No. 17-____

In the United States Court of Appeals for the Fifth Circuit

IN RE BAYLOR UNIVERSITY,

PETITIONER.

On Petition for Writ of Mandamus to the United States District Court
for the Western District of Texas, Waco Division
Case No. 6:16-CV-00173-RP

PETITION FOR WRIT OF MANDAMUS OF BAYLOR UNIVERSITY

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CERTIFICATE OF INTERESTED PERSONS

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Case No. 6:16-CV-00173

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification:

1. **Petitioner and Counsel**:

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2. **Respondents and Counsel**

As the presiding judge below, the Honorable Robert L. Pitman, U.S. District Judge, Western District of Texas, is a Respondent.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF RELIEF SOUGHT

The district court granted Plaintiffs' motion to compel Baylor University to produce the student records of nonparty students and former students, dating back to 2003, relating to "sexual conduct generally" and other topics related to "sex." Tab.35, pp.8, 13; *see* Tab.20, p.6 & Ex.A, pp.11-12, 12-20. The court clarified that, to the extent that information about sexual assaults is contained in mental-health counseling records and medical records, Baylor must review those records and disclose—in chart format—student allegations of sexual assault. Tab.49, pp.5, 8.

A separate order compels the production of more than 32,000 nonparty student records, and hundreds of thousands of additional documents, without regard to: (1) the relevance and proportionality requirements of Federal Rule of Civil Procedure 26 (Rule 26); or (2) the heightened standards for production of records protected by FERPA, 20 U.S.C. §1232g. *See* Tab.43, pp.19-20. The basis for the second order is that Baylor made the files available to its outside counsel, Pepper Hamilton, during its Title IX investigation. *See id*. Under the second order, Baylor is now prepared to release the 6,200 FERPA notices unless mandamus is granted. *See* Tab.48, p.3 & Ex.A.

Because these orders are a clear abuse of discretion and Baylor has no other adequate remedy, Baylor requests a writ of mandamus: (1) vacating the portion of the Order (Tab.49) compelling disclosure of the bulleted items in nonparty medical

and counseling records; (2) vacating the portion of the Order (Tab.35) compelling Baylor to produce nonparty student records responsive to Plaintiffs' "Issues of Concern" RFPs, as limited by that order; (3) vacating the Order (Tab.43) compelling production of nonparty student records made available to Pepper Hamilton, except the records of Plaintiffs' alleged assailants and students with knowledge of the incidents involving the Plaintiffs; and (4) directing the district court to grant Baylor's motion for protection as to the nonparty student records covered by those Orders, except the records of Plaintiffs' alleged assailants and students with knowledge of the incidents involving the Plaintiffs (Tab.21).

Baylor requests the following remedies in the alternative: (1) delaying discovery under the litigation's present circumstances; (2) limiting discovery of FERPA records to summary information; or (3) delaying discovery pending an interlocutory appeal about the validity of Plaintiffs' "heightened risk" theory, which is the only basis for Plaintiffs' broad discovery requests for the disputed records of nonparty students and former students.

ISSUES PRESENTED

1. Did the district court clearly and indisputably abuse its discretion by compelling disclosure of confidential communications in mental-health counseling records, which are protected by an absolute federal privilege? Relatedly, did the trial court clearly and indisputably abuse its discretion in compelling disclosure of confidential communications in student medical records regarding sexual assault?

2. Did the district court clearly and indisputably abuse its discretion by failing to apply, or by incorrectly applying, the significantly heightened standard for production of student educational records protected by FERPA?

3. Did the district court clearly and indisputably abuse its discretion by failing to apply, or by incorrectly applying, Federal Rule of Civil Procedure 26's standards of relevance and proportionality?

4. Alternatively, did the court clearly and indisputably abuse its discretion by denying additional protections for the nonparty student records at issue?

5. Are the circumstances appropriate for mandamus relief, and does Petitioner have no adequate remedy by appeal, where the orders compel (1) disclosure of nonparty confidential communications in counseling and medical records; (2) production of FERPA-protected nonparty records involving sensitive

topics like sexual conduct and sexual assault; and (3) production of at least 32,000 FERPA-protected student records, some of which address sensitive topics such as sexual conduct and sexual assault?

STATEMENT OF FACTS & PROCEDURAL HISTORY

Current and former students have sued Baylor under Title IX of the Education Amendments of 1972, which prohibits sex-based discrimination by schools that receive federal funding. Plaintiffs have advanced two theories: (1) Baylor improperly responded to complaints about sexual assaults (*i.e.*, "post-assault" claims); and (2) Baylor instituted policies or customs that created a "heightened risk" of sexual assaults for all students both on and off campus (*i.e.*, "pre-assault" claims). Tab.9, pp.1, 39-41; Tab.18, p.1. The latter theory is relevant here, being the sole basis for discovery of the disputed nonparty student records.

Baylor moved to dismiss the pre-assault claims, arguing in part that the Plaintiffs had failed to allege that Baylor had prior "actual knowledge" of sexual harassment occurring in a context under the "substantial control" of Baylor as required by *Davis v. Monroe County Board of Education*, 526 U.S 629 (1999). *See* Tab.2, p.9-10; *see, e.g.,* Tabs.4-8, 10-13. The court ruled that, irrespective of a school's actual knowledge of prior harassment within a specific program or activity, a plaintiff may state a claim by showing that the University's general "handling of reports of sexual assaults created a heightened risk of sexual assault throughout [its] student body." Tab.14, p.15. Baylor moved for an interlocutory appeal, arguing that this Court had never sanctioned such a sweeping interpretation of Title IX. Tab.15, pp.3-7. The district court denied the motion. Tab.18, p.5.

