

Case Study of an Investigation

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Hypothetical Situation

- Factual Scenario
- Demonstrates the complexity of these investigations
- Trust your instincts, but must follow the law



Hypothetical Situation

Complaint of Racial Discrimination

- Professor Dr. Sara Martinez complains that the President of Lone Star University, Tex Shuttleford, discriminated against her.
- She alleges he failed to promote her from Assistant Dean to Dean of Latin Studies due to her being Latina.
- She believes she was the most qualified candidate, with the longest tenure in the department, and that the person selected, Bob White, was chosen because he is Caucasian.
- President Shuttleford made the decision on who to promote and did not consult with anyone in making his decision.

Hypothetical Situation

- In the past, President Shuttleford talked about the Latin Studies department and getting it in order so that it is “Spic and Span,” which she took to be a racial slur about Hispanics.
- During his time as President, Shuttleford has never promoted any Latino applicant to any level above Assistant Dean. Unrelated but interesting to note that he has promoted more women than men.
- Dr. Martinez was on a performance improvement plan two years ago, but she completed the plan and her reviews since have been marked as “meets expectations.”
- Bob White served as a Dean of another department many years ago, but his most recent position was in the Compliance department of the university.

Hypothetical Situation



- Dr. Martinez learned of Mr. White's promotion (and thus that she was not selected) by a departmental memo sent via email.
- She files a complaint with HR in accordance with University Policy and indicates her general belief that she was not promoted due to race. She does not include the racial slur as it is too upsetting to her to put that in writing.
- Head of HR, Joy Full, has been on the job for ten years and knows all the people in the Latin Studies Department. She has provided them with training, including about unlawful discrimination. She thinks Dr. Martinez is a high maintenance employee who complains a lot.



What do we do?

- Initial Considerations

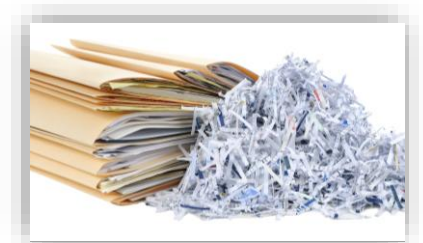
- Dr. Martinez's allegations are very general and vague. Ms. Full knows that Dr. Martinez's subjective belief that her race was a reason for the lack of promotion is likely insufficient to prove discrimination.
- However, their Policy requires a full investigation.
- Good news – she has hired YOU, outside legal counsel, to conduct the investigation!
- Bad news – the Latin Department Recruitment Fair happens on campus in two weeks, and the event may be jeopardized if the complaint isn't timely handled.



Initial Steps



- Why you?
 - Although you have provided wise legal counsel for many years, you have never had reason to interact with the Latin Studies Department and are truly impartial.
 - You are a licensed attorney with a thriving employment law practice. You regularly train on anti-discrimination.
- Measures to prevent harm pending investigation
 - Should anyone be put on leave?
 - Should Dr. Martinez be reassigned to report to someone else?
 - Are there any documents we worry could be destroyed?



Initial Steps for Investigator

- Review Policies
 - University has strong anti-discrimination.
- Review personnel files and any complaints
 - *President Shuttleford* – nothing in file. No complaints, no prior issues. Attended training as recently as six months ago on preventing racial discrimination.
 - *Professor Martinez* – five years ago, she reported student as making racist remarks in a paper. Allegation could not be substantiated, and the student claimed he was falsely accused. Student filed a complaint with administration that resulted in a reprimand to Dr. Martinez for making unsubstantiated complaint against a student.
 - Bob White has always had “exceeds expectations” on his evaluations, but the record seems suspiciously devoid of any explanation for his reassignment from Dean to Compliance (a lateral move).



Interviews

- Most common mistakes interviewers/ investigators make:
 - jump to conclusion(s) before hearing all the information
 - believes first person they interview
 - believes people with whom they have good rapport are telling the truth
 - fails to ask follow-up questions
 - fails to obtain documentary evidence in support of claim or that refutes claim
 - does not identify opportunities for improvement even if investigation does not prove discriminatory or retaliatory conduct



Interviews

- Who should you interview?



- In what order should you interview parties?

1 2 3 4 5
6 7 8 9 10

Interviews

- Suggested Order:
 - Professor Sarah Martinez
 - Dean Bob White
 - President Shuttleford
 - Employee(s) who work closely with President
 - Employees with knowledge of Dean White's career track
 - Other people with knowledge of job performance of both candidates
 - May need to re-interview Professor Martinez and/or President Shuttleford, especially if there are inconsistencies

Interviews

- Create outline of key topics to cover
- Who, what, when, where (need details)
- Who else was present
- Clarify what is based on personal knowledge
- Observe witness' tone, demeanor, credibility, likeability
- Does the witness have any reason to withhold information?
- Does the witness have any incentive to be untruthful?
- Remind the witness they are protected by law and policy and should report any concerns about retaliation for their participation in the investigation
- Encourage the witness to circle back to you if they remember anything or learn something new
- Can request confidentiality, but may not be able to require



Interviews

- **Professor Sara Martinez** – you contact Professor and inform her that you have received her complaint. You ask her if she will sign confidentiality agreement and agree to do interview. You explain to her the following:
 - Need full cooperation
 - Will be kept as confidential as possible – on need to know
 - No retaliation
- Professor refuses to give interview. She says she meant to file complaint, but does not want to discuss any further. She says, “if I go through with this I know there will be repercussions for me.”



Interviews

- **Professor Sara Martinez**

- Now what do we do??
- If complainant won't cooperate, can we move forward?
- All we know is that she alleges she was more qualified but not selected due to race. That doesn't mean it's not serious, but we don't have much information at this point.
- Professor seemed very nervous though when she declined interview.
- Probably should investigate further.
- Proceed with other interviews:



Interviews

- * **Bob White**

- Mr. White creates a great impression when you interview him. He looks you in the eye, tries to honestly answer all of your questions. You find him credible and likeable.
- He details significant experience at a previous University where he was Dean of Latin Experiences (you wonder if Experiences is a cooler department than Studies). He discusses significant challenges with staffing and budget and that he left to come to Lone Star University when a position opened up as Assistant Dean of Latin Studies (current title of Dr. Martinez).
- Mr. White applied, was interviewed, and was appointed Dean of Indigenous People Studies at Lone Star three years ago. He served for one year before the department merged due to lack of doctoral candidates in the program. At that time, there were no positions available at the Dean level. Mr. White asked if he could be considered for a position as the Head of Compliance given his degree in statistics and his passion for detail. He was hired into that position, where he has been since. He knew the time in Compliance would not count towards tenure.
- Mr. White admits that President Shuttleford emailed to ask him if he might return to the Department of Latin Studies as Dean when he learned the then Dean was studying Viticulture and Enology and seemed to have lost all interest in Lone Star's work to promote Latin Studies.

Interviews

- **President Tex Shuttleford**
- He wants to know what your investigation is all about. You tell him you are investigating whether recent promotions and placements were appropriate and supportable. You ask him about the three positions he has unilaterally filled this past school year, including documentation with applications, any job descriptions or criteria, documents gathered from any candidates, and any documents he created as he worked through his decisions.
- President's documentation shows what we was looking for and why he picked particular candidates.

Interviews

- **President Tex Shuttleford**
- President's notes on Dr. Martinez include detailed aspects of her job performance, including documentation he shared with her about turning in grades late but stellar student evaluations of her. President has pulled a copy of her curriculum and several pages from her University webpage, which are not very detailed or engaging. She has not updated study abroad program information in 18 months. Information about the Latin Studies Recruitment Fair (which she is in charge of) omits reference to several programs and clubs sponsored by the department.

Interviews

- **President Tex Shuttleford**
- In Contract, Bob White's work as Assistant Dean and particularly how he promoted the Latin Studies Recruitment Fair, which resulted in transfer of general education students into the department, enlarged number of students applying for study abroad experiences in Latin American and other Spanish speaking countries, and resulted in more high school students enrolled in dual credit courses applying to Lone Star University.
- President Shuttleford explained that Bob White took the job in Compliance because his wife had breast cancer and the job required fewer hours at work so he could take his wife to treatment. She made a full recovery but later divorced Bob.
- Importantly, President Shuttleford had concrete examples how Bob helped Sarah when she took over his job as Assistant Dean of Latin Studies. Much of her initial success in the role was because of Bob's help and support.

Interviews

Assistant to President, Ms. Verdad



- Considerations:
 - Ms. Verdad has worked closely with President for 8 years.
 - She is Latina, speaks fluent Spanish, and has Spanish nicknames for the President (things like El Jefe)
 - Therefore she may have relevant information
 - Must handle questions delicately – but be firm in seeking truth but not spreading unsubstantiated allegations
 - Confidentiality Agreements (for all witnesses)
 - What do we want to know?
 - Has Professor Martinez told her anything about President?
 - Has she seen or heard anything about President's selection of Mr. White? Has she seen or heard anyone (especially President) say or do anything that is racially insensitive? Discriminatory?

Interviews

Ms. Verdad:

- **Facts:** She loves her job, President gives her lots of autonomy and respect. He has made racially insensitive comments (He called her taquito once), she explained why it was offensive, he apologized and changed his behavior immediately. She reports that the President has a good sense of humor.
- She knows that Mr. White and President Shuttleford get along really well, belong to the same gun club that they frequent almost every weekend, and that Mr. White went through a painful divorce when his wife left him.
- Ms. Verdad adores Dr. Martinez and describes her as a kindred spirit. They speak only Spanish to each other (mostly because no one else in the department is fluent), they share recipes, and they have the same manicurist and hair stylist. Ms. Verdad describes Dr. Martinez as deeply feeling and one who easily gets her feelings hurt. She knows that Dr. Martinez never turns grades in on time but that her student evaluations are stellar.
- Ms. Verdad heard the Spin and Span comment and explained to
- President Shuttleford why it was terribly offensive. He turned
- Pale, apologized and left early for the day.
- **What did we learn?** Looks like President *may* have legitimate, non-discriminatory reasons for selecting Mr. White. The President
- could almost certainly benefit from some sensitivity training.



Interviews

Should we try speaking to Professor Martinez again?

- You place a call to her and state that you have received additional information and ask if she would be willing to talk. You can let her know that another witness heard the spic and span comment and how President Shuttleford reacted when told it could be offensive. She still refuses to talk.
- An hour later, she sends you an email that she did hear the comment and why she believes it was a micro aggression against Hispanics.
- She does not want to meet and thinks there could not be any excuse for such a terrible comment.



Interviews

- **President Tex Shuttleford**
- You decided you need to tell President Shuttleford what the exact concern is.
- He admits making the comment.
- He confirms that Ms. Verdad heard it and admonished him.
- He states that he was too embarrassed to apologize to Professor Martinez.
- He agrees to sensitivity training for the entire University (to be conducted by You, the awesome attorney investigator!)
- He asks if he should apologize to Professor Martinez now.
- He states whether he should sit down and walk through areas where she can improve to be considered for the next promotion.
- He suggests that the position over the study abroad programs for the entire University (higher on org. chart than Assistant Dean in Latin Studies) is about to open as current employee wants to spend more time with his ailing mother. He thinks Professor Martinez would likely be qualified if she could improve on the timeliness of her administrative tasks.

Recommendation



- Let's look at our evidence. What do we have?
 - Complaint from Professor Martinez
 - Information supporting Bob White as the best candidate
 - Confirmation that President made offensive remark but that he was embarrassed and apologized for it.
 - Fact that President is already considering Professor Martinez for a promotion if she is interested and can improve her administrative duties.
 - At least some acknowledgement from President of inappropriate comment and willingness to learn and improve.
- Should we recommend discipline? Any other action?

Final Steps

- Meet with Professor Martinez to go through the findings of the investigation and recommended training for President.
- Schedule meeting for Ms. Full to conduct with President and Assistant Dean to go over job performance suggestions and identify resources for Professor Martinez so that she will be qualified for new position if interested.
- Identify and schedule sensitivity training.
- Plan to follow-up with President Shuttleford, Professor Martinez, and Ms. Full in a few months.

Questions?



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How to Conduct an Effective Workplace Investigation

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Legitimate Goals of An Investigation

- To determine if a problem exists and fix it
- To protect the educational institution
- Opportunity to demonstrate fairness – Juries always think in terms of fairness
- To encourage internal dispute resolution and reporting of problems without employee feeling he/she has to go to the TWC/EEOC first



Policies Needed Before The Investigation

- EEO and Anti-Harassment Policies
- Employee Conduct and Discipline Policies
 - Refusal to cooperate with investigation can subject employee to discipline
 - Retaliation against complainant can subject employee to discipline
- Computer Use Policies
 - Clear notice to employees that e-mails can and may be reviewed and intercepted



Steps To An Effective Investigation

1. Choose the best investigator

- Consider demeanor
- Is empathy important?
- What value is there in the investigator being in the same protected class as the complainant?
- Who can be impartial?
- Who is not in the direct supervisory chain of the complainant?



Should You Use an Attorney?

- Pros

- Know law and have a variety of experiences
- Skilled and impartial investigator
- Good if your human resources are thin or the facts are complicated
- New, objective set of eyes
- Privilege arguments

- Cons

- May preclude representation by that attorney in litigation
- Timing and cost issues



Steps To An Effective Investigation

2. Review personnel files of those involved
3. Review policies and other relevant documents
4. Review e-mails and electronic files
5. Conduct employee interviews (consider starting with a leader with knowledge of the people involved so you can learn their jobs, work habits, potential reliability or credibility, what motives do



Steps To An Effective Investigation



- Guide to conducting employee interviews
 - Use Witness Confidentiality Form
 - Determine the order of the witnesses
 - Case by case determination
 - Would like to fully confront the accused
 - Are there witness tampering issues?
 - Are there confidentiality concerns?
 - Common order: Complainant, witnesses, the accused, then more witnesses
- Is the element of surprise important?
- Should anyone else be present?
- Where is the best location?

Investigation Confidentiality Agreement

You have been asked to provide assistance and information in an internal investigation currently being undertaken on behalf of the Best University Ever ("BUE"). Internal investigations are a key part of BUE's commitment to conducting its operations with integrity. As a participant in this internal investigation, you are being asked to agree to the following:

1. Cooperation. You agree to cooperate fully and to respond to all questions and requests fully and truthfully. Being untruthful **may** result in disciplinary action.
2. Confidentiality. You agree to keep confidential anything discussed with you as part of the investigation, including the fact that an investigation is underway. Please do not discuss the investigation or details of the investigation with anyone, except as directed by the person(s) conducting the investigation or as otherwise required by law. Failure to maintain confidentiality **may** also result in disciplinary action.

Investigation Confidentiality Agreement

3. Don't play detective. Do not try to conduct your own investigation or draw conclusions as a result of your interview about "who has done what," other than as requested during the interview. This is to ensure that the reputation of anyone involved in the investigation is protected.
4. No obstruction. You agree not to interfere or obstruct the investigation. You must retain any records, information or documents stored on your computer(s) and keep all records relating to the investigation until advised otherwise. Your destruction of records or failure to retain records **may** result in disciplinary action and/or may have legal consequences.
5. Continuing duty. If you learn of or remember anything additional relating to this investigation or if you have reason to believe any of the agreements noted here are being violated by any employee, please contact the person(s) conducting the interview immediately.

Steps To An Effective Investigation

- Interview Techniques
 - Be Prepared
 - Be Patient (silence encourages witness to fill in the empty space and tell you key facts)
- Basics
 - Date, Location, People present, general impressions
 - Note facts and opinions of witness
 - Items for follow up (documents to request/review, additional people to interview)



Steps To An Effective Investigation

Meeting with Connie Jones

February 13, 2007

Store #234, C Wallis and Jones present

Re: Jones allegations of improper conduct



1st incident – Monday, March 2, 2020; Mike Stewart asked her to have sex with him as leaving 10:00 faculty meeting

2nd incident – Tuesday, March 3, 2020; Stewart made motion with tongue at her; may have been witnessed by Sue Meyers

Witnesses: Sue Meyers

Anything else to report? No

Follow up: Sue Meyers, faculty meeting attendance roster

Steps To An Effective Investigation

- Suggested Script Topics
 - Why interview is taking place
 - Seriousness of investigation
 - Truthful cooperation and completeness is required
 - How information may be used
 - Confidentiality, to the extent possible
 - Best to say that the school will attempt to maintain confidentiality as best it can – and share only on a “need to know” basis



Steps To An Effective Investigation

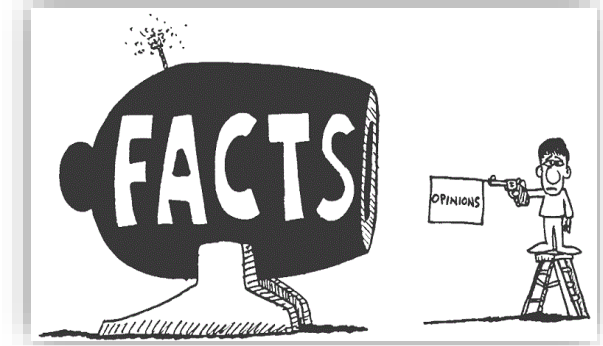
- Suggested Script (cont'd)
 - Explain there will be no retaliation for good faith reports and statements
 - You are unsure about the final outcome at this point



Steps To An Effective Investigation

Interview Techniques

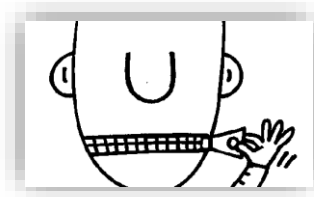
- Slow interviewee down
- Use direct quotes sparingly
- If rumor or speculation, label it as such – Go to source
- Easy questions first, hard questions last
- Avoid legalese or legal jargon
- Try to get chronological explanation
- Re-tell, confirm chronology as necessary
- Avoid compound questions
- Avoid opinions
- Support conclusions with facts
- Preserve evidence



Steps To An Effective Investigation

The Bad and the Ugly

- Record objective observations, not conclusions
 - “Blushed,” “raised voice,” “no eye contact”
 - Not “appears to be lying”
- Do not make legal conclusions
 - “Inappropriate” or “unprofessional”
 - Not “harassment” or “discrimination”
- Don’t discuss theories or speculation with interviewee



Steps To An Effective Investigation

Do Not Forget To:

- Review your notes and ask "Is there anything else I should know?"
- Remind person to circle back to you if they recall anything additional, witness anything concerning, or see any evidence of retaliation



Steps To An Effective Investigation

Interviewing the Complainant:

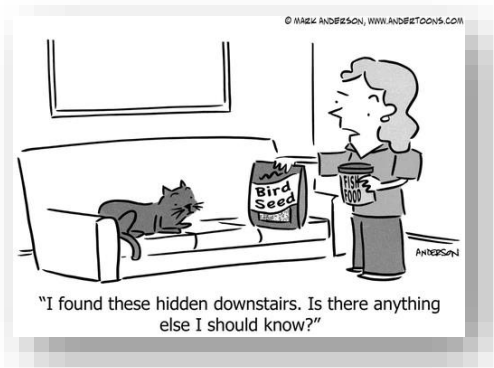
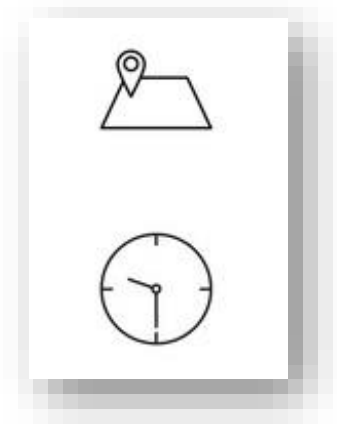
- Who, what, when, where, why, how, who else present
- Details, details, details
- Identify specific conduct involved
- Are there others with similar complaints?
- Has employee complained to anyone else?
- Consider obtaining written, signed statement



Steps To An Effective Investigation

Interviewing the Complainant (Cont'd)

- Does conduct occur at any particular time or location so that you could observe it
- Frequency of conduct
- Identity of witnesses
- "Anything else I should know?"



Steps To An Effective Investigation

Interview other witnesses

- All witnesses identified
- Challenge responses that are too agreeable
- Any former employees necessary to interview?
- Do documents support facts shared?



Steps To An Effective Investigation

Interview the Accused

- Who, what, when, where, why, how
- Details, details, details
- “Any reason for Bob [complainant] to lie or exaggerate?”
- Get response to each allegation individually
- “Anything else I should know?”



Steps To An Effective Investigation

Interview the complainant's supervisor

- Knowledge of current complaint
- Discipline problems
- Different behavior or work performance



Steps To An Effective Investigation

Developing the Right Conclusion

- Look for common threads of credibility
 - Believability, as objective as possible
 - Is story vague or consistent
 - Bias
 - Motives
 - Demeanor and attitude



Steps To An Effective Investigation



Make Decision and Write a Final Report:

- Avoid creating causes of action for accused
 - Keep conversations private, need to know basis
- Proofread carefully
 - If attorney involved – label “attorney-client privileged”
 - Have another executive review before finalizing
 - Prepare as if your materials will end up in court
 - Avoid stating it was discrimination or harassment
 - Say unprofessional or policy violation

Post-Investigation Steps

- Take Appropriate Corrective Action
 - Prompt
 - Appropriate
 - Reasonable



Corrective Action



- What is reasonable corrective action?
 - Consider severity, frequency, duration of conduct
 - It should stop the offensive behavior
 - Should be proportional to the offense
- If apply inconsistently, could lead to disparate treatment claim
- Document that corrective action implemented

Final Steps

- Confirm that corrective action has been taken and whether it was effective
- Ensure no retaliation occurs
- Decide if additional training should be expanded to prevent this type of allegation from arising in the future
- Identify any other actions you can take to make the work place better than you found it, even if not the subject of the complaint



Questions?



