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THE MORE THINGS CHANGE: SCHOOLS' OBLIGATIONS UNDER THE NEW TITLE IX REGULATIONS

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I. GENERAL BACKGROUND OF TITLE IX

A. Title IX is an Anti-Discrimination Statute

1. **Title IX of the Civil Rights Act of 1964 provides that:**

   "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under and education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a)

2. The Office of Civil Rights (OCR) within the United States Department of Education enforces Title IX.

B. Harassment on the Basis of Sex is One Form of Unlawful Discrimination.

The OCR's regulations implementing Title IX require specific procedures with regard to responding to allegations of sexual harassment.

C. Title IX Prohibits Discrimination in Other Areas too.

II. DEFINITIONS

A. Sexual Harassment. The Title IX regulations currently define sexual harassment as conduct on the basis of sex that also satisfies one or more of the following conditions:

1. A school employee conditioning the provision of an aid, benefit, or service of school 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 the school's education program or activity; or

3. Sexual assault dating violence, domestic violence, or stalking, as those terms are defined by federal law.

   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. *See* 20 U.S.C. 1092(f)(6)(A)(v).

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. *See* 34 U.S.C. § 12291(a)(10).

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. *See* 34 U.S.C. § 12291(a)(8).

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. *See* 34 U.S.C. § 12291(a)(30).

34 C.F.R. § 106.30(a)

B. **Actual Knowledge**. Actual knowledge, which triggers a school or district's duty to respond in a manner that is not deliberately indifferent, means, in relevant part, "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.*

C. **Complainant**. "Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).

D. **Respondent**. "Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).

E. **Supportive Measures.** The term "supportive measures" or "interim supportive measures" means "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." 34 C.F.R. § 106.30(a). Supportive measures "are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." *Id.* Examples include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restriction]ns on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." *Id.*

Supportive measures are coordinated by the Title IX Coordinator, and should be kept confidential, to the extent that maintaining confidentiality does not otherwise interfere with the provision of supportive measures.

F. **Education Program or Activity.** "Education program or activity" includes locations, events, or circumstances over which the school or district exercised substantial control over both the respondent and the context in which the sexual harassment occurs. 34 C.F.R. § 106.44(a).

III. GENERAL RESPONSIBILITIES REGARDING PREVENTION OF SEXUAL HARASSMENT

A. **Designation of Title IX Coordinator**. Every school or school district must designate at least one Title IX Coordinator. 34 C.F.R. § 106.8(a). The Title IX Coordinator receives complaints of sexual harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. *Id.* Accordingly, the identity of the Title IX Coordinator and that person's contact information must be provided to (1) applicants for admission and employment, (2) students, (3) parents or legal guardians, (4) employees, and (5) all unions and professional organizations that have collective bargaining or professional agreements with the school or district. *Id.*

B. **Dissemination of Policy.** Schools and school districts must provide notice to the persons listed in Paragraph A above that the school or district does not discriminate on the basis of sex in its education program or activities, including in employment, that it is required by Title IX not to discriminate in such a manner, and that questions regarding Title IX may be referred to the Title IX Coordinator. 34 C.F.R. § 106.8(b)(1).

This notice must be listed on the school or school district's website, and in each handbook or catalog that it makes available to students, parents, employees, applicants for employment or admission, and unions. 34 C.F.R. § 106.8(b)(2).

C. Grievance Procedure. The regulations establish the guidelines for a grievance procedure. *See* 34 C.F.R. § 106.45. All schools and/or school districts who receive federal funding are required to adopt a grievance procedure that complies with the regulations. 34 C.F.R. § 106.8(c).

