

HUSCH BLACKWELL

# Summary of Proposed Title IX Regulations

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# Regulatory Update

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- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments (September 12, 2022?)
- **When effective?**



A weathered street sign for 'MEMORY LANE' is mounted on a black pole. The sign is white with a black border and shows signs of rust and wear. The text 'MEMORY LANE' is written in bold, black, sans-serif capital letters. The sign is attached to the pole with a black metal bracket and four screws. The background is a blurred green hedge and blue sky.

**MEMORY LANE**

# Obama Administration OCR

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- Issued 2011 Dear Colleague Letter
- Ramped up Title IX program compliance reviews
- Created “list of shame”
- Was not deferential
- As a result, schools for first time in Title IX’s history took extraordinary steps to comply and ceased handling cases informally
- Disciplined students begin aggressively challenging institutions -- backlash



## *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.



The rules preserve Education Secretary Betsy DeVos's broad goals in overhauling Title IX. Anna MoneyMaker/The New York Times

EDUCATION

# Biden's Title IX reforms would roll back Trump-era rules, expand victim protections

Updated June 23, 2022 · 2:40 PM ET ⓘ

DUSTIN JONES 





# Overview of Proposed Regulations

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1. Mix of provisions from the 2011 OCR Dear Colleague Letter, the 2020 Title IX regulations (currently in place) and some new provisions.
2. Not a return to 2011 – attempt to balance complainants’ rights and the rights of those who are accused.
3. Modest return to long history of institutional discretion with process (from elimination of virtually all administrative discretion to discretion with guardrails)
4. With discretion comes challenging choices



# Texas Law Reminder

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Institutional policy on sexual harassment, sexual assault, dating violence, and stalking must (1) “be approved by the **institution’s governing board** before final adoption by the institution” and (2) be reviewed at least “each biennium” and, “with approval of the institution’s governing board, revise the policy as necessary.” §51.282(c).



# Coordinator Responsibility Under Proposed Regs

“A recipient must:

(1) Require its Title IX Coordinator to monitor the recipient’s education program or activity for **barriers to reporting information** about conduct that may constitute sex discrimination under Title IX; and

(2) Take steps reasonably calculated to address such barriers.”

**Be sure to document your efforts in this regard.**

# Scope of Proposed Regs Coverage

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- Applies to all claims of sex discrimination
- Explicitly includes as forms of sex discrimination under Title IX: discrimination based on pregnancy, **sexual orientation, gender identity**, sex stereotypes, or sex characteristics (\*this will trigger a challenge)
- Proposed regulations' explicit definition of discrimination on the basis of gender identity: "different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity."
- **Athletics: Stay tuned . . .**

# Hostile Environment

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- Subtly modifies the definition of hostile environment sexual harassment to align with Title VII (and Texas law).
- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity.
- Problematic: No guidance on potential tension between definition and institutional free speech obligations.

# Retaliation: A Broad Definition

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“Retaliation means **intimidation, threats, coercion, or discrimination** against any person **by a student**, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient’s education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX . . . or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part . . . .”

# Retaliation

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- “A recipient must prohibit retaliation in its education program or activity. **When a recipient receives information about conduct that may constitute retaliation,** the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45.”
- “Prohibited retaliation includes but is not limited to:
  - a. Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
  - b. **Peer retaliation.”**

# Question 1

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- What are examples of peer retaliation?
- How will institution assess?

# Jurisdictional Scope

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- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if such harassment contributes to a hostile environment within an educational program or activity.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority."
- Net effect: End of bifurcated processes?

# Reminder: Texas Law On Mandatory Reporting

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- SB 212's employee reporting obligation is triggered when an "employee of a postsecondary educational institution" "**witnesses or receives information**" regarding an incident that "the employee reasonably believes constitutes **sexual harassment, sexual assault, dating violence, or stalking**" which was allegedly committed by or against "a student enrolled at or an employee of the institution at the time of the incident."
- The employee reporting obligation only exists, though, when the employee witnesses or receives information regarding sexual harassment, sexual assault, dating violence, or stalking "in the course and scope of [the employee's] employment."
- If a school determines that an employee failed to satisfy their mandatory requirement, the school would be required to terminate that employee "in accordance with the institution's disciplinary procedure."



# New Broad Mandatory Reporting Requirements

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- “Any employee who is not a confidential employee **and who has authority to institute corrective measures on behalf of the recipient** to notify the Title IX Coordinator when the employee **has information about conduct that may constitute sex discrimination** under Title IX”
- “Any employee who is not a confidential employee **and who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity** to notify the Title IX Coordinator when the employee has information about a **student** being subjected to conduct that **may constitute sex discrimination** under Title IX”

# New Mandatory Reporting Requirements

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- “Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity and has information about an **employee** being subjected to conduct that may constitute sex discrimination under Title IX to either:
  - Notify the Title IX Coordinator when the employee has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX; or
  - Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information”

# New Mandatory Reporting Requirements

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“All other employees who are not confidential employees, if any, to either:

- Notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX; or
- Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.”

# Question 2

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- What are some approaches to reconcile the mandatory reporting obligations in both statutes?
- Will failure to make mandatory IX report result in termination?
- How to memorialize in policy and training?
- What will be impact on “actual knowledge” argument?

# New(ish) Mandatory Training

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**“All employees** must be trained on:

- i. The recipient’s obligation to address sex discrimination in its education program or activity;
- ii. The scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment; and
- iii. All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.”

# New(ish) Mandatory Training

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**“all investigators, decisionmakers, and other persons who are responsible for implementing the recipient’s grievance procedures or have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:**

- i. The recipient’s obligations under § 106.44\*;
- ii. The recipient’s grievance procedures under § 106.45, and if applicable § 106.46;
- iii. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- iv. The meaning and application of the term relevant in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under §106.45, and if applicable § 106.46.”

# New(ish) Mandatory Training

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- “**In addition to the training requirements** in paragraph (d)(1) of this section, **all facilitators of an informal resolution process** under §106.44(k) must be trained on the rules and practices associated with the recipient’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.”
- “In addition to the training requirements in paragraphs (d)(1)-(3) of this section, **the Title IX Coordinator and any designees** under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, § 106.40(b)(3), § 106.44(f), § 106.44(g), the recipient’s recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient’s compliance with Title IX.”

# Recordkeeping

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A recipient must maintain for a period **of at least seven years**:

1. For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.
2. For each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the recipient took to meet its obligations under § 106.44.
3. All materials used to provide training under paragraph (d) of this section. A recipient must make these training materials publicly available on its website.
4. All records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57.



# Pregnancy

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- “A recipient must not discriminate in its education program or activity against any student **based on the student’s current, potential, or past pregnancy or related conditions**. A recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.”
- **Another quasi-reporting obligation:** “A recipient must ensure that **when any employee** is informed of a student’s pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student’s pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified.”

# More on Pregnancy

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Once a student notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must promptly:

- (i) Inform the student, and if applicable the person who notified the Title IX Coordinator, of the recipient's obligations to:
  - (A) Prohibit sex discrimination under this part, including sex-based harassment;
  - (B) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraphs (b)(3)(ii) and (b)(4) of this section;
  - (C) Allow access, on a voluntary basis, to any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section;
  - (D) Allow a voluntary leave of absence under paragraph (b)(3)(iii) of this section; and
  - (E) Ensure the availability of lactation space under paragraph (b)(3)(iv) of this section.

# More on Pregnancy

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- **Allow the student a voluntary leave of absence** from the recipient's education program or activity to cover, **at minimum**, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider. To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses.
- Upon the student's return to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.
- Ensure the availability of a lactation space, **which must be a space other than a bathroom**, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

# Grievance Procedures Overview

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1. Proposed rules would allow educational institutions to use the “single investigator/decisionmaker” model again in many cases. **But should you?**
2. The current Title IX rules require the decisionmaker to be someone other than the investigator and Title IX Coordinator. The proposed rules would jettison that requirement, allowing the decisionmaker to be Title IX Coordinator, the investigator, or all three roles. **But should you?**
3. Another big change relates to hearings. The current rules require higher education institutions to have a hearing with live cross-examination by parties’ advisors for allegations of sexual harassment. The proposed rules would allow colleges and universities to decide whether to offer a hearing unless the law in their jurisdiction requires one. A college or university that does not provide a live hearing must require its decisionmaker to question the parties in one-on-one meetings instead of having live cross-examination at a hearing. **Should you retain hearings?**

# Grievance Procedures Overview

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4. Even if a higher education institution offers a hearing, it is not required to allow live cross-examination by advisors. Instead, institutions can have the decisionmaker question the parties and witnesses at the hearing. And because hearings and live-cross examinations by advisors are not required, higher education institutions would no longer be required to provide an advisor to every party, as mandated by the current rules. Only if a higher education institution chose to provide a hearing and allow cross-examination by advisors would it be required to provide a no-cost advisor to any party that does not have one. **But should you maintain live cross examination from advisors anyway?**

# Grievance Procedures Overview

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5. Finally, whereas the 2020 Title IX rules require appeals to be offered for several reasons, the proposed rules require appeals only for dismissals in higher education non-sex-based harassment cases, and with no guidance for the bases for appeals. For sex-based harassment in postsecondary situations, appeals are required for dismissals and determinations that sex-discrimination occurred, but not for a determination that sex-discrimination did not occur. Like the current rules, the decisionmaker in any appeal must continue to be different from the initial decisionmaker.

# Grievance Process (All Sex Complaints)

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“For purposes of addressing complaints of sex discrimination, a recipient’s prompt and equitable grievance procedures must be in writing and include provisions that incorporate the requirements of this section

1. Treat complainants and respondents equitably;
2. Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;
3. Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient’s grievance procedures for complaints of sex discrimination;

# Grievance Process (All Sex Complaints)

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“For purposes of addressing complaints of sex discrimination, a recipient’s prompt and equitable grievance procedures must be in writing and include provisions that incorporate the requirements of this section

4. Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.
5. Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient’s grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests;
6. Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person’s status as a complainant, respondent, or witness.



# Dismissal of Complaint

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A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:

- i. The recipient is unable to identify the respondent after taking reasonable steps to do so;
- ii. The respondent is not participating in the recipient's education program or activity and is not employed by the recipient (**but beware Texas law**);
- iii. The complainant voluntarily withdraws any or all of the allegations in the complaint and the recipient determines that without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or
- iv. The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX.

