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NFHS Legal Meeting – 2019

Abuse and Molestation in Youth Sports

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I. Child Molesters - Generally: Child abusers and molesters come from all economic backgrounds, geographic areas and include every ethnicity, race and creed. The sole characteristic all child molesters share is having thoughts about being sexual with children, and acting on those thoughts. These individuals actively seek access to children and the opportunity to be alone with them. Also, contrary to common "Stranger Danger" warnings, child molesters are rarely strangers; at least 90% of sexually abused children are exploited by someone in the child's immediate or extended family, or by someone close to the family.

The most common lure used by child molesters, called the "Affection Lure", is used both offline and online to exploit unsuspecting youngsters in need of love and attention. **Most victims of abuse are befriended and "groomed" over a period of hours, days, weeks, months, or years**. Child molesters have repeatedly admitted: When there's a physically or emotionally absent parent in the picture, it makes the child more vulnerable to grooming and abuse.

Early grooming efforts by sexual predators seek to determine if the child has a stable home life, or if the family is facing challenges like poverty, divorce, illness, drugs, homelessness, etc. Children lacking stability at home are at higher risk for sexual abuse, as there is usually more access to the child and opportunities to abuse the child.

Child molesters will also target kids who are loners, or who look troubled or neglected. Youngsters who smoke, vape or use drugs and alcohol are seen as risk-seekers lacking adequate supervision, and therefore easy targets. Single moms are often targeted, as they are more likely to be overwhelmed by parenting duties and vulnerable to offers to babysit and/or drive kids to school, practices, lessons and other activities.

Most child molesters are expert at getting children and families to trust them. Many target their victims and attempt to involve themselves in the child's life, including their family, school, house of worship, sports, and hobbies. They are often the first to offer to babysit or drive your child to activities. Child molesters will smile at you, look you right in the eye and make you believe they are trustworthy.

While there are many reasons victims don't tell, the "VIP Factor" is a significant reason why sexual crimes against children have continued for generations. These "Very Important Persons" (VIPs) are well-known local leaders in our schools, athletic and civic organizations, houses of worship, healthcare and business communities. Some are VIPs on the state or national level, in the educational, legal, military, corporate, media, higher education and political worlds. They have power and money, and they have imposed a culture of silence that few dare attempt to confront. (See, Jerry Sandusky case, and Larry Nasser case – discussed below).

Child molesters are family members, relatives, neighbors, coaches, teachers, preachers, friends and our children's peers. Knowing this – and knowing that adults cannot be with children every moment of every day – it is essential to talk openly with children about personal boundaries and personal safety. Teach children, age-appropriately, how to recognize and evade the lures used for generations by sexual predators of every kind. "A Profile of the Child Molester" by Rosemary Webb and Jennifer Mitchell, national child safety experts and co-presidents of Child Lures Prevention/Teen Lures Prevention, website address: https://childluresprevention.com/resources/molester-profile/.

II. Perp. Case Study:

A. Larry Nassar - A Predator Hiding in Plain Sight Behind Medical Science.

The most recently notorious cad of molestation of children and young adults is that of Larry Nassar, athletic trainer of USA Gymnastics. A big question is: How could Mr. Nassar molest so many female athletes under his care over almost two decades – particularly such high profile Olympians? The answer is found in the general description of a VIP and the "trusting" relationship of the athletes and their parents – yet it was there is plain sight.

"Larry Nassar gave cops a PowerPoint to explain why he molested girls." Former USA Gymnastics doctor Larry Nassar is accused of abusing more than 265 people, and he's already been convicted on multiple counts. But ongoing investigations are still trying to uncover how he managed to keep law enforcement off his back for decades.

As it turns out, one police department in Michigan just needed to question the PowerPoint Nassar showed them.

In 2004, the Meridian Township Police Department was investigating Nassar after 17-year-old Brianne Randall-Gay said he'd massaged her breasts and tried to stick his fingers into her vagina during a visit about scoliosis. ***The officers, however, decided not to pass the case on to prosecutors after Nassar showed them a PowerPoint that explained these actions were necessary for medical treatment****.*

Nassar explained in his presentation to police that the touching was part of an accepted medical treatment called "Sacrotuberous Ligament Release" which would relieve muscle pain, records show. ***It's a legitimate medical procedure, experts say, but one that shouldn't be performed without detailed explanation to a minor and their parent, as well as permission. The procedure should also be done over clothes with gloves****.*

Still, police bought it. Afterward, an officer got in touch with Randall-Gay's mother and told her they "would be closing the case with no prosecution sought, due to the facts presented to me by Dr. Nassar," records show.

"You had audacity to tell (police) I misunderstood the treatment because I was not comfortable with my body," Randall-Gay told Nassar last week during a sentencing hearing."[1] See, also, *Better Late than Never: Why the USOC Took So Long to Fix a Failing System for Protecting Olympic Athletes from Abuse"*, 26 Jeffrey S. Moorad Sports Law Journal 157, for an in depth discussion of the issue of sexual assault/abuse/molestation of female athletes in Olympic sports.[2]

B. Grooming - Extended Scope of Responsibility – The "Two Year" Rule?

In *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 938 (6th Cir. 2004), the court was presented with a circumstance where the Board of Education of a school district determined to non-renew the contract of a teacher who engaged in a sexual relationship with a former student after the student graduated. Plaintiff, a high school teacher and coach, claimed defendants, a school system and its board members, violated her rights to intimate association, privacy, and to be free of arbitrary state action under the Fourteenth Amendment, by denying her tenure after learning that she had an intimate relationship with a former student. The United States District Court for the Eastern District of Michigan granted summary judgment to defendants. The teacher appealed.

The court held that it did not have to decide whether the relationship, either before graduation or nine months later, was a protected intimate association. **In view of the importance of prohibiting teachers and students from beginning romantic relationships, a school board could prohibit such relationships within a year or two of graduation**. Teachers could still date a wide range of adults of a wide range of ages. It was appropriate for the principal to ask questions on the nature of the relationship before graduation and in the months after graduation.

On the basis of the teacher's answers and other evidence (texts and e-mails), it was rational to conclude that the relationship started before graduation. As to the right to privacy, as the ability to engage in intimate relationships was not directly and substantially impacted, the court did not have

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[1] *Vice News*, February 1, 2018.

