

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

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

*Plaintiffs,*

VS.

BAYLOR UNIVERSITY

*Defendant.*



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

**PLAINTIFFS' MOTION TO COMPEL RESPONSES TO**  
**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

TO THE HONORABLE ROBERT PITTMAN:

COME NOW JANE DOES 1-10, Plaintiffs, who move to compel Baylor University to respond fully to Plaintiffs' First Request for Production of Documents (RFP):

## Introduction

Since the inception of this suit in June 2016, Baylor has produced approximately 4,300 pages of documents, a shockingly small number considering the scope and importance of the case. Moreover, the documents produced to date contain virtually none of the documents central to Plaintiffs' core claims<sup>1</sup>. Baylor received Plaintiffs' Requests for Production in September 2016, and despite the short abatement for 12(b)(6) consideration, Baylor's production demonstrates either dismal preparation for discovery or deliberate delay. A year after the litigation began, Baylor

<sup>1</sup> E.g., Baylor has not even produced its insurance coverage documents, despite disclosure rules and repeated informal request by Plaintiffs. This week, Baylor confirmed the insurance documents are coming soon.

claims still to be collecting documents with a need to produce on a slow rolling basis.<sup>2</sup> No privilege log has been made<sup>3</sup> and one can easily observe from what has been produced that Baylor is picking and choosing what it intends to hand over and giving no indication of what is being withheld.<sup>4</sup>

Before turning to specific issues, the Court should be aware that Baylor's constant public statements over the last year are in direct conflict with Baylor's litigation position that discovery compliance will require months and months of searching. If Baylor's public statements are to be believed, much, if not all, of the requested documents already have been collected and turned over to others.<sup>5</sup> In addition to the Pepper Hamilton investigation (which was complete by May 2016), Baylor publically claims it has been collecting and providing materials in connection with no less than six other investigations before the NCAA<sup>6</sup>, BIG XII<sup>7</sup>, U.S. Dept. of Educ. Office of Civil Rights<sup>8</sup>, Southern Association of College and Schools<sup>9</sup>, Texas Rangers<sup>10</sup>, and U.S. Dept. of Educ. Clery Act Investigators<sup>11</sup>.

---

<sup>2</sup> Although Plaintiffs do not oppose a rolling production, the progress is inexplicably slow. Also, Plaintiffs have no way to know when and whether a full production has been made. The production so far is in no conceivable order, contains unexplained and unsupported redactions and cannot be in the form and order in which the document are kept in the normal course of business.

<sup>3</sup> The morning this Motion was filed, Baylor produced a category only privilege log of the Pepper Hamilton materials. No log of Baylor's withheld document production has been produced.

<sup>4</sup> Counsel have engaged in several phone calls in an attempt to resolve outstanding issues. Although some progress has been made, it is apparent that, absent order of this Court, full and adequate document production will not begin.

<sup>5</sup> As shown in Plaintiffs' motion filed this same date concerning the Pepper Hamilton investigation, Baylor claims to have already collected and turned over to Pepper Hamilton every relevant material and it should have been no trouble over the last year to prepare those documents for production in this litigation.

<sup>6</sup> See Exhibit C. Baylor also immediately hired law firm Bond, Schoeneck and King, a leading consultant to other schools facing NCAA violations. *Id.*

<sup>7</sup> See Exhibit D.

<sup>8</sup> See Exhibit E.

<sup>9</sup> See Exhibit F.

<sup>10</sup> See Exhibit G. In a March 2017 Texas Senate hearing, Garland reaffirmed that "we've given them all that they've asked for." (Texas State Senate Committee on Higher Education, March 29, 2017. SB 1092, 85<sup>th</sup> Regular Session. [http://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=42&clip\\_id=12025](http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=12025)).

<sup>11</sup> See Exhibit H.

