

# School Law for School Psychologists: Beyond Special Education



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# Purpose

- The purpose of this workshop is to provide information specific to several discrete areas of school law
- Rather than the typical focus on special education law, this workshop will focus on the legal rights of all students
- Apply knowledge of school law to a variety of case studies

# Foundations of School Psychological Service Delivery

## Legal, Ethical, and Professional Practice

- knowledge of the history and foundations of school psychology; multiple service models and methods; ethical, legal, and professional standards; and other factors related to professional identity and effective practice as school psychologists

### Relevance to School Law

- Legal challenges to yoga and mindfulness programs
- Title IX (sex discrimination)
- Legal implications of bullying



# Legal Literacy of Teachers

- Schimmel & Militello (2007) surveyed 1,300 teachers in grades K-12 in 17 states
  - Findings show that the majority of teachers:
    - Are uninformed or misinformed about student and teacher rights,
    - Have not taken a course in school law,
    - Get their information from other teachers, and
    - Would change their behavior if they knew more about school law.

# Specific Findings

- Teachers were given 12 true/false/unsure questions concerning student rights that have been clearly resolved by the courts for more than a decade
  - Average mean score was 41%
- Teachers were given 17 true/false/unsure items concerning teachers' rights/responsibilities
  - Average mean score was 39%

# Sample Items

- Teachers cannot be held liable for student injuries that occur in breaking up a fight
- Schools can be held liable for failing to prevent student sexual harassment
- Teachers can be held liable for any injury that occurs if they leave their classroom unattended

# Consequences of Legal Illiteracy

- Teachers violate students' constitutional rights
- Teachers are often unnecessarily concerned about being held liable for a student's injury
- Teachers view the law as a source of fear and anxiety

# Principals and the Law

- Twenty-three states require a course in school law for principals
- 493 secondary school principals completed a school law survey
- 87% had completed a law course as part of their principal preparation
- 58% participated in a school law inservice training within 10 years

# Comparison of Results

## Teacher Rights Survey

### Percent Correct

Item	Teachers	Principals
Stop fight – injury	26%	41%
Sexual harassment	5%	7%
Liable for any injury	3%	6%

# What we know...

- Highest scores on school law survey were earned by teachers who took a law course while they were teachers
- Next highest scores were earned by teachers who took a law course during certification
- Knowledge of the law is positively correlated with law training

# School Psychologists and the Law

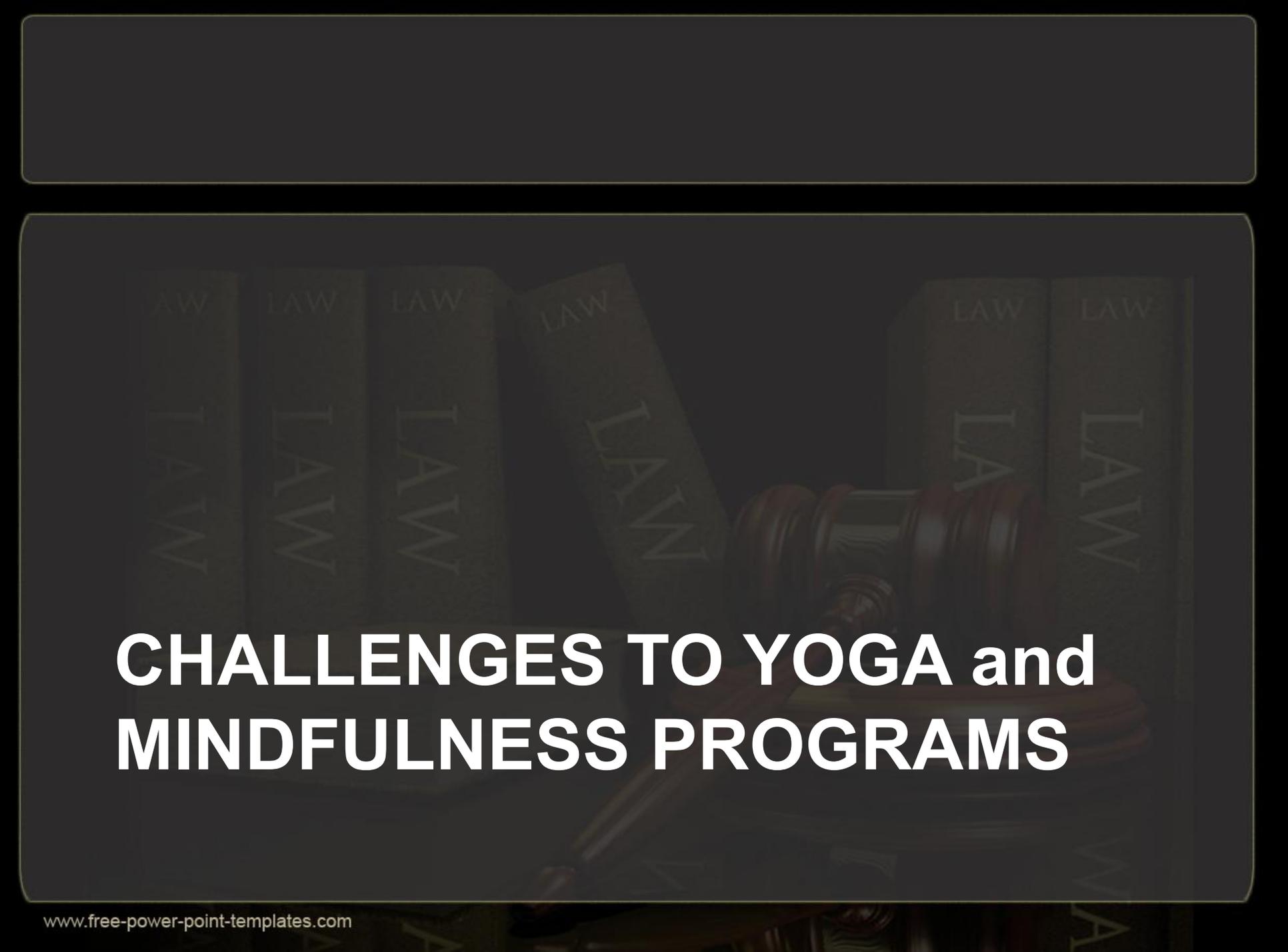
- 67 school psychologists representing 18 states completed a school law survey
- 48% had completed a law course as part of their training
- 24% participated in a school law inservice training within 10 years

