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Spectrum High School

HARASSMENT TRAINING

2023-2024 STAFF IN-SERVICE

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I. APPLICABLE STATUTES

- A. **Title VI of the Civil Rights Act of 1964 (“Title VI”).** Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.*
- B. **Title VII of the Civil Rights Act of 1964 (“Title VII”).** Title VII prohibits employers from discriminating on the basis of an individual’s race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2.
- C. **Title IX of the Education Amendments of 1972 (“Title IX”).** In relevant part, Title IX provides that: “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 USC § 1681(a). The Office of Civil Rights for the United States Department of Education (“OCR”) enforces Title IX, along with

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2023 Ratwik, Roszak & Maloney, P.A.

Title VI, Section 504, and certain other federal statutes. Amendments to Title IX's regulations take effect August 14, 2020.

- D. The Americans with Disabilities Act (“ADA”).**¹ The ADA prohibits discrimination against individuals with disabilities. 42 U.S.C. § 12101, *et seq.* The ADA and Section 504 are similar with regard to the manner in which they relate to education and employment.
- E. Section 504 of the Rehabilitation Act of 1973 (“Section 504”).** Section 504 prohibits discrimination against individuals with disabilities in all programs and activities receiving federal financial assistance. 29 U.S.C. § 794. Section 504's requirements apply in the areas of employment, education, and “other services” offered by a recipient of federal funds. As a recipient of federal funds, Spectrum has Section 504 obligations in all three of the above areas.
- F. The Minnesota Human Rights Act.** The Minnesota Human Rights Act (“MHRA”) prohibits discrimination based on membership in various protected classes depending on the specific program or activity. As a general rule, the MHRA is construed in accordance with federal law prohibiting discrimination against the same class of protected persons.
1. With regard to employment, the MHRA prohibits discrimination on the basis of: race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age. Minn. Stat. § 363A.08, subd. 2.
 2. With respect to educational programs, the MHRA prohibits discrimination on the basis of: race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability. Minn. Stat. § 363A.13, subd. 1.
 3. Both the employment and the educational sections of the MHRA require Spectrum to make accommodations for individuals with disabilities. Minn. Stat. §§ 363A.08, subd. 6, 363A.13, subd. 1.
- G. Other Potentially Applicable Laws.** Other laws also may impact Spectrum's responsibilities to respond to alleged harassment or discrimination based on sex. The Minnesota Pupil Fair Dismissal Act (“PFDA”), for instance, has specific

¹ While an extensive discussion of the ADA and Section 504 are outside the scope of this presentation, SPECTRUM staff should be aware of these provisions.

limitations on Spectrum’s ability to suspend and expel students for their misconduct. *See, e.g.*, Minn. Stat. § 120A.45. The PFDA also contains specific provisions related to the suspension, expulsion, or exclusion of students with disabilities. Minn. Stat. § 121A.43. Data gathered by Spectrum in responding to allegations of harassment and discrimination will be governed by the Minnesota Government Data Practices Act (“MGDPA”), and the Family Educational Rights and Privacy Act (“FERPA”). Minn. Stat. §§ 13.32 (educational data) and 13.43 (personnel data), 34 C.F.R. part 99 (FERPA regulations).

II. EMPLOYEES’ OBLIGATIONS WITH REGARD TO HARASSMENT UNDER SPECTRUM’S POLICIES

A. Policy 504 – Harassment and Violence

- This Policy prohibits harassment and violence on the basis of race, color, creed, religion, national origin, sex, age, marital status, familial status, status with regard to public assistance, sexual orientation, including gender identity or expression, and disability. Policy 504 implements the requirements of the Minnesota Human Rights Act. Note that, despite the prohibition on sex harassment, allegations of sexual harassment must be addressed through Policy 507, as opposed to this Policy, due to the requirements of Title IX.

B. Policy 506 – Equal Education Opportunities Act Policy

- Policy 506 prohibits discrimination on the basis of race, color, religion, national origin, sex, age, disability, marital status, pregnancy, and sexual orientation in Spectrum’s educational activities and employment practices.

C. Policy 507 – Title IX Sex Nondiscrimination Policy, Grievance Procedure, and Process

- Policy 507 prohibits discrimination and harassment on the basis of sex, including sexual harassment. Its definitions, statements regarding response to harassment, and other provisions are mandated by Title IX and its implementing regulations.

D. Policy 515 – Section 504 Policy – Education of Students with Disabilities Under Section 504 of the Rehabilitation Act

- This Policy prohibits discrimination against students with disabilities. Policy 515 implements Spectrum’s obligations under Section 504.

E. Policy 516 – Bullying Prevention and Response

- This Policy implements the Minnesota Safe and Supportive Schools Act, commonly referred to as the “bullying law” or “anti-bullying law.” In part, bullying includes conduct that otherwise meets the definition of bullying and is directed at a student or group of students because the student’s (or students’) actual or perceived race, ethnicity, color, creed, religion, national origin, immigration status, sex, marital status, familial status, socioeconomic status, physical appearance, sexual orientation (including gender identity and expression), academic status related to student performance, disability, or status with regard to public assistance, age, or any additional characteristic defined in the Minnesota Human Rights Act.

III. HARASSMENT

A. Definition of Harassment. Harassment consists of physical or verbal conduct, including but not limited to, electronic communications, relating to an individual’s or group of individuals’ race, color, creed, religion, national origin, sex, age, marital status, familial status, status with regard to public assistance, sexual orientation, or disability, whether actual or perceived, when the conduct:

1. has the purpose or effect of creating an intimidating, hostile or offensive working or academic environment. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s or employee’s ability to participate in or benefit from the services, activities, or opportunities offered by Spectrum;
2. has the purpose or effect of substantially or unreasonably interfering with an individual’s work or ability to participate in or benefit from the services, activities or opportunities offered by Spectrum; or
3. otherwise adversely affects an individual’s employment or ability to participate in or benefit from the services, activities or opportunities offered by Spectrum.

B. Definition of Sexual Harassment. The Title IX Regulations that took effect on August 14, 2020, define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

1. An Spectrum employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct;

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Spectrum’s education program or one or more Spectrum activity or activities; or
3. Sexual assault, dating violence, domestic violence, or stalking.
 - a. “Sexual Assault” means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
 - b. “Dating Violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether such a relationship exists depends on the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
 - c. “Domestic Violence” means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
 - d. “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress.
4. Sexual harassment may include but is not limited to:
 - a. unwelcome verbal harassment or abuse;
 - b. unwelcome pressure for sexual activity;

- c. unwelcome, sexually motivated, or inappropriate patting, pinching, or physical contact, other than necessary restraint of pupil(s) by teachers, administrators, or other school personnel to avoid physical harm to persons or property;
- d. unwelcome sexual behavior or words, including demands for sexual favors, accompanied by implied or overt threats concerning an individual's employment or educational status;
- e. unwelcome sexual behavior or words, including demands for sexual favors, accompanied by implied or overt promises of preferential treatment with regard to an individual's employment or educational status; or
- f. unwelcome behavior or words directed at an individual because of a person's sex.

