



ICUT

INDEPENDENT COLLEGES & UNIVERSITIES OF TEXAS

**2019 Title IX  
Compliance  
Conference**



**HUSCH BLACKWELL**

**2019 Texas  
Legislative  
Session Update**

# A Direct Contradiction

Lawyers and Title IX practitioners have identified potential conflicts between the Trump administration's new proposed regulations on the gender discrimination law and state policy.

By [Jeremy Bauer-Wolf](#) // December 13, 2018

13 COMMENTS 

Three years ago, Kevin Kruger, head of the country's association for student affairs professionals, [wrote to \*The Washington Post\*](#) over his concerns with new state laws around campus sexual assaults.

At the time, states such as California and New York were responding to the same pressures that led to the Obama administration's efforts to crack down on sexual violence at colleges and universities. The states passed legislation that both cemented the rules from Obama's Education Department into state law and went further, adding new definitions of consent and more. Many of the laws applied to both public and private institutions.



# HB 1735: Key Points

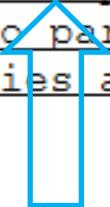
1. “The changes in law made by this Act apply beginning **August 1, 2020**”
2. Adopt policy with required components
3. Board must approve policy & changes to policy
4. Required prevention programming
5. Disciplinary process requirements
6. Training requirements
7. Confidentiality
8. Unprecedented administrative enforcement

# HB 1735: Definition Tension

(5) "Sexual harassment" means unwelcome, sex-based verbal or physical conduct that:

(A) in the employment context, unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment; or

(B) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.



# HB 1735: Board Involvement

- Policy must be “approved by the institution’s governing board before final adoption by the institution.”
- “Each biennium, each postsecondary educational institution shall review the institution's sexual harassment, sexual assault, dating violence, and stalking policy and, with approval of the institution's governing board, revise the policy as necessary.”

# HB 1735: Prevention Programming

3           (d) Each postsecondary educational institution shall  
4 develop and implement a comprehensive prevention and outreach  
5 program on sexual harassment, sexual assault, dating violence, and  
6 stalking. The program must:

7           (1) address a range of strategies to prevent sexual  
8 harassment, sexual assault, dating violence, and stalking,  
9 including a victim empowerment program, a public awareness  
10 campaign, primary prevention, bystander intervention, and risk  
11 reduction; and

# HB 1735: Process Requirements

16           Sec. 51.286. DISCIPLINARY PROCESS FOR CERTAIN VIOLATIONS.

17   A postsecondary educational institution that initiates a  
18   disciplinary process concerning an allegation that a student  
19   enrolled at the institution violated the institution's code of  
20   conduct by committing sexual harassment, sexual assault, dating  
21   violence, or stalking shall:

22           (1) provide to the student and the alleged victim a  
23   prompt and equitable opportunity to present witnesses and other  
24   evidence relevant to the alleged violation during the disciplinary  
25   process;

26           (2) ensure that both the student and the alleged  
27   victim have reasonable and equitable access to all evidence

# HB 1735: Process Requirements

1 relevant to the alleged violation in the institution's possession,  
2 including any statements made by the alleged victim or by other  
3 persons, information stored electronically, written or electronic  
4 communications, social media posts, or physical evidence, redacted  
5 as necessary to comply with any applicable federal or state law  
6 regarding confidentiality; and

7 (3) take reasonable steps to protect the student and  
8 the alleged victim from retaliation and harassment during the  
9 pendency of the disciplinary process.

# HB 1735: Process Requirements

Sec. 51.287. STUDENT WITHDRAWAL OR GRADUATION PENDING DISCIPLINARY CHARGES. (a) If a student withdraws or graduates from a postsecondary educational institution pending a disciplinary charge alleging that the student violated the institution's code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking, the institution:

(1) may not end the disciplinary process or issue a transcript to the student until the institution makes a final determination of responsibility; and

(2) shall expedite the institution's disciplinary process as necessary to accommodate both the student's and the alleged victim's interest in a speedy resolution.

(b) On request by another postsecondary educational institution, a postsecondary educational institution shall provide to the requesting institution information relating to a determination by the institution that a student enrolled at the institution violated the institution's code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking.

# HB 1735: Confidentiality

6            (b) Unless waived in writing by the person, the identity of  
7 a person described by Subsection (a):

8            (1) is confidential and not subject to disclosure  
9 under Chapter 552, Government Code; and

10           (2) may be disclosed only to:

11            (A) the postsecondary educational institution to  
12 which the report described by Subsection (a) is made as necessary to  
13 conduct an investigation of the report;

14            (B) a law enforcement officer as necessary to  
15 conduct a criminal investigation of the report described by  
16 Subsection (a); or

17            (C) a health care provider in an emergency  
18 situation, as determined necessary by the institution.