# “Sex-based harassment involving student complainants or student respondents”

Everything in general process plus

1. Written notice of allegations.
2. “entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence.”
3. “A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence . . . prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution’s discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing”

# Appeals

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- A postsecondary institution must offer the parties an appeal from a determination that sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:
  - i. Procedural irregularity that would change the determination of whether sex-based harassment occurred in the matter;
  - ii. New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made; and
  - iii. The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome of the matter.
- A postsecondary institution may offer an appeal equally to the parties on additional bases, as long as the additional bases are available to all parties.

# What Now? Things to Start Considering

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1. Continue with detailed notice of allegations?
2. Transparency of evidence obtained?
3. Are we comfortable with one person for everything?
4. At your institution is single investigator/hearing process/something else best approximation of what happened?
5. Detailed explanation of decision?
6. Robust appeal process for all parties?



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# Case Law Update



## Federal judge blocks Education Department's Title IX guidance that protects transgender students

The preliminary injunction essentially ties the department's hands when it comes to protecting transgender students from discrimination in 20 states.



LGBT activists and their supporters rally in support of transgender people on the steps of New York City Hall in New York City, on October 24, 2018. | Drew Angerer/Getty Images



# Cummings v. Premier Rehab Keller

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- Supreme Court held that a plaintiff suing under Title VI (prohibiting race, color, and national origin discrimination), Title IX (prohibiting sex discrimination), the Rehabilitation Act (prohibiting disability discrimination), and the Patient Protection and Affordable Care Act (ACA) may not recover emotional distress damages.
- Court reasoned that the scope of available remedies under these Spending Clause statutes is limited to only those remedies generally available for breach of contract.




# Fairfax County School Board v. Jane Doe



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## High Court Seeks SG's Take On Title IX Harassment Liability

By [Patrick Hoff](#) · May 16, 2022, 7:42 PM EDT ·  [Listen to article](#)

The [U.S. Supreme Court](#) on Monday invited the U.S. solicitor general's office to weigh in on whether the justices should consider a Virginia school board's appeal arguing it's off the hook for an alleged sexual assault on a student because no harassment took place after its investigation.





# Hall v. Millersville, 22 F.4th 397 (3rd Cir. Jan. 11, 2022)

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- Student murdered in her residence hall room by her boyfriend who was not a student
- “The record shows that Millersville knew, and intended, for its Title IX policies to apply to nonstudents. Millersville's 2014 Title IX policy, which was in place while Karlie was enrolled, defined sexual misconduct to include sexual assault and intimate partner/dating violence, and also required that incidents of sexual misconduct be reported to Millersville’s Title IX Coordinator. More importantly, as admitted by Millersville's corporate designee, this policy cover[ed] all areas of University operations, programs, sites, and include[d] the conduct of employees, students, visitors/third parties” To be liable under Title IX, the
- Liability predicated on university having “substantial control over both the harasser and the context in which the known harassment occurs.”



# Brown v. State, 23 F.4th 1173 (9th Cir. Jan. 25, 2022)

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- Plaintiff, a former student at the University of Arizona, brought a complaint under Title IX after she was physically assaulted by Orlando Bradford, her boyfriend who was also a football player at the University, in his private, off-campus residence.
- In asserting deliberate indifference to her risk, plaintiff alleged that the University did not respond adequately to two prior incidents in which officials knew that Bradford had assaulted other women on campus.
- In sustaining summary judgment in favor of the University, the court held that plaintiff's assertions about officials' response to the prior incidents did not establish that the University had control over the context in which her abuse occurred. The majority also rejected the focus in the dissenting opinion on the facts that Bradford's University scholarship paid for his rent and that Bradford needed the approval of a coach to live off campus. The majority held that these facts may be relevant to the University's control of the abuser, but they do not address the separate requirement under Title IX that the University also control the context in which the harassment occurred.

# Tension Between Policy & Speech Rights

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## Professor who wouldn't use trans student's pronouns wins \$400K settlement

Nicholas Meriwether will no longer be required to refer to students at Shawnee State University in Ohio by their preferred pronouns.



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FREE SPEECH

## Eleventh Circuit Strikes Down Univ. of Central Florida's "Discriminatory Harassment" Speech Code

EUGENE VOLOKH | 4.21.2022 6:50 PM

# Modest Uptick in Athletics Cases

Colleges cut sports to save money amid the pandemic. Then came the Title IX lawsuits.

 By Molly Hensley-Clancy

March 25, 2021 at 8:00 a.m. EDT





# Trends

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1. On the whole, feels like courts are starting to rein litigation in (especially complainant litigation)
2. Onslaught of respondent litigation has slowed (Covid, Trump regs?)
3. Pivot to tort?
4. Back to the future?



**HUSCH BLACKWELL**

# Trauma-Informed Approach

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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.



## ATIXA POSITION STATEMENT

### TRAUMA-INFORMED TRAINING AND THE NEUROBIOLOGY OF TRAUMA

#### ABOUT ATIXA

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*Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance and supports our over 3,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 4,000 Title IX Coordinators and more than 10,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit [www.atixa.org](http://www.atixa.org).*

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ATIXA has, at times, issued position statements when we see an unhealthy direction in the field in the hope that our position can offer some level of correction. With this statement, ATIXA wishes to reiterate the value of being trauma-informed in our sexual misconduct interview techniques<sup>1</sup>, but encourages our members and the field to avoid the use of information on the neurobiology of trauma to substitute for evidence.



End Violence Against Women International  
(EVAWI)

## Statement on Trauma- Informed Responses to Sexual Assault

Kimberly A. Lonsway, PhD  
Sergeant Joanne Archambault (Ret.)

With contributions by Jim Hopper, PhD

September 2019



# Trauma-Informed

1. How brains and bodies respond to acutely stressful and traumatic events **as they are happening**
2. How these experiences of extreme stress are **encoded, stored, and potentially retrieved from memory**



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[Nat Neurosci](#). Author manuscript; available in PMC 2016 Mar 31.

PMCID: PMC4816215

Published in final edited form as:

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[Nat Neurosci](#). 2015 Oct; 18(10): 1376–1385.

PMID: [26404712](#)

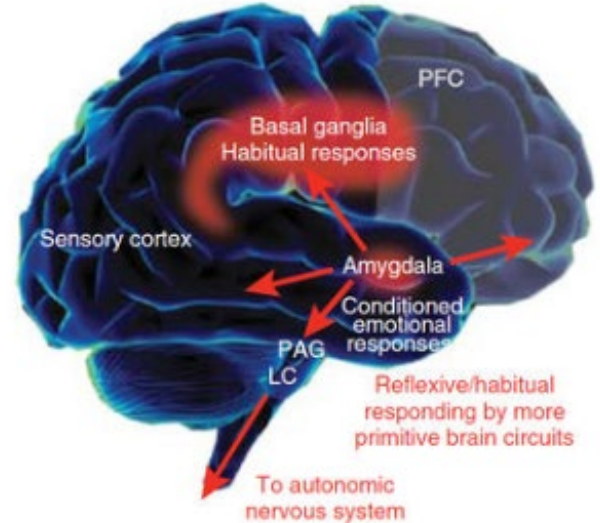
Published online 2015 Sep 25. doi: [10.1038/nn.4087](#)

## Stress weakens prefrontal networks: molecular insults to higher cognition

[Amy F T Arnsten](#)

# Trauma: Shift to Reflexes and Habits

- “Stress tends to promote simple decision-making strategies that depend on **ingrained habits**, at the expense of **more thoughtful, goal-directed actions**”
- “Uncontrollable stress flips the brain from a more 'reflective' state, mediated by the more recently evolved PFC [prefrontal cortex], to a more 'reflexive' state, mediated largely by subcortical structures.”



Stress shifts brain functioning to habits and reflexes. Image from review by the world's leading researcher on the topic (see Arnsten 2015 in references).

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Ashley A 4 days ago

@ 1:07 Did he really say "Get in the car?" after asking what he should do? Wow!



1



REPLY



Larry G 3 months ago

Wait! That was less than 2 feet of water....why did he swim? And did that reporter(out of breath) really "save" the guy? Omg



2



REPLY



Seth B 1 year ago

Face it our American people do NOT have any common since they might be book smart but dumb as a wooden fence post when it comes to common sense. I am talking about you city people ranchers and farmers would never do something like this without a tractor or horse .



2



REPLY

View 3 replies ▾



Aaron Bills aka KillSauce 1 year ago

natural selection was at work... leave him

# Habit Responses

- **Some engage in fighting or fleeing**
- Passive ones (which can avert additional violence or retaliation)
- Tonic immobility -- fear-based state of rigid paralysis (which can render one mute as well)
- Collapsed immobility, a different survival reflex that sends heart rate and blood pressure plummeting. The brain's loss of oxygen brings on faintness or even passing out as the body goes limp. Can happen when there is extreme fear and physical restraint







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## **Fear and the Defense Cascade** Clinical Implications and Management

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Kozłowska, Kasia MBBS, FRANZCP, PhD; Walker, Peter BSc Psych, MPsychol; McLean, Loyola MBBS, FRANZCP, PhD; Carrive, Pascal PhD

Harvard Review of Psychiatry: July/August 2015 - Volume 23 - Issue 4 - p 263–287

doi: 10.1097/HRP.000000000000085

Perspectives

OPEN

8DC

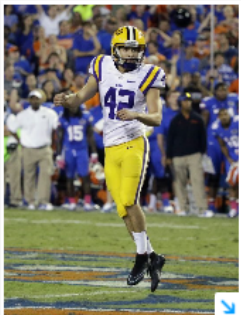
# Memory

- Fragmentary memories – Considerable research shows how stress can enhance memory for details closer to the onset of stress and then impair it for details that come later.
- Many studies have shown that the “central details,” **which had the most attention and significance at the time**, can be strongly encoded and stored, while the “peripheral details” may not get into memory and, even if they do, may fade quickly or be recalled inconsistently
- Encoding sequence problems



## 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.**”

*Review Article*

# **The Temporal Dynamics Model of Emotional Memory Processing: A Synthesis on the Neurobiological Basis of Stress-Induced Amnesia, Flashbulb and Traumatic Memories, and the Yerkes-Dodson Law**

**David M. Diamond,<sup>1,2,3</sup> Adam M. Campbell,<sup>1,2</sup> Collin R. Park,<sup>1,2</sup> Joshua Halonen,<sup>1,2</sup> and Phillip R. Zoladz<sup>1,2</sup>**

<sup>1</sup>*Medical Research Service, VA Hospital, Tampa, FL 33612, USA*

<sup>2</sup>*Department of Psychology, University of South Florida, Tampa, FL 33620, USA*

<sup>3</sup>*Department of Molecular Pharmacology and Physiology, University of South Florida, Tampa, FL 33612, USA*

Received 28 July 2006; Revised 18 December 2006; Accepted 20 December 2006

# The Revolt of the Feminist Law Profs

Jeannie Suk Gersen and the  
fight to save Title IX from itself.