Plaintiffs' pre-assault "heightened risk" Title IX claim is the basis for dozens of requests for production (RFPs) seeking fourteen years' worth of student records related to "Issues of Concern." *See, e.g.*, Tab.20 (Ex. A pp.11-20) (RFP 2-3, 6-8, 20, 27-35, 37, 39-41, 43, 46-50, 53, 57-58); Tab.35 pp.4, 12. Plaintiffs defined "Issues of Concern" to include:

> all matters that fall within the definitions of "Conduct code violation", "Prohibited Conduct under Title IX Policy", "Sexual Violence" and "Sexual Harassment" above, as well as the Pepper Hamilton investigation, the Counseller investigation, and the findings of fact issued by the Board of Regents in May 2016.

Tab.20 (Ex.A p.12).

"Conduct code violation" means "any act that violates Baylor's Student Conduct Code or would constitute 'misconduct' under Baylor's Student Conduct Code." *Id.* p.10. The district court interpreted that term to require "discovery regarding violations relating to 'sex'—which the Court understands to mean *sexual conduct generally*.'" Tab.35, p.8 (emphasis added).

Plaintiffs defined "Prohibited Conduct" to include much more than sexual assault and sexual harassment. That definition included "Sex discrimination, sexual violence, sexual harassment, dating relationship violence, domestic violence, stalking, sexual exploitation, sexual harassment, sexually inappropriate conduct, [and] retaliation." Tab.20, p.10.

Baylor objected to Plaintiffs' "Issues of Concern" RFPs on grounds that they were irrelevant, disproportionate, overbroad, and improperly sought disclosure of confidential and sensitive records regarding third-party students, such as medical and mental health information, along with FERPA-protected documents. *See, e.g.*, Tab.20, Ex.B (Baylor's Response to RFPs 2-3, 5-8, 20, 27-30, 32, 37, 39-40, 46-50, 53).

Plaintiffs filed a motion to compel Baylor to "provide responsive documents pursuant to Plaintiffs' numbered requests related to 'Issues of Concern' within the relevant 'Time Period,' unless protected by privilege or a valid specific objection beyond Baylor's general objections," including nonparty student records. Tab.20, p.6. On the same day, Baylor filed a motion for protection from all discovery requests that would require disclosure of non-party student information (other than students with knowledge of Plaintiffs' incidents). Tab.21, p.8 (listing RFPs). Baylor argued that (1) the RFPs did not satisfy Rule 26; (2) some of the RFPs encompassed nonparty counseling records protected by the psychotherapist privilege, (3) Plaintiffs had not satisfied FERPA's balancing test, and (4) the court should delay production of the nonparty records until other discovery was complete, and, alternatively, should allow Baylor to produce the information in a format that would better protect nonparty privacy. *Id.* p.7-17.

The court granted Plaintiffs' motion to compel in part, as to nonparty student records that "related to sexual violence or sexual harassment, and student code of conduct violations related to sexual conduct." The court denied that motion in part, and granted Baylor's motion for protection, as to nonparty student records "related to other third party student code of conduct violations, including those for drinking and other personal conduct." Tab.35, p.13.[1]

The court then signed a Confidentiality and Protective Order requiring Baylor to notify current and former students that their records have been requested and that they may consent or object via email. Tab.38 ¶4(b)-(c). Baylor's notice must state: "You may, if you wish, hire an attorney, but you do not need to do so in order to register an objection . . . ." ¶4(c).

Pursuant to the order, if the student consents, then the material will be produced without redaction. ¶4(d). If the student objects, the court will review *in camera* to determine "whether the student's information should be produced and, if so, under what conditions." ¶4(f). The failure to object or consent will be deemed an objection unless there is evidence that the individual received the notice and Baylor confirms with Court personnel that no objection was lodged directly with the Court. ¶4(g). If those conditions are met, Baylor must "produce the affected student's information with no redactions." ¶4(g). Depending on the record, the

[1] The order also ruled on discovery disputes that are not at issue here.

production may be under seal or "Attorneys' Eyes Only." ¶3(c) & Tab.162 (modifying order).

Plaintiffs also sought broad discovery relating to Baylor's investigating counsel, Pepper Hamilton. Tab.20, Ex.A (RFPs 9-11, 13-17). For example Plaintiffs requested production of all "emails, mobile device data, including text messages, and documents from current and former Baylor employees" provided by Baylor to Pepper Hamilton. *Id.* RFP 17. Baylor objected on grounds that included overbreadth, relevance, proportionality, and FERPA protections. Tab.17 Ex.B, (Responses 9-11, 13-17). When Plaintiffs moved to compel (Tab.19), Baylor responded that it had given Pepper Hamilton "unfettered access" to its files, without screening for privilege or relevance to Plaintiffs' claim. Tab.24, p.2-3 & Ex.2 ¶11.

The court granted Plaintiffs' motion to compel in part, reasoning (incorrectly) that "[p]resumably, Baylor and Pepper Hamilton did not collect documents or conduct interviews that they did not expect to reveal information about the school's compliance under Title IX." Tab.43, pp.19-20. This order encompasses all such documents, not merely those related to sexual conduct generally. The court further ordered that, while the parties could agree on a smaller subset of data based on ESI terms, the Court would not entertain "requests by Baylor for further protection based upon relevance or burden." *Id.* at 20. This production likewise is

subject to the confidentiality and protective order (Tab.38). *Id.* at 21. Plaintiffs agreed to limit initial production to the 450,000 documents culled by Pepper Hamilton, while reserving their right to request the other information that Pepper Hamilton examined (Tab.44 p.3), which included "more than a million pieces of information" (Tab.19, p.3). Baylor agreed to the 450,000 while reserving its rights to obtain modification of the order. Tab.44, p.2; Tab.47, p.9.