# HB 1735: New Training

Sec. 51.288. TRAUMA-INFORMED INVESTIGATION TRAINING. Each peace officer employed by a postsecondary educational institution shall complete training on trauma-informed investigation into allegations of sexual harassment, sexual assault, dating violence, and stalking.

Sec. 51.289. MEMORANDA OF UNDERSTANDING REQUIRED. To facilitate effective communication and coordination regarding allegations of sexual harassment, sexual assault, dating violence, and stalking at the institution, a postsecondary educational institution shall enter into a memorandum of understanding with one or more:

- (1) local law enforcement agencies;
- (2) sexual harassment, sexual assault, dating violence, or stalking advocacy groups; and
- (3) hospitals or other medical resource providers.

# HB 1735: Enforcement

Sec. 51.292. COMPLIANCE. (a) If the coordinating board determines that an institution of higher education is not in substantial compliance with this subchapter, the coordinating board shall report that determination to the legislature for consideration of whether to reduce the allocation of state funding to the institution for the following academic year.

(b) If the coordinating board determines that a private or independent institution of higher education is not in substantial compliance with this subchapter, the coordinating board may assess an administrative penalty against the institution in an amount not to exceed the amount of funding received by students enrolled at the institution from tuition equalization grants under Subchapter F, Chapter 61, for the preceding academic year or \$2 million, whichever is greater. In determining the amount of the penalty, the coordinating board shall consider the nature of the violation and the number of students enrolled at the institution.

# SB 212: Key Points

1. Takes effect September 1, 2019 (except criminal sanctions connected to mandatory reporting requirement which takes effect September 1, 2020)
2. Broad mandatory reporting obligation for all employees
3. Mandatory reporting obligation for Title IX personnel
4. Civil litigation immunities
5. More board involvement
6. Confidentiality

# SB 212: Mandatory Reporting

Sec. 51.252. REPORTING REQUIRED FOR CERTAIN INCIDENTS.

(a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.

# SB 212: Mandatory Reporting

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Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

(a) A person commits an offense if the person:

(1) is required to make a report under Section 51.252 and knowingly fails to make the report; or

(2) with the intent to harm or deceive, knowingly makes a report under Section 51.252 that is false.

(b) An offense under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.

(c) A postsecondary educational institution shall terminate the employment of an employee whom the institution determines in accordance with the institution's disciplinary procedure to have committed an offense under Subsection (a).

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# SB 212: New Immunities

Sec. 51.254. IMMUNITIES. (a) A person acting in good faith who reports or assists in the investigation of a report of an incident described by Section 51.252(a) or who testifies or otherwise participates in a disciplinary process or judicial proceeding arising from a report of such an incident:

(1) is immune from civil liability, and from criminal liability for offenses punishable by fine only, that might otherwise be incurred or imposed as a result of those actions; and

(2) may not be subjected to any disciplinary action by the postsecondary educational institution at which the person is enrolled or employed for any violation by the person of the institution's code of conduct reasonably related to the incident for which suspension or expulsion from the institution is not a possible punishment.

(b) Subsection (a) does not apply to a person who perpetrates or assists in the perpetration of the incident reported under Section 51.252.

Sec. 51.253. ADMINISTRATIVE REPORTING REQUIREMENTS.

(a) Not less than once every three months, the Title IX coordinator of a postsecondary educational institution shall submit to the institution's chief executive officer a written report on the reports received under Section 51.252, including information regarding:

- (1) the investigation of those reports;
- (2) the disposition, if any, of any disciplinary processes arising from those reports; and
- (3) the reports for which the institution determined not to initiate a disciplinary process, if any.

(b) The Title IX coordinator or deputy Title IX coordinator of a postsecondary educational institution shall immediately report to the institution's chief executive officer an incident reported to the coordinator under Section 51.252 if the coordinator has cause to believe that the safety of any person is in imminent danger as a result of the incident.

(c) Subject to Subsection (d), at least once during each fall or spring semester, the chief executive officer of a postsecondary educational institution shall submit to the institution's governing body and post on the institution's Internet website a report concerning the reports received under Section 51.252. The report:

# SB 212: Confidentiality

12           Sec. 51.256. CONFIDENTIALITY. (a) Unless waived in  
13 writing by the alleged victim, the identity of an alleged victim of  
14 an incident reported under Section 51.252:

15                   (1) is confidential and not subject to disclosure  
16 under Chapter 552, Government Code; and

17                   (2) may be disclosed only to:

18                           (A) persons employed by or under contract with  
19 the postsecondary educational institution to which the report is  
20 made who are necessary to conduct an investigation of the report or  
21 any related hearings;

22                           (B) a law enforcement officer as necessary to  
23 conduct a criminal investigation of the report;

24                           (C) the person or persons alleged to have  
25 perpetrated the incident, to the extent required by other law; or

26                           (D) potential witnesses to the incident as  
27 necessary to conduct an investigation of the report.

