

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION**

JOHN DOE, by and through his next friend
JANE DOE,

Case No. 1:16-cv-00373

Plaintiff,

Hon. Travis R. McDonough
Hon. Christopher H. Steger

v.

HAMILTON COUNTY BOARD OF
EDUCATION, *et al.*,

Defendants.

Consolidated with:

RICHARD ROE, a minor student, by and through his
parents and next friends, RICHARD ROE, SR. and
JANE ROE,

Case No. 1:16-cv-00497

Plaintiff,

v.

HAMILTON COUNTY DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

**PLAINTIFFS', RICHARD ROE AND JOHN DOE'S, SECOND JOINT MOTION TO
COMPEL DOCUMENTS BEING WITHHELD BY THE HAMILTON COUNTY
DEPARTMENT OF EDUCATION CONCERNING OUTSIDE INVESTIGATOR-
TURNED RULE 26 EXPERT COURTNEY BULLARD**

COME THE PLAINTIFFS in Civil Action No. 1:16-cv-00373 and No. 1:16-cv-00497, and
move this Honorable Court to compel Defendant Hamilton County Department of Education
("HCDE") to produce all materials provided to or produced by outside investigator now turned
Rule 26 Expert Courtney Bullard ("Bullard"), including all documents withheld in the 3rd

Privilege Log of Courtney Bullard, and in support thereof would respectfully show unto this Honorable Court as follows:

I. Ms. BULLARD'S UNFOLDING AND CONFLICTING ROLES

As this Court is well aware, HCDE has charted a seemingly unprecedented course of (a) first hiring an “independent” lawyer, Ms. Courtney Bullard, to write an “external” report, (b) releasing that report to the general public and waiving any argument of privilege, and (c) now in this litigation, repurposing Ms. Bullard as its sole Rule 26 expert and producing her *verbatim* report as HCDE’s Rule 26 expert report.

Plaintiffs recently filed a motion to compel documents involving Ms. Bullard to more fully understand her many roles. At the hearing, grasping Ms. Bullard’s role was somewhat like hugging water. Initially, Ms. Bullard was said to be an outside investigator. Later, counsel called her a consulting non-testifying expert. Then she became a Rule 26 testifying expert.

As Ms. Bullard’s role changed, so did HCDE’s privilege log. The first privilege log, served with HCDE’s responses to Request for Production, omitted documents exchanged between Ms. Bullard and HCDE’s counsel, Mr. Scott Bennett. (*Exhibit 1*) After Plaintiffs’ Motion to Compel, HCDE changed Ms. Bullard into a Rule 26 expert and served a second privilege log. The second privilege log included, for the first time, communications between Ms. Bullard and Mr. Bennett. (*Exhibit 2*) Now, HCDE has produced a third privilege log with still additional documents sent by Mr. Bennett to Ms. Bullard. This log, reprinted below, shows Mr. Bennett to be copying Ms. Bullard about defense strategy *during Ms. Bullard’s* investigation and before she wrote her “independent” report:

Document Date/ Bate Stamp NO.	Author	Recipient	Description	Privilege Asserted
3/21/2016 272-280	Scott Bennett	HCBOE Later forwarded to Courtney Bullard by Scott Bennett	Legal Advice offered to HCBOE administration by Scott Bennett to limit claims and exposure. Was forwarded for information only	Attorney-client privilege
3/24/2016 106-108	Scott Bennett	Courtney Bullard	Legal advice given to James Jarvis by Scott Bennett regarding interviews conducted by PI	Attorney-client privilege
3/24/2016 038-046 064-066	Scott Bennett	Courtney Bullard	Emails regarding how to resolve conflict issues with HCBOE at the time of hiring Courtney Bullard	Attorney-client privilege
5/2/2016 270-271	Scott Bennett	Courtney Bullard	Legal advice offered to HCBOE administrators by Scott Bennett to limit claims and exposure	Attorney-client privilege
6/1/2016	Scott Bennett	Courtney Bullard	Confidential under Open Records Act. Disclosure made with agreement with counsel not to disclose to any third party, including media/press	Attorney-client privilege

(Exhibit 3)

Today, HCDE has sent these documents for *in camera* review. Plaintiffs firmly maintain they are entitled to review these communications from Mr. Bennett to Ms. Bullard because (1) Plaintiffs now have highly credible evidence that Ms. Bullard, now a “Rule 26 expert,” was *not*

acting independently as she originally claimed but openly receiving input from HCDE about legal defenses and legal theories; and (2) any attorney client privilege does not apply or has been waived.

II. THE NEW EVIDENCE SHOWS MS. BULLARD WAS OPENLY WORKING WITH HCDE'S COUNSEL ON LEGAL THEORIES AND DEFENSES

HCDE has chosen a strategy of naming Ms. Bullard, a lawyer, its sole Rule 26 expert, with her *exact* report serving the function of its Rule 26 expert report. Plaintiffs are confronted with a situation of HCDE's lawyer, Mr. Bennett, hiring another lawyer, Ms. Bullard, to opine on issues of legal compliance.¹ Yet the newly released emails prove HCDE's lawyer, Mr. Bennett, was supplying substantive information and defensive arguments prior to the report being written.

HCDE hired Ms. Bullard, initially, for an external report to consider culture, bullying, and Title IX issues at Ooltewah High School.² Believing this was truly an independent exercise, the mothers of the injured minors participated in working with Ms. Bullard through interviews. Ms. Bullard captioned her report, "Report of the *External* Investigation," not an *internal* one. And she repeatedly claimed in her Report that she was "independent" of HCDE:

- "On March 17, 2016, the HCDE School Board voted to retain me as an *independent* investigator to conduct a fair and impartial investigation...." (Bullard Report, p. 1)(emphasis added).
- "I *independently* identified, obtained and reviewed information relevant to the investigation." (*Id.* at p. 2)(emphasis added).

¹ By analogy, the Court dismissively queried at the last hearing whether Plaintiffs' counsel could hire his co-counsel to write an expert report and then testify for the Plaintiff.

² A friendly relationship was apparent from the start. When Ms. Bullard was hired, Mr. Bennett greeted her by email with a hardy "Welcome Aboard! Let's talk tomorrow." (*Exhibit 5*, HCDE-privilege log docs 00028). Her selection came as a "bit of shock" to Ms. Bullard. (*Id.*). Mr. Bennett, apparently referencing an earlier relationship, stated: "You are most welcome! Turn about [sic] seems like fair play, yes?" (*Id.*)

- Ms. Bullard also cited a “preponderance” standard of fairness pursuant to an April 11, 2011 “Dear Colleague Letter” from the Office of Civil Rights. (*Id.* at p. 2, FN 7).
- Further professing her alleged *independence*, she wrote: “I have not been contacted by any board member and/or HCDE administrator attempting to influence how my investigation is conducted or when my findings are released.” (*Id.* at pp. 5-6).

(Ex. 4, Bullard Report)

Behind the curtain, unknown to the students, HCDE’s counsel was floating legal defenses and shaping Ms. Bullard’s thought process. Plaintiffs now have no choice but to catalogue some of that evidence below.

A. HCDE FLOATS A DEFENSIVE THEORIES UNDER TITLE IX

The first month, April of 2016, HCDE, through its counsel, planted a legal seed for a finding of no Title IX violation but a possible *policy* violation. Specifically, Mr. Bennett asked Ms. Bullard to “suppose” that Title IX is not implicated because the pool cue “wasn’t motivated by sex and it wasn’t an act of sexual violence within the meaning of Tennessee law.” (*Exhibit 6*, HCDE - privilege log docs 000261).

In an even more elaborate exploration of legal defenses, Mr. Bennett acknowledged that John Doe’s injury was both severe and an act of violence, thus implicating Title IX. (*Exhibit 7* - HCDE privilege log doc 000253-254). Mr. Bennett argued that Title IX may *not* be implicated for “other victims” who were not actually penetrated with the pool cue absent a “tradition” of demeaning boys in prior years. Therefore, Mr. Bennett asked Ms. Bullard to “peel that onion,” noting it was important for HCDE to “develop an appropriate response.” (*Exhibit 7* - HCDE privilege log doc 000253-254). Ms. Bullard responded that “sexual assault” is not always

necessary for “sexual harassment,” and neither is “sexual gratification,” but “[o]ur conversation on this point has my mind going.” (*Id.*)³

A year later, at the deposition of Richard Roe, this lack of “sexual” gratification or sexual violence theory was raised by HCDE to Roe in his deposition:

Q. Did you think that what Student B did to you and the two that held you down, did you have any thought that that was sexual, intended to be sexual in nature?

A. Yes, sir.

Q. And why do you think that?

A. Anybody trying to put anything, no matter what it is, up your butt is sexual.

(Exhibit 8 - Deposition of Richard Roe, p. 124).

B. Ms. Bullard Has “No Pride of Authorship” and Seeks Edits from HCDE’s Counsel

In June of 2016, well before the final report, Ms. Bullard released a preliminary report for Mr. Bennett’s eyes. Even though she was hired to be “independent,” she claimed she had “no pride of authorship” in what *she and her law firm* were hired to write, “as long as the what is not changing.” Ms. Bullard said Mr. Bennett should “feel free to send comments, questions, changes on it if you have them this week” (*Exhibit 9* - HCDE – privilege docs 000332).

While the minor Plaintiffs and the public believed Ms. Bullard was acting independently of HCDE, that is simply not accurate. Ms. Bullard stated in her report that she was not contacted “by any board member and/or HCDE administrator attempting to influence how my investigation is conducted...” But she failed to state that she was openly collaborating with the Board’s *legal*

³ In her report, Ms. Bullard found “HCDE satisfied its Title IX obligations in its response” to John Doe, the physically injured freshman, merely by taking action after the injury. (Ex. 4, page 12).

counsel. A year later, of course, Ms. Bullard became HCDE's Rule 26 expert with her exact report being tendered *against the minor Plaintiffs*.

C. HCDE OFFERED LEGAL REVISIONS TO HELP HCDE AGAINST THE STUDENTS

By August of 2016, when Ms. Bullard closed in on her final report, Mr. Bennett made a number of suggestions. This included asking whether “the conduct meets the statutory definition of bullying, which does require a hostile educational environment?” (*Exhibit 10 - HCDE – privilege docs 000367*)(emphasis in original). Mr. Bennett also provided very technical language about whether bullying conduct “interfered with the educational opportunities of the students”:

"Because there was no evidence that the racking in substantially interfered with the educational opportunities of the students, this behavior did not constitute bullying within the technical meaning of Tennessee law or board policies. However, this conduct was clearly prohibited by the Code of Acceptable Behavior, and, over time, certainly could have developed into true bullying behavior." >>> >>> I sort of think that this language walks the line between the law and what we viscerally feel to be true. But I hesitate even to offer any language since this has to be your conclusion. So perhaps just consider this as inspiration. Or shared angst!"

(*Exhibit 11 - HCDE - privilege log docs 000412-000413*).

Ms. Bullard responded:

“At the end of the day, I think I am going to say my finding is based on the Olweus definition etc but that I cannot state whether it would or would not meet the statutory/HCDE definition..... BUT we shall see in the morning.”

(*Id.*).

Mr. Bennett then observed how this could help HCDE against upcoming lawsuits:

“That's probably a good distinction. Yes under olweus, no under Tennessee law and board policy. **That may help, too, with upcoming lawsuits.**”

(*Id.*)(emphasis added).

The following day, August 3, 2015, Ms. Bullard again released a copy of her proposed report to Mr. Bennett first. Returning to the alleged policy versus law distinction, Mr. Bennett wrote: “I think you did a good job of addressing the bullying issue vis a vis the TDOE and Olweus definitions versus the TCA and policy definitions.” (*Exhibit 12* - HCDE-privilege log docs 001186). Ms. Bullard wrote to a colleague that certain language in the report was Mr. Bennett’s: “That language came from Scott [Bennett].” (*Id.*).

D. MS. BULLARD ELIMINATED “GENDER-BASED” HARASSMENT AND MALE-ON-MALE HARASSMENT

Originally, Ms. Bullard envisioned a “Sexual Harassment” section complete with findings that HCDE and OHS failed to provide the appropriate scope of training under Title IX for gender based harassment:

“I find that the HCDE and OHS efforts towards training on sex and gender based harassment, including obligations of the school district in responding to those complaints under Title IX are deficient. Student, staff, coaches and administration explained sexual harassment in a limited venue that only addressed boys sexually harassing girls.”

(*Exhibit 13*- HCDE – privilege docs 000338). However, this important finding was strangely omitted from the final report. And, as mentioned previously, Ms. Bullard found *compliance* with Title IX with respect to student John Doe. *See footnote 3.*

III. PLAINTIFFS REQUIRE THE REMAINING COMMUNICATIONS ABOUT LEGAL STRATEGY BETWEEN HCDE AND MS. BULLARD

HCDE *chose* to designate Ms. Bullard as its sole Rule 26 expert. It produced her so-called “independent” report *verbatim* as its Rule 26 report. It is now clear from the emails above that Ms. Bullard was actively seeking HCDE’s counsel’s input and her thought processes were, in fact, being shaped by HCDE’s legal counsel.

Perhaps most alarming, the third privilege log shows HCDE's legal counsel *was even copying Ms. Bullard on its own defensive theories limiting HCDE's exposure*. In other words, the defense play-book was provided to Ms. Bullard before she finished her investigation and wrote her report. HCDE now wants to shield its actions and these communications, again offering "attorney client privilege."

A. ATTORNEY CLIENT PRIVILEGE DOES NOT APPLY AND, IF IT DID, IT WAS WAIVED

The attorney client privilege simply does not apply to these communications for at least two reasons. First, at the time Mr. Bennett provided the defense strategy against the Plaintiffs to Ms. Bullard, *she* was not the client. HCDE was. Indeed, Ms. Bullard held herself out to the minor Plaintiffs and the public as being "independent."⁴ Why else claim that she had not spoken to Board members or HCDE administrators?

Nor was Ms. Bullard, *at that time*, a Rule 26 expert. Thus, the communications from Mr. Bennett to Ms. Bullard cannot possibly be attorney client privileged *as to her*. And even if they were, this Court has already found, under *Doe v. Baylor University*, 320 F.R.D. 430 (W.D. Tex. 2017), that the public release of the Bullard report waived any privileges for all underlying materials she received. As this Court wrote: "Similarly, I find that when the Board released the Bullard Report, it waived the attorney-client privilege as to the entire scope of the investigation performed by Attorney Bullard, and all materials, communications, and information provided to

⁴ By professing independence, Ms. Bullard's report disclaims that she was acting as HCDE's attorney. In the newly disclosed emails, even she admits that she simply inserted the "legal advice" part of her engagement letter so that she could have an "option" of wearing conflicting hats of neutral investigator versus party lawyer: "You will see I included language about providing legal advice to HCDE **so that we can maintain the option of preservation of attorney-client privilege.**" (*Exhibit 14* - Doc. 00048)(emphasis added).

Attorney Bullard as part of her investigation.” (Dkt. 144, p. 7). Therefore, the communications must be produced.

B. RULE 26 REQUIRES PRODUCTION OF DOCUMENTS INFLUENCING MS. BULLARD, AS RULE 26 EXPERT

Second, now that HCDE *has* named Ms. Bullard as a Rule 26 expert, Plaintiffs are clearly entitled to discovery on her lack of “independence.” The Board and administrators may not have spoken to her, but the Board’s attorney summarized its legal defenses to her. In essence, one law firm (HCDE’s law firm) hired another law firm (Ms. Bullard’s) to make findings which “may help with upcoming lawsuits,” and then Ms. Bullard will testify to them. Plaintiffs *must* review the extent to which Mr. Bennett’s additional emails copied to Ms. Bullard further tainted her objectivity by making her HCDE’s “avatar” against the minor Plaintiffs.