# Comparison of Results

## Teacher Rights Survey

### Percent Correct

Item	Teachers	Principals	SPSY
Stop fight – injury	26%	41%	34%
Sexual harassment	5%	7%	16%
Liable for any injury	3%	6%	18%

The background of the slide is a dark, semi-transparent image. It features several law books with the word 'LAW' printed on their spines, arranged in a row. In the foreground, a wooden gavel is positioned diagonally, its head resting on the books. The overall aesthetic is professional and legal.

# **CHALLENGES TO YOGA and MINDFULNESS PROGRAMS**

# Mindfulness Defined

Mindfulness means having a moment-by-moment awareness of thoughts, feelings, bodily sensations and surrounding environment.

Though it has its roots in Buddhist meditation, a secular practice of mindfulness has entered the American mainstream in recent years.

Source: Greater Good Science Center, University of California, Berkeley

# Yoga Defined

Yoga - a Hindu spiritual and ascetic discipline, a part of which, including breath control, simple meditation, and the adoption of specific bodily postures, is widely practiced for health and relaxation

Source: Oxford Languages

# What is the objection?

- The American Center for Law and Justice argues that school mindfulness unconstitutionally coerces children to participate in meditation based on Buddhism
- The Supreme Court has consistently ruled against school prayer and Bible reading, even when children are allowed to “opt out”
- Students may feel pressured to participate due to teacher and peer influences

# An Early Legal Decision

## Malnak v. Yogi (1979)

- US Court of Appeals for the 3rd Circuit affirmed the US District Court of New Jersey's decision
- Found that an elective course in 5 NJ high schools constituted an establishment of religion in violation of the 1st Amendment
- Course: (SCI/TM) The Science of Creative Intelligence - Transcendental Meditation

# An Early Legal Decision (continued)

## Malnak v. Yogi (1979)

- Course was offered as an elective
- Instructor was trained by the World Plan Executive Council - dedicated to disseminating the teachings of SCI/TM
- Students were required to attend an off-campus weekend ceremony in which they had to recite Sanskrit chants and make offerings

# Other Early Cases

Powell v. Perry (1988) Arkansas case

- Concluded that “yoga is a method of practicing Hinduism”

Self-Realization Fellowship Church v. Ananda Church of Self Realization (1995)

- classified the “Hindu-Yoga spiritual tradition” as a “religious tradition”

# Are school yoga and mindfulness religious practices?

Opinions differ based on the legal context

- First Amendment religious free exercise clause protection
- First Amendment establishment clause restriction

# Are school yoga and mindfulness religious practices?

New York's Good Samaritan Hospital was sued in 2011 by Dr. Glenn Mendoza for religious discrimination against him

- He described yoga as “devoted spiritual practice rooted in religion and ancient spiritual teachings of meditation ... no different than being Jewish, Hindu, Buddhist, Catholic or Muslim.”

# Are school yoga and mindfulness religious practices?

A year later (2012), Dr. Mendoza tried to co-found a public charter school in PA on yoga and meditation practices

- He argued that the practices are purely “secular”, “educational” tools

Application was denied by PA Charter Appeal Board

It was found legally unacceptable to define a practice as “religious” in one context and “educational” in another as a matter of legal convenience

# Alabama School Policy

## State Board of Education Administrative Code

- *School personnel shall be prohibited from using any techniques that involve the induction of hypnotic states, guided imagery, meditation or yoga*
- Memo dated 6/21/2006 by the State of Alabama Department of Education reads: *yoga will not be offered during regular school hours or after regular school hours to public school students on a public school campus in Alabama*

# Sedlock v Baird (2015)

- The Sedlocks and two minor children filed suit against the Encinitas Union SD in CA
- Argue that school's Ashtanga yoga program as part of the physical education curriculum was an impermissible establishment of religion and violated religious freedom provisions
- They wanted the program to cease and to be declared unconstitutional

# Sedlock v Baird (2015) (Continued)

- Sedlocks were unsuccessful and appealed the decision
- Trial court determined that yoga may be religious in some contexts, but as taught in the District, they were “devoid of any religious, mystical, or spiritual trappings”
- Court of Appeal confirmed the decision

# Cole v Cobb



# Cole v Cobb

In 2014, Bonnie Cole, assistant principal at Bullard Elementary in the Cobb County SD in Kennesaw, Georgia introduced yoga and mindfulness.