“It was likely, for instance, to promote the practice of so-called ‘trauma-informed’ investigation, which proceeds on the assumption that inconsistent or confused victim recollections reflect the traumatic effects of assault **and are themselves evidence of the truth of the accusation.**”

# 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

“As a result, those adjudicating sexual-assault allegations are told, the absence of verbal or physical resistance, the inability to recall crucial parts of an alleged assault, a changing story—none of these factors should raise questions or doubt about a claim. **Indeed, all of these behaviors can be considered evidence that an assault occurred.**”





Jim Hopper, Ph.D.

Sexual Assault and the  
Brain

# Sexual Assault and Neuroscience: Alarmist Claims vs. Facts

The science is strong, a solid foundation for trainings and fair investigations.

Posted Jan 22, 2018

# 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

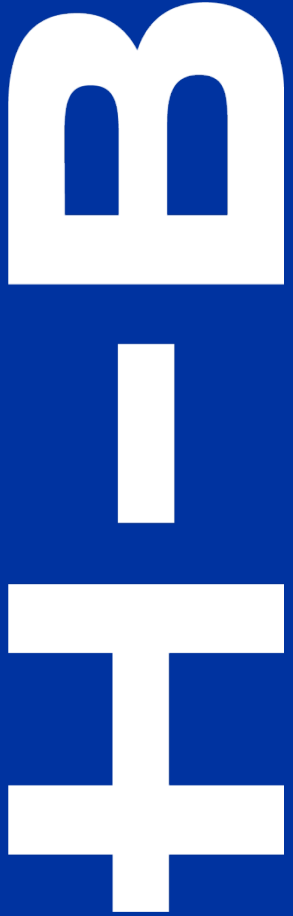
Ever felt that people are a bit quick to judge? That's because we are. Research shows we make up our minds about someone in a matter of seconds – and what's more, we're surprisingly good at it. Rosie Ifould explores the consequences of our snap decision-making



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

# Solid Ground

1. Basic initial interview/question approach with complainants and respondents is the same
2. Interviewing/questioning for clarification
3. This is about how some people respond to trauma
4. Gender-neutral



**HUSCH BLACKWELL**

# **Academic Medical Centers & Health- Related Environments**

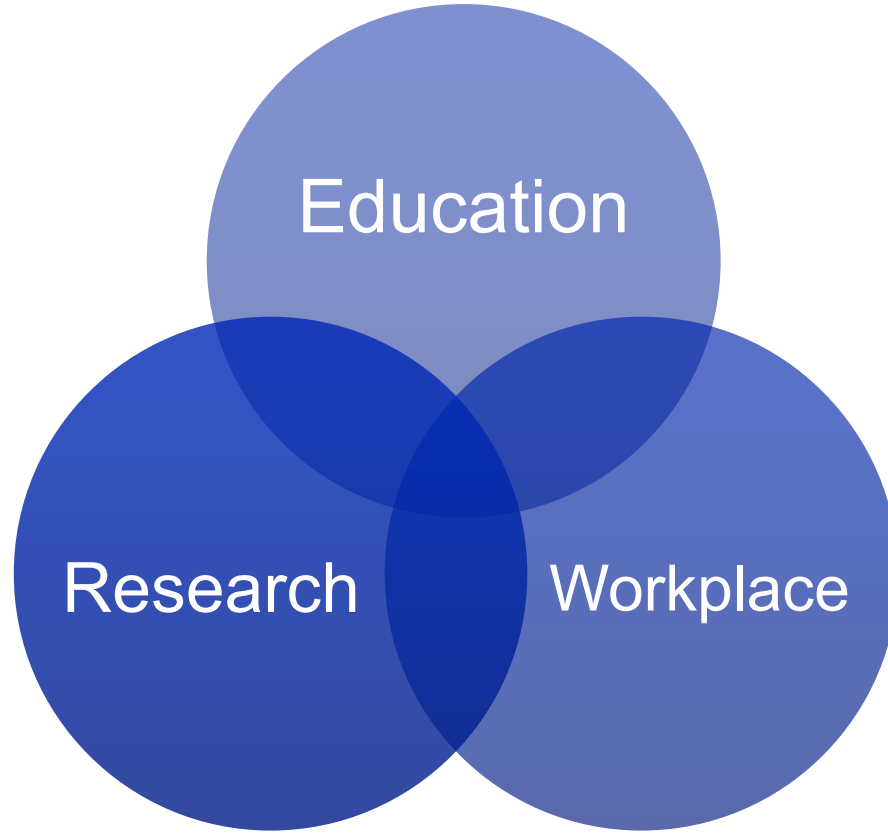




# Regulatory Bodies

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- U.S. Department of Education regulations effective August 2020
  - Apply to recipients of U.S. Department of Education funds
  - Add live hearing & cross-exam requirement
  - Will be amended after 2022 regulations become final
- U.S. Department of Health and Human Services
  - HHS Office for Civil Rights
- National Institute of Health
  - NIH policy/notification requirements





# Application at Academic Medical Centers

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- All educational institutions receiving federal financial assistance:
  - All operations
- Educational programs and activities at federally funded hospitals



# UT Educational programs/ activities

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- All Graduate School programs and activities
- Undergraduate and graduate educational programs and activities
- Post-doctoral scholar and clinical fellow programs and activities
- Medical and nursing rotations, residencies and internships, and academic clinical placements



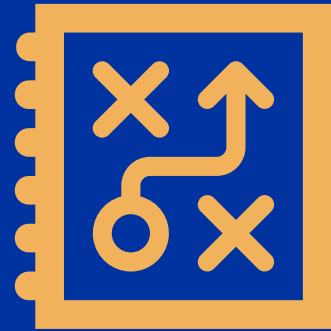
# Research & Employment

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- As educational program/activity
- Granting agencies
  - E.g.:
    - NIH
    - NSF
  - Grant agreements
- Employment related to educational program/activity

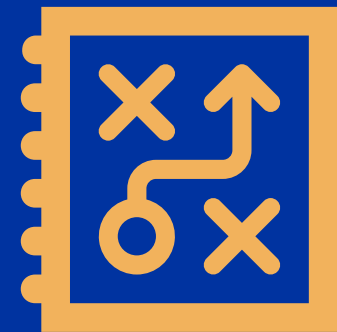


# Example – Education Program or Activity ?



A Graduate School Master's Program student has partnered with a colleague at an outside hospital to complete a thesis research project. The colleague has privileges at a UT AMC. The colleague sexually harasses the student when the two are working in a laboratory at the outside hospital.

# Example – Education Program or Activity ?



Two Post-Doc Scholars are at a conference in another state. One alleges that the other sexually assaulted the other in their conference hotel room.

# Civil Liability

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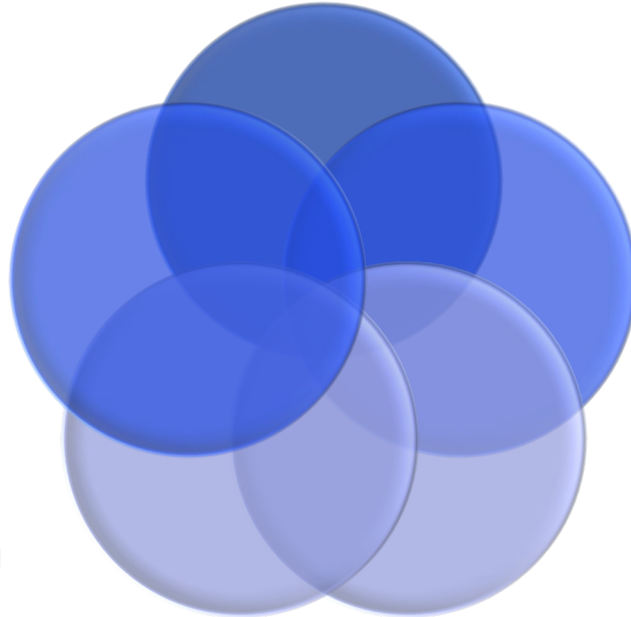
- Title IX
  - Actual knowledge
  - Deliberate indifference
  - Resulting in severe, pervasive, objectively offensive discrimination
- Title VII (workplace)
  - Essentially, failure to act reasonably
    - Exception: Tangible action by supervisor
- Tort Liability (negligent hiring, etc.)

# Policies

## Sexual Harassment in Educational Programs or Activities (Title IX)

Contracts  
(e.g., affiliation agreements,  
funding agreements)

Non-Discrimination and Non-Retaliation Policies



Faculty, staff, and student conduct policies

Personal relationship policies

*Consensual Relationships*  
*Conflicts of Interest*

# How do Title IX and Title VII standards compare?

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

## Title VII Sexual Harassment

Quid pro quo

Sufficiently severe  
or pervasive

## Title IX Sexual Harassment

Any quid pro quo by  
employee

Unwelcome and  
Sufficiently severe  
and pervasive and  
objectively offensive

Any sexual  
assault/DV  
/stalking

# Title VII of the Civil Rights Act of 1964

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- Prohibits discrimination in employment (private and public) based on:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex



# Title VII Sexual Harassment Standard

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## Hostile environment

Unwelcome  
subjectively and  
objectively

“severe OR  
pervasive”

Similar conduct at  
issue under Title IX

*Quid Pro Quo*

Sexual Violence  
(e.g. assault)



# Example of typical “Title VII” process

Complaint to manager, HR,  
ethics line, etc.