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HIGHER EDUCATION INSTITUTION GOVERNING BOARDS: ROGUE REGENTS AND MALICE IN WONDERLAND

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Introduction

- ▶ The first English and European universities (**circa 1100**) were governed by their faculties.
- ▶ From its inception in 1636, Harvard University was placed under the control of a board of regents (or trustees) who were responsible for safeguarding the Puritan doctrine in policy development and institutional leadership. American Puritans would not defer to college presidents or faculties to make and implement educational policy, opting for governance by a “lay board” (Potter, p. 34).
- ▶ The first regents were often members of the clergy.
- ▶ Harvard’s method of regent appointment and institutional governance has remained the pattern in American colleges and universities.
- ▶ Current postsecondary governing boards are dominated by business and professional members of the lay community (Potter, p. 34).

College and University Governance

- ▶ Governance is defined as a process for the equitable distribution of authority, influence, and resources among all internal and external constituencies.
- ▶ Current broad-based participation in governance complicates the process because stakeholders' interests vary and resources are limited. Discretionary decisions by boards on resource allocation seldom satisfy all constituencies.
- ▶ Therefore, governance is a dynamic and contentious process.
- ▶ Effective governing boards act only as corporate entities at regularly scheduled meetings. Individual members have no authority to speak for the board unless specifically authorized to do so.
- ▶ Effective governance is dependent on mutual trust and respect among regents and between the board and the president.

Rogue Regents and Malice in the Wonderland of Higher Education

- ▶ Rogue regents do not contribute to the trust, respect, and harmony that are essential to effective governance. Rogues are elected or appointed to governing boards for a variety of reasons, most of them negative. Rogue regents come from all socioeconomic backgrounds and classes, all races, and all political persuasions, but their impact on governance is essentially the same. They bring rancor, ill-will, and malice into the board room. Rogues often join the board with a very narrow agenda (e.g., fire the president, lower taxes, start an athletic program, eliminate the athletic program, start or eliminate a specific institutional program).

An Overview of Rogue Regents

- ▶ Rogue regents do not work cooperatively with fellow board members and/or the president of the institution. They violate tenets in the Board's Code of Ethics whenever it suits their purpose(s). For example, they may release confidential information to the media without authorization or attack the honesty and integrity of the board chair or president without cause. Too often, rogue regents meddle in daily operations of the institution and advocate for special interest groups on and off the campus (e.g., the faculty union or taxpayers association). They have been known to pressure college leaders to hire personal friends and family members (e.g., spouses), ignoring the institution's *nepotism policy* and/or state law.

Rogue Regents in the Sunlight (with acknowledgment to Dr. Terry O'Banion in *The Rogue Trustee*, 2009).

- ▶ Rogue regents act maliciously, spitefully, and unethically. They often condescend to other board members and seek to demean fellow board members who disagree with them - their purpose is to divide, not unite.
- ▶ Rogues may act furtively or publicly, depending on their motives at the time. They do not comply with the behavioral norms and standards expected of public officials under policy and law. For example, rogues have been known to leak confidential personnel information to the media in direct violation of board policy.
- ▶ Rogue regents ignore the Board's Code of Ethics and place their personal interests over the interests of the institution. They often make inappropriate alliances with other constituencies to accomplish political or personal agendas.
- ▶ Rogue regents may accept financial and political support from institutional employee groups (e.g., unions) or external special interest groups, thereby committing to act (vote) in the interests of those groups.
- ▶ Rogues often recommend and support policies and practices that are not in the best interests of the college.

Rogue Regents in the Sunlight (with acknowledgment to Dr. Terry O'Banion in *The Rogue Trustee*, 2009). Cont'd.

- ▶ Rogues often consume an inordinate amount of the staff's time (particularly the president's time), and they often try to dominate discussions at board meetings. Consequently, they are often viewed as "high maintenance" persons.
- ▶ Rogues crave attention; they appeal to the base motivations of others; and they manipulate others and situations to their personal advantage.
- ▶ Rogues are catalysts for divisiveness, paranoia, fear, and subterfuge on the board and campus. They poison the culture of the board and the institution.
- ▶ In summary, rogue regents can cause enormous and irreparable damage to the reputation and effectiveness of the governing board.

Mitigating the Negative Impact of Rogue Regents

- ▶ There are a number of ways to mitigate the negative impact of rogues.
- ▶ The most effective way to deal with rogue regents, of course, is to prevent their election or appointment to the board in the first place. Consequently, current board members have a responsibility and vested interest in encouraging qualified (and ethical) candidates to seek membership on the board.
- ▶ Every higher education governing board must develop a Code of Ethics and a Conflict of Interest Policy and follow the tenets of each policy consistently and fairly. All new board members must be required to complete an orientation program and periodic training on board policies and procedures, led by the chairperson, experienced board members, and legal counsel. The orientation must include briefings on the shared-governance model used in colleges and universities and the unique role of citizen-regents in that model. New members should be informed early about the many ethical issues and potential conflicts of interest that confront all college and university board members.

Mitigating the Negative Impact of Rogue Regents Cont'd.

- ▶ Newly elected or appointed regents should be paired with veteran board members who can serve as mentors and “buddies” for the newcomers.
- ▶ The aforementioned policies and practices are usually effective in preparing all regents for effective service on the board. However, if and when these initiatives fail and a rogue regent disrupts the governance process, the chairperson and other members must confront the rogue about his/her unethical (and/or illegal) conduct.
- ▶ Should the rogue’s unacceptable behavior continue, the entire board should publicly reprimand and/or censure the wayward regent, an embarrassing and unpleasant task which board members tend to avoid if at all possible.
- ▶ State laws and governing board policies must include provisions for the legal recall of irresponsible and/or incompetent regents. Such provisions serve public notice that regents will be held to high standards of conduct and performance while governing colleges and universities. Students, faculty, and staff in all colleges and universities deserve no less.

Epilog to Rogue Regents and Malice in Wonderland

- ▶ The “politicalization” of many college and university governing boards strains board-president and regent-to-regent relationships and may well bring more rogues to future boards. Too often, “politicalization” leads to “polarization.”
- ▶ *Memorandum to presidents and board chairpersons*- Treat all board members courteously, fairly, and respectfully - even rogue members who disrupt, distract, and divide.
- ▶ *Memorandum to presidents and chairpersons*- Beware of a “conspiracy of silence” that may develop among responsible regents regarding the disruptive, unacceptable, and unethical conduct of a rogue regent (or regents).

Epilog to Rogue Regents and Malice in Wonderland Cont'd.

- ▶ Above all, responsible governing board members must understand that ignoring or overlooking a rogue regent's unethical and/or illegal behavior is usually not an effective way to deal with the problem. Too often, the rogue interprets the silence of fellow regents as acquiescence and/or approval and acts accordingly - to the chagrin of all concerned. In addition, the board must acknowledge publicly that it is not the responsibility of the institution's president to discipline recalcitrant board members, either rogues or well-meaning regents who may fail to comply with established policy and/or procedure on occasion.
- ▶ Finally, Lucius Annaeus Seneca, first century Roman philosopher and statesman, said on one occasion: "Malice drinks one-half of its own poison." We should be so lucky.

Concluding Remarks and Advice from Legal Counsel

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March 23-24, 2020

UNT Higher Education Law Conference

The Supreme Court and Protection for LGBT Individuals



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“A house divided against itself . . .”

About the
not-so-simple
meaning of “SEX”



Conflicts in the Courts of Appeals



- Prior to the Supreme Court's June 15, 2020 decision in *Bostock v. Clayton County, Georgia*, and the consolidated cases of *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, the Circuit Courts of Appeals were divided on whether Title VII protected LGBT employees in the workplace from discrimination on the basis of sex

Conflicts in the Courts of Appeals



- However, the watershed moment had occurred three years earlier, in 2017, when the Seventh Circuit, sitting *en banc*, reversed its precedents denying Title VII protection to an employee discriminated against based on her sexual orientation – she was a faculty member in higher education



What We'll Talk About Today



- Title VII and the Civil Rights Act of 1964
- The Real Meaning of Being LGBT
- The Watershed Case: *Hively v. Ivy Technical College*
- Appeals from Three Courts of Appeals to the Supreme Court, and How the Court Handled Them
- The Oral Arguments and the Actual Decision
- What This All Means

Background of Title VII



- At 7:40 on the evening of June 19, after the longest debate in its nearly 180-year history, the U.S. Senate passed the **Civil Rights Act of 1964**, of which Title VII is part. The vote in favor of the bill was 73 to 27
- Thirteen days later, on July 2, the U.S. House of Representatives passed the bill and President Lyndon B. Johnson signed the bill into law that same evening
- **Five hundred amendments had been made to the bill and Congress had debated the bill for 534 hours**

What Is Title VII?



Title VII of the Civil Rights Act of 1964

- Title VII is a federal civil rights law that prohibits employers from discriminating against employees **on the basis of sex**, and also race, color, national origin, and religion.
- It generally applies to employers with 15 or more employees, including federal, state, and local governments

Enforcement of Title VII



- The Equal Employment Opportunity Commission enforces Title VII
- Permission to sue is required from the EEOC before an employee can initiate suit to sue an employer for a discriminatory action



Baldwin v. Foxx (2015)



- The Equal Employment Opportunity Commission (EEOC) ruled that Title VII protects against discrimination on the basis of sexual orientation, but not all Circuit Courts of Appeals agreed



2015 – *Obergefell v. Hodges*



- The Supreme Court made same-sex marriage legal in all states; required that all states recognize same-sex marriages
- 5-4 decision
- May have also widened the divide among the American public



Who Is An LGBT Individual?



- One of approximately 4.5% of U.S. adults who identify as LGBT, according to the 2019 data from the Williams Institute of UCLA Law School
- That's approximately 11.3 million people
- The American College Health Association and the American Association of Colleges and Universities put the percentage of college/university students who identify as LGBTQ as 10%

The Numbers Have Been Increasing



- Latest Figures
- U.S. Adults Identifying as LGBT, 2012-2018

	2012	2014	2016	2018
% LGBT	3.5%	3.7%	4.1%	4.5%
Estimated Number of LGBT Adults	8.3 million	9.2 million	10.1 million	11.3 million

- Gallup Daily Tracking

LGBT Students In Higher Education



- Many LGBT students fail to identify as such for fear of harassment/stigma
- But the other problem is the different terminology many queer people use to describe themselves
- Of the over 3000 institutions in the U.S. only about 350 include sexual orientation in their anti-discrimination policies
- Most require new students to live on campus and match roommates randomly
- Few institutions provide LGBT sensitivity training to their campus security/police forces

LGBT Faculty in Higher Education

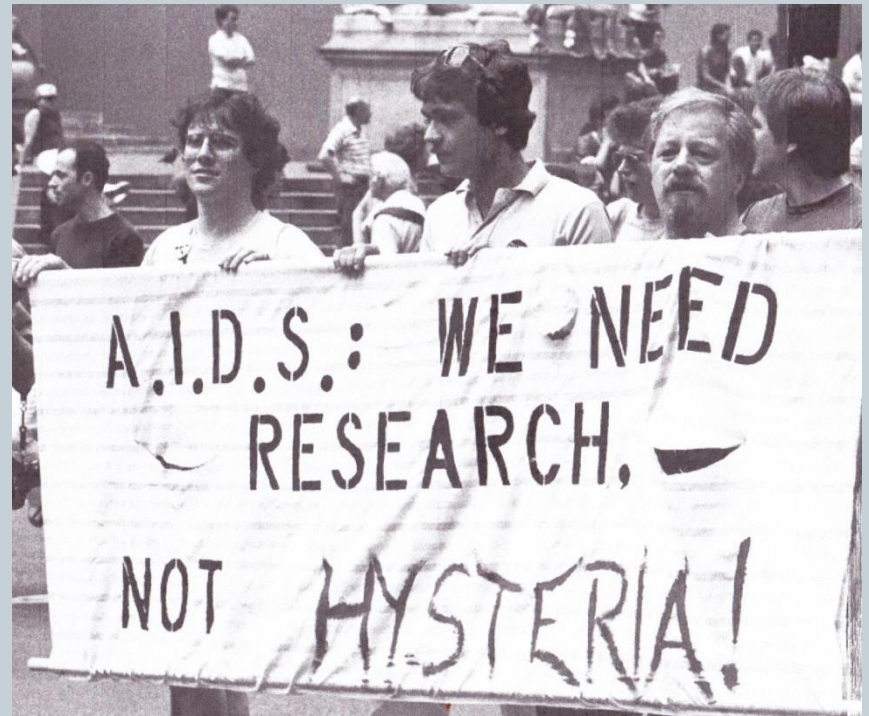


- The Postsecondary Education Data System does not track sexual orientation or transgender status
- The AFT reports that 60% of all faculty in higher education and 54% of all staff report observing instances of LGBT harassment
- But *Inside Higher Education* (2016) reported that faculty in HE are disproportionately LGBT, perhaps due to “task independence” at work, and social perceptiveness, which is higher in LGBT individuals, even controlling for age, race, gender

1980s: The AIDS Epidemic



- “Rare Cancer Seen in 41 Homosexuals” appeared in the NY Times in 1982
- Called the “gay cancer”
- Confusion and near panic resulted
- Stigma grew about homosexuals and intravenous drug users



What It Means To Be LGBT



- Stigma and discrimination
- Joblessness and poverty
- Substandard health care in many cases; having to train your doctor what your health needs are
- Depression, low self esteem
- Suicides –
 - Highest risk is during teen years-3x more likely to attempt suicide than heterosexual peers
 - Adults at 2x the risk; transgender highest

The High Cost of Being LGBT



- Encountering discrimination in virtually every sphere in many places
- Especially in employment
- Over half of the states allowed an employer to fire, or not even hire, a person who revealed their LGBT status
- And over half (52%) of LGBT individuals live in those states
- Some localities have non-discrimination statutes
- More do not

The Case That Brought Us Here



- ***Hively v. Ivy Technical Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017)**
- Kimberly Hively , an openly gay part-time instructor at Ivy Tech, alleged that the college denied her a full-time position and ultimately failed to renew her contract because of her sexual orientation; she sued the college
- After the district court dismissed her suit, Hively appealed to the Seventh Circuit, represented by Lambda Legal

The *Hively* Decision



- A three-judge panel of the Seventh Circuit ruled against Hively, stated that Title VII applied only to discrimination “against a woman because she is a woman, and against a man because he is a man”
- But taking note of Title VII’s protection for sexual stereotyping and the *Obergefell* decision, the three-judge panel called the situation a “**confused hodge-podge of cases**”
- **The Seventh Circuit then reconvened *en banc* to reconsider the three-judge panel decision and ruled 8-3 in Hively’s favor on April 4, 2017**

The *Hively* Decision



- Chief Judge Diane Wood wrote for the majority
- The *en banc* court relied on two theories:
 - **1. A “counterfactual” analysis** where “only the variable of sex is allowed to change”
 - **2. An associational argument**, where “a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits”



The *Hively* Decision



- Noting that they were not amending Title VII, but performing a **pure question of statutory interpretation**, the majority posited the “counterfactual” scenario in which Hively was not a female, but a male
- If Hively had been a male attracted to a female, she would not have been denied a teaching contract on the basis of her attraction
- The *en banc* majority said the college had engaged in sexual stereotyping
- **“It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”**

The *Hively* Dissent



- In a dissent nearly as long as the majority opinion, Judge Diane Sykes fired back at the “**judge-empowering, common-law decision method**” of the majority which created a “**statutory amendment courtesy of unelected judges,**” which “comes at a great cost to representative self-government.”

Posner's Concurrence



- “Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will **update it to the present**, . . . call it **judicial interpretive updating** . . .”
- “I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.”

The *Hively* Decision



- *Ivy Technical College* did not petition the Supreme Court for *certiorari*
- For a time, *Hively* was controlling precedent only in the courts of the Seventh Circuit: Illinois, Indiana, and Wisconsin
- But the *Hively* analysis extended all the way to the Supreme Court arguments of October 8, 2019



Petitions for *Certiorari* Post-*Hively*



Name of the Decision	Circuit Court	Date of Petition for Certiorari	Scheduled for Conference
<i>Bostock v. Clayton County, Georgia</i>	Eleventh	May 25, 2018	Set for Conference: September 24, 2018
<i>Altitude Express, Inc. v. Zarda</i>	Second	May 29, 2018	Set for Conference: September 24, 2018
<i>G.R. & R.G. Harris Funeral Homes, Inc. v. EEOC</i>	Sixth	July 20, 2018	Set for Conference: November 30, 2018

Zarda v. Altitude Express



- 883 F.3d 100 (2nd Cir. 2018)
- Like *Hively*, *Zarda* was also an *en banc* decision
- And the *Zarda* majority quoted extensively from the *Hively* decision
- However, the *Zarda* decision was notorious for its 8 separate opinions from the 13 Justices of the Appeals Court: the majority opinion (6), 4 separate concurrences, and 3 separate dissents
- In total, about 160 pages



Zarda v. Altitude Express



- Anthony Zarda was a skydiving instructor
- As part of his job he regularly took tandem jumps with his clients, and when jumping in tandem with a woman, he often told the woman he was gay, allegedly to make her feel more comfortable so close to an unfamiliar man
- His trouble began when in June 2010, he told a woman he was gay, but she told her boyfriend, who told Zarda's boss, and the boss fired Zarda
- Zarda filed suit, alleging a violation of Title VII, but the district court granted summary judgment to Zarda's boss

Zarda, cont.



- Meanwhile, the EEOC decided *Baldwin*
- Zarda renewed his Title VII claim, and eventually landed up in the Second Circuit Court of Appeals, on *en banc* reconsideration to decide whether discrimination on the basis of sexual orientation was a subset of discrimination based on sex
- The *en banc* majority quoted extensively from *Hively's* two arguments, and also argued that discrimination on the basis of sexual orientation was sexual stereotyping
- They remanded Zarda's case to the district court, to be decided in his favor

Zarda, cont.



- Unfortunately, Zarda died in a BASE jumping accident in Switzerland before the decision in his favor
- However, the *Hively* and *Zarda* decisions put the Seventh and Second Circuits clearly in the camp that considered Title VII to extend to protect employees from discrimination on the basis of sexual orientation
- **On May 29, 2018, Altitude Express filed a petition for *certiorari* to the Supreme Court**

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

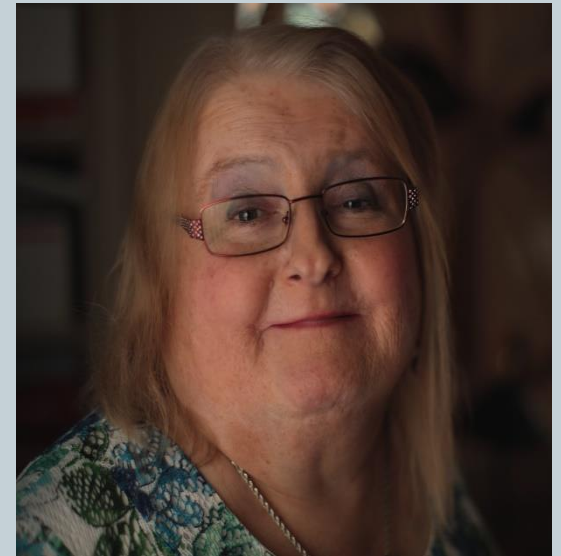


- 884 F.3d 560 (6th Cir. 2018)
- On March 7, 2018, the Sixth Circuit joined its sister circuits in extending the protection of Title VII, in this case, to protect against discrimination on the basis of gender identity
- The plaintiff, Aimee Stephens, a transgender female funeral director at one of the three Harris Funeral Homes, was fired when she informed her boss that she would be transitioning and wearing female clothing on the job

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.



- Her boss claimed that having her wear female clothing would place an unjustified burden on his sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act
- No evidence existed that Stephens' boss or the funeral homes were dedicated to any particular religion, and he hired employees of any (or no) professed faiths, but the company had not had any female employees since 1950



EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.



- After announcing her intention dress as a woman and to have sex reassignment surgery after living and working full-time for the required year as a woman, Stephens was fired
- The EEOC brought suit, and the district court ruled that Stephens had been discriminated against on the basis of her sex, but that the Religious Freedom Restoration Act prevented the court from deciding in her favor
- There was a second issue in the case about disparate clothing allowances for female and male employees
- The court said EEOC should have simply asked for a gender neutral clothing policy

Harris Funeral Homes, cont.



- **The Sixth Circuit Court of Appeals reversed in very straightforward language**
- **“We also hold that discrimination on the basis of transgender and transitioning status violates Title VII.”**
- **“... Title VII protects against sex stereotyping and ‘transgender discrimination is based on the non-conformance of an individual’s gender identity and appearance and behavior . . . to the sex assigned to them at birth.’”**
- The Court also quoted *Hively* and *Zarda*
- “The Funeral Home is wrong.” Also, the Religious Freedom Restoration Act does not apply

Bostock v. Clayton County Board of Commissioners (2018)

- In a very short *per curiam* opinion on May 10, 2018 (strangely, also, labelled “Do Not Publish”), a three-judge panel of the Eleventh Circuit Court of Appeals affirmed the dismissal of Gerald Lynn Bostock’s lawsuit by the district court
- Bostock had been working as a county child welfare services coordinator
- His employer alleged he was mismanaging funds, but Bostock said he was fired because he was gay, in violation of Title VII



Bostock, cont.



- The Eleventh Circuit Court relied on a Fifth Circuit precedent, *Blum v. Gulf Oil Corporation* (1979), deciding that “discharge for homosexuality is **not prohibited** by Title VII”
- The Eleventh Circuit was carved out of the Fifth Circuit by statute in 1980, and its first decision in 1981 was to adopt as binding precedent all prior Fifth Circuit decisions

Bostock, cont.



- Bostock appealed for a rehearing *en banc*, which was denied, but accompanied by a vigorous dissent by Obama-appointee Judge Rosenbaum
- Rosenbaum referenced both *Hively* and *Zarda*, as *en banc* decisions that underscored the need for the Eleventh Circuit to convene *en banc* to decide *Bostock*

Bostock, cont.