Kids folded hands in prayer position in front of their hearts while saying, “Namaste.”

They colored mandalas.

# Cole v Cobb

- Parents complained of religious coercion.
- Parents protested, placing their hands on the Cole's office window and praying "for Jesus to rid the school of Buddhism".
- Cole was ultimately transferred to another school in the district to calm the situation.

# Cole v Cobb

- Cole sued the school for “capitulating” to Christian complaints by ending the yoga program and transferring the director, thereby advancing a competing “religious cause”.
- Settlement was reached in November 2019
- Cole paid \$150,000 in exchange for a “full release, no admission of liability and a resignation effective June 30, 2021”
- Cole’s attorney says schools need to recognize that succumbing to pressure from religious groups is a violation of the Establishment Clause and can result in a claim or lawsuit.

# Addressing Objections

- Yoga and mindfulness programs have been “secularized”
  - Language, gestures, and objects linked to Hinduism, Buddhism and other spiritual traditions have been removed
- BUT studies show that participants in “secular” yoga and mindfulness are more likely to report spiritual experiences and develop spiritual motives the longer they practice

# Recommendations

When using instructional materials specific to mindfulness in the school setting, users should consider clearing the materials through the school's curriculum committee with approval from the school board if required by district policy. This is recommended whether the materials are used by a particular educator or as part of a broader curriculum implemented on a larger scale by school counselors/physical education teachers/health teachers.

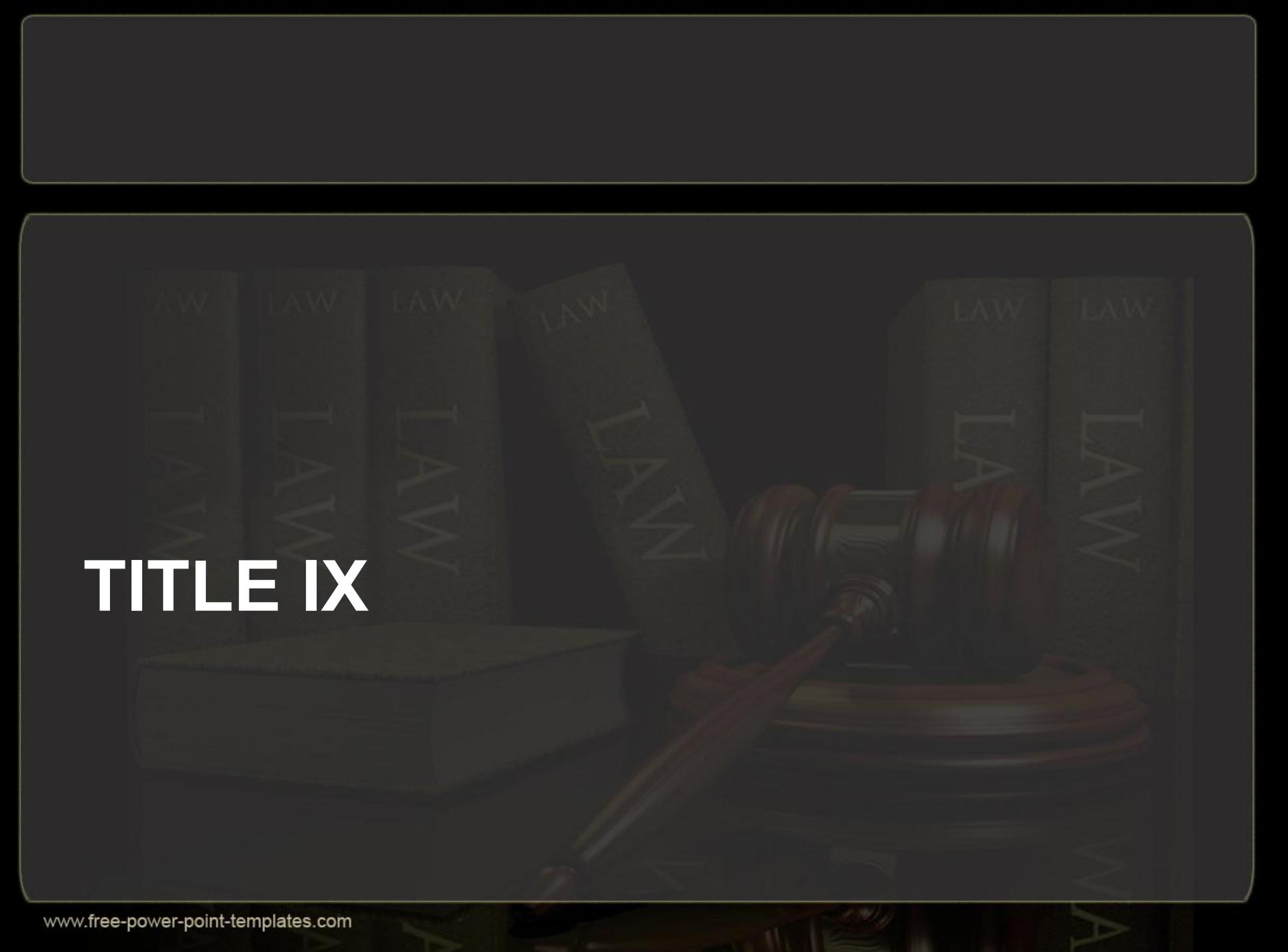
# Recommendations

- Transparency is essential. Student and parents need to know, not just the about the benefits of yoga and mindfulness, but also about potential religious effects, health risks, and alternatives.
- Voluntarism is recommended. Children should not feel pressured to join in or have to opt out to avoid participating.
- Choose programs that are designed as secular programs. Remove religious symbols, mantras, Sanskrit, etc.
- Consider securing parental consent.