HR/manager  
collaborate to provide  
information to parties,  
investigate, and resolve

HR/manager take any  
appropriate corrective  
and preventive action,  
and protect against  
retaliation

# Comparison

## Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

## Title IX Regs Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation

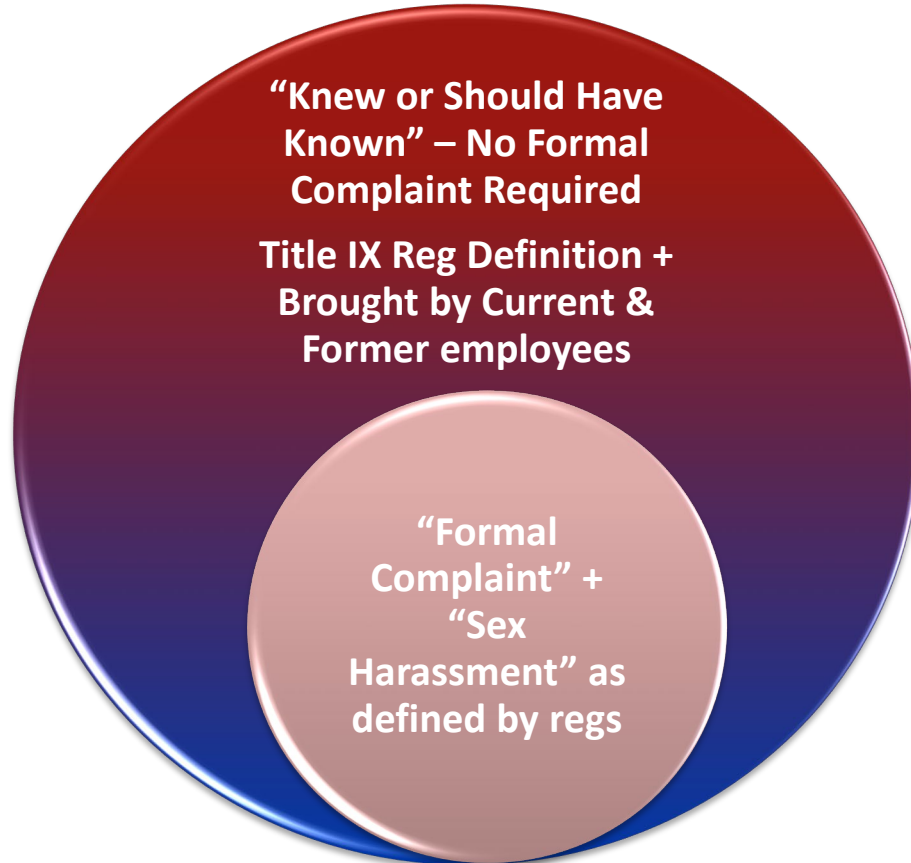


# What triggers an employer's liability for sexual harassment under Title VII?

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- ✓ An employer, its agent, or its supervisor
  - ✓ Knew or should have known
  - ✓ About severe **OR** pervasive sexual harassment
  - ✓ That a reasonable person would consider intimidating, hostile, or abusive
  - ✓ By an employee or non-employee over which it has control and
  - ✓ Failed to take appropriate corrective action
- U.S. Equal Employment Opportunity Commission, *Harassment* (<https://www.eeoc.gov/harassment>)

# What triggers obligations for VII vs. IX?





# Categories

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1. VII obligations but no IX obligations (no need to follow IX policies)
  - Should have known of discrimination but no formal complaint
  - Discrimination does not meet IX definition of SH
  - Complainant no longer employed or a student
2. Twin VII and IX obligations
  - Quid pro quo, “severe and pervasive,” VAWA crimes
  - ***Complainant currently employed or a student***
  - Formal complaint

# Example: Overlapping Policies

- Resident claims Attending Physician Supervisor is subjecting employee to pervasive and severe racial and sex harassment
- Other resident corroborates the claim
- How should institution respond in satisfying obligations under Titles VII and IX?



# Example: *Brock v. Mich. State Univ.* (2022)

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- Two female employees in Neuro Clinic at MSU brought tort claims against MSU after a med student in the clinic allegedly sexually harassed and abused them. The med student had previously been found responsible for harassing another student, pleading guilty to criminal sexual conduct and using a computer to commit a crime. The court dismissed certain claims, but some claims remain pending, including: negligent hiring, retention, and supervision against the COM Dean; and failure to investigate against the clinic supervisor.



# Example: *Castro v. Yale Univ.* (2021)

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- Six physicians brought claims of alleged sex discrimination and retaliation under Title IX alleging that their superior at Yale New Haven Hospital sexually harassed them, and that both the hospital and university ignored their complaints. The Court held that Title IX applies to academic medical centers when certain criteria are met.





# Questions





**HUSCH BLACKWELL**

# Hearings & Sanctioning

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Lessons Learned



# Subjects

Pre-hearing conference

Remote or in-person

Facilitating questions

Managing time

Decision writing

Sanctioning matrix

Challenges





HUSCH BLACKWELL

**Prior Criminal &  
Disciplinary History**

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The New York Times

## He Committed Murder. Then He Graduated From an Elite Law School. Would You Hire Him as Your Attorney?

Give this article





**THE BIG PICTURE IN TWO PICTURES**

# Common App removes School Discipline question on the application



By Emma Steele  
September 30, 2020



## Common App Drops Criminal History Question

Decision reverses one made a year ago to keep the question. Individual colleges may still ask it. Disciplinary records question remains.

By Scott Jaschik // August 13, 2018



The Common Application announced Tuesday that it is dropping the question it has been asking since 2006 about applicants' criminal histories.

Many educators and civil rights activities have been pushing the Common App for years to drop the question. For the organization, Tuesday's announcement is a major shift. In March 2017, after its last review of the issue, the organization **announced that it was keeping the question**. Individual colleges maintain the right to ask the question on their supplements to the Common Application, just as they have had the ability to not consider the information provided to date. But advocates for "banning the box," as the movement to end the question has been known, have said that including or dropping the question from the main application would have a major impact.



# A BYGONE ERA?

70 N.Y.2d 175

518 N.Y.S.2d 608

Jacob EISEMAN, Individually and as Administrator of the Estate of Rhona Eiseman, Deceased, et al.,  
Respondents,

v.

STATE of New York, Appellant.

New York Court of Appeals

July 9, 1987.

“His release and return to society at the age of 33 — presumably with a long life still ahead of him — were mandated by law as well as by public policy, which have as their objectives rehabilitating and reintegrating former inmates in the hope that they will spend their future years productively instead of returning to crime. To this end, the value of education — both as an escape from society's underclass, and as a benefit to the public generally — is apparent.”

A young man with reddish hair, wearing a red football jersey with the number 2, is shown from the waist up. He is holding a brown football with white laces and stripes. He is looking upwards and to the right. The background is a dark brown wall with a diagonal light-colored stripe. The text "Monday Morning Quarterback" is overlaid on the right side of the image in a white, bold, serif font.

# Monday Morning Quarterback

## To ask or not ask?

- Three national surveys of institutional admissions practices, conducted in 2009, 2010, and 2014 by separate research teams, indicate that 60 to 80 percent of private institutions and 55 percent of public institutions require undergraduate applicants to answer criminal history questions as part of the admissions process.
- Unclear stats on prior disciplinary history



**IF EVERYONE ELSE JUMPED  
OFF A CLIFF, WOULD YOU JUMP, TOO?**

# WHAT TO ASK?

- Be specific about what must (and should not) be disclosed
- Time limits?
- Not arrests
- Juvenile records?

A black and white photograph of a person holding a protest sign. The sign is made of cardboard and has the words "WHAT" and "NOW?" written on it in large, bold, hand-drawn letters. The person's hands are visible at the bottom corners of the sign, gripping it. The background is blurred, suggesting an outdoor setting with other people or structures.

WHAT  
NOW?

# CRIMINAL AND DISCIPLINARY HISTORY IN COLLEGE ADMISSIONS

Released: December 17, 2019



[www.aacrao.org](http://www.aacrao.org)

1108 16th Street NW Ste 400  
Washington, DC 20036



U.S. Department of Education

Student Loans

Grants

Laws

## 404 - Page not found

Sorry, the page you requested cannot be found.

Many of the pages on the site moved to new URLs during our recent redesign. If you reached this page by using a bookmark or a link from another site, please search for the updated url using our [Bookmark Search](#) below.

If you arrived at this page by following a link within this site, please help us correct the problem by going to our [Report Technical Issues](#) form and logging the problem.

Otherwise, please ensure that you typed the URL correctly, and note that our server is case-sensitive.

You can also search for the page content by using our [Advanced Search](#) page or contact site administrators via [webmaster@ed.gov](mailto:webmaster@ed.gov) with any further technical questions.

## IF YOU ASK, THEN WHAT?

1. Whatever process you come up, be sure you can (and do) follow it (the curse of assumed duties)
2. Establish forms and process for securing additional information
3. Not for amateurs: Bit team/threat assessment matrix (appropriate training)
4. Does not have to be yes or no/Can we develop risk mitigation plans?
5. Appeal process
6. Periodic review for disparate impact



# NCAA Policy – Where we are going (Expectations)

# NCAA Sexual Violence Policy

The Policy requires member college and university chancellors or presidents, directors of athletics, and campus Title IX coordinators to annually attest that:

1. The athletics department is informed, integrated, and compliant with the following:
  - Institutional policies and processes regarding sexual violence prevention; and
  - Proper adjudication and resolution of sexual violence and interpersonal violence.

# NCAA Sexual Violence Policy

2. Policies and processes are readily available within the department and provided to student-athletes, including:
  - Institutional policies and processes on violence prevention and adjudication; and
  - The name and contact information of the campus Title IX coordinator.
3. All student-athletes, coaches, and staff are educated on sexual violence prevention, intervention, and response each year.

# The New Requirements

4. Collect annual disclosures from all incoming, continuing, and transferring student-athletes related to their conduct that resulted in discipline through a Title IX proceeding or a criminal conviction for sexual, interpersonal, or other acts of violence, and collect the same from transfer student-athletes if a Title IX proceeding related to their conduct is ongoing;
5. Take reasonable steps to confirm whether such student-athletes have been disciplined or criminally convicted of sexual, interpersonal, or other acts of violence; and
6. If recruiting incoming or accepting transfer student-athletes, have a written procedure that directs its staff to gather information from a former institution about any discipline or criminal conviction relating to any sexual, interpersonal, or other act of violence.

# Pregnancy & Parenting



Title IX Issues

## Legal Requirements

- Applicable Laws:
  - Title IX
  - Pregnancy Discrimination Act
  - ADA/Section 504
  - State and local civil rights laws





# Pregnancy Discrimination Act

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Title VII, as amended by the PDA, prohibits *employment* discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth



## ADA / Section 504

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- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.
- Pregnancy itself is not a disability, but complications from pregnancy or childbirth may qualify.



