

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

JANE DOE 1, <i>et al.</i> ,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 6:16-CV-00173-RP
	§	
	§	
BAYLOR UNIVERSITY,	§	
Defendant.	§	

**DEFENDANT’S MOTION FOR PROTECTION AND
ENTRY OF CONFIDENTIALITY AND PROTECTIVE ORDER**

Pursuant to Rule 26, Defendant Baylor University submits this Motion for Protection and Motion for Entry of a Confidentiality and Protective Order and asks the Court to (i) enter an order protecting Baylor from all discovery requests that would require disclosure of non-party student information (other than Plaintiffs' alleged assailants) and (ii) enter the Confidentiality and Protective Order attached hereto.

INTRODUCTION

This is a Title IX case involving ten Plaintiffs who allege that, while students at Baylor, they were sexually assaulted by different assailants at different locations and different times over a twelve-year period. They allege that some Baylor personnel inadequately responded to their complaints of assault or discouraged them from reporting and that Baylor in fact created a heightened risk of such assaults through an official policy of intentional discrimination.

In this motion, Baylor asks the Court for protection from Plaintiffs' extremely broad, university-wide discovery requests—requests that in many instances will expose intimate and painful details of non-parties' lives to scrutiny and exposure for the purpose of highly publicized litigation. Under the substantive law, Plaintiffs do not need access to this information to investigate their claims. Accordingly, Baylor asks that the Court limit discovery at this time to policies and factual information directly relevant to the handling of the claims of the ten Jane Doe Plaintiffs and their eleven alleged assailants. If a "policy" of discrimination exists, it should be apparent from this discovery, which will cover at least a 13-year period. And if no such policy emerges, the intimate, painful discovery will have caused great harm and no good.

Baylor also asks the Court to enter a Confidentiality and Protective Order that will protect non-parties' rights and enable Baylor to comply with legal and ethical obligations. Baylor has agreed to produce documents related to each of the ten Jane Doe plaintiffs and each of the eleven alleged assailants, but is unable to disclose information about the alleged assailants without an

appropriate protective order in place. Baylor has submitted a proposed protective order designed to address these concerns.

As the Federal Rules reflect, discovery is a balancing act. It is intended to provide parties with the information they need to prosecute or defend their claims. It is not, however, intended to be a fishing expedition, out of proportion to the needs and factual demands of the case, that disregards the legitimate privacy concerns of non-parties.

BRIEF BACKGROUND

I. There is another, untold side to this story.

Plaintiffs allege that, through an “extensive history of abuse and conscious disregard” of its obligations to investigate and respond to sexual assaults on campus, Baylor has allowed a condition to be created that substantially increased Plaintiffs’ chances of being sexually assaulted. Dkt. 56 at 1-2. Plaintiffs allege that the pattern and practice of discouraging sexual assaults was so pervasive as to become an “official policy” and that Baylor should therefore be held liable for any and all sexual assaults, regardless of whether the context was under the university’s substantial control and even though the university lacked any knowledge that their alleged assailants or locations posed a serious risk. Contrary to Plaintiffs’ representations in their Complaint, however, Baylor has always been committed to the safety and well-being of its students. This context is important for the Court to understand as it decides these discovery disputes.

Since the emergence of campus assault as a national concern, Baylor has been actively taking steps to address the issue. For example, in 2010 a sexual assault committee was formed to recommend improvements to policies and to develop prevention programming. Ex. A. By the time the U.S. Office of Civil Rights had issued the 2011 “Dear Colleague” letter—a document setting forth guidance to universities on their responsibilities under Title IX—Baylor already

disseminated information to students about reporting sexual assaults and options for counseling and guidance following such an assault. Ex. B. In September 2011, Baylor designated John Whelan as its Title IX Coordinator. By early 2013, Baylor had established a Title IX Sexual Assault Task Force to conduct a comprehensive review of Baylor's policies and practices relating to sexual violence. Ex. C.

In September 2013, Baylor launched a "Do Something" sexual assault prevention campaign for incoming freshman. Ex. D. The campaign was sponsored by the Baylor Sexual Assault Advisory Board, chaired by Dr. Cheryl Wooten, staff psychologist at the Baylor Counseling Center. *Id.* The campaign featured a series of "Candid Conversations" held at various residence halls, the goal of which was to create awareness and prevent sexual assault. *Id.* By the fall of 2013, Baylor already had a comprehensive system in place for reporting and adjudicating sexual assaults, and it was disseminating information about the process. Ex. E.