At a July 28, 2017 hearing, Baylor requested clarification on whether the order compelled production of mental health and medical records, and the court requested additional briefing on that issue. Tab.42. While awaiting clarification, Baylor proceeded with its review of the Pepper Hamilton documents. Baylor determined that the production from records of a single dean in response to RFP 17 would yield 47,326 documents in total, including 32,000 identified as FERPA-protected student records. Tab.48 & Ex.A ¶3-4. At least 6,200 individual students would receive FERPA notices as a result of that single RFP. *Id.*

Yesterday, the trial court clarified that Baylor must disclose student reports of sexual assault in medical records (dating to 2006) and counseling records (dating to 2009), along with corresponding information, in an anonymized chart format. Tab.49. Baylor then filed this petition. Baylor's motion for a stay of production of nonparty records during the mandamus proceedings is pending. Tab.48.

ARGUMENT

Mandamus is appropriate for clear and indisputable abuses of discretion. *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). That relief is appropriate in this extraordinary circumstance, where the discovery orders at issue threaten to work a "manifest injustice" to thousands of nonparty Baylor students and former students, and a "safety valve[]" is necessary for "correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (citation & internal quotation marks omitted).

Because an appeal would come too late to prevent harm to the affected nonparty students and former students, there are no other adequate means for relief. *See In re LeBlanc*, 559 Fed. App'x. 389, 392 (5th Cir. 2014) (per curiam). Baylor therefore respectfully requests that the Court grant mandamus relief as follows.

I. THE COURT CLEARLY ABUSED ITS DISCRETION BY ORDERING DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS IN NONPARTY PRIVILEGED MENTAL-HEALTH RECORDS, AND IN MEDICAL RECORDS.

Counseling records are protected by an absolute federal privilege that applies in this federal-question case. *See Jaffee v. Redmond*, 518 U.S. 1, 9-17 (1996); *see* Fed. R. Evid. 501. The district court clearly and indisputably abused its discretion by compelling disclosure of nonparty student communications of sexual

assault (and related details) contained within those privileged counseling records. Tab.49. pp.5, 8.

The United States Supreme Court recognized a federal common-law privilege for counseling records, observing that (1) "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears"; (2) "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"; (3) "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem"; and (4) "[i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled." *Jaffee*, 518 U.S. at 10-12. This privilege also extends to the confidential communications made to licensed social workers in the course of psychotherapy. *Id*. at 15.

This privilege, once established, is absolute. It does not turn on any "evaluation of the patient's interest in privacy and the evidentiary need for disclosure," because a balancing test "would eviscerate the effectiveness of the privilege." *Id*. at 17.

The privilege applies here, as shown by the declaration of Dr. Jim Marsh, a psychologist and Executive Director of the Baylor University Counseling Center.

See Tab.42 & Ex.A ¶1-2. Since at least 2003, all counseling services at Baylor have been provided by licensed psychologists, licensed professional counselors, licensed marriage and family therapists, and licensed social workers, or by counseling staff who work under the direct guidance and license of a licensed staff member. *Id.* ¶3. Dr. Marsh explained that "[c]onfidentiality is absolutely critical to the services" provided to students and warned of the chilling effect—and personal harm—that would occur should Baylor not be able to guarantee confidentiality of its students' counseling records. *Id.* ¶¶5-8.

Given the significant public policy at issue, courts have refused to allow discovery of nonparty counseling records so long as the nonparty had an expectation of privacy in the counseling session. *See Perez v. City of Chicago*, 2004 WL 1151570, at *3 (N.D. Ill. April 29, 2004); *Caver v. City of Trenton*, 192 F.R.D. 154, 160-62 (D.N.J. 2000). Dr. Marsh's declaration confirms that Baylor students who sought counseling services at the Counseling Center had such an expectation of privacy and signed consent forms that assured them their information will be kept confidential. Tab.42, Ex.A at ¶7.

The trial court thus clearly and indisputably abused its discretion by compelling Baylor to disclose, for all records dating back to 2009, the following information: each report of sexual assault made by a female student; the date of said report, the date of the assault, if known; whether the assailant was a Baylor

student, if known; and the sex of the alleged assailant, if known.[2] Tab.49 p.8. These reports and details are communications made in confidence to Baylor counseling staff. While the court has ordered these communications produced in an anonymized format, such a format does not relieve the communications of their privileged status. *Jaffe* guarantees "confidentiality" in information disclosed—not merely anonymity. *Jaffee*, 518 U.S. at 11.

The court's reliance on *Merrill v. Waffle House*, 227 F.R.D. 467 (N.D. Tex. 2005) is misplaced. *Merrill* ordered disclosure of names of parties' mental health care providers and the dates of treatment. *Id.* at 471. This information is not a confidential communication made *by* a patient *to* a mental health care provider.