IV. GENERAL RULES FOR RESPONDING TO A REPORT OF SEXUAL HARASSMENT

A. Respond in a Manner that is Not Deliberately Indifferent

When a school or district has actual knowledge of an allegation of sexual harassment, it has a duty to respond to that complaint in a manner that is not deliberately indifferent. 34 C.F.R. § 106.44(a). "Deliberate indifference" means a response that is "clearly unreasonable in light of the known circumstances." *Id.*

It is the responsibility of the Title IX Coordinator to contact the complainant promptly, discuss supportive measures that are available with or without the filing of a formal complaint, consider the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint to the complainant. *Id.*

The response must treat the complainant and respondent equitably, by offering supportive measures to the complainant, and by following the grievance process if a formal complaint is filed. *Id.*

B. Interim Removal from Campus

1. **Student Respondents.** The new Title IX regulations require schools and school districts to complete the full grievance process before any discipline is imposed. 34 C.F.R. § 106.44(a); 34 C.F.R. § 106.45(b)(1)(iv). Students who are accused of sexual harassment cannot be suspended, expelled, excluded, or otherwise disciplined for that harassment until a full investigation has been completed and a neutral decision-maker has reviewed all evidence and made a determination regarding responsibility at the conclusion of the grievance process.

   However, nothing in the regulations prohibits a school from disciplining a student under another policy or provision of its code of conduct, so long

as the purpose of such discipline is not to interfere with any right or privilege secured by Title IX or its regulations. *See* 34 C.F.R. § 106.45(b)(3)(i) (expressly allowing discipline under other provisions of the code of conduct if a complaint is mandatorily dismissed); *but see* 34 C.F.R. § 106.71 (prohibiting retaliation by a school against a respondent in the form of disciplining the student for another code of conduct violation arising from the same facts or circumstances as a report or complaint of sex discrimination or sexual harassment, "for the purpose of interfering with any right or privilege secured by Title IX.")

Additionally, the new regulations allow schools and districts to remove a respondent on an emergency basis. To conduct an emergency removal, the school or district must:

a. Conduct an individualized safety and risk analysis;

b. Determine that the respondent poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; and

c. Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

34 C.F.R. § 106.44(c)

2. **Staff Respondents.** Schools and school districts are still permitted to place a staff member who is the subject of a complaint of sexual harassment on administrative leave while the grievance process is pending. 34 C.F.R. § 106.44(d).

C. Investigate and Respond to Complaints of Sexual Harassment Consistent with the Title IX Regulations and Applicable Policies

D. Remember the Presumption of Non-Responsibility

V. PROPOSED CHANGES TO TITLE IX REGULATIONS

A. In April 2023, the Department of Education released a notice of proposed rulemaking that would amend Title IX regulations. OCR announced an October 2023 deadline for a final proposed rule, but the regulations have not been released yet. It is now suspected that the new regulations will not be released until 2024, with an effective date of the 2024-2025 school year.

B. Changes Regarding Sexual Harassment

1. The proposed rule would require schools to respond to all forms of sex-based harassment. In addition to sexual harassment, this includes harassment on the basis of sex, sex stereotypes, sex characteristics, sexual orientation, gender identity, as well as pregnancy or parenting status, and any related conditions whether or not the harassment is sexual in nature.

2. Obligations to respond to "quid pro quo" harassment, sexual assault, dating violence, domestic violence and stalking would remain the same.

3. The proposed rules broaden the definition of what is often referred to as "hostile environment" harassment, so that it is largely consistent with the standard that existed prior to the 2020 amendment to the rules. The proposed rules would require that individuals show the harassment is "sufficiently severe or pervasive" both "objectively and subjectively" such that it denies or limits a person's ability to participate in or benefit from...the education program or activity."

4. The proposed rules expand schools' authority (and obligations) to respond to sex-based harassment that occurs off campus. Specifically, schools would be responsible for responding to conduct that occurs off-campus if: (1) the conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution; or (2) the conduct occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority.

5. The proposed rules require schools to operate their education programs and activities free from sex discrimination at all times, which requires schools to take "prompt and effective" action to "end prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects." This expands on the "deliberate indifference" standard currently embodied in the rules.

6. The proposed rules require additional training and information as to: (1) when employees must notify the Title IX Coordinator about possible sex discrimination; and (2) how students can report sex discrimination.

a. The proposed regulations would also allow communications with "confidential employees" to not trigger Title IX reporting or investigation procedures. Given the definition of "confidential" employees, however, it is unlikely that the exception would apply to elementary or secondary school employees in Minnesota.