# Transcript Notation

## HB 449

Sec. 51.9364. CERTAIN NOTATIONS REQUIRED ON STUDENT TRANSCRIPTS. (a) In this section, "postsecondary educational institution" means an institution of higher education or a private or independent institution of higher education, as those terms are defined by Section 61.003.

(b) If a student is ineligible to reenroll in a postsecondary educational institution for a reason other than an academic or financial reason, the institution shall include on the student's transcript a notation stating that the student is ineligible to reenroll in the institution for a reason other than an academic or financial reason.

# Civil Liability for Reporting Sexual Misconduct

## HB 4345

### Sec. 84.0066. LIABILITY FOR DISCLOSING SEXUAL MISCONDUCT.

(a) A charitable organization, or an employee or volunteer of a charitable organization, acting in good faith is immune from civil liability for any act to disclose to an individual's current or prospective employer information reasonably believed to be true about allegations that the individual, while employed by or serving as a volunteer of the charitable organization:

- (1) engaged in sexual misconduct;
- (2) sexually abused another individual;
- (3) sexually harassed another individual; or
- (4) otherwise committed an offense under Chapter 21 or

43, Penal Code.

(b) An individual is not immune under this section from civil or criminal liability for:

(1) disclosing the individual's own conduct that constitutes:

- (A) sexual misconduct;
- (B) sexual abuse of another individual;
- (C) sexual harassment of another individual; or
- (D) an offense under Chapter 21 or 43, Penal

Code; or

(2) acting in bad faith or with a malicious purpose in making a disclosure described by Subsection (a).

# Civil Liability for Reporting Sexual Misconduct

## HB 3809

1

AN ACT

2 relating to the limitations period for personal injury claims that  
3 arise from certain offenses involving child sexual abuse.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 16.0045(a), Civil Practice and Remedies  
6 Code, is amended to read as follows:

7 (a) A person must bring suit for personal injury not later  
8 than 30 [~~15~~] years after the day the cause of action accrues if the  
9 injury arises as a result of conduct that violates:

10 (1) Section 22.011(a)(2), Penal Code (sexual assault  
11 of a child);

12 (2) Section 22.021(a)(1)(B), Penal Code (aggravated  
13 sexual assault of a child);

14 (3) Section 21.02, Penal Code (continuous sexual abuse  
15 of young child or children);

# Hazing: Criminal Liability for Failure to Report

A person commits a **Class B Misdemeanor** if the person:

1. engages in hazing;
2. solicits, encourages, directs, aids, or attempts to aid another in engaging in hazing;
3. recklessly permits hazing to occur; or
4. has **firsthand knowledge** of the **planning of a specific hazing incident** involving a student in an educational institution, **or** has firsthand knowledge that **a specific hazing incident has occurred**, and **knowingly fails to report** that knowledge in writing to the dean of students or other appropriate official of the institution.

Tex. Educ. Code § 37.152

# SB 38: Updated Definition of Hazing

“Hazing” means “any **intentional, knowing, or reckless** act, occurring **on or off the campus** of an educational institution, by one person alone or acting with others, directed against a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining **membership in an organization** if the act:

- is “any type of physical brutality”;
- involves any activity that “subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student”;
- involves criminal activity;
- involves “coercing” a student to consume drugs or alcohol

# SB 38: Implementation and Effective Date

- Effective September 1, 2019
- Not later than 14<sup>th</sup> day before the first class day of each fall or spring semester, must provide students with:
  - Summary of the Hazing Law
  - Copy of or link to a “report on hazing committed on or off campus by an organization”
  - Also must give notice of the report in orientation

# Hazing: Contents of Report to Students

9                   (1) must include information regarding each  
0 disciplinary action taken by the institution against an  
1 organization for hazing, and each conviction of hazing under  
2 Section 37.153 by an organization, during the three years preceding  
3 the date on which the report is issued or updated, including:

4                   (A) the name of the organization disciplined or  
5 convicted;

6                   (B) the date on which the incident occurred or  
7 the citation was issued, if applicable;

8                   (C) the date on which the institution's  
9 investigation into the incident, if any, was initiated;

0                   (D) a general description of:

1                   (i) the incident;

2                   (ii) the violations of the institution's  
3 code of conduct or the criminal charges, as applicable;