If not corrected by mandamus, this order threatens irreparable harm not only to affected nonparties, but also to potential patients. Dr. Marsh explained that revealing sexual assaults recounted under a promise of confidentiality would create a "terrible situation for those individuals who trusted [counseling staff] to keep their highly sensitive information confidential." Tab.42, Ex.A, ¶8. Furthermore, current and future Baylor students will know that they have no true expectation of confidentiality in any report of sexual assault made to counseling staff, thereby bringing about the very chill in treatment-seeking communications that *Jaffe*

[2] The court's order would also compel disclosure of reports of childhood sexual assault, which are not relevant to Plaintiffs' claim. *See* Tab.42, Ex.A, ¶ 10 (noting that such reports make up about half of sexual violence reports).

warned of two decades ago.[3] Accordingly, mandamus relief is warranted here. *See In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir. 2006) ("Mandamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal.").

Relatedly, the trial court clearly and indisputably abused its discretion by compelling disclosure of the same information in nonparty student medical records dating back to 2006. Tab.49, p.5. Although no federal doctor-patient privilege exists, "the federal courts may consider state policies supporting a privilege in weighing the patient's interest in confidentiality" when examining whether to order production. *De Santiago-Young v. Histopath, Inc.*, 2015 WL 1542475, at *2 (S.D. Tex. Apr. 1, 2015) (citing *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991)).

Thus, in *De Santiago-Young*, the court acknowledged that the Texas Rules of Evidence recognize the physician-patient privilege, and looked to the parameters of that privilege in determining whether the plaintiff's medical records were discoverable. *Id.*; *see also* Tex. R. Evid. 509; Tex. Occ. Code §§159.002 (establishing privilege); 159.003 & 159.004 (setting forth limited exceptions). Further, federal courts have weighed whether plaintiffs are seeking "the kind of highly sensitive information that is often found in *e.g.* psychotherapy or other

[3] Such reports are not relevant to Plaintiffs' claims because, due to professional obligations, counseling staff cannot share reports of sexual assault with Baylor administrators. Tab.42, Ex.A, ¶8.

medical treatment notes." *Bull v. City & Cty. of San Francisco*, 2003 WL 23857823, at *3 (N.D. Cal. Oct. 27, 2003). Precisely that kind of information is at issue here. The order compels disclosure of sexual assault reports from the medical files of nonparty Baylor students dating back to 2006. The Department of Education's Office for Civil Rights has advised schools not to voluntarily share students' medical records even with the schools' attorneys or the courts unless the litigation in question directly relates to the medical treatment itself. *See generally* Aug. 24, 2016 DEAR COLLEAGUE LETTER: PROTECTING STUDENT MEDICAL RECORDS. Tab.23, Ex. C.

Given the interests at stake, court clearly abused its discretion in compelling disclosure, even in an anonymized format. As explained in the declaration of Dr. Sharon Stern, the Medical Director of Baylor University's Health Center, confidentiality and privacy are crucial to both Health Center employees and patients. Tab.42, Ex.B ¶¶5-7. Patients are advised that, except in very rare circumstances, their personal medical records will be kept confidential unless they consent otherwise. *Id.* ¶5. Confidentiality is particularly important for patients who present conditions or concerns related to sexual violence or sexual health generally. *See id.* ¶6. At the very least, Baylor demonstrated good cause for a protective order prohibiting such discovery at this time. Fed. R. Civ. P. 26(c)*; infra* Part IV.

II. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION BY COMPELLING THE PRODUCTION OF FERPA-PROTECTED NONPARTY RECORDS.

A. The trial court never applied FERPA's heightened standard to nonparty student records covered by the Pepper Hamilton RFPs.

Parties seeking production of FERPA-protected records must prove a genuine need for the requested records that outweighs the privacy interests of the affected students—a "significantly heavier burden" that goes beyond relevance and proportionality. *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008) (citation omitted). The trial court did not apply that standard *at all* to *any* of the student records covered by the trial court's order to produce all information given to Pepper Hamilton. Tab.43, pp.19-20 (no mention of FERPA); Tab.19 n.1 (referencing RFPs). That order—covering at least 32,000 FERPA-protected records (Tab.48, Ex.A)—is a clear and indisputable abuse of discretion.

FERPA protects student education records from disclosure to third parties. The statute prohibits "the release of education records" or "personally identifiable information contained therein other than directory information" concerning "students" without their written consent. 20 U.S.C. §1232g(b)(1), (b)(2), (d). "Education records" are "records, files, documents and other materials" that "(i) contain information directly related to a student," and (ii) are maintained by an educational institution. *Id.* §1232g(a)(4)(A). A college's Title IX sexual assault investigation files are an example of a FERPA-protected record.

FERPA regulations state that protected information includes "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," and "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. §99.3.

Although FERPA does not provide a privilege, it protects the confidentiality of educational records by threatening financial sanctions against schools that adopt policies of releasing student records. *Ragusa,* 549 F. Supp. 2d at 291–92. Likewise, although FERPA allows disclosure of educational records pursuant to a judicial order, the privacy violations that result from disclosure are "'no less objectionable simply because release of the records is obtained pursuant to judicial approval unless, before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students.'" *Id.* (quoting *Rios v. Read*, 73 F.R.D. 589, 599 (E.D.N.Y. 1977)). The higher burden is justified here by the "significant privacy interests of nonparty students which underlie FERPA." *Alig-Mielcarek v. Jackson*, 286 F.R.D. 521, 527 (N.D. Ga. 2012) (citations omitted).

Because the trial court never required Plaintiffs to carry this significantly heavier burden as to the Pepper Hamilton RFPs, at least 6,200 current and former Baylor students will be deprived of the protections that Congress mandated. Tab.48, Ex.A. Mandamus relief is necessary to protect those students' interests.

B. The trial court failed to apply (or correctly apply) Rule 26's relevance and proportionality standard to the Pepper Hamilton RFPs.