- Calling the decision “*en-banc*-worthy,” Rosenbaum noted the large numbers of workers potentially impacted by the *Bostock* decision
- Criticizing the Court’s reliance on *Blum*, Rosenbaum wrote in her dissent, “**I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine.**”

So Here's What Happened . . .



Name of the Decision	Circuit Court	Date of Petition for Certiorari	Actions Taken
<i>Bostock v. Clayton County, Georgia</i>	Eleventh	May 25, 2018	Set for Conference: September 24, 2018 Rescheduled: 13x
<i>Altitude Express, Inc. v. Zarda</i>	Second	May 29, 2018	Set for Conference: September 24, 2018 Rescheduled: 13x
<i>G.R. & R.G. Harris Funeral Homes, Inc. v. EEOC</i>	Sixth	July 20, 2018	Set for Conference: November 30, 2018 Rescheduled: 12x

LGBT Oral Arguments on October 8, 2019



Petitioner	Issue
<p>Consolidated Cases <i>Bostock v. Clayton County, Georgia</i> <i>Altitude Express, Inc. v. Zarda</i></p>	<p>Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.</p>
<p><i>R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission</i></p>	<p>Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under <i>Price Waterhouse v. Hopkins</i></p>

The Attorneys Arguing the Cases



- **Arguing that Title VII protects gender orientation:**
- **Pamela Karlan**
 - Professor at Stanford Law School, Co-Director of the Supreme Court Litigation Clinic
 - Former law clerk for Justice Henry Blackmun
- **Arguing against Title VII protection for gender orientation:**
- **Jeffrey Harris**
 - Experienced litigator in private practice
 - Former law clerk to Chief Justice John Roberts

The Attorneys Arguing the Cases



- **Arguing that Title VII protects transgender individuals:**
- **David Cole**
 - National Legal Director for the ACLU
 - Professor, Georgetown University Law Center
- **Arguing against Title VII protection for transgender individuals:**
- **John Bursch**
 - Represents the Alliance Defending Freedom
 - Former Solicitor General of Michigan

The Attorneys Arguing the Cases



- General Noel Francisco, U.S. Solicitor General, also argued in each case
- He represented the administration position against extending Title VII protections on the basis of gender orientation or transgender status
- He had been a former law clerk for Justice Antonin Scalia

The Nine Who Decided



How the Arguments Proceeded . . .



- Attorney Karlan speaking for Gerald Bostock and Melissa Zarda began with the straightforward statement that **“when an employer fires a male employee for dating men but does not fire female employees who date men, [the employer] violates Title VII”**
- “the adverse employment action is based on the male employee’s failure to conform to a particular expectation about how men should behave”
- The *Hively* argument reversed for a male

How the Arguments Proceeded . . .



- In fact, Karlan argued, it is no defense if an employer says he treats gay men and lesbian women the same; that employer is a “double discriminator”
- J. Ginsburg was the first Justice to interrupt, asking if Congress in 1964 could have intended to protect gay men because in 1964 males’ same-sex relations were a criminal offense

How the Arguments Proceeded . . .



- Karlan replied that Title VII now applied to many cases that Congress did not think of in 1964, especially, e.g., sexual harassment, which the High Court itself had to add to the meaning of discrimination on the basis of sex
- “In 1964 those were the days of ‘Mad Men’”
- And Karlan made the first reference to Ann Hopkins and the *Price Waterhouse* decision

Karlan's Arguments, cont.



- C.J. Roberts jumped in to ask if Karlan agreed with Judge Posner's quote about helping the legislative branch **update old statutes**
- Karlan said she disagreed with Posner, and later, when J. Alito returned to the issue of the Court being wrong if it acted as a legislature, Karlan characterized Judge Posner as “a loose cannon”
- Karlan stressed that the Court should just look at the words of the statute, “men” and “women”

Karlan's Arguments, cont.



- Karlan used the example of two employees who tell their boss they “married their partner Bill” last weekend, and the boss gives the female employee who married Bill a few days off to celebrate, but fires the male employee
- “[T]hat’s discrimination because of sex,” said Karlan
- Karlan paused, but no one jumped in, so at only about 4 1/2 minutes into her argument, Karlan said, “Well, if no one has any further questions, I’ll reserve the remainder of my time for rebuttal,” and the audience laughed

The Other Side

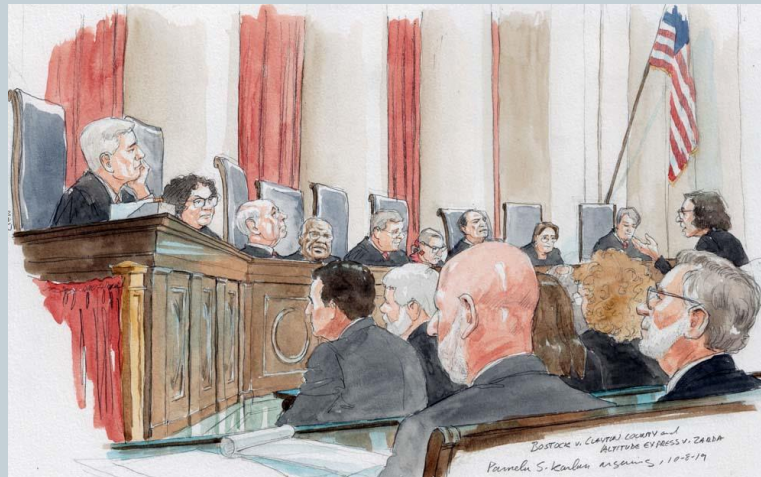


- Jeffrey Harris began with the argument that in 1982, Wisconsin was the first state to ban discrimination on the basis of sexual orientation, and the ban was lauded as a landmark achievement, but his opponents were trying to say Congress adopted that ban in 1964
- Harris also quoted *Oncale*'s critical inquiry, as members of one sex were being treated worse than members of the other sex, and he said both men and women can have same sex attractions, so can't they be treated equally without discrimination?

Karlan's Final Shot



- “So the idea that this is one large idea about sexual orientation discrimination in the abstract, without reference to sex, simply burkes the history and burkes the understanding.”



<https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/>

The Transgender Arguments



- David Cole argued basically the same arguments as Karlan did in the previous sexual orientation cases
- Treating transgender men and women the same is no defense; that would be double discrimination
- No Posner redefinition or “updating” is necessary
- Cole said all his arguments are based on the meaning of “sex” as the sex assigned at birth on the basis of visible anatomy, biological sex

David Cole's Arguments



- C.J. Roberts jumped right in on the bathroom issue
- What do you do about “policies” – i.e., if the transgender woman wants to use the women’s bathroom? J. Sotomayor also jumped in
- Cole insisted that this question will arise no matter how the Justices decided the question at hand
- And Kagan rephrased Cole: “So . . . we’re stuck with that question regardless of how we decide this case.”
- The arguments followed in the same vein for athletics, religion; those issues would remain to be decided

David Cole's Argument, cont.



- J. Gorsuch strongly argued that the textual evidence was close . . . But that the legislative process should decide
- Gorsuch pointed to the “massive social upheaval” that would be entailed in this decision, and stressed that “judicial modesty” should be maintained
- Gorsuch was hard to read during oral arguments

Breyer's Eloquent Response



- In response to Gen. Francisco in the Harris Funeral Homes case, Breyer stated:
- “In the '60s, we were only ten years away from where people who were real slaves and -- and discriminated against -- obtained a degree of freedom. And these statutes were all part of a civil rights movement that was designed to give, [to] include in our society, people who had been truly discriminated against for the worst of reasons. And at that time, this civil rights statute, when it was passed, would have put in the category gay people, transgender people, a people who were suffering terrible discrimination.

Breyer's Response, cont.



- And over time, this Court has moved away from that view finding it unconstitutional. And now, doesn't that fact, which is an overwhelming fact to me about the nature of the country under law, argue that that's a change. That's a change that both explains why they didn't put it in initially and explains why we should, other things being equal, interpret it to include gay people and transgender people now?"

And Sotomayor's Eloquence



- In the same vein, Sotomayor also asks:
- “May -- may I just ask, at what point does a court continue to permit invidious discrimination against groups that, where we have a difference of opinion, we believe the language of the statute is clear. I think Justice Breyer was right that Title VII, the Civil Rights Act, all of our acts were born from the desire to ensure that we treated people equally and not on the basis of invidious reasons.”

Sotomayor's Eloquence, cont.



- “And we can't deny that homosexuals are being fired merely for being who they are and not because of religious reasons, not because they are performing their jobs poorly, not because they can't do whatever is required of a position, but merely because they're a suspect class to some people. They may have power in some regions, but they are still being beaten, they are still being ostracized from certain things.”

Sotomayor's Eloquence, cont.



- At what point does a court say, Congress spoke about this, the original Congress who wrote this statute told us what they meant. They used clear words. And regardless of what others may have thought over time, it's very clear that what's happening fits those words. At what point do we say we have to step in?”

Francisco's Final Retort



- Francisco repeated Justice Scalia's "great line," implying Scalia invented the line
- "... we don't hide elephants in mouse holes."
- **"There is no way to find that elephant in this mouse hole."**



Were Predictions of the Result Correct?



- Massive social upheaval?
- *Obergefell* did that, and America lived through it
- Did the Court split along party lines?



Predicting the Result?



- Who will be chosen to write the majority opinion?
- Will Clarence Thomas write one of his famous dissents? He, characteristically, did not speak at all at oral arguments.
- Will Gorsuch be the “textualist” as advertised?
- If the Justices believe that sexual orientation and gender identity cannot be considered separately from sex . . .
- Speculation lasted from October to mid-June

The Result Was a Stunner!



- **6-3**
- **Gorsuch wrote the majority opinion!**
- Breyer, Ginsburg, Sotomayor, Kagan, and Roberts composed the majority
- Roberts dissented, with Thomas signing on
- Kavanaugh also dissented
- The decision was *Hively, Hively*, and more *Hively*
And reiterated the points made in oral arguments

Gorsuch's Beginning



- “Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. . . .
- Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. . . .
- Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

The Majority Opinion, cont.



- In statutory interpretation “. . . only the words on the page constitute the law adopted by Congress and approved by the President.”
- “With this in mind, our task is clear.”
- “We must determine the ordinary public meaning of Title VII’s command that it is ‘unlawful for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.’”
- “We orient ourselves to the time of the statute’s adoption, here 1964 . . .”

The Majority Opinion, cont.



- Gorsuch promptly assumed the employers' argument, that "sex" signified biological distinctions between male and female
- But qualified that concession as only a "starting point"
- Gorsuch: The question isn't just what "sex" meant, but what Title VII says about it. . . . Most notably, the statute prohibits employers from taking certain actions *because of* sex.
- And that led to the standard of "but for" causation
- **If sex is a even only one factor in the employer's decision**

The Majority Opinion, cont.



- The majority opinion reiterated the counterfactual argument of *Hively*
- In parsing out the employer's action, change one characteristic at a time, and look at the outcome
- Gorsuch reiterated the points raised in oral arguments; he was a “dark horse”
- Roberts was the other unknown, but they went different ways

Hively Pure and Simple



- Gorsuch's reasoning:
- **Firing a person for actions or attributes that would be tolerated in an individual of a different sex is intentional discrimination on the basis of sex**
- And Title VII focuses on the individual, not on groups
- Even if an employer treats women or men as a group fairly, discrimination against an individual violates Title VII

The Mousehole?



- “This elephant has never hidden in a mousehole; it has been standing here all along.”
- There is an elephant here; but there is **no mousehole** in the statute; the statutory language is broad and individualized in application



What the Ruling Left Out



- Religious considerations and the Religious Freedom Restoration Act
- Sex-segregated bathroom, locker rooms
- Dress codes
- All of these had been topics in the oral arguments, where the response was that, despite the ultimate ruling in these consolidated case, **these issues would remain to be sorted out in the future, as noted strongly in oral arguments**

The Decision



- **168 pages in total**
- Gorsuch's 33-page majority opinion mirrored the oral arguments presented by Attorney Karlan and the comments from the liberal Justices
- **Alito's 107-page dissent was completely tedious**
- He cited to the definition of sex in eight separate dictionaries and included page after page of applications for everything from government benefits to life insurance, where an individual had to report his or her "sex"
- Kavanaugh's 28-page dissent was more tempered

What the Ruling Established



- The ruling established the workplace civil rights of individuals to be judged by how they do their jobs, not on their sex-related choices, not on their sexual orientation or on their gender identity
- Employees' rights under Title VII no longer depended on their geographical location
- Was it, is it, controversial?
- Alito called the decision “preposterous”
- The LGBT community lauded the decision as a landmark in civil rights

What the Ruling Established



- The ruling was condemned by social conservatives, and does not impact the administration's military ruling on LGBT individuals
- However, many commentators called the decision even more significant than the *Obergefell* decision, for its possible ramifications for housing, education, credit, health care, and beyond
- Even Alito specifically recognized that over 100 federal statutes prohibit discrimination “on the basis of sex;” the ripple effect may be widespread

What the Ruling Established



- Gorsuch's majority opinion was phrased in straightforward language and praised as demonstrating that he was the textualist he professed to be
- The fallout from policy decisions on bathroom and locker room usage, athletics, and religious issues will be seen in the future, but the LGBT community is optimistic

Thank you for your attention!



- I can be reached for questions or comments at:

kconn@kingspry.com



So, Is the “Hodge-Podge” Any Clearer?



- You can check out these law review commentaries:
- *The Supreme Court and Protections for LGBT Individuals: The Beat Goes On*, 368 Ed.Law Rep. [1] (September 19, 2019).
- *Re-Interpreting Sex: Changing Judicial Views of Title VII and Title IX*, 357 Ed.Law Rep. [1] (October 4, 2018).
- *After Ruling on Title VII Protection for Gender Orientation, the Seventh Circuit Opens the Door to Title IX Protection for Gender Identity*, 343 Ed.Law Rep. [641] (July 27, 2017).
- *Transgender Students on College Campuses: Challenges and Opportunities*, 330 Ed.Law Rep. [441] (July 14, 2016).



Controlled and Applied Research in Higher Education

University of North Texas

AGENDA

- FUNDAMENTAL RESEARCH VS CONTROLLED RESEARCH
- CONTROLLED RESEARCH
 - EXPORT CONTROL (ITAR AND EAR)
 - CONTROLLED UNCLASSIFIED INFORMATION (DOD AND NIST)
- FOREIGN COLLABORATION AND INFLUENCE

TERMS

- INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)
 - DIRECTORATE OF DEFENSE TRADE CONTROLS (DDTC) UNDER DEPARTMENT OF STATE (DOS)
 - UNITED STATES MUNITIONS LIST (USML)
- EXPORT ADMINISTRATION REGULATIONS (EAR)
 - BUREAU OF INDUSTRY AND SECURITY (BIS) UNDER DEPARTMENT OF COMMERCE (DOC)
 - EXPORT CONTROL CLASSIFICATION NUMBER (ECCN)
- CONTROLLED UNCLASSIFIED INFORMATION (CUI)
 - TO INCLUDE ITEMS IDENTIFIED IN EAR, ITAR
 - NIST 800-171 APPLIES TO CUI – PHYSICAL AND INFORMATION SECURITY

WHAT IS EXPORT CONTROL?

- REGULATORY
 - INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)
 - EXPORT ADMINISTRATION REGULATIONS (EAR)
 - OFFICE OF FOREIGN ASSETS CONTROL (OFAC) AND MANY MORE...
- SECURITY
 - PHYSICAL SECURITY
 - INFORMATION SECURITY – ENCRYPTION, NIST LEVEL FIPS 140-2
- “EXPORT CONTROLS ARE U.S. LAWS AND REGULATIONS THAT REGULATE AND RESTRICT THE RELEASE OF CRITICAL U.S. TECHNOLOGY, INFORMATION, AND TRAINING TO FOREIGN NATIONALS, WITHIN THE UNITED STATES, AND FOREIGN COUNTRIES FOR REASONS OF FOREIGN POLICY AND NATIONAL SECURITY”

FUNDAMENTAL VS CONTROLLED RESEARCH

- WHAT IS FUNDAMENTAL RESEARCH?

- BASIC AND APPLIED RESEARCH IN SCIENCE AND ENGINEERING
- RESULTING INFORMATION IS ORDINARILY PUBLISHED AND SHARED BROADLY WITHIN THE SCIENTIFIC COMMUNITY

- WHAT IS CONTROLLED RESEARCH?

- RESEARCH WITH PUBLICATION RESTRICTIONS
 - DFARS CLAUSES – DOD CONTRACTS
 - EXPORT CONTROLLED RESEARCH
 - INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)
 - EXPORT ADMINISTRATION REGULATIONS (EAR)

CONTROLLED RESEARCH

- EXPORT CONTROLS
 - ITAR – DEPARTMENT OF STATE ENFORCED
 - EAR – DEPARTMENT OF COMMERCE ENFORCED

- CONTROLLED UNCLASSIFIED INFORMATION (CUI)
 - DEFENSE (CRITICAL INFRASTRUCTURE, SECURITY)
 - PROVISIONAL (HOMELAND SECURITY)
 - EXPORT CONTROL
 - DOD ENFORCED

DFARS AND NIST

- DFARS INITIATES A CONTROLLED RESEARCH REVIEW
 - 252.204-7008 COMPLIANCE WITH SAFEGUARDING COVERED DEFENSE INFORMATION CONTROLS AND
 - 252.204-7012 SAFEGUARDING COVERED DEFENSE INFORMATION AND CYBER INCIDENT REPORTING

- NIST 800-171 INFORMATION AND PHYSICAL SECURITY
 - PHYSICAL ACCESS CONTROL MEASURES – EFFECTIVE CONTROL & AUDIT
 - INFORMATION SECURITY – ENCRYPTION AND MULTI-FACTOR

DEEMED EXPORT RISK

- WHAT IS A DEEMED EXPORT?
 - ANY RELEASE OF TECHNOLOGY OR SOURCE CODE SUBJECT TO THE EAR/ITAR TO A FOREIGN NATIONAL
 - SUCH RELEASE IS DEEMED TO BE AN EXPORT TO THE HOME COUNTRY OR COUNTRIES OF THE FOREIGN NATIONAL
 - WHAT DOES “RELEASE” MEAN?
 - VISUAL INSPECTION BY FOREIGN NATIONALS OF U.S.-ORIGIN EQUIPMENT AND FACILITIES
 - ORAL EXCHANGES OF INFORMATION IN THE UNITED STATES
 - THE APPLICATION OF PERSONAL KNOWLEDGE OR TECHNICAL EXPERIENCE ACQUIRED IN THE UNITED STATES – I.E. TRAINING
- WHAT TECHNOLOGY?
 - ALL TECHNOLOGY EXCEPT:
 - TECHNOLOGY UNDER THE JURISDICTION OF ANOTHER AGENCY
 - PRINTED BOOKS
 - PUBLICLY AVAILABLE TECHNOLOGY
 - TECHNOLOGY THAT ARISES DURING OR RESULTS FROM FUNDAMENTAL RESEARCH

FOREIGN COLLABORATION REPORTING

- NIH/NSF REPORTING:
 - REQUIRES THAT APPLICANTS DISCLOSE “ALL CURRENT AND PENDING SUPPORT FOR ONGOING PROJECTS AND PROPOSALS”— INCLUDING ANY FUNDING FROM FOREIGN GOVERNMENT AGENCIES. KEY PERSONNEL MUST ALSO DISCLOSE ALL ORGANIZATIONAL AFFILIATIONS.
- CHINA’S THOUSAND TALENTS PROGRAM:
 - SINCE 2008 THE PROGRAM HAS RECRUITED 56,000 RESEARCHERS TO FULL- OR PART-TIME EMPLOYMENT AT CHINESE UNIVERSITIES— MANY WHILE SIMULTANEOUSLY MAINTAINING POSTS AT UNIVERSITIES IN THE UNITED STATES AND OTHER COUNTRIES.
- CRIMINAL AND CIVIL PENALTIES FOR NON-REPORTING

FOREIGN INFLUENCE

- DR. CHARLES LIEBER: CHAIR OF HARVARD'S CHEMISTRY AND CHEMICAL BIOLOGY DEPARTMENT.
 - BEEN AT HARVARD FOR 30 YEARS RESEARCHING NANOTECHNOLOGY, BIOLOGY, ENERGY AND COMPUTING
 - RECEIVED MORE THAN \$15 MILLION IN GRANTS THAT REQUIRED DISCLOSURE OF ANY TIES TO FOREIGN UNIVERSITIES AND FOREIGN GOVERNMENTS
 - DR. LIEBER SECRETLY SIGNED A CONTRACT IN 2011 WITH A CHINESE UNIVERSITY TO GUIDE RESEARCH AT THAT INSTITUTION
 - ALLEGEDLY PART OF CHINA'S THOUSAND TALENTS PLAN
 - PAID UP TO \$50,000 A MONTH, RECEIVED \$150,000 PER YEAR FOR LIVING EXPENSES AND MORE THAN A MILLION DOLLARS IN FUNDING FOR A LAB IN CHINA



QUESTIONS?



Going Beyond the Headlines:

Understanding the Legal Issues Driving Concern Over Foreign
Influence on College Campuses

Jennifer Cowley, Provost and Vice President for Academic Affairs

Mark McLellan, Vice President for Research and Innovation

University of North Texas



Department of Justice

DEPARTMENT OF JUSTICE CHINA INITIATIVE FACT SHEET

Background

The Department of Justice's Initiative reflects the Department's strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy. The Initiative is launched against the background of previous findings by the Administration concerning China's practices. In March 2018, the Office of the U.S. Trade

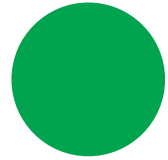


Theft of universities' secrets fuels US crackdown on Chinese talent programmes



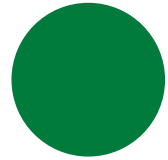
BY REBECCA TRAGER | 27 JANUARY 2020

Foreign Agents Registration Act



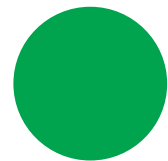
Legal Requirement

Requires disclosure of any work that organizations do to further the interest of foreign governments.