C. Definition of Sexual Violence. Sexual violence is a physical act of aggression or force, or the threat thereof, which involves the touching of another's intimate parts, or forcing a person to touch any person's intimate parts. Intimate parts, as defined in Minnesota Statutes Section 609.341, includes the primary genital area, groin, inner thigh, buttocks, or breast, as well as the clothing covering these areas. Sexual violence may include, but is not limited to:

- 1. touching, patting, grabbing or pinching another person's intimate parts, whether that person is of the same sex or the opposite sex;
- 2. coercing, forcing, or attempting to coerce or force the touching of anyone's intimate parts;
- 3. coercing, forcing, or attempting to coerce or force sexual intercourse or a sexual act on another; or
- 4. threatening to force or coerce sexual acts, including the touching of intimate parts or intercourse, on another.

D. Definitions of Protected Classes

- 1. **"Disability"** means any condition or characteristic that renders a person a disabled person. A disabled person is any person who:
 - a. has a physical, sensory or mental impairment which materially limits one or more major life activities;

- b. has a record of such an impairment; or
 - c. is regarded as having such an impairment.
2. **“Familial status”** means the condition of one or more minors being domiciled with:
- a. their parent or parents or the minor’s legal guardian; or
 - b. the designee of the parent or parents or guardian with the written permission of the parent or parents or guardian.

The protections afforded against harassment on the basis of family status apply to any person who is pregnant or is in the process of securing legal custody of an individual who has not attained the age of majority.

3. **“Marital status”** means whether a person is single, married, remarried, divorced, separated or a surviving spouse and, in employment cases, includes protection against harassment on the basis of the identity, situation, actions or beliefs of a spouse or former spouse.
4. **“National origin”** means the place of birth of an individual or of any of the individual’s lineal ancestors.
5. **“Sex”** includes, but is not limited to, pregnancy, childbirth and disabilities related to pregnancy or childbirth.
6. **“Sexual orientation”** means to whom someone is, or is perceived of as being, emotionally, physically, or sexually attracted to based on sex or gender identity. A person may be attracted to men, women, both, neither, or to people who are genderqueer, androgynous, or have other gender identities.

Practice Point: Same-sex harassment violates the law and Spectrum policy if the conduct is directed at the other individual due to the individual’s sex or sexual orientation. In addition, under this provision, any conduct based upon the stereotyping of a person’s sex, sexual orientation or perceived sexual orientation, including any form of “gender stereotyping,” may be construed as sexual harassment.

OCR announced in June 2021 that it considers sex discrimination under Title IX to include discrimination or harassment based on sexual

orientation or gender identity. The Minnesota Court of Appeals also recently held that sex discrimination under the Minnesota Human Rights Act includes discrimination based on sexual orientation or gender identity in *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

7. “**Status with regard to public assistance**” means the condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements.
8. “**Race**” includes traits associated with race, including but not limited to hair texture and hair styles, such as braids, locs, and twists.

IV. HARASSMENT REPORTING AND INVESTIGATION

A. Reporting Harassment (Other Than Sexual Harassment)

1. Any person who believes he or she has been the victim of harassment or violence on the basis of race, color, creed, religion, national origin, sex, gender, age, marital status, familial status, status with regard to public assistance, sexual orientation, or disability by a student, teacher, administrator or other Spectrum personnel, **or** any person with knowledge or belief of conduct which may constitute harassment or violence prohibited by the MHRA or Spectrum Policy 504 toward a student, teacher, administrator, or other Spectrum personnel, should report the alleged acts **immediately** to a Principal.
 - a. A person may report harassment and violence anonymously, but Spectrum cannot rely solely on an anonymous report to determine discipline or other remedial responses.
 - b. The report may be in writing or verbally. The use of formal reporting procedures is not required.
 - c. If the complaint involves a Principal, the complaint must be filed directly with the Human Rights Manager/Dean of Students. If the complaint involves the Human Rights Manager/Dean of Students, it must be filed with the Executive Director.
2. Any Spectrum employee who receives a report of harassment or violence **must immediately** inform a Principal. The Principal “shall ensure

[Policy 504] and its procedures, practices, consequences, and sanctions are fairly and fully implemented and shall serve as a primary contact on policy and procedural matters.

3. All Spectrum employees “shall be particularly alert to possible situations, circumstances, or events that might include acts of harassment or violence. Any such person who witnesses, observes, receives a report of, or has other knowledge or belief of conduct that may constitute harassment or violence shall make reasonable efforts to address and resolve the harassment or violence and shall inform a [Principal] immediately. [Spectrum] personnel who fail to inform a [Principal] of conduct that may constitute harassment or violence or who fail to make reasonable efforts to address and resolve the harassment or violence in a timely manner **may be subject to disciplinary action.**”
4. Upon receipt of a report of harassment or violence, a Principal **must** notify the Human Rights Manager/Dean of Students immediately, without screening or investigating the report. If the Principal received the report verbally, he or she must reduce it to writing within 24 hours and then forward it to the Human Rights Manager/Dean of Students. “Failure to forward any harassment or violence complaint as provided [in Policy 504] **may result in disciplinary action** against a [Principal].”
5. Spectrum will respect the privacy of the complainant(s), the individual(s) against whom the complaint is filed, and the witnesses as much as possible, consistent with Spectrum’s legal obligations to investigate, take appropriate action, and comply with any discovery or legal disclosure obligations.
6. Retaliation against a victim, good faith reporter, or witness of violence or harassment is prohibited.
7. False accusations or reports of violence or harassment against another person are prohibited.

B. Investigation of Harassment (Other than Sexual Harassment)

1. The Human Rights Manager/Dean of Students, within three (3) days of the receipt of a report or complaint alleging harassment or violence prohibited by Policy 504 shall undertake or authorize an investigation. The investigation may be conducted by Spectrum officials or a third party designated by the Executive Director.

2. The investigation may consist of personal interviews with the complainant(s), the individual(s) against whom the complaint is filed, and others who may have knowledge of the alleged incident(s) or circumstance(s) giving rise to the complaint. The investigation may also consist of any other methods and documents deemed prudent by the investigator.
3. In determining whether alleged misconduct constitutes a violation of Policy 504, Spectrum will consider: (1) the surrounding circumstances; (2) the nature of the behavior; (3) past incidents or past continuing patterns of behavior; (4) the relationships between the parties involved; and (5) the context in which the alleged incident(s) occurred. Whether a particular action or incident constitutes a violation Policy 504 requires a determination based on all the facts and surrounding circumstances.
4. Spectrum may take immediate steps, at its discretion, to protect the target or victim, the complainant, students, teachers, administrators, or other Spectrum personnel pending completion of an investigation of alleged harassment or violence prohibited by Policy 504.
5. The alleged perpetrator of the act(s) of harassment or violence shall be allowed the same opportunity to present a defense during the investigation or prior to the imposition of discipline or other remedial response.
6. The investigation will be completed as soon as practicable. The Human Rights Manager/Dean of Students will prepare a written report upon completion of the investigation. If the complaint involves the Executive Director, the report may be filed directly with the Board Chair. The report shall include a determination of whether the allegations have been sustained as factual and whether they appear to be to be violations of Policy 504.

