend, and just wants a little help understanding some math concepts.” “Glad to hear it!” Phil replies, not hearing the chime of the text on Bob's cell phone as a message from the female student arrives in regard to their next rendezvous.

Immediate analysis: Schools conceivably may have their own unique policy as to whether students may be in a classroom alone with a teacher and whether doors are closed. But the upshot from this hypothetical (which was not pulled out of thin air) is that while Phil and Bob may be friends, Phil has observed behavior that probably should be reported to a supervisor for inquiry or investigation. This is not to say that Phil is accusing Bob or should be understood to be accusing Bob. But Phil needs to think about his obligations to the student and school and his interest in protecting his own educator's license—and needs to be open the possibility that more is happening than what Bob says. If there is any indication that Bob may be involved in an inappropriate relationship with the student, Bob should be placed on suspension pending investigation. Additionally, per OCR guidance, it also should be noted that a law enforcement investigation of sexual victimization does not absolve a public school of its responsibility to conduct its own internal investigation.⁴ The burdens of proof are different. The school has responsibilities and interests to protect irrespective of whether law enforcement determines there to be probable cause to charge someone with a criminal offense.

⁴. As per OCR guidance issued in 2001: “Once a school has notice of possible sexual harassment of students whether carried out by employees, other students, or third parties it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who harassed makes a complaint or otherwise asks the school to take action.” Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, Department of Education, Office for Civil Rights (January 19, 2001).

Part II: Key components of the typical FFH (Local) policy and their legal foundations

Discriminatory conduct as defined in policy and the legal foundations

Most Texas school districts have an FFH (Local) policy that would be implicated by each of the above scenarios. If there is a public-school entity that does not have an FFH (Policy) or its effective equivalent in place, it needs to adopt one. The prototypical FFH policy tracks federal antidiscrimination law. FFH defines unlawful “discrimination,” “harassment” and “retaliation.” The protected characteristics of race, gender, religion, color, national origin, and disability are all integral to these definitions.

“Discrimination” against a student is generally defined as: “conduct directed at a student on the basis of race, color, religion, gender, national origin, disability, or on any other basis prohibited by law, that adversely affects the student.”⁵

“Prohibited harassment” is defined as:

physical, verbal, or nonverbal conduct based on the student’s race, color, religion, gender, national origin, disability, or any other basis prohibited by law that is so severe, persistent, or pervasive that the conduct:

1. Affects a student’s ability to participate in or benefit from an educational program or activity, or creates an intimidating, threatening, hostile, or offensive educational environment;
2. Has the purpose or effect of substantially or unreasonably interfering with the student’s academic performance; or
3. Otherwise adversely affects the student’s educational opportunities.

This definition of harassment is grounded in federal antidiscrimination law. For example, a school district receiving federal funds may be liable under Title VI (relating to race, color and national origin) for student-on-student harassment if (1) the harassment was so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school, and the district (2) had actual knowledge, (3) had control over the harasser and the environment in which the harassment occurred, and (4) was deliberately indifferent. *Reed v. Kerens Indep. Sch. Dist.*, 2017 U.S. Dist., LEXIS 87024 *27 (June 6, 2017). Similarly, with respect to the elements of a student-on-student harassment claim based on disability, a plaintiff must show: (1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment. *See id.* at *33 (citing *Nevills v. Mart Indep. Sch. Dist.*, 608 F.App’x 217, 221 (5th Cir. 2015)).

FFH (Local) usually defines “dating violence” as a form of prohibited harassment, and “sexual harassment” is commonly defined under FFH (Local), as follows:

Sexual harassment of a student by a District employee includes both welcome and unwelcome sexual advances; requests for sexual favors; sexually motivated physical, verbal, or nonverbal conduct; or other conduct or communication of a sexual nature when:

1. A District employee causes the student to believe that the student must submit to the conduct in order to participate in a school program or activity, or that the employee will make an educational decision based on whether or not the student submits to the conduct; or

⁵ Various antidiscrimination laws generally address the various protected characteristics referenced. Title VI, for example, prohibits discrimination based on race, color or national origin. Title IX, as another example, generally prohibits discrimination based on sex in any education program or activity receiving federal financial assistance. *See* 20 U.S.C. § 1681(a). The U.S. Office for Civil Rights relies upon Title VI to protect students from religious discrimination based on a student’s actual or perceived shared ancestry or ethnic characteristics.

2. The conduct is so severe, persistent, or pervasive that it:
 - a. Affects the student’s ability to participate in or benefit from an educational program or activity, or otherwise adversely affects the student’s educational opportunities; or
 - b. Creates an intimidating, threatening, hostile, or abusive educational environment.