Basic Facts Behind Headline

China operates a range of talent programs that target foreign. In May 2018, a University of Kansas professor signed a five-year contract with Fuzhou University designating him as a Changjiang Scholar Distinguished Professor. He received \$37,000 in salary paid for by DOE and NSF as part of his funded research at the University of Kansas.



Implications for Universities

Universities need to focus on full disclosure of all possible outside employment and conflicts of interest.

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Chinese Military Turns to U.S. University to Conduct Covert Research

Case of Chinese researcher at Boston University renews fears Beijing is targeting American academia

By *Kate O’Keeffe* and *Aruna Viswanatha*

Feb. 23, 2020 9:00 am ET



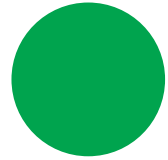
UNT

Chinese Researchers Ordered to Leave Country After UNT Terminates Visa Program

By Meredith Yeomans • Published September 4, 2020 • Updated on September 4, 2020 at 10:33 pm

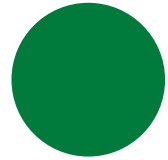


Foreign Agents Registration Act



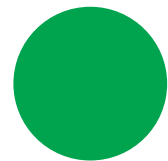
Legal Requirement

Requires disclosure of any work that organizations do to further the interest of foreign governments.



Basic Facts Behind Headline

Yanqing Ye, a lieutenant in the People's Liberation Army had gained a non-immigrant visa to become a PhD student and conduct research in a lab in the Department of Physics, Chemistry and Biomedical Engineering at Boston University. She misrepresented her foreign military service to gain entry to the U.S.



Implications for Universities

Review protocols for visiting scholar invitations, as well as protocols for access to laboratories that require security controls.

WGBH NEWS

LOCAL

Bail Set At \$1M For Harvard Professor Accused Of Lying About Ties To China

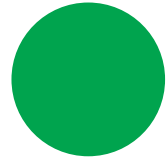


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LATEST STORIES

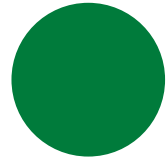
[Valentine's Day With Myers + C](#)

False Statements, Concealment



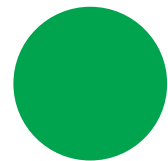
Legal Requirement

Required to make true statements under 18 U.S. C. § 1001



Basic Facts Behind Headline

Harvard's chair of chemistry established a research lab in Wuhan without the university's knowledge, as part of China's Thousand Talents program. He received \$1.5M to establish his lab and \$50,000 a month in compensation. He made false statements to the US Department of Defense about his ties to a Chinese government program.



Implications for Universities

Universities need to focus on full and TRUTHFUL disclosure of all possible outside employment and conflicts of interest.

Politics

U.S. Charges Chinese Professor Accused of Theft to Help Huawei

By [Patricia Hurtado](#)


September 9, 2019, 7:03 PM CDT

- ▶ Bo Mao was said to have aided Huawei by stealing trade secrets
- ▶ New, criminal case is moved to N.Y., where Huawei faces trial

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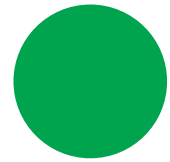
[Listen to Live Radio](#) >



US INDEX UPDATE			
<small>SP500</small>	29,398.08	▼ 25.23	0.09%
<small>NASDAQ</small>	3,380.16	▲ 6.22	0.18%
<small>DAX</small>	9,731.18	▲ 19.21	0.20%

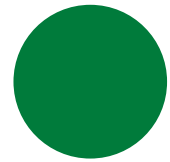
YOUR PROGRAM WILL RESUME MOMENTARILY

Wire and Program Fraud



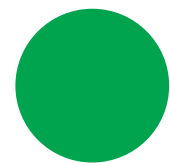
Legal Requirement

Wire Fraud and Program Fraud by defrauding the U.S. government by unlawfully receiving federal grant money at the same time that he was employed and paid by a Chinese research university



Basic Facts Behind Headline

Mao, a professor at Xiamen University and a Visiting Professor at UTA, obtained a circuit board from CNEX for the purposes of academic research, but instead is accused of committing wire fraud against a technology startup to obtain “property” on behalf of the Chinese telecommunications company Huawei.



Implications for Universities

Faculty cannot use their university identity for purposes not directly related to their faculty roles. Increase clarity of what constitutes outside employment.

EDUCATION



Harvard, Yale Accused Of Failing To Report Hundreds Of Millions In Foreign Donations

February 13, 2020 · 7:37 AM ET

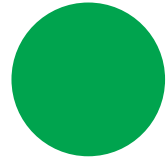
SCOTT NEUMAN



CORY TURNER

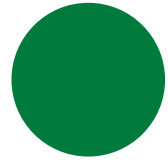


Reporting Foreign Donations



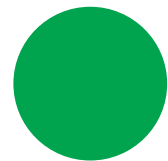
Legal Requirement

Section 117 of the Higher Education Act requires that universities report foreign donations of more than \$250,000



Basic Facts Behind Headline

The U.S. Department of Education opened an investigation into Yale and Harvard over failure to properly disclose foreign donations. Yale between 2014 and 2017 failed to disclose any foreign donations. DOE states that Yale failed to disclose \$375M in foreign donations. Other universities under investigation include Georgetown, Texas A&M, Cornell and Rutgers.



Implications for Universities

Increase institutional controls over foreign money and ensure all foreign gifts and contracts are reported. Requires collaboration across student affairs, academic affairs, research, financial aid etc.



UNITED STATES

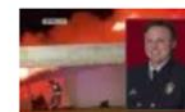
Texas A&M University Under Investigation for Foreign Funding

The Trump administration is reviewing foreign money to US colleges

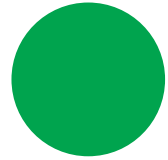
Published on June 13, 2019 at 3:28 pm



Trending S

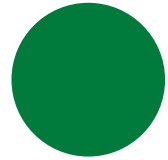


Reporting Foreign Donations



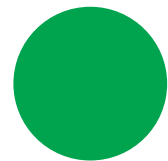
Legal Requirement

Section 117 of the Higher Education Act requires that universities report foreign donations of more than \$250,000



Basic Facts Behind Headline

Texas A&M disclosed foreign donations, but failed to disclose donations tied to Texas A&M Qatar campus, which included funding from the Qatar Foundation.

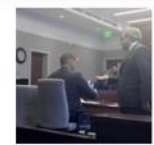


Implications for Universities

Universities need to carefully consider ALL sources of funding support, not just research support.



Delaware schools official charged with theft in office



HomePay makes it Easy. Household payroll, Nanny Taxes & HR help. Sign up Today. HomePaySM

Dealing with nanny taxes is no fun! We can help with household payroll, tax filing and more. AD

Senator proposes offering vouchers to every student in Columbus, Cincinnati,...



Budget proposal threatens project to keep out invasive fish

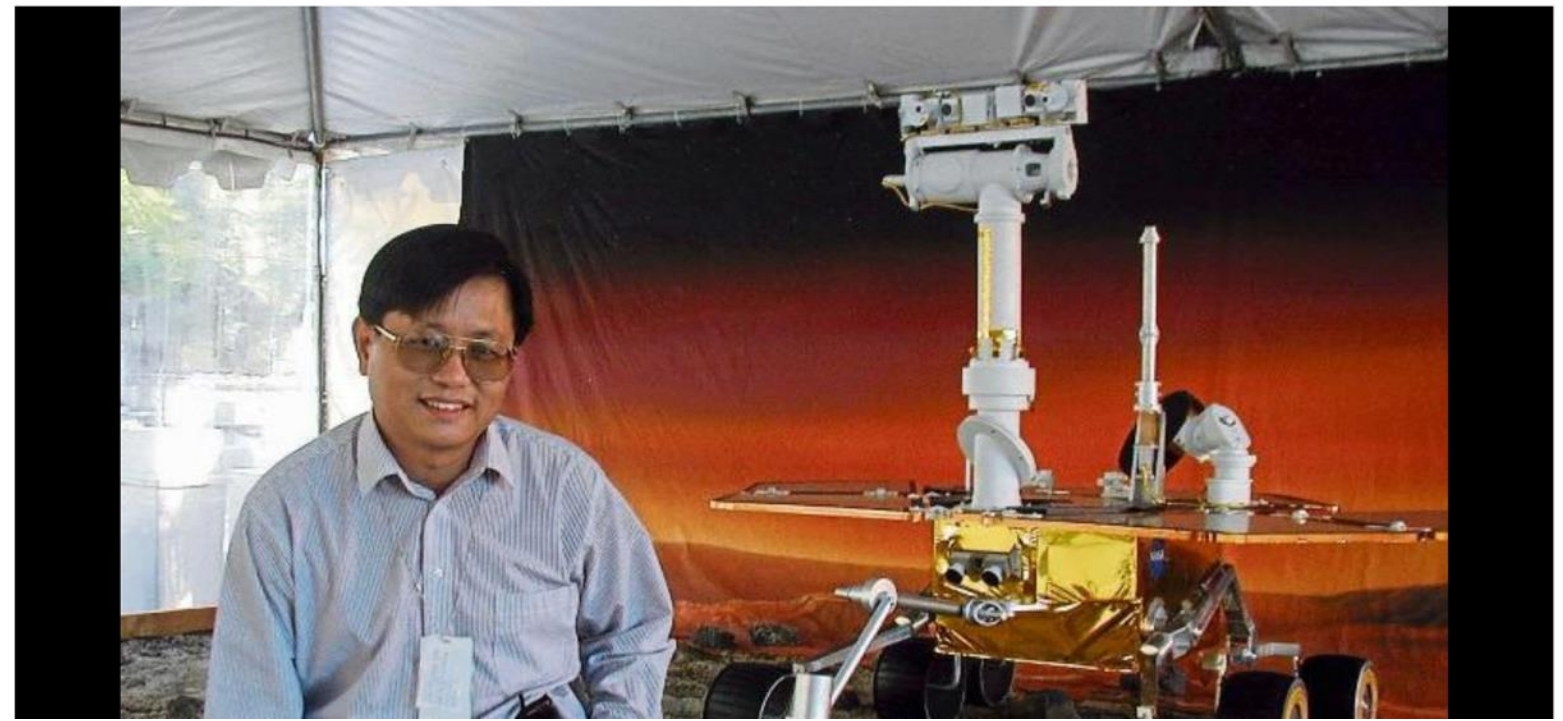


Gahanna man volunteers at the border

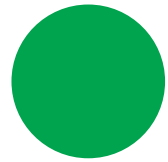
FBI investigates China ties of Ohio State professor who resigned, disappeared

Ad \$15 million in scholarships available. WGU AMBITION NEVER RESTS™ Award Winning Degree Programs WGU

MOST POPULAR
1 Ohio State football players accused of

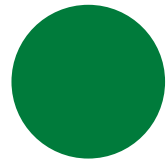


International Traffic in Arms



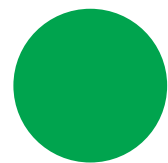
Legal Requirement

International Traffic in Arms Regulations (ITAR 22 CFR 120-130) is the implementation of the US Arms Export Control Act, which restricts the export of defense technologies. Access to physical materials or technical data is restricted to US citizens only.



Basic Facts Behind Headline

The FBI opened an investigation after a faculty member failed to disclose ties to China in a NASA grant application. The application was in partnership with a defense contractor which provided ITAR restricted data. The spouse was stopped at a US border and found to have USB's that contained ITAR restricted content.



Implications for Universities

Careful monitoring of conflict of interest disclosures.

GLOBAL



Oldest Confucius Institute in U.S. to Close

By *Karin Fischer* | JANUARY 22, 2020

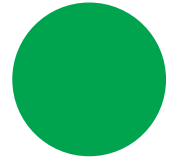
You're reading the latest Global Newsletter, a weekly publication on international higher-ed trends and developments. [Sign up here](#) to subscribe.

Hello, everyone! I'm Karin Fischer, and here's the latest news on the international-education beat:

Oldest Confucius Institute in U.S. to Close

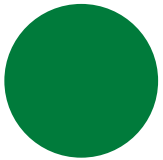
The oldest Confucius Institute in the United States is closing. [In a letter](#) to students and faculty and staff members at the University of Maryland at College Park, President Wallace D. Loh said the 15-year-old Chinese language and cultural center would shut down because

National Defense Authorization Act



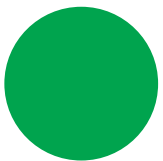
Legal Requirement

Passed in 2018, the law prohibits the US Defense Department from funding Chinese language programs at institutions that host Confucius Institutes except in cases where the institutions have obtained a waiver.



Basic Facts Behind Headline

The FBI has expressed concern over Confucius Institutes, as well as legislators. Concern is focused on potential political influence and at least one legislator has stated “threat to our nation’s security by serving as a platform for China’s intelligence collection and political agenda”. Senator Rubio sent a letter to Florida universities urging closures.



Implications for Universities

The University of Rhode Island closed its Institute in order to not jeopardize funding for its defense-funded Chinese Language Flagship program. Universities need to determine the pros-cons of financial support for Chinese programs. Arizona State and others have applied for waivers.



Legislative Responses to Foreign Influence

GLOBAL



Florida to Investigate Foreign Ties to Researchers

By *Karin Fischer* | JANUARY 16, 2020

You're reading the latest Global Newsletter, a weekly publication on international higher-ed trends and developments. [Sign up here](#) to subscribe.

Hello, I'm Karin Fischer, a longtime international-education reporter. Here are some of the developments I'm keeping an eye on this week:

Florida to Investigate Foreign Ties

Florida has become the first state to set up [its own commission](#) to examine foreign influence on research. The inquiry was triggered by the recent dismissal of six scientists at a state-founded cancer-research center, including its chief executive, for failing to disclose their

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[About Ipswich Local News](#)

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North Shore

After Harvard and BU arrests, Moulton to introduce bill to "help America better detect foreign agents"

By **John P. Muldoon** - January 29, 2020

👁 285 💬 0

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Proposed Federal Bills

National Defense Authorization Act

Safeguarding American Innovation Act

COVID_19 Vaccine Protection Act

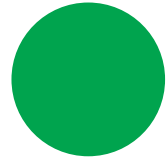
National Security Innovation Pathway Act

Homeland Security Higher Education Advisory Council Act



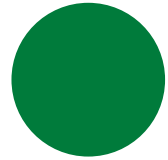
Where Do We Go From Here

Next Steps for Universities



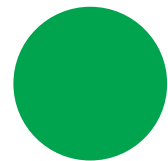
International Collaborations Continue

International work will remain a mainstay of most research universities. Universities will continue to encourage collaborative research.



Increased Transparency By All

Full transparency will be needed by all parties on all materials of foreign engagement. Implementing transparency will be a challenge, because complete disclosure is not embedded in university culture.



Discovery Ownership

Universities must reinforce with everyone in the research community that the discoveries made by university employees are owned by the university and cannot be given away without explicit permission.

2020 Texas Higher Education Law Conference
Zoom Links
Conference Passcode: TXHEL2020

Monday – October 26 - Day One

10am Breakouts

Breakout Room A: How to Conduct an Investigation: Katie Anderson and Pete Thompson, Clark, Hill, & Strasburger, LLP

Join Zoom Meeting

<https://unt.zoom.us/j/88976509434?pwd=QUtMcmtZcFYUkNpUWx0RnRmc3lyQT09>

Meeting ID: 889 7650 9434

Passcode: TXHEL2020

Breakout Room B: Responding to Student Deaths on Campus: Maureen McGuinness, University of North Texas

<https://us02web.zoom.us/j/82753162590?pwd=YU9VelhPZ09rT2MvdFEvR3NSWDZOQT09>

Meeting ID: 827 5316 2590

Passcode: TXHEL2020

Breakout Room C: SCOTUS Wrestles with LGBT Discrimination under Title VII: Kathleen Conn, King, Spry, Herman, Freund & Faul, LLC

Join Zoom Meeting

<https://unt.zoom.us/j/88698901502?pwd=SHRNRGI4aGY2em1uRHR1N0w0dVRaQT09>

Meeting ID: 886 9890 1502

Passcode: TXHEL2020

11am Breakouts

Breakout Room D: Case Study of an Investigation: Katie Anderson and Pete Thompson, Clark, Hill, & Strasburger, LLP

Join Zoom Meeting

<https://unt.zoom.us/j/84179535160?pwd=dXg2emlXRnpKWUgxYURtbmREUzk1UT09>

Meeting ID: 841 7953 5160

Passcode: TXHEL2020

Breakout Room E: Understanding and Championing Neurodiversity: Smita Mehta, University of North Texas

<https://us02web.zoom.us/j/88293916340?pwd=TINmU0owVkhXVXVQ3VIQnVNR0xZZz09>

Meeting ID: 882 9391 6340

Passcode: TXHEL2020

Breakout Room F: Title IX Administrator Voices: What Supervisors and Institutions Should Know: Demesia Razo, Tarrant County College

Join Zoom Meeting

<https://unt.zoom.us/j/85648671895?pwd=emY5N3VQZm9zWjZQZlZlYXVlY0hDUT09>

Meeting ID: 856 4867 1895

Passcode: TXHEL2020

12pm Plenary

Update on the US Department of Education's Office for Civil Rights Investigations & Resolutions: Lynn Rossi Scott, Brackett & Ellis, P.C.

Join Zoom Meeting

<https://unt.zoom.us/j/88996243427?pwd=TVQ2R2dleThyR3NqQ0Fvc3hCdmpYUT09>

Meeting ID: 889 9624 3427

Passcode: TXHEL2020

1pm Breakouts

Breakout Room G: Higher Education Institution Governing Boards: Rogue Regents and Malice in Wonderland: William R. Fossey, University of Louisiana, and Robert Cloud, Baylor University

Join Zoom Meeting

<https://unt.zoom.us/j/86527226784?pwd=YThoMGtmT1pHNzd3Y2RJYUJzdmxNZz09>

Meeting ID: 865 2722 6784

Passcode: TXHEL2020

Breakout Room H: Hanging in the Balance: The Legal Update of DACA and its Implications for Undocumented Students: David Nguyen, Indiana University, and Joshua Cohen, University of North Dakota

<https://us02web.zoom.us/j/81005222160?pwd=cVErT2FkOWlXbzhscUdYTnVla3phQT09>

Meeting ID: 810 0522 2160

Passcode: TXHEL2020

Breakout Room I: Not Just a Private Matter: Required Sexual Misconduct Reporting for Faculty and Staff at Faith-Based Universities: Chris Riley and Andrew Little, Abilene Christian University

Join Zoom Meeting

<https://unt.zoom.us/j/88581468377?pwd=WEo0aE9NWE1CM0JjWUI3cWNjaitPQT09>

Meeting ID: 885 8146 8377

Passcode: TXHEL2020

Tuesday – October 27 - Day Two

10am Breakouts

Breakout Room A: Higher Education and the First Amendment: Amy Magee and Danielle Dary, Texas Association of School Boards

Join Zoom Meeting

<https://unt.zoom.us/j/88976509434?pwd=QUtMcmtZclFYUkNpUWx0RnRmc3lyQT09>

Meeting ID: 889 7650 9434

Passcode: TXHEL2020

Breakout Room B: Controlled and Applied Research in Higher Education: Jamie Peno and Justin Cook, University of North Texas

<https://us02web.zoom.us/j/82753162590?pwd=YU9VelhPZ09rT2MvdFEvR3NSWDZOQT09>

Meeting ID: 827 5316 2590

Passcode: TXHEL2020

Breakout Room C: Supporting Undocumented Students by Enhancing Individual and Institutional Undocu-Competence: Nicholas Tapia-Fuselier, University of Colorado; Colorado Springs

Join Zoom Meeting

<https://unt.zoom.us/j/88698901502?pwd=SHRNRGI4aGY2em1uRHR1N0w0dVRaQT09>

Meeting ID: 886 9890 1502

Passcode: TXHEL2020

11am Breakouts

Breakout Room D: Information Security in Texas Public Higher Education Institutions - What You Need to Know: Charlotte Russell and Rich Anderson, UNT System Office

Join Zoom Meeting

<https://unt.zoom.us/j/84179535160?pwd=dXg2emlXRnpKWUgxYURtbmREUzk1UT09>

Meeting ID: 841 7953 5160

Passcode: TXHEL2020

Breakout Room E: Campus Expression and Facilities Use: Danielle Dary and Scott Rizzo, Texas Association of School Boards

<https://us02web.zoom.us/j/88293916340?pwd=TINmU0owVkhXVXVQ3VlQnVNR0xZZz09>

Meeting ID: 882 9391 6340

Passcode: TXHEL2020

Breakout Room F: Legal Issues regarding Neurodiversity: Katy Washington, University of North Texas

Join Zoom Meeting

<https://unt.zoom.us/j/85648671895?pwd=emY5N3VQZm9zWjZQZlZlY0hDUT09>

Meeting ID: 856 4867 1895

Passcode: TXHEL2020

12pm Plenary

An Ever-Changing Landscape: New State Mandates for Responding to Sexual Misconduct: Chad Timmons, Abernathy, Roeder, Boyd & Hullett, P.C.