F. Reporting Sexual Harassment.

1. **Actual Knowledge.** Under the Title IX regulations, a school is deemed to have actual knowledge, which triggers Spectrum's duty to respond in a manner that is not deliberately indifferent, when it has "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school." 34 C.F.R. § 106.30(a) (emphasis added). "This standard is not met when the only official of the recipient with actual knowledge is the respondent." *Id.*

In plain English, if you hear about or know about sexual harassment, or an allegation of sexual harassment, under the law, that means Spectrum knows about the sexual harassment or allegation of sexual harassment. You therefore have an obligation, and are instructed by your employer as a result of this training, to report any alleged or actual sexual harassment that you see or hear about to the Title IX Coordinator (either the Human Resources Manager—for reports against staff—or the Dean of Students—for reports against students) immediately.

This definition applies to student-to-student, staff-to-staff, student-to-staff, or staff-to-student harassment.

- 2. Relationship to Title VII.** Spectrum has dual responsibilities under Title VII and Title IX to prevent sex harassment of employees. However, sex harassment is actionable under Title VII if the harassing behavior is severe *or* pervasive, whereas under Title IX the behavior must be so severe, pervasive, and objectively offensive that it effectively denies the employee access to Spectrum’s education program. Thus, in addition to the Title IX Coordinator, sexual harassment of employees should also be reported to the Executive Director.

G. Investigating Complaints of Sexual Harassment.

- 1. Formal Complaint.** The term “formal complaint” means a document, either electronic or in hard copy, filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school or school district investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a). The formal complaint may be filed in person, electronically, or by mail.
2. Upon receipt of a formal complaint, the Title IX Coordinator will authorize an independent investigation. Both the complainant and the respondent will be notified of the grievance procedure, the allegations, the presumption of non-responsibility, the right to have an advisor, and any policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
3. The parties will be notified of any investigative interviews with sufficient time to prepare. If you are called as a witness, however, you may not be notified in advance of your interview. Unlike complainants and respondents, witnesses do not have the right to an advisor.

4. The parties and their advisors will have opportunities to review and respond to all evidence, to review and respond to the investigation report, and the opportunity to ask relevant written questions of the other party and any witnesses.
5. A determination will be made by an independent decision-maker, who is not the investigator. Spectrum will designate a decision-maker on a case-by-case basis, from a group of administrators who satisfy the Title IX requirements to hold that role.
6. Employees who are alleged to have engaged in sexual harassment may be placed on administrative leave pending the outcome of the investigation.

V. STUDENT HARASSMENT

A. When Does Conduct Towards a Student Reach the Level of Harassment?

1. Whether conduct by a student toward another student constitutes harassment is evaluated in the same manner as it is with respect to the conduct of employees. The behavior must be sufficiently severe, persistent or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment.
2. A one-time incident may amount to harassment if it is sufficiently severe.
3. Even if the individual incidents are not severe, a pattern of conduct may rise to the level of harassment.

B. Factors to Consider When Evaluating Claims of Student-to-Student Harassment

1. Age and maturity of students
2. Whether the conduct is of a sexual nature or based on a protected classification (i.e., student's contact with another student to demonstrate a sports maneuver is not harassment)
3. Whether the behavior is welcome (whether the student requested or invited the conduct or regarded it as undesirable or offensive)

Practice Points: Consensual relationships (i.e.: dating relationships and behavior) are not prohibited. Even if the student to whom the conduct is directed welcomes or is not offended by the behavior, the conduct still

may constitute harassment. Intent also is not the standard. Comments may be intended to be friendly but may be seen by the receiver or bystander as harassing. Reciprocation does not necessarily mean the conduct is welcome.

4. Whether the harasser was in a position of authority/relationship between the parties
5. Whether the conduct was severe, persistent or pervasive (unless it is sexual conduct, in which case it must be severe, pervasive, and objectively offensive)
6. Whether the conduct deprived a student of an educational opportunity

C. Examples of Student-to-Student Harassment Claims

1. *Doe on behalf of Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4rth 459 (6th Cir. 2022). In May of 2022, the Sixth Circuit Court of Appeals reversed a summary judgment order in favor of a school district on a Title IX deliberate-indifference claim. Jane and Sally Doe were both videotaped by male students during non-consensual sexual encounters, and the videos were disseminated amongst other students. Both girls were called various derogatory names, including “sluts” and “whores” by their peers. Both matters were turned over to the police; however, in the case of Sally Doe, the school principal told the parents that the school could not take further action because this was a criminal matter.

Jane and Sally Doe alleged that the School District was on notice of widespread sexual misconduct and had failed to take appropriate remedial action that would have protected them, and was therefore deliberately indifferent. Records showed that, in the 4 years before Jane Doe was assaulted, the school district had documented “over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact,” many of which involved photos and videos of explicit acts being disseminated. Many of these incidents were never reported to the Title IX Coordinator, which prevented the Title IX Coordinator from taking appropriate action to address any systemic issues. Accordingly, the Sixth Circuit held that the School District could be found to have been deliberately indifferent to sexual harassment before Jane and Sally Doe were assaulted, and that, had the school district not been deliberately indifferent, Jane and Sally Doe could have been protected.

The Court also concluded that a reasonable jury could find that the school district's response to Jane and Sally Doe's assaults was deliberately indifferent. With respect to Sally, the school district's failure to take action other than contacting the police, who were not familiar with Title IX, could be considered deliberate indifference. As for Jane Doe, the district court's holding was based on university case law, and so the sixth circuit vacated the decision for reevaluation based on the high school setting.

2. *Doe v. Fairfax Cty. Sch. Bd.*, 1 F. 4th 257 (4th Cir. 2021). In 2021, the Fourth Circuit Court of Appeals reversed a jury verdict in favor of a school district of a Title IX case. The case arose when Jane Doe was sexually assaulted by an older male student on a band trip to Indianapolis. The students were seated next to each other on a bus, and the male student had covered them both with a blanket. He then repeatedly touched her breasts and genitals, and penetrated her with his fingers. The student told two of her friends about the incident, who reported it to school officials. The student repeated her statement to the school's assistant principal and safety specialist. The school interviewed the male student, who admitted to touching Doe's breasts, but denied touching or penetrating her genitals.

The school officials understood that Doe did not consent to the touching; however, they concluded that they had insufficient evidence to declare what had happened a sexual assault, and imposed no discipline. The male student was allowed to remain in Doe's band classes. Doe avoided band class, was unable to fully participate in band activities, and began counseling for anxiety. Ultimately, Doe sued the school district under Title IX, alleging that the school district had been deliberately indifferent to her report of sexual assault.

At trial, the jury found that the male student had sexually harassed Doe, and that the harassment had been severe, pervasive, and offensive enough to deprive Doe of equal access to educational opportunities. However, the jury also found that the school district did not have actual knowledge of the harassment. The Fourth Circuit Court of Appeals reversed this finding because there was no evidence to support it. The student had given a written statement, the assistant principal testified at trial that she understood the touching to be nonconsensual, and school officials had received reports from other sources, including other students and parents, that the sexual activity was not consensual. The Fourth Circuit wrote "[i]f these facts do not show that the School Board had actual notice, we don't

know what would.” Accordingly, the case was remanded to the District Court for a new trial.