4                   (iii) the findings of the institution or  
5 court; and

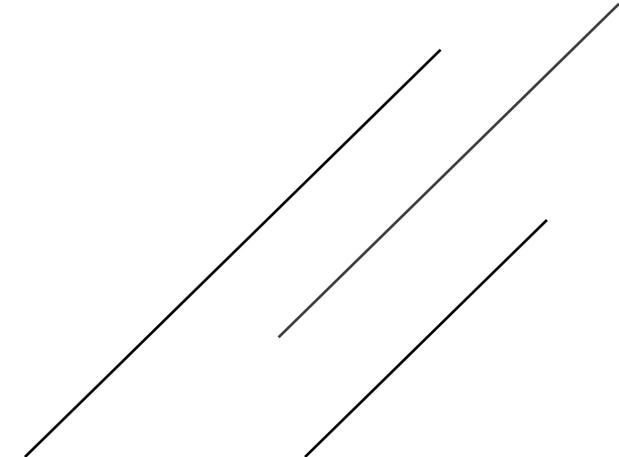
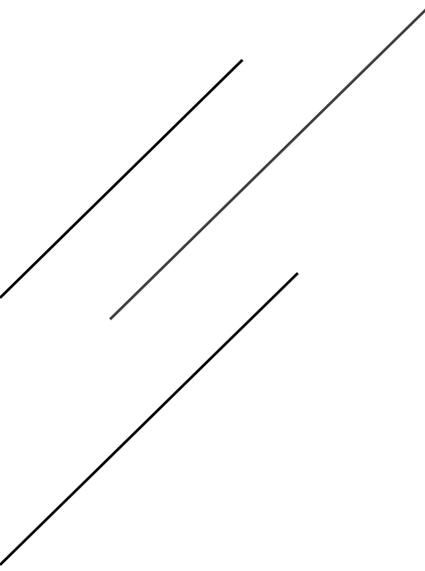
6                   (iv) any sanctions imposed by the  
7 institution, or any fines imposed by the court, on the

1 organization; and

2 (E) the date on which the institution's  
3 disciplinary process was resolved or on which the conviction became  
4 final;

5 (2) must be updated to include information regarding  
6 each disciplinary process or conviction not later than the 30th day  
7 after the date on which the disciplinary process is resolved or the  
8 conviction becomes final, as applicable; and

9 (3) may not include personally identifiable student  
10 information and must comply with the Family Educational Rights and  
11 Privacy Act of 1974 (20 U.S.C. Section 1232g).



**HUSCH BLACKWELL**

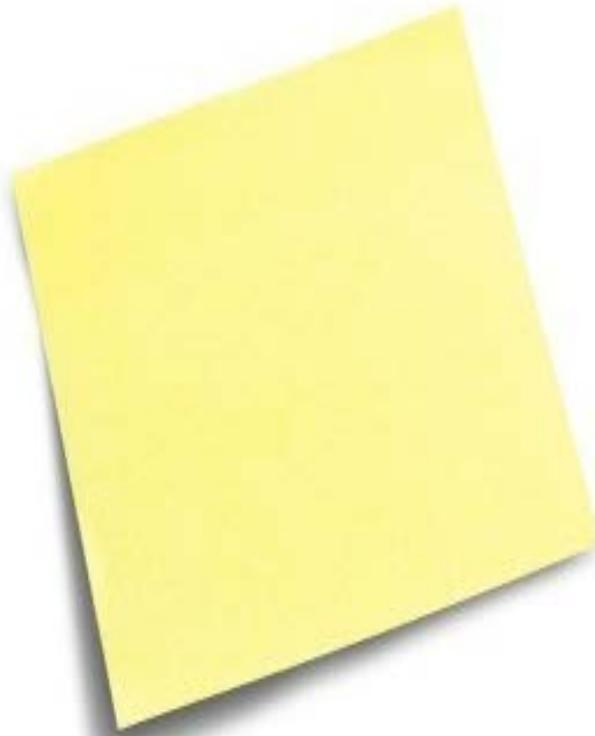


**HUSCH BLACKWELL**

**Planning  
Investigations &  
Conducting  
Interviews**

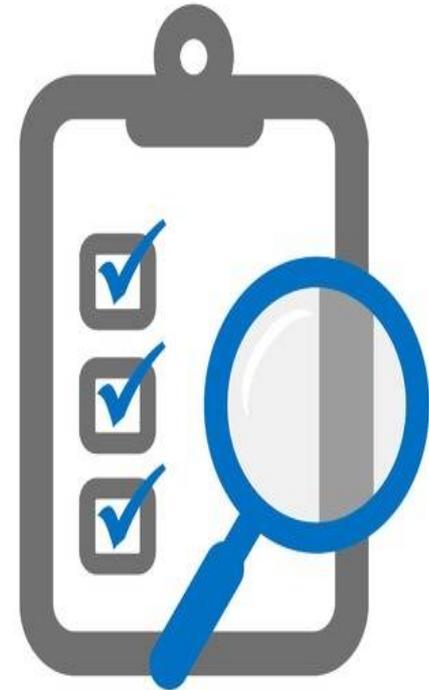
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# What Do You Want Us To Cover?



# Preliminary Considerations

- Evidence
- Interim Measures
- Special intake concerns for crimes
  - VAWA statement of rights and options
  - Clery Act Obligations
  - Minors involved?
  - Threat Assessment/ BIT/Other safety concerns?