Join Zoom Meeting

<https://unt.zoom.us/j/88996243427?pwd=TVQ2R2dleThyR3NqQ0Fvc3hCdmpYUT09>

Meeting ID: 889 9624 3427

Passcode: TXHEL2020

1pm Breakouts

Breakout Room G: Cybersecurity from the FBI Perspective: Miguel A. Clarke, Federal Bureau of Investigation

Join Zoom Meeting

<https://unt.zoom.us/j/86527226784?pwd=YThoMGtmT1pHNzd3Y2RJYUJzdmxNZz09>

Meeting ID: 865 2722 6784

Passcode: TXHEL2020

Breakout Room H: Diversity in the Classroom, TWU Interactive Theatre Troupe: Artistic Director Noah Lelek, Texas Woman's University

<https://us02web.zoom.us/j/81005222160?pwd=cVErT2FkOWIXbzhscUdYtNvla3phQT09>

Meeting ID: 810 0522 2160

Passcode: TXHEL2020

Breakout Room I: The Intersection Between "Hate Speech" and the First Amendment: Derek Teeter, Husch Blackwell

Join Zoom Meeting

<https://unt.zoom.us/j/88581468377?pwd=WEo0aE9NWE1CM0JjWUI3cWNjaitPQT09>

Meeting ID: 885 8146 8377

Passcode: TXHEL2020

Wednesday – October 28 - Day Three

10am Breakouts

Breakout Room A: Going Beyond the Headlines: Understanding the Legal Issues Driving Concern Over Foreign Influence on College Campuses: Jennifer Cowley and Mark McLellan, University of North Texas

Join Zoom Meeting

<https://unt.zoom.us/j/88976509434?pwd=QUtMcmtZcFYUkNpUWx0RnRmc3lyQT09>

Meeting ID: 889 7650 9434

Passcode: TXHEL2020

Breakout Room B: Screening for Safety: Ross Mitchell, Praesidium

<https://us02web.zoom.us/j/82753162590?pwd=YU9VelhPZ09rT2MvdFEvR3NSWDZOQT09>

Meeting ID: 827 5316 2590

Passcode: TXHEL2020

Breakout Room C: It's Kind of a Big Deal: SB212, Title IX, and Sexual Violence Reporting Requirements for Texas' Institutions of Higher Education

Zachary Taylor, Trellis Company

Join Zoom Meeting

<https://unt.zoom.us/j/88698901502?pwd=SHRNRGI4aGY2em1uRHR1N0w0dVRaQT09>

Meeting ID: 886 9890 1502

Passcode: TXHEL2020

11am Breakouts

Breakout Room D: National Hazing Update: Kim Novak, NovakTalks.com

Join Zoom Meeting

<https://unt.zoom.us/j/84179535160?pwd=dXg2emlXRnpKWUgxYURtbmREUzk1UT09>

Meeting ID: 841 7953 5160

Passcode: TXHEL2020

Breakout Room E: Preventing Abuse in Your Organization: Ross Mitchell, Praesidium

<https://us02web.zoom.us/j/88293916340?pwd=TINmU0owVkhVXVVVQ3VIQnVNR0xZZz09>

Meeting ID: 882 9391 6340

Passcode: TXHEL2020

Breakout Room F: Open Session: Q&A on Title IX and Civil Rights: Scott Lewis, TNG Consulting

Join Zoom Meeting

<https://unt.zoom.us/j/85648671895?pwd=emY5N3VQZm9zWjZQZlZYOXVPY0hDUT09>

Meeting ID: 856 4867 1895

Passcode: TXHEL2020

12pm Plenary

PANEL DISCUSSION – COVID ON CAMPUS – PART I: THE STUDENT EXPERIENCE: Kim Novak, NovakTalks.com; Michelle Kelly-Reeves, Texas Womens University; and Brandon Kitchin, University of North Texas.

Join Zoom Meeting

<https://unt.zoom.us/j/88996243427?pwd=TVQ2R2dleThyR3NqQ0Fvc3hCdmpYUT09>

Meeting ID: 889 9624 3427

Passcode: TXHEL2020

1pm Plenary

PANEL DISCUSSION – COVID ON CAMPUS – PART II: THE LEADERSHIP EXPERIENCE: Scott Lewis, TNG Consulting, Christine Hubbard, North Texas Community College Consortium; and Brent Wallace, North Central Texas College

Join Zoom Meeting

<https://unt.zoom.us/j/4689091007?pwd=VHhvOFF0MkV5RVl0cWUzbDFVbDhNUT09>

Meeting ID: 468 909 1007

Passcode: TXHEL2020

Responding to Student Death On Campus

Maureen M. McGuinness, Ed.D.

Assistant Vice President of Student Affairs/ Dean of
Students



Why are you attending this presentation?

Drop your comments in the “chat”.



Presenter's Background

- Undergraduate experiences
- Experiences
- Building a Response & Program





Not so fast...

Think about the Family



Some Circumstances

- Suicide
- Accidents
- Hazing
- Drugs and alcohol
- Murder
- Illness



Things to Think About

- Social media impact
- FERPA no longer applies
- No perfect answers
- The Blame Game
- Are there outstanding debts
- Attending services
- Posthumous degrees



Questions??



Understanding and Championing Neurodiversity

Smita Shukla Mehta, PhD
Professor of Special Education
Department of Educational Psychology

Smita Mehta, PhD

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1

Outline

- ▶ Basics of Neurodiversity
- ▶ Characteristics
- ▶ Support Needs
- ▶ Effective Accommodations (Snapshot)

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Neurodiversity Basics

- ▶ Definition
 - Neuro = nervous system (nerves)
 - Diverse = different
- ▶ Terminology
 - Neurodiverse → refers to people with different neurological conditions
 - Neurodiversity → refers to concept

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Neurodiversity *continued...*

- ▶ Phrase coined by sociologist, Judy Singer in the 1990s;
- ▶ Emphasis on strengths rather than deficits;
 - Neurological conditions result in different abilities or disabilities;
 - Focus on person, not condition

Smita Mehta, PhD

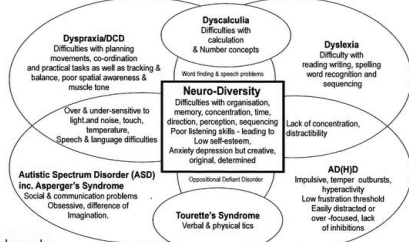
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Neurodiversity *continued...*

The Make-up of Neuro-Diversity
This is a document for discussion. Concentrating mainly on the difficulties of those with neuro-diversity. It must however, be pointed out that many people with neuro-diversity are excellent at maths, co-ordination, reading etc. We are people of extremes.



danda

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Neurodiversity *continued...*

- ▶ Common = disability due to neurological disorder;
- ▶ Common characteristics set;
 - Difficulty with specific cognitive functions – organization of information (processing) and things; ability to focus and stay on task or topic; perception of events, etc.

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6

Neurodiversity *continued...*

- ▶ **Characteristics *continued*;**
 - Social interaction and communication;
 - Deficits in processing social information'
 - Difficulty perceiving others' perspective;
 - Determining others' and own feelings / state;
 - Focus only on topic of special interest;
 - Unpretentious – say what is perceived

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Neurodiversity *continued...*

- ▶ **Support needs not exclusively on common characteristics;**
 - Needs identified based on characteristics
 - Unique characteristics, unique needs;
 - Value neurological differences but do not deny disability or disorder

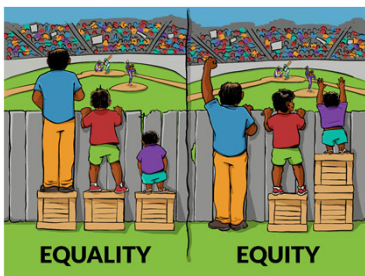
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8

Value Equity



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Support Needs

- ▶ It's a civil rights issue;
- ▶ Supports → success in school, work and community;
- ▶ Famous individuals with neurological disorders;
 - Robin Williams; Justin Timberlake; Tom Cruise; Jennifer Aniston; Andy Warhol

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10

Effective Accommodations for University Students

Learning Challenges	Supports for Success
Reading text books and articles	Text-to speech software adjustable for reading speed
<ul style="list-style-type: none"> • Cursive writing – motor and speed issues • Spelling accuracy 	<ul style="list-style-type: none"> • Permission to type with autocorrect options for spelling • Keyboard with sounds (to ensure accurate letter is typed)
Word recognition and sequencing	<ul style="list-style-type: none"> • Provide list of key terms with meanings (comprehension too) • Peer buddy to discuss key terms and context for use

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11

Accommodations *continued...*

Learning Challenges	Supports for Success
Distractibility due to noise, movement, lights and technology sounds	<ul style="list-style-type: none"> • Front row seat with prior consent • Seat away from doors / windows • Allow use of headphones • Fake glasses to mask bright light • Well-organized lessons with smooth transition across topics • Frequent interaction with student for engagement • Awareness of student's state

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Accommodations *continued...*

Learning Needs	Supports for Success
Complete class or homework on time	<ul style="list-style-type: none"> • One size does not fit all! • Break into small parts • Credit for completing portions • Modify based on learning needs • Teach organization – planner with due dates for sub-tasks → project • Teach study skills + HW / CW • Set study time periods • Meet with professors & staff • ODA to “train” their staff & faculty

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Accommodations *continued...*

Learning Needs	Supports for Success
Motor challenges (difficulty with writing, taking notes, typing, body balance, physical delays, time management)	<ul style="list-style-type: none"> • Note taker – scribe / tools • Record lecture • E-text books • Extra time: exams/projects • Bulleted notes • Peer support • Teach self-advocacy • Reduced load

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14

Accommodations *continued...*

Learning Needs	Supports for Success
Social-interaction and communication difficulties	<ul style="list-style-type: none"> • Reasonable expectations for group work • Use literal language • Avoid jokes or sarcasm • Be aware of distress signs • Avoid unexpected changes • Give time to adjust for change • Awareness of comorbid conditions (e.g., anxiety)

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Accommodations *continued...*

- ▶ Many neurodiverse individuals have combinations of support needs;
 - Comorbid conditions;
 - Variety of accommodations;
 - Match supports with intensity of needs

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16

Final Word!

- ▶ We need to be like First Responders;
- ▶ Empathy goes a long way;
- ▶ Accept not just tolerate;
- ▶ ODA – maybe.... learn delivery of supports from SPED faculty

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17

A group of diverse children, including boys and girls of various ethnicities, are shown from the chest up, holding hands in a circle. They are all smiling and looking towards the camera. The image has a dark blue overlay. The word "PRAESIDIUM" is written in a white, serif, all-caps font across the center of the image.

PRAESIDIUM



J. Ross Mitchell, JD

Safety Analyst

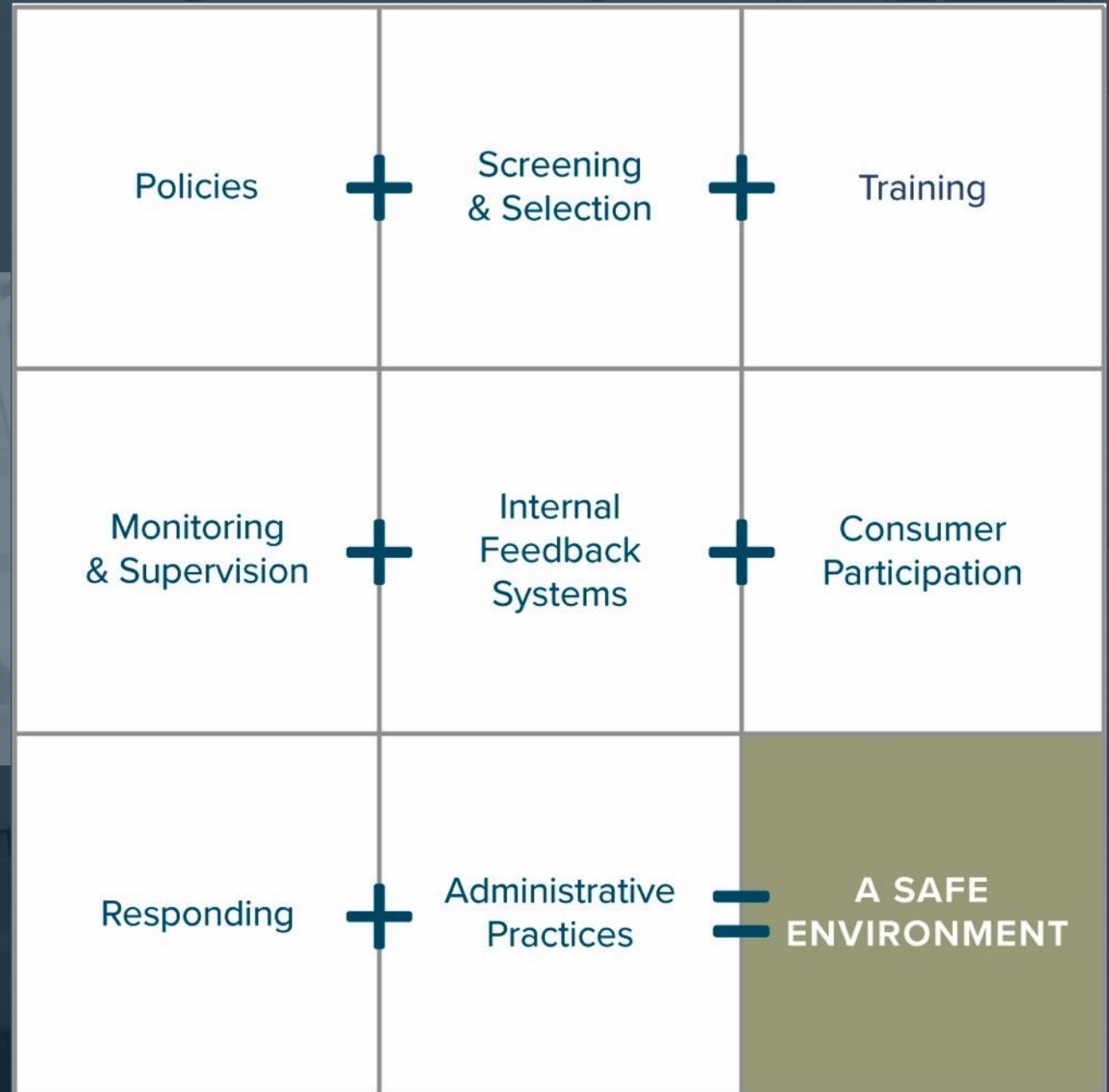


Ross works closely with Praesidium's educational clients as well as other youth-serving organizations. In collaboration with the Praesidium team, Ross trains employees and volunteers, conducts risk assessments, and performs accreditation visits to ensure the protection of youth and vulnerable adults from abuse. Prior to coming to Praesidium, Ross practiced law in his firm's education practice group. He represented teachers in a variety of employment matters and worked closely with both teacher organizations and school districts. Ross graduated from Baylor University with a bachelor's degree in business administration and obtained his law degree from South Texas College of Law in Houston, Texas.

A group of five young people, seen from behind, are walking up a wide set of stone stairs. They are all wearing backpacks and winter jackets, suggesting a school or outdoor setting. The background shows a building with large windows and a dark doorway. The entire image is overlaid with a semi-transparent dark blue filter.

Best Practices for Managing Abuse Risk in Youth Programming

Praesidium Safety Equation[®]





**We believe abuse is
PREVENTABLE**



Preventing Sexual Abuse

- ✓ Scope of the Issues
- ✓ Setting Boundaries
- ✓ Preventing False Allegations
- ✓ Transitioning Back to Programing
- ✓ Reporting Concerns



Scope of the Issues

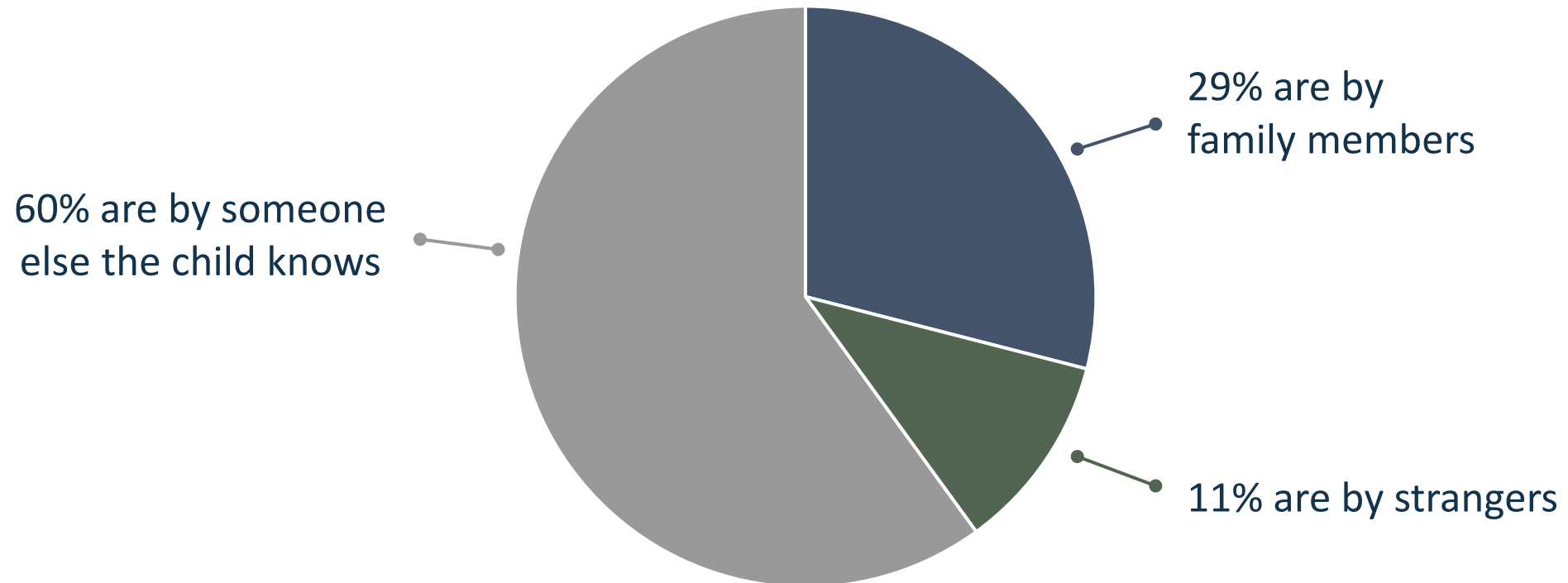
Scope of the Problem



- One in four girls
- One in seven boys
- Ten percent of school children
- Forty to fifty percent of child molestations committed by juveniles
- Eighty percent of abuse **does not get reported**

Who is Most Likely to Molest a Child?

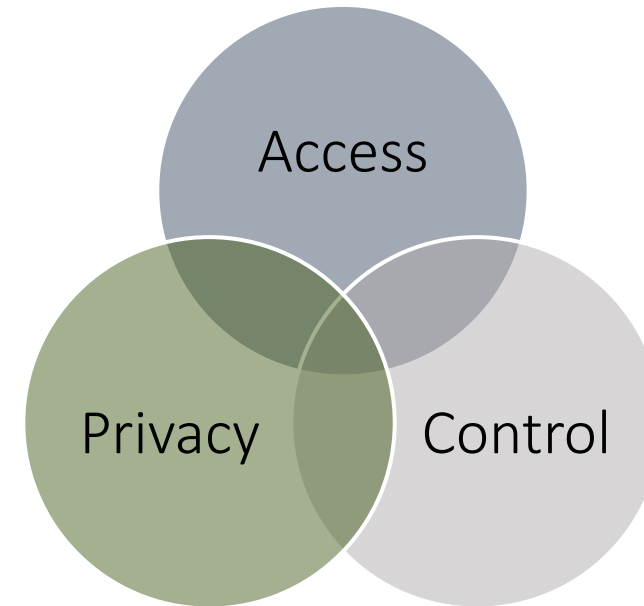
Of all molestations that are committed:



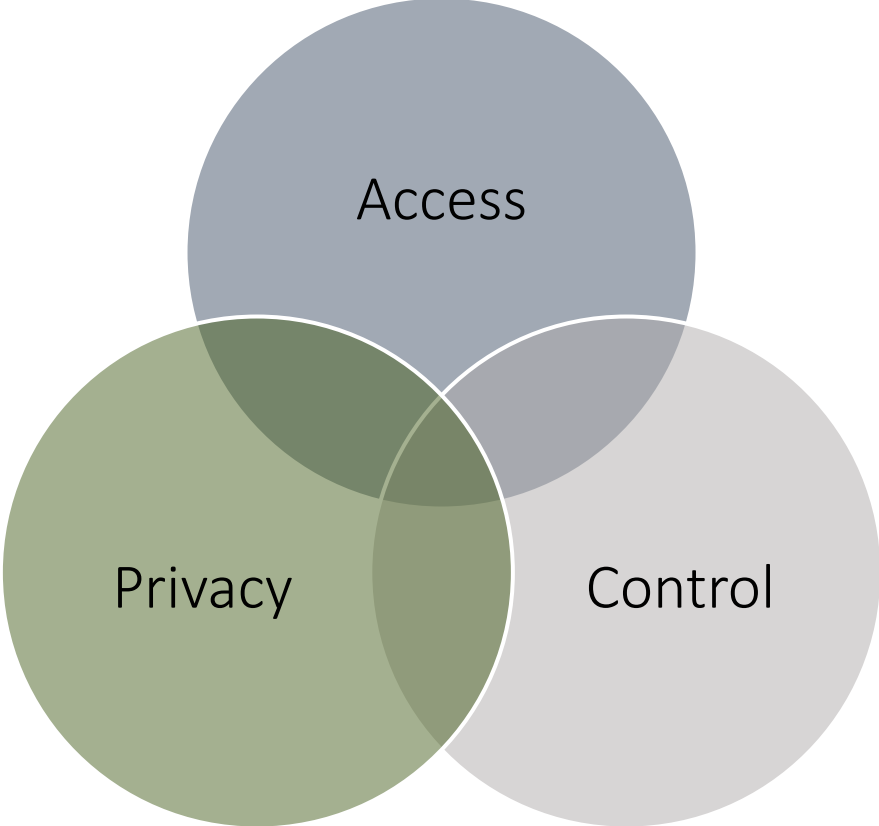
Are you surprised by these numbers? What did you expect?