3. *Doe v. Lincoln Pub. Schs.*, 2021 WL 2320479 (D. Neb. June 7, 2021). In this case, eighth grade students took a field trip to Washington D.C. that was organized by the school district. Two of the were staying in a hotel room. During the night of Wednesday, April 3, 2019, or the early morning of Thursday, April 4, 2019, a student, B.A., recorded a video in which he pleased himself to completion on another student’s face while the other student was sleeping. B.A. told John Doe what he had done the following morning.

School chaperones became aware of the incident on Thursday, April 4, 2019, and reported the incident to the student’s middle school principal in Lincoln, Nebraska no later than Friday, April 5, 2019. By the following Monday, April 8, 2019, the school had removed Doe from all classes that he shared with B.A. By April 9, 2019, someone had contacted the local police department, which prompted the school district to remove B.A. from school altogether. However, B.A. was not removed from the trip to Washington D.C. In fact, according to Doe’s lawsuit, B.A. was not even removed from his hotel room.

Additionally, the following fall, the school district allowed John Doe and B.A. to enroll at the same high school, despite its knowledge of the April 2019 incident. B.A. was also allowed to participate on the football team, which caused John Doe to forgo participating on the football team. Doe’s parents sued under Title IX, asserting that the district’s response was deliberately indifferent.

The School District moved to dismiss the lawsuit. The Court denied this motion, however, for various reasons. Allowing B.A. to not only remain on the trip, but to stay in the same hotel room as Doe, if proven, could show deliberate indifference, and a failure to exercise proper control. The lawsuit also alleges that the district’s Title IX coordinator never contacted Doe, and that Doe was never advised of how to file a formal complaint. The Court noted that “the failure of a defendant’s Title IX coordinator to do something—or anything—in response to a known sexual harassment incident may constitute evidence of the defendant’s deliberate indifference to student-on-student sexual harassment. Finally, the Court noted that the district’s decision to remove Doe, rather than B.A., from their shared classes, and to allow both to enroll at the same high school, were actions that could potentially have caused a concrete, negative effect on Doe’s education or access to school-related resources.

4. *Doe v. Pawtucket School Dep't*, 969 F.3d 1, (1st Cir. Aug. 2020). The student-plaintiff reported that she was sexually assaulted twice in a school bathroom, once in May 2016, and once in June 2017. The sexual assaults were committed by separate students, both of whom were four years older than the plaintiff at the respective times. The principal was aware of both incidents, and the assistant principal, assistant superintendent, and superintendent were all aware of the second. When the first incident occurred, the principal approached the then 13-year-old Student the day after, said “I heard you had sex with [17-year-old-male-student],” and then took no further action when the Student said “yes.” When the second incident occurred, the Student was 14 and her assailant was 18. The adult student, shortly before the rape, had attempted to lure the Student out of class, overcoming minimal efforts by the teacher to tell him to leave. The school did not contact the police, did not take any statements, and only escorted the Student and her assailant from the building for the day. The next day, the school resource officer learned of the rape and contacted police. At that time, the school social worker contacted the Student and told her that she could put her complaint in writing if she wished.

The Student’s claims were all dismissed by the District Court. On appeal, however, the 1st Circuit reinstated her Title IX deliberate-indifference claim. The Court found that the principal was deliberately indifferent with respect to the May 2016 incident, because the principal knew a 17 year old student had sex with a 13 year old student in the bathroom, but, despite the age difference, took no action to further investigate or even ask if it was consensual. The Court then reasoned that, because the school failed to respond appropriately to discover that the May 2016 incident was rape, it was plausible that the June 2017 incident only occurred because the school had not taken appropriate action to identify the Student as someone who might be particularly vulnerable to sexual assault by an older male student. Had the teacher known that, the Court reasoned, the teacher might have worked harder to remove the 18-year-old student from the classroom before he lured the Student to the bathroom and sexually assaulted her.

5. *DJ by and through Hughes v. Sch. Bd. of Henrico County*, 488 F. Supp.3d 307 (Sept. 18, 2020). On October 13, 2017, DJ and two other black seventh graders were grabbed by their white football teammates, forced down, and subjected to simulated sex acts, including being pinned to benches and having other students simulate performing anal sex on them. The assault was videotaped on Snapchat, and spread across social media, including the captions “There has [sic] been two cases of rape in the short

pump boy's locker room today" "ever wonder what happens in the football locker room?" and "we gonna f*** the black outta these African children from Uganda." The video went viral and gained national media attention. In fact, the principal of a neighboring school contacted the principal of the school where the assault occurred to report the video. DJ was subjected to continued harassment and mockery at school following the publication of the video. This harassment allegedly took place in the presence of school employees, who allegedly did nothing to address it. The football coach also allegedly dismissed the incident as "foolishness" and "a joke." According to DJ's lawsuit, no consequences were imposed on the students who had assaulted him.

DJ sued the school district and multiple individual employees under a number of theories, including race discrimination, sex discrimination, disability discrimination (DJ is a student with ADHD and had a 504 Plan), gross negligence, deliberate indifference, and violation of his constitutional due process and equal protection rights. The School District moved to dismiss on all counts; however, the Court only dismissed the disability discrimination claim, because DJ did not allege that the other students assaulted him based on his ADHD. With respect to his Title IX claim, the Court found both that DJ's allegations that this was not the first incident of locker room harassment at the school, and the alleged "half-hearted measures" taken in response to the incident, could support a claim that the school was deliberately indifferent to student-on-student harassment.

6. *L.E. v. Lakeland Joint Sch. Dist. #272*, 403 F. Supp.3d 888 (D. Idaho 2019). In this case, an eighth grader at a cross-country camp, where his future high school coach was volunteer coaching, had the handle of a plunger forcibly inserted into his rectum by his teammates. The Student reported the incident to the coach, who chastised the other teammates for "screwing around." The coach did not report the incident to the District. The other students who had assaulted the plaintiff mocked him regarding the incident throughout the school year, and threatened to repeat the incident.

Eventually, the Student-plaintiff told his mother, who reported it to a district employee. The District asked the coach what had happened, and the coach finally reported the incident to the District. The District reprimanded the coach, and reported his failure to fulfill his mandatory reporting responsibilities to the state Department of Education. However, the District's Title IX Coordinator and assistant superintendent wrote an addendum to the reprimand letter saying that the reprimand was

“unwarranted” because the coach had “responded appropriately to the information he had.”

The U.S. District Court for the District of Idaho found that a reasonable jury could find that the coach’s failure to report the incident with the plunger, the fact that the only discipline for forcibly inserting a plunger handle into a teammate’s rectum was that the other students were made to apologize, and the District’s failure to take any measures to prevent further harassment, were all clearly unreasonable in light of the coach’s actual knowledge.