# Title IX Regulations: Gender-Neutral Rules

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A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR § 106.40(a)

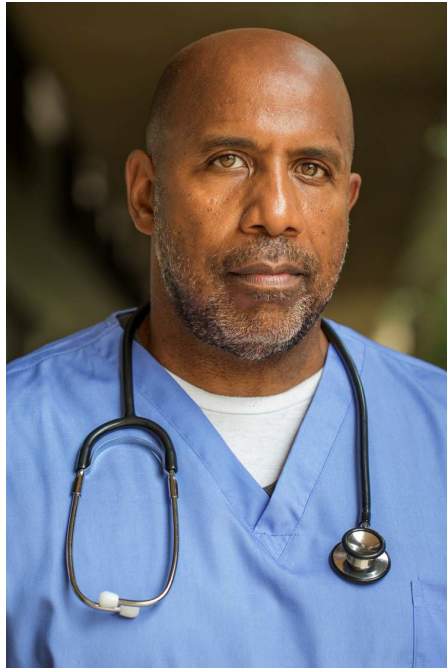
## Title IX Regulations: Equal Participation

A recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 CFR § 106.40(b)(1)



# Title IX Regulations: Medical Certification

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A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

34 CFR § 106.40(b)(2)



## Title IX Regulations: Separate Programs

A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

34 CFR § 106.40(b)(3)



# Title IX Regulations: Temporary Disability Policies

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A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

34 CFR § 106.40(b)(4)



## Title IX Regulations: Leaves of Absence

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

34 CFR § 106.40(b)(5)

# OCR Guidance: Administrative Measures

Schools **MUST**

- Protect students from harassment based on pregnancy or related conditions.
- Possess and distribute a policy against sex discrimination. OCR recommends the policy make clear that sex discrimination covers discrimination against pregnant and parenting students too.



# OCR Guidance: Administrative Measures

## Schools **MUST**

- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parenting.
- Identify at least one employee to carry out Title IX responsibilities.





## OCR Guidance: Day-to-Day

### Schools **MUST**

- Allow pregnant students to continue participating in classes and extracurricular activities.
- Allow pregnant students to choose if they want to participate in special programs or classes for pregnant students. Schools may not pressure students to participate in these types of programs.
- Provide reasonable adjustments such as a larger desk or elevator access.





## OCR Guidance: Day-to-Day

### Schools **MUST**

- Allow pregnant students to return to the same academic and extracurricular status as before medical leave, including the opportunity to make up missed work.
- Ensure that teachers understand the Title IX requirements. Teachers may not prohibit students from submitting work after a deadline missed due to pregnancy or childbirth. Students should be permitted to make up missed participation and attendance credits.



# OCR Guidance: Medical Accommodations



## Schools **MUST**

- Excuse absences due to pregnancy or childbirth for as long as medically necessary.
- Provide pregnant students with the same special services they provides to individuals with temporary medical conditions, including remote instruction, tutoring, and/or independent study.



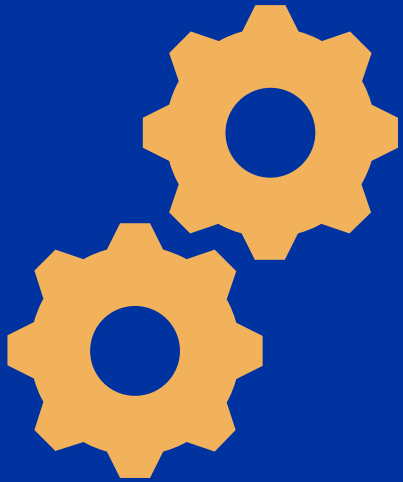
# OCR Guidance: Medical Accommodations

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- Schools may only require pregnant students to submit a doctor's note if the school also requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor.

## Hypothetical



Amy is enrolled in an accelerated program at Husch College of Nursing. Two months into the eight-month program, she notifies the nursing director that she is pregnant and is due in February. The nursing director reminds Amy that the college has a zero-absence policy and if she misses more than two consecutive days of class or clinical, she will be dismissed from the program. When Amy delivers her baby, she misses two days of class, including one pop quiz, and three days of clinical. She receives a zero for the absences in accordance with the college policy, which is applied consistently to all students regardless of the reason for the absence. Amy files a complaint alleging that she should have been allowed to make up the missed quiz and clinicals.



# Salt Lake Community College

## June 2022 OCR Decision

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- A student at SLCC found out she was pregnant after the semester began. She told her professor she was pregnant and struggling with morning sickness, which caused her to miss or be late to the professor's classes.
- The student requested academic adjustments from the professor to allow for additional absences and allow her to turn in assignments late.



# SLCC: Background

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- The professor told the student that she was concerned the student decided to continue with the class and that she had lowered final grades if missed days were excessive. The professor also told her a late submission penalty would apply to late assignments and advised the student to drop the class because “health is more important than a class.”
- The student contacted the Disability Resource Center on her own to seek formal academic adjustments and provided a note from her treating physician. An Advisor spoke with the student and referred the student to the Title IX Coordinator to discuss her adjustments.
- The Title IX Coordinator determined the student’s requested academic adjustments constituted a fundamental alteration to the courses.



## SLCC: OCR Findings

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- The professor's alleged comments encouraging the student to drop the class could constitute pregnancy discrimination and therefore merited a prompt and equitable resolution under Title IX grievance procedures (which SLCC did not conduct).
- The Title IX Coordinator did not create an investigatory file, obtain written statements, take notes of his conversations, or issue a notice of the investigation's outcome to the student.





## SLCC: OCR Findings

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- The Title IX Coordinator did not respond to the student's allegation the professor encouraged her to drop the class because of her pregnancy, which she viewed as discriminatory.
- SLCC did not engage in the interactive process with the student to determine appropriate academic adjustments in light of her pregnancy.



## SLCC: OCR Findings

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- To the extent SLCC determined the student's requested adjustments would have constituted a fundamental alteration, SLCC did not engage in a proper deliberative process in making such determination.
- SLCC did not consider whether the student's pregnancy caused a temporary disability or engage in the interactive process under Section 504.



## SLCC: OCR Findings

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- SLCC's failed to excuse the student's absences and tardies caused by her pregnancy in violation of Title IX.
- SLCC's website does not contain information on how a student may file a complaint alleging pregnancy discrimination, nor does SLCC mention pregnancy discrimination in their Student Code.



# SLCC: Voluntary Resolution Agreement

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- Revise its Nondiscrimination Statement to include reference to actual or potential parental, family, or marital status, including pregnancy and related conditions.
- Revise its grievance procedures to include information regarding students' opportunity to file a grievance based on alleged pregnancy discrimination, including grievances related to different treatment based on pregnancy, exclusion from the College's programs or activities based on pregnancy, or the College's failure to excuse pregnancy-related absences or provide appropriate academic adjustments in the same manner as it provides academic adjustments to students with temporary disabilities.



# SLCC: Voluntary Resolution Agreement

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- The College will provide information on its Title IX and Disability Resource Center webpages that describes the process under which pregnant students can seek academic adjustments, including:
  - the rights of pregnant students under Title IX;
  - how to request academic adjustments, special services, excused absences, or leaves of absence;
  - the process the College follows to determine appropriate academic adjustments and special services;
  - the process available to students if the College denies requested academic adjustments or special services; and
  - the process the College uses to determine when a requested academic adjustment constitutes a fundamental alteration of a program or activity.



# SLCC: Voluntary Resolution Agreement

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- Training for the professor, all staff in the DRC, and all staff in the Title IX office
- Conduct investigation into student's allegations of discrimination
- Promptly take any necessary steps to remedy any discrimination that is found



# Title IX Proposed Regulations

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- Include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation.
- Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.



# Title IX Proposed Regulations

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- The proposed regulations would expand the scope of protections for pregnancy or related conditions by prohibiting institutions from discriminating against a student or employee based on current, potential, or past pregnancy or related conditions.





# Title IX Proposed Regulations

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- When a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information.
- The Title IX Coordinator must inform the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.



# Title IX Proposed Regulations

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- Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs.
- Such modifications may include breaks during class to attend to related health needs, breastfeeding, or expressing breast milk; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; time extensions for coursework and rescheduling of tests; counseling; changes in physical space or supplies; elevator access; or other appropriate changes to policies, practices, or procedures.



# Common Policy & Practice Problems

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- Zero absence attendance policies.
- Targeted medical documentation requirements.
- Requirements to restart programs from the beginning rather than status at the time a leave began.
- Deference to discriminatory clinical site policies.

# Practical Guidance: Inclusive Language and Policies

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- Much of the statutory language surrounding pregnancy is not gendered.
- Students of many genders, including cisgender women, non-binary people, and transgender men, might be pregnant.
- Regardless of a student's gender-identity, they are protected through their status as a pregnant person.



## Practical Guidance: Faculty and Staff Training

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- Many pregnancy discrimination investigations share a common theme: students reach out to faculty and staff members who are not familiar with the rights of pregnant students.
- **Solution: Inform all faculty and staff of the rights of pregnant students under Title IX.**



## Practical Guidance: Review Institutional Policies

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- Another common problem OCR identifies is school Title IX policies which do not specifically address pregnancy.
- Clear, written guidelines will allow faculty and staff to understand their obligations towards pregnant students, as well as provide pregnant students with clear expectations for available support.
- **Solution: Review institutional policies to ensure pregnancy discrimination is explicitly addressed.**



## Practical Guidance: Review Institutional Procedures

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- A common challenge OCR often finds in pregnancy discrimination cases is a lack of prompt responses to student Title IX grievances.
- Individuals who express concerns about any type of discrimination, including pregnancy discrimination, should receive prompt responses to those concerns.
- **Solution: Evaluate your school's grievance procedures. Does every student receive a response to a report of discrimination? Is that response timely?**

Questions







HUSCH BLACKWELL



IPV Cases  
—



# The Beginning

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- John Doe and Jane Roe attend Texas University where, after meeting during the fall of their freshman year, they began a steady, and steadily volatile, relationship.
- A mutual professor reported to the Title IX Coordinator that he was aware that arguments, sometimes violent, were common. During their first summer vacation, for example, Roe purportedly scratched and grabbed Doe's arm while traveling with Doe's family.
- Additionally, the professor reported to the University, the couple's penchant for physical altercations extended to intimacy, including “consensual choking” in Doe’s residence hall.