Online Interactions: Understanding the Statistics

- ✓ Approximately 95% of all Americans between 12 and 17 years old are online
- ✓ **1 in 5** U.S. teenagers have received an unwanted sexual solicitation via the web (**only 25%** of those told a parent)
- ✓ **Nearly 30%** of the victims of internet sexual exploitation are **boys**
- ✓ **75% of children** are willing to share personal information online about themselves and their family in exchange for goods and services



How Adult-to-Youth Abuse and False Allegations Occur

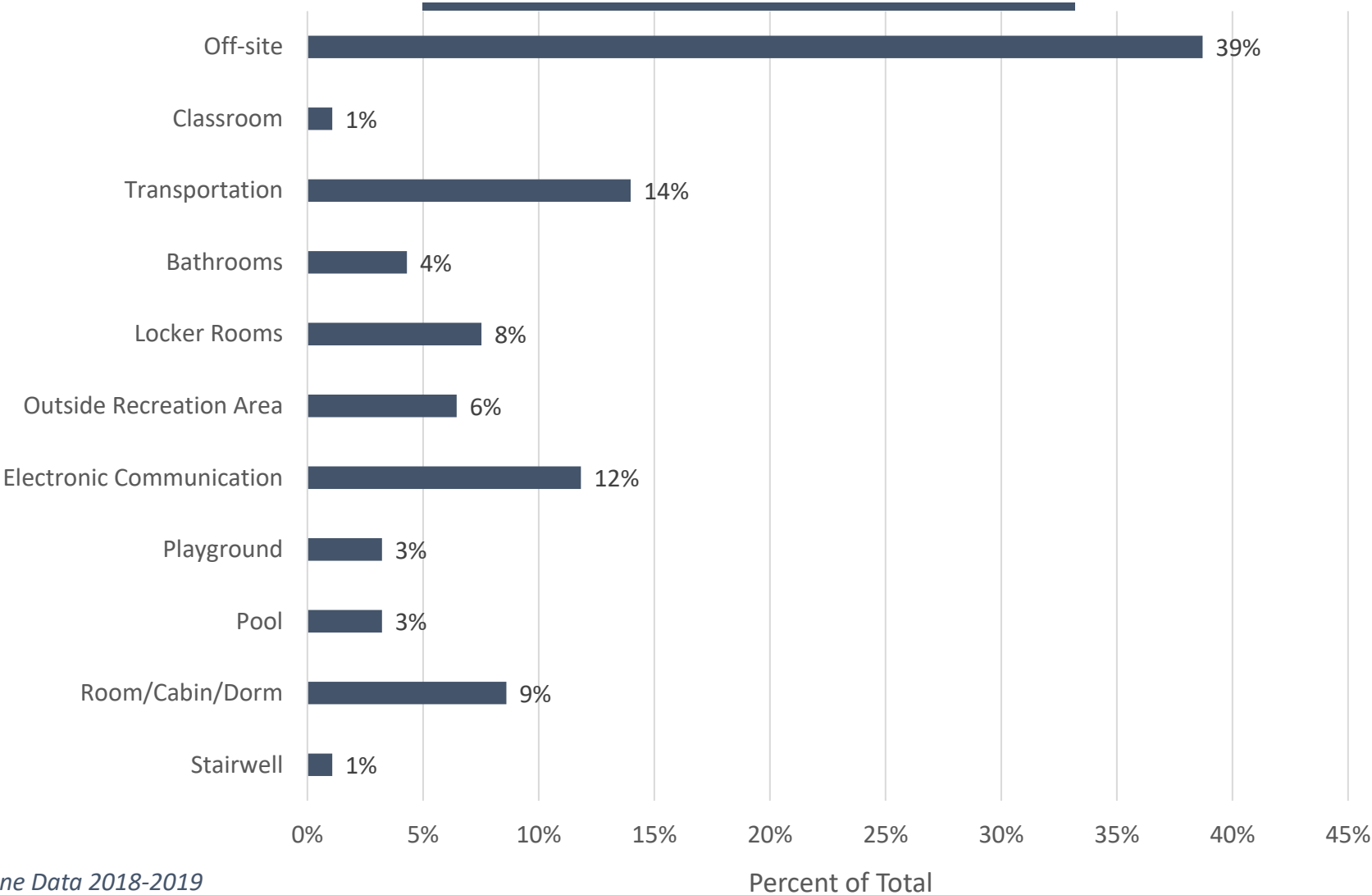


✓ Access

✓ Privacy

✓ Control

Praesidium Data Trends: Where Adult-to-Youth Sexual Misconduct Occurs



Source: Praesidium Helpline Data 2018-2019



Set Appropriate Boundaries

Common Policy Gaps



Electronic Communication



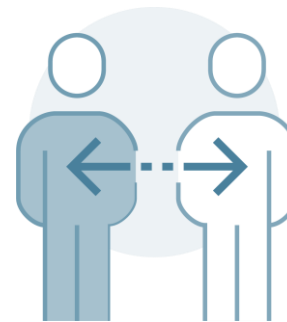
Physical Contact



Verbal Interactions



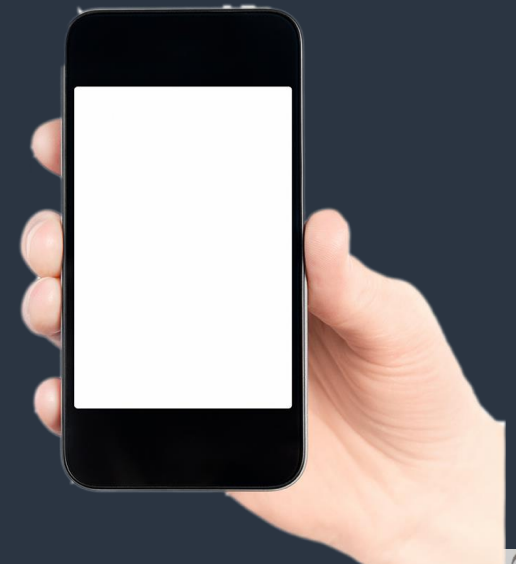
Staff Cell Phone Use



One-on-One Interactions

Maintain Better Boundaries with Youth


- Texting
- Social Media
- Emailing
- Babysitting
- Tutoring
- After Hours Coaching or Lessons
- Close Knit Community



Setting the Tone

- ✔ **Define Appropriate Boundaries**
 - Set parameters around the communication platform
 - Conversations should be professional vs. personal
 - Limit one-on-one interactions

- ✔ **Maintain Professionalism and Supervision**
 - Set supervision procedures for monitoring interactions
 - Scheduling and standardization
 - Dress and maintain professionalism



What Programs Need to Know Now

✔ Keep Consumers & Parents Engaged

- Create Youth Code of Conduct/Provide Policy Update
- Limit Barriers to Reporting for Consumers

✔ Respond and Report Concerns

- Conduct check-ins with newly transitioned programs
- Follow existing reporting procedures both internally and externally
- Remind of Responsibility

Red Flag Behaviors in Adults

- ✔ Prefers time and friendships with youth more than adults
 - ✔ Gives special gifts to youth, especially without permission
 - ✔ Engages in too much physical contact with youth
 - ✔ Bends the rules for certain youth
 - ✔ Ignores policies about interacting with youth
- ✔ Has “favorite” or preferred youth
 - ✔ Uses inappropriate language or jokes
 - ✔ Behaves as a peer with youth rather than a supervising adult
 - ✔ Uses social networking sites and text messages to contact youth privately or away from programming
 - ✔ Finds reasons to spend time alone with youth



Preventing False Allegations

Decreasing the Risk of Adult-to-Youth Sexual Abuse and False Allegations

- Follow policies governing interactions with students
- Reduce one-on-one interactions
- Increase supervision
- Refrain from social media and electronic communication
- Training and increased awareness

Ask yourself: How would this appear to an outsider?





Youth-to-Youth Abuse and Sexualized Behaviors

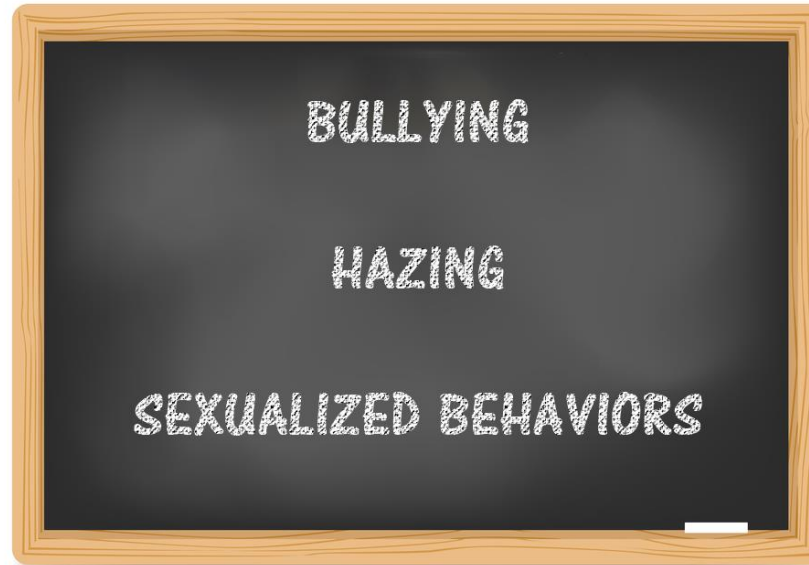
Youth-to-Youth Abuse

For each incident involving an adult, seven incidents of abuse by another youth occur

Majority of incidents involve youth 10 years or older

“Hidden horror of school sex assaults revealed,” [Associated Press](#) (May 2017)

Types of Peer-to-Peer Abuse



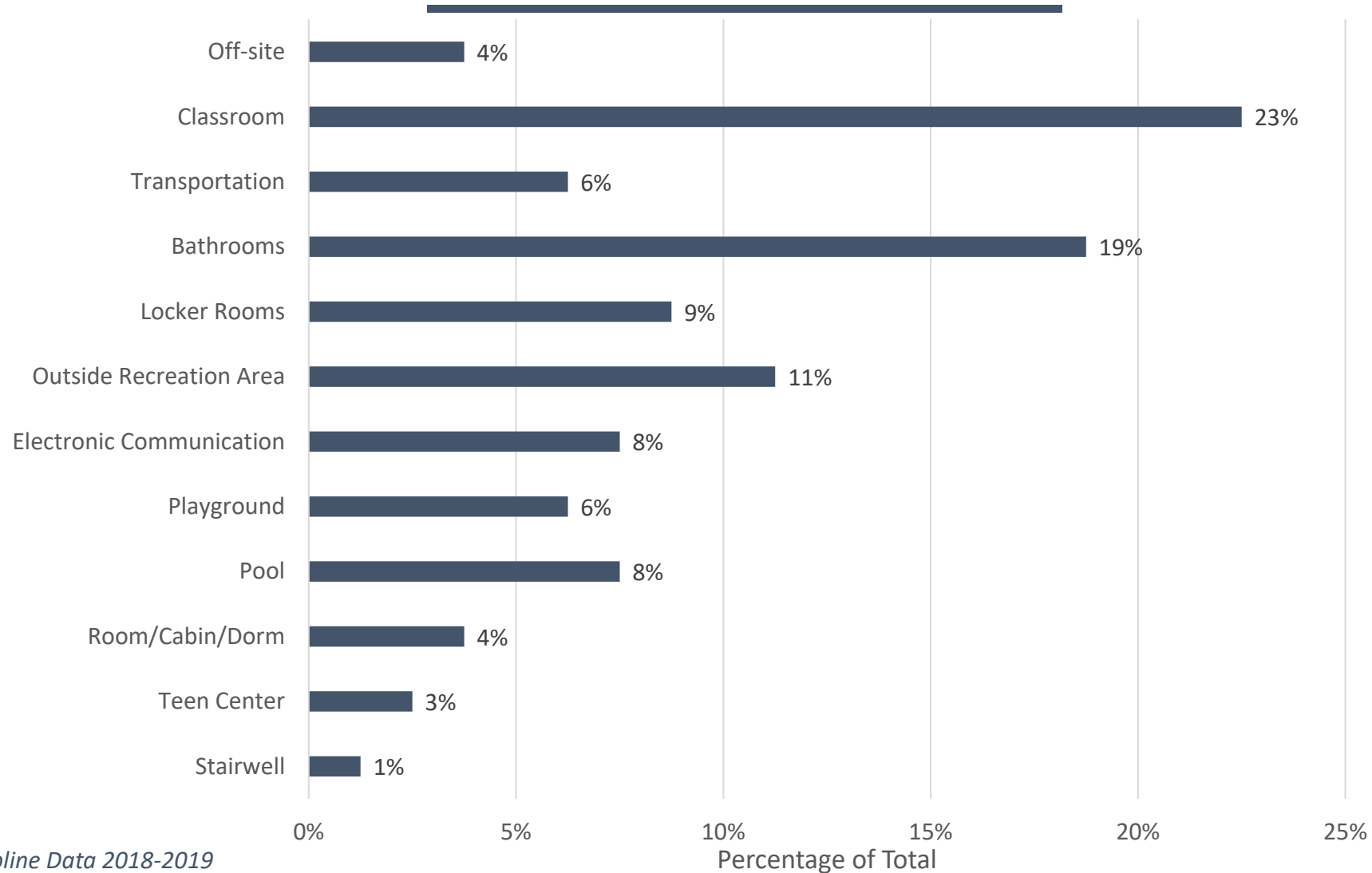
-
- **Left unattended, bullying and hazing often progress from less severe behaviors to sexual behaviors**

Types of Bullying

- Verbal
- Nonverbal and relational
- Physical
- Sexual
- Racial
- Cyberbullying



Praesidium Data Trends: Where Youth-to-Youth Sexualized Behaviors and Abuse Occur



Source: Praesidium Helpline Data 2018-2019

Preventing Youth-to-Youth Sexualized Behaviors and Abuse

- Staff behavior sets the tone; youth should not define what is appropriate behavior.
- There is no standard definition of “normal curiosity.”
- Monitoring and supervision is key.
- Report any sexual activity.

Decreasing Youth-to-Youth Risks



- ✔ Structured activities
- ✔ Maintain Supervision
- ✔ Follow guidelines for appropriate interactions
- ✔ Maintain “zero tolerance”
- ✔ Document and report policy violations
- ✔ Respond to incidents of youth-to-youth inappropriate activity



Managing Higher-Risk Situations

Higher-Risk Situations

Activity Risks

- ✓ Undressing and nudity
- ✓ Transportation
- ✓ Periods of transition
- ✓ Bathrooms and locker rooms
- ✓ Mixed age groups
- ✓ Youth supervising youth
- ✓ Youth *Truth or Dare* and games involving power dynamics

Architectural Risks

- ✓ Isolated areas, rooms
- ✓ Rooms without windows or access to informal monitoring
- ✓ Bathrooms and locker rooms
- ✓ Outdoor/wilderness areas

Bathroom Tips

- Make isolated areas strictly off-limits, except when monitored by adults.
- When possible, limit the number of students in a bathroom to the number of stalls.
- When possible, utilize group bathroom breaks.
- Utilize the 'Rule of Three'.
- Ensure policies and procedures for bathroom and changing assistance are followed at all times.

Locker Room Tips

- Avoid changing, using the bathroom, or taking showers at the same time or in the same area as students.
- Ensure locker rooms are monitored when in use or accessible to students.
- Prohibit horseplay.
- Consider implementing a 'No Cell Phone Zone' policy.
- Eliminate one-on-one interactions.

Travel and Overnight Tips

Consider unique characteristics and challenges posed by:



Travel and Overnight Tips

1. Clarify the supervision roles
2. Design a supervision plan with particular attention paid to:
 - Free Time
 - Transitions
 - Common Areas
 - Bathrooms
 - Overnights
3. Delineate off-limits areas
4. Communicate all rules and expectations with program participants early on
5. Evaluate who has access to facility and program participants

How to Respond



Reporting and Responding



Inappropriate
Behaviors



Suspicious of
Abuse



Youth-to-Youth
Abuse



Responding to Inappropriate Behaviors or Policy Violations

- ✔ Interrupt and spotlight the behavior
- ✔ Report warning signs immediately to your supervisor or administrator
- ✔ If the behavior does not stop, keep reporting your suspicions up the chain of command
- ✔ Remember you can always report anonymously

Don't wait until you witness an act of abuse – report suspicious behavior and policy violations



Responding to Youth-to-Youth Sexual Behaviors

- ✔ Respond immediately to inappropriate behaviors and notify your supervisor
- ✔ You should not determine if the sexual behavior is abuse or “normal curiosity”
- ✔ Document the behaviors
- ✔ Keep reporting if the minor continues to exhibit inappropriate behaviors



Responding to Suspicions or Incidents of Abuse

- ✔ Interrupt the behaviors if witnessed.
- ✔ Follow mandated reporting requirements.
- ✔ Report immediately to your supervisor or designated administrator.
- ✔ Follow documentation requirements.

How to Respond if a Minor Discloses Abuse or Neglect

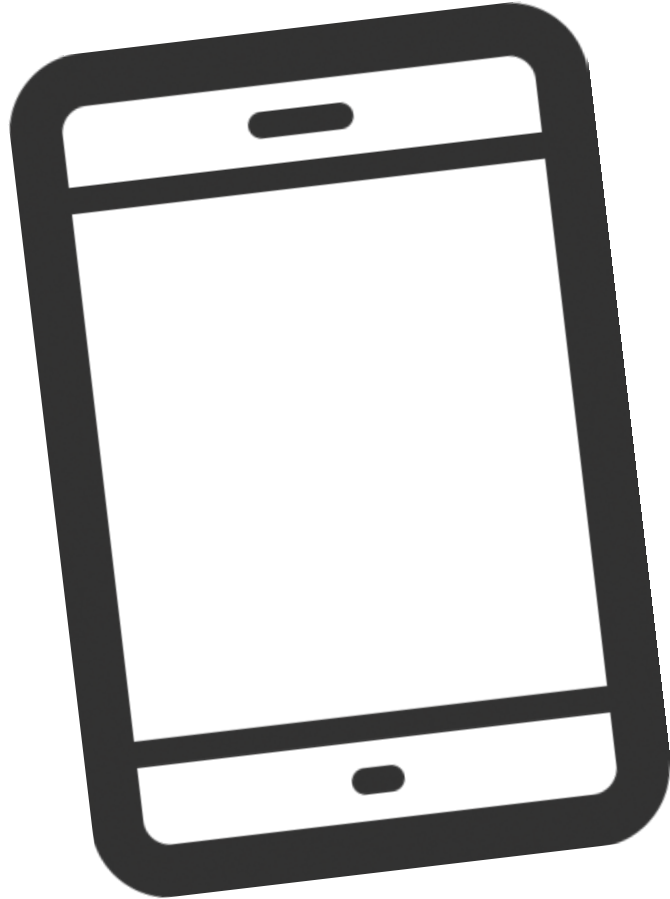


Remember: It is never your responsibility to probe or investigate.
Always report the allegation up to your supervisor.

Reporting Suspected Abuse to EXTERNAL Authorities



Reporting Resources



Texas Department of Family and Protective Services

1-800-252-5400

www.txabusehotline.org

KEEP IN TOUCH

Ross Mitchell, JD
Account Manager
RMitchell@Praesidiuminc.com

Praesidium
800.743.6354
PraesidiumInc.com





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J. Ross Mitchell, JD

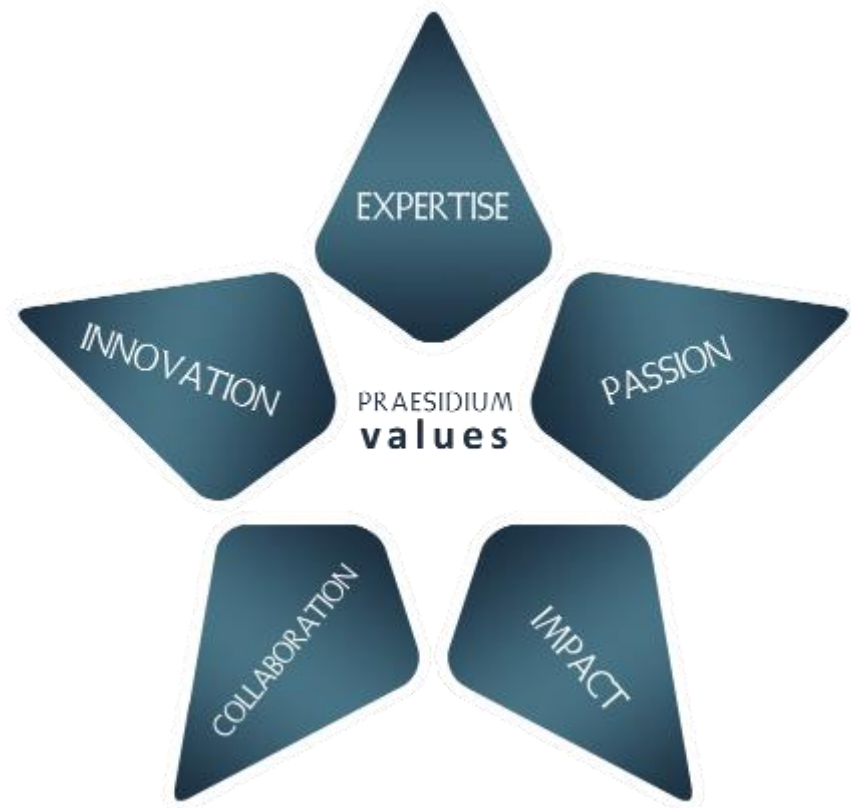
Safety Analyst



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Screening & Selection in a CoVid World

About Praesidium



“To help you **protect those in your care** from abuse and to help **preserve trust** in your organization.”