7. *M.M. ex rel. Ashmore v. Indianapolis Public Schools*, 2015 WL 2449612 (S.D. Ind. 2015). Three sixth grade boys contrived to get out of class at the same time, made their way to the girl’s bathroom, and sexually assaulted a sixth-grade girl. In addition to other claims, the parents of the girl sued the school district for student-to-student sexual harassment. The court dismissed that claim, finding that the school was not deliberately indifferent to the situation. There was no evidence in this case of previous incidents involving the students. The school was not aware of any previous sexually harassing conduct by the boys or directed towards the girl. The school did not become aware of the assault until the student reported it. The school responded promptly to the assault. The response included calling the police, suspending the boys, offering school-wide counseling and training on bullying and harassment, prohibiting gossip among the students about the assault, and allowing the girl to change to a different school on the day after the assault. Based on that evidence, the court concluded that no jury could consider the school’s actions “clearly unreasonable in light of the known circumstances.”
8. *Carmichael v. Galbraith*, 574 Fed. Appx. 286 (5th Cir. 2014). The parents of a thirteen-year-old middle school boy who killed himself brought this claim against their son’s former school district and some of its employees. The parents alleged that, on multiple occasions, their son was accosted by a particular group of boys in the school locker room. Often, the parents claimed, the boys stripped their son naked. A few days before the boy committed suicide, another student took a video of members of the football team stripping him nude, tying him up, and dropping him into a trashcan while calling him various names based on their perception that he was a homosexual. The student uploaded the video to Youtube.com. The video depicted a school employee watching, and not responding to the incident. The parents further alleged that other school employees were aware of the boys’ past conduct towards their son and replied “boys will be boys” when another teacher complained about it.

The federal court of appeals held that the parents alleged sufficient facts to allow the case to go forward against all defendants.

9. *Schaefer v. Las Cruces Public School District*, 716 F. Supp. 2d 1052 (D. N.M. 2010). The plaintiffs alleged that the school failed to properly respond to three attacks against students during the month of September, 2009. At least one of these incidents involved one student “racking” another (intentionally striking a male in the testicles), which caused serious injury to the plaintiffs’ son. The school held a meeting with all of the middle school boys and informed them of the dangers of harassment, bullying, and student-on-student violence. The plaintiffs alleged that this was not enough, and that the school district failed to identify or punish the bullies. The court dismissed the federal claims, including an allegation that the school district violated Title IX, but remanded the case to state court for resolution of the state law claims, including negligent supervision.

D. Staff to Student Harassment. Schools also may be liable for the harassing acts of their employees if the school has sufficient notice of conduct and fails to take appropriate remedial action. “No one questions that a student suffers extraordinary harm when subject to sexual harassment and abuse by a teacher, and that the teacher’s conduct is reprehensible and undermines the basic purposes of the educational system.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). Examples include:

1. *SB on Behalf of AB v. Newark Cent. Sch. Dist.*, 2022 WL 541773 (W.D.N.Y. Feb. 23, 2022). A teacher, Teacher H, posed as a 14-year-old boy to solicit nude photographs of a female student via Snapchat. The teacher then used various pseudonyms to blackmail the student for additional photographs via Snapchat. Teacher H was eventually caught by law enforcement and criminally convicted for a variety of offenses, including possession of child pornography. The student then sued the school district and various individual employees, alleging they were on notice of Teacher H’s proclivities and the threat he posed to students.

For example, Teacher H had previously received a counseling memo from the principal regarding inappropriate conversations with students. Another teacher had also overheard a recording the student and her friend talking about how Teacher H was creepy, reported that conversation to Teacher H, confronted the student about the conversation in Teacher H’s presence, and deleted the recording when she recanted. A separate staff member allegedly witnessed Teacher H behaving inappropriately toward female students; however, when that staff member reported it to the

assistant principal, the assistant principal downplayed the concerns, suggested that female students liked to be around Teacher H because he was attractive, and took no further action. Further, two teaching assistants reported that Teacher H had called the student-plaintiff into a room, alone, to allege that she had negatively impacted a job application by calling him creepy, but Teacher H was only given a reprimand for “unprofessional behavior.” None of these incidents were ever investigated by the school district.

Based on these allegations, the student sued the school district, the school board, the superintendent, the principal, the assistant principal, and the teacher who reported her recorded conversation to Teacher H. All of these parties moved to dismiss. The Court denied the motion of the school district and the board of education, finding that the facts, as alleged, could establish deliberate indifference toward known or reasonably suspected harassment of students by Teacher H. The Court also allowed the claims against the individual defendants to proceed, finding that the complaint had adequately alleged that each of these defendants’ actions (or inactions) had violated her rights under Masha’s Law, a component of the Child Abuse Victims’ Rights Act of 1986, but noted that individual defendants could not be sued under Title IX.

2. *KD v. Douglas County Sch. Dist. No. 001*, 1 F.4th 591 (8th Cir. 2021). This case involved a middle school student, L.D., who was sexually assaulted by her algebra teacher. In April 2014, a school staff member notified the principal that the algebra teacher was mentoring the student, despite the fact that opposite-sex mentor-mentee pairings were prohibited. The principal prohibited the teacher from mentoring the student without parental consent, with the teacher eventually obtained. Later that same month, the teacher chaperoned a weekend field trip, and sent the principal pictures of students, including L.D. The e-mail also included correspondence between the teacher and L.D. in which he referred to her as “sweetheart” and told her “I’ve never had a student mean this much to me;” however, the principal did not scroll down the e-mail chain, and only noticed the photographs. During the 2014-2015 school year, incidents continued, including reports that L.D. and the teacher were eating lunch alone in his classroom, that the teacher tied L.D.’s shoe and poked her stomach in the hallway, and that he was hugging students for excessive periods of time. The principal investigated each of these reports, as well as an anonymous note he received calling into question a school day on which both L.D. and the teacher were absent, but did not find any evidence of a sexual or romantic relationship. Nevertheless, the principal repeatedly counseled the teacher regarding expectations for his

interactions with students. Another teacher also contacted Child Protective Services regarding the algebra teacher's behavior toward L.D. and other students. Six months after L.D. graduated from middle school, the algebra teacher was arrested for sexually assaulting her.

The student's parents sued the school district, the principal, and the teacher who assaulted their daughter under Title IX, as well as various other legal theories. The court granted summary judgment in favor of the principal and school district, however because, while the teacher's behavior toward L.D. was strange, the school had no knowledge of any sexual interactions between the two until it learned of the teacher's arrest.

The teacher, on the other hand, was found individually liable for \$1.25 million in damages, which the school district was not required to cover because it was not responsible for his intentional actions.

3. *K.C. v. Mayo*, 983 F.3d 365 (8th Cir. 2020). This case involved an eighth grade student who was allowed by her mother to spend time outside of school and school-sponsored activities with her English teacher. The student and the teacher went biking, traveled together to watch a softball game, and the student stayed at the teacher's house. Subsequently, however, the student's mother found two love letters that the teacher had written to the eighth grader. The student's mother brought the letters to the middle school principal. Two weeks later, the student's mother returned with text messages that the teacher had sent to the student because the student was no longer returning her calls or texts. The principal met with the teacher, directed her to have no out of school contact with the student, and to only communicate with the student regarding school related issues.