# Preparing for an Investigation

## Four Critical Planning Questions:

1. What is the relevant policy language (*i.e.*, critical issues)?
2. Where is there agreement and disagreement?
3. Where is the evidence? (special emphasis: social media & video)
4. How long will the evidence be there?

## Investigative Plan

Complainant Name:

Respondent Name:

Date Report Received:

Action	Planned Date	Actual Date and Reason for Delay
Complainant Interview		
Respondent Interview		
Primary Witness List/Dates of Interviews		



# Prior to Initiating Investigatory Interviews

- Interim guidance: “Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school **should** provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, **the precise conduct allegedly constituting the potential violation**, and the date and location of the alleged incident.”
- “Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.”

# Four Boring Questions I Ask Before Every Interview

1. Have I adequately prepared (and what does that entail)? \*\*\* I am gathering and reviewing “hard evidence” before any interviews (if possible)
2. Am I doing this in an appropriate location (and how can I make witness most comfortable)?
3. Have I given myself adequate time?
4. What is my process for memorializing witness statements?



# Power of 1<sup>st</sup> Impressions – Thin Slicing

- People quickly reach “macro” conclusions (pleasant, kind, hostile, creepy, competent) based on “micro” traits (smiling, eye contact, open-handed gestures, fidgeting, stiff posture, facing another direction)
- What is macro impression we are trying to communicate and what are nonverbal micro cues that can get us there?

## Acting on impulse

Ever felt that people are a bit quick to judge? That's because we are. Research shows we make up our minds about someone in a matter of seconds - and what's more, we're surprisingly good at it. Rosie Ifould explores the consequences of our snap decision-making



📍 Finding out you share the same name can create a sense of affection Photograph: Guardian

# Forensically-Sound Interview



1. Rapport-building phase
2. Substantive phase
3. Closure phase

# What topics do you discuss to build rapport?

Start the presentation to see live content. Still no live content? Install the app or get help at [PollEv.com/app](https://PollEv.com/app)

# Preliminary Statements With C & R

1. Introduce myself and, more importantly, my role
2. Thank for reporting (for complainant) and acknowledge difficulty of conversation
3. Provide overview of investigation
4. Discuss available resources with both parties
5. Explain process and prohibition on retaliation (\*\*\*\*)
6. Identify and address questions and concerns
7. Explain recording or other mechanism to keep record
8. Discuss process for supplementing
9. Identify any impediments to receiving accurate account of what happened
10. Stress importance of telling truth
11. Explain what to do if there is any confusion about questions

# General Questioning Guidelines

## Open-ended/close-ended questions:

- Open-ended questions will generate more information while closed-ended questions will clarify specifics.
- When possible, start with open-ended questions (What happened?) rather than close-ended (“Did you go to the bar?”).
- Open-ended questions will allow the person to answer as long as he or she desires, possibly yielding more information than requested. (Where would you like to begin?) (What are you able to tell me about your experience?)

# General Questioning Guidelines

- Credibility: If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the student's response to your concern (E.g., "Help me understand . . . ")
- Ask the difficult but relevant questions: We want to give both parties an opportunity to address your concerns in the context of the interview and not after the fact

# General Questioning Guidelines

- Seek other evidence: documents, physical evidence, videos, texts, Facebook posts, other witnesses, etc.
- Generally speaking, save tough, close-ended questions for the end
- “Anything else?”

\*\*\*\* THERE ALMOST ALWAYS NEEDS TO BE\*\*\*\* FOLLOW-UP INTERVIEWS WITH COMPLAINANTS & RESPONDENTS

# How do you close an interview?

Start the presentation to see live content. Still no live content? Install the app or get help at [PollEv.com/app](https://PollEv.com/app)

# Memorializing Witness Statements

- Recording – ensures accuracy, allows you to concentrate on conversation, logistically simpler, enhances quality (?), allows for meaningful feedback
- If being done in a statement format:
  - A. Convey all information relayed
  - B. Use quotes when appropriate (significant statements, jargon)
  - C. Allow parties opportunity to review but not make substantive revisions without notations
  - D. Consider “multiple witnesses” to statement

# Exercise: Mock Interview



# Documenting Attempts To Obtain Relevant Information and Witnesses

Two challenges here:

(1) We don't have subpoena power

(2) "They ignored evidence" is a common complaint

- Identify relevant information and witnesses in our investigation plan
- Ask for it in interviews
- Meticulously document efforts to obtain

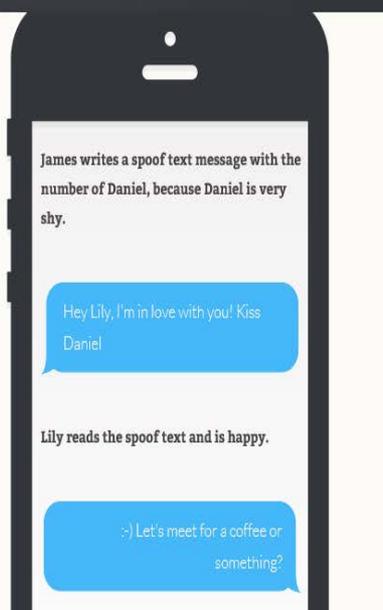
# Text Messages Exercise

- You are investigating a case involving the alleged violation of a no-contact order
- Complainant prints out some text messages but not all
- Respondent deleted contact information for Complainant and all text messages. Says there is additional context for Complainant's text messages.
- How do you handle?

