

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JANE DOE 1, JANE DOE 2,
JANE DOE 3, JANE DOE 4,
JANE DOE 5, JANE DOE 6,
JANE DOE 7, JANE DOE 8,
JANE DOE 9, AND JANE DOE 10

Plaintiffs,

vs.

BAYLOR UNIVERSITY

Defendant.

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Cause No. 6:16-cv-173-RP-JCM
JURY TRIAL DEMANDED

**PLAINTIFFS' OPPOSITION TO MOTION TO COMPEL
PRODUCTION OF UNREDACTED DOCUMENTS**

TO THE HONORABLE ROBERT PITMAN:

COME NOW JANE DOES 1-10, Plaintiffs, who submit this Opposition to Defendant's Motion to Compel Production of Unredacted Documents (ECF 240), and in support state as follows:

Baylor's motion raises two issues. The first concerns redactions of non-party student names and information, an issue that Plaintiffs have been attempting to resolve with Baylor for months. The second issue is far more serious, as Baylor has again used a Court filing to cherry-pick out of context and misleading statements, using altered documents, attempting to again publicly smear a Jane Doe.

FIRST ISSUE – THE REDACTIONS

On July 31, 2017, Plaintiffs began delivering production to Baylor certain materials responsive to Baylor's Request for Production. From the beginning, Plaintiffs notified Baylor that non-party student names would be redacted pending a resolution of their privacy interests. Plaintiffs urged Baylor to resolve this issue through either an agreed process to notify students that their names would

be released or through Court clarification of the need for student notification.¹ Baylor's rejection of these options directly conflicts with Baylor's constant proclamations of protecting student privacy. When resisting Plaintiffs' discovery requests, Baylor's uses delay tactics via "FERPA FERPA" and goes to extreme lengths, most recently scaring thousands of students that Plaintiffs are trying to pry into their records. The double standard is glaring. Non-party students' names temporarily redacted pending resolution of this issue include some victims of sexual assault at Baylor who communicated within private support networks and who chose not to bring claims out of concern for their own privacy and their emotional healing. These currently redacted names are also within student baylor.edu email accounts and possibly under FERPA per the broad interpretations previously argued by Baylor.

Baylor's motion takes a position in opposition to even its recent positions before the Fifth Circuit. Baylor awaited a decision on mandamus to argue this inconsistent position, as any earlier effort would conflict with claimed abuse of discretion. This Court will recall that Plaintiffs' position is that FERPA is inapplicable so long as identifying information is redacted, while Baylor contends that notice now needs to be given to over 6,200 students whose records Pepper Hamilton received without any notice, which regardless could be avoided by redaction of "identifying information."²

Nevertheless, from the inception, Plaintiffs have proposed a process that would notify non-party students that their names were going to be provided to Baylor, both in accord with Baylor's long-standing interpretation of FERPA, and also in deference to and in compliance with this Court's

¹ ECF 240 1-10 (Plaintiffs' discovery objections which state that non-party names will be redacted pending resolution of same); ECF 240-14 and e.g., Exhibit A (emails attempting resolution)

² Counsel have conferred concerning pending discovery items, much of which is held up pending resolution of issues such as FERPA redactions and how that might obviate the need for notice letters. Plaintiffs contend only identifying information need to be redacted such as name, ID numbers, etc. while Baylor contends that broader redactions are needed. The parties are conferring to develop filings with the Court after the holidays. Plaintiffs hope the Court can craft an order from competing proposals so document production can then proceed in earnest without need of thousands of notices.

statements regarding student privacy. Baylor declined to come up with any process other than “turn over the names,” despite the parties’ past agreements regarding similar issues. See e.g., ECF 235.

Plaintiffs believe that non-party student names, such as those in baylor.edu accounts and other private messaging such as Facebook private messaging, either individually or within a victim support group, need to be handled with extreme care to protect privacy concerns. And while some communications arguably may not fall within FERPA, guidance from the Court is prudent as to what level of notice should be provided, if any, in light of the Court’s (and Plaintiffs’) sensitivity to non-party student information. This issue is likely to arise again, for when employees of Baylor are compelled to produce their private e-mails and text messages that were sent utilizing non-Baylor platforms, Baylor will surely contend that such records are FERPA protected. Rather than file an agreed motion for this Court’s guidance concerning student names, Defendant chose to file this motion implying that Plaintiffs are being obstinate. As the Exhibits demonstrate, this is not accurate. On October 9, 2017, Plaintiffs even submitted a proposed written notification similar to the Court’s approved FERPA notification.³ Baylor again responded essentially with “just turn over the names.”