Still, Baylor recognized that there was room for improvement. In April 2014, the Office of Civil Rights for the first time provided detailed guidance on its "Dear Colleague" letter published in 2011. In mid-2014, Baylor retained the highly regarded consulting firm of Margolis Healy & Associates to assess Baylor's compliance with Title IX and Clery Act requirements. Ex. F. The Margolis firm found that "while the University has taken significant steps to comply with the guidance from OCR," the University could do more and specifically would be better served with a more strategic, comprehensive and integrated approach to its Title IX policies and procedures. *Id.* The Margolis firm made a series of recommendations which Baylor began to implement, one of which was to hire a full-time, dedicated Title IX coordinator. *Id.* Previously, Baylor had designated Title IX coordinators, John Whelan and Karla Leeper, but their Title IX

responsibilities were not full-time. In November 2014, Baylor hired Patty Crawford as its full-time Title IX coordinator. Ex. G.¹

On July 17, 2014, Vice President for Student Life, Kevin Jackson, presented an update to the Baylor Regents noting the following “[s]teps we are taking to prevent and respond to sexual violence:”

- Conducted consultant review of our policies and practices
- Implementing online sexual violence prevention and education training for all new students
- Implementing sexual violence awareness campaign
- Implementing faculty and staff training on sexual violence
- Increasing staff resources to address Title IX requirements (training, student support, coordinating response, policy revisions, interview and adjudication processes, reporting of data, etc.)
- Seeking a thoughtful, prayerful and caring approach

Ex. H.

In addition, the Sexual Assault Advisory Board developed a sexual assault prevention proposal in the fall of 2014 that resulted in the “Bear Up Now—Courage Takes Action” program designed to prevent assaults on campus. Ex. I. Further, throughout the fall of 2014, Baylor trained several thousand administrators, staff, faculty, and student workers on sexual violence prevention. Ex. J.

By the fall semester of 2015, when Baylor retained Pepper Hamilton in the wake of the Sam Ukwuachu case, Baylor had already taken numerous and extensive steps to prevent sexual assault on campus and to encourage reporting of assaults. While Pepper Hamilton found serious

¹ The Office of Civil Rights did not issue its 2015 “Dear Colleague” letter, stating that a full-time Title IX coordinator was required, until April 2015.

administrative failings, those failings do not erase the fact that Baylor had for years been devoting time, energy, and resources to the prevention of sexual assault. That these efforts may not have been successful in preventing all assaults, or that some employees in individual instances failed to comply with the policies that existed, does not evince intentional discrimination.

II. Baylor has already produced a large number of documents and has agreed to produce more upon the entry of an appropriate protective order.

Since the Court lifted the stay of discovery in March 2017, Baylor has produced 4,300 documents and is in the process of producing thousands more. These documents include documents reflecting processes and procedures for reporting and handling sexual assaults and other criminal investigations, including how Baylor's Health Center and Baylor Police Department respond to sexual assault; training programs and forms for notifying their students of their rights; task force documents relating to sexual assault prevention; documents related to the Faculty Code of Conduct; documents related to the Student Code of Conduct; and Annual Fire & Safety Reports.

Baylor has also produced documents related to the Jane Doe Plaintiffs' school records, to the extent those records do not contain information about other students or Plaintiffs' alleged assailants (which Baylor will produce upon entry of an appropriate protective order and FERPA notification to the affected students). Baylor has further agreed to produce medical and counseling records of Plaintiffs as well, but Plaintiffs' counsel will not authorize Baylor's counsel to have access to the documents to do so.

Baylor has also informed Plaintiffs' counsel that its production will be on a rolling basis, due in large part to the large volume of information at issue, the fact that the requests cover a long period of time (more than a decade), and compliance with the Federal Education Rights

Privacy Act (FERPA). Even with these limitations, Baylor is planning another major production for within the next week.