7. The proposed rules expand the scope of potential complainants to include: (1) complainants who are no longer part of (or seeking to be part of) the recipient's education program or activity (e.g., former students and former employees); and (2) "with respect to complainants of sex discrimination other than sex-based harassment, any student or employee; or any third party participating in or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred."

8. Additionally, the proposed rules set forth a change in the way schools must investigate sex-based harassment relative to timeframe and delays, presumption of non-responsibility, questioning parties and witnesses, evidence of past sexual behaviors, standard of proof and the appeals process.

a. This includes a provision that would allow a recipient to expand an ongoing Title IX investigation to include allegations that it becomes aware of during the investigation, by providing proper notice to the parties.

b. This also includes revised grounds for dismissing a complaint (including instances where the recipient is unable to identify the respondent after taking a reasonable opportunity to do so, and in certain circumstances, when the complainant voluntarily withdraws the complaint).

c. The proposed rules also limit recipients' ability to use the "clear and convincing" standard for the burden of proof to situations in which the recipient uses that standard for all other comparable proceedings, including other types of discrimination investigations.

d. The proposed rules also provide greater flexibility in timelines for investigations.

C. Changes Regarding Pregnancy and Parenting Students

1. The new regulations would reinforce that schools cannot discriminate against pregnant and parenting students. Some of the proposed language will be changed to reflect the protections against sex discrimination that students may experience because of their potential to become pregnant. The new language would prohibit discrimination based on "current, potential, or past pregnancy or related conditions." The language would also clarify that the term "related conditions" includes childbirth, termination of pregnancy, lactation, and "medical conditions" or "recovery" related to any of these conditions.

2. There is also proposed language defining a school's responsibilities to pregnant and parenting students, Title IX Coordinator responsibilities, how schools must treat absences, obtain doctor's notes, and provide services and supports for pregnant and parenting students.

D. LGBTQ+ Students

1. The proposed regulations would clarify that "sex discrimination" under Title IX includes discrimination based on sexual orientation, gender identity, sex-related characteristics, status as transgender or nonbinary, or sex stereotypes. In addition, the regulations will state that LGBTQ+ students must be allowed to participate fully in school programs and activities.

2. In April 2023, the OCR announced a notice of proposed rulemaking specifically regarding transgender student participation in athletic programs. There is no set date for the proposed rules to take effect.

E. Changes Related to Special Education

1. The proposed rule would add a definition of "student with a disability" to §106.02 of the regulations. The Department of Education proposes adding a definition of "student with a disability" to mean a student who is an individual with a disability who would be covered by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3).

2. Require that is complainant/respondent is an elementary or secondary student with a disability that the Title IX Coordinator meet with t the

student's IEP team or with persons knowledgeable about the student under Section 504.

VI. THE INTERPLAY OF TITLE IX AND SPECIAL EDUCATION

The Department of Education has proposed adding language "to clarify how a recipient's Title IX obligations intersect with its obligation to ensure the rights of students with disabilities." While the current regulations are largely silent with regard to students with disabilities, the regulations do intersect with students with disabilities' rights under other existing laws.

A. Regarding Investigations

1. The Role of Advisor.

a. 34 C.F.R. § 106.45 requires that schools inform the parties to a Title IX Complaint that they may have an "advisor of their choice." The powers and limitations of an advisor are largely left to the discretion of the school or school district. As such, most schools limit advisors' role to the requirements of the text. This means that, in most cases, advisors are limited to:

i. Attending any interview or other proceeding that the party they are advising is asked to attend;

ii. Reviewing the evidence and assisting their advisee with providing a written response;

iii. Reviewing the investigation report and assisting their advisee with providing a written response; and

iv. Formulating written cross-examination questions.

b. 34 C.F.R. § 106.45(b). Under the current regulations, however, schools and school districts do not have a clear right to limit who can be an advisor. This can pose issues for special education staff, particularly staff who work in more restrictive settings or in programs where they may know both of the students involved in a complaint fairly well.