Baylor also has not missed a chance to release details supportive of its press narrative, details which must come from information already compiled. When former Title IX Coordinator Patti Crawford was about to release information and be interviewed on 60 Minutes, Baylor pre-empted with an orchestrated Wall Street Journal story of selective information in an effort to focus attention solely on the football program, as opposed to the university-wide problem and the senior administrators responsible. When Art Briles sued Baylor and then dismissed his claim, Baylor filed a 40 page factual narrative in its original *state court* answer (before even being served) revealing page after page of details of abuses in the football program. If space permitted, Plaintiffs could recount numerous times Baylor has handpicked information from the Pepper Hamilton investigation and released it to the media to drive its desired football focused narrative.

Baylor's Regents made finding after finding about Baylor's policy inadequacies.<sup>12</sup> This is no fishing expedition. Plaintiffs are simply asking that the basis for those findings - Baylor's own findings - be produced.<sup>13</sup> Plaintiffs are justified in seeking discovery to show who was responsible at all levels for these policies. Baylor's press talking points are that these are all football problems and the coach is gone. But most Plaintiffs have zero to do with athletics<sup>14</sup>, and it would be staggering to believe that Art Briles had anything to do with Jane Doe Plaintiffs who were put on probation for Code of Conduct violations the same day they reported their assaults to Baylor. Moreover, Baylor's Regents admit that "University administrators", not just coaches, committed these actions to directly discourage victims from reporting, thus contributing to a hostile environment.<sup>15</sup>

---

<sup>12</sup> See Exhibit I.

<sup>13</sup> Plaintiff's discovery requests are indeed comprehensive and Plaintiffs ultimately believe full production will be necessary. In an effort to focus the issues and avoid taxing the court, Plaintiffs have offered to limit initial production as described herein.

<sup>14</sup> Baylor has acknowledged that 90% of victims are not football related, at least 125 women. See Exhibit J.

<sup>15</sup> See Exhibit K, Baylor University Board of Regents Findings of Fact, pages 1-2.

Plaintiffs move this Court to compel Baylor University to produce documents concerning Defendant's irresponsible and admitted practices regarding sexual assault because those widespread practices created a heightened risk of sexual assault.<sup>16</sup>

### **Argument**

#### **I. Baylor Must Identify In Its Response Whether and to What Extent It Is Producing Documents or Standing On Its Objections.**

Baylor's responses to Plaintiffs' RFP are inadequate because they fail to articulate with any specificity the portions of requests to which they object and the portions of requests for which they plan to provide responsive documents. While Baylor provides this information for a few requests,<sup>17</sup> the vast majority of Baylor's responses include nothing more than a laundry list of repetitive and boilerplate objections with no specificity regarding what portions Baylor will respond to and what portions it will not.<sup>18</sup> As a result of the meet and confer process, Baylor has sent a letter that clarifies to some degree, some of the requests but ultimately Plaintiff should receive a formal production response that makes clear under each request what has been withheld and why.

An objection to a request for production "must state whether any responsive materials are being withheld on the basis of that objection" and "an objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34. Rule 34(b) "is structured in this way so that, in combination with [Rule 26(g)(1)], both the requesting party and the court may be assured that *all* responsive, non-privileged materials are being produced, except to the extent a valid

---

<sup>16</sup> Plaintiffs' RFP is attached hereto as Exhibit A. Baylor University's Response to Plaintiffs' RFP is attached hereto as Exhibit B.

<sup>17</sup> See, e.g., Response to RFP No. 9, indicating that Baylor will only provide the Pepper Hamilton engagement letter in response to Plaintiffs' request for all documents exchanged between Baylor University and Pepper Hamilton (see *infra*) and Responses to RFP Nos. 33-35, indicating that Baylor is withholding all information regarding these requests (see *infra*). Moreover, the engagement letter contains redactions of the compensation rates paid, a relevant piece of information.