In addition to the redaction of non-party names, Baylor complains that Plaintiffs have improperly redacted whole conversations from their production. However, the redactions are of non-responsive conversations, such as discussions of buying clothing, new motherhood, etc.⁴ Also, to the extent there is objection to the manner in which items were produced, Plaintiffs’ production has been made as those conversations appeared and are not rearranged.

Plaintiffs have been ready to remove redactions of names from the start, so long as the process corresponds with this Court’s prior rulings and statements noting concern for student privacy. If the

³ See Exhibit C - Plaintiffs’ Proposed Notice Letter

⁴ Exhibit B compared to ECF 243-16 at 13, note that these type communications were not requested by Baylor, so they were redacted. Plaintiffs have endeavored to produce without redaction the matters in Baylor’s long list of topics requested. ECF 240 1-10.

Court decides no notice need be given, then Plaintiffs stand ready to comply. Regardless, Plaintiffs believe further clarification of how FERPA notice requirements apply by the Court would be helpful in light of the mandamus denial and the Court's recently stated concerns. ECF 228, at 2. There are important privacy concerns in releasing non-party student names, particularly of non-party sexual assault survivors, some current students and some of whom have real concerns about being targeted by Baylor for further retaliation and smearing.

Thus, in summary, names of non-party students have been redacted. Plaintiffs immediately proposed both a solution or the alternative of seeking Court guidance. Rather than do either, Baylor filed its Motion to Compel, and Plaintiffs submit that Baylor's real purpose in this motion is to again publicly smear and intimidate the Plaintiffs and further potential claimants.

SECOND ISSUE – SELECTIVE FACTS STATED ABOUT JANE DOE 3

For the fifth time⁵, Baylor has included within a court filing what can only be described as a drive-by shot at the Does, in an attempt to try facts by motion or to sway the Court or the potential jury pool with out-of-context, incomplete, or demonstrably inaccurate assertions. Baylor inserts material having little or no relevance to the redaction of names, but instead containing blatant smears, this time of Doe 3, to insinuate blame falls on her for her sexual assault - further reinforcement of David Garland's interest in "...women who may seem willingly to make themselves victims."⁶

For example, Baylor includes in sealed filings 159 pages (59 pages of which have no redactions), of private Facebook messages, emails, and counseling records. The inclusion of these

⁵ Baylor has developed a practice of cherry picking portions of records in blatant attempts to wrongfully discredit Plaintiffs. The Court will recall that in Baylor ECF 100, 101 and 110, Baylor insinuated Does 2 and 4 were liars. To level this claim, Baylor relied in part on Doe 2's mysteriously redacted police report and Doe 4's entire missing Judicial Affairs folder. Of course, it was demonstrated that the documents Baylor used to justify its allegations were incomplete and perhaps altered. See ECF 107, 108. Then in ECF 216, Baylor attempted to discredit Doe 1, suggesting she was also untruthful.

⁶ ECF 196-1

pages which have no redactions and pages which have no relevance to redacted non-party names can only be an effort to get selective and inflammatory “facts” before the reader.

Deeply disturbing is Baylor’s inclusion of ECF 243-12 that consists of 16 pages, which as produced by Plaintiffs contained no redactions.⁷ The only redactions in ECF 243-12 were added by Baylor, leaving readers with the false impression that Plaintiffs made these redactions. Baylor redacted such statements as “prez Starr” and “I worked in his office my last summer And I got that job bcuz we were already bros”,⁸ thus concealing Assailant 3’s closeness to Starr and his position in Starr’s office – the relevance of which is shown below. Why would Baylor file 16 pages that had no redactions by Plaintiffs in support of a motion about redactions, and more importantly, why would Baylor parade around out of context quotes about Doe 3 while at the same time concealing the portions of those records that implicate Ken Starr and undermine Baylor’s preferred narrative? Baylor’s selective and misleading assertions to the Court and Baylor’s altering of documents must stop.