The following school year, the student was spending the night at a friend's house, and her friend's mother happened to be an elementary school teacher with the school district. The middle school English teacher, in violation of her directive not to contact the student, contacted the friend's mother and asked to pick the student up from the sleepover. The friend's mother denied the request, and reported the incident to the elementary school principal, who alerted the middle school principal. The English teacher was given a notice of deficiency, and warned that she would be further disciplined or terminated if she continued to contact the student.

A year later, the student's mother discovered a burner phone that the teacher had purchased for the student, which contained text messages that confirmed a sexual relationship between the teacher and the student. The

school district immediately contacted the police and placed the teacher on leave once the student's mother notified them of the text messages. The teacher was arrested, resigned from the District, and pled guilty to four felonies, including sexual conduct with a student and statutory sodomy. The student sued the school district under Title IX.

The Court, however, granted the school district's motion for summary judgment. In this case, like in *K.D.*, the evidence showed that the school district was aware of teacher-student contact that was inappropriate and unprofessional, but not necessarily sexual. As soon as the school district learned of sexual contact, it immediately took appropriate action to remedy the issue. Therefore, the student's Title IX claim against the school district failed.

4. *Doe v. Flaherty*, 623 F.3d 577 (8th Cir. 2010). The parents of a female high school student sued the principal and the school district under the U.S. Constitution and Title IX. The plaintiffs alleged that the coach had a history of sending inappropriate messages to students and that principal was aware of the student's sexual relationship with her head basketball coach, but failed to take remedial action. The school district ultimately decided to non-renew the coach for these and other concerns. It was not until after starting the school district started non-renewal process that a teacher informed the principal that there was a rumor that the coach was having a sexual relationship with a student. Based on the record in this case, the court held that the school district and the principal did not have sufficient notice of the coach's actions and, therefore, could not be liable under Title IX or the Constitution.
5. *Plamp v. Mitchell School District No. 17-2*, 565 F.3d 450 (8th Cir. 2009). A female high school student sued the school district after her teacher made several sexual comments and sexually touched her. The student reported the conduct to her parents, who told the superintendent. The superintendent immediately called the police, suspended the teacher, and refused to let him come onto school property without a police escort. The school district eventually fired the teacher. With regard to their Title IX claim, the parents alleged that the school district had knowledge of past complaints of sexual misconduct about the teacher and failed to respond appropriately to them. The court, however, concluded that the complaints were vague and unsubstantiated. The court also concluded that, to the extent the complaints had been made to the guidance counselor, the counselor was not the appropriate person to take action to remediate the conduct because the counselor did not exercise supervisory control over

the teacher. The court noted, however, that the counselor (and every other school employee) had the duty to report the complaints to the principal.

VI. BULLYING

- A. Definition of Bullying.** “Bullying” means severe or pervasive physical or verbal acts or conduct that is intimidating, threatening, abusive, or harming, is objectively offensive and:
1. an actual or perceived imbalance of power exists between the student engaging in the prohibited conduct and the target of the prohibited conduct, and the conduct is repeated or forms a pattern; or
 2. materially and substantially interferes with a student’s educational opportunities or performance or ability to participate in school functions or activities or receive school benefits, services, or privileges; or
 3. has a substantially detrimental effect on the student’s physical and/or mental health.
- B. Definition of Cyberbullying.** Cyberbullying means bullying using technology or other electronic communication, including, but not limited to, a transfer of a sign, signal, writing, image, sound, or data, including a post on a social network Internet website or forum, transmitted through a computer, cell phone, or other electronic device. The term applies to prohibited conduct that occurs on school premises, on school district property, at school functions or activities, on school transportation, or on school computers, networks, forums, and mailing lists, or off school premises to the extent that it substantially and materially disrupts student learning or the school environment.
1. Cases Involving Cyberbullying
 - a. *R.S. v. Minnewaska Area School District No. 2149*, 2012 WL 3870868 (D. Minn. Sept. 6, 2012). In this case, a twelve-year-old student was disciplined for two postings that she had made on her Facebook wall. On her wall, she posted about a school hall monitor: “I hate a Kathy person at school because Kathy was mean to me.” This was done at home and her privacy settings only allowed friends to see the post. The message was recorded by a friend and got back to the principal, who gave the student detention and

required her to apologize to the hall monitor. The student went home and posted another comment on her wall: “I want to know who the f%\$# told on me.” After learning about this message, the principal gave her a one-day suspension and prohibited her from attending a school trip. The Minnesota District Court disagreed with the discipline, although the decision was made at an early stage of the litigation before the district presented any information. The court held that there was no true threat by the student’s comments, and that her out-of-school statements were not likely to cause a substantial disruption to the school.

- b. *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). A student created a MySpace group called “S.A.S.H.” or “Students Against Sluts Herpes” from her off-campus computer. The content of the group was directed primarily at another student. Many other students participated in the group, posted pictures of the subject of the group, and made derogatory comments about her. In this case, the Court held that given the targeted, defamatory speech of the student who created the group, which was aimed at a fellow classmate, the conduct created substantial disorder and disruption in the school justifying disciplinary action against the student.
- c. *Doe by and through Doe v. Hopkinton Pub. Sch.*, 490 F.Supp.3d 448, (D. Mass. Sept. 2020). A student’s parent filed a bullying complaint, indicating that the student was being excluded at hockey team events, was being recorded without his permission, and that his hockey teammates were circulating the recordings in a group chat. The District conducted an investigation, and discovered a group Snapchat thread where eight hockey players had posted pictures and videos of the complainant without his consent, pictures of the complainant’s parents with disparaging comments on their appearance, and disparaging comments regarding the complainant’s appearance, voice, and anatomy. As a result of this investigation, the complainant entered formal mental health treatment, and left the District at the end of the school year to attend school in Canada.

The eight members of the Snapchat group were suspended from the hockey team for the remainder of the year, and

each member was suspended from school for varying lengths of time. Two of the eight sued the District, alleging that the discipline constituted a violation of their First Amendment Rights. The District Court rejected their claim, noting that “There is no constitutional right to be a bully . . . Schools are generally permitted to step in, and protect students from abuse . . . Students cannot hide behind the First Amendment to protect their ‘right’ to abuse and intimidate other students at school. Outside the school context, of course, much harassment by name calling (understood broadly) is protected. But the First Amendment does not interfere with basic school discipline.”

2. Other Prohibited Conduct
 - a. Retaliation for asserting, alleging, reporting, or providing information about prohibited conduct is prohibited.
 - b. Knowingly making a false report about bullying is prohibited.

C. Examples of Bullying/Cyberbullying Conduct

1. Name calling
2. Physical threats and abuse
3. Verbal or physical teasing
4. Put downs or jeering
5. Rejection or ostracizing
6. Vandalism
7. Publicly distributing sexually suggestive photographs of another student and/or ridiculing the subjects of the photos once they have been made public
8. Flaming: Sending angry, rude, or vulgar messages to a person.
9. Cyberstalking: Online or electronic harassment that is highly intimidating or includes threats of harm. May result in large volumes of text messaging to the person being stalked.

10. Masquerading: Pretending to be someone else and sending materials to another for the purpose of negatively affecting that other person.
11. Outing: Sending materials that contain sensitive or private information about a person to someone who was not an original recipient to embarrass the original sender.