In addition, the parties have conferred on at least three occasions in an attempt to reach agreement on Plaintiffs' document requests, and to narrow the issues to be presented to the Court. Baylor also proposed an agreed protective order similar to the original order entered by the Court in the *Hernandez* litigation. Following the recent direction from the Court in that case, Baylor forwarded a revised version of its proposed protective order to Plaintiffs' counsel. Ex. K. Despite these efforts, the parties continue to have significant disputes regarding the (1) appropriate form of the protective order; (2) the requisite FERPA notice to be given to the alleged assailants and non-party students prior to production of their records; and (3) the scope of certain of Plaintiffs' discovery requests and in particular, Plaintiffs' requests for records related to sexual assault reports by non-parties.

Based on statements made by Plaintiffs' counsel during the parties' attempts to confer, Baylor anticipates that Plaintiffs' counsel will complain that Baylor has not complied with its discovery obligations to date, is attempting to prevent meaningful discovery of Plaintiffs' claims, and based on representations in the media that Pepper Hamilton was provided with a significant amount of data, should be able to easily produce that data in this lawsuit. What Plaintiffs' counsel ignores, however, is that Baylor has legal obligations to protect the private and sensitive information of its current and former students—which is why entry of an appropriate protective order and resolution of the FERPA issues, *see below*, is so critical. Plaintiffs' counsel further fail to recognize that what might have been relevant to the Pepper Hamilton investigation is not necessarily relevant to Plaintiffs' claims.

Further, to the extent that Plaintiffs’ counsel argues that Baylor has not acted in good faith with respect to its document production to date or in conferring on Plaintiffs’ discovery requests, attached as Exhibit L to this Motion is a letter from Baylor’s counsel to Plaintiffs’ counsel setting forth its position on the relevant discovery issues, including what it will and will not produce subject to appropriate rulings from the Court. As is apparent from Exhibit L, a common theme in Baylor’s position, as explained in detail below, is that it must provide appropriate FERPA notification to affected students and that any discovery of non-party sexual assault records should not occur until after Plaintiffs have conducted discovery on the facts surrounding their own alleged assaults and the development and implementation of Baylor policies and procedures for preventing and reporting sexual assault during the relevant time period.

ARGUMENT & AUTHORITIES

When requested discovery is outside the scope of Rule 26(b)(1)—which allows “discovery regarding any nonprivileged matter that is *relevant to any party’s claim or defense and proportional* to the needs of the case”—a court must limit discovery. FED. R. CIV. P. 26(b)(1), (2)(C) (emphasis added). A court may also, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .” FED. R. CIV. P. 26(c)(1). Here, Baylor does not object to producing the relevant student records of the ten Jane Doe Plaintiffs or their eleven alleged assailants (after the entry of an appropriate protective order and obtaining necessary authorizations). Rather, Baylor asks the Court both (i) to limit Plaintiffs’ discovery regarding non-parties (other than the eleven students alleged to have assaulted the Jane Doe Plaintiffs) because the requested discovery is intrusive, not relevant to Plaintiffs’ claims, and wholly out of proportion with the needs of the case, and (ii) to enter a

Confidentiality and Protective Order to protect all non-party students and Baylor's obligations to them.

I. The Court should enter an order protecting non-party students and former students from Plaintiffs' exceedingly broad and intrusive discovery requests.

Of Plaintiffs' 63 requests for production of documents, more than half seek confidential and sensitive records of non-party students and former students—including reports of sexual assault since 1996.² *See* Plaintiffs' First Request for Production of Documents to Defendant, attached as Exhibit M, Nos. 1-3, 5-20, 27-29, 32, 37-41, 44, 46-51, and 53; Defn. 15. The only purported protection suggested by Plaintiffs for "students not a party to this litigation" is to "redact the name and identifying information of each student and substitute a unique separate pseudonym for that student." *Id.* at 6. As explained below, this "protection" is wholly inadequate, and the Court should protect Baylor and non-party students from Plaintiffs' requests.

A. Baylor cannot produce the non-party discovery without violating non-parties' privacy rights.

The desire for privacy by victims is vividly demonstrated by the ten Jane Doe Plaintiffs, who are proceeding in this lawsuit under pseudonyms. In other words, even though Plaintiffs have filed a public lawsuit about their alleged sexual assaults, they still want privacy – a choice that Baylor respected by not opposing their motion to proceed anonymously. And yet, Plaintiffs

² *Davis* was not even decided until three years later. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999). Plaintiffs' counsel has agreed to change this time period to 2003; however, this slight adjustment does not diminish the intrusion. As it stands, Plaintiffs are seeking records of former students who are now in their 30s.