“[A]n expert witness who is merely a party’s lawyer’s avatar contributes nothing useful to the decisional process.” *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014). Moreover, in addition to the traditional *Daubert* factors for reliability, a trial court may consider “whether the proposed testimony grows [out] of independent research or if the opinions were developed ‘expressly for the purposes of testifying.’” *Siegel v. Dynamic Cooking Sys.*, 501 F. App’x 397, 403 (quoting *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997) (abrogated on other grounds by *Morales v. Am. Honda Motor Co.*, 151 F.3d 500 (6th Cir. 1998))).

The Sixth Circuit has rightly recognized that “expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert’s line of scientific research or technical work, should be viewed with some caution.” *Johnson*, 484 F.3d at 434; *see also Mike’s Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006) (“We

have been suspicious of methodologies created for the purpose of litigation."). When analyzing this factor in *Johnson*, the Sixth Circuit has noted, "[I]f a proposed expert is a quintessential expert for hire, then it seems well within a trial judge's discretion to apply the *Daubert* factors with greater rigor." *Johnson*, 484 F.3d at 434 (internal quotation marks omitted). *Wilden v. Laury Transp., LLC*, 2016 U.S. Dist. LEXIS 115476, at *13 (W.D. Ky. Aug. 29, 2016).

The evidence shows that Ms. Bullard asked HCDE's counsel for changes and suggestions and that HCDE's legal counsel not only proposed language and theories, but copied Ms. Bullard on defensive strategies *before* she could issue her report. Having now named Ms. Bullard a Rule 26 expert witness, Plaintiffs are entitled to *all* the materials she reviewed as this Court already ruled.

CONCLUSION

The requested documents must be produced because the attorney client privilege does not apply and the evidence openly shows that Ms. Bullard's opinion was being influenced by HCDE's counsel. Put simply, HCDE purchased too many hats for Ms. Bullard and she wore them all—"independent" investigator; lawyer-aiding-the defense in upcoming lawsuits; and, then, Rule 26 expert. HCDE alone chose this course and Plaintiffs are entitled to the discovery to decide whether to seek *Daubert* disqualification, present these conflicts to the jury, and/or whether to seek other appropriate relief once the final documents are produced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent to the following via the Court's Electronic Filing System on January 25, 2018:

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s/ Eric J. Oliver

CERTIFICATE OF CONFERENCE

I, Eric J. Oliver, counsel for Plaintiff Richard Roe, hereby certify that counsel have conferred on the issues raised in this motion. I have discussed this issue with counsel for HCDE, but the matter remains unresolved. It is apparent the parties require Court guidance on the issues raised in this motion.

s/ Eric J. Oliver

Privilege Log

Document Date	Author	Recipient	Description	Privilege Asserted
11/13/11	Benjamin McGowan	D. Scott Bennett	Correspondence regarding student punishment and privacy	Attorney client privilege
11/21/11	D. Scott Bennett	Benjamin L. McGowan Lee McDade Steve Holmes Robert Alford	Legal assessment of school board policy regarding bullying at Hunter Middle School	Attorney client privilege Work product doctrine
5/24/12	Ann Bates	D. Scott Bennett Erik Miller	Communication with school board attorney	Attorney client privilege Attorney work product
12/5/12	Dr. Lee McDade	D. Scott Bennett, Linda Howerton Karen Glenn	Tracking form, cyber bullying incident report	Attorney client privilege Attorney work product
12/5/12	Dr. Lee McDade	D. Scott Bennett, Linda Howerton, Karen Glenn	Correspondence regarding a cyberbullying incident report tracking form	Attorney client privilege
5/9/13	Dr. Lee McDade	D. Scott Bennett	Correspondence regarding a bullying is not tolerated form	Attorney client privilege
12/30/15	Rick Smith	Members of the Hamilton County Board of Education, D. Scott Bennett	Correspondence regarding the investigation into the Ooltewah Basketball incident	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Metro Nashville Bullying, Discrimination, Reporting, Investigating, and Field Trip Policies	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Clarksville Montgomery board policies dealing with Harassment, Intimidation, Field Trips, and Excursions	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Shelby County board policies	Attorney client privilege

		Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	dealing with harassment, intimidation, bullying, field trips, and codes of conduct	
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Marion County policies dealing with Student Discrimination and Harassment, Field Trips, and Excursions	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Knox County Board Policies dealing with Harassment, Intimidation, Misbehaviors, Disciplinary Options, and Off-Campus Trips	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Jackson-Madison County Board Policies dealing with Student Discrimination and Harassment, Field Trips, and Excursions	Attorney client privilege
1/7/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding Hamilton County Board Policies 4.300, 4.301, 6.301, 6.302, 6.304, and 6.408	Attorney client privilege
1/7/16	Dr. Lee McDade	Rick Smith, D. Scott Bennett,	Correspondence regarding bullying policy recommendations	Attorney client privilege
1/8/16	Dr. Lee McDade	Dr. Greg Martin, Mosley Karitsa, Dr. Steve Highlander, Joe Galloway, Rick Smith, D. Scott Bennett, Ann Bates	Correspondence regarding policies dealing with the suspension and dismissal of tenured and non-tenured teachers	Attorney client privilege
1/13/16	Dr. Lee McDade	Neal Pinkston, D. Scott Bennett, Jim Jarvis	Correspondence regarding Child and Abuse and Neglect Policy	Attorney client privilege
6/29/16	Karen Glenn	Courtney Bullard	In anticipation of litigation,	Attorney client privilege

			Ms. Glenn's emails and attachments regarding Ms. Bullard's investigation	Attorney work product
8/4/2016	Courtney Bullard	Members of the Hamilton County Board of Education	Addendums A and B to Report of External Investigation authored by Ms. Bullard in anticipation of litigation	Attorney client privilege Attorney work product
4/13/17	D. Scott Bennett	Eve Ellis Dr. Lee McDade	Correspondence regarding discipline of students at Hunter Middle School	Attorney client privilege
4/13/17	Eve Ellis	Dr. Lee McDade D. Scott Bennett	Correspondence regarding discipline of students at Hunter Middle School	Attorney client privilege
4/13/17	D. Scott Bennett	Jim Jarvis, Dr. Lee McDade	Correspondence regarding Courtney Bullard's investigation into Ooltewah Basketball incident	Attorney client privilege

Privilege Log
Courtney Bullard

Document Date	Author	Recipient	Description	Privilege Asserted
4/25/16	Scacey Voelp	D. Scott Bennett, Hamilton County BOE	OHS girls' soccer team seeks rights to practice field in accordance with Title IX.	Attorney-client communications between Mr. Bennett and the school board.
10/4/17	Dr. Steve Highlander	D. Scott Bennett	Preliminary report regarding OHS.	Attorney-client privilege.
6/28/16	Dr. Steve Highlander	Dr. Jonathan Welch David Testerman Mosley Karitsa George Ricks Martin Greg Thurmond Rhonda Joe Galloway Donna Horn Dr. Kirk	Preliminary Bullard report.	Attorney-client privilege.
9/22/17	D. Scott Bennett	Courtney Bullard Charles Purcell	E-mail regarding attorney-client privilege issues.	Attorney-client privilege
9/23/17	D. Scott Bennett	Courtney Bullard Charles Purcell	Discussion of attorney-client privilege with issues regarding Bullard report.	Attorney-client privilege.
1/5/17	Courtney Bullard	Hamilton County Dept of Education – Investigation	Statement for Professional Services	Attorney-client privilege and attorney-work product doctrine.
2/17/16	Courtney Bullard	D. Scott Bennett	Proposal of external audit for HCDE	Attorney-client privilege and attorney-work product doctrine.
3/17/16	D. Scott Bennett	Courtney Bullard	Discussions with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/17/16	D. Scott Bennett	Courtney Bullard	Discussion of report between Bullard and school board	Attorney-client privilege and attorney-work product

			attorney.	doctrine.
3/17/16	D. Scott Bennett	Courtney Bullard	Discussions with school board attorney regarding investigation.	Attorney-client privilege and attorney-work product doctrine.
3/17/16	D. Scott Bennett	Courtney Bullard	Discussions with school board attorney regarding upcoming investigation	Attorney-client privilege and attorney-work product doctrine.
3/18/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/18/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/18/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/18/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	Courtney Bullard	D. Scott Bennett	HCDE engagement letter.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	Courtney Bullard	D. Scott Bennett	Communication with school	Attorney-client privilege

			board attorney	and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.

3/22/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/22/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/24/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/25/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/25/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/25/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
3/25/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product

				doctrine.
4/4/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/4/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/4/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/5/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/6/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/6/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/6/16	Courtney Bullard	Hamilton Co. Dept. of Education & D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/13/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/13/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/13/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/13/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/13/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
4/21/16	D. Scott Bennett	Courtney Bullard	Communication with school	Attorney-client privilege

			board attorney.	and attorney-work product doctrine.
4/21/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/2/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/4/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/5/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/5/16	Courtney Bullard	Hamilton Co. Dept. of Education, c/o D. Scott Bennett	Statement for Professional Services.	Attorney-client privilege and attorney-work product doctrine.
5/9/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	D. Scott Bennett	Courtney Bullard Stacy Stewart	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	Courtney Bullard	D. Scott Bennett Stacy Stewart	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.

5/11/16	Courtney Bullard	D. Scott Bennett Stacy Stewart	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/11/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/12/16	Courtney Bullard	D. Scott Bennett Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/12/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/12/16	Courtney Bullard	D. Scott Bennett Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/12/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/17/16	Courtney Bullard	D. Scott Bennett	Statement for Professional Services.	Attorney-client privilege and attorney-work product doctrine.
5/23/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/23/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/19/16	Courtney Bullard	D. Scott Bennett	Statement for Professional Services	Attorney-client privilege and attorney-work product doctrine.
5/25/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/25/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product

				doctrine.
5/27/16	Courtney Bullard	Stacy Stewart Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/27/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/27/16	Courtney Bullard	D. Scott Bennett Stacy Stewart Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/27/16	D. Scott Bennett	Stacy Stewart Courtney Bullard Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/27/16	Stacy Stewart	Courtney Bullard D. Scott Bennett Beth Benson	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
5/27/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/1/16	Stacy Stewart	Courtney Bullard D. Scott Bennett Mary Decamp	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/6/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/9/16	Courtney Bullard	D. Scott Bennett	Professional Services Statement.	Attorney-client privilege and attorney-work product doctrine.
6/10/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/10/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/10/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/14/16	Courtney Bullard	Hamilton Co. Dept. of	Professional Services	Attorney-client privilege

		Education, c/o D. Scott Bennett	Statement.	and attorney-work product doctrine.
6/15/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/15/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/16/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/15/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/24/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/27/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/27/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/27/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
6/28/16	Dr. Steve Highlander	D. Scott Bennett; Welch, Dr. Jonathan; Testerman David; Mosley Karitsa; Ricks George; Martin Dr. Greg; Thurman Rhonda; Galloway Joe; Horn Donna; Kelley Dr. Kirk	Bullard's preliminary report.	Attorney-client communications between school board counsel and board members. Attorney-client privilege and attorney-work product doctrine.
6/11/16	Courtney Bullard	Hamilton Co. Dept. of Education c/o D. Scott Bennett	Professional Services Statement.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product

				doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
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8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/2/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/4/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/4/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
8/9/16	Courtney Bullard	Hamilton Co. Dept. of Education c/o D. Scott Bennett	Professional Services Statement.	Attorney-client privilege and attorney-work product doctrine.
8/20/16	Courtney Bullard	D. Scott Bennett	Communication with school	Attorney-client privilege

			board attorney.	and attorney-work product doctrine.
9/12/16	Courtney Bullard	Hamilton Co. Dept. of Education c/o D. Scott Bennett	Professional Services Statement.	Attorney-client privilege and attorney-work product doctrine.
10/13/16	Courtney Bullard	Hamilton Co. Dept. of Education c/o D. Scott Bennett	Professional Services Statement.	Attorney-client privilege and attorney-work product doctrine.
10/17/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
10/17/16	D. Scott Bennett	Courtney Bullard	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
10/20/16	Courtney Bullard	D. Scott Bennett	Communication with school board attorney.	Attorney-client privilege and attorney-work product doctrine.
	Courtney Bullard		Draft of investigative report outline.	
	Courtney Bullard		Draft of investigative report outline.	
	Courtney Bullard		Draft of Preliminary findings and recommendations of the external investigation.	

PRIVILEGE LOG

Document Date / Bate Stamp No.	Author	Recipient	Description	Privilege Asserted
3/21/2016 272-280	Scott Bennett	HCBOE Later forwarded to Courtney Bullard by Scott Bennett	Legal advice offered to HCBOE administration by Scott Bennett to limit claims and exposure. Was forwarded to Courtney Bullard for information only.	Attorney-client privilege
3/24/2016 106-108	Scott Bennett	James Jarvis	Legal advice given to James Jarvis by Scott Bennett regarding interviews conducted by PI	Attorney-client privilege
3/24/2016 038-046 064-066	Scott Bennett	Courtney Bullard	Emails regarding how to resolve conflict issues with HCBOE at the time of hiring Courtney Bullard	Attorney-client privilege
5/2/2016 270-271	Scott Bennett	Courtney Bullard	Legal advice offered to HCBOE administrators by Scott Bennett to limit claims and exposure	Attorney-client privilege
6/1/2016 326-331	Scott Bennett	Courtney Bullard	Confidential under Open Records Act. Disclosure made with agreement with counsel not to disclose to any third party, including media/press.	Attorney-client privilege

REPORT OF THE EXTERNAL INVESTIGATION

I. Introduction

The Hamilton County Department of Education (“HCDE”) provides approximately 42,000 students with K-12 education.¹ Ooltewah High School (“OHS”) is one of the largest schools in Hamilton County, with approximately 1,600 students and 100 teachers and staff. During the 2015-2016 school year, Mr. Jim Jarvis served as principal for OHS. Ms. Stephanie Allen, Ms. Sylvia Hutsell and Mr. Wendell Weathers served as assistant principals for OHS.²

OHS has a vibrant athletics program consisting of boys’ baseball, basketball, soccer, cross country, and football; girls’ cheerleading, dance, basketball, soccer and softball; a swim team and track and field.

II. Appointment as External Investigator and Scope of Investigation

Appointment

On December 22, 2015, a member of the OHS boys’ basketball team, with the assistance of two other members, assaulted a freshman player with a pool cue while on a team trip in Gatlinburg. As a result of the incident, on March 17, 2016, the HCDE School Board voted to retain me as an independent investigator to conduct a fair and impartial investigation into the following:

- Assess the climate of the OHS basketball program regarding the reporting and addressing of bullying, hazing and/or sexual harassment;
- Review OHS and HCDE policies and procedures to determine where, if any, deficiencies in communication or conflicts in policy may exist with respect to bullying, hazing and/or sexual harassment; and
- Review training for student-athletes and OHS athletics staff to determine where, if any, deficiencies exist with respect to bullying, hazing and/or sexual harassment.³

On March 22, 2016, the relationship was formalized.

During the investigation, I provided regular updates to the school board attorney, Scott Bennett. At the end of June, I provided the school board with my Preliminary Findings and Recommendations of the External Investigation before the completion of my investigation. The purpose behind submitting the preliminary findings early was to provide information to assist the HCDE in making any policy and personnel decisions for the upcoming 2016-2017 academic year. Those findings are incorporated into this report.

¹ HCDE website.