# SPOOF TEXT MESSAGES

FALSIFY SENDER NUMBERS OF  
TEXTS ANONYM AND EASY!

GET STARTED »



After the no-contact order was imposed, Doe deleted Roe’s contact – including the “hundreds of text messages that they had sent to one another,” Simon wrote:

Jane took a different tack. She decided to retain all of the text messages, and candidly this gave her the upper hand because it enabled her to control what texts would be produced and considered in the administrative process. ...

Jane ... provided [investigator Lynn] Kalamaros with some, but not all, of the text exchanges between the two. The ones she shared with Kalamaros placed John in a very bad light and without context. Kalamaros, for example, had no idea that Jane had invited John to Champaign two weeks earlier, that they were having sleepovers and meeting up for “naps,” or that Jane expressed her love for John in no uncertain terms.

# Some Thoughts on Text Messages

1. Can be powerful evidence in these cases, but beware.
2. Be skeptical of print outs – **ask to see originals for full context**
3. **Corroborate with opposing party**
4. Request access or full context
5. Is there any process where complete messages can be provided via subpoena?

# Working with Reluctant Witnesses

- There will be cases where complainants are not comfortable with proceeding
  - Especially true in dating violence and stalking cases
  - Same is true for witnesses
1. Identify concerns and be realistic about whether we can ameliorate them
  2. Give space and time
  3. Are informal means appropriate for resolution?
  4. If confidentiality wants to be maintained, assess and **document** whether you can honor request
  5. For witnesses, is discipline an option?

# Reluctant Witness Exercise

- Are you comfortable with the way the Title IX Coordinator handled this?
- Concerns?
- What do you think?

# Boundaries with Advisors (Especially Attorneys)



- Why is this important? Follow policy and equity?
- How do we manage attorneys who will not be quiet?
- Empowered to pull the plug.

# Some Difficult Practical Questions

- How do I deal with question of “do you believe me?”
- How do I deal with the interview that turns hostile?
- What do I tell witnesses (especially now) about confidentiality?
- How do I deal with questions about timing?
- Can I record this meeting?
- Will I be able to review your notes? Report?



## Trauma and the Brain



mediaco-op

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# Trauma-Informed Investigations

YouTube

9:11 / 1:30:18

"The Neurobiology of Trauma" by Dr. Rebecca Campbell

AquinasCollegeGR

Subscribe

0 070

A screenshot of a YouTube video player. The video shows a woman with dark hair, wearing a dark top and a necklace, speaking at a wooden podium. The video player interface includes a search bar at the top, a play button, a progress bar showing 9:11 / 1:30:18, and a subscribe button for the channel 'AquinasCollegeGR'.



## LSU kicker Colby Delahoussaye on final moments before friends' fatal crash

Glenn Guilbeau, USA TODAY Network 7:18 p.m. EDT August 18, 2016



(Photo: John Raoux, AP)

BATON ROUGE — Snapshots and flashes are all LSU kicker Colby Delahoussaye remembers from just before and just after the car accident that killed two of his friends last month on rural Beaver Lake Road between Wales and Merton, Wis.

The wreck on July 23 killed former Michigan State punter Mike Sadler of Grand Rapids, Mich., who was driving, and senior Nebraska punter Sam Foltz of Grand Island, Neb., who was in the passenger seat.

Delahoussaye, an LSU senior from New Iberia, La., happened to sit in the two-door Mercedes coupe's back seat, an arbitrary fact that saved his life. That and the burning sensation he felt on his upper left leg after impact.

- “We were talking and all joking around. After we got in the car, Mike started playing some Justin Bieber, and me and Sam kind of looked at each other. And Mike said, ‘I hope you guys don’t mind. His new album (Purpose) is awesome.’ That’s what Mike told us. We were just having fun. Mike was always a humorous guy – just smiling, having a good time. And I remember that it was a really dark road, a back road.”
- “There were no lights or anything. I remember, on the GPS, I could see a curve coming up. But as soon as I told Mike, I said, ‘Hey, Mike, there’s a curve,’ I mean, as soon as I said that, the curve was right there. And you couldn’t see anything. The only thing you could see is what the headlights showed you because there were no lights around. Next thing I remember is he tried to turn, but it was raining, the roads were wet, and I remember us going down the hill. I remember seeing some trees and all that.”
- “The next thing I remember — I remember my leg burning, And I remember waking up, and I was hanging upside down. I had my seatbelt on. The car was upside down. I remember seeing the fire. I remember trying to get out of my seatbelt.”
- “I don’t remember how I got out of my seatbelt. I don’t even remember how I got out of the car.”
- “I remember being on my hands and knees in the mud in the woods, and running up and calling 911,” he said. “And my phone was shattered. I don’t know how I called on that either. But God was definitely right there with me because there’s no explanation why I’m here talking with you guys right now. Whenever people talk of miracles, that’s it. There are miracles. That was a 100 percent miracle. I have no idea where my phone was before I called.”