School districts can be liable for indifference to sexual harassment of students that is so severe, pervasive and objectively offenses that it can be said to deprive victims of access to educational benefits or opportunities provided by the school. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). FFH (Local) specifically advises that romantic or inappropriate social relationships between students and District employees are prohibited. Any sexual relationship between a student and a District employee is always prohibited, even if consensual. This aspect of policy, moreover, is underpinned by the Texas Penal Code. *See, e.g., Tex. Penal Code §§ 21.12, 22.011.*

Under FFH (Local), sexual harassment of a student by a student also is specifically defined:

Sexual harassment of a student, including harassment committed by another student, includes unwelcome sexual advances; requests for sexual favors; or sexually motivated physical, verbal, or nonverbal conduct when the conduct is so severe, persistent, or pervasive that it:

1. Affects a student’s ability to participate in or benefit from an educational program or activity, or creates an intimidating, threatening, hostile, or offensive educational environment;
2. Has the purpose or effect of substantially or unreasonably interfering with the student’s academic performance; or
3. Otherwise adversely affects the student’s educational opportunities.

Examples of sexual harassment of a student may include sexual advances; touching intimate body parts or coercing physical contact that is sexual in nature; jokes or conversations of a sexual nature; and other sexually motivated conduct, communications, or contact.

Again, this definition generally tracks antidiscrimination law, i.e., the interests of Title IX and some of the elements of a cause of action under Title IX.⁶

“Retaliation” is defined as retaliatory action “against a student alleged to have experienced discrimination or harassment, including dating violence, or another student who, in good faith, makes a report of harassment or discrimination, serves as a witness, or participates in an investigation.”⁷

Discrimination, harassment and retaliation as defined under the typical FFH (Local) are also typically referred to as forms of “prohibited conduct” under FFH (Local). But all of these forms of discrimination are conduct defined under law, and for which public schools may be liable if appropriate action is not taken with respect to reports of such conduct.

Discrimination issues are not bullying issues as defined under the typical FFI (Local) policy

With these definitions of various permutations of discrimination in mind, it also important to recognize that while bullying may be a type of harassing behavior, not all bullying meets the definition of harassment, discrimination or retaliation included in FFH (Local). So, bullying behavior that does not implicate the type

⁶. To assert a cause of action under Title IX for student-on-student harassment, a plaintiff must allege facts shown that: (1) the school had actual knowledge of the harassment, (2) the harasser was under the school’s control, (3) the harassment was based on the victim’s sex, (4) the harassment was so severe, persistent and objectively offensive that it effectively barred the victim’s access to an educational opportunity or benefit, and (5) the school was deliberately indifferent to the harassment. *Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).

⁷. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (recognizing Title IX’s privation cause of action encompasses suits for retaliation).

of conduct that is the subject of FFH (Local) would be processed under FFI policy, not FFH policy. But as a practical matter, upon initial review of a sexual harassment or victimization scenario, a racial harassment matter, or the bullying of a student with a disability—or any discrimination situation where a protected characteristic seems to be an asserted or explanatory factor—it may help to process the matter, at least initially, under FFH. If the matter is thereafter determined not to qualify under FFH, it would then be referred to FFI policy and procedure, as will be noted below.

Reporting prohibited conduct under FFH

The policy and interests at stake for public schools when presented with a report of discrimination, harassment or retaliation—including prompt and appropriate response, and protection of the school from liability exposure—depend on prohibited conduct being reported. The following are two components under the prototypical FFH policy in regard to reporting conduct prohibited under FFH (Local):

Student reporting—

“Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, counselor, principal, other District employee, or the appropriate District official listed in this policy.”

Employee reporting—

“Any District employee who suspects or receives notice that a student or group of students has or may have experienced prohibited conduct shall immediately notify the appropriate *District official* listed in this policy and take any other steps required by this policy.”

Notice that with respect to employees, *any* employee who suspects or receives notice *shall immediately* report it. Employees are to make sure any reports of prohibited conduct or possible prohibited conduct make their way to *designated district officials* with respect to various categories of discrimination. The district official or designee is to promptly notify the parents of any student alleged to have experienced prohibited conduct by a district employee or another adult.

Students are not required to report prohibited conduct to the person alleged to have committed the conduct. Further a report against the Superintendent may be made directly to the board. A report against the Title IX Coordinator of ADA/Section 504 Coordinator may be directed to the Superintendent.