² Mr. Jesse Nayadley previously served as one of the assistant principals. Mr. Nayadley was placed on administrative leave on January 14, 2016. Thereafter, Mr. Weathers served as assistant principal.

³ During the course of my investigation, based on information received and as more fully explained in Section III of the Analysis & Factual Findings, I expanded the scope of the investigation into the OHS football program.

Criminal Investigations

The Gatlinburg incident resulted in criminal charges brought against the assailants and certain adults who were on the trip. While some of the charges against the adults were resolved during the course of the investigation, one remains. In addition, the charges against the assailants remain.

My investigation is not a criminal investigation, and it is not a substitute for the pending criminal investigations. As part of my investigation, I reviewed interviews conducted by the Hamilton County Sheriff's Office ("HCSO"), the Department of Children's Services ("DCS"), and the transcript of the preliminary hearing for Mr. Andre Montgomery, Mr. Jesse Nayadley and Mr. Karl Williams on February 15, 2016 in the Juvenile Court of Hamilton County. As of the date of this report, despite numerous attempts, I have been unable to obtain copies of the police reports associated with the Gatlinburg incident, talk with Detective Rodney Burns in Sevier County, or talk with District Attorney Neil Pinkston in Hamilton County.

III. Overview of Methodology

I independently identified, obtained and reviewed information relevant to the investigation. I determined the course of the investigation and selected individuals to interview. I did not advise the HCDE or OHS personnel of my selections or contents of the interviews. HCDE and OHS administrators and employees fully cooperated with requests for information and interviews.⁴ I maintained all communications and documents related to the external review as privileged and confidential and in accordance with the Family Education Rights and Privacy Act.⁵

As part of my investigation, I spent the better part of seven (7) weeks at OHS conducting interviews. OHS administration were aware of the timing of some of my visits; however, on most occasions I arrived unannounced. The times of my arrival and departure varied and, as such, I was able to observe different parts of the school day. I observed the busiest times of the school day on many occasions: the beginning and ending, class changes and lunch. I also was at the school after hours when some of the extra-curricular activities were taking place. I independently walked the halls throughout the day and toured the school.

Interviews

I interviewed 40 individuals, including OHS administrators, teachers and students, the parent or guardian of students⁶ and HCDE administrators. I met with any third parties who contacted me and claimed to have information relevant to the investigation. A list of all interviewees is set forth in Addendum A. The interviews were conducted in-person at OHS, HCDE, law offices of

⁴ All HCDE and OHS personnel cooperated with a request for an interview with the exception of Mr. Montgomery, boys' head basketball coach, who declined to be interviewed through his counsel because of pending criminal charges.

⁵ 20 U.S.C. §1232g; 34 CFR Part 99.

⁶ Some parents or guardians provided written authorization for me to meet with their child without them present. The majority of students were interviewed with a parent or guardian present.

an attorney representing interviewees, my office or other locations convenient for interviewees. In some instances, I conducted follow-up interviews by phone.

Witnesses were advised of the scope of my review and asked to provide any relevant information: whether good, bad or neutral. Witnesses were requested to keep the contents of their interview confidential. Witnesses also were advised that the HCDE and OHS prohibit retaliation of any kind for participating in the investigation and that if they felt they were experiencing retaliation, to contact me. All witnesses were provided with my business card.

Documents

I conducted an extensive review of the HCDE and OHS policies, procedures and training related to bullying, hazing and sexual harassment. I reviewed student disciplinary files of the assailants and employee personnel files of those involved in the Gatlinburg incident. A list of all documents reviewed is attached as Addendum B. I also reviewed applicable federal and state laws and regulations.

Standard of Review

In accordance with federal law regarding claims of sexual harassment, I used “preponderance of the evidence” as the standard of proof in evaluating whether HCDE’s response to a complaint of sexual harassment was reasonably prompt.⁷ The scope of my investigation included an analysis of whether a culture of hazing or bullying existed and OHS’s response to that culture, which falls outside of OCR’s guidance on a standard of review. For consistency, the same standard was applied in evaluating those matters as well.

Delays

I conducted the majority of the witness interviews within a seven (7) week span in an effort to complete the interviews before school dismissed for summer break. Many of the witnesses were reluctant to participate, which ultimately caused unexpected delays in conducting interviews. For example, some witnesses declined to participate, but then changed their minds. Some witnesses agreed to participate and then did not show up for the interview. Some of those witnesses did subsequently reschedule.

Furthermore, I discovered additional witnesses to interview and documentation to review in early June, as more fully explained in Section V of the Analysis & Factual Findings, which delayed the completion of my investigation.

Terminology

This report addresses issues related to bullying, hazing and sexual harassment. These terms are often used by the general public in imprecise ways and sometimes confused. In addition,

⁷ Office of Civil Rights, Dear Colleague Letter, April 11, 2011.

conduct that fits within one term also may fit into another (i.e. bullying may also be sexual harassment). Each is prohibited by applicable law and the HCDE and OHS policies.

For purposes of this report, these terms are described below. These definitions are not intended as full descriptions of the applicable law, regulations and policies, but merely as a point of reference for the reader. In some instances, these definitions are those prescribed by HCDE and therefore are noted as such and utilized in evaluating employee or student conduct within the report.⁸

1. **Sexual Harassment** is one type of discrimination based on gender. In a school setting, sexual harassment generally means unwelcome conduct or written, verbal or electronic communication where (a) sexual favors are threatened to be used as the basis for employment or academic decisions, (b) the conduct or communication unreasonably interferes with an individual's work performance or participation in an education program or activity, or (c) the conduct or communication has the purpose or effect of creating a hostile, intimidating or offensive academic environment. It includes, but does not require, unwanted physical contact.

Examples of prohibited sexual harassment can include verbal and electronic communications about a person's physical appearance or sexual activities, sexual innuendos and joking, sexually explicit photos and videos, and touching, including sexual assault and sexual violence.

The HCDE states that "harassment (sexual, racial, ethnic, religious) includes words, gestures, threats, or any other conduct that is severe, pervasive or persistent and creates a hostile environment that interferes with or limits a student's ability to participate in or benefit from services, activities, or opportunities offered by a school."⁹ It states also that sexual offenses, which constitute major offenses resulting in short-term suspension or possible expulsion, are "conduct of a sexual or indecent nature towards another person that is accompanied by actual physical force."¹⁰

2. **Sexual assault** includes rape and other forms of non-consensual sexual contact.

3. **Title IX** refers to the Education Amendments Act of 1972. Although this federal law prohibits sex discrimination, sexual harassment, and sexual violence in the school's educational programs and activities, Title IX often is referred to for the requirement of gender equity in athletics' programs.

4. **Bullying** "always involves at least these three elements: (1) unwanted, aggressive behavior, (2) involving an actual or perceived imbalance of power, that is (3) repeated or

⁸ During the course of my investigation, HCDE approved Board Policy 6.304 – Student Discrimination, Harassment, Bullying, Cyber-Bullying and Hazing. For purposes of assessing employee and student conduct, I utilized the Code of Conduct and relevant policies in place at the time the incidents took place. In assessing the policies and procedures and making recommendations, I reviewed both the policies in place at the time of the incident and the revised policy.

⁹ HCDE Code of Conduct.

¹⁰ *Id.*

occurring over a period of time.”¹¹ Bullying is defined by the HCDE as “unwanted, aggressive, repeated behavior that involves a power imbalance and places a student in reasonable fear and causes a hostile education environment.”¹² A power imbalance may be real or perceived by the victim. Bullying can take many forms (both direct and indirect), such as hitting or punching, teasing or name-calling, intimidation through words or gestures, or social exclusion.

5. **Cyber-bullying** is defined by the HCDE as “bullying that takes place using electronic technology. Electronic technology includes devices and equipment such as cell phones, computers, and tablets, as well as communication tools including social media sites, text messages or emails, rumor sent by email or posted on social network sites, and embarrassing pictures, videos, websites or fake profiles.”¹³

6. **Hazing** is defined by the HCDE as “any act intended to or reasonably expected to have the effect of humiliating, intimidating or demeaning a student or endangering the mental or physical health of the student committed by an individual or group against a student in connection with pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization affiliated with any school or program operated by the school district.”¹⁴

The Report

I intentionally avoided ascribing specific statements and conduct to particular witnesses in the report to encourage candid interviews and to protect the identity of minors. I provided HCDE with relevant information regarding individual conduct that may justify further action.

To date, I still am attempting to follow up with some individuals who may have information relevant to the investigation. I also have outstanding requests that may contain information relevant to this investigation, such as reports requested from Sevier County Juvenile Court. I am submitting the report prior to completion of those interviews because I do not believe any information obtained from those individuals will substantively change my findings. As such, I reserve the right to supplement or amend this report at a later date, if necessary.

Any decision to prepare and submit the preliminary report and this final report has been at my sole discretion and a result of how information has been received and the investigation has unfolded. The timing and submission of this report during the election process is not intended to have any effect on that process and is merely coincidental. I have not been contacted by any

¹¹ Civil Rights and Bullying Compliance FAQs by the Tennessee Department of Education, referencing the definition of bullying developed by Dan Olweus and used in the Olweus Bullying Prevention Program more fully discussed in Section V(a) of my Analysis & Factual Findings. The U.S. Department of Education Office of Civil Rights, through its interagency bullying-resource Web site, www.stopbullying.gov, defines bullying as “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time.”

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

board member and/or HCDE administrator attempting to influence how my investigation is conducted or when my findings are released.

ANALYSIS & FACTUAL FINDINGS

I. The Culture of the 2015-2016 OHS Boys' Basketball Program

Overview of Program

The OHS boys' basketball program is comprised of a freshmen, junior varsity ("JV") and varsity team. While the majority of freshmen play on the freshmen team, for the 2015-2016 season, four (4) freshmen were chosen to play on the varsity team.

Mr. Jesse Nayadley served as assistant principal and athletic director for OHS. Mr. Nayadley fully cooperated with the investigation.

Mr. Andre Montgomery served as the head coach of the JV and varsity boys' basketball teams as a paid employee. Mr. Montgomery declined to participate in the investigation through his attorney due to pending criminal charges.

Mr. Karl Williams served as an assistant coach of the JV and varsity boys' basketball teams as an unpaid volunteer. Mr. Williams declined to participate in the investigation through his attorney due to pending criminal charges.

Mr. Jeremy Robinson served as the coach for the freshmen boys' basketball team as an unpaid volunteer. Mr. Robinson declined to participate in the investigation.

There were thirty-two (32) players on the boys' basketball roster for the 2015-2016 season. Out of the thirty-two (32) players, nineteen (19) were freshmen, and four (4) of those freshmen played on the varsity team. Of the remaining upperclassmen, nine (9) made the trip to Gatlinburg where the incident at issue occurred.

I attempted to interview all of the players listed on the basketball roster. Fifteen (15) players' parent or guardian agreed to allow their son to participate in the investigation. Two (2) declined to participate in the investigation, and the remaining players' parent or guardian could not be reached, despite repeated attempts.

In addition to interviews, I toured the boys' basketball locker room and coaches' offices.

Culture¹⁵ of Hazing Prior to the Gatlinburg Incident

I found that a culture of hazing existed on the varsity basketball team prior to the Gatlinburg incident. This conclusion is based on my interviews of players and a review of the HSCO and DCS interviews that revealed the following:

- Nine (9) players stated that “racking in” or the “freshmen rack” occurred on the basketball team prior to the Gatlinburg incident.¹⁶ “Racking in” is described as upperclassmen turning off the lights in the locker room, grabbing a freshman player and punching him with fists from the neck down, without the intention of causing injury. One player stated that the older players would lock or block both locker room doors before turning the lights off. Players stated that the purpose was to bring the freshmen onto the varsity team or “the big leagues.” One player stated that they were “hit hard to the point you want to fight.” Accounts stated that it lasted 20 to 30 seconds.
- Of the players who did not have personal knowledge of “the rack,” they did observe the lights out in the locker room.
- Freshmen varsity players stated that “racking in” began when the football season ended and the assailants began practicing with the basketball team. Prior to the assailants joining the team for practices, players stated that it was openly discussed as something that would happen to them.
- Freshmen varsity players stated that “racking in” happened more than once from November 22 until December 22. While reports on frequency varied from once a week to three times a week, there is no disputing it happened on more than one occasion.
- Although freshmen varsity team players were the main target, some members of the freshmen basketball team reported that it also happened to them.
- There is no disputing that the main assailants were the three players involved in the Gatlinburg incident; however, there were reports of other upperclassmen participating. This information was provided to the school board attorney for disposition.
- Three upperclassmen stated that the “freshmen rack” happened to them when they were freshmen.

¹⁵ Merriam-Webster Learner’s Dictionary defines culture as “a way of thinking, behaving, or working that exists in a place or organization.” It further states that culture is “the set of shared attitudes, values, goals and practices that characterizes an institution or organization.”

¹⁶ One parent stated that “racking in” is a gang term and is therefore an inappropriate term to use to describe this behavior. Enough players, however, recognized and used the term to describe the behavior that it is appropriate to use in this context.

The HCDE Code of Conduct defines hazing as “any act intended to or reasonably expected to have the effect of humiliating, intimidating or demeaning a student or endangering the mental or physical health of the student committed by an individual or group against a student in connection with pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization affiliated with any school or program operated by the school district.” The behavior described as “racking in” fits this definition of hazing in that it had the possible effect of intimidating the freshmen players in connection with being affiliated with the varsity team. The majority of the players interviewed stated that they did not know the definition of hazing prior to the Gatlinburg incident, but they did understand bullying. Many players described “racking in” as horseplay or “boys being boys.” This description is indicative of a desensitization and minimization of the behavior and a lack of education on what conduct constitutes hazing.

Culture of Bullying Prior to the Gatlinburg Incident

I find that a culture of bullying existed on the 2015-2016 boys’ basketball varsity team prior to the Gatlinburg incident. In making this determination, my analysis was based on the definition referenced on the Tennessee Department of Education’s website and utilized in the training received by HCDE and OHS administrators and staff,¹⁷ which states:

“Several definitions of bullying exist, but bullying always involves at least these elements (1) unwanted, aggressive behavior, (2) involving an actual or perceived imbalance of power, that is (3) repeated or occurring over a period of time.”¹⁸

“Racking in” meets these elements.

First, while many students described “racking in” as horseplay, at least one of the freshmen subjected to it stated that he did not want it to occur. Players did not report the behavior because they did not want to be a “snitch” and they did not want it to get worse. Several targeted players described it as more of a game, while others were confused between whether it was a game or whether they were in fear of it happening to them. Part of “racking in” was the element of surprise, leaving targeted players in a constant state of apprehension regarding when it may occur.

Second, incidents always involved several upperclassmen, who were bigger and stronger by virtue of their age and maturity, targeting one freshman. Ultimately, it was commonly known and accepted that it would occur, and freshmen therefore accepted it as part of being on the team.

Finally, it was reported that the “rack” repeatedly occurred over an approximate four (4) week period.

¹⁷ See Section V(a) of my Analysis & Factual Findings for a discussion of the training.

¹⁸ Tennessee Department of Education website Bullying FAQs, citing the definition of bullying developed by Dan Olweus and used in the Olweus Bullying Prevention Program.

Despite receiving training and education on bullying at OHS, many players did not recognize it as bullying at the time that it occurred. In hindsight, however, they stated that they believed that the behavior did constitute bullying.

I had difficulty determining whether the conduct rose to the level of bullying as defined by Tennessee law and the HCDE Code of Conduct. Tennessee Code Annotated § 49-6-4502 includes in its definition of bullying a requirement that it “substantially interfere with a student’s educational benefits, opportunities or performance.” The Sample Bullying and Harassment Policy provided for Tennessee school districts by the Tennessee Department of Education also includes this element in its definition. Thus, the HCDE definition incorporates this language in its definition of bullying as well.