The Court also should be aware that Baylor removed the Attorneys’-Eyes-Only designation and Bates Numbers on the bottom of each of the 16 pages filed with the Court, yet Baylor publicly quotes this material. Baylor does not mince words with these selective quotes – the implication is clear – according to Baylor, Doe 3 asked for it.⁹ The full facts reveal otherwise.

The quotes on page 4 of Defendant’s motion are not only out of context, but are used by Baylor out of chronological order and re-arranged to fit Baylor’s narrative.¹⁰ One example are the two

⁷ See Plaintiffs’ Exhibit D as compared to ECF 243-12.

⁸ See Exhibit D.

⁹ Of course, Baylor’s own policy says that “Consent to one act does not constitute consent to another act. Consent on a prior occasion does not constitute consent on a subsequent occasion.”, but it seems that does not apply to Baylor before this tribunal. Exhibit E at 10.

¹⁰ On page 4 of Baylor’s Motion, in its first full paragraph, Baylor pulls from portions of Facebook posts selecting sections of posts from several different dates. The sequence of the quotes is December 9, 2015, January 31, 2016, February 7, 2016, back to December 12, 2015 and then February 6, 2016. Baylor also crafts all the quotes together as if they are part of one conversation, which they are not.

quotes presented within one sentence with a conjunctive “and” beginning “I barely remember what happened.” Doc 240 at 4. A casual reader would naturally conclude the quotes are from the same communication, but one portion is from a very lengthy February 7, 2016 post to a friend recounting Doe 3’s horrific experience reporting to Title IX, and the second is from a previous December 12, 2015 post to a different friend. The quotes are also taken out of context, concealing the nightmare Doe 3 was undergoing. For example, on February 7, 2016, Doe 3 wrote in relevant part:

“...I reported my assault to Title IX. While not investigated or proven, I was assaulted at 7am on Sunday, May 11, 2014¹¹ while I was at work...by...my coworker and my friend...it has been 1 year and almost nine months. That’s 638 days. That’s more than 55 million seconds of hell. So why did I not report it? Short story: I was afraid...I was scared no one would believe me...I was sober. I didn’t scream. I didn’t fight. I was frozen. I wore a dress. We were close. He was popular, and I was not. Plus I was scared that if I reported it, he would lose his job and not leave Waco following his graduation at the end of the summer. So I chose not to report it. After all, I barely remember what happened. It may very well have been a total misunderstanding for all I know. Except it completely changed who I was...I pretended nothing was wrong...I stayed up late every night trying to calm my mind from an undefined sense of anxiety...I was beyond depressed, and my assaulter was still in Waco. I could not get out of bed...I quit my job...I started seeing someone at the counseling center here, and they were super kind, but I was not at all willing to talk about the actual problem...I started spiraling down a lot more in my personality that semester through summer and this past fall, but other than that, I don’t remember much. I remember that I ran into my assaulter sometime in April on campus and had to go home and cry before I could return to campus and finish my project...I cry almost every night, and I have panic attacks at work when I have to sit at the desk alone. But I’m starting to think that maybe it doesn’t have to be like this. It feels like the air is right for change. So I went to Title IX and reported it even though I am scared... See ECF 243-11, pgs 376-377.

From this passage, Baylor pulls just one sentence, misleading the reader about the actual turmoil of this sexual assault victim. This post was written during a time of uncertainty within the new Title IX office, as Patty Crawford had quit and publicly detailed the indifference of Baylor to sexual assault victims (e.g., Reagan Ramsower’s saying they had “mental illness”) and also detailed

¹¹ At the time of Doe 3’s assault, Assailant 3 was working for then President Starr and Kevin Jackson. His responsibilities included drafting Title IX policy. Exhibit F - Assailant 3’s LinkedIn page.

Baylor's failure to support the Title IX office.¹² Around this same time, sexual assault survivors held a public vigil on campus to support women like Doe 3 in their reporting. Doe 3 was scared, particularly as her assailant bragged to her that he was "bros" with Starr, and also close with Vice President of Student Affairs Kevin Jackson and Associate Dean of Student Conduct Bethany McCraw (all of whom were right in the middle of sexual assault reporting and investigation). For a survivor to question herself, to be scared and attempt to legitimize a relationship between herself and her assailant, is universally recognized as common among sexual assault victims. Ignoring this, Baylor further attaches a portion of Doe 3's counseling records and pulls Attorney'-Eyes-Only phrases, again from separate sentences, excluding all context to further vilify her. The date of the counseling record is August 2014, and the portion omitted by Baylor states, "She also reported an unwanted sexual encounter that occurred between her and [Assailant 3] when she worked [at Baylor] . . . She stated she had a boyfriend at the time and was very attracted to [Assailant 3] but told him 'no' when he tried to become intimate with her." ECF 243-17 at 96. Yet all Baylor wants the world to see is that she was "attracted to" him. Does thinking a boy is handsome justify rape in Baylor's worldview? Included in Baylor's ECF 243-17 is more context not referenced for public consumption. In December 2015,