# Recommendations

Consider who is providing the programming.

- Relying on outside providers with limited understanding of education and child development may not be advisable or sustainable
- Educators without adequate preparation may also be problematic



# TITLE IX

# Title IX of the Education Amendments Act of 1972

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a).
- Long-awaited Final Regulations issued on May 6, 2020
- Historic recognition of sexual harassment as sex discrimination
- Effective August 14, 2020.

# Definition of Sexual Harassment

- “Quid pro quo” harassment by an institution’s employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; and
- Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking (as defined in the Violence Against Women Act).

# “Education Program or Activity in the U.S.”

- Institutions must respond when sexual harassment occurs in the school’s “education program or activity,” against a person “in the United States.”
- Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred.

# Notice: Actual Knowledge

- An institution with actual knowledge of sexual harassment must respond promptly and in a manner that is not deliberately indifferent
- An institution has actual knowledge when it has knowledge that a person may have been victimized by sexual harassment
- Anyone has the right to report sexual harassment to put the institution on notice
- Notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the institution's behalf, charges a school with actual knowledge and triggers the school's response obligations

# Notice: Actual Knowledge

- A K-12 school must respond whenever any employee has notice of sexual harassment
- For postsecondary institutions, the institution may choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office

# Supporting Alleged Victims: Mandatory Response

- Respond promptly
- The “deliberate indifference” standard
- Title IX coordinators must immediately contact the alleged victim (“complainant”) confidentially to discuss:
  - Availability of supportive measures (which are available with or without filing a formal complaint);
  - Complainant’s wishes with respect to supportive measures; and
  - Process for filing a formal complaint.

# Supporting Alleged Victims: Supportive Measures

- Must be offered to complainants
- May also be offered to the reported perpetrator of conduct that could constitute sexual harassment (“respondent”)
- Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party
- Designed to ensure equal educational access, protect safety, or deter sexual harassment

# Examples of Supportive Measures

- Counseling
- Extensions of deadlines/course-related adjustments
- Work or class schedule modifications
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security/monitoring of certain areas

# Title IX Coordinator

- The employee designated to coordinate efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.”
- Title IX Coordinator’s contact information - name, title, address, phone number - must be provided to:
  - Students and employees
  - Applicants for admission and employment
  - Parents and legal guardians of K-12 schools
  - All unions
  - And must be prominently displayed on institution’s website

# Title IX Coordinator

- Any person may report sex discrimination in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- A report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

# Non-Discrimination Policy

- Institutions must disseminate (to the same groups that receive the Title IX Coordinator's contact information) a notice that it has a policy against discrimination on the basis of sex and that it is required by Title IX not to discriminate on the basis of sex
- The policy must be displayed prominently on the institution's website, handbooks and catalogs

# The Grievance Process

- Initiated by the filing of a formal complaint
- A complainant's wishes with respect to whether a school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances
- Institutions may consolidate formal complaints where the allegations arise out of the same facts.

# Formal Complaint

- Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the institution investigate
- At the time of filing, a complainant must be participating in or attempting to participate in the education program or activity of the institution
- Must be filed with the Title IX Coordinator in person, by mail, email, or any other way the institution designates
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process

# Responding to a Formal Complaint

- Send written notice to both parties with sufficient time for the respondent to prepare a response before an initial interview. The written notice must include:
  - Notice of the grievance process, including any informal resolution process;
  - Notice of the allegations, including sufficient detail;
  - A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
  - Notice of the parties' rights to have an advisor; and
  - Notice of any provision in the code of conduct that prohibits knowingly making a false statement or providing false information in the grievance process

# Emergency Removals

- There is no prohibition against the immediate removal of a respondent (student or employee) from the education program or activity on an emergency basis, provided that the institution conducts an individualized safety and risk analysis and determines that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
- Must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal

# During the Grievance Process and When Investigating

- The burden of gathering evidence and burden of proof must remain on institutions, not on the parties
- Institutions must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence
- Institutions must not restrict the ability of the parties to discuss the allegations or gather evidence
- Parties must have the same opportunity to select an advisor of the party's choice (who may be an attorney)

# During the Grievance Process and When Investigating

- Institutions must provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose, and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate
- Must also provide both parties and their advisors an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint
  - Such evidence must be provided prior to the completion of the final investigation report and in time to give the parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report

# K-12 Schools: Hearings Optional, Written Questions Required

- The grievance process may, but need not, provide for a hearing
- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

# Written Determination of Responsibility

- Identify the allegations that potentially constitute sexual harassment;
- Describe the institution's procedural steps taken from the receipt of the complaint to the determination;
- Include findings of fact supporting the determination;
- Include conclusions about whether the alleged conduct occurred;