None of the freshmen subjected to “racking in” reported being physically injured. I also did not find any obvious indications during my interviews that the targeted players suffered academically or socially as a result of the “rack” specifically, given that school transfers and other issues may solely have been attributable to the Gatlinburg incident. Although I was unable to easily identify an immediate negative impact on the victims’ educational environment, my review was during a limited window of time. Any future impact is impossible to predict. Ultimately, the behavior created an environment within the school that had the potential to interfere with the victims’ educational environment. Moreover, there is a high likelihood that the behavior would have continued had the Gatlinburg incident not happened.

Knowledge of Coaches/Administrators of Culture

a. Coach and Administrator Backgrounds

OHS parents, players and administrators described Mr. Montgomery as a good coach and employee. Players considered him a mentor and/or father-figure and felt that he always had their best interests at heart. Mr. Montgomery utilized his own money to buy players dinner, help with tournament costs and often would drive them home from practice. Mr. Montgomery expected the players to act with integrity and instilled in the players that they were a family as members of the basketball team and should treat each other as such. Some accounts of Mr. Montgomery by players, however, were of him behaving more as a friend than an authority figure.

Players also described Mr. Williams, who served as a volunteer, as a mentor and/or father-figure. They considered him the disciplinarian of the two coaches and stated that he reinforced the same philosophy as Mr. Montgomery.

Administrators and staff described Mr. Nayadley as a good athletic director and employee who was committed to OHS. Colleagues said that he brought more structure to the athletics’ program, evidenced through a Coaches Manual that he created and implemented. He often stayed after hours to assist with beautification of the school, such as hanging blinds. He maintained a high standard for student athletes. Athletes who got in trouble at school, for example, could not circumvent detention due to practice and instead had to serve school detention plus any other discipline through their team as a result of being late and/or missing practice.

b. Finding

Although I could not substantiate that Mr. Montgomery or Mr. Williams were aware of the hazing and bullying, they certainly were aware of excessive horseplay. It is undisputed that Mr. Montgomery and Mr. Williams had the best interests of their players at heart and that they took measures to address the horseplay. These measures included an exercise referred to as running suicides, running during practice, push-ups, squats and other physical activity. Despite these efforts, racking in and horseplay continued. Therefore, those efforts were not effective at addressing the behavior. Thus, other measures, such as benching a player or suspension, should have been considered.

Students interviewed by the HCSO, DCS and me, who were either the subject of or had direct knowledge of “racking in,” stated that they never told coaches or administration about it. Regardless, based on the accounts, it is difficult to believe that, at a minimum, Mr. Montgomery was not aware of excessive horseplay occurring in the locker room. The following information supports a high likelihood of this knowledge:

- Mr. Montgomery’s office was adjacent to the boys’ locker room. It is unlikely that he would not hear the players banging around in the locker room, given the proximity of his office and the fact that they were separated by only a wall. One player stated that you could hear the players banging around in the locker room from outside the door.
- One player reported that Mr. Montgomery walked in several times when the lights were off, turned them on and told the team to knock it off.
- One player stated that they were disciplined by Mr. Montgomery and Mr. Williams for “the rack” and had to run suicides.
- Players reported that they often spoke about “the rack” in front of the coaches.
- Mr. Montgomery bought the players a TV for the locker room. Due to excessive horseplay, the TV was broken, and parents had to pay for the damage.
- School dismissed at 2:15 p.m. The freshmen began practice at 2:30 p.m., immediately after dismissal. The JV and varsity practice did not start until 4:00 p.m. because of Mr. Williams’ work schedule. From 2:30 p.m. until 4:00 p.m., the players were therefore in study hall with Mr. Montgomery. Players described instances of little to no supervision in study hall. One instance, for example, involved two players getting into a heated verbal altercation.

Culture of Bullying and Hazing Prior to the 2015-2016 Season

I was unable to conclude whether a culture of bullying or hazing targeted at varsity freshmen players existed in the basketball program prior to the 2015-2016 season without expanding my investigation; however, it is highly likely that it did. Three (3) upperclassmen interviewed were

subjected to “racking in” as freshmen, which leads me to conclude it happened for at least three seasons under Mr. Montgomery. Any other accounts that it occurred were rumors or hearsay that could not be substantiated through my interviews of current players. To substantiate that information, I would need to interview former OHS basketball players.

Culture of Sexual Harassment Prior to the Gatlinburg Incident

The HCDE Code of Conduct states that “harassment (sexual, racial, ethnic, religious) includes words, gestures, threats, or any other conduct that is severe, pervasive or persistent and creates a hostile environment that interferes with or limits a student’s ability to participate in or benefit from services, activities, or opportunities offered by a school.” I did not find that a culture of sexual harassment existed in the basketball program prior to the Gatlinburg incident. The only account of misconduct discovered during my investigation was “racking in,” which does not constitute sexual harassment. Because I did not find any other incidents of sexual harassment involving the basketball team, there was no evidence that school officials were deliberately indifferent to a culture within the program.

II. Gatlinburg and the Response of OHS and Central Office

Overview

Thirteen (13) players and three (3) chaperones went to the tournament in Gatlinburg. All of the freshmen who attended, with the exception of the physically injured victim, who declined to participate through his attorney, participated in the investigation. Of the remaining players on the trip, one (1) player declined to participate through his attorney and one refused to participate through his mother, who has a personal relationship with one of the coaches. I was unable to reach the three assailants. For players who did not participate in the investigation, I reviewed their HCSO and DCS interviews for information.

General Timeline of Events

The team arrived in Gatlinburg on December 19th. That evening, the four (4) freshmen players were dunked in the hot tub by upperclassmen. On December 20th, an upperclassman, with the assistance of two other players, poked two freshmen on the rectum, over clothing, with a pool cue. They did not sustain physical injuries. On December 21st, another freshman player was subjected to the same treatment. On December 22nd, the fourth freshman was subjected to the same treatment and, in this instance, sustained physical injuries that required hospitalization. During the early hours of December 23rd the assailants were driven back to Chattanooga. That morning, at 11:30 a.m., the team played its last game in the tournament. Immediately after the game the team returned to Chattanooga.

Conduct of the Assailants

It is undisputed that the players were wrestling and engaging in horseplay at the cabin during the trip, including dunking four (4) freshmen in the hot tub. It is also undisputed that all four (4) freshmen were subjected to the pool cue, with one resulting in serious physical injuries.

The placement of the pool cue on the players' rectums was not an accident. The assailant intended to place the cue in that location. While the players did not believe that any of the assailants intended to physically injure anyone, this was not a case of the main assailant poking other areas of the players' bodies and the cue slipping and hitting that area instead. Therefore, the assailants had the intent to bully, haze and sexually harass the victims.

I did not find any evidence that the HCDE or OHS administrators knew or should have known that these incidents would occur. Despite the fact that the incidents occurred over the course of three nights, none of the players in Gatlinburg told school officials or their parents. Additionally, there was no prior culture of sexual harassment on the basketball team, and the assailants had no prior history of reported similar conduct. While I found that Mr. Montgomery failed to take appropriate measures to address the excessive horseplay within the basketball program prior to the Gatlinburg incident, it is unlikely there was any way for Mr. Montgomery to know that the behavior would escalate to such an extreme.

Response of Coaches and Administrators

a. Physically Injured Freshman

With respect to the freshman who was physically injured, I found that the HCDE satisfied its Title IX obligations in its response. Mr. Montgomery and the other adults present in the cabin took immediate action to identify and eliminate the hostile environment and address its effects once on notice. Mr. Montgomery attempted to ascertain what happened, promptly sought medical care for the victim, and quickly notified his family. Once the police became involved, the coaches followed directives, kept the assailants separate from the victim pursuant to the detective's recommendations, and ultimately drove the assailants back to Chattanooga in the early morning hours of December 23rd. Mr. Montgomery also notified Mr. Nayadley that evening with current information. Thereafter, OHS suspended all three assailants.

b. Remaining Freshmen

I found that the pool cue incidents involving the remaining freshmen constituted hazing and bullying. It was a part of being brought onto the varsity team, specifically targeted at freshmen, and each freshman was held down by two upperclassmen.

I found that the incidents also constituted sexual harassment. I was unable to interview the assailants, but it is reasonable to assume that the conduct was sexual in nature, given the intended placement of the pool cue. The contact was unwanted, offensive and had the purpose or effect of intimidation and embarrassment. The victims had responses indicative of victims of sexual harassment that can be characterized as shame, anger, embarrassment, confusion, humiliation and disgust. Although the incident occurred only once with each freshman and the contact was over the clothing, it involved contact with an intimate body part with an object that can be used as a weapon. Also, as already noted, on each occasion the freshman victim was grabbed and held down by two players.

I found that Mr. Jarvis and Mr. Nayadley failed to take appropriate measures to address the effects of the incidents with the other freshmen once on notice because they did not notify the families of the freshmen and allowed the team play the next day. Mr. Jarvis and Mr. Nayadley did not violate any HCDE or OHS policies or procedures; however, this does not obviate their responsibilities as administrators to exercise appropriate judgment and take necessary measures to ensure the mental and physical well-being of the players who were the target of bullying, hazing and sexual harassment.

Both Mr. Jarvis and Mr. Nayadley received training on bullying, which includes identifying and responding appropriately to the behavior. Much of the behavior covered in the training on bullying also encompasses behavior that constitutes sex- and gender-based harassment. Thus, even though the training may not have delineated between the HCDE's Title IX obligations and obligations in responding to bullying, it included the necessary information to inform them, as administrators, of how to address those behaviors.

During the early morning hours on December 23rd, Mr. Montgomery and Mr. Nayadley became aware that prior pool cue incidents had occurred with the other freshmen in Gatlinburg with no resulting physical injuries. One of them was Mr. Nayadley's son. Once Mr. Nayadley learned that it happened to his son, he texted his son to check on him. Based on their text exchange, he believed that his son was safe.¹⁹ Mr. Nayadley had a close relationship with the coaches and trusted them to handle the situation appropriately. As a result, Mr. Nayadley did not contact the families of the other two freshmen to inform them of what occurred.²⁰ Mr. Montgomery stayed at the injured victim's side, leaving Mr. Nayadley as the most senior administrator in Gatlinburg to make the decision to notify families. One of the two families did not learn about what happened until after the team played in the tournament and were thirty minutes outside of Chattanooga on their way home. She only learned about it then because she contacted Mr. Williams to find out how the game went. The mother of the other player did not learn about it until her son told her when they were back in Chattanooga.²¹ Those families were therefore unable to make an informed decision on the well-being of their child and whether they wanted to come and get their sons from Gatlinburg. One mother expressed that had she known what happened, she would have immediately gone to Gatlinburg and brought her son home.

Mr. Jarvis was the ultimate decision-maker on playing in the tournament the morning after the incident occurred. His decision largely was influenced by the reports he received from Mr. Nayadley. Mr. Nayadley felt the players were ready to play and wanted to play. None of the players interviewed stated that they wanted to play. One player described the team as "sluggish." They were tired from a long and stressful evening, and their minds were with the injured victim.

¹⁹ Mr. Nayadley did not stay in the same cabin as the team because he was attending the tournament as a parent of a player. Cell service was poor which made it difficult to make phone calls. Thus, the best way to contact someone was via text.

²⁰ Mr. Nayadley may have reported the pool cue incident to one of the freshman's parents; however, I could not verify this information with that parent.

²¹ Some of the players stated that they did not tell their parents what was going on after the incident occurred with the injured player that night because police were at the cabin and they were unsure what they were allowed to talk about to other people.

In allowing the team to play, Mr. Jarvis rationalized that the remaining players should not be punished for the conduct of three. Had the team come back from Gatlinburg and an investigation commenced into the culture of the program, OHS would have discovered that hazing and bullying were occurring in the locker room and that additional upperclassmen were involved in hazing and bullying. While I do not know what discipline would have been appropriate for those players had this been discovered in January, there certainly was evidence of behavior that would rise to the level of a disciplinary infraction that was not considered.

Mr. Nayadley informed Mr. Steve Holmes²² from Central Office that he would ensure the boys were physically and mentally ready to play in the tournament. Mr. Nayadley stated that in making this determination, he observed the boys warming up, and they were “getting after it.” Every player interviewed, however, said that they were worn out and confused as to why they were playing. Mr. Nayadley also spoke to the players, although there were mixed accounts as to whether that occurred before or after the game. The players, with the exception of one, said that Mr. Nayadley did not talk to them until after they played. The player that stated he spoke to them prior to the game said that he told them “let’s finish the game out” as they were getting their shoes on to play. Regardless of when Mr. Nayadley spoke with the team, ultimately it was clear to the team that they were going to play despite what had occurred. In having the team play, Mr. Nayadley ran the risk of sending a message to the freshmen players that the conduct was acceptable.

When Mr. Nayadley spoke to the team, he told them that the behavior was not acceptable and that the three assailants would be kicked off the team. Mr. Nayadley pulled each freshman aside to tell them the conduct would not be tolerated. He told the players that he would talk with their parents about what occurred.

By not immediately contacting the families and in allowing the team to play, Mr. Jarvis and Mr. Nayadley failed to take appropriate measures to address the effects of the hazing, bullying and sexual harassment of the freshmen players.

c. After the Gatlinburg Incident

All of the players’ parents on the basketball team that I spoke with expressed frustration at the lack of response from OHS and the HCDE after the Gatlinburg incident. While some of the boys were not subjected to hazing, bullying and/or sexual harassment, they did witness a traumatic event, and thereafter, their season was cancelled, which had a profound impact on them. Someone from OHS or HCDE should have reached out to these families to extend support. One guidance counselor did talk with a few of the boys that he had a relationship with, to let them know he was available if they needed to talk. By in large, though, there was no concerted, organized effort to reach out to families.

I relayed this information to Mr. Bennett, who attempted to convince Mr. Jarvis of the necessity of speaking to these families. I also spoke to Mr. Jarvis and attempted to explain the need. Mr. Jarvis failed to understand the need to reach out to these families because “there was only one

²² Mr. Holmes is the secondary operations director for the HCDE.

victim that he was aware of.” When I explained that many students have transferred, are in need of counseling services and so on, Mr. Jarvis continued to be unable to understand why parents should be contacted unless he had news for them regarding the upcoming basketball season. Ultimately efforts with Mr. Jarvis were exhausted, and the Title IX Coordinator began reaching out to the families.

III. The Culture of the 2015-2016 OHS’ Football Program

Overview

I expanded my investigation into the OHS football program due to the following:

1. Several players stated that “racking in” began when the football season ended and the three assailants began practicing with the basketball team;
2. One assailant, in his interview with HCSO and DCS, stated that it happened to him on the football team; and
3. Students stated that they heard rumors that it occurred in football.

The football program has a freshmen, JV and varsity team. Mr. Mac Bryan serves as the head coach of the JV and varsity teams. Mr. Doug Greene and Mr. J.D. Dunbar serve as paid assistant coaches. All of the coaches fully cooperated with the investigation.

There were over 100 students on the OHS football roster during the 2015-2016 season. In the interest of time, I attempted to contact the parent or guardian of all sophomores on the football team because, as the youngest members of the varsity team, they would have been the most likely subjects of hazing and/or bullying. There were thirty-one (31) sophomores on the roster and two (2) more identified through interviews. Only four (4) of those players agreed to participate.²³ The remaining parents or guardians of the players would not allow their sons to participate in the investigation or could not be reached despite repeated attempts. There were a few basketball players I interviewed who also played football, which enabled me to confirm certain information about the program.