[2] "At the 2012 Summer Olympic Games in London, the United States sent 530 athletes to compete, a team comprised of 269 women and 261 men. This was the first time women outnumbered men on Team USA, and the United States was on the leading side of a worldwide trend of increasing female participation at the Olympic Games. The 2016 Summer Olympics in Rio set a record for female participants at forty-five percent and the United States broke its own record from 2012 with 292 female participants out of 555 athletes. However, this increase in female participation has not been without a significant number of sexual misconduct allegations made against adults connected to Olympic sport organizations.

The sexual assault allegations referred to herein taint the otherwise historic achievement and growing number of female sport opportunities at the Olympics. Since 1982, over 290 coaches and officials within the United States' Olympic sport organizations have faced public accusations of sexual misconduct. The latest scandal, amongst a series of publicized incidents, involves the United States National Gymnastics Team ("USA Gymnastics"). In 2015, sexual abuse claims were filed against Larry Nassar, a former USA Gymnastics team doctor. In 2017, notable Olympic gymnasts and gold medalists McKayla Maroney, Aly Raisman, Gabby Douglas, and Simone Biles joined the 150-plus female athletes in publicly accusing Larry Nassar of sexual abuse. This case is not an isolated incident, but rather continues to highlight preventable errors committed by Olympic sport organizations that have put numerous children at risk. Nassar has since pled guilty to sexually assaulting ten girls and has been sentenced to sixty years on federal child pornography charges and forty to 125 years for molesting young girls under the guise of medical treatment."

to address that claim. The results of the investigation were not disseminated publicly. The limited inquiry was justified. The principal learned of the nature of the relationship from the student's mother and through the teacher's lack of candor on whether the relationship was on-going. Suspension and a denial of tenure was not irrational or arbitrary state action.

B. "He 'would be honored' to be her first kiss. How coach 'groomed' his player for sex". By Cynthia Hubert, *Sacramento Bee*, January 23, 2018.

"She was a Catholic high school girl who had yet to have her first kiss. When her softball coach began texting her late at night, showering her with compliments and telling her she was special, it was easy for [Student] to forget that he was 54 years old and she was just 16.

"I thought we had a great love and the age didn't matter, and no one could possibly understand," [Student], now 21, said of the man she knew as Coach Mike.

In reality, [the Coach] was "grooming" her to become his sexual partner, according to a lawsuit Boone has filed against St. Francis Catholic High School and the Sacramento Catholic Diocese. The school and diocese, **the lawsuit alleges, should have known that [the Coach] was a predator, and failed to take steps to protect Boone and other students when he was a softball coach from 2010 through 2014**."

Typical case: "[M]other in 2015 discovered romantic texts between her daughter and [Coach], he was charged and arrested. [Coach] pleaded guilty to having unlawful sex with [Student] and another teenage girl. In November 2017, he was sentenced to four years in jail and is required to register as a sex offender."

School = "We had no idea." [Coach] "passed a background check and that his behavior raised no "red flags" among administrators, teachers or coaches. [Coach] was a trusted member of the community and did business with Boone's mother."

Student = Damaged. [Student] "struggling with the emotional fallout. She wonders if she ever will be free of the anxiety, guilt and shame that for a time caused her life to spiral into alcohol abuse, depression and unhealthy sexual relationships, she said."

Set Up for Criminal Act = Grooming. "Experts in child abuse said the term [grooming] refers to a process in which adults methodically increase attention toward their young targets, giving them gifts or spending extra time with them to gain trust and ultimately enter into sexual relationships."

> *"They groom the person they want to victimize to overcome their resistance, get access to them, and prevent disclosure," said Charol Shakeshaft, a professor at Virginia Commonwealth University who instructs educators around the country about how to identify child abusers and prevent sexual misconduct. "They also groom the people around them, making sure the parents like them and the teachers and administrators think they have the best interests of the child at heart. . . ."*

Training = Prevention. School administrators, activities directors, coaches, teachers, **and students and their parents** must be trained to recognized predatory activity by those entrusted with the care of our kids. As stated by Professor Shakeshaft:

> *"[S]tudents, teachers and administrators must be trained to detect the signs of untoward behavior including "grooming," and be committed to reporting suspicions to authorities.*
>
> *Schools and districts should develop strict policies for interactions with students, including when it is appropriate for staff members, coaches and volunteers to travel with students, spend time with them before and after school, and communicate with them on social media . . . .*
>
> *We could go a long way toward reducing this kind of exploitation by doing really good training at schools.*
>
> *"**Most schools aren't doing it."***

Read more at https://www.sacbee.com/news/local/education/article195776949.html.

III. Sexual Abuse Occurring in Our Member Schools—Patterns.

According to the 2001 OCR Guidance, "Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." In 2008, the OCR gave the following examples of "sexual conduct:"

- Making sexual propositions of pressuring students for sexual favors;
- Touching of a sexual nature;
- Writing graffiti of a sexual nature;
- Displaying or distributing sexually explicit drawings, pictures, or written materials;
- Performing sexual gestures or touching oneself sexually in front of others;
- Telling sexual or dirty jokes;
- Spreading sexual rumors or rating other students as to sexual activity or performance; or
- Circulating or showing e-mails or Web sites of a sexual nature[3].

The OCR also gives a specific "Example: A school official sends a student a text message to arrange a time for a sexual encounter."

However, not all physical contact is sexual in nature. For example, "a high school athletic coaching hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee" is not considered sexual harassment. But it is this dichotomy between "sexual" and "nonsexual" contact or behavior that makes it difficult for schools to identify grooming behavior. The OCR cautions that "nonsexual conduct may take on sexual connotations and rise to the level

[3] U.S. Department of Education, Office for Civil Rights, Sexual Harassment: It's *Not* Academic 2008.

of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment."

> "*Grooming is a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common though, are subtle approaches designed to build relationships with families.*
>
> *The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family. These individuals intentionally build relationships with the adults around a child or seek out a child who is less supervised by adults in her/his life. This increases the likelihood that the offender's time with the child is welcomed and encouraged*[4]."

Unfortunately for School Districts, in the context of schools, students are taught to trust teachers and coaches. But, sexual abusers who use grooming techniques use a variety of techniques to trap students; "they lie to them, isolate them, make them feel complicit, and manipulate them into sexual contact." **The school dynamic in particular has the opportunity to create an environment where this behavior goes unnoticed because "schools are also a place where teachers are more often believed than are students and in which there is a power and status differential that privileges teachers and other educators.**" Moreover, because these sexual predators often target marginal or vulnerable students, in a school setting, "students that adults regard as marginal are also unlikely to be accepted as credible complainants against a celebrated teacher[5]."