2. Investigation Interviews.

a. The parties to a Title IX investigation have the opportunity to be interviewed as part of the process. While the regulations do not specifically address special education or disability status with regard to interviews, there are a few different areas where input from special education staff can be helpful to the investigator.

i. **Communication.** As interviews are conducted verbally, ensuring that the investigator is able to communicate clearly with a party (or witness) is critical to ensuring that student's equal access to the Title IX process and equal opportunity to be heard. Sharing communication limitations and/or accommodations with the Title IX Coordinator, so that the Title IX Coordinator can convey them to the investigator, allows for both a more productive interview and a more equitable process.

ii. **Dysregulation.** The topic areas of Title IX interviews are frequently upsetting to students, regardless of whether the student has a disability. In addition, the presence of an unfamiliar adult, such as an attorney assigned as an investigator—or an administrator with whom the student does not generally interact or who the student views as a disciplinarian—can cause increased stress and anxiety. In certain cases, offering the Title IX Coordinator insight on how to respond, or refrain from responding, to a student who becomes dysregulated may be beneficial to the investigator.

3. **Response to the Evidence.** As with the formal complaint, the grievance process, and the notice of complaint, ensuring that the evidence is accessible to the party is a required component of the Title IX process. This is another area where special education staff, through the Title IX Coordinator, can and should share information about how the student receives and processes information. Although their advisor or parent can certainly assist, if there are accommodations or modifications an investigator could make to ensure the evidence is accessible to the student, that may also be warranted to ensure due process.

4. **Inclusion of Records.** Under the Title IX regulations, the parties are entitled to the opportunity to review "any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility." 34

C.F.R. § 106.45(b)(5)(vi). In some situations, such as allegations of sexual assault where a student's attorney claims that the student lacks the mental capacity to commit sexual assault, where a student's disability and IEP may become directly-related evidence. Out of an abundance of caution, however, special education documents should not be provided directly to the investigator unless necessary or requested by the student's family.

a. To the extent that this requirement appears to contradict FERPA, the Title IX regulations expressly state that FERPA does not alleviate the obligation to comply with the Title IX grievance process. 34 C.F.R. § 106.6(e).

b. State data privacy laws are superseded by the Title IX regulations as well, to the extent required to comply with the Title IX requirements. 34 C.F.R. § 106.6(h).

B. Regarding Decision Making

1. **Responding to the Investigation Report.** As with the evidence, ensuring that the parties understand the investigation report is a required piece of the Title IX investigation process. This is another area where staff may need to assist a student or be prepared to answer parent questions if a parent is serving as an advisor.

C. Cross-Examination. Most K-12 schools offer cross-examination only through written questions. 34 C.F.R. § 106.45(b)(6)(ii). The cross-examination questions are first screened for relevance by the investigator.

1. However, in some situations, the content of a question may directly relate to the student's disability, and the regulations allow for questioning of both witnesses and parties. It is possible that, if a staff member is a witness, they may receive questions that relate to a student's disabilities. Again, FERPA and state data privacy laws are superseded by the Title IX regulations.

D. Manifestation Determination Following a Finding of Responsibility. School districts and charter schools may not expel a disabled student if the misbehavior is a manifestation of the student's disability but may expel a disabled student if the misconduct is not a manifestation of the student's disability. See 34 C.F.R. § 300.530.

1. **Federal Law.** The IDEA provides that a manifestation determination meeting must be held within ten (10) school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. See 34 C.F.R. § 300.530(e)(1).

    a. Under the IDEA, for purposes of conducting a manifestation determination, a "change in placement" occurs when: (1) a student has been removed from class (e.g., suspended) for ten consecutive school days; or (2) the student has been subjected to a series of removals that constitute a pattern based a number of factors including: (i) the series of removals total more than 10 school days in a school year, (ii) whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and (iii) such additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536.

    b. Although Section 504 and its regulations do not include the phrase "manifestation determination," the OCR has interpreted Section 504 to require a manifestation determination before a change in a student's placement due to disciplinary removals. Per the OCR's interpretation, the process for conducting a manifestation determination under Section 504 (including determining whether a change in placement has occurred) is virtually identical to the IDEA manifestation determination process.