Both the lack of participation in the investigation and the fact that two players declined to participate through attorneys was surprising. Of those I did interview, I asked why players were unwilling to participate. I also asked parents or guardians I spoke with by phone why they were unwilling to allow their sons to participate. Ultimately, I deduced from these conversations that the unwillingness was a result of frustration over the negative depiction of OHS in the media, parents feeling confident that their son had not been subjected to similar conduct based on conversations with their son about the Gatlinburg incident, parents not wanting to subject their children to an interview, concern that the behavior of the assailants would be attributed to the football program, and a belief that the investigation was a “witch hunt.” I did not receive any information indicating a fear of retaliation.

²³ Two (2) of those players were the assailants in the Gatlinburg incident therefore I was unable to interview them.

In addition to witness interviews, I toured the locker room area for both the freshmen and varsity football teams as well as the practice fields.

Finding

I did not find that a culture of hazing, bullying or sexual harassment existed in the football program during the 2015-2016 football season. Although I was unable to interview a significant number of sophomore players on the team, the credibility of the players that I did interview, the consistency of statements regarding the program from players, parents and coaches, and the following information supports this finding:

- The freshmen team is kept entirely separate from the JV and varsity teams. They maintain separate locker rooms, practice times, and schedules. This is by design as Coach Bryan's philosophy is that freshmen are not mature enough physically or emotionally to practice or interact with upperclassmen.
- The varsity team practice starts at 2:30. The coaches are mindful of not allowing players to have any free time between the end of school and the start of practice. Players cannot access the locker room to get ready for practice until it is unlocked by a football coach who is then around to supervise. At the end of practice, players again cannot access the locker room until it is unlocked by a coach. Two coaches are always assigned to the locker room after practice. Coach Bryan and Coach Greene have offices in the locker room.
- Players and coaches reported that Coach Bryan and his staff maintain a strict program, and players are held to a high standard. If a player gets in trouble at school, engages in horseplay, is tardy for practice, is reported as having behavior issues in the classroom, etc., they are subject to "afternoon delights"²⁴ led by Coach Dunbar.
- Through grad focus,²⁵ the coaches have made it a point to discuss current events involving athletes and sexual misconduct or other social issues that may affect them.

Based on the foregoing, there was no direct evidence of a culture of hazing, bullying, or sexual harassment. The structure of the football program does not support such conduct occurring in the presence of coaching staff. Freshmen are intentionally kept completely separate from the JV and varsity teams. They have separate locker rooms and practice on different fields. Players always are supervised, and the coaches do not tolerate horseplay or conduct that could lead to

²⁴ Afternoon delights consist of running drills and other exercises in addition to practice.

²⁵ HCDE students who are in exceptional education and under an Individualized Education Plan (IEP) must receive a certain amount of direct instruction each week. Each school has discretion in how to provide this instruction. OHS chose to create grad focus which is a block that meets three times a week for the non-IEP students. Through grad focus, students may elect coursework ranging from art to foreign language. OHS also utilized this time for coaches to have time with student athletes in a classroom setting while they were in season. During that time, the football program provided cyber-bullying training through i-SAFE, ACT prep and had students write about current events. Although the football players who are not in exceptional education do not participate, the majority of the players are in grad focus.

fights among teammates. Thus, when conduct occurs that has the potential to escalate, it is dealt with quickly and effectively.

IV. Other Issues

During my investigation, I discovered other operational issues that I provided to Mr. Bennett for disposition.

V. OHS Policies, Procedures & Educational Programs Regarding Bullying, Hazing and Sexual Harassment

Bullying

a. Overview

The HCDE mandates bullying training for all teachers and staff. Each school has discretion on the implementation of training and then must report back to the Central Office.

One option provided to the schools within the HCDE is training through the Olweus Bullying and Prevention Program (“OBPP”). OBPP “prevents or reduces bullying in elementary, middle, and junior high schools” and “deals with bullying at the schoolwide, classroom, individual and community levels.”²⁶ OBPP is research validated, and recognized by the U.S. Department of Education.²⁷

Ms. Karen Glenn serves as the STARS²⁸ Director for HCDE. In that role, she provides Olweus training for the schools and oversees school climate. Each school that opts to utilize Olweus training can work with Ms. Glenn to initiate training specific to their school. First, schools implement a student survey to assess school climate. Then, based on the result of the survey, a core team receives initial training and discusses implementation of the school-wide training. Although the training elements are the same, each school can modify training to reflect their own culture. Ms. Glenn’s Olweus training provides in-depth instruction on identifying, preventing and responding to bullying. It also discusses the relationship to other civil rights’ violations, such as discrimination and sex- and gender-based harassment.

OHS utilized Olweus training and worked with Ms. Glenn prior to the 2015-2016 school year. Data from the 2014-2015 surveys was presented to the eight OHS staff members identified as the core team during their full day of training. In August 2015, the entire staff at OHS was trained during teacher in-service. As a result of the core team’s analysis of the culture at OHS, they developed “Give a Hoot” posters to raise awareness and prevention of bullying. They also created anti-bullying posters that were prominently displayed in every classroom and throughout

²⁶ Olweus Bullying Prevention Program Brochure.

²⁷ HCDE website.

²⁸ Students Taking a Right Stand (STARS) “is a school-based program dedicated to strengthening the learning environment by addressing social issues such as bullying and substance abuse.” STARS website. One program offered is Olweus training.

the building. Staff were also given quick-tip intervention cards with specific procedures for responding to observed bullying behavior. In addition, OHS teachers taught at least three lessons on an aspect of bullying or other behavior that could negatively affect students throughout the school year. Ms. Glenn stated that the training at OHS was among the best received trainings of all of the schools she worked with that year.

In addition to Olweus training, OHS utilized training provided through STARS for its students. OHS identified twelve (12) students²⁹ who were considered “change agents” to attend one day training on school climate that included bullying awareness and prevention. At the end of the training, the group created a plan to combat prevalent issues including bullying and raise awareness at OHS for its students. Included in their prevention efforts were PSA announcements giving encouraging quotes of the day, making an effort to sit with students sitting alone at lunch, and acknowledging students for positive actions. OHS students also visited elementary schools promoting the “Kindness Matters” campaign for 5th graders and participated in the multi-school Youth Conference for middle school students encouraging positive behavior.

At the end of the academic year, STARS commended OHS on their work in an email to administrators and staff who led the program.

Finally, the HCDE mandates training on cyber-bullying for all students through a program called i-SAFE. This program provides educators with age-appropriate, grade specific e-Safety curriculum and includes professional development for instructors. OHS provided i-SAFE to its students in wellness or grad focus and tracked students who have completed the curriculum.

b. Finding

The HCDE has made significant efforts to combat bullying. Olweus training is thorough and tailored to meet each school’s specific culture and climate. Statistics on bullying are collected each year by Ms. Glenn and reported to the Office of Civil Rights. Ms. Glenn also administers climate surveys for each school for parents, teachers and students. The results of the surveys are shared with school administration so that needs are identified and goals established for strengthening the school learning environment.

As noted, all schools are not required to utilize Olweus training. I could not find a consistent mechanism in place to ensure those schools provide sufficient training to staff; thus I cannot say that all schools are receiving adequate training in this regard.

OHS has gone above and beyond HCDE mandate in its efforts to combat bullying. OHS provided robust bullying training for all of its teachers and participated in STARS for its students. OHS’s efforts are evident throughout the school grounds with posters and pamphlets.

²⁹ Three (3) of the twelve (12) students were football players.

Hazing

I found that the HCDE and OHS efforts towards training on hazing are deficient. Although the Code of Conduct addresses hazing, students do not understand what actions might constitute hazing, which demonstrates a lack of education in this area. It appeared some of the OHS administrators had a “that doesn’t happen here” approach to hazing and failed to see the value in proactive measures through education and training for staff, teachers and students.

Sexual Harassment

a. Overview

I encountered significant difficulty in determining what efforts were being made with respect to HCDE meeting its Title IX obligations. I first interviewed the designated Title IX Coordinator, Ms. Marsha Drake, as well as other HCDE administrators. My initial determination was that very little was being done by the HCDE to meet its obligations based on these interviews. It was only after I spoke with Mr. Bennett about these issues that I learned that Ms. Glenn was doing a lot of work that would satisfy some of the HCDE’s Title IX obligations. This discovery was very concerning because, if it was difficult for me to find out this information, it certainly would be difficult for a parent or student to locate.

b. Analysis

The Office of Civil Rights states the HCDE “must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX These designated employees are generally referred to as Title IX coordinators.”³⁰ The HCDE designated a Title IX coordinator, Ms. Drake.

The Title IX coordinator must have the “qualifications, training, authority and time” to address all complaints throughout the school district implicating Title IX.³¹ Ms. Drake has not received adequate training on Title IX. She also has a host of responsibilities outside of those as a Title IX coordinator. Thus, the HCDE designated her as coordinator without the consideration of the appropriate infrastructure, support and training.

The Title IX coordinator is “responsible for coordinating the school district’s responses to all complaints involving possible sex discrimination. This includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.”³² Although Ms. Drake serves as the Title IX coordinator, many of these responsibilities are being carried out by Ms. Glenn.³³ In addition, Ms. Drake was unaware that Ms. Glenn was carrying out these duties.

³⁰ Office of Civil Rights, Dear Colleague Letter on Title IX Coordinators, April 24, 2015.

³¹ *Id.*

³² *Id.*

³³ The climate surveys utilized by Ms. Glenn assess climate on a variety of issues, but fall short with respect to sexual misconduct. Ms. Glenn does collect data from each school that includes information regarding reports of bullying based on sex or gender.

Under Title IX, the HCDE is required to provide mandatory training for staff and students. HCDE training efforts are as follows:

- Annually, all of the HCDE administration and staff must acknowledge review of the Harassment/Sexual Harassment and Discrimination Board Policy. There is no accompanying training.
- The schools utilizing Olweus training also receive training on conduct that constitutes sex-and gender-based harassment, including how to respond to these incidents once a student or school official is on notice of the conduct.
- In 2015, Ms. Glenn provided an exercise for the HCDE administration to further illustrate the interplay between bullying and other civil rights violations, including sex- and gender-based harassment.

The HCDE needs to further bolster any existing training to include HCDE's Title IX obligations and mandate such training for all students and staff. In addition, the HCDE needs to ensure those schools which do not opt to utilize Olweus training are providing adequate training which satisfies its Title IX obligations.

The HCDE is required to ensure that all "persons involved in implementing . . . grievance procedures must have training or experience in handling complaints of sexual harassment and sexual violence." I did not find evidence that building administrators, who are tasked with investigating reports, receive training or experience in these matters. Likewise, I did not find evidence that other administrators involved in the process receive training or have experience in these matters. While many of them may have gone through adequate training, there is no tracking mechanism in place to ensure that it occurs.

Finally, under Title IX, the HCDE is required to provide a prompt and equitable response to complaints, support complainants through the provision of interim measures, take action to identify and eliminate a hostile education environment, prevent its recurrence, and address its effects for individual complainants and the broader school community.³⁴ The HCDE is making efforts in this regard; however, they are disjointed and therefore difficult to ascertain. They are being undertaken by Ms. Glenn, who is not the designated Title IX coordinator, and funneled up through building administrators who have not been adequately trained on the HCDE's Title IX obligations. As a result, it is difficult to determine whether the HCDE is satisfying its obligations in this regard.

c. Finding

I found that the HCDE's and OHS's efforts towards training on sex-and gender-based harassment, including obligations of the school district in responding to those complaints under Title IX, are inadequate in some areas, disjointed in others and overall in need of improvement. The issues that I have discovered in this regard did not impact Mr. Montgomery's ability to

³⁴ Office of Civil Rights, Dear Colleague Letter, April 4, 2011.

appropriately respond to the injured freshman in Gatlinburg; however, they are issues that must be addressed to ensure overall compliance by the HCDE with Title IX going forward.

VI. OHS

As I previously noted, I spent the better part of seven (7) weeks at OHS with unfettered access to the school. The environment at OHS is a positive one, and there certainly is more good than bad happening within the school. Teachers I spoke to were dedicated to their profession and students and had profound loyalty to the school.³⁵ Students also spoke very highly of their experience at OHS, including the students who were in Gatlinburg. Students and teachers alike felt that the media's depiction of the school was unfair and that the Gatlinburg incident was an isolated incident which was not an accurate reflection of the school or its athletics' program. My observations during my time there were consistent with these sentiments.

RECOMMENDATIONS

During the course of my investigation, new policies and procedures were adopted, which may include some of these recommendations. Also, because training efforts are disjointed, some of the following recommendations may be in place, but difficult to ascertain. Finally, my recommendations should not be construed as meaning that had these recommendations been implemented prior to the Gatlinburg incident, the actions taken in Gatlinburg would not have occurred.

Training and Education

1. Provide and mandate training to all HCDE and school administrators that includes:
 - a. HCDE's Title IX obligations;
 - b. How to identify and address bullying, hazing, sex- and gender-based harassment ("prohibited behavior");
 - c. The proper reporting structure once personnel are on notice of prohibited behavior; and
 - d. Repercussions for failure to report incidents of prohibited behavior.
2. Provide and mandate training and education to HCDE staff and teachers regarding prohibited behavior. Consider providing this training to all school sites during teacher in-service at the beginning of the school year. This training includes:
 - a. HCDE's Title IX obligations;
 - b. How to identify and address prohibited behavior;
 - c. Where to report prohibited behavior once on notice of it; and
 - d. Repercussions for failure to report incidents of prohibited behavior.

³⁵ I was directed to contact teachers who may have felt differently about the school environment and administration. I attempted to interview those individuals but was unsuccessful despite repeated attempts.

3. Expand educational efforts on bullying and cyber-bullying for students to also include education on hazing and sex- and gender-based harassment.
4. Provide bystander training for students and establish a student peer-based leadership program. Consider programs such as Step Up! to assist with these efforts.

HCDE's Title IX obligations

5. Clarify the roles and responsibilities of Ms. Karen Glenn and Ms. Marsha Drake and make any necessary changes to appropriately designate a Title IX coordinator for the HCDE.
6. Properly resource the Title IX coordinator to be able to implement policies, procedures and practices, which include:
 - a. Appointing deputy Title IX coordinators at each school site for intake, support and case management. These may already be contemplated under the newly adopted policy as building administrators and/or school officials;
 - b. Providing appropriate training opportunities for the Title IX coordinator and deputy Title IX coordinators; and
 - c. Provide appropriate support and authority for the Title IX coordinator and deputy Title IX coordinators to implement necessary interim measures for complainants.
7. Appropriately train any building administrator and/or school official designated for investigating matters involving sexual harassment to ensure adequate, reliable and impartial investigation of complaints. Training should be trauma-informed and include information regarding conducting an investigation during a pending criminal investigation.
8. Ensure that all forms of resolution to disciplinary matters implicating Title IX are clearly documented to demonstrate actions were taken to eliminate a hostile education environment, prevent its recurrence and address its effects on the complainant and the school community. Maintain appropriate complaint logs and records of all reports and steps taken to eliminate, prevent and address the effects of the prohibited conduct.
9. Train guidance counselors on available and comprehensive victim services to all students affected by sexual harassment or sexual violence. Consider designating an "on call" guidance counselor at each site to assist victims when needed.
10. Train all School Resource Officers on the HCDE Title IX obligations.
11. Train the HCDE school board on the HCDE's Title IX obligations.