Studies show that these school employees who are sex offenders "work at being recognized as good professionals in order to be able to sexually abuse children. For them, being a good educator [or coach] is the path to children.[6]"

What makes identifying these individuals in schools difficult is that very often, the signs of grooming can appear to be legitimate contacts or time spent together. For instance, "grooming often takes place in the context of providing a child with extras like additional help learning a musical instrument, advisement on a science project, or opportunities for camping and outdoor activity. These opportunities not only create a special relationship with students, they are also ones for which parents are usually appreciative[7]."

Schools also cannot rely on the students whom are being abused to come forward and tell a school that they are being abused:

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[4] U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) definition, https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/

[5] U.S. Department of Education, Educator Sexual Misconduct: A Synthesis of Existing Literature (2004).

[6] Id. This may not be the case in middle and high school level. "Educator abusers may or may not be outstanding practitioners." Studies show that at this level, "the initial acts are somewhat less premeditated and planned and more often opportunistic, a result of bad judgment or a misplaced sense of privilege."

[7] Id.

> Offenders work hard to keep children from telling. Almost always they persuade students to keep silent either by intimidation or threats (if you tell, I'll fail you), by exploiting the power structure (if you tell, no one will believe you), or by manipulating the child's affections (if you tell, I'll get in trouble; if you tell, I won't be able to be your friend anymore)[8].

Further:

> [A]n abuser selects a student, gives the student attention and rewards, provides the student with support and understanding, all while slowly increasing the amount of touch or other sexual behavior. The purpose of grooming is to test the child's ability to maintain secrecy, to desensitize the child through progressive sexual behaviors, to provide the child with experiences that are valuable and that the child won't want to lose, to learn information that will discredit the child, and to gain approval from parents. Grooming allows the abuser to test the student's silence at each step. It also serves to implicate the student, resulting in children believing that they are responsible for their own abuse because, "I never said stop.[9]"

IV. Legal Implications for Activity Association Member Schools of Students Being Sexually Abused or Harassed by Coaches or Other Students.

A. Title IX.

1. Applicability of Title IX: Title IX applies to all public and private educational institutions that receive federal funds, i.e. recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges and universities. Title IX protects students in connection with all the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere[10].

Further, note, that Title IX protects any "person" from sex discrimination, meaning that both male and female students are protected from sexual harassment. This is the case regardless of the sex of the harasser. What is more, sexual harassment directed at gay or lesbian students is prohibited under Title IX.

2. Administrative Guidance on School District's Requirements to Prevent Sexual Harassment of Students by School Employees.

a. Distinction between Administrative Enforcement and Private Litigation for Monetary Damages. The purpose of the 2001 OCR guidance is to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund

[8] Id.
[9] Id.
[10] Office of Civil Rights, Revised Sexual Harassment Guidance (2001) (Most recent guidance because the 2011 guidance was rescinded in 2017).

termination or other enforcement mechanisms. "The guidance provided by the [OCR] is obviously broader than the scope of liability for private causes of action for money damages under Title IX[11]." Further, "there is no private right of action to recover damages under Title IX for violations of [the OCR's] administrative requirements, much less the provisions of the DCL and Q&As, which are agency guidance documents[12]. "For example, the 2001 OCR explains, "if a school otherwise knows or *reasonably should have known* of a hostile environment and fails to take prompt and effective correction action, a school has violated Title IX." The Supreme Court has clearly stated that a standard of "should have known" is insufficient to impose monetary damages onto a federally funded entity:

> Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power . . . as it has in Title IX . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award . . . If a school district's liability for a teacher's sexual harassment rests on principals of constructive notice or respondent superior, it will likewise be the case that the recipient of funds is unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation.[13]

The legal standard for monetary damages is discussed elsewhere in this outline. However, an analysis of the 2001 OCR guidance is useful, because it can "bear upon the question of whether [a] School Board's response to known sexual abuse of a student was appropriate and adequate in [a] case, or whether the School Board responded with deliberate indifference by failing to take remedial measures[14]."

3. <u>How Schools Are Administratively Expected to Identify and Investigate Grooming and Sexually Abusive Behaviors Amongst Coaches</u>.

a. Response to Student or Parent Reports of Harassment: Response to <u>Direct</u> Observation of Harassment by a Responsible Employee. According to the 2001 OCR guidance, the specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases, the inquiry must be prompt, thorough, and impartial.

- Interim measures during the investigation
  - Allowing the student to transfer to a different class
  - Inform law enforcement
- If sexual harassment has occurred:

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[11] *Karasek v. Regents of the Univ. of Cal.*, 2015 U.S. Dist. Lexis 1666524, at *39-40, 2015 WL85277338, at *39-40 (N.D.Cal. 2015)
[12] *Moore v. Regents of the Univ. of Cal. No 15-cv-5779, 2016 U.S. Dist. LEXIS 67548*, 2016 WL 2961984, at *5 (N.D. Cal. May 23, 2016).
[13] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-88 (1998).
[14] *E.g., Doe v. Russell Cty. SCh. Bd.*, 292 F. Supp. 3d 690, 710 (W.D. VA 2018).

  - Counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents
  - Series of escalating consequences
  - Termination
  - Suspension
- Steps to prevent further harassment
  - At a minimum includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow up inquiries to see if there have been any new incidents or retaliation
  - Counseling for the harasser
  - Training for the larger school community to ensure parents, students, and teachers know how to recognize harassment if it recurs and how to respond.

b. Response to Other Types of Notice. Most common with grooming behavior. If a school learns of harassment through other means, for example, if information about harassment is received from a third party (such as a witness to an incident or an anonymous letter or telephone call), different factors will affect the school's response. These factors include:

- The source and nature of the information;
- The seriousness of the alleged incident;
- The specificity of the information;
- The objectivity and credibility of the source of the report;
- Whether any individuals can be identified who were subjected to the alleged harassment; and,
- Whether those individuals want to pursue the matter.

If based on these factors it is *reasonable* for the school to investigate and *it can confirm the allegations*, an investigation is necessary.