Over **25 years** of experience

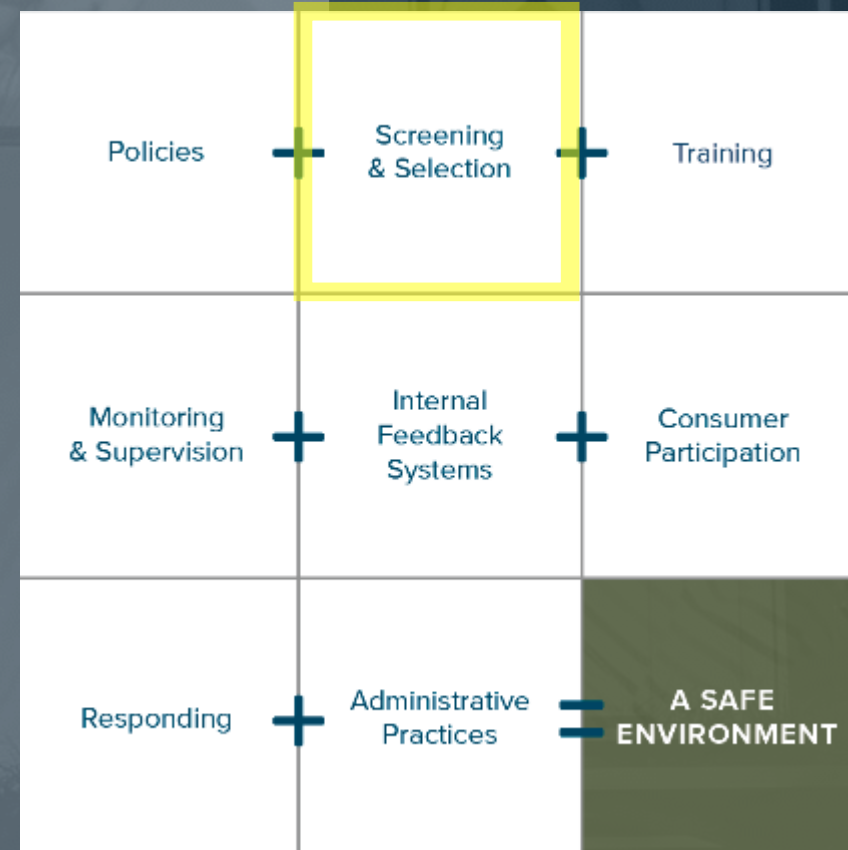
More than **4,000 clients** across diverse industries

Completed thousands of **root cause analyses**

Developed proprietary **abuse risk management model**

Offer complete range of **risk management solutions**

Praesidium Safety Equation[®]



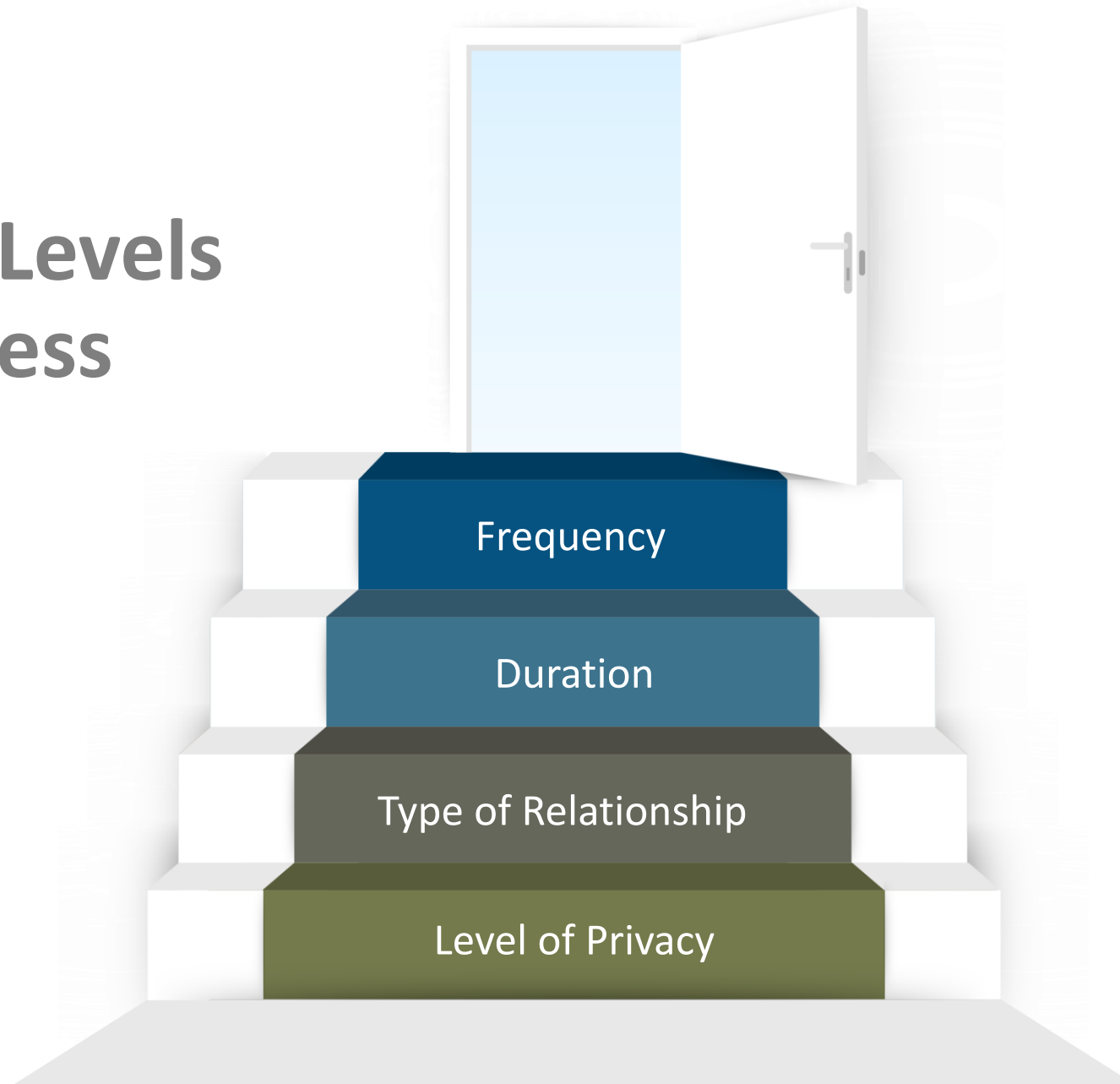


**Multiple elements must work in
concert to create a reliable
Screening & Selection process**



Where Do I Start?

Evaluate Levels of Access



Who has access?





**What Are the Key Elements in a Successful
Screening & Selection Program?**



Critical Screening & Selection Components

1

Application

2

Behavioral Interviews

3

Reference Checks

4

Background Checks

5

Drug Testing

Challenges in Executing Best Practices

- ✓ Pace of hiring process
- ✓ Information silos
- ✓ Failure to solicit input and perspectives
- ✓ Fear of discouraging volunteer participation
- ✓ Difficulty due to CoVid

A group of people, including a young girl in the foreground, are looking at a screen. The image is overlaid with a dark blue filter. The text is centered and enclosed in a white L-shaped frame.

**Applications: A Goldmine
of Information at a
Reasonable Price**

Best Practices in Applications

- ✔ Communicate a zero tolerance for abuse
- ✔ Create an application that allows hiring managers to quickly assess for red-flags
- ✔ Identify red-flags in the application
- ✔ Notify interviewer of red-flags for follow up

How Applications Are Changing



Criminal History Disclosures

- When can you ask?



Salary History Details

- Can you ask at all?



Leveraging Technology

- How do you streamline processes without losing the detail?



**Interviews: Let People Tell
You Who They Really Are**

Successful Interviews

- ✓ Create a sense of privacy
- ✓ Minimize barriers
- ✓ Use an open communication style
- ✓ Create an environment that encourages honesty
- ✓ Decrease the consequences of telling the truth
- ✓ Use behaviorally-based interview questions
- ✓ Ask questions designed to assess abuse risk & applicant skills

How Are Interviews Evolving

Technology

Video conferencing adds convenience AND effectiveness

Culture

A millennial twist on behaviorally based questions: Value based interview questions

Science

“Gut instinct” is a poor predictor of a good hire – use interviews to gather data methodically that will be used to complete the big picture analysis of the candidate



**References: Your
Opportunity to Learn from
Others**

Best Practices in Reference Checks

- ✔ Ensure you have the “types” of references – in what capacity should the reference know the applicant?
- ✔ Use a standard reference form for each call, but be sure to modify questions so that you can learn about the specific experiences the reference has had with the applicant
- ✔ Ask follow up and clarification questions
- ✔ Take notes during the call and write short quotes from the reference to prompt your memory
- ✔ Review and elaborate on your notes immediately after the call

What Can You Really Learn From a Reference?

Personal Reference

Q: Would you place a child in [her] home?

A: "I would not put my child in her care."

Professional Reference

Q: Would you feel comfortable placing your child in [his] care?

A: "No. I would not be comfortable. He is not reliable."

Professional Reference

Q: How would you rate the applicant's ability to use good judgment?

A: "I can't lie, at work, he has lost his temper a couple of times. He had a confrontation with a co-worker that had to be handled by upper management."

How Is The Reference Process Changing?

Greater Reliance on Electronic Reference Gathering

Options are time and cost effective but look for ways to mitigate the impersonal nature of the process that reduce effectiveness

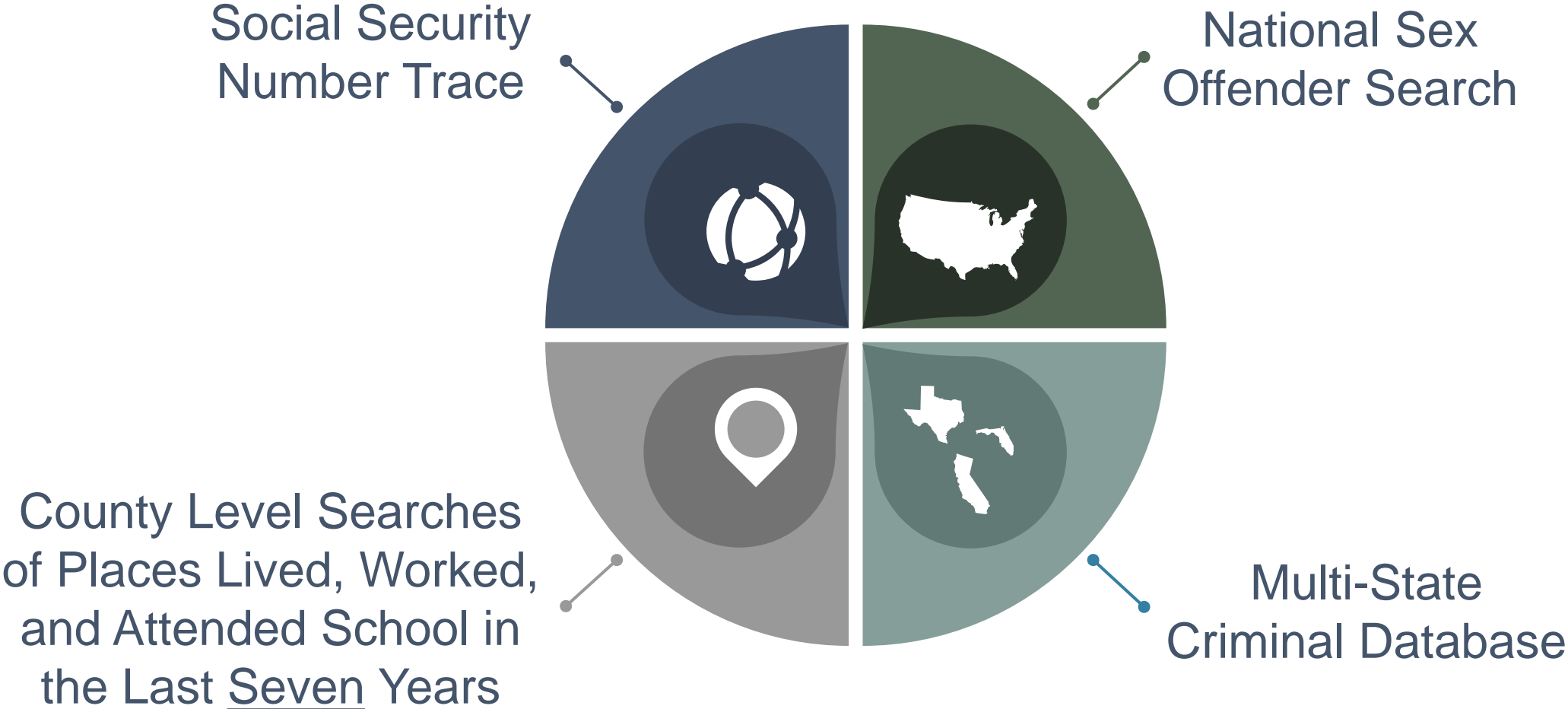
Increased Fear of Litigation

Organizations face lawsuits for disclosing issues AND for failing to do so the outcome of reference interviews is increasingly varied

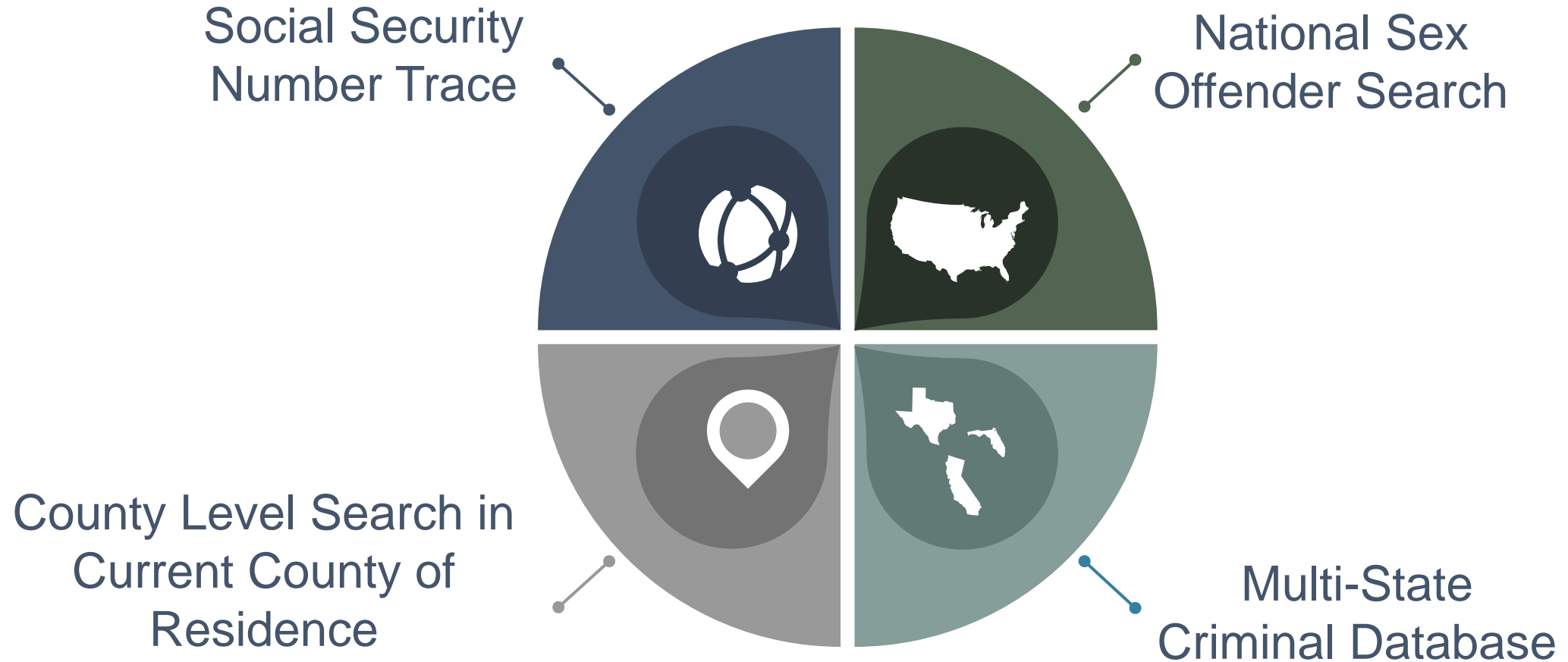


**Criminal Background
Checks: So Much More than
Sex Offender Searches**

Employees & High Access Volunteers

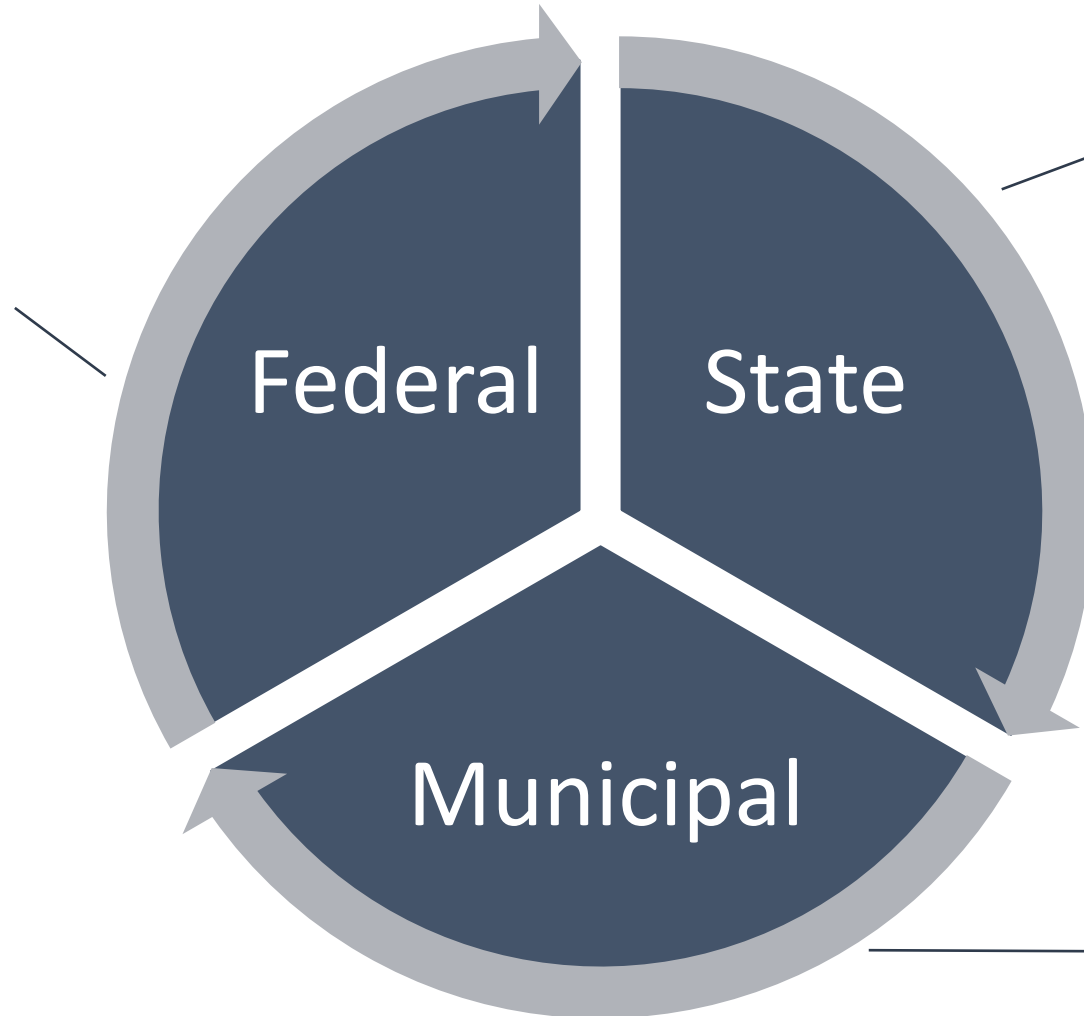


Low Access Volunteers & Visitors



United States: Compliance Comes From All Levels

The Fair Credit Reporting Act (FCRA) has been a constant in screening for decades – expectations are clear so focus on getting these requirements right



Not applicable in all states but may substantially impact what information you receive from your background screening provider and how you use it

Compliance challenges are rapidly emerging here – cities and counties are passing ordinances that add notification requirements and usage restrictions on information and with limited geographic applicability, parts of your organization may be impacted differently



Questions

Demesia Razo, Ph.D.

UNT Higher Education Law
Conference

10/26/2020

Title IX Administrator

Voices: What

Supervisors and

Institutions Should

Know



Introduction and Background

Positionality



Current Administrator



Former Deputy Title IX Coordinator



Student conduct administrator



Front line response to sexual assault



Prevention education

The purpose of the study was to understand the educational experiences and professional training of Title IX administrators as preparation for the role and their independence in decision making in those roles.