12. Review disciplinary and grievance procedures to ensure they are consistent with the law and guidance. This may include modifications to the newly adopted policy, or the establishment of a complainant's bill of rights, which includes:
 - a. A time frame for all major stages of the procedures including the time frame within which (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal. The policy also should provide that both parties will receive periodic status updates;
 - b. Clarifying that throughout the investigation, including any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and respondent must be afforded similar and timely access to any information used at a hearing;
 - c. Notifying both parties, in writing, of the outcome of the complaint and appeal concurrently, to the extent allowed by law; and
 - d. Notifying a complainant of the right to file a criminal complaint.
13. Conduct a review of all disciplinary matters implicating Title IX since 2011; create a log of those instances and how they were handled; and engage in any remedial efforts deemed necessary as a result of the review.
14. Conduct appropriate periodic climate surveys or assessments to evaluate the effectiveness of these measures.

Athletics


15. Ensure that all athletics' personnel, including volunteer coaches, are appropriately trained on an annual basis regarding Title IX obligations, hazing and bullying.
16. Create and maintain a zero tolerance culture for prohibited behavior that includes consistent enforcement and discipline within athletics at OHS.
17. Establish a registration process for volunteer coaches maintained in a centralized location that includes a system for volunteer coaches to acknowledge training on hazing, bullying, and sex- and gender-based harassment, school-sponsored overnight travel procedures and protocol, and mandatory reporting.
18. Create standards for volunteer coaches in line with those expected of stipend coaches.
19. Clarify the roles and responsibilities of Athletic Directors in handling reports of prohibited behavior within athletics.

Other

20. Ensure accountability for failures to report by HCDE employees.

21. Develop procedures and protocol for addressing incidents of prohibited behavior that occur on school-sponsored overnight trips. Identify decision-makers for notifying parents, returning home early, and cancelling games.
22. Provide detailed periodic reports to the school board regarding the implementation of these recommendations.

Respectfully submitted,



Courtney H. Bullard
Spears, Moore, Rebman & Williams, P.C.

Addendum A

1. Student A and parent(s)
2. Student B and parent(s)
3. Student C and parent(s)
4. Student D and parent(s)
5. Student E
6. Student F and parent(s)
7. Student G and parent(s)
8. Student H
9. Student I
10. Student J
11. Student K and parent(s)
12. Student L
13. Student M
14. Student N
15. Student O and parent(s)
16. Student P and parent
17. Student Q
18. Student R
19. Student S
20. Matthew Henson
21. Ken Buchanan
22. Jensen Morgan
23. Rocky Chavis
24. Jesse Nayadley
25. Jim Jarvis
26. Sylvia Hutsell
27. Chris Brown
28. Stephanie Allen
29. Wendell Weathers
30. Lee McDade
31. Wayne Rich
32. Doug Greene
33. Donald Mullins
34. James (J.D.) Dunbar
35. Steve Holmes
36. Mac Bryan
37. Marsha Drake
38. Grey Briggs
39. Officer Nathan Sampley
40. Karen Glenn

ADDENDUM B

1.	HCDE Policies & Procedures
2.	HCDE Revised Board Policy 6.304
3.	HCDE Training on Abuse Reporting Procedures 4.14.16
4.	2015-2016 HCDE School Calendar
5.	HCDE High School Administrative Policy & Procedure Manuals
6.	HCDE Volunteer Form
7.	2015-2016 HCDE Hardship Report
8.	HCDE Bullying Policies
9.	2015-2016 HCDE Bullying Compliance Report for OCR
10.	HCDE Form Elementary, Middle and High School Climate Surveys
11.	HCDE Non-Faculty Volunteer Coach Procedures for Setup
12.	HCDE Secondary School Counselor Manual
13.	HCDE Form Request for Early Approval for Field Experience
14.	HCDE Consent for Athletic Participation and Medical Care
15.	HCDE Disciplinary Referral Form
16.	HCDE Parent Complaint Form
17.	TN Department of Education Civil Rights and Bullying Compliance FAQs
18.	Tennessee Department of Education Sample Bullying and Harassment Policy
19.	stopbullying.gov website
20.	Personnel Records of Avery Rollins, Jesse Nayadley and Andre Montgomery
21.	Transcript from the Preliminary Hearing for Karl Williams, Andre Montgomery and Allard Nayadley in the Juvenile Court of Hamilton County
22.	Timeline of events from Steve Holmes
23.	Bullying and Prevention Training for HCDE Assistant Principals Powerpoint 9.2014
24.	2015 Dear Colleague Training Activity for Assistant Principals 9.9.14
25.	Bullying Is Not Tolerated (B.I.N.T.) Investigation Form
26.	OHS Teacher Contact List
27.	OHS Web Page
28.	OHS Map
29.	OHS Hardship Transfers
30.	2015-2016 OHS Boys' Basketball Roster
31.	2015-2016 OHS Boys' Basketball Schedule
32.	Smoky Mountain Classic Basketball Schedule 2015
33.	2016 Chattanooga Elite Roster
34.	2015-2016 OHS Football Roster
35.	2015-2016 OHS Football Schedule
36.	OHS Student Handbook 2015-2016
37.	OHS Faculty Handbook 2015-2016
38.	OHS Coaching Handbook 2015
39.	OHS Student Handbook 2014-2015
40.	OHS Code of Acceptable Behavior and Discipline
41.	OHS Registration Packet

42.	OHS i-SAFE Curriculum Materials OHS Participation Request 12.7.15
43.	General Demographics of Specific OHS Students
44.	Fall 2015 Class Schedules of Victims and Assailants
45.	Meeting Notes re: Gatlinburg 1.4.16
46.	Disciplinary records of assailants
47.	Olweus Pamphlet
48.	Olweus Bullying and Prevention Program Brochure
49.	OHS Olweus/STARS Bullying Prevention Brochure
50.	OHS OASIS curriculum materials
51.	Email from Gregory Gwen to administrators and staff re: STARS
52.	OHS 2013 Tennessee School Climate Survey Past 30-day Personal Alcohol, Tobacco, and Other Drug Use Prevalence
53.	OHS 2013 Parent Survey
54.	OHS 2013 Teacher Survey
55.	OHS Tennessee S3 Student Survey School Summary 2013-2014
56.	OHS Sign-in Sheet for Initial Core Training
57.	OHS Olweus Core Team Powerpoint Presentation 11.11.14
58.	OHS Expectation Poster – Rules on Bullying
59.	OHS Thanks for Giving a Hoot Bullying Poster
60.	OHS On the Spot Bullying Intervention Cards
61.	OHS Olweus Staff Training Powerpoint Presentation 8.7.15
62.	OHS Sign-in Staff Training 8.7.15
63.	STARS website
64.	HCSO and DCS Interviews (12) of Nayadley, Jarvis, Montgomery, victims and witnesses
65.	Newspaper Articles from 12/30/15 – 07/01/16

From: D. Scott Bennett
To: [Courtney Bullard](#)
Subject: Re: Investigation
Date: Friday, March 18, 2016 6:56:26 AM
Attachments: [imagede1c59.PNG](#)

You are most welcome! Turn about seems like fair play, yes?

On Thu, Mar 17, 2016 at 11:45 PM -0700, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>> wrote:

I should have said it out of the gate but thanks for the opportunity. I think when you first emailed me I was in a bit of shock. :). Look forward to getting to work!

> On Mar 17, 2016, at 6:55 PM, D. Scott Bennett <scott.bennett@leitnerfirm.com> wrote:

>

> Welcome aboard! Let's talk tomorrow.

>

>

> D. Scott Bennett

> Attorney at Law | Member

> vCard<<http://www.leitnerfirm.com/attorneys/d-scott-bennett/vcf>> | Bio<<http://www.leitnerfirm.com/attorneys/d-scott-bennett>> | Website<<http://www.leitnerfirm.com>>

>

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D. Scott Bennett

Attorney at Law | Member

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Courtney Bullard

From: Courtney Bullard
Sent: Wednesday, April 13, 2016 7:13 PM
To: D. Scott Bennett
Subject: Re: Nayedley

That was my thinking exactly. If I gave the impression I am just concerned about title IX that was not the correct impression. We definitely need to discuss more what findings that you need from me which I expect we will do as I get closer to ending interviews and writing the report.

On Apr 13, 2016, at 7:10 PM, D. Scott Bennett <scott.bennett@leitnerfirm.com> wrote:

Following up on our conversation and back-and-forth emails, I think that the scope of your investigation really doesn't need to be limited to Title IX. Yes, obviously, that was the purpose of your retention. However, I think it would be myopic to look at what Nayedley did or didn't do and then to dismiss any concerns if his actions didn't implicate Title IX.

Suppose that he did know that the other three victims had been hazed with the pool cue. Suppose, however, that their hazing doesn't implicate Title IX (just assume here – that will be for you to decide based upon the surrounding circumstances, IMO) because it wasn't motivated by sex and it wasn't an act of sexual violence within the meaning of Tennessee law. Further suppose, however, that these students were victims of bullying and/or hazing as defined by Tennessee law and/or board policy. And finally suppose that he didn't call the parents to alert them of what had happened (again, assuming that he knew).

The question that I think you will probably need to answer is whether his actions constituted neglect of duty. You may need guidance from me as to the statutory definitions, precedent, etc., but, at the end of the day, the Board is also going to need to know whether to discipline him. There is no sense in my conducting a parallel investigation to arrive at a conclusion that is well within your grasp; don't you think?

This is the sort of thing we can continue to kick around. I just don't want a non-violation of Title IX to cover up a breach of duty.

D. Scott Bennett

Attorney at Law | Member

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<imagec67ea3.PNG>

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Regina Dabbs

From: Courtney Bullard
Sent: Wednesday, April 13, 2016 9:01 AM
To: Beth Benson
Subject: FW: Thoughts for next discussion
Attachments: Discrimination, Harassment, Bullying, and Hazing Policy (04540709-2xA015B).docx

Please put this policy in PL and note it in our log.

FROM: COURTNEY BULLARD [mailto:courtneybullard@chsc.edu]

SENT: WEDNESDAY, APRIL 13, 2016 9:07 AM

TO: Courtney Bullard

SUBJECT: RE: Thoughts for next discussion

Yes – you are entirely correct. It isn't an easy analysis. Vickie Lewis and I went around and around with “but what about” and “what if.” And, to compound matters, what is a Title IX issue for OCR isn't always a Title IX issue for the courts.

What I settled on from kicking this around with Vickie and Art as well as other Title IX compliance officers from around COSA is that, because what happened to _____ was (1) severe and (2) by statutory definition an act of sexual violence, that does in fact implicate Title IX, at least under the OCR's analysis, even though there was no sexual gratification.

The more difficult question is the other victims. If the acts with the pool cue were not motivated by sex – either gratification or to demean – and if they were not acts of sexual violence under Tennessee law, then Title IX is not obviously implicated. However – and this is a big however – if this was truly a tradition, then it becomes a little bit more difficult to argue that this wasn't an effort to demean boys because of their sex. The pervasive element starts to drive the analysis.

What we settled on was that the investigator – you – would have to peel that onion and determine why the pool cue actions happened. Was it part of a spontaneous event that was repeated over the course of the trip? Or was it something that was really embedded in a tradition, all calculated to demean boys because they were boys?

Of course, the reason that is important is to develop an appropriate response. Vickie and Art were content with the school's immediate response to the incident – _____ was protected (and the other ones were too, if they were Title IX victims); the assailants were removed from the situation; and the

assailants were subsequently disciplined to the fullest extent of the Board's power.

But the next layer remains – how did this come to happen, and what steps do we take to prevent it from happening again? To some extent, the response depends upon what you learn as part of the inquiry set forth two paragraphs above. Is there a culture of bullying and hazing? Maybe. But does this culture rise to the level of discriminating on the basis of sex in violation of Title IX? Don't know.

But at some level, the distinction is academic simply because Tennessee law requires us to address the bullying regardless of its motivation. Sure – if there is a culture of sex-related violence, then the training will look different from training designed to train people to treat people decently. Give some thought to that – what practical difference does it make to the response (as to these other victims) whether this was bullying and hazing or whether this was bullying and hazing in violation of Title IX. The answer is always “it depends,” but we need to drill down to bedrock.

Oh – attached is the new anti-bullying policy.

D. Scott Bennett

Attorney at Law | Member

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From: Courtney Bullard [<mailto:chb@SMRW.com>]

Sent: Wednesday, April 13, 2016 9:22 AM

To: D. Scott Bennett

Subject: Thoughts for next discussion

This is an excerpt from OCR's revised 2001 guidance on Title IX. In evaluating whether something constitutes sexual harassment there is a fine line in claiming that the conduct must be for sexual gratification. While the pool cue incidents with the other victims may not rise to sexual assault, it could conceivably still be sexual harassment if the conduct is

severe or pervasive enough but there is no sexual gratification involved at all..... Food for thought. Our conversation on this point has my mind going.

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.

Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered

sexual harassment. *However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.*

Courtney H. Bullard, JD
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Member, Workplace Investigations Group

*ICS is a division of Spears, Moore, Rebman & Williams PC

1 Q I understand. What happens then, after that?

2 A We get ready for the game and we leave.

3 Q When you got to the locker room to dress out for
4 the game, everything okay?

5 A Yes, sir.

6 Q No fights, no arguments, nothing among the team
7 members?

8 A Correct.

9 Q Right?

10 A Right. Yeah.

11 Q So after the game, you come back to the, to the
12 cabin?

13 A Yes, sir.

14 Q About what time did y'all get back from the cabin?

15 A Middle of the day.

16 Q What happens then?

17 A Everybody showers and just hanging out. Us, us
18 freshmen were hanging out in our room.

19 Q Did you think that what Student B did to you and
20 the two that held you down, did you have any thought that
21 that was sexual, intended to be sexual in nature?

22 A Yes, sir.

23 Q And why do you think that?

24 A Anybody trying to put anything, no matter what it
25 is, up your butt is sexual.

From: Courtney Bullard
To: scott.bennett@leitnerfirm.com
Subject: Fwd: HAMILTON COUNTY DEPARTMENT OF EDUCATION -
Date: Monday, June 6, 2016 8:15:19 AM
Attachments: [image001.jpg](#)
[ATT00001.htm](#)
[Preliminary Report of External Investigation.docx](#)
[ATT00002.htm](#)

Morning Scott. So last week I had strep, the gift that keeps on giving, thanks to my girls. It also turns out I have mono. Combined they are truly a treat. Since I was home bound I was bouncing the report back and forth with my secretary. I did not realize my secretary sent me a pdf to forward you until late last night when I pulled it up. A fever, inability to swallow and overall exhaustion had me a little out of it. Anyways, here is a word version. Feel free to send comments, questions, changes on it if you have time this week or we can talk through them when I am back in town. I do not have pride of authorship and as long as the what is not changing, welcome any suggestions. I defer to your judgment on the best approach with the board.

Have a good day!!

Courtneh

Begin forwarded message:

From: Melanie Goins <MLG@SMRW.com>
Date: June 6, 2016 at 8:41:39 AM EDT
To: Courtney Bullard <chb@SMRW.com>
Subject: HAMILTON COUNTY DEPARTMENT OF EDUCATION -

Preliminary Report of External Investigation

Melanie Goins
P.O. Box 1749
801 Broad Street, 6th Floor
Chattanooga, TN 37401-1749
423.756.7000 ? Phone
423.756.4801 ? Fax

**PRELIMINARY FINDINGS AND RECOMMENDATIONS OF
THE EXTERNAL INVESTIGATION**

On December 22, 2015, a member of the Ooltewah High School (“OHS”) boys’ basketball team, with the assistance of two other members, assaulted a freshman player with a pool cue while on a team trip to Gatlinburg. As a result of the incident, on March 17, 2016, the school board for the Hamilton County Department of Education (“HCDE”) retained me to conduct a fair and impartial investigation into the following:

- Assess the climate of the OHS boys’ basketball program regarding the reporting and addressing of bullying, hazing and/or sexual harassment;
- Review OHS and HCDE policies and procedures to determine where, if any, deficiencies in communication or conflicts in policy may exist with respect to bullying, hazing and/or sexual harassment; and
- Review training for student-athletes and OHS athletics staff to determine where, if any, deficiencies exist with respect to bullying, hazing and/or sexual harassment.