4. <u>Standard for Monetary Damages under Title IX for Students</u>: The Supreme Court's 1998 Ruling in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) made it more difficult for students to secure monetary damages in staff-to-student sexual harassment cases. To be liable for monetary damages, (1) someone with authority to take corrective action (an "appropriate person") (2) must have had actual knowledge of the sexual harassment and (3) the school must have acted with deliberate indifference to its knowledge of the discrimination[15].

a. Appropriate Person: An "appropriate person" is one who at a minimum has authority to address discrimination and to institute corrective measures on the recipient's behalf." *See Gebser*, 524 U.S. at 290, *P.H. v. Sch. Dist. Of Kan. City*, 265 F.3d 653, 661 (8th Cir. 2001). Who is an "appropriate person" under Title IX is fact dependent. "In order to answer the question [of who is an appropriate person], it would be necessary to examine how [a District] organizes its public schools, the authority and responsibility granted by state law to administrators and teachers, the school district's discrimination procedures, and the facts and

[15] As discussed above, the Supreme Court did acknowledge that the power of Federal agencies, such as the Department of Education, to effectuate Title IX's prohibition of sex discrimination even under circumstances that would not result in liability for monetary damages.

circumstances of the particular case." *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1286 (11th Cir. 2003). Typically, this fact inquiry comes into play most often when determining if a teacher can qualify as an appropriate person. *Id*.

b. Actual Knowledge: "School administrators have actual knowledge only of the incidents that they witness or that have been reported to them." *Doe v. Galster*, 768 F.3d 611, 618 (7th Cir. 2014). The Supreme Court has refused to impose Title IX liability "under what amounted to a negligence standard" in situations where a school district failed to "react to teacher-student harassment of which it *should have known.*" *Davis v. Monroe County Bd. Of Educ.*, 536 U.S. 629, 642 (1999) (emphasis in original). But "the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Escue v. N. Okla Coll*., 450 F.3d 1146, 1154 (10th Cir. 2006).

c. Deliberate Indifference: The deliberate indifference standard has been described as "stringent" and "requiring proof that [the official] disregarded a known or obvious consequence of his action." *Bd. Of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997); *see also Roe v. St. Louis Univ*., 746 F.3d 874, 882 (8th Cir. 2014). Thus, deliberate indifference is not a "mere reasonableness standard," *Davis*, 526 U.S. at 649, and it requires a showing of a response that was more deficient than merely "negligent, lazy or careless." *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006). Instead, a funding recipient must respond to known sexual harassment in a manner that is not "clearly unreasonable under the known circumstances." *Davis*, 526 U.S. at 648. The Supreme Court has stated "courts must refrain from second-guessing the disciplinary decisions made by school administrators." *Id*. School administrators need not "engage in a particular disciplinary action." *Id*. And, "[v]ictims do not have a right to seek particular remedial demands." *Theno v. Tonganozie United Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (citing *Davis*, 526 U.S. at 648).

5. <u>Title IX standard for monetary damages - *Doe v. Flaherty*, 623 F.3d 577 (8th Cir. 2010)</u>. In that case the School District hired a girls' basketball coach. The coach had prior coaching experience and positive recommendations. In the first few months of the coach's job at School District, parents began to complain to school officials about text messages between the coach and female students. Some examples of the text messages included:

- "Are you drunk yet?"
- "OMG you look good today."
- "tell your mom that I love her"

The Superintendent was informed by his secretary that one of the ninth-grade girls might have a crush on the coach and that she was skipping class to be with the coach. The secretary also told the ninth grade girl's parents that she had witnessed the ninth grader sitting on the coach's office desk in her cheerleading skirt. The secretary insisted to the Superintendent and the parents that "something was going on" between the Coach and the ninth grader. The secretary explained to the Superintendent and the parents that there was another staff member who had seen incidents that were "inappropriate" between the Coach and the ninth grader. There were also allegations that the Coach prohibited his players from shaking an opposing coach's hand following a basketball game and that he provided answers to tests to his players. Approximately six months after the secretary's

conversation with the ninth grade girl's parents, the principal of the high school was informed of a rumor by her granddaughter about the ninth grader and the Coach. At this time, the ninth grader revealed a sexual relationship between her and the Coach.

a. Actual Knowledge:

- Coach's text messages to female students did not provide School District with actual notice of sexual abuse. "The inappropriate comments in those messages, without more, did not alert the Superintendent that the Coach was involved in a sexual relationship with a student.
- Conversation between secretary and parents and Superintendent did not provide the Superintendent with actual knowledge of sexually abusive behavior. "The [secretary] averred only that . . . "something was going on" with the ninth grader and the coach." "The vague inquiry about whether "something was going on" was insufficient to provide the principal with knowledge of sexual abuse by the Coach. The comment that the ninth grader might have a "crush" on the Coach and may have been spending time with him in the gym was insufficient because "a student's familiar behavior with a teacher or even an "excessive amount of time" spent with a teacher, without more, does not "automatically give rise to a reasonable inference of sexual abuse."
- No one alleged during the relevant time period any physical contact between the Coach and the ninth grader. The plaintiffs at trial presented no evidence that the Coach may have reciprocated the ninth grader's flirtatious behavior with physical contact.
- The secretary's allegation that another teacher saw something "inappropriate" was also insufficient for actual knowledge. "This assertion regarding potential accounts of unspecified 'inappropriate behavior' from unidentified individuals did not notify the principal of sexual misconduct." The secretary "never stated that the behavior allegedly witnessed 'voiced any suspicions of sexual abuse.'" There is no evidence that the teacher, who had frequent contact with the secretary and the principal, shared any additional information related to that conversation. The teacher's nonspecific statements of October 23, 2006, without more concrete information, do not constitute the type of notice required to impose § 1983 supervisory liability.

b. Actions the School took:

- Investigated allegations that the student was skipping class to be with the coach by asking the student's teacher if she noticed the student skipping class, which the teacher denied saying she only was absent once or twice.
- Investigated the text messages by asking the Coach about them. The Coach had excuses such as, a male player stole his cell phone to send prank text messages.
- Investigated the allegations about the handshake incident and the test answers by interviewing several students regarding their knowledge of the allegations. Only the allegations regarding the handshaking incident were confirmed.

6. Title IX standard for monetary damages – *Campbell v. Dundee Cmty. Sch.*, 661 Fed. Appx. 884 (6th Cir. 2016).

Facts: At the beginning of Doe's seventh grade season in January 2009, Coach began texting Doe and other girls on the team. Initially, Coach's texts to Doe reflected a typical "student/coach

relationship." But by the summer of 2009, Coach's texts to Doe became "excessive" and involved topics unrelated to basketball or school. Coach began calling Doe regularly, and at the end of June, Coach secretly kissed Doe on the cheek when he visited Doe's home to watch a hockey game with Doe's father. The coach began a sexual relationship with Doe during the fall of 2009. The coach would covertly visit Doe's family property and Doe would sneak out of the house to visit the coach in his car. During these encounters the Coach would hug, touch, and kiss Doe. Coach's phone calls and texts with Doe became sexual in nature as well.