Moreover, Plaintiffs have not limited their requests to non-party allegations of sexual assault but instead have asked for documents related to *any* type of student misconduct. Baylor addresses this overbreadth below, and its discussion herein relies in anticipation that the Court, like other courts, will agree that student misconduct completely unrelated to sexual assault has no bearing on Plaintiffs' Title IX claims.

asked for university-wide documents describing other non-party students' alleged sexual assaults that may have occurred during the last 14 years in any context.

1. ***An “official” policy, if one existed, should be apparent from the information related to Baylor’s policies during the relevant period and the ten named plaintiffs.***

University-wide discovery regarding non-parties is not necessary. If Baylor had an “official policy” of intentional discrimination that created a “heightened risk of sexual assault,” Dkt. 78 at 15,³ that policy should be apparent just from examining the ten Jane Doe Plaintiffs’ individual experiences, as well as Baylor’s policies and procedures for handling sexual assaults over the years relevant to their claims. The assessment of whether Baylor had an “official policy” of discrimination at any given time is further impacted by changes in federal guidance that occurred over the last decade. Federal guidance in 2004 was demonstrably different than the guidance issued in 2011, 2014, and 2015. As set forth above, despite Plaintiffs’ allegations of a policy to discourage sexual assault complaints, documents already produced by Baylor reveal

³ This Court has referred to the official-policy rubric as allowing a claim to move forward on a showing of an “official policy or custom” of gender-based discrimination. Dkt. 78 at 15. The “custom” language relied on by the Court, however, does not appear in the language of Title IX or in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) or *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). Instead, the word “custom” is found in an entirely different statute, 42 U.S.C. § 1983. Although *Gebser* borrowed the “deliberate indifference” standard found in cases involving Section 1983, it did not borrow any other Section 1983 elements. Baylor respectfully continues to assert that “custom” is not the standard for Title IX (particularly when divorced from Section 1983’s other critical requirements, including that the entity’s “final policy maker” approved or sanctioned the unlawful custom or policy). *See, e.g., Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 602 (5th Cir. 2001). Notably, even in the Section 1983 context, when an official’s discretionary decisions are constrained by the entity’s policies, “those policies, rather than the subordinate’s departures from them, are the act of the municipality.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

Regardless, Baylor denies having either an official policy or custom of intentional discrimination. Moreover, the argument set forth above – that if there were an official policy it should be apparent from the facts of the ten Plaintiffs – applies equally to an official-custom rubric: if there were an official custom, it should be apparent from the facts surrounding the incidents involving the ten named plaintiffs.

long-standing prohibitions on sexual misconduct. The documents also reveal a historical and ongoing, albeit imperfect, attempt by Baylor to comply with evolving legal standards, to respond effectively to complaints, and to prevent sexual violence on campus.⁴

Further, Plaintiffs' own allegations create serious doubt as to the existence of any such "official policy." Dkt. 56 at 14-38. They describe assaults by different assailants, and different locations on- and off-campus, and different responses from different Baylor personnel. *Id.* While Baylor firmly denies that it maintained an "official policy" that constituted or caused intentional discrimination against any plaintiff, the facts should be developed in these ten individual cases before university-wide, privacy-invading discovery is allowed.

The Title IX Office provides a good example of why discovery limited to the Plaintiffs' individual allegations should precede non-party litigation. Several of the Jane Does went to the Title IX Office, which provided academic support and conducted formal investigations that led to adjudication hearings. Dkt. 88 at 20, 38-42. In fact, in the case of Jane Doe 10, one of the adjudicators was the retired chief justice of the Iowa Supreme Court. In another case, the Title IX Office affirmatively reached out to a Jane Doe after a professor learned of her possible assault and contacted the Title IX Office. *Id.* at 37. This Jane Doe declined assistance from the Title IX Office, writing in an email that she "appreciated" the Title IX Officer's contacting her, but that