# Question 1

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- How do you respond to this report?
- Obligations under federal or state law?



# Things Deteriorate

---

- Roe informed Doe she was dating others, and Doe called the relationship off.
- Except, it turned out, Doe had also been unfaithful. A revelation that did not sit well with Roe, which purportedly prompted Roe to spread rumors about Doe on campus.
- One such accusation: that Roe ended the relationship because Doe was physically abusive. And she threatened Doe directly via text: “take a year off and nothing will happen to you.”



## Question 2

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- Concerned, Doe went to TU's Director of Student Life.
- In an email, Doe complained that he was being harassed by his ex-girlfriend, who was "spreading false information."
- Doe explained in the email that he "simply" did not "feel safe."
- Q: How should Director of Student Life respond?



## Question 3

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- Dean of Student Life recommended that Doe seek mental health services. He did not recommend that Doe file a Title IX complaint and did not make his own report.
- Concerns?



# Roe Reports

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- Meanwhile, Roe met with TU's Director of Gender Equity and Title IX Administration. Roe told the Director that she was a victim of “Intimate Relationship Violence” under University policy and described certain incidents of abuse by Doe.
- Roe explained that she was not interested in pursuing further action.
- How should Director respond?



# No Contact Order

---

- Soon after, when Doe began a new relationship, Roe requested an order prohibiting Doe and Roe from any contact.
- Question: How do you respond?
- On the day the mutual order issued, Roe approached Doe on a campus running trail, attempting to apologize.
- Doe notified the University of the incident.
- How should University respond?
- Assume TU told Roe not to let it happen again.





# A Change in Plans

---

- A few months later, Roe notified the Director that she would cooperate with a Title IX investigation.
- A formal notice was issued, and Texas University barred Doe—but not Roe—from campus during the investigation.
- Concerns?
- Then, several months later, Doe accidentally “liked” one of Roe's social media posts, in violation of the Order. Doe immediately self-reported the mistake but, TU launched another disciplinary process that resulted in a reprimand and a written warning from a dean.
- Concerns?



# The Hearing

---

- TU appointed a three-person panel to investigate Roe's allegations against Doe, review the evidence they gathered, weigh the testimony they allowed and then decide whether the facts they found violated the TU Policy.
- At one of Doe's meetings with the Panel, he mentioned an interest in pursuing counterclaims against Roe.
- How should University respond?



# Decision

---

- The Panel's investigation culminated in a “Report” finding evidence to support the incidents of physical abuse alleged by Roe.
- Doe received a letter with the Panel's punishment: expulsion.
- Vindicated, Roe tweeted “my life is good again ... worked out boy problems that were never real problems just things I created.”



# What Happens Next?

---

- Lawsuit
- What claims?



# **Doe v. Princeton Univ., 30 F.4th 335 (3rd Cir. Mar. 31, 2022)**

---

- 3<sup>rd</sup> Circuit found that plaintiff's factual assertions regarding the University's different handling of his and his accuser's misconduct reports and order violations, together with his assertion that the Department of Education's 2011 Dear Colleague Letter created external pressure to which the University had yielded, were sufficient to permit his Title IX discrimination claim to proceed.
- 3<sup>rd</sup> Circuit also found plaintiff's factual allegations sufficient to permit his breach of contract and breach of implied covenant of good faith and fair dealing claims to proceed.



# A Reminder Though . . .



THE CHRONICLE OF HIGHER EDUCATION

NADIA EZALDEIN, SHANNON JONES, CECILIA LAM, DIAMONEY GREENE, MAGGIE WARDLE, KARLIE HALL, LATASHA NORMAN, JENNI-LYN WATSON, HYSEUNG LINDA HONG, JENNIFER DUKE, BOITUMELO MCCALLUM, DEMETRIA BRACEY, CHAKA BALDWIN, GENEVIEVE COMEAU, ALYSSIA WILEY, JENNIFER FORETICH, TAMARA SONYA WILLIAMS, ANARAE SCHUNK, RACHEL KATE JOINER, ROBIN EHLMAN, ALLISON MYRICK, JANA MACKEY, SHAO TONG, MARSY NICHOLAS, TYNESHA STEWART, SAMANTHA MACQUILLIAM, TINA CROUCHER, REBECCA ELDEMIRE, HAILEY NICHOLLS, ALINA SHEYKHET, MICHELLE DANIELLE MIELECKI, SHAKENA "AMY" VARNELL, ANDREA O'DONNELL, LAUREN MCCLUSKEY, MENGCHEN HUANG, EMILY RACHEL SILVERSTEIN, REBECCA KASPER, KIMBERLY SMITH, KELSEY ANNESE, TALISHA DANIELLE CROWDER, HEATHER CAMPBELL, EMMALLE TERRELL, DANIELLE TAGBERY, CAITLIN MCGUIRE, DANIELLE LATIF, KATHLEEN ROSKOT, AHYANNA BAKER-GRIFFIN, ROSEMARIE REILLY, CINDY NANNAY, GENA BARBER, SARA LAMONT, MICHEL DAVID, MACKENZIE MADDEN, ROSA SPEAGLE, SARANNAH MENEAL, KRISTY FLOWERS, CLARE ORTON, JENNIFER LYNN ROQUETA, SARAH HAWLEY, CHALALAI CHAIHIRUNKARN, DANNETTE WILLORY, MORIAH PIERCE, LAUREL R. CHASMAR, SUSAN CLEMENTS, KATY STRAALSUND, ASIA ADAMS, TIANA NOTICE, AIMEE GIRO, LACOY MCQUEEN, LINSI LIGHT, IRIS ACOSTA, JOSSELYN BISHOP, OLIVIA GREENLEE, AGATHA HALL, SALEHA HUUDA, JASMINE BENJAMIN, DEVON WADE

## In Plain Sight

The killing of a student, one in a growing list of victims, opened her university's eyes to the unseen danger of intimate-partner violence.

By EMMA PETTIT



# Big Picture Takeaways

---

1. Involve campus or external experts in IPV cases (experts **trained** to recognize the full array of domestic-violence signifiers).
2. Significance of **face-to-face meeting**.
3. Resources for students.
4. **Importance of coordinated, working institutional relationship.**
5. Report to **BIT**.
6. Lethality Assessment



HUSCH BLACKWELL

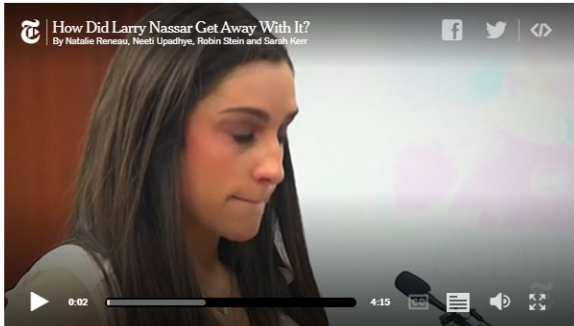
# Avoiding System Failure





## *Michigan State's \$500 Million for Nassar Victims Dwarfs Other Settlements*

Give this article 183



Lawrence G. Nasser, the sports doctor accused of sexually abusing hundreds of young women, committed his crimes with impunity for decades. Here's how. Matthew Dae Smith/Lansing State Journal, via Associated Press

## Settlements in UCLA sex abuse cases reach nearly \$700 million

New \$374.4 million payout announced Tuesday to resolve claims related to former UCLA gynecologist James Heaps

By [Nick Anderson](#) and [Susan Svrluga](#)  
May 24, 2022 at 9:06 p.m. EDT



# After Michigan State: 'Could We Be Next?'



Randy Lyhus for The Chronicle



By Donald E. Heller | JANUARY 28, 2018

- “Are we as college leaders prepared to respond appropriately should evidence of wrongdoing appear on our campus?”
- “Will we be willing to stand up for what is **morally right** to protect potential victims of maltreatment, rather than reflexively reacting in a way that maximizes the interests of our institutions?”
- “These are questions that should be asked by all of us in leadership positions: presidents, provosts, board members, athletic directors, and university lawyers. None of us should be so **naïve** as to think that what happened at Penn State and Michigan State could not happen again.”

THE SUNDAY TIMES TOP TEN BESTSELLER

Yuval Noah Harari



# Sapiens

A Brief  
History of  
Humankind

"A RARE BOOK ... THRILLING AND BREATHTAKING"  
—OBSERVER

JOHNSON



1. Are individual institutional players motivated to “maximize the interests of their institutions” or are they motivated to maximize their own personal interests within a large organization?
2. Does this ring true to you: that [fill in the name here] is willing to cover for a known pedophile to advance institutional or personal interests?
3. Reframe: why do well-intentioned, smart, skilled people who are willing to “stand up for what is morally right” occasionally reach the clearly wrong conclusion or do the clearly wrong thing.

IMHO, this requires a serious conversation about the common human frailties which impact all of us.





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MIND & MOOD

PAIN

STAYING  
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*Harvard Women's Health Watch*

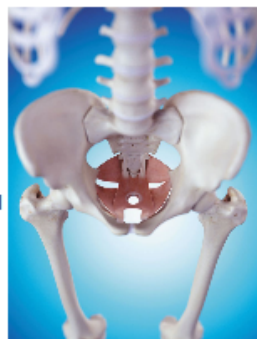
## Pelvic physical therapy: Another potential treatment option

***This treatment approach may help provide relief for many women with chronic pelvic pain and urinary symptoms.***

Published: June, 2018

The exact cause of pelvic pain for many women can be elusive, despite lots of tests and scans. In some cases, the symptoms are related to a problem that is often overlooked, says Dr. Eman Elkadry, an instructor in obstetrics, gynecology, and reproductive biology at Harvard Medical School. Pelvic pain may stem from a pelvic floor muscle problem that can be helped by a specialized form of physical therapy known as pelvic physical therapy.

"Although pelvic physical therapy may not work for everyone, it can be quite effective for certain individuals," says Dr. Hye-Chun Hur, director of the Division of Minimally Invasive Gynecologic Surgery at Harvard-affiliated Beth Israel Deaconess Medical Center and associate faculty editor of *Harvard Women's Health Watch*. She stresses that pelvic







# Why Did the Investigator Get It Wrong?

"We cannot find that the conduct was of a sexual nature. Thus, it did not violate the Sexual Harassment Policy. However, we find the claim helpful in that it allows us to examine certain practices at the MSU Sports Medicine Clinic."