During Doe's 8th grade year, the athletic director received complaints from parents that the Coach was sitting in the back of the bus when the team traveled and was calling and texting students on the team. A teammate's parents complained about the Coach and Doe's relationship to the school's vice principal. The parent complained that Doe was "in love" with the coach and that the coach favored Doe during practice and that Doe's infatuation was causing friction among team members and that school administrators should "put a stop to" the problem. But the parent stated she never saw Doe's "crush" reciprocated by the coach. The parent stated that Doe's behavior was "odd" and negatively affecting the "team dynamic" and that the coach was not doing enough to stop it. The athletic director discussed the parent complaints with the coach and instructed him to stop texting players and to no longer sit with players in the back of the bus. The purpose of this instruction as "to protect the coach at the time" and to respect "normal protocol." In April of 2010, a school janitor observed the coach and Doe engaging in sexual contact in a janitor's closet after school hours. The janitor reported the incident to the athletic director who in turn called the Superintendent. The Superintendent called the police and child protective services. The coach was arrested and prosecuted.

a. Actual Notice:

- The parent complaints about the coach sitting in the back of the bus with the girls, the coach texting and calling the girls on their cell phones, that Doe had a crush on the coach, and that there was a "weird feeling" about the coach and Doe, did not "show any indication that there was a risk of a sexual relationship between the Coach and Doe." The complaints "were related to preserving the 'team dynamic' by not showing favoritism."
- Communications at odd hours, inappropriate counseling, unchaperoned off-campus activities, and inappropriate interactions with team members do not provide notice that sexual harassment is occurring.
- Even Doe's father was not aware- "this gives rise to the inference that the other observers with more distant relationships to Doe were not at fault when they did not take action to remedy or report the unknown sexual activity.

b. Deliberate Indifference:

- Athletic director's comment that he advised the coach to stop sitting in the back of the bus not because he saw it as inappropriate but because he wanted to protect the coach, were not evidence of the school's deliberate indifference. "The statements show just the opposite." The athletic director's concern was that the coach should follow protocol, not that there was a substantial risk of sexual abuse. There was no evidence that any school official, or even any other person, was aware of the risk.

7. Title IX Standard for Monetary Damages – *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355 (3d Cir. 2005):

Facts: A coach and fifteen year old were engaged in a sexual relationship. The relationship became a topic of discussion among students and generated reports that reached the principal and the associate principal. The student's parents became concerned about the close relationship they observed, including an incident when the coach and student were found alone together in a car at night. The principal called in the coach who stated that he was sitting in the car with the student discussing his marital problems. The principal told the coach that being alone with a student at night in a parked car was inappropriate. The associate principal told the coach to minimize contact with the student. The coach responded that he had "it covered." The principal told the parents of the student what he had done and asked the parents to call him back if he had any further concerns. A teacher at the school subsequently saw the coach and student standing together in the hallway on two occasions. The teacher stated that the coach and student were so close together that they appeared to be two students, rather than a teacher and a student. The principal told the coach to cease one-on-one contact with the student. A few months later, the coach's wife, also a teacher at the high school, told the principal that she had caught the coach and the student alone in her room at school. The next day, the student's mother told the principal that she had purchased a clone pager, was monitoring the coach's pages, and had hired a private investigator to monitor the situation. The principal talked with the coach and again expressed his concerns. The coach admitted to calling the student but told the principal that he was texting about track practice. The mom wanted to have the private investigators install cameras in the school, the principal would not permit that. Eventually, the mother spoke with a member of the board of education who agreed to call the police. The associate principal tried to dissuade the board member from calling the police. The police opened an investigation and the coach was eventually arrested and prosecuted.

a. Actual Notice:

Appellants contend that the "actual notice" requirement is satisfied by "information sufficient to alert the principal to the possibility that a teacher was involved in a sexual relationship with a student"... Contrary to [the plaintiff's] contention, *Gebser* never set forth a standard of "actual notice" based upon "information sufficient to alert the principal to the possibility that a teacher was involved in a sexual relationship with a student." Rather, *Gebser* clearly stated that "an appropriate person" must have "actual knowledge" of discrimination and fail to adequately respond. . . What the Court actually stated was that information that "consisted of a complaint from parents of other students charging only that [the teacher] had made inappropriate comments during class...was plainly insufficient to alert the principal to the possibility that the teacher was involved in a sexual relationship with the student." Moreover, given the Court's express rejection of constructive notice or respondent superior principles to permit recovery under Title IX, it is unlikely that it intended "actual notice" to be based on a "possibility."

B. 42 U.S.C. § 1983

1. Policy and Custom: The law is clear that physical sexual abuse of a student by a school teacher [or coach] is actionable under § 1983 if such physical abuse occurred under color of state law. *Becerra v. Asher*, 105 F.3d 1042, 1045 (5th Cir. 1997). In order for a School District to be liable under § 1983 for monetary damages, a Plaintiff must prove that the School District violated his/her constitutional right to liberty **either "pursuant to official municipal**

policy" or as part of "a custom or usage with the force of law." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

a. Policy: A "policy" is an official policy, a deliberate choice of a guiding principal or procedure made by the municipal official who has final authority regarding such matters. *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). "A single decision could reflect official . . . policy provided that a deliberate choice to follow a course of action was made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Buzek v. Cty. Of Saunders*, 972 F.2d 992, 996 (8th Cir. 1992). These actions must take place by a final policy maker in order for there to be municipal liability. Typically, this is the board of education, however, this is also a fact specific question.

What is known is that decision-making authority is not the same as policymaking authority. *See, e.g., Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247-48 (5th Cir. 2003); *Madon v. Laconia Sch. Dist.*, 952 F. Supp. 44, 49 (D.N.H. 1996) ("Without an identified policy maker or [facts] sufficient to support a conclusion that a policy or custom existed, the actions of district employees do not give rise to a claim for municipal liability under § 1983.").

b. Custom: To establish the existence of a governmental custom of failing to receive, investigate, and act upon information concerning violations of constitutional rights, a plaintiff must prove: 1) the existence of a continuing, widespread, persistent pattern of constitutional misconduct by the governmental entity's employees; 2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and 3) that the plaintiff was injured by acts pursuant to the governmental entity's custom, i.e. that the custom was a moving force behind the constitutional violation. *Thelma D. v. Bd. of Educ.***, 934 F.2d 929, 932033 (8th Cir. 1991).**

c. Case Law Example of Court Analysis of 1 and 2 above –– *Doe v. Sch. Bd.*, 604 F.3d 1248 (11th Cir. 2010):