D. Reporting

1. Any person with knowledge or belief of conduct that may constitute bullying shall report the alleged acts immediately to the Dean of Students.
2. A person may report bullying anonymously. However, Spectrum may not rely solely on an anonymous report to determine discipline or other remedial responses. The reporting party or complainant should be encouraged to report in writing, but oral reports shall be considered complaints as well.
3. If the complaint involves the Dean of Students, the complaint shall be made or filed directly with the Executive Director by the reporting party or complainant. The Dean of Students taker shall serve as the primary contact on policy and procedural matters. The Dean of Students or a third party designated by the school district shall be responsible for the investigation.
4. The Dean of Students shall provide information about available community resources to the target or victim of the bullying or other prohibited conduct, the perpetrator, and other affected individuals as appropriate.
5. A teacher, school administrator, volunteer, contractor, or other school employee shall be particularly alert to possible situations, circumstances, or events that might include bullying. Anyone who witnesses, observes, receives a report of, or has other knowledge or belief of conduct that may constitute bullying or other prohibited conduct shall make reasonable efforts to address and resolve the bullying or prohibited conduct and shall inform the Dean of Students immediately.
6. Spectrum personnel who fail to inform the Dean of Students of conduct that may constitute bullying or other prohibited conduct or who fail to make reasonable efforts to address and resolve the bullying or prohibited conduct in a timely manner may be subject to disciplinary action.

7. Reports of bullying or other prohibited conduct are classified as private educational and/or personnel data and/or confidential investigative data and will not be disclosed except as permitted by law.
8. Submission of a good faith complaint or report of bullying or other prohibited conduct will not affect the complainant's or reporter's future employment, grades, work assignments, or educational or work environment.
9. Spectrum will respect the privacy of the complainant(s), the individual(s) against whom the complaint is filed, and the witnesses as much as possible, consistent with the school district's obligation to investigate, take appropriate action, and comply with any legal disclosure obligations.

VII. BULLYING INVESTIGATION PROCEDURE

- A.** Within three days of the receipt of a complaint or report of bullying or other prohibited conduct, Spectrum shall undertake or authorize an investigation by the Dean of Students or a third party.
- B.** The Dean of Students or other appropriate Spectrum officials may take immediate steps, at their discretion, to protect the target or victim of the bullying or other prohibited conduct, the complainant, the reporter, and students or others, pending completion of an investigation, consistent with applicable law. Every effort will be made to protect the confidentiality of those who report incidents.
- C.** The purpose of the investigation is to determine whether a reported incident violates Spectrum policy. These determinations will be made in consideration of the totality of the facts and the circumstances surrounding the incident, such as the nature of the behavior, past incidents or continuing patterns of behavior, the relationship between the parties involved and the context in which the alleged incident occurred.
- D.** The alleged perpetrator of the bullying or other prohibited conduct shall be allowed the opportunity to present a defense during the investigation or prior to the imposition of discipline or other remedial responses.
- E.** Upon completion of an investigation that determines that bullying or other prohibited conduct has occurred, Spectrum will take appropriate action, including but not limited to: warning, suspension, exclusion, expulsion, transfer, remediation, termination, or discharge.

- F. Remedial responses to the bullying or other prohibited conduct shall be tailored to the particular incident and nature of the conduct, Spectrum will be consistent with the requirements of applicable statutory authority, including the Minnesota Pupil Fair Dismissal Act; the Discipline Policy, and other applicable school district policies; and applicable regulations.

VIII. DISCRIMINATION

A. Discrimination by an Educational Institution

1. Title IX regulations provide that no person on the basis of sex shall be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide such athletics separately on such basis. 34 C.F.R. § 106.41.
2. The MHRA similarly prohibits discrimination by educational programs, not only on the basis of sex, but also based upon race, color, creed, national origin, age, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, and age, by discriminating against anyone in the full utilization of any benefit or service the educational institution provides. Minn. Stat. §363A.13.
3. To establish a prima facie case of discrimination in the school context, the complainant must show: (1) member in a protected group; (2) status in relation to the educational institution; (3) services or benefits were available which were not provided; and (4) the educational institution provided those services and benefits to non-protected class members that were similarly situated. *See Harper v. North Hennepin Cmty. Coll.*, 1997 WL 471198 (Minn. Ct. App. 1997); *Robinson v. Hamline Univ.*, 1994 WL 175019 (Minn. Ct. App. 1994). Examples include:
4. Discrimination in the Administration of Discipline
 - a. Title IX regulations prohibit a school from subjecting any person to separate or different rules of behavior, sanctions or other treatment, such as discriminatory discipline, based on sex.
 - i. Similarly situated students should not be disciplined differently based on sex of the same offense.

- ii. Discipline policies should not have a disparate impact on students based on sex.
 - iii. Students should not be disciplined based upon their sex or failure to conform to stereotypical notions of masculinity or femininity.
- b. *Doe v. University of Massachusetts-Amherst*, 2015 WL 4306521 (D. Mass. July 14, 2015). A male student alleged that the University violated Title IX by applying disciplinary guidelines adversely to him on the basis of sex. The plaintiff, a male student, met a female student at a party. Both students consumed alcohol and a sexual encounter ensued. The female student brought a complaint about the male student's conduct to the University's Title IX coordinator. The University notified the male student that he was charged with four violations of the student code of conduct, including sexual harassment and misconduct, for which he ultimately was expelled. The University also ordered him to have no contact with the female student and investigated the charges. The male student asserted that the University's disciplinary proceeding was biased and that he was given a disproportionately high sanction because of his sex. The court rejected this argument, concluding that male student's claim amounted to a challenge of the disciplinary panel's decision that certain witnesses were more credible than he was. The court rejected the conclusory allegations that college disciplinary proceedings are biased against men.

5. Reprisal

- a. Federal and state law prohibit the punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment. For example, it is unlawful to retaliate against applicants or employees for:
- filing or being a witness in a charge, complaint, investigation, or lawsuit
 - communicating with a supervisor or manager about employment discrimination, including harassment
 - answering questions during an employer investigation of alleged harassment
 - refusing to follow orders that would result in discrimination

- resisting sexual advances, or intervening to protect others requesting accommodation of a disability or for a religious practice
 - asking managers or co-workers about salary information to uncover potentially discriminatory wages
- b. Participating in a complaint process is protected from retaliation under all circumstances.
- c. Other acts to oppose discrimination are protected as long as the individual was acting on a reasonable belief that there was a violation of the discrimination laws.
- d. Engaging in a protected activity, however, does not shield an employee or student from all discipline or adverse action. Charter schools are free to discipline or take adverse action if motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences. A charter school is not allowed, however, to do anything in response to the protected activity that would discourage someone from resisting or complaining about future discrimination (i.e.: reprimand the employee or give a performance evaluation that is lower than it should be or denying a student the opportunity to play in extracurricular activities).
- e. *Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996). Three female plaintiffs were tenured associate professors in the University's dental hygiene program. The dean made a recommendation to eliminate the dental hygiene program from the University's offerings. The plaintiffs objected (assumedly based upon concerns of sex discrimination). The University ultimately discontinued the program. The plaintiffs sued claiming, in part, retaliation by the University for their allegations of sex discrimination. They asserted: (1) they were excluded from various committees that reviewed the recommendation to close the program or from participating in the planning for the phase out of the program; (2) the program was closed before the last students graduated instead of phasing out the program; and (3) the University changed the title of one of the plaintiffs and reduced her secretarial help. The University claimed it took no adverse employment action against the plaintiffs that could be construed as retaliation. The court agreed, noting that the timing of the decisions in relation to the complaints, alone, is not enough to demonstrate

retaliation with a causal connection the allegations of discrimination.