These preliminary findings and recommendations of the investigation are provided to the school board prior to its completion to allow for the HCDE to consider necessary actions with regard to personnel and/or policy decisions. This is a truncated version of the anticipated final report. It does not contain all of the supporting information for my findings. There are outstanding requests for information to authorities in Gatlinburg and Chattanooga with respect to the criminal investigation that I believe will contain relevant information. There are additional witnesses to interview. I do not expect that information to substantially alter these findings; however, I reserve the right to make modifications to these findings, if necessary.

To date, over thirty-five (35) witnesses in approximately seven (7) weeks have been interviewed. I have interviewed OHS students and their parents or guardians, teachers, and administration. I have also interviewed certain HCDE staff and administration.

As part of the investigation, an extensive review of the HCDE and OHS policies and procedures related to bullying, hazing and sexual harassment has been conducted. In addition, I have reviewed student disciplinary files of the assailants and employee personnel files of those involved in the Gatlinburg incident.

PRELIMINARY FINDINGS

I. The Culture of the 2015-2016 OHS Basketball Program

Culture of bullying and hazing prior to Gatlinburg

I find that a culture of hazing and bullying existed on the 2015-2016 boys’ basketball varsity team prior to Gatlinburg. There is credible information to conclude that the upper classmen engaged in “racking in” or the “freshman rack.” “Racking in” is described as upper classmen turning off the lights in the locker room, grabbing freshmen players, and punching them with

fists from the neck down, without the intention of causing injury. One player stated that the older players would lock or block both locker room doors before turning the lights off. Players stated that the purpose was to bring the freshmen onto the varsity team or “the big leagues.” Accounts stated that each incident lasted 20 to 30 seconds. Although accounts of frequency varied, it occurred at least once a week during a four week period.

None of the players interviewed reported knowing the definition of hazing prior to Gatlinburg, but they did understand bullying. Many players described “racking in” as horseplay or “boys being boys.” This description is indicative of a desensitization and acceptance of excessive horseplay and a lack of education on what conduct constitutes hazing.

Knowledge of Coaches/Administrators of Culture

All accounts of Mr. Montgomery and Mr. Williams as coaches were positive. Mr. Montgomery often paid money out of his own pocket to help pay for dinner for players, or provided them with gas money. Mr. Williams was seen as the disciplinarian and also had the players’ interests at heart. Both were viewed as father figures and mentors by the players on the team and respected by their parents and guardians. Mr. Montgomery and Mr. Williams declined to participate in the investigation.

None of the players stated that they told coaches or administrators about “racking in.” Regardless, although I cannot substantiate that Mr. Montgomery or Mr. Williams were aware of “racking in” per se, they were certainly aware of excessive horseplay and did not take appropriate measures to address it. One player specifically stated that Mr. Montgomery walked into the locker room many times when the lights were off, turned them on and told the team to knock it off. The players broke a television that Mr. Montgomery provided in the locker room. They were frequently having to run suicides, or do push-ups or squats as a result of horseplay; however, the accounts of the continued “racking in” and horseplay at the cabin in Gatlinburg are indications that those efforts were not effective at addressing the behavior.

Mr. Nayadley and Mr. Jarvis stated that they had never heard of the term “racking in.”

Culture of Bullying and Hazing Prior to the 2015-2016 Season

I find that a culture of bullying or hazing targeted at Varsity freshmen players existed in the basketball program prior to the 2015-2016 season. Most of the information provided that indicated “racking in” occurred in prior seasons was through rumor or hearsay, and I did not find credible evidence to support it. One upper classman interviewed, however, was subject to “racking in” as a freshman, which leads me to conclude it happened for at least three seasons under Mr. Montgomery. In order to explore this further, the investigation would need to be expanded.

Culture of Sexual Harassment Prior to Gatlinburg

I did not find that a culture of sexual harassment existed in the basketball program prior to Gatlinburg. The only account of misconduct discovered during the investigation was “racking in” which does not constitute sexual harassment.

II. Gatlinburg and the response of OHS and Central Office

Conduct of the Assailants

It is undisputed that on December 22, 2015, a member of the OHS boys’ basketball team, with the assistance of two other members, assaulted a freshman player with a pool cue while on a team trip to Gatlinburg. Three other freshmen on the trip were subject to being poked in the rectum with a pool cue in the same manner, but they did not sustain physical injuries.

The placement of the pool cue in the players’ rectums was not an accident. The assailant intended to place the cue in that location. While the players did not believe that he intended to physically injure anyone, it was not a case of him poking other areas of their bodies and the cue slipping and hitting that area instead.

Response of Coaches and Administrators

With respect to the freshman who was physically injured, I find that Mr. Montgomery and the other adults present in the cabin took immediate action to identify and eliminate the hostile environment and address its effects once on notice. Mr. Montgomery attempted to ascertain what happened, immediately sought medical care for the victim, and quickly notified his family. Once the police became involved, they followed directives, kept the assailants separate from the victim pursuant to the detective’s recommendations, and ultimately drove the assailants back to Chattanooga that night. Mr. Montgomery also notified Mr. Nayadley that evening with current information.

With respect to the other three freshmen, I find that Mr. Nayadley and Mr. Jarvis substituted their own judgment for that of their parents in not notifying the families and having the team play the next day. On the night of the incident, Mr. Montgomery and Mr. Nayadley were aware that pool cue incidents occurred with the other freshmen on the team with no resulting physical injuries. One of them was Mr. Nayadley’s son. When he found out, Mr. Nayadley texted his son that evening and, based on their exchange, believed that he was safe. Mr. Nayadley had a close relationship with the coaches and trusted them to handle the situation appropriately. As a result, Mr. Nayadley did not contact the families of the other two freshmen to inform them of what occurred. Those families did not learn about what happened until after they played in the tournament and were close to being back in Chattanooga.

In not informing parents of what occurred that evening once he was on notice, Mr. Nayadley substituted his judgment for the judgment of the parents of the two remaining freshmen. Those parents were therefore unable to make an informed decision on the well-being of their child and whether they wanted to come and get their sons from Gatlinburg. One mother expressed that had

she known what happened, she would have immediately gone to Gatlinburg and brought her son home. Mr. Montgomery stayed at the injured victim's side, leaving Mr. Nayadley as the most senior administrator in Gatlinburg to make this determination.

Principal Jarvis was the ultimate decision maker on playing in the tournament the morning after the incident occurred. His decision was largely influenced by the reports he received from Mr. Nayadley. Mr. Naydley felt the players were ready to play and wanted to play. None of the players interviewed stated that they wanted to play. One player described the team as "sluggish." They were tired from a long and stressful evening, and their minds were with the injured victim.

In allowing the team to play, Mr. Jarvis rationalized that the remaining players should not have to be punished for the conduct of three. Had the team come back from Gatlinburg, and an investigation commenced into the culture of the program, OHS would have discovered that hazing and bullying was occurring in the locker rooms and that upper classmen who were not involved in the pool cue incidents were involved in that conduct. While I do not know what discipline would have been appropriate for those players had this been discovered in January, there certainly was evidence of behavior that would rise to the level of a disciplinary infraction that was not considered.

Mr. Nayadley informed Mr. Holmes, from Central office, that he would ensure the boys were physically and mentally ready to play in the tournament. The players, with the exception of one, said that Mr. Nayadley did not talk to them until after they played. When Mr. Nayadley did speak to the team, he told them that they knew better than to engage in the behavior, and that the three assailants would be kicked off the team. He also stated that the players that played that day in the tournament were all that was left on the team and all they would have for the remainder of the season. Mr. Nayadley did pull each freshman aside to tell them the conduct was not tolerated.

In not taking appropriate measures to insure that the remaining freshmen were OK, Mr. Nayadley ran the risk of sending a message to those players that the conduct was acceptable and also failed to take proactive measures to ensure their mental and physical well-being. In failing to notify families and making the decision to have the team play the next day, Mr. Nayadley and Mr. Jarvis did not take appropriate measures to address the effects of the harassment of the other freshmen; however, they did not violate any HCDE or OHS policies or procedures. Their decisions, in part, were a reflection of the lack of education and training with respect to incidents of sexual misconduct, as more fully explained below.

All of the parents of the players on the basketball team that I spoke with expressed frustration at the lack of response from OHS or the HCDE after Gatlinburg. While some of the boys were not subject to hazing, bullying or sexual harassment, they did witness a traumatic event and, thereafter, their season was cancelled; which had a profound impact on them. Someone from OHS or HCDE should have reached out to these families to extend support. One guidance counselor did talk with a few of the boys that he had a relationship with to let them know he was available if they needed to talk. By in large, though, there was no concerted, organized effort to reach out to families.

I relayed this information to Mr. Bennett who attempted to convince Mr. Jarvis of the necessity of speaking to these families. I also spoke to Mr. Jarvis and attempted to explain the need. Mr. Jarvis failed to understand the need to reach out to these families because “there was only one victim that he was aware of.” When I explained that many students have transferred, are in need of counseling services and so on, Mr. Jarvis continued to be unable to understand why parents should be contacted unless he had news for them regarding the upcoming basketball season. Ultimately efforts with Mr. Jarvis were exhausted, and the Title IX Coordinator has begun reaching out to the families.

III. The OHS Football Program & Bullying, Hazing and Sexual Harassment

I expanded my investigation into the OHS football program due to information received during my investigation. I did not find that a culture of bullying, hazing or sexual harassment existed during the 2015-2016 football season. There was no direct evidence a culture and the structure of the program does not support such conduct occurring in the presence of coaching staff. Freshman are intentionally kept completely separate from the JV and varsity team. They have separate locker rooms and practice on different fields. Players are always supervised and the coaches do not tolerate horseplay or conduct that could lead to fights among teammates. Thus, when it occurs it is dealt with quickly and effectively.

IV. Other Issues

During my investigation, I discovered a possible TSSAA recruiting violation by Mr. Williams. An investigation of this nature is outside the scope of my investigation and falls under TSSAA; however, given the relationship of the basketball coaches and Mr. Nayadley, I find it unlikely that they were unaware that this conduct was occurring. I provided this information to Mr. Bennett for disposition.

V. OHS Policies, Procedures & Educational Programs Regarding Bullying, Hazing and Sexual Harassment

Bullying

I find that the HCDE has made a lot of efforts to combat bullying and cyber-bullying. OHS has gone above and beyond HCDE mandate in this regard, working with STARS to attend training and include it in their teacher in-service. In fact, STARS commended OHS on their work at the end of the school year. In addition, OHS includes bullying prevention in their grad focus program.

Hazing

I find that the HCDE and OHS efforts towards training on hazing are deficient. Although the Code of Conduct addresses hazing, students do not understand what actions might constitute hazing, which demonstrates a lack of education in this area. OHS administrators had a “that

doesn't happen here" approach to hazing and failed to see the value in proactive measures through education and training for staff, teachers and students.

Sexual Harassment

I find that the HCDE and OHS efforts towards training on sex- and gender-based harassment, including obligations of the school district in responding to those complaints under Title IX, are deficient. Students, staff, coaches and administration explained sexual harassment in a limited manner that only addressed boys sexually harassing girls. The football coaches, through grad focus, do address current events with the players in an effort to raise awareness, but these efforts fall short of federal mandates and guidance.

While there may be documentation of incidents that implicate Title IX through PowerSchool, there is no complaint log maintained by the Title IX Coordinator or a building administrator. Without proper documentation and cataloging of these instances, filtered up through the Title IX Coordinator, it is impossible to know whether reports are being handled appropriately without an expanded and rigorous review of all disciplinary matters at OHS and/or the district as a whole.

Although a Title IX Coordinator was appointed by the HCDE, the appropriate training and infrastructure has not been put in place to support the position. In addition, she has a host of responsibilities outside of those as a Title IX Coordinator, which demonstrates a lack of emphasis on Title IX compliance by the HCDE.

Further, under Title IX, the HCDE is required to provide a prompt and equitable response to complaints, support complainants through the provision of interim measures and take action to identify and eliminate a hostile education environment, prevent its recurrence, and address its effects for individual complainants and the broader school community. I find that the HCDE does not have the proper infrastructure to ensure that these requirements are met.

VI. OHS

As previously noted, I spent the better part of seven weeks at OHS. The administration was aware of the timing of some of my visits, but on most occasions I arrived unannounced. The times of my arrival and departure varied and, as such, I was able to observe different parts of the school day, including the busiest times of day - the beginning and end of the school day and lunch. I was also at the school after hours when some of the extra-curricular activities were taking place. During my time I was able to walk the halls during class changes and tour the school independently.

The environment at OHS is a positive one, and there is certainly more good than bad happening within the school. Teachers I spoke to were dedicated to their profession and students and had profound loyalty to the school. Students and teachers alike felt that the media's depiction of the school was unfair and that Gatlinburg was an isolated incident that was not an accurate reflection of the school or its athletics program. My observations during my time there were consistent with these sentiments.

PRELIMINARY RECOMMENDATIONS

Training and Education

1. Provide and mandate training to all HCDE and school administrators that includes:
 - a. HCDE's Title IX obligations;
 - b. How to identify and address bullying, hazing, sex- and gender-based harassment ("prohibited behavior");
 - c. The proper reporting structure once personnel are on notice of prohibited behavior; and
 - d. Repercussions for failure to report incidents of prohibited behavior.
2. Provide and mandate training and education to HCDE staff and teachers on prohibited behavior. Consider providing this training to all school sites during teacher in-service at the beginning of the school year. This training includes:
 - a. HCDE's Title IX obligations;
 - b. How to identify and address prohibited behavior;
 - c. Where to report prohibited behavior once on notice of it; and
 - d. Repercussions for failure to report incidents of prohibited behavior.
3. Expand educational efforts on bullying and cyber-bullying for students to also include education on hazing and sex- and gender-based harassment.
4. Provide bystander training for students and establish a student peer-based leadership program. Consider programs such as Step Up! to assist with these efforts.

HCDE's Title IX Obligations

5. Properly resource the Title IX Coordinator to implement policies, procedures and practices, which includes:
 - a. Appointing Deputy Title IX coordinators at each school site for intake, support and case management. These may be those already contemplated under the newly adopted policy as building administrators and/or school officials;
 - b. Providing appropriate training opportunities for the Title IX Coordinator and Deputy Title IX Coordinators; and
 - c. Provide appropriate support and authority for the Title IX Coordinator and Deputy Title IX Coordinator to implement necessary interim measures for complainants.
6. Appropriately train any building administrator and/or school official designated for investigating matters involving sexual harassment to ensure adequate, reliable and impartial investigation of complaints. Training should be trauma-informed and include

information regarding conducting an investigation during a pending criminal investigation.