Facts: Doe was sexually abused by teacher in his classroom. Prior to this sexual abuse, two other female students had previously filed complaints against the teacher with the school for sexual harassment. The first complaint against the teacher was by an 11th grade student in the teacher's math class. During a tutoring session after school, the teacher told the student she was "beautiful," "sexy," had a "flat stomach," and a "beautiful smile, and then gave her his phone number. In later meeting, the teacher told the 11th grader that he wanted to do "business" with her and wanted her to be his girlfriend. When the 11th grader said she had to go to lunch the teacher lifted up her shirt, and commented on her flat stomach and "sexy" physique. When the 11th grader approached the teacher about a bad grade, the teacher told her that she couldn't get a good grade because she didn't "want to do business." That day, the 11th grader reported all of the sexual harassment to the Principal. The principal responded with an investigation. Interviews were conducted with the 11th grader and other students. Decision was made that the evidence was "inconclusive" as to whether any sexual misconduct occurred. Pursuant to school policy, teacher went back to teach. The second incident was with a 10th grader. Teacher asked student if she wanted to "ride around with him" over the weekend." Another time the teacher touched her leg and tried to hold her hand. Comments about how "very grown up" the student was and how he liked her "soft hands" and how her "lips look." 10th grader claimed the teacher lifted up her shirt to see her stomach. Student

reported immediately after this second incident. Another investigation took place. Again, results were inconclusive.

Liability: Court explained that a municipality may be held liable "only if such constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law." Court stated, that in this case, "Doe does not point to an official School Board policy or a "custom or practice so pervasive and well-settled that it assumes the force of law." "Instead, she argues that the School Board is liable under § 1983 for the deprivation of her constitutional right to be free from sexual abuse due the actions of the principal and the superintendent, "officials fairly deemed to represent government policy." According to Doe, the principal and superintendent's actions reflect a school board policy of ignoring standard investigative measures and presumptively resolving "he said, she said" complaints in favor of the teacher. The principal and superintendent are not "final policy makers" under the § 1983 standard.

Could the principal be held personally liable? Court said no; "[the principal] did not personally participate in [the teacher's] sexual assault of Doe. Therefore, to impose [personal] liability, Doe must establish liability in a supervisory capacity . . . she cannot do so. It is well established in this circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates unless the supervisor personally participates in the alleged constitutional violation or there is a casual connection between actions of the supervising official and the alleged constitutional deprivation." Court stated this could be proven with notice of a widespread history of abuse. However, "a few isolated instances of harassment will not suffice." In this case there were only two previous complaints. There is no evidence that the two previous complaints rose to the level of "obvious, flagrant, rampant, and of continued duration." *Compare with Valdes v. Crosby*, 450 F.3d 1231 (11th Cir. 2006) (evidence that the prison warden received at least thirteen complaints and inquiries in the year and a half preceding the plaintiff's son's death at the hands of the prison guard, along with repeated warnings from the outgoing warden concerning the prison's problems with specific guards using excessive force on prisoners.)

2. Failure to Train under § 1983:

In addition to liability for a policy or custom of ignoring or inadequately responding to claims of sexual abuse, **section 1983 has an alternative theory of liability, specifically, the failure to adequately train**. "In limited circumstances, a local government's decision to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51 (2011). Under § 1983, a municipality can be held liable under a failure to train theory "only where the failure to train amounts to deliberate indifference to the [constitutional] rights of persons with whom the [employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Under this theory of liability, deliberate indifference exists "when . . . policymakers are on actual constructive notice that a particular omission in their training program causes . . . employees to violate citizens' constitutional rights." *Connick*, 536 U.S. at 61. "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id*. However, "that a particular [employee] may be unsatisfactorily trained will not alone suffice to fasten liability on [a school], for the [employee's] shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91.

One way to defend a failure to train claim is with strong board policies regarding training and preventing sexual abuse. The 8th Circuit has held that when the record clearly indicates that the Board has developed and implemented policies and procedures for handling complaints of sexual abuse, and when the Board has implemented various programs to instruct principals [or other employees] on reporting procedures, it is evidence of the Board's sensitivity to the constitutional rights of its students as they relate to incidents of child abuse. *Thelma D. v. Board of Educ*. 934 F.2d 929, 934 (8th Cir. 1991). Further, with these policies in place, schools can avoid § 1983 liability even if the absence of training in a particular case is proven through the "negligent administration of an otherwise sound program." *Id*. at 935.

In general, failure to train claims present a difficult burden for plaintiffs. These claims are a "step removed" from the resulting constitutional deprivation, and courts apply a "stringent standard of fault," lest culpability "collapse into respondent superior." *Connick*, 563 U.S. at 69; *see also Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 379, 405 (observing that "rigorous standards of culpability and causation must be applied" where a plaintiff alleges a local government "has not directly inflicted an injury" but "caused an employee to do so" through its failure to act or train.").

V. State Tort Claims: In addition to the federal protections offered to victims of sexual abuse from their teachers or coaches, Plaintiffs have been successful in obtaining relief in State Courts. Generally, schools are not held vicariously liable for a teacher's sexual harassment through respondent superior. *See, e.g., John R. v. Oakland Unified School Dist.*, 48 Cal. 3d 438 (1989); *see also* Neb. Rev. Stat. § 13-910(6) (stating political subdivisions are immune from liability for "any claim arising out of assault."). Complaints seeking liability on the basis of respondent superior rarely make it past a motion to dismiss. However, plaintiffs are generally free to pursue claims against school districts for their own negligence. The following are a few, limited, examples of claims for different types of negligence in schools.

A. Failure to Warn: *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 409 Ill. App. 3d 1087 (2011).

Facts: Allegations in Complaint were that School District 1 knew of teacher's sexual misconduct and instead of reporting, sought teacher's resignation and "passed" him to School District 2 with a positive recommendation, where teacher abused another child. Plaintiffs sought monetary damages for School District 1's "willful and wanton" conduct.

Court Analysis: The Court acknowledged that "generally, there is no duty requiring one person to protect another from criminal activity by third persons absent a special relationship. Here there is no 'special relationship' between the individual administrators of one school district and the students of another." However, under the Restatement (Second) of Torts, a duty arises if there are sufficient facts to put the defendant on notice that an intervening criminal act is likely to occur. In other words, in the context of an intervening criminal act by a third person, the existence of a legal duty requires that the occurrence be reasonably foreseeable. **Here, because the individual administrators at School District 1 knew that the teacher had sexually abused students, it was reasonably foreseeable that the teacher would do it again at School District 2. School District 1 could have refused to prepare a letter of recommendation for the teacher, warned School District 2 of the potential danger, and/or reported the abuse to DCFS as mandated by the Reporting act. Instead, as alleged by Plaintiffs, they intentionally chose to create a**

condition that placed plaintiffs and other students at School District 2 at the risk of foreseeable harm.