The trial court's failure to apply FERPA is all the more fraught, given the court's failure to apply Rule 26(b)'s significantly lower threshold for relevance and proportionality.

Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any non-privileged matter that is *relevant* to any party's claim or defense and proportional to the needs of the case. . . ." Fed. R. Civ. P. 26(b)(1) (emphasis added). The trial court can and must disallow discovery that is not relevant or not "proportional to the needs of the case." *See id.* at 26(b)(2)(C)(iii). Rule 26 has "never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." *Murphy v. Deloitte & Touche Group Ins. Plan,* 619 F.3d 1151, 1163 (10th Cir. 2010).

The court abused its discretion by never considering whether all information that Baylor provided to Pepper Hamilton *actually* is relevant to Plaintiffs' heightened risk theory, which the court described as follows:

> even prior to their initial reports of sexual assault, Baylor's discriminatory practices in handling reports of sexual assault—discouraging victims from reporting their assaults and failing to investigate their claims or punish their assailants—constituted a policy of intentional discrimination that substantially increased Plaintiffs' risk of being sexually assaulted.

Tab.14, p.11.

Instead, the court simply "presume[d]" that "Baylor and Pepper Hamilton did not collect documents or conduct interviews that they did not expect to reveal information about the school's compliance under Title IX." Tab.43. pp.19-20. This presumption cannot substitute for Rule 26's relevance test, which the Court did not apply. That abuse of discretion is magnified where Baylor put forward evidence contradicting the court's presumption: Baylor gave Pepper Hamilton "unfettered access" to its files, meaning that Baylor did not prescreen for relevance to the Title IX investigation. *See* Tab.24, pp.6-7 & Ex.2 ¶¶ 8-11.

Courts have held that "[a] party is no more entitled" to "unfettered access to an opponent's social networking communications than it is to rummage through the desk drawers and closets in his opponent's home." *Gondola v. USMD PPM, LLC*, 223 F. Supp. 3d 575, 591 (N.D. Tex. 2016) (*quoting Moore v. Wayne Smith Trucking Inc*., No. Civ. A. 14-1919, 2015 WL 6438913, at *2 (E.D. La. Oct. 22, 2015)). The order compels production of all of the emails, data, and documents in the employee files made available to Pepper Hamilton, except for privileged

documents. *See* Tab.19, n.1, Ex.A (RFPs 9, 17); Tab.24, pp.6-7; Tab.43 n.8. By ordering production on the same scope that Baylor gave its *own counsel* in a university-wide investigation, the court is allowing Plaintiffs to effectively rummage through Baylor's entire digital "home." *Gondola*, 223 F. Supp. 3d at 591. The order casts "too wide a net" and sanctions inquiry into thousands of *nonparties*' personal information that is "irrelevant and non-discoverable." *Id.*

Aside from the improper presumption of relevance, this discovery is disproportionate to the needs of the case. Compliance with *one facet* of RFP 17 alone would yield production from a single custodian of 47,326 documents, including 32,000 that are FERPA protected, triggering 6,200 individual FERPA notices, some of which involve sexual assault, while others involve sensitive topics like self-harm assessments and other types of student code of conduct violations. Tab.48, Ex.A, ¶4. The court already found the FERPA standard unsatisfied as to records of conduct violations not involving sex sought by Plaintiffs' "Issues of Concern" RFPs. Tab.35, p.7.

The harm threatened by this order cannot be undone. Baylor was entitled to an order protecting thousands of nonparty students and former students from the guaranteed annoyance—and potential for great embarrassment and harm—from being confronted with FERPA notices as to these records for which Plaintiffs have no genuine need. Fed. R. Civ. P. 26(c)(1).

C. The trial court clearly abused its discretion in ordering production of sex-related student records responsive to Plaintiffs' "Issues of Concern" RFPs.

The trial court also clearly and indisputably abused its discretion by compelling production of sex-related student records responsive to Plaintiffs' dozens of "Issues of Concern" RFPs. Tab.35, p.13. Plaintiffs did not demonstrate a genuine need for the records that outweighs the privacy interests of the affected students. *See Alig-Mielcarek*, 286 F.R.D. at 527.

Plaintiffs' "Issues of Concern" RFPs encompass much information for which Plaintiffs have no genuine need. For example, the term "Conduct Code violation" does not merely encompass scenarios in which Baylor investigated or *actually charged* a student. Instead, the definition encompasses "any act that violates Baylor's Student Conduct Code or would constitute 'misconduct' under Baylor's Student Conduct Code." Tab.20 Ex.A, p.10. Taking this definition together with the court's interpretation, the court has ordered the production of ***every student record since 2003 relating to "sex" or "sexual conduct generally."*** Tab.35, p.8; Tab.20, Ex. A, RFP 40 (requesting "all documents related to any alleged incident which would involve any Issues of Concern"). This order is unprecedented in the scope and severity of its threat to student privacy interests, and is a clear and indisputable abuse of the trial court's discretion.

Specifically, the order would require production of extensive files with no relevance to Plaintiffs' "heightened risk" claims, including:

- a student's complaint to dorm personnel regarding a roommate's participation in consensual sexual conduct; or
- a student's disclosure to a professor of childhood sexual abuse or sexual assault by a non-Baylor student in the student's hometown.

Even if such information were relevant, mere "relevance" is not enough to satisfy FERPA's balancing test. Plaintiffs did not carry FERPA's heavier burden here. Tabs.20, 22.