⁴ Moreover, while it is true that Pepper Hamilton found deficiencies in Baylor's policies and practices during the three school years reviewed by that law firm, even the complete absence of a policy does not equate with a *policy* of encouraging intentional discrimination. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-292 (1998); *Reshkovsky v. Valerio*, No. 4:16-cv-1572, 2017 U.S. Dist. LEXIS 47221, *20 (S.D. Tex., March 29, 2017) ("to the extent that Plaintiff argues that HISD's policies and procedures were insufficient, he fails to state a claim under Title IX. *Gebser*, 524 U.S. at 292-93"). At the end of the day, Plaintiffs' theory of the case is really one of disparate impact, which is not a cognizable theory under Title IX. *See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 946 (D.C. Cir. 2004); *Manley v. Tex. Southern Univ.*, 107 F. Supp. 3d 712, 726 (S.D. Tex. 2015) (disparate impact theory not available under Title IX).

she felt “safe” and “kn[e]w [her] rights.” *Id.* at 38. Two months later, she returned to the Title IX Office to lodge a complaint; Baylor performed a full investigation, and interim measures were implemented. *Id.* The Title IX Office also investigated two other Jane Does’ complaints. *Id.* at 41-42. The Plaintiffs do not need university-wide discrimination regarding other students to evaluate the legal adequacy of Baylor’s handling of their specific claims.

Regarding Plaintiffs’ allegations relating to Baylor physicians or counselors who allegedly discouraged the reporting of sexual assault, discovery should begin with these alleged incidents and the policies and practices of those departments at the time in question.⁵ Again, these core factual disputes should be explored before Plaintiffs are allowed to conduct university-wide discovery of the confidential and private information of non-party students.

If an official policy cannot be gleaned from these ten Plaintiffs’ treatment, then they should not be allowed to wade through non-parties’ information looking for one. *See, e.g., Dibbern v. Univ. of Mich.*, No. 12-15632, 2015 U.S. Dist. LEXIS 42303, *13 (E.D. Mich. April 1, 2015) (“The protective order will allow Plaintiff to seek oral discovery on issues related to Plaintiff and the College of Engineering while avoiding a ‘fishing expedition’ into matters concerning the rest of the university—which will, in turn, prevent harm and undue burden on the deponents.”). In addition to the tremendous burden associated with such production,⁶ asking Baylor to produce highly sensitive sexual-assault files for non-parties for the last 20 years would

⁵ As explained earlier, Baylor has agreed to produce Plaintiffs’ medical and counseling records, but Plaintiffs’ counsel will not authorize Baylor’s counsel to have access to the documents to do so.

⁶ If Baylor is required to conduct university-wide discovery of other sexual assaults over a nearly two-decade period, then under Plaintiffs’ requests for production, Baylor would have to conduct an enormous search of electronically stored information consisting of millions of documents. The burden of this ESI is yet another reason to limit Plaintiffs’ discovery at this time. *See also, e.g., Metcalf v. Yale Univ.*, No. 15-cv-1696, 2017 U.S. Dist. LEXIS 21032, *17-19 (Feb. 15, 2017).

cause harm without adding any benefit to the case. Indeed, if Plaintiffs were to proceed on an official-policy claim based on the experiences of *other* students, then Baylor would be forced to defend against this “policy” claim by presenting the testimony of Baylor students who were sexually assaulted but felt supported by the University following their traumatic experiences, placing Baylor (and these students) in an untenable position. Plaintiffs’ request for university-wide, non-party discovery is not at all “proportional to the needs of the case, considering the importance of the . . . discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(1).

The Court seemingly acknowledged that discovery should focus on the Jane Doe Plaintiffs when it stated that “much of the same evidence” would be required for Plaintiffs’ heightened-risk claims as for their post-reporting claims. Dkt. 89 at 4. The evidence necessary for the post-reporting claims, which require actual knowledge and deliberate indifference, Dkt. 78 at 11, will focus on how Baylor responded to the *Plaintiffs’* own alleged assaults. How Baylor responded to other allegations will be completely irrelevant. *See Does v. Rust College*, No. 3:13-cv-220, 2015 U.S. Dist. LEXIS 72312, *8 (N.D. Miss. June 4, 2015) (denying “discovery of acts by and experiences of others rather than the plaintiffs themselves or the named defendants . . . because the Supreme Court has affirmatively stated that actual notice is the necessary component to proving the Title IX claims asserted here”); *Dibbern*, 2015 U.S. Dist. LEXIS 42303, at *13 (“It appears that Plaintiff will only have to prove that the Defendants were deliberately indifferent to *her* reports of harassment, making discovery concerning others’ reports of harassment irrelevant.”).