<sup>18</sup> See, e.g., Response to RFP No. 5.

objection has been made.” *Evans v. United Fire & Cas. Ins. Co.*, Civ. A. No. 06–6783, 2007 WL 2323363, at \*2 (E.D.La. Aug. 9, 2007). Baylor’s responses do not attempt to meet this standard and “thus violate the letter and spirit of Rule 26(g).” *Heller v. City of Dallas*, 303 F.R.D. 466, 483 (N.D. Tex. 2014)<sup>19</sup>. By failing to provide reasonable specificity in its objections, Baylor has left the Plaintiffs “guessing and wondering as to the scope of the documents or information that will be provided as responsive will be.” *Id.* at 487. Therefore, Plaintiffs request that the Court overrule Baylor’s objections and order Baylor to supplement their responses to comply with Rules 26 and 34.

## **II. Baylor University Must Produce Documents and Communications Regarding Reports of Sexual Assault On Campus and Officials’ Responses Thereto During the Relevant Time Frame.**

This Court has already held that Plaintiffs have plausibly alleged Baylor’s widespread practice of deliberate indifference to sexual assault and harassment on campus created a heightened risk of sexual assault. Doc. 78. Plainly, all reports of sexual assault on campus during the relevant time frame and all documents and communications, both internal and external, pertaining to those reports and Baylor’s response to those reports are relevant to those claims. Moreover, all of those items are relevant to Plaintiffs’ ability to prove their post-reporting claims because a pattern and practice of inadequate responses is probative of Baylor’s deliberate indifference.

Baylor appears to be refusing to produce *any* documentation outside of official policies and guides and documents pertaining specifically to Plaintiffs and their Assailants. Baylor’s boilerplate objections ignore the substance of this litigation—Baylor’s largely admitted pattern and

---

<sup>19</sup> “Plaintiff made no attempt to explain the applicability of the general objections to the discovery requests. In every response, Plaintiff asserted a general objection for privileged or proprietary information, yet Plaintiff does not explain (in a privileged document log or otherwise) what, if any, information was withheld.” *Id.*

practice of discrimination against sexual assault and harassment victims.<sup>20</sup> Baylor's further objection that "it is not clear that opening up all sexual assault and harassment records is necessary to prove Plaintiff's case" ignores the relevant Rule 26 standard, which provides for discovery into relevant matters and does not limit discovery to what is absolutely necessary to prove a claim's elements.

Rather than requiring the Court to examine each and every request for production at this stage, Plaintiffs request the Court to order Baylor University to provide responsive documents pursuant to Plaintiffs' numbered requests related to "Issues of Concern" within the relevant "Time Period," unless protected by privilege or a valid specific objection beyond Baylor's general objections.

**A. Issues of Concern:**

In their first request for production, Plaintiffs defined "issues of concern" as the following: all matters that's 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."

Defendants have objected that the above definition improperly extends "subjects that are not relevant to Plaintiffs' Title IX claims. For example, Plaintiffs seek information on non-sexual misconduct and general student code of conduct violations." Yet, this information is directly relevant to this case. For example, were students who reported non-sexual assault incidents subjected to honor code drinking violations? Plaintiffs believe the evidence, when produced, will show that Plaintiffs' subjection to honor code enforcement was direct retaliation for reporting

---

<sup>20</sup> Baylor attempts to revive the argument the Court rejected in its ruling on Motions to Dismiss that this case is about nothing more than an "amalgam" of isolated incidents.

sexual assault used to chill victims from coming forward. This information goes to the heart of this case. Baylor has admitted this conduct publicly. The factual basis for these admissions goes to the heart of this case.

### **B. Time Period**

In their first request for production, Plaintiffs defined “time period” as January 1, 1996 to present unless otherwise noted. Defendants have objected that this time frame is “excessive and burdensome and ... not proportional to the needs of the case.” While Plaintiffs recognize that the time frame spans a significant amount of time, Plaintiffs’ claims, which this Court has held are within the appropriate statute of limitations, involve events dating back to 2004. Since Jane Doe 2 is alleging that Baylor’s pattern and practice of inadequate protection of sexual assault victims created a heightened risk on campus, evidence related to these issues for at least some period prior to 2004 is plainly relevant. Thus, the relevant time period, while lengthy, is entirely “proportional to the needs of the case.” Fed. R. Civ. P. 26. Nonetheless, in order to mitigate the burdens and expedite discovery, Plaintiffs have offered to limit the first round of production to one year prior to Jane Doe 2's sexual assault.