Alig-Mielcarek confirms that FERPA's demanding standard is not met where a plaintiff's requests are expansive and disproportionate to the need for relevant discovery, particularly where nonparties' privacy interests are threatened. In that case, the court granted the university's motion to quash the plaintiff's subpoena for production of certain nonparty educational records based on FERPA and Rule 26, even though those documents had "some relevance" to the plaintiff's claims. The court reasoned that:

> as currently drafted, without any temporal or other limitations, the demands are too broad. Plaintiff's demands are like a bulldozer that levels an entire hill in hopes of finding some specks of gold. Again, that Plaintiff seeks to bulldoze nonparty academic records provides even more basis to sustain the objection.

Id. at 527.

Here, Plaintiffs seek a mountain of nonparty educational records in search of a speck that might lend credulity to their "heightened risk" claim (assuming that such a claim could be recognized), and at a terrible price to the privacy of the students whose records would be exposed. FERPA requires that schools notify students of judicial orders requiring production of their records in advance of compliance with the orders. 20 U.S.C. §1232g(b)(2)(B); *Craig v. Yale Univ. Sch. of Medicine*, 2012 WL 1579484, at *2 (D. Conn. May 4, 2012). Under the protective order in this case (Tab.37), affected students will receive written notice that a court has required production of their personal records relating to—for example—their own sexual assaults.

The harms created by these FERPA notices cannot be undone on appeal. A decade-old, unpursued allegation of sexual assault will yield a FERPA notice to the victim. And also to the accused, who could react in anger upon learning of the allegation. Further, a file reference regarding consensual sexual activity between a couple would yield FERPA notices to both persons, perhaps fourteen years after the fact.

Because mere receipt of such a notice may traumatize the recipient, at least one court has required other discovery to be conducted before authorizing notices to students who did not pursue sexual assault allegations to a hearing. The court cited "concern[] about the impact that this letter may have on the reporting

Gonzaga female students; some of these women may not have shared their sexual-assault experience with their loved ones, who may question why they received a letter from Gonzaga, thereby possibly causing these women additional pain and discomfort." *Hobbs v. Corp. of Gonzaga Univ.*, 2011 WL 4498970, at *1 (E.D. Wash. Sept. 27, 2011); Tab.21, p.14.

These concerns may be multiplied here, given the broad span of the discovery period. Furthermore, the trial court's acceptance of an identity-protecting chart as to medical and counseling records demonstrates the lack of genuine need for intrusive nonparty discovery on this broader scale.

III. EVEN IF THE NONPARTY RECORDS WERE DISCOVERABLE, THE COURT ABUSED ITS DISCRETION BY NOT ADOPTING ADDITIONAL PRIVACY PROTECTIONS.

Even assuming the propriety of production, the court abused its discretion by refusing temporal and procedural protections for the student records at issue. Specifically, the trial court (1) failed to properly analyze whether nonparty records are needed at this stage in the litigation; (2) improperly refused to employ a less intrusive means of providing the information, such as a summary or spreadsheet; and (3) refused to first allow an interlocutory appeal to determine the validity of the novel heightened risk claim—the only claim for which discovery of nonparty records is sought.

Finally, the protective order is weakened by the requirement that Baylor advise nonparties as follows: "You may, if you wish, hire an attorney, but you do not need to do so in order to register an objection via either of the mechanisms described above." Tab.38, ¶ 4(c). This language inadvertently may discourage students from seeking legal counsel to understand and assert their privacy rights.

A. It is premature to allow discovery of nonparty student records.

So far there has been minimal discovery of the circumstances surrounding the alleged treatment of the ten Plaintiffs. Until that discovery happens, neither Baylor nor the Court can have any assurance that the broad discovery requested by Plaintiffs is relevant and proportional. If an "official policy" cannot be gleaned from these ten Plaintiffs' disparate experiences across a fourteen-year period, then they should not be allowed to wade through non-parties' information looking for one. *Cf. Doe v. Bibb Cty. Sch. Dist.,* 688 F. App'x 791, 796 (11th Cir. 2017) (stressing the importance of sufficiently similar circumstances of nonparties before imposing Title IX liability).

Most Plaintiffs allege that they were misinformed about their Title IX rights or discouraged by counselors, doctors, and other school employees. But no attempt has been made to depose the health professionals or other employees to inquire about their clinical or administrative practices or to determine whether they acted pursuant to some unlawful policy.

In addition, there are substantial discrepancies between Plaintiffs' allegations and Baylor's records. For example, while Jane Doe 4 alleges that Judicial Affairs did not assist her, Baylor's emails show that Judicial Affairs provided her with a Title IX rights flyer and arranged a meeting with the Title IX coordinator. Tab.23 p.6, Ex.G. Until the unique facts of Plaintiffs' circumstances are explored, neither the parties nor the Court can know which nonparty records might be relevant to the Plaintiffs' claims.

Understanding the Plaintiffs' specific situations is essential because the only potentially relevant nonparty records would be those involving assaults in substantially similar circumstances. Regardless of whether a plaintiff asserts a pre-assault or post-assault claim, the alleged harassment must occur within a "program or activity" under the "substantial control" of the university. *Weckhorst v. Kansas State Univ.*, 2017 WL 3674963, *6 (D. Kan. Aug. 24, 2017); *Doe v. Bibb Cty. Sch. Dist.*, 688 F. App'x 791, 797 (11th Cir. 2017); *Ostranger v. Duggan*, 341 F.2d 745 (8th Cir. 2003); *Pahssen v. Merrill Comm. Sch. Dist.*, 668 F.3d 356, 366 (6th Cir. 2012).