2. **Interplay with Title IX.** The Title IX, Decision-Maker's determination regarding responsibility must state, among other things, "any disciplinary sanctions the recipient imposes on the respondent." 34 C.F.R. § 106.45(b)(7)(ii)(E). Depending on the disciplinary sanction, the school district or charter school may be required to conduct a manifestation determination or otherwise follow IDEA procedures, including procedures in IEPs, Section 504 plans, or other special education plans.

    a. Again, early coordination with the Title IX Coordinator about the special education implications can make a huge difference. For example, Decision-Makers may be able to add qualifying language to the statement of discipline to be imposed, such as "subject to any applicable policies or procedures."

    b. Although the Title IX regulations require the written determination to be provided to the parties simultaneously, and although the

written determination have to include any discipline imposed on the respondent, there is nothing that entitles the complainant to know details about the final discipline. Thus, there is no obligation to notify the complainant of a manifestation determination meeting or its results.

c. Similarly, any disciplinary sanctions must comply with the requirements of the Pupil Fair Dismissal Act and other relevant law.

E. Changes to the IEP. Following the determination regarding responsibility, changes may need to be made to a student's IEP or Section 504 Plan.

1. **Potential Changes to the Complainant's IEP or Section 504 Plan.** Harassment, including sexual harassment, can result in a denial of a free appropriate public education. This determination is made on a case-by-case basis. However, one of the types of sexual harassment consists of unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive as to effectively deny the complainant of equal access to the school or district's education program or activity. If a student with an IEP or Section 504 Plan, for example, is being denied equal access to a school's education program or activity, additional or different aides and services to restore or ensure that access may also be warranted. Moreover, significant harassment could cause the student to have additional special education needs that may not have been identified or properly addressed.

2. **Potential Changes to the Respondent's Education Plan.** Similarly, if a respondent is determined to have engaged in sexual harassment that is a manifestation of the respondent's disability, or that is not a manifestation and results in suspension or expulsion, the school is required to conduct a functional behavioral assessment or review the existing behavior intervention plan and modify that Behavior Intervention Plan if necessary. 34 C.F.R. § 300.530(d)(1)(ii), (f). As with the complainant, a finding that a respondent-student with disabilities engaged in sexual harassment may indicate new or changing special education needs that may result in changes to an IEP or Section 504 plan, or new areas of suspected disability that may require additional evaluations.

VII. CURRENT STATE OF THE LAW REGARDING TRANSGENDER STUDENTS

A. Shifting Federal Guidance/Enforcement

1. As presidential administrations have changed over the last eight years, federal guidance on the extent to which Title IX interacts with the rights of transgender students has shifted.

2. The Department of Education under the Obama administration expressly took the position, in a "Dear Colleague Letter" that Title IX requires schools to permit transgender students access to restroom and locker room facilities that align with their gender identity.

3. The Trump Administration withdrew that letter in 2017. But in March 2021, President Biden issued an Executive Order declaring that it was the policy of the Biden Administration to construe Title IX's prohibition on sex discrimination as including claims of sexual-orientation or gender-identity discrimination.

4. In June of 2021, the U.S. Department of Education issued a Notice of Interpretation indicating it would interpret Title IX consistently with how the U.S. Supreme Court interpreted Title VII in *Bostock v. Clayton County*, meaning that OCR plans to enforce Title IX's prohibition on sex discrimination to include discrimination on the basis of gender identity. 86 FR 32637 (Jun. 22, 2021).

    a. There have been various attempts to enjoin this notice of interpretation from taking effect in various ways. None of those cases, however, affect Minnesota schools, as Minnesota was neither a party to, nor covered by, the proposed injunctions. Minnesota schools, therefore, need to follow the same Title IX process that applies to investigating complaints of sex harassment and discrimination when it receives reports of harassment based on sexual orientation or gender identity.