2. *FERPA imposes a significantly heavier burden on a party seeking access to student records.*

The fact that the overwhelming majority of non-party documents requested by Plaintiffs constitute “education records” under FERPA buttresses this conclusion. FERPA prohibits “the release of education records” or “personally identifiable information contained therein other than directory information” concerning “students” without their written consent. 20 U.S.C. § 1232g(b)(1), (b)(2), (d). “Education records” are “records, files, documents and other materials” that “(i) contain information directly related to a student,” and “(ii) are maintained by an educational . . . institution” *Id.* at § 1232g(a)(4)(A). FERPA regulations state that protected information includes “[o]ther information that, alone or in combination, is linked to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty,” and “information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” 34 C.F.R. § 99.3.

FERPA does not completely prohibit the disclosure of education records in discovery. *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004). “Given FERPA’s underlying privacy concerns, it does, however, place a higher burden on a party seeking access to student records to justify disclosure than with the discovery of other types of records.” *Id.*; *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (explaining that FERPA “places a significantly heavier burden on a party seeking access to student records”); *see also Briggs v. Bd. of Trustees Columbus St. Comm. College*, No. 2:08-CV-644, 2009 U.S. Dist. LEXIS 92950, *6 (S.D. Ohio July 8, 2009) (“When the requested materials include personal information of individuals who are not parties to the lawsuit, the court may require the plaintiff

to show that the value of the evidence to party litigants outweighs the privacy interests of third parties”—even outside the FERPA context). Plaintiffs cannot meet this burden.

3. *The very act of FERPA notifications could be traumatic.*

Even if Plaintiffs could meet their burden under FERPA, the notice and opportunity-to-object procedures required by FERPA could themselves be painful for current and former students who are not parties. At least one court has denied a request for information about how a university handled sexual-assault reports other than the named plaintiff's based on its “concern[] about the impact that this letter may have on the reporting Gonzaga female students; some of these women may not have shared their sexual-assault experience with their loved ones, who may question why they received a letter from Gonzaga, thereby possibly causing these women additional pain and discomfort.” *Hobbs v. Corp. of Gonzaga Univ.*, No. CV-10-0292-EFS, 2011 U.S. Dist. LEXIS 116064, *3 (E.D. Wash. Sept. 27, 2011). Likewise, some of the third-party alleged perpetrators might never have been told of the accusations against them due to the victims' request for confidentiality. They should not learn of such serious accusations through a FERPA notice.

4. *Medical and counseling records are privileged.*

Finally, some of the most sensitive documents—medical and counseling records of non-parties—requested by Plaintiffs are protected by privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (recognizing privilege for confidential communications between a psychotherapist and her patient); TEX. OCC. CODE § 159.002(a) (“A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.”). Although the Texas statute would allow the Court to order discovery of medical records, even of

non-parties, *id.* at § 159.003(a)(12), the Court should not do so until Plaintiffs can demonstrate a real and compelling need for such highly personal and private information.

For all of these reasons, the Court should deny all university-wide, non-party discovery at this time. If, after Plaintiffs review Baylor's policies and the discovery related to their individual cases, they continue to believe "that further information is necessary to present [their] case, [they] may file a properly-supported motion seeking such discovery, justifying the intrusion on the non-parties' lives." *Hobbs*, 2011 U.S. Dist. LEXIS 116064, *4.

B. Plaintiffs' definitions, in addition to increasing the invasion of privacy on non-parties, also make their requests overly broad, unreasonably burdensome, irrelevant and even more disproportional to the needs of the case.

The definitions accompanying Plaintiffs' requests for production exacerbate the privacy concerns—and stray further from the realm of relevance. Plaintiffs define "Issues of Concern," a phrase used in 28 of their requests, as "all matters that fall within the definitions of 'Conduct code violation', 'Prohibited Conduct under Title IX Policy', 'Sexual Violence' and 'Sexual Harassment' above, as well as the Pepper Hamilton investigation, the Counseller investigation, and the findings of fact issued by the Board of Regents in May 2016." Ex. M, Defn. 17; Nos. 2-3, 5-8, 20, 27-34, 37, 39-41, 43, 46-50, 53, 57-58. This definition, which would capture student conduct violations of any type whatsoever—including academic violations—is patently overbroad, unduly burdensome, irrelevant, and completely out of proportion to the needs of the case. *See, e.g., Shank v. Carleton Coll.*, No. 16-CV-1154 (PJS/FLN), 2017 U.S. Dist. LEXIS 3057, *11 (D. Minn. 2017) ("The Court agrees with Carleton that Shank's allegations regarding Carleton's tolerance of underage and excessive drinking do not state a claim under Title IX. The Supreme Court [has] made clear that, to be held liable under Title IX for sexual assault, a funding recipient must have actual knowledge of sexual assaults and be deliberately indifferent