# Written Determination of Responsibility

- Include a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the institution's education program or activity will be provided to the complainant; and
- Include procedures and permissible basis for appeals
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal

# Appeals

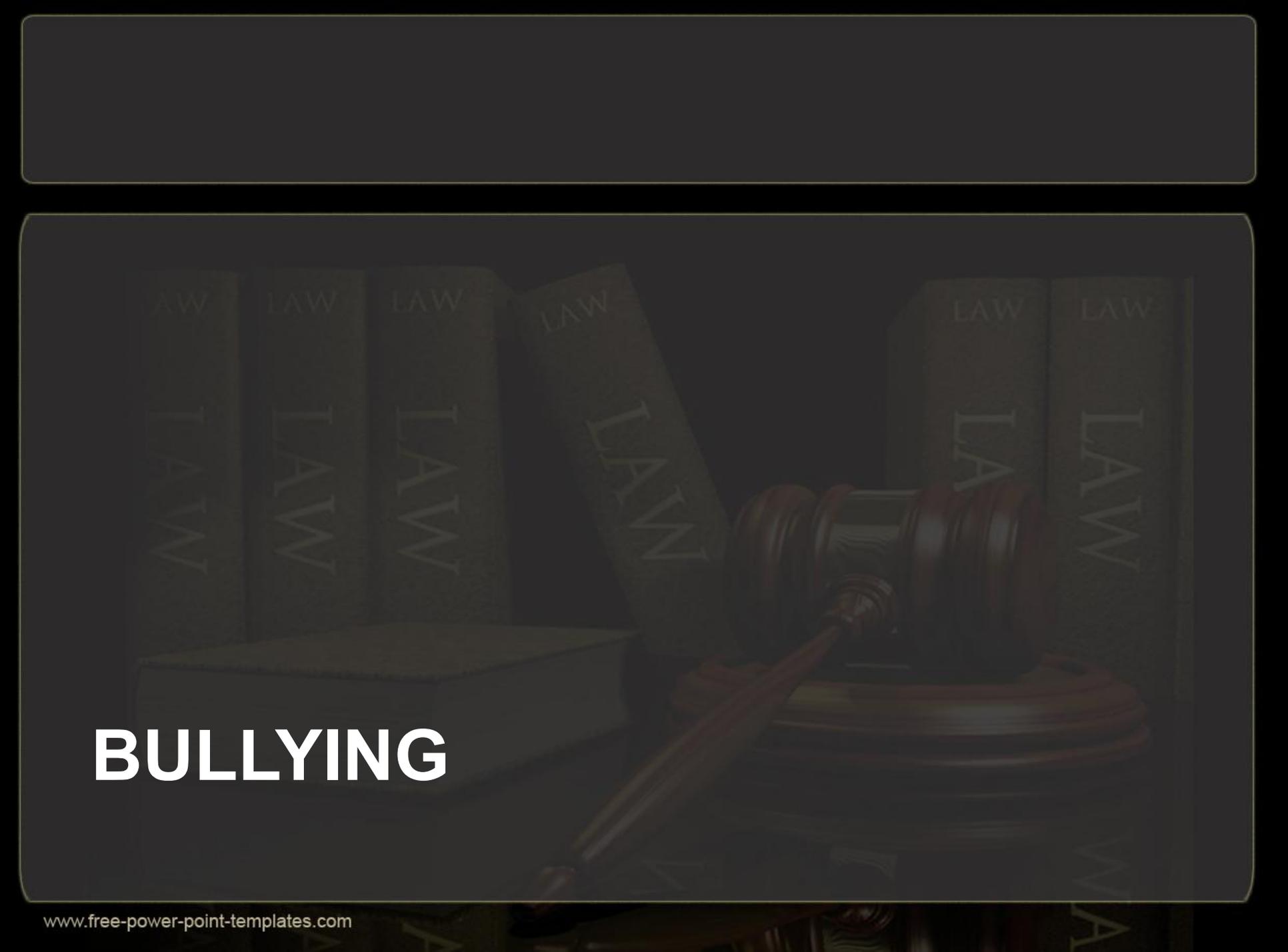
- An institution must offer both parties an appeal from a determination regarding responsibility, and from an institution's dismissal of a formal complaint or any allegations for the following reasons:
  - Procedural irregularity that affected the outcome of the matter;
  - Newly discovered evidence that could affect the outcome of the matter; and/or
  - Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.

# Informal Resolution

- An institution may choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained
- An institution may not:
  - Require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment
  - Require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed
  - Offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

# Retaliation

- Retaliation is expressly prohibited
- The institution must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding
- Complaints alleging retaliation may be filed according to a institution's prompt and equitable grievance procedures
- The exercise of rights protected under the First Amendment does not constitute retaliation



# BULLYING

# Bullying Defined

- Bullying is “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance”
- Behaviors may be a single act or occur over time
- Bullying results from a power imbalance - the bully uses his or her physical or social power over a target

# Types of Bullying

- Three types of bullying
  1. **Verbal bullying** - delivered orally, electronically or in writing, and can include insulting remarks, verbal teasing, and threats
  2. **Physical bullying** - includes unconsented to touching of another individual, and may include hitting, tripping, damaging personal property, and threatening
  3. **Social or relational bullying** - involves shunning an individual from a group, gossiping and public humiliation