# What Being Trauma-Informed Does Not Mean

## The Bad Science Behind Campus Response to Sexual Assault

Assertions about how trauma physiologically impedes the ability to resist or coherently remember assault have greatly undermined defense against assault allegations. But science offers little support for these claims.

EMILY YOFFE | SEP 8, 2017 | EDUCATION

- If someone cannot recall critical details, that does not necessarily mean they must have experienced trauma.
- If someone acts in an inexplicable way, that does not necessarily mean they must have experienced trauma.
- **Being trauma informed simply means that we don't immediately jump to "liar" when someone cannot recall all critical details or acts in an atypical fashion.**

# Forensic Experiential Trauma Interview



100 Words on FETI



USACIDC PAO

Subscribe 78

2,776 views

## The Forensic Experiential Trauma Interview (FETI)

*By Russell W. Strand*

*United States Army Military Police School*

Traumatized individuals often undergo a process many professionals and victims do not commonly understand. Many professionals inside and outside law enforcement have been trained to believe when an individual experiences an event, to include a trauma event, the cognitive (prefrontal cortex) brain usually records the vast majority of the event including the who, what, where, why, when, and how, and peripheral vs. central information. This approach often ignores the role of bottom-up attention of the more primitive portion of the brain during a highly stressful or traumatic event. Therefore, when the

# FETI (In A Nutshell)

- What are you able to tell me about what happened?
- Get out of the way and let the person tell the story.
- Reliance on senses to try to recover details.
- **THE KICKER:** we can (and should use) this technique with both the complainant and the respondent.



**QUESTIONS?**



**HUSCH BLACKWELL**

**Best Practices for  
Resolving Cases  
Informally**

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Title IX & Restorative Justice



# Life Anew Restorative Justice

CREATING AN ATMOSPHERE FOR LIFE CHANGE



## Sherwynn Patton - Program Director

Sherwynn began to look at the deteriorating families, rising drop out rates, increase in domestic violence and high recidivism rates within the community and began to develop a God given vision for a community collaborative action plan to find solutions for the most pronounced problems our community faces. Sherwynn has also served as the Missions Pastor at Greater Mt. Zion Baptist Church where he developed programs to address poverty, teen pregnancy, fatherlessness and Economic Empowerment.

# Discussion Overview

- What is informal resolution and why do we hardly ever do it?
- What are our obligations when administering an informal resolution program?
- What is Restorative Justice and why should we use it in Title IX cases?
- What are some options for incorporating RJ into institutional response to sexual misconduct?
- Legal Considerations

# Does your institution have an informal resolutions procedure?

Yes **A**

No **B**

Maybe? **C**

I'm not sure. **D**

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**REVISED SEXUAL HARASSMENT GUIDANCE:  
HARASSMENT OF STUDENTS  
BY SCHOOL EMPLOYEES, OTHER STUDENTS,  
OR THIRD PARTIES**

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**TITLE IX**



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January 2001

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Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.<sup>109</sup> OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint.

# Archived Information



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Grievance procedures generally **may include voluntary informal mechanisms** (e.g., mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. **Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.** OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

# TIME

## Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution

- “I am deeply worried that allowing mediation as a resolution to all forms of sexual violence at schools’ discretion will result in schools pressuring survivors to participate.”
- “Survivors of sexual violence should not be asked to compromise, self-reflect or reconcile relationships with someone that assaulted them.”
- “[M]ediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what is really is: a violent abuse of power.”





UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

**INFORMAL RESOLUTIONS OF COMPLAINTS**

Question 7:

After a Title IX complaint has been opened for investigation, may a school facilitate an informal resolution of the complaint?

Answer:

If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.



# Proposed Regulations

“[A]t any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides to the parties a written notice disclosing—

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

The recipient must also obtain the parties’ voluntary, written consent to the informal resolution process.”