"...she experienced a 'breakthrough' within the last week related to a sexual assault she experienced during her time at Baylor. She described feeling that she previously tried to minimize the event in her own mind in order to lessen the emotional distress which she has been experiencing since the assault occurred...she was not ready to really engage in the processing until now. Client stated that the assailant recently graduated...but was shocked when she saw him on campus again. She indicated that she felt overwhelmed as her sense of security was threatened once again..." *Id.* at 61.

Baylor's omissions of contextual information such as this, while instead attacking Doe 3, simply tells us that the failures found by Pepper Hamilton continue through today - Baylor was not and still is not "trauma-informed" and Baylor's actions are representative of "...conduct that could

¹² http://www.wacotrib.com/news/higher_education/crawford-says-baylor-leadership-drove-discriminatory-culture/article_b3df9edd-2386-5ecb-bd05-45087f80c70a.html

be perceived as victim-blaming, focusing on the complainant's choices and actions, rather than robustly investigating the allegations..."¹³

Also omitted by Baylor is the evidence that Baylor knowingly allowed a documented juvenile sex offender on campus, actively covered up his actions and knowingly protected this predator's placement on campus where he could assault Jane Doe 3 and harass other students.¹⁴ These actions were fully known to Baylor, yet Assailant 3 was allowed to enroll as a student, hired and placed in position of responsibility by Baylor, and allowed to supervise female students. He also worked closely under Starr and Jackson.¹⁵ The Court may recall that this is the same Kevin Jackson who exchanged the emails with David Garland concerning "willing victims" and the application of the Book of Romans and the "wrath of God" upon sexual behavior.¹⁶

Following his graduation from Baylor, Assailant 3 was denied a governmental security clearance needed for his career advancement.¹⁷ After that denial, Jackson and Starr attempted to intervene by writing a character reference recommendation to have the government reconsider the denial, which effort ultimately failed. As shown in email exchanges, Jackson believed the letters should

¹³ ECF 93-3 at 8.

¹⁴ Assailant 3 was arrested a first time and "placed on sex offender registration (juvenile)". He was arrested a second time for "sex assault-unlawful contact; crimes against person-harassment, forcible fondling and disorderly conduct/disturbing the peace." He was arrested a third time for "sex assault - unlawful sexual contact and crime against person - harassment", and arrested a fourth time for "peeping tom charge." After entering Baylor, Assailant 3 sexually harassed at least two other students who he supervised. See Exhibit G.

¹⁵ Incredibly, Assailant 3 was also placed a the board having responsible for looking into charges of student misconduct. See Exhibit H.

¹⁶ ECF 196-1.

¹⁷ When applying for government security clearance, Assailant 3 lied about his prior criminal conduct and sexual harassment conduct at Baylor. Those around him reported "concerns about [his] conduct . . . if he fail[ed] to modify [his] behavior towards female personnel," concerns he "required[d] close supervision until [he] demonstrate[d] no attempts to pursue a relationship with female subordinates," concerns of his need to "immediately abandon efforts to engage in sexual relations if the woman indicates she is not interested," and that "there appears to be some consistency with [his] methods" in his "pursuit of relationships with the female[s]." See Exhibit G - SECURITY CONCERNS AND SUPPORTING ADVERSE INFORMATION – Statement of Reasons.

have a “qualifier at the beginning of the letter speaking to how he doesn’t know anything about the alleged incidents earlier [which has prevented his clearance].”¹⁸ This representation was false. Starr and Jackson both knew the exact reasons for the denial, and indeed their correspondence included the Statement of Reasons as an attachment.¹⁹ This misrepresentation is compounded by the fact that Bethany McCraw also knew of the Statement of Reasons and cautioned Starr’s assistant that Starr must read the Statement of Reasons before writing a recommendation.²⁰