Even the Tenth Circuit case cited by the district court, focused on sexual assaults within a *specific* university program, not incidents throughout the entire university. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174-75, 1184

(10th Cir. 2007). Here, the ten plaintiffs describe completely different contexts involving different alleged perpetrators over a fourteen-year period.

Simpson also is distinguishable because it focused on one university administrator (a head coach) who had actual knowledge of prior assaults in a *specific* program but continued to maintain the program without supervision. *Simpson*, 500 F.3d at 1184. The court found that the head football coach was sufficiently high in the organization to be deemed a "policymaker" for the program in question. *See id.* The coach's knowledge of assaults by others in the same program was sufficient to survive summary judgment in that case. *Id.* at 1184.

This Court has repeatedly acknowledged that Title IX liability rests on the knowledge of decisionmakers with authority to take corrective action in response to known abuse. *See, e.g., Salazar v. San Antonio Ind. Sch. Dist.*, 2017 WL 2590511, at *4 (5th Cir. June 15, 2017). Consequently, if an "official" policy does not emerge from the Plaintiffs' ten cases, then they should not be allowed to fish through nonparty files looking for one. And even if the suggestion of a "policy" were to appear, Plaintiffs' discovery requests should be limited to the particular programs relevant to their own cases (if any), and the knowledge of officials with authority to take corrective action. Tab.21, p.11-13.

B. Discovery of nonparty student records should be limited, at least at the present time, to anonymous summaries.

Baylor offered to produce a detailed spreadsheet of all sexual assaults brought to its attention since 2003 (to the extent the records are available and still exist)—an approach that would eliminate the need to release actual nonparty records.

The proposed spreadsheet would contain: (i) the date of alleged assault; (ii) the date alleged assault was reported to a Baylor employee; (iii) whether the alleged victim was a Baylor student; (iv) genders of the alleged victim and the alleged assailant; (v) where it is unclear whether the alleged assailant was a Baylor student or not, that information will also be provided; (vi) whether Baylor knew the identity of the alleged victim and the alleged assailant; (vii) whether the alleged victim asked Baylor to keep the alleged assailant's identity confidential; (viii) the location where the alleged assault occurred; (ix) how Baylor learned of alleged assault; (x) the specific offices or type of Baylor personnel who were made aware of the alleged assault; and (xi) disposition of the complaint. Tab.29 pp.1-2.

This approach, or one similar to it, would protect the rights of nonparties in their FERPA records[4] while providing Plaintiffs with the information that they claim they need to investigate their claims.

[4] This approach does not adequately protect counseling record communications, which are privileged, or medical record communications presenting similar privacy interests.

C. The district court should have allowed an interlocutory appeal before ordering production.

In the balancing process, the district court did not determine whether the validity of that novel "heightened risk" claim—not previously recognized by this Court—should first be tested in an interlocutory appeal under 28 U.S.C. §1292(b) before allowing discovery of nonparty records.

Here, the court focused on judicial economy, noting that an interlocutory appeal would not end the litigation given the existence of post-assault claims not barred by limitations. Tab.18, p.3. Failing to consider the privacy interests at stake in deciding whether to allow an interlocutory appeal was a clear abuse of discretion, given the serious questions about the validity of the heightened risk claims, as discussed below.

Title IX is a federal statute that prohibits gender discrimination in the education programs and activities of educational institutions that receive federal funds. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998). The only express remedy in the statute is an administrative cut-off of federal funds. *Id.* at 288-89. In recognizing an implied right of action and in fashioning a liability standard for such claims, the Supreme Court determined that the school's opportunity for voluntary compliance should take place under conditions that are roughly "comparable" to those in an administrative proceeding, which requires notice and an opportunity for corrective action. *Id.* at 288-90.

The Court held that, in sexual harassment cases, which "do not involve official policy of the recipient entity," damages are not available unless an "appropriate person" with authority to "end the discrimination" had actual knowledge of the assault and responded with deliberate indifference. *Id.* at 290-91. The Court imposed a high standard to avoid the risk that the school "would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.*

Accordingly, the Court rejected liability standards based on negligence, constructive notice, and respondeat superior precisely because the recipient of federal funds will not have known about the discrimination. *Id.* at 285-88. A lower standard under Title IX would "frustrate the purposes" of the statute by diverting funds from educational purposes to pay damages claims when the institution is unaware of the discrimination and is willing to institute prompt corrective measures. *Id.* at 285, 289.

After *Gebser*, the Supreme Court recognized in "certain limited circumstances" a cause of action for damages based on student-to-student sexual harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S 629, 643 (1999). In that case, the Court held that damages are available if an appropriate person with authority to take corrective action receives actual knowledge of peer sexual harassment and responds with "deliberate indifference" that "'subjects' its students

to harassment" that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[ ] of access to the educational opportunities or benefits provided by the school." *Id.* at 644-45, 648, 650-651.

Even then, liability is permitted only if the institution exercised "substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645 (emphasis added). The Supreme Court recognized that peer harassment "is less likely to satisfy these requirements than is teacher-student harassment," and it further observed that universities do not "exercise the same degree of control over [their] students that a grade school would enjoy." *Id.* at 649, 653.

The requirement of "substantial control" emanates from the statute itself. *See* 20 U.S.C. §1681(a) (the prohibition of discrimination applies to the recipient's "education programs and activities"). Owing to the statutory language, courts have rejected liability in cases in which the sexual assault did not occur in connection with a school activity. *See, e.g., Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014). Nor can the "substantial control" element be based solely on the fact that the alleged offender is a Baylor student. A university does not have "substantial control" over a student merely because it may discipline an alleged offender *ex post*. *See, e.g.*, *Roe*, 746 F.3d at 882-84; *cf. Davis*, 526 U.S. at 646 (where

misconduct occurs "during school hours and on school grounds," school retains control over the context).