# Statistics

- According to the National Bullying Prevention Center:
  - 22% of students reported being bullied within the school year
  - Only 36% of students bullied reported it to an adult
- More than half of bullying situations stop when a peer intervenes on behalf of the victim
- Student who *experience bullying* are at a greater risk of poor school adjustment, sleep difficulties, anxiety, and depression
- Students who *are bullies* are at increased risk for academic problems, substance abuse and violent behavior in adolescence and adulthood
- One study of students in grades 4-12 found that 49% of students reported being bullied in the past month (U.S. Dept. of Health and Human Services website, Facts About Bullying, *available at* <https://www.stopbullying.gov/resources/facts>)
- Over 70% of students reported having seen bullying in their schools (U.S. Dept. of Health and Human Services website, Facts About Bullying, *available at* <https://www.stopbullying.gov/resources/facts>)

# Statistics

- **Almost 1 out of every 5 high school students reported being bullied at school in the past year** (DOE and the National Center for Education Statistics. “Bullying: Fast Facts.” <https://nces.ed.gov/fastfacts/display.asp?id=719>)
- **Bullying is the most common in middle school and tends to “peak” during the transition between elementary and middle school** ([www.stopbullying.gov/sites/default/files/2017-09/white\\_house\\_conference\\_materials.pdf](http://www.stopbullying.gov/sites/default/files/2017-09/white_house_conference_materials.pdf))
- **Most common types of bullying reported are verbal and social/relational** (U.S. Dept. of Health and Human Services website, Facts About Bullying, *available at* <https://www.stopbullying.gov/resources/facts>)
- **40% of teachers reported bullying is a major to moderate problem in their school, and 62% of teachers reported seeing bullying in the past month** ([www.stopbullying.gov/sites/default/files/2017-09/white\\_house\\_conference\\_materials.pdf](http://www.stopbullying.gov/sites/default/files/2017-09/white_house_conference_materials.pdf))
- **Adults are estimated to be notified of only 20-30% of bullying incidents** (U.S. Dept. of Health and Human Services website, Facts About Bullying, *available at* <https://www.stopbullying.gov/resources/facts>)

# Defining Cyberbullying

- Cyberbullying is bullying that takes place virtually, i.e., through the use of the internet, cell phones, computers or other devices
- Cyberbullying includes “sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing **embarrassment or humiliation.**” (U.S. Dept. of Health and Human Services website, What is Cyberbullying?, *available at* [www.stopbullying.gov/cybergullying/what-is-it](http://www.stopbullying.gov/cybergullying/what-is-it))

# Defining Cyberbullying

- Cyberbullying can occur anywhere there is electronic communications (i.e., text, social media apps, emails, online gaming, chat rooms, etc.), and at anytime of the day or night
- Cyberbullying can be different from other forms of bullying due to:
  - Anonymity
  - Frequency of aggression
  - Permanence of content sharing
  - Lack of adult supervision in some online spaces
  - Capacity for larger numbers of aggressors to target a victim

# Cyberbullying Statistics

- Over 15% of high schoolers reported being cyberbullied in the past year
- Reports of cyberbullying among public school students rate highest for middle schoolers (33%), followed by high schoolers (30%), students in combined schools (20%), and elementary school age kids (5%)
- The most common form of cyberbullying reported in one study was mean, hurtful comments (25%) and rumors spread online (22%)
- Adolescent girls are more likely to have experienced cyberbullying in their lifetimes than boys
- Students with disabilities are cyberbullied more frequently than their general education peers

# Bullying of Students with Disabilities

- Students with disabilities are two to three times more likely to be bullied than their classmates without disabilities
- Rates of bullying vary depending on disability type - for example, students with behavioral and emotional disorders reported higher levels of bullying (35.3%), as did students with Autism (33.9%) and students with intellectual disabilities (24.3%), than student with other forms of disability
- Students with observable disabilities reported higher levels of bullying and victimization than their general education peers

# Bullying of Students with Disabilities

- A Canadian study reported that 59% of students who stutter reported being bullied, and of those students, 69% reported the bullying takes place on a weekly basis
- Reasons for why special needs students are targeted more often may include:
  - Their disability results in weaker social, communication or processing skills
  - Students receiving special education services in school are identifiable by peers
  - Students may lack adequate coping skills or self-regulation skills
  - Students may have observable disabilities and differences

# Devastating Consequences of Bullying

- The impact of bullying for all students, and particularly more vulnerable students, can be devastating:
  - Poor academic achievement
  - Higher rates of dropping out of school
  - Changes in brain chemistry due to a prolonged stress response, which impacts overall health
  - Increased anxiety, depression
  - Sleeping difficulties
  - Increased drug and alcohol use
  - Suicide

# State Anti-Bullying Laws

- All 50 states have passed some type of anti-bullying law or policy applicable to public schools
- State anti-bullying laws, in general, provide a framework for districts to implement anti-bullying policies, establish procedures to report and investigate bullying, to encourage staff training, and to promote student awareness
- However, not all states *require* that school districts have procedures for filing bullying complaints in place, follow common investigation protocols, arrange for staff trainings, mandate disciplinary action for bullying, and/or require anti-bullying educational programming for students  
([www.stopbullying.gov/resources/laws](http://www.stopbullying.gov/resources/laws))
- State bullying laws typically do not provide a private cause of action