to those sexual assaults.” (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)); *JR v. Pike Cty. Bd. of Educ.*, No. 2:06-cv-1120-MEF, 2008 U.S. Dist. LEXIS 46433, at *36 (M.D. Ala. June 13, 2008) (finding no Title IX violation when defendants were aware that the accused had previously gotten in trouble for smoking on campus, smoking marijuana, and choking a fellow student, but none of the prior infractions had a sexual connotation). Baylor asks the Court to limit the definition of “Issues of Concern” to claims of sexual assault.

II. The Court should enter a protective order that adequately protects non-party rights.

Based on the foregoing considerations, Baylor has proposed a Confidentiality and Protective Order. A copy of Baylor’s proposal for the order to be entered in this case is attached as Exhibit N. The parties have discussed Baylor’s proposal but have been unable to agree on the content of an order. While Baylor believes that a specific, FERPA-tailored order is warranted under the circumstances, the Plaintiffs have suggested that the parties use the Western District’s standard order with only slight modifications.

The proposed Confidentiality and Protective Order differs from the Western District’s standard order in a few important and necessary respects. It includes specific provisions for “Student Information,” which includes reports of sexual assaults, counseling and medical files, and FERPA records. *See, e.g.*, Ex. N at 3.b. It also specifies the procedures (i) that Baylor must follow to notify students of the potential disclosure of their information, (ii) that allow the students either to consent or object, and (iii) allow the parties and the Court to resolve any objections. *Id.* at 4. These provisions will apply to the Jane Doe Plaintiffs and their alleged assailants; to the extent any further non-party discovery is ever deemed proper, these provisions will be even more critical. Baylor’s proposed order also allows each of the individuals identified

as an “assailant” in this action and his counsel to review limited classified information that pertains to him, subject to certain limitations. *Id.* at 2.c.⁷

In a case of this sensitive nature, there is good cause for these protective provisions. Fed. R. Civ. P. 26(c)(1); Local Court Rule CV-26(c); *Gillard v. Boulder Valley Sch. Dist. Re-2*, 196 F.R.D. 382, 386 (D. Colo. 2000) (finding good cause to enter blanket protective order governing student records in a school sexual assault case); *see also Metcalf v. Yale Univ.*, No. 15-cv-1696, 2017 U.S. Dist. LEXIS 21032, *2 (Feb. 15, 2017) (Title IX case ordering non-party discovery to be redacted and declared Attorneys’ Eyes Only, and prohibiting plaintiff’s counsel from making any “effort to identify or interview” any of the non-parties).

CONCLUSION AND PRAYER

For the foregoing reasons, non-party discovery is neither relevant to Plaintiffs’ claim or proportional to the needs of the case, and there is also good cause to issue an order protecting Baylor and non-party students from annoyance, embarrassment, oppression, and undue burden. FED. R. CIV. P. 26(b)(1), (2)(C); 26(c)(1). Accordingly, Baylor asks the Court both (i) to limit Plaintiffs’ discovery regarding non-parties because the requested discovery is intrusive, not relevant to Plaintiffs’ claims, and wholly out of proportion with the needs of the case, and (ii) to enter a Confidentiality and Protective Order to protect non-party students and Baylor’s obligations to them.

⁷ Again, it is possible that the Jane Doe Plaintiffs’ alleged assailants have no knowledge that they have been identified as rapists in this lawsuit.

Respectfully submitted,

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BAYLOR UNIVERSITY**

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Baylor has communicated in good faith with Plaintiffs' counsel via phone and email regarding the relief requested in this motion. The parties have not been able to agree.

/s/ Julie A. Springer

Julie A. Springer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was served upon all counsel of record on May 24, 2017, via the Court's ECF/CMF electronic service system as follows:

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