And Nassar's copy:

"We cannot find that the conduct was of a sexual nature. Thus, it did not violate the Sexual Harassment Policy. However, we find the claim helpful in that it brought to light some significant problems that the practice will want to address."

## Larry Nassar: 2014 police report sheds light on how he avoided criminal charges

Police report shows how Larry Nassar avoided charges



- "Nassar stated he is not saying he did not touch (Thomashow)," Capt. Valerie O'Brien, who at the time was a detective, wrote in the report. "Nassar stated he purposely touched her there. Nassar stated he has been doing this since 1997. 'What now, what happened?' "
- Nassar began sending O'Brien emails, videos and references to other doctors who performed similar procedures.
- University police submitted a warrant request for a 4th-degree criminal sexual conduct charge, a misdemeanor. Prosecutors denied the charges and said what Nassar did appeared to be "a very innovative and helpful manipulation."



**Hey there!**

**Why don't you  
have a seat?**



## **Child Molesters: A Behavioral Analysis**

**For  
Law Enforcement  
Officers  
Investigating  
Cases of  
Child  
Sexual  
Exploitation**

**149252**

In cooperation with the **Federal Bureau of Investigation**

- “In view of the fact that many people still believe in the myth that child molesters are ‘strangers’ or misfits of society, this tactic can unfortunately be effective.”

- 10% of children were abused by a total stranger
- 30% of children were abused by a family member
- 60% were abused by an adult they knew who was not a family member



# Profiling Serial Child Sex Abusers

- Male and over 30 years of age
- Single or with few friends in age group
- Works in jobs with access to children
- Engages in activities with children, often excluding other adults
- Seduces with attention, affection, and gifts
- Has hobbies and interests appealing to children
- Popular with both children and adults
- Appears to be trustworthy and respectable -- has good standing in the community.
- Almost always collects child pornography or child erotica

# Confronted: How Do Serial Abusers Respond?

1. **Denial.** “The offender may act shocked, surprised, or even indignant about an allegation of sexual activity with children . . . He might admit to an act but deny the intent was sexual gratification: ‘Is it a crime to hug a child?’ He may imply that his actions were misunderstood, and a mistake has been made. His denial may be aided by relatives, friends, neighbors, and coworkers. These associates may be uncooperative and may even hinder police investigation of the offender.”
2. **Minimization.** “If the evidence against him rules out total denial, the offender may attempt to minimize what he has done, both in quantity and quality. He might claim that it happened on one or two isolated occasions or that he only touched or caressed the victim. He might admit certain acts, but deny they were engaged in for sexual gratification.”



# Confronted: How Do Serial Abusers Respond?

- 3. Fabrication.** “Some of the more clever child molesters come up with ingenious stories to explain their behavior. One offender, a doctor, claimed he was doing research on male youth prostitution. A professor claimed he was doing research on pedophilia and collecting and distributing child pornography for scientific research. A teacher said that his students had such a desperate need for attention and affection that they practically threw themselves at him and misunderstood his affection and response as sexual advances . . . In another case, a nursery school operator, who had taken and collected thousands of photographs of young, nude or seminude children in his care, claimed they were not for sexual purposes; he simply admired the anatomy of children.”

# Confronted: How Do Serial Abusers Respond?

4. **Sympathy.** “Pedophiles may resort to a ‘nice guy defense.’ In this defense, the offender expresses deep regret and attempts to show he is a pillar of the community, a devoted family man, a military veteran, a church leader, nonviolent, without prior arrests, and a victim of many personal problems. In view of the fact that many people still believe in the myth that child molesters are ‘strangers’ or misfits of society, this tactic can unfortunately be effective. Many traits introduced by the offender as evidence of his good character (*i.e.*, dedication to children, volunteer work, etc.) in fact contribute to his ability to access and seduce children.”

# Solomon Asch: Social Proof



*Exhibit 1*



A



B



C

*Exhibit 2*





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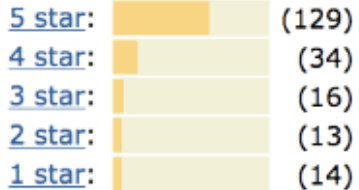


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### 206 Reviews



### Average Customer Review

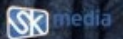
★★★★☆ (206 customer reviews)

Share your thoughts with other customers

[Create your own review](#)



**TRICIA BOSROK**  
DIRECTOR OF COMMUNICATIONS



# Social Proof

- People will conform to the actions of others under the assumption that those actions are reflective of the correct behavior.
- It is especially prevalent in ambiguous situations and when there are other people who are perceived to be particularly knowledgeable about a situation.
- **Social proof works through our very human need to belong, to be respected by others and to avoid social punishment such as ridicule or ostracism for taking a position apart from the herd.**



## *Apathy at Stabbing of Queens Woman Shocks Inspector*

By **MARTIN GANSBERG**

For more than half an hour 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.

Twice the sound of their voices

**Minimum Qualifications:** Master's degree in student affairs, higher education, social work, counseling, criminal justice or related field. Requisite knowledge, training and experience related to Title IX, VAWA, and conducting investigations necessary for a candidate to be considered. The candidate must have excellent problem solving and conflict resolution skills, strong organizational and administrative skills, strong interpersonal communication skills, excellent written and verbal communication skills, team building skills, the ability to build positive and effective relationships across the campus and community a strong commitment to diversity, ability to work independently with minimal supervision, ability to manage multiple tasks, ability to work evenings and weekends as needed, knowledge of legal issues in higher education, and ability to provide exemplary customer service. The candidate must have experience interacting with the public, attorneys, parents, students, staff and faculty.

# Civil Rights Investigators Cannot Be “People Pleasers”

- Who gets promoted and why?
- Role of Title IX investigator: “voice of institutional cognitive independence.” ~ legal ethicist Donald Langevoort.
- **You are a bearer of bad news.**
- Be mindful of normative influences (like social proof) and nevertheless reach unpopular decisions based on your own personal knowledge, your own rigorous analysis, and a thorough gathering of valid and factual information.
- Institutions must reflect on whether prioritizing things like collegiality over cognitive independence (and the attendant upset that occasionally comes with it) in evaluating performance creates environments where people avoid reaching difficult conclusions which could rock the proverbial boat.



**Selective**  
from Simo

**In**  
**Count how**  
**players w**  
**the**



# Selective Attention

- Attention is a limited resource, and what has been dubbed “selective attention” allows us to tune out details that we think are unimportant and focus on what really matters.
- The more that is going on, the more likely it is that busy people are missing the significant gorilla dancing in the room.
- Reasonable caseloads are not only a quality-of-life issue – they are a quality-of-investigation issue.

# Lessons

- We can continue to frame this as a battle of good versus evil and I suspect we will continue to make the same mistake
- Reaching the correct conclusion requires us to know **what** we are looking for, know **how to meaningfully investigate** in this space, and to recognize the **human frailties** that afflict us all and sometimes present us from reaching the correct conclusion

# Sexual Misconduct Issues in Patient Settings

Krista Anderson, Systemwide Title IX Coordinator

Fall 2022



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



# Agenda

1. Intro/Background
2. Legal Framework
  - Title IX Regulations
  - Clery Act
  - Patient Protection (§1557) & Affordable Care Act (ACA)
  - HIPAA/FERPA
3. Recent Regulatory Actions & Litigation
4. Practical Takeaways

# Intro/Background



# Sexual Misconduct in the Healthcare Context

- Inherent **power imbalance**:
  - Between healthcare providers & their patients
  - Between physicians & other staff (e.g. nurses, trainees, medical assts)
- **Healthcare** is subject to its own rules & regulations: Licensures, credentials, patient privacy, grievance processes, and adjudication of misconduct allegations.
- Academic institutions: Student health services, sports-medicine for student-athletes
- Health institutions (HRI's): Medical facilities, hospitals, clinics, teaching facilities.

The background image shows a classical building facade with two prominent statues. On the left, a female figure representing Liberty holds a torch and a tablet. On the right, a male figure representing Justice sits on a horse, holding scales of justice. Below these, there are more intricate carvings, including a lion and a figure with a scroll. The entire image has a blue tint and a white grid pattern.

# Legal Framework





**Title IX (Educational Amendments of 1972)** prohibits discrimination **on the basis of sex** in educational programs or activities receiving federal financial assistance

Anyone participating in or attempting to participate in educational programs or activities



## “Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



# Title IX

Sex Discrimination  
Sexual Harassment  
Retaliation



# Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



# Under Title IX: Institutions must reasonably respond in light of known circumstances...

1. Stop & prevent behavior from continuing or escalating

2. Remedies: Supportive measures & resources

3. Formal grievance process



# Title IX Regulations – IHE Patient Care Context

## ED-OCR

- How IHE's treat any **party** (CP, RP, Witness) in response to a SH complaint may itself constitute **sex discrimination**.
- IHE's must provide equal opportunity for the parties to present **expert witnesses**, which can impact situations where **expert opinions** (e.g. standard of care, medical necessity) are necessary to make reliable determinations.
- IHE's must recognize the limitations of accessing, considering, disclosing, or otherwise using any party's **medical records** during the grievance process.



# Jeanne Clery Act (1990)



Publish  
campus crime  
statistics &  
safety policies  
annually



## Health and Human Services (HHS) – Office for Civil Rights

- HHS adopted ED/OCR’s definitions of **sexual harassment** *et al.*
- HHS Guidance “*Effective Practices for Preventing Sexual Harassment*” (Sept 2020) further clarifies and emphasizes IHE obligations in the **patient care context**.
- HHS oversees compliance with **Patient Protection (§1557) & Affordable Care Act (ACA)** which extends Title IX protections to “*any health program or activity...*”



# Health Privacy Laws



*HHS-OCR*



*ED-OCR*





# Regulatory Actions & Litigation

# Michigan State University (MSU) 2019 ED/OCR Findings

Failed to provide an equitable response to a complaint in 2014 in which Larry Nassar (RP) had allegedly sexually assaulted a CP during an appt at the university's **sports medicine clinic**.

- **Medical experts** that MSU relied upon were found to be **not independent** (e.g. conflict of interest) due to their close/personal relationships with Nassar (RP).
- CP wasn't given sufficient opportunity to present rebuttal evidence (e.g. expert medical witnesses).