While most of the plaintiffs have alleged assaults in off-campus contexts, Plaintiffs have alleged that three assaults occurred in Baylor residence halls or apartments; however, Plaintiffs have not alleged that Baylor had notice of any pattern of rapes in these locations, nor have they alleged that Baylor had prior notice of sexual misconduct by the alleged assailants in question. *See, e.g., Frazer v. Temple Univ.*, 25 F. Supp. 3d 598, 614 (E.D. Pa. 2014) (dismissing student's claim based on a rape in her dorm where University did not have notice of any prior sexual harassment by the accused student).

The Supreme Court requires prior actual knowledge—*before* the assault—that the student faced a substantial risk of sexual assault in a specific program or activity of the university. Liability for student-to-student harassment requires deliberate indifference to "*known* harassment." *Davis*, 526 U.S. at 644-645 (emphasis added). Actual knowledge is a "high bar." *Sanches v. Carrolton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011). Constructive notice "will not suffice." *Kelly v. Allen Indep. Sch. Dist.*, 602 F. App'x 949, 953 (5th Cir. 2015) (unreported); *see also Salazar*, 2017 WL 2590511, at *4 (rejecting liability where the only employee with actual knowledge was the principal who molested the plaintiff); *cf. Williams v. Univ. of Georgia*, 477 F.3d 1282 (11th Cir.

2007) (allowing claim when school official knew that the same offender had harassed others in the past).

Other courts have recognized that a general problem of sexual violence is not enough to establish either actual knowledge or deliberate indifference. *See Karasek v. Regents of the Univ. of Calif.*, 2016 WL 4036104, at *9-10 (N.D. Cal. July 28, 2016); *accord Pahssen*, 668 F.3d 356, 363, 366 (stating that "an individual plaintiff generally cannot use incidents involving third-party victims to show severe and pervasive harassment") (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

To avoid the effect of these missing elements, the court held that the Plaintiffs could proceed by showing and "official policy or custom." Tab.14, p.16. Case law, however, demonstrates that an official policy under Title IX is an actual *institutional, programmatic* decision, such as a discriminatory admissions policy[5] or a decision whether to fund a women's sport.[6] Title IX liability cannot be premised on the independent actions of university employees, particularly given the prohibition of constructive knowledge and *respondeat superior* liability under *Gebser*. Yet the court below held that the Plaintiffs could state a claim by showing a discriminatory "custom." The word "custom," however, appears nowhere in Title

[5] *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

[6] *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Mansourian v. Regents of Calif.*, 602 F.3d 957, 967 (9th Cir. 2010).

IX or in *Gebser* or *Davis*. It does appear in an entirely different statute, 42 U.S.C. §1983. Although *Gebser* referenced the "deliberate indifference" language found in Section 1983 jurisprudence, it did not borrow any other Section 1983 element. *Gebser*, 524 U.S. at 282.[7]

In short, "custom" is not the standard for Title IX, particularly when divorced from Section 1983's other essential elements, such as the requirement that the plaintiff show that the entity's "final" policymaker sanctioned the unlawful custom or policy. *See generally Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 602 (5th Cir. 2001); *Bolton v. City of Dallas*, 541 F.3d 545, 549 (5th Cir. 2008) (citation omitted)(when an official's discretionary decisions are constrained by the entity's policies, "those policies, rather than the subordinate's departures from them, are the act of the municipality"); *see, e.g.*, *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249-50 (5th Cir. 2003) (although the middle school was in an area "where gang activity has existed for years," the school board did not have actual or constructive knowledge of school personnel's alleged custom of tolerating gang activity; therefore, school board could not be held liable for death of student killed in an apparently gang-related fight on school grounds).

[7] In *Gebser*, the Court used the "deliberate indifference" language from section 1983 to capture the concept of an institution that has "refuse[d] to take action to bring the recipient into compliance." 524 U.S. at 290. "Comparable considerations led to our adoption of a deliberate indifference standard for claims under §1983 . . . ." *Id.* at 291.

The court purported to find support for the "custom" concept by referencing a discussion in *Davis* between the majority and dissent over whether a school could be held liable for failing to enforce rules when boys target girls on a widespread level at school on a daily basis. Tab.14, p.2. But the Supreme Court and dissent were addressing known harassment in a specific context, such as boys preventing girls from using a computer lab on a daily basis. *See* 526 U.S. at 650-51, 682-83. The *Davis* hypothetical provides no support for a broad cause of action based upon harassment that occurs in any context, on or off campus, without notice to the school.

By allowing claims based on "custom," and by omitting the *Davis* requirements of prior actual knowledge and substantial control, the district court in effect recognized a new cause of action and effectively eliminated any boundaries on a school's liability in damages for student-to-student harassment. Intrusive discovery of highly sensitive nonparty claims should not be allowed in support of such a novel theory absent a certification of an interlocutory appeal under 1292(b).

CONCLUSION

For the aforementioned reasons, Baylor requests that this Court issue a writ of mandamus granting the relief set out in its Statement of Relief Sought.

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Respectfully submitted,

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I certify that this document was filed with the Court via the court's electronic filing system, on the 7th day of November, 2017, and an electronic copy of this document was served on all counsel of record, as listed below, via the court's electronic filing system and/or via e-mail on the same date and was also delivered to the Hon. Robert Pitman via First Class Mail and/or overnight delivery:

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