# Federal Law

- There are no federal laws that specifically address bullying in public schools, however...
  - Bullying may be considered discriminatory harassment that is covered under federal civil rights laws
    - Enforced by the United States Department of Justice
    - Require school districts to address bullying-type behaviors that are severe, pervasive, or persistent, create a hostile environment in school, or are based on a student's race, color, national origin, sex, disability, or religion

# Federal Law - Office of Civil Rights and DOJ Investigations

- Applicable federal laws and statutes:
  - Title VI of the Civil Rights Act of 1964
  - Title IX
  - Section 504 of the Rehabilitation Act
  - Americans with Disabilities Act
  - Due Process and Equal Protections under the Constitution
  - Section 1983

# The Deliberate Indifference Standard

*Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)

- Case involved a 5th grade girl who was repeatedly harassed by a male peer (i.e., peer made sexually explicit statements, gestures, and touched her inappropriately at school over a five month period)
- Student became distressed, her grades declined, and she expressed suicidal ideation
- Parents reported conduct to the school, but the school was not adequately responsive
- The sexual harassment did not stop until the peer was charged with, and pled guilty to, sexual battery
- Supreme Court ruled a district could be liable for peer-to-peer sexual harassment under Title IX under certain, limited circumstances

# The Deliberate Indifference Standard

- Under *Davis*, a plaintiff must show each of the following elements to establish liability against a district for peer-to-peer sexual harassment under Title IX:
  - the victim was harassed on the basis of gender
  - the harassment was so severe, pervasive, and objectively offensive that it created a hostile learning environment
  - the district had actual notice of the harassment; and
  - the school district was “deliberately indifferent” to the harassment
- The Court went to great lengths to emphasize in its discretion that the district’s liability stemmed not from the conduct of the student harasser, but rather from the district’s own deliberate indifference to such conduct after becoming aware that the conduct was so severe as to interfere with another student’s learning, and the district’s response was “clearly unreasonable in light of the known circumstances.” *Id.* at 648-651.

# Applying *Davis* to Disability Bullying and Harassment Cases

- Courts have applied the *Davis* analysis and deliberate indifference standard when examining school district liability for other forms of peer-to-peer harassment including harassment based on disability See e.g., *S.S. v. Eastern Kentucky Univ.*, 532 F. 3d 445, 453 (6th Cir. 2008)
- In *S.S.*, the Sixth Circuit adapted the *Davis* standard for assessing district liability for peer-to-peer harassment based on disability:
  - plaintiff is an individual with a disability;
  - her or she was harassed based on the disability;
  - the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment;
  - the defendant was aware of the harassment; and
  - the defendant was deliberately indifferent to the harassment

# *Anthony Motta Jr. and Christine Horne Motta v. Eldred Central School District*

- Motta Jr. alleged that for roughly 5 years, he was bullied relentlessly by a group of students, including vulgar, sexually charged and ethnic name calling, mocking of his speech impairment, stuffing him in lockers, tossing his background, spilling milk on him, urinating in his hat, and striking him in the chest
- At points, the bullying turned physical, including being choked to the point of nearly blacking out
- This was reported to the principal, but the harassment did not end
- The student eventually fought back and received a long-term suspension
- Parents prevailed at a lawsuit against the district based on negligent supervision
- Following an 8-day trial, in October 2017, a Sullivan County Jury awarded the family \$1 million in a unanimous verdict, finding the district failed to enforce its own anti-bullying policies

# *Doe v. Southeastern Greene School District,* 2006 US Dist. LEXIS 12790 (2006)

- A 7th grade student had a history of being harassed due to his weight and sexuality. This included threats of violence and students exposing themselves to him and sexually touching him. He was stabbed in the buttocks by one of his tormentors
- This was reported to his teachers but the harassment did not stop
- The student was admitted to the hospital for depression and suicidal ideation
- The court concluded that the student adduced enough evidence that a jury could find that his harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school”

# *Scruggs v. Meriden*

## Fourteenth Amendment / IDEA

- Daniel Scruggs was classified with a learning disability, but eventually declassified and provided with a 504 Plan
- Daniel was subject to “constant” bullying during sixth and seventh grades (i.e., name calling, pushed, shoved, spit on, several altercations with peers, a peer threw a chair at Daniel, he was choked and pushed down stairs, his hair was pulled, etc.)
- Daniel’s grades declined during sixth grade.
- The district placed Daniel in the same class with one of the students who had assaulted him, and would not change the class assignment after parents requested it
- Daniel completed suicide in 2002

# *Scruggs v. Meriden*

- Parents filed a § 1983 claim alleging 14th amendment violations of due process and equal protection, violation of Section 504, as well as other constitutional and state law claims
- The Court ruled in favor of the District on Parents' 14th amendment claims, noting that, in general, districts do not have an affirmative duty to protect children from private actors
- The court also held that districts have “no duty under the due process clause to protect students from assaults by other students, even where the school knew or should have known of the danger presented.” (Internal citation omitted).
- Court denied summary judgment as to the IDEA claim on the basis of a denial of FAPE (substantively and procedurally), noting Parents had alleged sufficient facts that the district did not adequately evaluate Daniel prior to terminating his IEP

# US Department of Education Dear Colleague Letter (2013)

- “Bullying of a student with a disability that results in the student not receiving a meaningful education benefit constitutes a denial of FAPE under the IDEA and must be remedied.”
- When a student with a disability has been the *victim* of bullying:
  - The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student’s needs have changed such that the IEP is no longer designed to provide meaningful educational benefit
- When a student with a disability is *engaging* in bullying:
  - “The IEP Team should review the student’s IEP to determine if additional supports and services are needed to address the inappropriate behavior.”