Assailant 3 was also investigated in January 2014 by Judicial Affairs regarding a sexual harassment complaint,²¹ yet placed in a position that gave him access Baylor’s then developing Title IX policies. As shown he bragged to Doe 3 about his closeness with Starr, and his relationship with Starr was such that he personally addressed him as “Uncle Ken.”²² Yet Baylor allowed him to assist in developing Baylor’s Title IX policy – yes, believe it or not, Assailant 3’s LinkedIn page touted how he “Worked with the university’s counseling center and Title IX office to write rhetoric for sexual harassment/assault awareness and prevention initiatives.”²³

The timeline is important. Doe 3 was assaulted at the end of 2014, when Assailant 3 had already undergone at least one formal sexual harassment claim at Baylor. After he was denied his

¹⁸ See Exhibit G.

¹⁹ *Id.* In the same email exchange also Starr’s assistant also summarizes the documents involving Assailant 3’s security denial, “While the subject of the initial denial is about sexual harassment claims (and failing to disclose some of those past proceedings, through there was ambiguity about what was reportable), the letter from you simply speaks to your interaction with him as a student leader and as a student assistant in our office (only last summer).

²⁰ *Id.*

²¹ See Exhibit H. It is obvious Assailant 3 had a special relationship with those in charge of enforcing Title IX at Baylor. The day the young woman initiated the sexual harassment claim January 14, 2014, but before McCraw could even send out her initial notice email to Assailant 3, Assailant 3 was ahead of the game, emailing McCraw (calling her “Bethany”) saying “there is a very pressing issue I need to speak with you about. I’ve gotten myself into what may be a lot of trouble, and I would really appreciate your counsel on the matter. Do you have any openings today?” McCraw conducted an investigation at light speed and closed the case on January 15, 2014, the very next day.

²² See Exhibit G at “BU-Jane Does 1-10 025529.”

²³ See Exhibit F.

clearance and shortly after Doe 3 reported to Title IX, Baylor allowed him admission back on campus as a graduate student – recall how Doe 3 noted her surprise to Baylor staff when she saw him on campus. Her surprise was compounded because Patty Crawford had told her that if Assailant 3 returned to campus, a Title IX investigation would be opened on her complaint.²⁴ Yet, he did return and no investigation was opened according to Baylor’s current discovery responses. We also know that it was Jackson who recommended Assailant 3 be admitted into Baylor graduate school.²⁵

In short, this registered sexual predator with four arrests, who falsified a clearance application, who went on to harass two other women at Baylor and assault Doe 3 – is who Baylor wants people to believe Doe 3 stalked and set up. Indeed, Assailant 3’s attitude can best be summed up in an email he wrote to Jackson and Starr’s assistant that “To put it plainly, fighting this discharge is just not something I can reasonably fight; I put myself into a position that I can’t talk my way out of at this point.”²⁶

Baylor’s gratuitous drive-by attack on Jane Doe 3 invited this response on the full facts concerning the school’s intentional and repeated cover up for her assailant. The facts relayed herein show just the tip of the iceberg in this case with Jane Does 1-10 and how Baylor’s conduct justifies Plaintiffs’ concerns regarding names of students who privately confided in Plaintiffs concerning their own sexual assaults.

It is apparent that Baylor’s argument that produced names can “always be designated as ‘confidential’” would be futile. ECF 240-14. With this motion, while Baylor made filings under seal of documents marked “Attorneys’-Eyes-Only,” including the medical and counseling records of Doe 3, Baylor simultaneously publicly and directly quoted from these confidential documents. What good

²⁴ See Exhibit I.

²⁵ See Exhibit J.

²⁶ See Exhibit G at “BU-Jane Does 1-10 026375.” (emphasis added)

would it do labeling anything “Confidential”? At a minimum, prior to giving Baylor access to other victim names who have heretofore chosen not to bring claims, the Court should assure their private information is not later publicly filed without proper procedures being followed.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court enter an order denying Baylor’s motion and enter an order clarifying the parameters of notice to non-party students, including those who are prior victims of sexual assault.

Submitted December 19, 2017

Respectfully submitted,

/s/ Chad W. Dunn

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been filed by ECF and sent to counsel of record via electronic notification on December 19, 2017.

/s/Chad W. Dunn
CHAD W. DUNN