### **C. Privacy Concerns**

With respect to Baylor’s repeated objections that Plaintiffs’ requests “seek confidential and sensitive FERPA records regarding third-party students and/or records involving intimate and personal matters, the most invasive of which is sexual assault,” *e.g.* Response to RFP No. 10, Plaintiffs are sensitive to those concerns. Plaintiffs’ very requests themselves anticipated these concerns and provided for redaction of names,<sup>21</sup> and Plaintiffs repeatedly have proposed that Baylor redact identifying information in the first round of production and if identities are required

---

<sup>21</sup> See Exhibit A, Page 7.

by Plaintiffs, the parties can work through the FERPA issues. In the event identities are required to be disclosed later, Plaintiffs have requested from Baylor the FERPA notice sent affected persons when their information was handed over to Pepper Hamilton, because if these persons did not object when Pepper Hamilton was provided the materials, there is no reason to believe they have a privacy interest sufficient to prevent their non-identifying information be handed over to Plaintiffs' counsel under appropriate prophylactic guidelines. Plaintiffs have offered the protective order approved in the Local Rules with a particular paragraph concerning FERPA, but Baylor only wants to work from a complicated and unnecessary proposal of their own making that seems more likely to prevent Plaintiffs from obtaining necessary information and does not comport with the actual restrictions of FERPA.<sup>22</sup>

#### **D. Search Burdens**

In various responses, Baylor complains that the requests would require it to search “all communications between any employee at Baylor University” internally and with various outside groups such as the McLennan County District Attorney, Waco Police Department, and the McLennan County Sherriff’s Department. However, this cannot be a basis for Baylor refusing to search for *any* relevant communications. Plaintiffs have proposed to Baylor an initial list of relevant actors (e.g., counselors, health professionals, administration officials with disciplinary responsibilities, etc.) and search terms.<sup>23</sup> As of yet, there is no agreement to such a list. Clarification of the issues raised in these motions would likely go a long way to resolving the ESI issues. In the age of electronic communications, large organizations can easily execute electronic searches for e-mails and communications and create exports there from. With the Court's

---

<sup>22</sup> The Department of Education's own guidelines exempt consent requirements under FERPA when, "the disclosure is to comply with a judicial order or lawfully issued subpoena." 34 CFR §99.31(a)(9)(i)

<sup>23</sup> The parties have made significant progress on an Electronically Stored Information (ESI) protocol as far as the technical aspects of production are concerned, but not specifics of the search.



direction, the parties should agree to an ESI protocol and execute appropriate queries, but the parties cannot reach this point without guidance from the Court on discovery.

### **III. Specific Requests for Production**

#### **A. Requests for Production Nos. 22-26**

These requests seek pertinent information about the separation of certain officials (Art Briles, Ken Starr, Tom Hill, Ian McCaw, and others) from Baylor that arose from the Pepper Hamilton investigation. Clearly, the circumstances surrounding those separations and the terms thereof are relevant to Baylor's patterns and practices with respect to Title IX. Baylor has refused to provide documents except for "a document regarding the departure of" Art Briles, "a document regarding the departure of" Ken Starr, and "a statement regarding the departure of Ian McCaw." It is not for Baylor to pick and choose the documents it wishes to produce. Although the Regents findings repeatedly talk of misconduct of "coaches" and "senior administrators", Baylor has spent the last year attempting to lay virtually the entire blame on one coach, a coach Baylor reportedly paid millions on the way out the door. The exact nature of these separations is essential to revealing Baylor efforts to shield the "senior administrators" and others responsible for policies of suppressing and re-victimizing assault victims. The severance payments also will go to the credibility of the payor and payee's testimony.