7. Ensure that all forms of resolution to disciplinary matters implicating Title IX are clearly documented to demonstrate actions were taken to eliminate a hostile education environment, prevent its recurrence and address its effects on the complainant and the school community. Maintain appropriate complaint logs and records of all reports and steps taken to eliminate, prevent and address the effects of the prohibited conduct.
8. Train guidance counselors on available and comprehensive victim services to all students affected by sexual harassment or sexual violence. Consider designating an “on call” guidance counselor at each site to assist victims when needed.
9. Train all Security Resource Officers on the HCDE Title IX obligations.
10. Train the HCDE school board on the HCDE’s Title IX obligations.
11. Review disciplinary and grievance procedures to ensure they are consistent with the law and guidance. This may include modifications to the newly adopted policy, or the establishment of a complainants bill of rights, which includes:
 - a. A time frame for all major stages of the procedures including the time frame within which (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal. The policy should also provide that both parties will receive periodic status updates;
 - b. Clarifying that throughout the investigation, including any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and respondent must be afforded similar and timely access to any information used at a hearing;
 - c. Notifying both parties, in writing, of the outcome of the complaint and appeal concurrently, to the extent allowed by law; and
 - d. Notifying a complainant of the right to file a criminal complaint.
12. Conduct a review of all disciplinary matters implicating Title IX since 2011; create a log of those instances and how they were handled; and engage in any remedial efforts deemed necessary as a result of the review.
13. Conduct appropriate periodic climate surveys or assessments to evaluate the effectiveness of these measures.

Athletics

14. Ensure that all athletics personnel, including volunteer coaches, are appropriately trained on an annual basis regarding Title IX obligations, hazing and bullying and TSSAA rules on prohibited recruiting conduct.

15. Create and maintain a zero tolerance culture for prohibited behavior that includes consistent enforcement and discipline within athletics at OHS.
16. Establish a registration process for volunteer coaches maintained in a centralized location that includes a system for volunteer coaches to acknowledge training on hazing, bullying, and sex- and gender-based harassment, school-sponsored overnight travel procedures and protocol, and mandatory reporting.
17. Create standards for volunteer coaches in line with those expected of stipend coaches.
18. Clarify the roles and responsibilities of Athletic Directors in handling reports of prohibited behavior within athletics.

Other

19. Ensure accountability for failures to report by HCDE employees.
20. Develop procedures and protocol for addressing incidents of prohibited behavior that occur on school-sponsored overnight trips. Identify decision-makers for notifying parents, returning home early, and cancelling games.
21. Provide detailed periodic reports to the school board regarding the implementation of these recommendations.

From: D. Scott Bennett
To: [Courtney Bullard](#)
Subject: RE: Report of External Investigation
Date: Tuesday, August 2, 2016 11:28:52 AM
Attachments: [image04f92b.PNG](#)

Thanks very much. Here are some questions observations:

- On page 7, you mention that you provided me with information identifying other students who participated in the racking in. If you did, I have no record or recollection of that. Are you sure?
- On page 8, you find that the hazing did, in fact, constitute bullying. Reflexively, I agree with you, but I note that you do not find any social or educational impact. I wonder, then, if the conduct meets the statutory definition of bullying, which does require a hostile educational environment? Is apprehension enough? Just thinking...
- On the top of page 14, you mention that HCDE backed up from the investigation on January 5th. That is true – both Sevier County and Hamilton County asked HCDE to do so. But the statement sort of hangs there – I am not sure if that is an observation or a condemnation. For that matter, I am not sure whether that paragraph adds anything to what follows – your second paragraph really sort of says it all, IMO: frustration abounded.
- I am REALLY surprised and dismayed by the lack of cooperation from the football players.
- Do you need to put the TSSAA issue in here? I am not sure that the Central Office has finished investigating this, and I would hate for the witnesses to go to ground once this report hits the media. Could you maybe say that there were other operational issues that came to light during your investigation, and your forwarded these to me? Just a suggestion. If you take this out, note the text and the recommendation sections.
- The term is school resource officer, not security resource officer.

I presume that you will want to sign this when it is finalized?

D. Scott Bennett

Attorney at Law | Member

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From: Courtney Bullard [mailto:chb@SMRW.com]

Sent: Tuesday, August 02, 2016 11:04 AM

To: D. Scott Bennett

Subject: Report of External Investigation

Scott:

Attached is the final report and addendums. I have dated it for tomorrow, but realize you need time to digest it, us to discuss if necessary, etc. Point is, if I need to change the date no problem.

I also wanted to point out that originally I contemplated a more detailed timeline of events related to Gatlinburg. I have since changed my mind because I think those details will compromise the identity of the minors involved and the details are not necessary for purposes of the report. They may be helpful to you in litigation. If you want the timeline I can certainly send it to you.

Let me know if you want to discuss further by phone or in person once you have time to review everything.

Thanks,

Courtney H. Bullard, JD
*Institutional Compliance Solutions**
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Chattanooga, TN 37402
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Member, Workplace Investigations Group

*ICS is a division of Spears, Moore, Rebman & Williams PC

From: D. Scott Bennett
To: [Courtney Bullard](#)
Subject: RE: What about...
Date: Tuesday, August 2, 2016 7:13:23 PM
Attachments: [image766b96.PNG](#)

That's probably a good distinction. Yes under Olweus, no under Tennessee law and board policy. **That may help, too, with upcoming lawsuits.**

On Tue, Aug 2, 2016 at 8:04 PM -0400, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>> wrote:

My understanding from Karen is that it would be reported.... in other words they are not engaging in the analysis of whether it substantially interfered with the educational environment (right or wrong).

Other school districts outside of the state do not make substantial interference a requirement. In other words, they state that the action causes or creates actual or reasonably foreseeable substantial interference with a student's education environment OR that a reasonable person would know....or has the prongs and they are disjunctive. I am sure you already know this. Doesn't help you all - just saying it seems like that is the pretty prevalent in other states.

At the end of the day, I think I am going to say my finding is based on the Olweus definition etc but that I cannot state whether it would or would not meet the statutory/HCDE definition..... BUT we shall see in the morning.

D. Scott Bennett
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From: D. Scott Bennett [scott.bennett@leitnerfirm.com]
Sent: Tuesday, August 02, 2016 7:52 PM
To: Courtney Bullard
Subject: Re: What about...

I do not know.

On Tue, Aug 2, 2016 at 7:47 PM -0400, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>> wrote:

Question... Would the HCDE put these instances in their report of bullying to the TN dpt of education?

> On Aug 2, 2016, at 7:27 PM, D. Scott Bennett <scott.bennett@leitnerfirm.com> wrote:
>
>
>
>
>
> On Tue, Aug 2, 2016 at 7:16 PM -0400, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>>
wrote:
>
> Well I can't promise it is clear yet! But I am gonna work some more about it/give it more thought.
>
>> On Aug 2, 2016, at 7:14 PM, D. Scott Bennett <scott.bennett@leitnerfirm.com> wrote:
>>
>> As long as it is clear, I have no other opinion.
>>
>>
>>
>> On Tue, Aug 2, 2016 at 7:09 PM -0400, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>>
wrote:
>>
>> Lol. I have changed the section a bit but my finding is still the same based on what is on the TN Department of
Education website that discusses the 3 elements of bullying and cites the Olweus definition which this behavior
definitely fell under (and what HCDE bases its training on). This is on the portion of the website that also discusses
the statute (but provides little clarification regarding the difference). Of course the statute then goes on to add the
interference language and HCDE naturally followed suit which certainly muddies things. Even with that though the
behavior certainly affected the educational environment. So I think that I have addressed that (I hope) but I am
going to revisit in the morning.
>>
>>> On Aug 2, 2016, at 6:45 PM, D. Scott Bennett <scott.bennett@leitnerfirm.com> wrote:
>>>
>>> "Because there was no evidence that the racking in substantially interfered with the educational opportunities of
the students, this behavior did not constitute bullying within the technical meaning of Tennessee law or board
policies. However, this conduct was clearly prohibited by the Code of Acceptable Behavior, and, over time,
certainly could have developed into true bullying behavior."
>>>
>>> I sort of think that this language walks the line between the law and what we viscerally feel to be true. But I
hesitate even to offer any language since this has to be your conclusion. So perhaps just consider this as inspiration.
Or shared angst!
>>>
>>>
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From: Cassie Rieder
To: [Courtney Bullard](#)
Subject: RE: Report of the External Investigation
Date: Thursday, August 4, 2016 9:57:08 AM

Yeah I guess just take that last sentence out altogether and end with "Moreover, there is a high likelihood that the behavior would have continued had the Gatlinburg incident not happened."

Cassie C. Rieder
Spears, Moore, Rebman & Williams, P.C.
801 Broad Street, 6th Floor
P.O. Box 1749
Chattanooga, Tennessee 37401
Phone: 423-756-7000
Fax: 423-756-4801
www.smrw.com

-----Original Message-----

From: Courtney Bullard
Sent: Thursday, August 04, 2016 10:55 AM
To: Cassie Rieder
Subject: RE: Report of the External Investigation

I tried to figure that out and to be honest I couldn't... **that language came from Scott.** The Code of Conduct is a pamphlet that they sign. Maybe just leave it out to avoid questions?

-----Original Message-----

From: Cassie Rieder
Sent: Thursday, August 04, 2016 10:54 AM
To: Courtney Bullard
Subject: RE: Report of the External Investigation

Is the code of conduct and code of acceptable behavior the same thing?

Cassie C. Rieder
Spears, Moore, Rebman & Williams, P.C.
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-----Original Message-----

From: Courtney Bullard
Sent: Thursday, August 04, 2016 9:56 AM
To: Cassie Rieder
Subject: FW: Report of the External Investigation

I think he is talking about this section... thoughts?

I had difficulty determining whether the conduct rose to the level of bullying as defined by Tennessee law and the HCDE Code of Conduct. Tennessee Code Annotated § 49-6-4502 includes in its definition of bullying a

requirement that it “substantially interfere with a student’s educational benefits, opportunities or performance.” The Sample Bullying and Harassment Policy provided for Tennessee school districts by the Tennessee Department of Education also includes this element in its definition. Thus, the HCDE definition incorporates this language in its definition of bullying as well.

None of the freshmen subjected to “racking in” reported being physically injured. I also did not find any obvious indications during my interviews that the targeted players suffered academically or socially as a result of the “rack” specifically, given that school transfers and other issues may solely have been attributable to the Gatlinburg incident. Although I was unable to easily identify an immediate negative impact on the victims’ educational environment, my review was during a limited window of time. Any future impact is impossible to predict. Ultimately, the behavior created an environment within the school that had the potential to interfere with the victims’ educational environment. Moreover, there is a high likelihood that the behavior would have continued had the Gatlinburg incident not happened. The conduct was clearly prohibited by the HCDE Code of Acceptable Behavior; however, I was unable to conclude with certainty that the conduct fell within the technical meaning of Tennessee law or the HCDE board policy given my limited ability to review the effect of the behavior on the victims.

-----Original Message-----

From: D. Scott Bennett [<mailto:scott.bennett@leitnerfirm.com>]
Sent: Wednesday, August 03, 2016 7:43 PM
To: Courtney Bullard
Subject: RE: Report of the External Investigation

Maybe. Can't see it now. At a movie.

D. Scott Bennett
Attorney at Law | Member
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On Wed, Aug 3, 2016 at 7:01 PM -0400, "Courtney Bullard" <chb@SMRW.com<<mailto:chb@SMRW.com>>>> wrote:

Do you mean the sentence that starts with "The conduct was clearly prohibited by the HCDE Code of Acceptable behavior. . ." is redundant?

From: D. Scott Bennett [scott.bennett@leitnerfirm.com]
Sent: Wednesday, August 03, 2016 4:04 PM
To: Courtney Bullard
Subject: RE: Report of the External Investigation

I think you did a good job of addressing the bullying issue vis a vis the TDOE and Olweus definitions versus the TCA and policy definitions.

I see, however, what may be a vestige of several edits. On page 10, the last few lines of the first full paragraph seem

redundant to what you have already said. Do you want an opportunity to fix this? Or do you want me to send it on?

And I also see page breaks where you might not want them. That is totally up to you. I have quirks, as BSA will tell you!

D. Scott Bennett

Attorney at Law | Member

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From: Courtney Bullard [<mailto:chb@SMRW.com>]

Sent: Wednesday, August 03, 2016 3:20 PM

To: D. Scott Bennett

Subject: Report of the External Investigation

Scott:

Attached is the Report of the External Investigation and Addendums. Please let me know if you have any questions or comments before submitting it to the Board.

Thanks,

Courtney

doesn't happen here" approach to hazing and failed to see the value in proactive measures through education and training for staff, teachers and students.

Sexual Harassment

I find that the HCDE and OHS efforts towards training on sex- and gender-based harassment, including obligations of the school district in responding to those complaints under Title IX, are deficient. Students, staff, coaches and administration explained sexual harassment in a limited manner that only addressed boys sexually harassing girls. The football coaches, through grad focus, do address current events with the players in an effort to raise awareness, but these efforts fall short of federal mandates and guidance.

While there may be documentation of incidents that implicate Title IX through PowerSchool, there is no complaint log maintained by the Title IX Coordinator or a building administrator. Without proper documentation and cataloging of these instances, filtered up through the Title IX Coordinator, it is impossible to know whether reports are being handled appropriately without an expanded and rigorous review of all disciplinary matters at OHS and/or the district as a whole.

Although a Title IX Coordinator was appointed by the HCDE, the appropriate training and infrastructure has not been put in place to support the position. In addition, she has a host of responsibilities outside of those as a Title IX Coordinator, which demonstrates a lack of emphasis on Title IX compliance by the HCDE.

Further, under Title IX, the HCDE is required to provide a prompt and equitable response to complaints, support complainants through the provision of interim measures and take action to identify and eliminate a hostile education environment, prevent its recurrence, and address its effects for individual complainants and the broader school community. I find that the HCDE does not have the proper infrastructure to ensure that these requirements are met.

VI. OHS

As previously noted, I spent the better part of seven weeks at OHS. The administration was aware of the timing of some of my visits, but on most occasions I arrived unannounced. The times of my arrival and departure varied and, as such, I was able to observe different parts of the school day, including the busiest times of day - the beginning and end of the school day and lunch. I was also at the school after hours when some of the extra-curricular activities were taking place. During my time I was able to walk the halls during class changes and tour the school independently.

The environment at OHS is a positive one, and there is certainly more good than bad happening within the school. Teachers I spoke to were dedicated to their profession and students and had profound loyalty to the school. Students and teachers alike felt that the media's depiction of the school was unfair and that Gatlinburg was an isolated incident that was not an accurate reflection of the school or its athletics program. My observations during my time there were consistent with these sentiments.

From: D. Scott Bennett
To: [Courtney Bullard](#)
Subject: RE: talk today?
Date: Monday, March 21, 2016 10:13:38 AM
Attachments: [image9dbc19.PNG](#)

Note the following:

Your current rate is \$200 an hour. An attorney staffed to this matter will be billed at \$175 hour, paralegals at \$85 an hour.

Do you mean a second attorney is at \$175? Or you are at \$175?

You may send invoices for fees and expenses to me. I will review and send to the Board.

I think the joint superintendents ought to sign per the Board's authorization of last week. They are the hands and feet of the Board.

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-----Original Message-----

From: Courtney Bullard [<mailto:chb@SMRW.com>]
Sent: Monday, March 21, 2016 11:05 AM
To: D. Scott Bennett
Subject: RE: talk today?

Scott:

See attached. This contemplates HCDE appointing me (through the joint superintendents/board?) (vs us sending an engagement letter to you). That is what is customary in my experience but I am open to suggestions... You will see I included language about providing legal advice to HCDE so that we can maintain the option of preservation of attorney-client privilege. I also have highlighted some other questions. Thoughts?

Courtney

-----Original Message-----

From: D. Scott Bennett [<mailto:scott.bennett@leitnerfirm.com>]
Sent: Monday, March 21, 2016 10:55 AM
To: Courtney Bullard
Subject: RE: talk today?