# Michigan State University (MSU) 2019 HHS/OCR Requirements

## Required policy changes:

- Revisions to MSU's **sensitive exam chaperone policy**, to offer a **chaperone** to all patients, and obtain **informed consent** to all sensitive examinations, treatments, or procedures.
- Designation of **Health Care Civil Rights Specialists** (e.g. central, independent compliance unit at the university) to receive sexual misconduct complaints and assist with training, monitoring, and compliance efforts.



# Michigan State University (MSU) 2019 ED/Clery Findings

- Failed to **properly classify reported incidents**
- Failed to **disclose crime statistics**
- Failed to **issue timely warnings**
- Failed to **notify campus authorities**
- Failed to **maintain administrative capacity**





# University of Southern California (USC) 2020 ED/OCR Findings

**Failed to respond effectively** to possible sexual harassment by George Tyndall (RP), gynecologist in the university's **student health center**.

- **Failed to conduct investigations** into allegations made by multiple sources (students, chaperones).
- **Failed to assess** the need for **interim measures**.
- **Failed to take steps to prevent reoccurrence** of the alleged conduct.





# University of Southern California (USC) 2020 ED/OCR Requirements

## Required institutional restructure:

- Designation of **dedicated health care staff** as part of the restructuring of the Title IX Office.
- **Title IX compliance** as part of all employee reviews.
- Enhance the **responsible employee reporting processes** and trainings.
- Include a **data system** that can better manage and identify allegations against repeat RP's.
- Expand **trainings** campus-wide to focus on harassment in the **patient care setting**, with additional training requirements for employees that work in **student health**.





# University of Southern California (USC) 2020 HHS/OCR Requirements

## Required institutional changes:

- All students, employees, and patients must receive **Title IX reporting information**.
- Enhance **employee training**.
- **Chaperones** will be **required** to accompany patients at **sensitive examinations**.

HHS emphasized **Title IX policies** apply to Keck Medicine of USC, and USC must report KMUSC-related sex discrimination incidents to HHS/OCR on an ongoing basis.





# San Jose State University (SJSU) 2021 DOJ Findings

**Failed to respond** to allegations of sexual harassment against an athletic trainer (RP) during physical therapy sessions with **student-athletes**.

- **Failed to respond** to repeated allegations against the same RP, and widespread knowledge of the alleged conduct.

**SJSU retaliated against Athletic Dept employees (2)** who reported RP's alleged conduct

- **Adverse actions** against the employees included negative performance evaluation and employment termination.



# San Jose State University (SJSU) 2021 DOJ Requirements

## Required institutional changes:

- Restructure the **Title IX Office**.
- Offer **supportive measures** to all female athletes.
- Realign the **Athletics Dept policies** and **procedures** with the **student health center**.
- **Recognize and compensate the employees** who experienced **retaliation** after reporting sexual harassment to the institution.



# Institutional Litigation Risks (Patient Abuse)

- **MSU Settlement** (2018) of **\$500 million** with approx. **300 patients (victims)** of Larry Nassar
- **OSU Settlements** (2019/2020) of **\$52 million** with approx. **208 patients (victims)** of Richard Strauss
- **USC Settlements** (2021) of **\$1.1 billion** with approx. **17,700 patients (victims)** of George Tyndall
- **UCLA Settlements** (2021/2022) of **\$688 million** with approx. **7,100 patients (victims)** of James Heaps
- **Uni. of Michigan Settlement** (2022) of **\$490 million** with approx. **1,000 patients (victims)** of Robert Anderson



# Institutional Litigation Risks (Patient Abuse)

## Cause of Action (Examples):

- Title IX (deliberate indifference standard)
- Sex/gender discrimination (under state law)



# Practical Takeaways



# Prevention Strategies: Patient Protections

1. Implement **chaperone policies** at all clinical locations.
2. Offer **fact sheets** to patients about sensitive exams.
3. Expand the **scope of consent information** given before treatment.
4. Increase the frequency of messaging/publicity for **reporting options** for patients and employees.



# Prevention Strategies: Title IX Office

1. Ensure that the Title IX Office has **independent authority** to address and respond to reports of sexual misconduct.
2. Equip the Title IX Office to handle **healthcare-specific incidents**. Examples for need:
  - Increase staffing in the Title IX Office
  - Patient complaint capacity/campus-collaboration
  - Training for healthcare employees



# Prevention Strategies: Employment Practices

For institutional policies:

Consider **disclosure requirements** for prior reports or allegations of sexual misconduct as a condition of hiring, credentialing, promotion, or reappointment of a **healthcare provider** affiliated with the institution.





# UT System's Employee Reporting Requirements

Under the institution's Sexual Misconduct Policy, **Responsible Employees** have a duty to report incidents and information reasonably believed to be sexual misconduct (prohibited conduct defined) under the Policy.

All employees are Responsible Employees (except Confidential Employees or police officers when a victim uses a pseudonym form). Responsible Employees include all administrators, faculty, and staff.

Responsible Employees must report all known information concerning an alleged incident of sexual misconduct to the **Title IX Coordinator**.

## Definition of “Retaliation”

Any **adverse action** (including, but is not limited to, intimidation, threats, coercion, harassment, or discrimination) taken against someone because the **individual has made a report** or filed a Formal Complaint; or who has supported or provided information in connection with a report or a Formal Complaint; participated or refused to participate in a Grievance Process under this Policy; or engaged in other legally protected activities.

**Note:** Any person who retaliates against (a) anyone filing a report of Sexual Misconduct or Formal Complaint, (b) the parties or any other participants (including any witnesses or any University employee) in a Grievance Process relating to a Formal Complaint, (c) any person who refuses to participate in a Grievance Process, or (d) any person who under this Policy opposed any unlawful practice, is subject to disciplinary action up to and including dismissal or separation from the University.



## Definition of “Failure to Report” for Responsible Employees

If a Responsible Employee knowingly fails to report all information concerning an incident the employee reasonably believes constitutes Sexual Misconduct (including stalking, dating violence, sexual assault, or sexual harassment) committed by or against a student or employee at the time of the incident, the employee is subject to disciplinary action, including termination.

*Source:*

*UT System Model Policy for Sexual Misconduct;  
Tex. Edu. Code Section 51.252-51.259*



# Who are Confidential Employees?

- Employees that receive information confidentially, through **privileged communications under law**, such as healthcare & mental health care providers, other medical providers, or attorneys; or
- Employees **designated by the institution** as a person that **students** may speak with confidentially concerning sexual harassment, sexual assault, dating violence, or stalking.



# Examples of Confidential Employees

## Privileged communication under law:

- Licensed counselors, psychologists
- Doctors, physician assistants
- Nurses, nurse assistants
- Attorneys
- Licensed social workers in a clinical or medical setting

## Commonly designated “confidential” employees:

- Victim Advocates (who work with students)
- Student Ombuds
- Members of the clergy





# Employee Training

## 1. Training topics:

- Sexual Misconduct in Patientcare Setting
- Employee Reporting Requirements
- Anti-Retaliation Policy
- Boundaries

## 2. Increase participation of trainings by:

- a) Requiring **attestations of compliance**;
- b) Making participation a part of the **credentialing/re-credentialing process** and/or **employee's performance review**.

# Triage Reports: Title IX Office

## Due diligence review:

1. The **nature, circumstances, & seriousness** of the alleged conduct;
2. The **safety & risk of harm** to others;
3. Any **pattern evidence**, other similar conduct or allegations of the **RP**;
4. **RP's affiliation** with the institution & **applicable options** for institutional action; and/or
5. Other relevant factors in the specific matter?



# External/Other Reporting Factors

## Type of Concern

## Possible Action

Non-emergency behavioral or wellness issues(s)

Refer to Behavior Intervention Team (BIT) or campus equivalent

Immediate safety concerns (emergencies) or welfare check required

Report immediately to 911

Clery reportable crimes that meet Clery geography requirements and/or timely warning requirements

Timely Warnings: Report immediately to campus law enforcement  
Clery Crime Reporting: Report to the campus Clery Manager

Alleged abuse and/or neglect of minors

Report immediately to Dept. of Family & Protective Services (DFPS): 800-252-5400

Clinical conduct/patient safety concern(s)

Report to the applicable licensing board





## Clery Geography

### Campus geographic regions include:

- a) **On-campus property** (main-campus geography, additional campuses too)
- b) **Residence halls** (sub-set of on-campus property)
- c) **Non-campus property** (owned/controlled, and students can regularly access)
- d) **Adjacent to campus property** (perimeter)



## Clery Geography (Cont.)

### **Non-campus property must:**

- 1) Be owned or controlled by the institution;
- 2) Be used in direct support of or in relation to the institution's educational purposes;
- 3) Be frequently used by students; and
- 4) Not be within a reasonably contiguous geographic area of the institution

A man with a beard and short hair, wearing a grey blazer over a dark shirt, is seated in a wheelchair. He is looking directly at the camera with a slight smile. The background is a blurred outdoor setting with other people walking, suggesting a public space like a campus or a hospital. The entire image has a blue tint.

# Campus Security Authorities (CSA's)

## Considerations for **CSA's** in **Patientcare Setting:**

- 1) All campus police officers & security officials
- 2) Employees (faculty/staff) with significant responsibility over student clinical training programs
- 3) Title IX officials of the institution

# Interdisciplinary Case Mgt Team

1. Address **unique complexities** of investigating sexual misconduct allegations in the **patientcare context**. Members likely will include:
  - Title IX delegate
  - Senior medical officer (or designee)
  - Senior nursing officer (or designee)
  - Legal affairs designee
2. Ensure **compliance** with the following:
  - Title IX and other federal/state laws
  - Health regulatory standards
  - Patient safety and privacy provisions



# Interim Measures (Examples in Patientcare Context)

Placing Provider on  
Administrative  
Leave

Interim Suspension  
of Clinical Privileges

Issuing a Mutual  
No Contact  
Directive

Arranging a  
Different Provider  
for Patient

Offering Support  
Services to Patient

Assigning a  
Healthcare-related  
Advocate to Patient

**Note: Medical staff** likely will have independent jurisdiction on a healthcare provider/employee to initiate **interim measures** during the pendency of an investigation.



# Medical Experts: Avoiding Conflicts of Interest

Investigating SM allegations in patientcare settings may necessitate **medical experts** to opine on whether the alleged conduct meets clinical indications or applicable standard of care.

**Medical experts** utilized must have no personal, professional, or financial conflicts of interest with the complainant CP or respondent (RP).



Q & A



# Contact Information

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