5. The 2022 and 2023 proposed rulemaking regarding Title IX indicates that the current administration intends to take more formal action to ensure that Title IX extends to transgender and nonbinary students.

B. Differing Decisions by Federal and State Courts on this Issue

1. In *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) the Eleventh Circuit Court of Appeals considered whether a school board unlawfully discriminated against a transgender student under Title IX when its policy prohibited the transgender student from using the restroom of the gender he identified with. The court held the school board did not discriminate against the student because the definition of "sex" used in

Title IX referred to biological sex and did not include gender identity. *Id.* at 815.

2. In *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020), the Fourth Circuit Court of Appeals held that a school board's policy to exclude a transgender student from the bathroom that matched their gender identity was discrimination on the basis of sex under Title IX.

3. In Hecox *v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023), the Ninth Circuit Court of Appeals suggested, citing the Department of Education's proposed new rule, discussed above, expressly prohibiting gender identity discrimination under Title IX, that transgender discrimination is sex-based discrimination.

4. In *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023), the Ninth Circuit Court of Appeals, held that the Title IX prohibitions against sex discrimination protect individuals from discrimination on the basis of sexual orientation, citing the *Bostock* decision. This further suggests that if present with the question, the Ninth Circuit would find Title IX also protects against gender identity discrimination.

5. In a very recent decision, a Wisconsin state court held that Title IX does not apply to allegations of discrimination on the basis of gender identity. *T.F., et. al. v. Kettle Moraine Sch. Dist.*, 2021CV1650 (Branch 8 Wisc. Cir. Ct., October 3, 2023).

6. The Eighth Circuit Court of Appeals has not weighed in on this issue to date. In a recent decision concurring with the majority opinion striking down a school district's policies requiring students to "respect" other students' gender identities, one Eighth Circuit Judge argued that Title IX's prohibitions of sex discrimination protects individuals from discrimination on the basis of gender identity.

C. It is also important to note, that while Title IX may come to expressly protect individuals from gender identity discrimination, students are also protected by other statutes. For example, the Minnesota Human Rights Act expressly protects gender identity under the larger umbrella of "sexual orientation," which the Act defines as including "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, subd. 44. The MHRA prohibits discrimination on the basis of sexual orientation in a number of contexts,

including: 1) places of public accommodation, 2) public services, 3) educational institutions, and 4) employment.

1. The Minnesota Court of Appeals has expressly ruled that transgender students who are denied the use of a locker room that corresponds to the gender with which they identify can assert a viable claim under the Minnesota Human Rights Act and the Equal Protection Clause of the Minnesota Constitution. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

D. Additionally, in 2014, the Minnesota Legislature also passed the Safe and Supportive Minnesota Schools Act, commonly referred to as the anti-bullying law. The definition of "bullying" under the statute expressly includes conduct that is directed at a student or students "based on a person's actual or perceived . . . sexual orientation, including gender identity and expression. . ." Minn. Stat. § 121A.031, subd. 2(g). This means that any bullying towards a transgender student on the basis of their transgender status implicates the anti-bullying law and triggers the investigation and response obligations imposed by the statute.

VIII. A QUICK WORD ABOUT THIRD-PARTY SCHOLARSHIPS

A. A school may wish to advertise or promote third-party scholarships, fellowships, or other forms of financial assistance to its students. Title IX may prohibit a school from doing so.

B. In 2021, the Department of Education issued technical assistance regarding this issue. It stated that the general rule is that if a third-party scholarship imposes a preference or restriction for students of one sex, a school may not advertise or promote that scholarship. Under Title IX, a recipient is prohibited from advertising or promoting any scholarship, fellowship, or other form of financial assistance that discriminates on the basis of sex, even when the scholarship is administered by a third party, and not by or on behalf of the recipient.

C. Additionally, as to any third-party scholarship that the school does promote or advertise, OCR stated that it expects that schools will take reasonable steps to verify that the sponsoring organization's or person's rules for determining awards do not, expressly or in fact, discriminate on the basis sex.

D. The Department made it clear that advertising or promoting included listing the scholarship on the school's website.