IX. POTENTIAL CONSEQUENCES FOR ENGAGING IN HARASSMENT OR DISCRIMINATION AND/OR FAILING TO RESPOND APPROPRIATELY TO CLAIMS OF HARASSMENT

- A. Workplace Discipline
- B. Civil Liability
- C. Criminal Liability

X. PRACTICAL EXAMPLES AND HYPOTHETICALS

A. Common Issues in Schools

1. **What does “uncomfortable” actually mean?** One of the most common examples Spectrum has seen in the last year is reports from students that another student is making them “uncomfortable.” Uncomfortable is an extremely ambiguous term that covers a wide range of behaviors. If you receive this complaint, it is imperative that you follow up on what exactly the student means.
2. **Confidentiality.** Under the current Title IX regulations, once a formal complaint is filed, the title IX Coordinator must provide an initial notice to all parties that includes, among other things, the names of all known parties. It is not possible for a formal complaint to remain anonymous or confidential under the current federal regulations. Likewise, a Title IX investigation cannot commence without a formal complaint, and a determination regarding responsibility cannot be made unless the investigation is completed. Under federal law, therefore, any student reporting sexual harassment cannot remain anonymous if an investigation is warranted.
3. **“I don’t want to make this a big deal.”** Students may start to make reports, and then balk when faced with the prospect that their complaint could trigger an investigation. **Under no circumstances should any Spectrum staff member who becomes aware of a student complaint fail to report the complaint, or offer to assist a student in circumventing the investigation process.** Rapport with students is important; however, it does not outweigh staff obligations to protect students and comply with the law and Spectrum policies. Under the

current Title IX regulations, the Title IX Coordinator can file and order the investigation of a formal complaint on a student's behalf. Given that all employees must report known or alleged sexual harassment to the Title IX Coordinator to ensure that Spectrum can respond in a manner that is not deliberately indifferent, Spectrum staff cannot and should not tell a student reporting sexual harassment that their conversation will stay between them.

4. **Explicit Images.** *State v. Ting-Yi Oei*, Loudon County, Virginia (2008). In March 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. Mr. Oei received reports that children were sending sexually explicit pictures to each other via text message. In the course of his investigation, he called a student into his office, who admitted to having a picture of a girl in her underwear on his cell phone. Mr. Oei wanted to keep the picture as evidence, so he had the student send the picture to him via text message. He then e-mailed the image to his work computer. Ultimately, the school district did not pursue disciplinary action against the student. Mr. Oei, however, did nothing with the image and never deleted it from his cell phone or computer.

Later, the same student was disciplined for an unrelated incident. In the course of this disciplinary action, the "sext" came to the attention of the student's mother. She then informed local law enforcement, who confiscated Mr. Oei's cell phone. Since the cell phone contained the image of a minor in her underwear and it was never properly turned over to law enforcement, Mr. Oei was charged criminally for failure to report suspected child abuse. While the charges were ultimately dismissed, Mr. Oei went through a tremendous ordeal, which left his career and reputation in ruins.

B. Tips for Maintaining Professional Boundaries

1. Use good hiring practices, including criminal background checks, checking references, and hiring staff with prior experience working with children.
2. Adopt policies or practices addressing the key areas of concern. For example:
 - a. Classroom windows should not be fully covered.

- b. Employees should not be alone with a student in the locker room or bathroom (except as required for emergency situations).
- c. Employees should not be alone with a student (other than his or her own child) in any other school room unless there is an uncovered window or, if the room has no window, the door is left open.
- d. Generally, employees should not transport students (other than his or her own child) in personal vehicles to or from school or school-sponsored events (including field trips).
- e. In no circumstances should an employee be alone with a student (other than his or her child) in a vehicle (except as required for emergency situations).
- f. There should be multiple chaperones on all school-sponsored trips (including at least two chaperones of each sex of students attending the trip).
- g. Appropriate training for volunteer and non-staff chaperones.
- h. Thorough investigation into reports of suspected sexual harassment and abuse.
- i. Consistent enforcement of policies, procedures, and practices.

C. Hypotheticals

1. **A Ride Home.** A Spectrum employee is giving students rides home. When questioned about this practice, the employee explains that they only do so if a student has no other means of transportation home and their parents cannot be reached. Upon further investigation, however, Spectrum also learns that students, who are not related to this employee, occasionally spend the night at the employee's house if their parents are not at home.
 - a. Is this allowable?
 - b. What are the potential risks of these sorts of decisions?
 - c. What are some other appropriate ways the employee could address these student issues?

2. **“Slap Butt Friday.”** A group of Spectrum students decides to start a new game called “Slap Butt Friday.” The name is self-explanatory. A teacher first learns of “Slap Butt Friday” when Student A complains that Students B and C routinely include him in the weekly “festivities” against his will.
- What should the teacher do with this information?
 - Suppose in the course of the investigation it becomes clear that Student A is, in fact, an enthusiastic participant in “Slap Butt Friday.” Does that alter whether or not Student A has reported sexual harassment?
 - Suppose the teacher knows that Student A is, in fact, a willing participant. Does the teacher still need to report “Slap Butt Friday” to the Title IX Coordinator?
 - What if only male students participate in or are involved with “Slap Butt Friday?” Does that change whether this is sexual harassment?

Note: “Slap Butt Friday” was apparently an unofficial tradition for the students of a Texas school district in 2015. See Brend v. Copperas Cove Indep. Sch. Dist., 823 F. App’x 261 (5th Cir. 2020).

3. **Extra Help.** Spectrum Staff Member X has worked late and is leaving campus at approximately 8:00 PM. The staff member stops for dinner on the way home and sees a colleague, Staff Member Y, with a student at a local restaurant. Y is not related to the student. The next day, X asks Y what Y was doing with the student at the restaurant so late in the evening. Y responds that the student had stayed after school for extra help with an upcoming project, and they lost track of time and realized they were hungry.
- What should Staff Member X do with this information?
 - What are some other pieces of information that might change Staff Member X’s reaction or responsibilities?
 - What are the potential consequences if Staff Member X does nothing?
4. **Lost Cell Phone.** A staff member finds a cellular phone in a bathroom. The staff member goes to open the phone to see if they can determine who it belongs to, and the lock screen is an explicit image of a student who the

staff member knows. Just then, a different student comes into the bathroom and says “hey, that’s my phone.” To the best of the staff member’s knowledge, this student and the student on the phone’s lock screen are not friends or romantically involved.

- a. What should the staff member do?
- b. Should the staff member take a picture of the lock screen on their own cell phone and e-mail it to the Executive Director? Spectrum attorney Christian Shafer? The student in the picture?