#### **B. Request Nos. 32 and 51**

These requests ask for documents related to Baylor's reports to the United States Department of Education regarding the safety of students on campus, and in particular, the existence or non-existence of sexual assaults on campus. These reports are fundamental to the issue at the heart of this case, whether Baylor seriously investigated sexual assault allegations in compliance with Title IX or swept allegations under the rug, violating victims' rights and creating

a heightened risk of further assault and harassment on campus. Indeed, one of Baylor's representations to the Department of Education regarding the non-existence of sexual assaults on campus already informed this Court's opinion at the Motion to Dismiss stage. Doc. 78 at 8.

Nonetheless, Baylor has refused to provide responsive documents outside of the 2016-2017 academic year. There is no basis for so limiting its response and indeed this selective production purposefully excludes the most relevant years, the ones leading up to each Plaintiff's assault.

**C. Request Nos. 33-35**

These requests ask for relevant documents and communications about Issues of Concern with the Southern Association of Colleges and Schools, the Big XII Athletic Conference, and the NCAA. For the reasons discussed above, these matters are clearly relevant to the issues in this lawsuit. Moreover, it is a matter of public knowledge that Baylor's failure to respond seriously to sexual assault allegations was linked, at least in part, with its concern regarding how those investigations might affect its athletic teams.

Despite the foregoing, Baylor has indicated that it is refusing to provide *any* of the documents responsive to these requests. Responses to RFP Nos. 33-35 ("Defendant is withholding the requested information.") Yet its boilerplate objections to these requests cannot possibly support a wholesale refusal to produce documents. Baylor does not argue that any form of privilege protects any of these documents. Therefore, Plaintiffs request that the Court order Baylor to produce all responsive documents (based on the narrowed definition of "Issues of Concern" provided above).

**D. Miscellaneous**

Plaintiffs have also requested Plaintiffs' own student e-mail accounts, own student medical records, and documents from Buddy Jones, a former Baylor Regent. The requests to Jones were

through a subpoena duces tecum. Jones, however, refuses to produce documents absent Baylor's consent — consent that Baylor has yet to provide despite repeated requests. With respect to the student e-mail accounts and medical records, Baylor has been provided authorizations but has yet to provide responsive documents. There is simply no basis by which Baylor can argue that Plaintiffs are not entitled to Plaintiffs' own records and information. Plaintiffs request that the Court order Baylor to authorize Jones to release responsive documents and order Baylor to produce the student medical records and e-mail accounts.

### **Conclusion**

For the foregoing reasons, Plaintiffs request an order to compel.

Respectfully submitted,

/s/ Chad W. Dunn  
**BRAZIL & DUNN, L.L.P.**  
Chad W. Dunn  
State Bar No. 24036507  
K. Scott Brazil  
State Bar No. 02934050  
4201 Cypress Creek Pkwy., Suite 530  
Houston, Texas 77068  
Telephone: (281) 580-6310  
Facsimile: (281) 580-6362  
chad@brazilanddunn.com

**AND**

**DUNNAM & DUNNAM, L.L.P.**  
Jim Dunnam  
State Bar No. 06258010  
4125 West Waco Drive  
Waco, Texas 76710  
Telephone: (254) 753-6437  
Facsimile: (254) 753-7434  
jimdunnam@dunnamlaw.com

**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been filed by ECF and sent to counsel of record via electronic notification on May 24, 2017.

/s/Chad W. Dunn  
CHAD W. DUNN

**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that counsel have conferred extensively on the issues raised in this motion. Counsel have conducted no fewer than three group conference calls and have exchanged numerous letters and e-mails. Although some progress has been made, it is the belief of the undersigned that the parties will only be able to agree on parameters concerning discovery after gaining direction from the Court.

/s/Chad W. Dunn  
CHAD W. DUNN