# Informal Resolution: General Best Practices

- **Clear policies**, e.g, when can informal resolution agreement be revoked
- **Notice** (required in 2018 NPRM)
- **Informed, Voluntary & Written Consent**
- **Documentation**, including memorializing any agreements by the parties before, during, or at the conclusion of an informal resolution process and consequences for failure to abide by agreement terms
- **Investment**: appropriate resources, including training for facilitators

# Written Notice of Allegations

- Identity of parties involved (if known)
- Specific section of university's policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

# Background Information on Informal Resolution Process

Examples of information you may want to provide to the parties before embarking on informal resolution:

- What informal resolution is and the goal of the process;
- Whether and when a party can terminate the informal process (\*\*and/or criminal or civil suits);
- Whether information shared can be used to pursue formal resolution under university policy;
- Whether informal resolution can result in transcript notation or disciplinary record;
- How agreements reached as part of informal resolution process are executed and enforced

# Informal Resolution is not for all cases.

Factors to consider:

- Whether the parties' agreement to proceed with informal resolution is truly voluntary;
- Whether the person alleged to have caused the harm is participating in good faith;
- The nature of the alleged offense;
- Whether there is an ongoing threat of harm or safety to the campus community;
- Whether alleged respondent is a “repeat offender”

# Legal Considerations

- Voluntary Consent
- ED Regulations (disclosure/notice)
- Implications of Potential or Concurrent Legal Proceedings
  - MOU with local prosecutor?  
[HB 1735 / TEC 51.289(1)]
  - Waiver?
  - Confidentiality Agreement?
  - State privilege law?

# Have you heard of restorative justice?

Yes

No

Maybe?

# What is Restorative Justice?

“Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

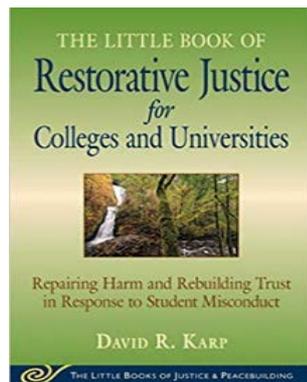
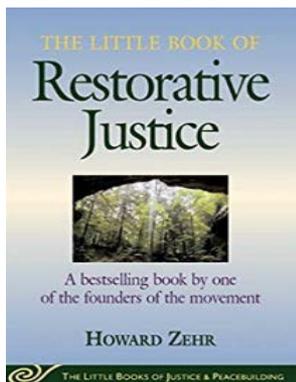
-Howard Zehr

## Relationship Building Tool:

Restorative Justice helps to

- deconstruct perceived power dynamics;
- provide process for building healthy relationships;
- teach/promote healthy values
- reinforces the need for boundaries; and
- provide social and emotional development.

Establishing these elements may prevent future sexual assaults or re-traumatizing someone who has been sexually assaulted.



# Where does RJ come from?



\*Adapted from Draper, Karp, and Petrowski, "Restorative Justice and Title IX Informal Resolutions, 2019 NACUA Annual Conference

# Mediation vs. Restorative Justice

- Empowered Participants
- Trained Facilitators
- Shuttle Negotiation
- Use of the word “mediation”

## Mediation

- No guided or structured preparation
- Immediate Parties only
- Shared responsibility/no obligation to accept responsibility
- Solution: Compromise
- Focus on Facts/Evidence

## Restorative Justice

- Substantial Preparation
- Community & Institutional Participation
- Acceptance of Responsibility
- Trauma-informed safeguards
- Focus on Repairing Relationships & Restoring Trust

# Concerns re RJ and Sexual Misconduct

- “Get out of jail free” concept
- Punishment disproportionate to crime
- Admitting Harm vs. Admitting Guilt
- Criminal Justice Implications
- Lack of investment and training for RJ/IR programs
- (Legitimate) Concerns about coercing survivors

# RJ as a Response to Campus Sexual Misconduct: Survivors

Traditional formal process can often be incompatible with needs of survivors:

- Long investigation and decision process
- Potential for re-traumatization
- Confrontation and Cross-examination\*
- Reluctance to expose Respondent to severe disciplinary sanctions
- Concerns about confidentiality, maintaining social relationships, etc.

# RJ as a Response to Campus Sexual Misconduct: Institution

RJ serves institutional goals of promoting safety and furthering educational objectives:

- **Provide opportunities for more students to come forward**
- More efficient use of resources, diverting away from costly Title IX investigations

# RJ as a Response to Campus Sexual Misconduct: Respondent

RJ can provide alternative to formal adjudication process that serves survivor/ community interest in accountability and respondent interest in a fair process:

- Non-adversarial
- Creates space for acceptance of responsibility
- Opportunity for education/growth

# Institutional Examples



## Restorative Justice



## Dispute Resolution Services

## SKIDMORE



Promoting Restorative Initiatives for Sexual Misconduct on college campuses



Policies and Guidance Student Accountability Process



**When is restorative justice chosen at Dalhousie instead of taking a formal route?**

Most of our policies that address behavior including the [Sexual Harassment Policy](#) and the Student Code of Conduct provide for informal and formal routes. Restorative justice is an example of an informal route.



**QUESTIONS?**

## Leading Toward Better

At Husch Blackwell, we have built our law firm around one idea: to lead our clients from where they are to where they want to be.



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