# OCR Dear Colleague Letter (2014)

- Public schools are responsible for addressing bullying of students with disabilities
  - A student with a disability may be denied FAPE if he is bullied for any reason - not just when bullying targets the student's disability
  - An IEP Team or 504 Team meeting should be held when a student with a disability suffers negative consequences from bullying that result in a “change in academic performance or behavior”

# OCR Dear Colleague Letter (2014)

- Steps must be taken to end the bullying and prevent it from continuing if it creates a “hostile environment”
- Factors to consider when determining whether a student has suffered negative consequences:
  - Sudden decline in grades
  - Onset of emotional outbursts
  - Increase in frequency or intensity of behavioral interruptions
  - Rise in missed classes or sessions of Section 504 services

# Second Circuit Decision: *T.K. v. NYCDOE* (2016)

- An elementary-aged student was subjected to bullying behavior by other students, including pinching her, stomping on her toes, tripping her, laughing at her, calling her “ugly,” “stupid,” and “fat,” and refusing to touch a pencil she touched
- The teachers did little to address the bullying behavior
- The parents tried to raise these issues at IEP meetings, but were told it was not a special education issue
- The parents unilaterally placed the student in a private school and filed for due process
- The district prevailed at the due process hearing and state-level appeal

# Second Circuit Decision: *T.K. v. NYCDOE* (2016)

- Lower Court's (EDNY Decision):
  - Rule that the bullying behavior that is not remedied could result in a denial of FAPE
  - The Court examined three factors to determine whether the IEP Team adequately addressed bullying
    - The IEP Team must consider evidence of bullying when developing the IEP, and failure to do so denies the parents the ability to meaningfully participate in the IEP's development
    - Anti-bullying measures must be included on the IEP "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities;" and
    - Any language on the IEP pertaining to anti-bullying must specify steps to be taken and must be written in language understood by a layperson, otherwise parents cannot meaningfully participate in the IEP development process

# Second Circuit Decision: *T.K. v. NYCDOE* (2016)

- On appeal, the district conceded that bullying behavior that “reaches a level where a student is substantially restricted in learning opportunities” could cause a FAPE denial and was an appropriate decision in developing an IEP
- The Second Circuit upheld the EDNY’s decision. Specifically, it found that the IEP Team’s refusal to discuss the student’s bullying, despite the parents’ requests to do so, was in and of itself a denial of the parents’ right to participate in the information of their child’s IEP
- The Second Circuit did not decide whether the bullying behavior in this case would have constituted a substantive violation of FAPE because it found the procedural violation was sufficient

# Bullying Results in Denial of FAPE

*Shore Reg'l High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004)

- P.S. attended school in the district during elementary and middle school. He was the “victim of relentless physical and verbal harassment as well as social isolation by his classmates.” The harassment was based upon his physique and perceived effeminacy.
- P.S. developed severe depression and his academic work declined as a result of the peer harassment. The District evaluated P.S. and began to provide him with IEP services. After the harassment intensified, P.S. attempted suicide in 8th grade.

# *Shore Reg'l High School Bd. of Educ.*

- A dispute arose between Parents and the regional high school about whether P.S. could receive an appropriate education if he remained grouped with the same bullies for ninth grade
- Parents ultimately unilaterally placed P.S. at a nearby public high school and filed a claim under the IDEA
- The Third Circuit, reversing the district court, found that there was evidence in the record supporting the ALJ's finding that P.S. would likely be bullied by the same peers if he continued to the regional high school, and that experiencing such bullying would deny P.S. a FAPE

# Key Takeaways for School Districts

- Take reports or concerns of bullying and suicide seriously - investigate promptly, follow up and communicate
- Act compassionately and reasonably in light of circumstances
- Consider if a student is experiencing a hostile educational environment, or if the bullying is interfering with FAPE - if so, take proactive steps to address the situation
- Promptly convene the IEP or 504 Team and consider what additional services may be needed to support a bullied and/or suicidal student
- Establish plans, protocols, programs and policies to address bullying and suicide prevention and educate the school community
- Notify parents of any bullying or mental health concerns
- Train staff on all policies, and on the topics of bullying and suicide
- Promote understanding and acceptance within the school community

# A Few Resources

- Militello, M., Schimmel, D., & Eberwein, H. J. (2009). *If they knew, they would change: How legal knowledge impacts principals' practice*. NASSP Bulletin, 93(1).
- Schimmel, D., & Militello, M. (2007). Legal Literacy for Teachers: A Neglected Responsibility. *Harvard Educational Review*. 77(3). 257-284.
- <https://rewirenewsgroup.com/religion-dispatches/2019/05/17/think-yoga-and-mindfulness-in-public-schools-are-a-no-brainer-think-again/>

Specific cases and other resources are noted in additional slides.