Investigation

If upon receipt of a report of prohibited conduct or notice thereof, the district official or designated coordinator determines that the allegations, if proven, would constitute conduct prohibited under FFH, the district must immediately undertake an investigation. If the allegations would not constitute prohibited conduct under FFH, the official shall refer the complaint for consideration under FFI, *i.e.*, the bullying policy. A proper investigation can help avoid liability under antidiscrimination law. *See Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1000 (court found that the record evidenced a pattern of active responses by the school district to incidents involving the student)

There are various methods and considerations as to how to conduct a proper investigation. Most of that discussion is outside the limitations of this particular article. Some good guidance can be found in the prototypical FFH (Regulation). The following, nevertheless, are some key considerations and/or pointers:

Who may conduct the investigation? The investigation may be conducted by the district coordinator (for compliance with regard to particular antidiscrimination law) or a designee, such as a principal, or even a third party, such as an attorney. Generally, the campus principal should be involved. However, determine who is an appropriate investigator in relation to the specifics of the report or allegations.

How should the investigation be framed? Structure the investigation in relation to the elements of alleged prohibited conduct as defined in policy, *e.g.*, the definitions of “harassment”, “discrimination”, or “retaliation” under policy.

How should the investigation proceed? Begin by identifying all persons who may have knowledge of relevant facts, and interview those persons. Document review also may be part of the process.

Consult OCR guidance. OCR has issued various “Dear Colleague” guidance letters or other forms of guidance relating directly or indirectly to Title IX and the prevention of sexual harassment⁸ and to the prevention of various other forms of discrimination. Review the elements of the cause of action corresponding to the claim(s) alleged, including holdings as to how these elements are interpreted and applied.

FAPE impacted? Further, whether or not the bullying is based on a disability, the schools must determine whether a student with a disability who is the target of bullying is still receiving a free appropriate public education, *i.e.*, “FAPE”, in accordance with his or her Individualized Education Program, or “IEP”.⁹

Form of investigative outcome. Set out (1) scope of investigation, (3) method and (4) specific findings dispositive of the issue(s) being investigated. I recommend that it be indicated that the investigation has been approved by the district or school official responsible for coordinating the response to report, if that person is not also the person investigating the report.

Action upon findings. If prohibited conduct occurred, FFH (Local) typically provides that the school district (1) shall promptly respond by taking appropriate disciplinary action in accordance with Student Code of Conduct, and (2) may take corrective action reasonably calculated to address the conduct. Include corrective action. Examples of corrective action might include training or guidance program for those involved in the incident; training program for school community; counseling to victim and the offender; follow-up inquiries to look for new incidents or retaliation.

Notice of outcome. A notice of the outcome of the investigation should be provided to the parties to the dispute; but the notice should be careful not to divulge information about a student protected under FERPA. Under the prototypical TASB policy, the notice should advise parent and/or student that their complaint may also be filed the U.S. Office for Civil Rights.

Appeal and OCR

Any one of *at least* three things can happen upon notice of outcome of the school or district investigation: (1) non-pursuit of any appeal or further complaint; (2) appeal through FNG (Local) or local internal complaint procedure; and (3) pursuit of the complaint with the U.S. Department of Education’s Office for Civil Rights (OCR). It is possible that a student or parent may already have filed the same complaint, or effectively the same complaint, with OCR. It is also possible that an aggrieved parent may threaten or pursue litigation at some point. In any event, we turn now to what it means or can mean to have a discrimination complaint filed with OCR.

⁸. *See, e.g.*, the Dear Colleague Letter and Q & A on Campus Sexual Misconduct issued by the Office for Civil Rights on September 22, 2017; see also Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, Department of Education, Office for Civil Rights (January 19, 2001). Please take notice that by way of the Dear Colleague Letter issued on September 22, 2017, the Department of Education formally withdrew the OCR Dear Colleague Letter on Sexual Violence dated April 4, 2011 and the OCR Questions and Answers on Title IX and Sexual Violence, dated April 29, 2014. The Q & A on Campus Sexual Misconduct issued on September 22, 2017 is interim Title IX guidance relating to campus sexual misconduct pending a formal rulemaking process.

⁹. *See* OCR Dear Colleague Letter dated October 21, 2014.

PART III: What to do if a complaint of discrimination, harassment or retaliation is filed with OCR

Understand OCR's enforcement purpose

First, while discrimination complaints may be filed with OCR, the agency is not a mere clearinghouse for receipt and distribution of discrimination-related complaints. Rather, OCR enforces various civil rights laws¹⁰, including many of the same laws tracked by FFH policy. Clients need to know this because upon receipt of qualifying complaints, OCR can:

1. Investigate;
2. Obtain requested information;
3. Issue findings;
4. Monitor resolution agreements; and
5. Initiate Enforcement Action, including referral to the U.S. Department of Justice (DOJ).