B. Negligent Supervision: *Shedivy v. Independent Sch. Dist. 279*, 2000 Minn. App. LEXIS 916; 2000 WL 1221627 (2000).

Holding: A claim of negligent supervision is different than vicarious liability. To prevail on a negligent supervision claim, the plaintiff must establish that the employer failed to exercise ordinary care in supervising the employee. In other words, liability for negligent supervision is predicated on some fault on the part of the employer. That claim of fault could implicate the employer's policy decisions, which could make the immunity defense applicable.

C. Failure to Follow Policies: *Shedivy v. Independent Sch. Dist. 279*, 2000 Minn. App. LEXIS 916; 2000 WL 1221627 (2000).

"The negligent implementation of a policy is not protected by discretionary immunity."

Holding: In this case, "there is evidence in the record that the school district had a policy that assigned specific students to administrative assistants and a policy that administrative assistants were generally not to fraternize with students. There is also evidence that the district had a policy for determining whether a student was spending an excessive amount of time with a staff member." Court determined there was an issue of fact whether the policies were followed.

D. Negligent Hiring/Negligent Retention: *Ritchie v. Turner*, 559 S.W.3d 822 (KY 2018).

Holding: "To succeed on a negligent hiring and retention claim, the plaintiff must prove (1) the employer knew or reasonably should have known that an employee was unfit for the job for which he was employed, and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff."

Court analysis: In this case, a thorough investigation took place when the teacher's texting of a student was revealed, and there was never any hint of sexual misconduct. "Just excessive texting between a teacher and student, texting that sometimes did not relate to the academic team, school assignments or other appropriate subjects, but never sexual texts.

VI. NEW - Safe Sport Authorization Act of 2017:

A. What does it do?

This bill was created in response to the Larry Nasser scandal with the National Gymnastics Organization. The bill has several new policy and training requirements for organizations directly affiliated with the U.S. Olympic Committee and a national governing body, but the bill does have direct implications for **school districts[16] with athletic programs** ***that participate in interstate or international amateur athletic competitions, and whose membership includes any adult who is in regular contact with an amateur athlete who is a minor.***

[16] Or any other league, team, camp, sports facility, tournament host, or church.

For school districts that meet the above description, the bill modifies the obligations of amateur athletic organizations, a not-for-profit corporation, association, or other group organized in the United States that sponsors or arranges an amateur athletic competition.

- Amateur sports organizations seeking a sanction for amateur athletic competitions must implement and abide by the policies and procedures to prevent emotional, physical, and child abuse of amateur athletes.
- Amateur sports organizations, which participate in interstate or international athletic competition and whose membership includes any adult who is in regular contact with an amateur athlete who is a minor, must:
    - Comply with the reporting requirements of the Victims of Child Abuse Act.
    - Establish reasonable ***procedures*** to ***limit one-on-one interactions*** between an amateur athlete who is a minor and an adult[17].
    - Offer and provide consistent ***training*** to adult members who are in contact with amateur athletes who are minors[18].
    - Prohibit retaliation.

In addition, the bill amends the Victims of Child Abuse Act of 1990 to extend the duty to report suspected child abuse, including sexual abuse, within 24 hours to certain adults who are authorized to interact with minor or amateur athletes at a facility under the jurisdiction of a national governing body. A "national governing body" means an amateur sports organization that is recognized by the United States Olympic Committee. An individual who is required, but fails to report suspected child abuse is subject to criminal penalties[19].

Additionally, the bill amends the federal criminal code to revise civil remedy provisions. Among other things it changes the civil statute of limitations to 10 years from the date the victim discovers

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[17] The Safe Sport Act has been criticized for not requiring other prevention procedures for organizations. However, in addition to limiting one-on-one interactions, a well-written child abuse/molestation risk management program will incorporate other more specific prevention policies such as:

- Requiring the presence of more than one adult at every activity
- Having take-home/pick-up policy to prevent one-on-one situations with a child who was not picked up by parents after practice
- Defining appropriate touching of a child
- Avoiding socialization with participants outside of sponsored activities
- Avoiding overnight sleepover social functions.

[18] It is important to note that the type of training contemplated under the Act is not merely to identify those who may already have been victimized by abuse by a list of indicators. Instead it is to learn how to prevent sexual abuse from occurring. In other words, the training must be proactive rather than reactive. The most essential part of the proactive training is to learn the process of sexual grooming of both minors and parents.

[19] Federal law already requires the following professionals to report suspected child abuse: physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts; Psychologists, psychiatrists, and mental health professionals; social workers, licensed or unlicensed marriage, family, and individual counselors; teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators; child care workers and administrators; law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees, foster parents, commercial film and photo processors.

the violation or injury (currently, 10 years from the date the cause of action arose). The bill also extends the statute of limitations for a federal sex offense to file a civil action to 10 years (currently, 3 years) from the date such individual reaches age 18.

Failure to comply with the Act is considered negligence per se. The claimant may bring a civil lawsuit in U.S. District Court and can recover actual damages or liquidated damages in the amount of $150,000 and the costs of the action including reasonable attorney's fees. The court may also allow punitive damages.

Recommendations for compliance with the Safe Sport Act (SSA): While state activity associations may not be subject to the SSA, associations should nonetheless comply with same as follows:

- Your sports organization should have a written child abuse risk management plan that satisfies the mandatory reporting, education, and prevention policies – and make same available to member schools.
- Distribute the plan via paper or electronic format on an annual basis to all participating adults who are in regular contact with minor amateur athletes. Be able to obtain their written acknowledgement that they received and completed the training. See, https://nfhslearn.com/courses/61157/protecting-students-from-abuse.
- Document compliance with 1 and 2 above so that it can be introduced into evidence in the event of an allegation covered by the Safe Sport Act.

The U.S. Center for SafeSport has made model Minor Athlete Abuse Prevention Policies available on their website. While these policies are specifically designated for the U.S. Olympic Committee and a national governing body, these policies may provide useful guidance to school districts in drafting their own policies and training.