Understand OCR's investigative and enforcement procedure

OCR's Case Processing Manual (CPM) provides detail as to how complaints are assessed, processed, concluded, resolved, or referred to DOJ. The current CPM was issued February 2015.¹¹ The various sections of the CPM advise as to what OCR can do with complaints and how a public school can be impacted:

1. Evaluation of Complaints (e.g., jurisdiction, timeliness, same complaint pending elsewhere)
2. Early Complaint Resolution (ECR) and Rapid Resolution Process (RRP)

ECR is a facilitated attempt to resolve the complaint by and between the parties. Key features of this process:

- i. OCR will facilitate but does not sign, approve, endorse or monitor any agreement reached between the parties;
- ii. OCR may suspend investigation for up to 30 days to facilitate an agreement between the parties; and
- iii. Confidential process.

RRP may be available in the following circumstances:

¹⁰. OCR has jurisdiction pursuant to the following statutes:

- Title VI of Civil Rights Act (race, color, national origin)
- Title IX of the Education Amendments of 1972 (gender)
- Section 504 of the Rehabilitation Act of 1973 (disability)
- Age Discrimination Act of 1975 (but not age in employment)
- Title II, Americans with Disabilities Act of 1990 (disability)
- Boy Scouts of America Equal Access Act of 2001

¹¹. Link: <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>.

- i. Recipient already has taken action that will resolve complaint;
 - ii. Recipient has indicated it is willing to take action in the future to resolve the complaint or has already taken action that requires monitoring;
 - iii. OCR has obtained sufficient information from the recipient to make a compliance determination;
3. Investigation and Resolution
- a. The CPM Appendix that is at Section 702 addresses Data Collection and Information Gathering, wherein OCR's information gathering authority is set forth in considerable detail.
 - b. OCR has the *right of access* during a recipient's regular business hours to the recipient's facilities and to information maintained by the recipient that is necessary to determine compliance status on those issues under investigation. Generally, this is understood to include access to recipient's (*e.g.*, public school district's) books, records, accounts, including electronic storage media, microfilming, retrieval systems and photocopies maintained, and other sources of information, including witnesses.
 - c. OCR has the *right of access* to a recipient's records even if those records identify individuals by name. OCR may permit recipient to replace names with a code; but if this impedes timely investigation, OCR may have access to unmodified records.
 - d. OCR may conduct interviews and focus groups.
 - e. OCR *needs parental consent for interviews of minors*, *except* this may not be necessary if questions are of a general nature and not related to any specific events in which the minor was involved and there are no records kept to identify the student.
 - f. In some cases, resolution can be pursued prior to conclusion of investigation.
 - g. Investigative Determinations. At the conclusion of the investigation, OCR will determine, using a preponderance of the evidence standard, whether:
 - i. There is insufficient evidence to support a conclusion of noncompliance; or
 - ii. The evidence supports a conclusion of noncompliance.
 - iii. Note: A Resolution Agreement will be pursued by OCR, but findings will have issued. The Resolution Agreement will be directed at addressing OCR's findings or concerns. ****
4. Compliance Reviews and Directed Investigations
5. Monitoring Resolution Agreements
6. Initiation of Enforcement Action. When OCR is unable to negotiate a resolution agreement with the recipient, OCR will initiate enforcement action. OCR will either:
- a. Initiate administrative proceedings to suspend, terminate or refuse to grant or continue financial assistance; or

- b. Refer the cases to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States.

OCR can enforce for denial of access to information and employees.

How following policy is important preparation for any OCR entry into the issues or for defense in litigation

Students who report being victims of discrimination, harassment or retaliation—or the parents of those students—may pursue redress through internal reporting procedures, they may pursue a private cause of action, and/or they may file a complaint with OCR. But if a complaint is filed with OCR, evidence that the school promptly responded to the complaint when it was reported to or observed by school employees, that it was investigated, with appropriate disciplinary and corrective action taken, and that the school followed its policy to the letter, *e.g.*, through notice of outcome of the investigation, will help reduce the possibility of OCR making any type of conscious indifference finding. If litigation is pursued, the showing of due diligence in responding to a report of discriminatory conduct, will help the overall defense of the school or district.

If the complaint were not filed or reported internally, then it may be that the school will not already have an investigative summary ready to share with OCR or otherwise have at its disposal in any proceeding that the complainant initiates. But if the school can show that it has the appropriate antidiscrimination policy in place, that it trained on the policy, and that it is and would be responsive to any concerns voiced directly to the school or witnessed by its employees, this likely would help in the course of review by OCR or any trier of fact.

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