VII. Why Strong Policies Which Comply with the Safe Sports Act may be useful Title IX and § 1983 Litigation.

Strong policies and strong training show plaintiffs and a court that your school cares about its students. The lack of policies and training can be evidence of deliberate indifference to students. The more people in your school who can testify that they understand the risks of sexual abuse, that they have been trained on these risks, and that they knew there are policies in place will help bolster a claim that if sexual abuse did happen in a school, it was not because of any deliberate indifference. You do not want a plaintiff arguing to a jury that the lack of policies and lack of training created an environment that helped breed or encourage sexual abuse in schools.

VIII. State Laws.[20]

Approximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands impost penalties on mandatory reporters who knowingly or willfully fail to make a report when they suspect that a child is being abused or neglected. In Florida, a mandatory reporter who fails to report as required by law can be charged with a felony.

[20] Child Welfare Information Gateway, *Penalties for failure to report and false reporting of child abuse and neglect* (2016).

Failure to report is classified as a misdemeanor or a similar charge in 40 States and American Samoa, Guam, and the Virgin Islands. In Arizona and Minnesota, misdemeanors are upgraded to felonies for failure to report more serious situations; while in Connecticut, Illinois, Kentucky, and Guam, second or subsequent violations are classified as felonies.

Twenty States and the District of Columbia, Guam, the Northern Mariana Islands, and the Virgin Islands specify in the reporting laws the penalties for a failure to report. Upon conviction, a mandated reporter who fails to report can face jail terms ranging from 30 days to 5 years, fines ranging from $300 to $10,000, or both jail terms and fines. In seven States, harsher penalties may be imposed under certain circumstances. In seven States and American Samoa, in addition to any criminal penalties, the reporter may be civilly liable for any damages caused by the failure to report. Florida imposes a fine of up to $1 million on any institution of higher learning, including any State university and nonpublic college who fails to report or prevents any person from reporting an instance of abuse committed on the property of the institution or at an event sponsored by the institution.

Approximately 10 States impose penalties against any employer who discharges, suspends, disciplines, or engages in any action to prevent or prohibit an employee or volunteer from making a report of suspected child mistreatment as required by the reporting laws. In six States, an action to prevent a report is classified as a misdemeanor. In Connecticut, an employer who interferes with making a report will be charged a felony. Three States specify the penalties for that action, and in four States the employer is civilly liable for damages from any harm caused to the mandatory reporter.

Approximately 29 States carry penalties in their civil child protection laws for any person who willfully or intentionally makes a report of child abuse or neglect that the reporter knows to be false. In New York, Ohio, Pennsylvania, and the Virgin Islands, making false reports of child maltreatment is made illegal in the criminal sections of State code.

IX. Boundary Training: Promoting Healthy Adult-Student Relationships.

A. Establishing Healthy Boundaries:

1. Establish boundary limits and parameters early in relationships. Staff members are encouraged to stay within their assigned roles, whether it be teacher, coach, counselor, advisor, or house parent.

2. Maintain personal awareness. Staff members should be alert to their own behavior and how personal stresses (i.e., health, family, employment) may affect their interactions with students. Consider the impact of one's behavior on students, parents, colleagues, and others. If a boundary is crossed, examine the motive. Discontinue or correct the behavior. When a student acts inappropriately, discuss the situation so that the student understands how to conduct himself or herself properly.

3. Avoid risky behavior. Staff members should be careful to avoid putting themselves in ambiguous or compromising situations with students. Physical contact should be limited and appropriate to the adult's role at the school. Minimize the sharing of personal information. Avoid secrets, unless the student's disclosure is made confidentially with a counselor

or clergy member. Staff should not consume alcohol while on duty or in the presence of underage students.

4. Use appropriate settings. Schedule meetings with students at regular times and when other staff members are present. Where appropriate, one-on-one meetings with a student should be conducted in rooms with an open door or unobstructed window views. School rules must be followed when transporting students in a staff member's personal vehicle. Avoid entering the bedrooms or bathrooms of students while on school trips and at other times, unless necessary for health or other reasons. Minimize contact with students away from the school except on school-sponsored functions.

5. Motivate students and build self-esteem. Modeling appropriate boundaries concepts can build students' self-esteem and reduce their vulnerability to misconduct with adults or peers. Rather than relying on a list of do's and don'ts, offer the student choices within reasonable limits to encourage cooperation.

6. Communicate positively by making promises for achievement rather than threats for failure. Respond to a student's problems or emotions with acceptance and support.

7. Document and communicate. Staff members and schools should maintain documentation of any interaction with students that might be interpreted as a boundary violation. Discuss the situation with the parents and other staff, as appropriate. Ensure that students understand whether communications will be kept confidential. Discuss the circumstances in which confidentiality will not be protected, such as imminent risk of harm to the student or another person.

B. <u>Boundary Training</u>: Topic areas for adult staff training may include the following:

1. Physical contact. Discuss what is educationally appropriate versus inappropriate touching.

- What is the school's policy on giving and receiving hugs and other physical affection?
- When does a staff member stand so close that he or she invades a student's personal space?
- Are there different physical contact policies for staff members in varied roles, such as athletic coaches, music teachers, or history teachers?

2. Verbal and electronic communications. Boundary issues often arise when staff engage in informal talk and electronic messages (for example, email or instant text messages) with students.

- Should staff ever use slang or vulgar language with students? Gossip about other students or staff?
- Give students a home or cell phone number or a personal email address? Should staff disclose or respond to questions involving their dating history, relationships, or sexual orientation?

3. Giving praise. Staff should be careful of their language when offering praise to students individually or in front of their peers.

- How should teachers compliment students without becoming too personal? Can a teacher commend a student for his or her physical attributes?
- Off-site school activities. Trips and outings away from school also raise issues:
  - When should a staff member transport students in his or her personal car?
  - Who enforces curfew?
  - How should staff intervene if students tell stories and jokes of a sexual nature or that are otherwise denigrating to other students?

4. Attire. Discuss how staff set an example in their own choice of clothing and accessories as well as their obligation to enforce the dress code with students.

- When is clothing too revealing or sexual? When does the clothing promote negative influences, such as drugs, sex, violence, and death?
- To what extent may clothing reflect membership in an unhealthy culture, such as gangs?

C. Adopt a Boundary Policy to Provide to Member Schools.

See, sample policy attached. The policy should also apply through implication to students, and their approach to relationships with coaches and other sponsors. Activity associations should emphasize the importance of reviewing with coaches and activity sponsors, students and parents the boundary policy and expectations.

D. Provide in-service materials to train athletic directors and coaches, and principals, students and parents. Activity associations can assist member schools by providing in-service materials to educate and train athletic directors, coaches, and principals regarding to how to recognize and prevent child abuse and molestation.