Purpose of
Study



Title IX Administrators

Significance of the Study



Specialized
knowledge and
training



High sensitivity, high
stakes, and
institutional
reputation



Retention,
recruitment, and
future training

Research Questions

RQ1

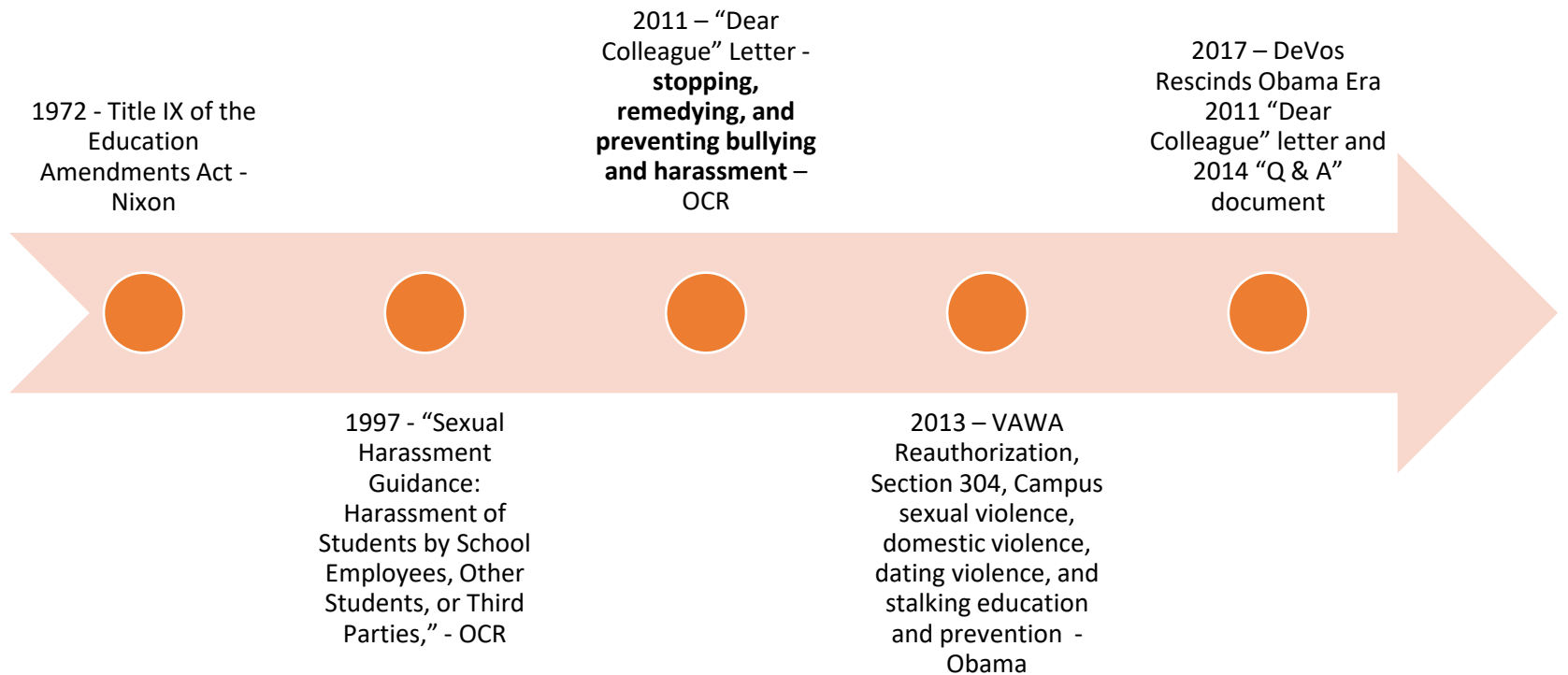
How do Title IX Administrators who address sexual misconduct between students understand their own educational and professional experiences as preparation for their work?

RQ2

How do Title IX Administrators who address sexual misconduct between students conceptualize their ability to use their professional judgement given internal institutional influences and external institutional influences?



Brief Review of Literature



Brief Historical Context

The epidemic of college peer sexual violence has been well studied (Krebs et al., 2007; Fisher, Cullen, & Turner, 2000; Heenana & Murray, 2006)

Guidance & laws have become more prescriptive

“Not Alone” & “#metoo” (Carmody, Ekhomu, & Payne, 2009; Guerette & Caron, 2007;)

Accused student rights (Foundation for Individual Rights in Education, 2016)

Media keeps issue in the forefront although this may cycle out (Kingkade, 2015; Wilson, 2016)

Title IX Social Context



Coordinators in K-12 setting provided limited training (Meyer et al., 2018) – *qualitative, 10 subject*



Coordinators felt well prepared for their roles, employed part-time, were trained by ATIXA (Wiersma-Mosley & DiLoreto, 2018) – *N=692 participants, on-line survey*



Researchers tested the knowledge of Title IX first responders (Edwards, Sessarego, & Schmidt, 2019) – *27% participation, N=174*

Title IX Coordinators Training



Work Socialization

How a professional acquires knowledge & professional standards of practice



Professionalization

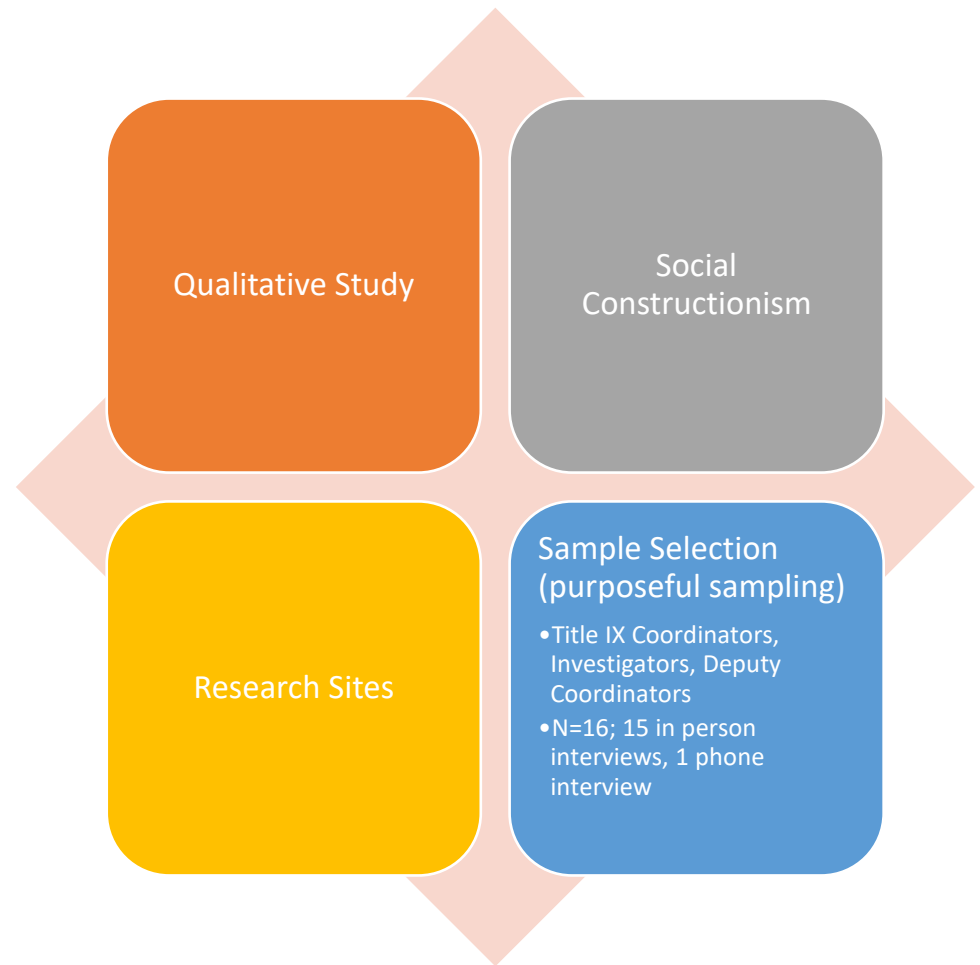
The role of professions in society - why they exist and how they function

Theoretical Framework



Methods

Research Design



Data

Data Generation

- Interviews and documents
- Interviews transcribed; reviewed by participants for accuracy
- Publicly available websites and organizational charts

Data Analysis

- Qualitative Content Analysis (Schreier, 2012)
- Nvivo



Findings

RQ1: Personal
Understanding
of Professional
Preparation for
Title IX Role

Formal education

Formative experiences

Position-specific training

Professional
organizations



Preparation for Role

Formal Education

Name	Highest Degree	Bachelor's Degree	Master's Degree	Terminal Degree	ATIXA Trained
Chuckie	Master's	BA History	College Student Personnel		Yes
Clarke	Master's	Sociology with concentration in Criminology	Higher Ed. Student Affairs	Higher Education in process	Yes
Dana	Master's	General Studies with concentration in Finance	College Student Administration	Higher Education in process	Yes
Diana	Master's	Business Administration	MBA		Yes
Elizabeth	Doctoral	Psychology	Student Affairs	Educational Leadership	Yes
Elle	Master's	BFA Graphic Design	M.Ed. Postsecondary Administration Student Affairs		Yes
Eric	Master's	Rhetoric and Media Studies	M.Ed. Student Affairs Admin. in Higher Education		Yes

Formal Education

Name	Highest Degree	Bachelor's Degree	Master's Degree	Terminal Degree	ATIXA Trained
Jason	Doctoral	English & Film	Education	Education Leadership	Yes
Natalie	Baccalaureate	Human Development	n/a		Yes
Nicole	JD	Communication emphasis in Public Relations	n/a	JD	Yes
Patricia	Doctoral	Communications and English	Counseling	Higher Education	Yes
Samantha	Doctoral	BS in Journalism	Education College Student Personnel	Doctorate in Philosophy/Education	Yes
Stan	Master's	Psychology	Counselor Ed. focus on Student Affairs Administration		Yes
Stu	Master's	BA Communication	Master of Ed. in Community Counseling		Yes
Sue	Doctoral	BA Speech Communication and Sociology	MA Communication	Ed.D. - Higher Education	No

Formal Education Influences



Writing



Student/Human
Development
Theory



Policy Analysis
Techniques



Women's/Gender
Studies



Counseling and
Communication
Skills

Student/Human Development Theory



CHUCKIE



“...AT LEAST I CAN UNDERSTAND WHERE
A STUDENT MIGHT BE AT AND GET A
BETTER SENSE THAT WAY.”

Policy Analysis Techniques

Dana

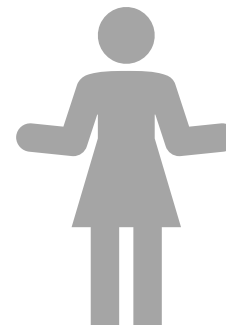
“Law school obviously, the ins and outs of reading what this guidance from **OCR** means. Knowing and interpreting the law, and Title IX is a **black hole** of, ‘Here it is. You decide what that means. **You decide** what that looks like at your institution. You decide what kind of **implication** that's going to have on your students, on your faculty, on your staff.’”



Women's/Gender Studies



Eric



[Being able to] **talk about sexual misconduct**, and sexual harassment, and sex and gender-based marginalization, and **systemic sexism** and oppression in the communities in which I've worked that **has been helpful**, because there have been sometimes where I have been someone who was sought out to engage in those conversations.

Counseling & Communication Skills

Stu

“Things that I went through grad school and counseling program are definitely always helpful...at times, I'll use motivational interviewing or motivational enhancement therapy techniques, CBT, like **cognitive behavioral therapy**. A lot of ... And sometimes, they're not even things necessarily that I would put necessarily into like a theoretical orientation, but **more of like things that have been helpful that I've learned**. Like if I'm dealing with somebody that I'm like, ‘Wow. This person seems very Axis II, borderline personality disorder,’ **I need to stay calm, remain calm, and not get pulled into their drama**. You know? Little things like that can be really helpful.”

Formative Experiences



Student Conduct/Residence Life



Other Work, Volunteer, and Practicum
Experiences Around Women's Issues

On the Job Training



On campus training

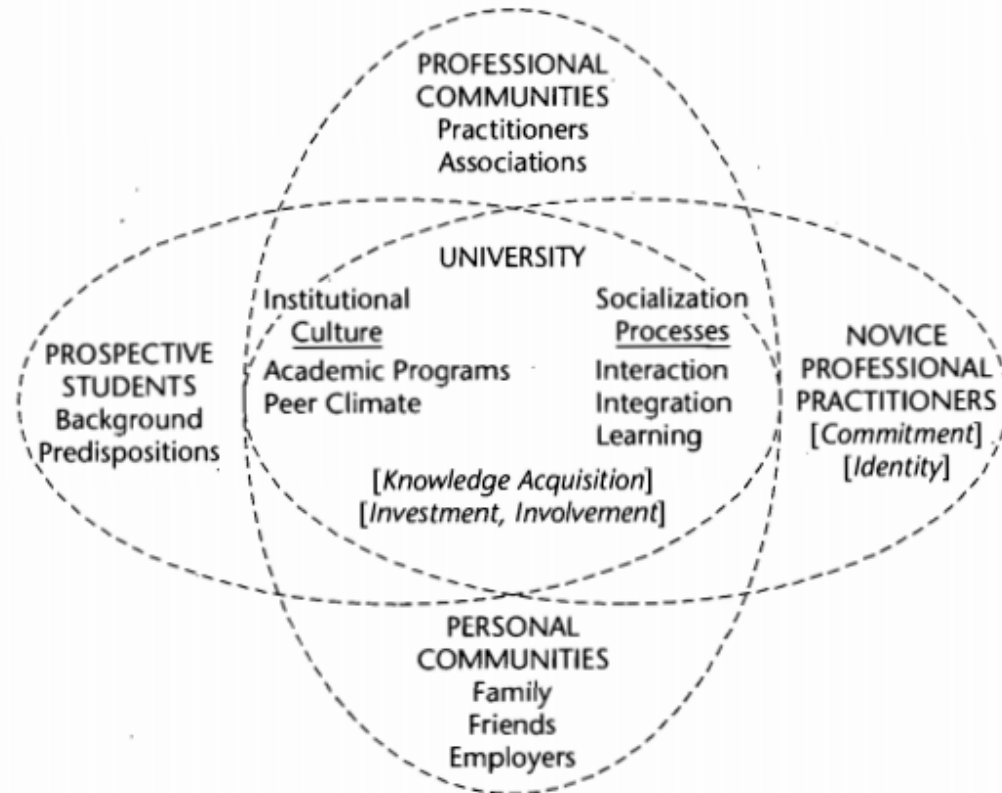
Pioneers, Supported, Lone
Rangers



Other training providers



ATIXA



Interactive Stages of Socialization: Anticipatory, Formal, Informal, Personal

Conceptualizing graduate and professional student socialization. Weidman, J., Twale, D., & Stein, E. (2001). *Graduate Socialization Framework*.

ATIXA Observations



Diana - “Oh, God. I think it builds the foundation for what to do and what not to do. Especially because it's a federal law.”



Jackie – “Scare tactics”



Natalie - “[t]heir commercial interests are not well separated from their other kinds of interest.”



Patricia - “making money off people being raped.”

Professional Organization Participation

- NASPA
- ATIXA
- ASCA
- NaBITA
- ICUT
- NACCOP
- TACUPSA



Professional Organizations - Benefits



Benchmarking



Standards of Practice



Field Updates



Resources



Networking



Clarke

“And I would say, just like the things that I went through to conferences ... For me, that was just more of, what were other institutions doing? I don't feel like I necessarily learned anything new, it was just **helpful to see how other institutions** approached it, how they did things, what were some things that could work here, or ... Oh, yeah. We could never do that. So just trying to **gauge.**”

Professional Organizations - Critique



Samantha – “they need to be accessible and affordable, because as institutions, we're cutting back everywhere.”



Clarke – “if your institution can't afford to send you to that [training], or to have them come to you, then what do you have?”



More responsive to specific institutional types

Nicole – focused on Division One Schools

Sue – no focus on small religiously affiliated schools



ATIXA monopoly on training

Nicole – “I think that initially when Title IX was being implemented, ATIXA kind of scared you into knowing that they were the only people that knew what was going on, and you'd follow them, and they were like the Bible. That is not the case anymore. We're learning more and more that there are more resources, more information, that they're not always right.”

Question for Institutions: How do you train new administrators?
What are expectations for their professional development?

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Professional Competencies

RQ1: Professional Competencies

- Hearing fundamentals
- Report writing
- Law and policy
- Bias awareness
- Student-centered focus
- Counseling and helping skills
- Self-care

Bias Awareness



Jason - "I think we live in a multicultural world, and issues of Title IX are not always well received in different cultures. I think that administrators need to understand that."



Jackie - "you really have to be open to hear the whole story, all the stories, all the witnesses."



Elizabeth - training needs to include ways for people to develop empathy and to help people understand those who may be different than themselves.



Bias identification could be stronger in training programs

Self-Care

Jackie – “...**it can be so horrific**...there were also people tied to chairs, and tied to beds, and really violent, evil acts, that were a lot for me to take home. And two hours later, I had to be at a celebration for something. Or I had to be at, you know, I don't know. Something that was much more upbeat, still working with students. The workday. You know. So I think that ... **preparation beforehand would have been nice**. I would have preferred some of that **formal training** beforehand. I also think the world wasn't up on it yet, right? We were all kind of figuring it out. So that would have been beneficial. “

Nicole – absent from training is how an administrator will feel during the process

Self-care is generally absent from training

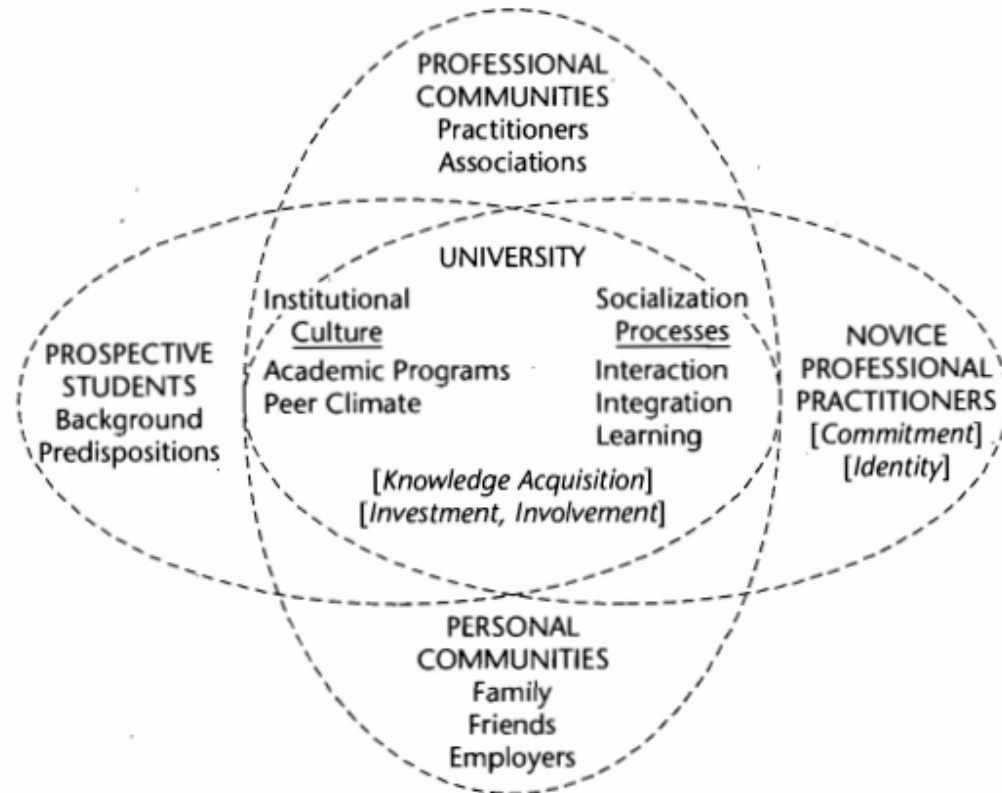
Institution question: Knowing what competencies are important in the T9 Administrator role, how can you intentional hire for these positions?



Title IX Work Context

RQ1: Title IX Work Context and Work Socialization

- Institutional context
(institutional
characteristics; division
and structure of work)
- Training frequency
- External environment



Interactive Stages of Socialization: Anticipatory, Formal, Informal, Personal

Conceptualizing graduate and professional student socialization. Weidman, J., Twale, D., & Stein, E. (2001). *Graduate Socialization Framework*.

Contexts

Institutional types

- 2yr, 4yr
- Public, private
- Religiously affiliated
- Large, small
- Region

Institutional and societal systems of oppression and inequity

- Sexism
- Homophobia
- Racism

Institutional mission

- Open access
- Research
- Liberal Arts

Institutional Context

”
“

Elle (4yr, private, liberal arts) – “Obviously I'd gone through the training in terms of what was legally required, or what was best practice. But it was good to find out the scope or length that they're looking for, and **level of detail that [her institution] specifically is looking for**. I've seen example reports from other schools that are much less detailed than what we do. So it was **good to get context** for that. “

”

Chuckie (2-yr, public)– “What expectations do we have for what **kind of culture** do we want to create **on our campus?**”

Institutional Context



Samantha (4 yr, private, Catholic) – “We talked about it being a mission driven, because we're **Catholic, mission** driven compliance model. The idea is that we don't do this just because the law says we should, but our mission compels us to treat everyone as a child of God, to find the dignity of the **human person** in everybody. Being in right relationship.”



Stan (2yr, public) and Nicole (4yr, public, comprehensive)– large college systems can be challenging and feel incongruent



Sue (4 yr, private, religiously affiliated) – only individual responsible for student sexual misconduct “isolating” & “add-on” to other responsibilities

External Environment



Samantha – “In the end, I don't want to put the institution at **risk reputationally** or legally...I pray to God that I never make a bad call and put the institution at risk. That would be horrible. When you're not the one making every call, but the people you provide supervision to are, that's a lot of herding cats and quality control. It ain't easy.”



Clarke – “I would say, you know, with the shift of the new **Department of Education** and things that have come out and the kind of shift from 2011, **how are other institutions handling this?** Are they walking things back? Just what that looks like now. Because we didn't change much about our process. But how are other institutions handling this?”

External Environment

- Nicole – “Every time an **update from the DOE** or OCR comes out, we have to take a look at our student handbook. We have to take a look at our website. We have to **take a look at our policy**. We have to take a look at all of the 18,000 handouts that we have that we educate students on our trainings and go, "Okay. What about this? Is it still accurate? **What needs to change?**" Also taking a look at what if anything are we going to change and what does that make sense to for students?”

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Professional Judgement in Practice

RQ2: Professional Judgment in Practice

- Authority to
make decisions
- Consultation
practices

Independence

- Freidson (2013) – when professional discretion is replaced with bureaucratic standardized responses, professionals lose the ability to exercise professional judgement to individual human need; professionals need to **retain independence in decision making**



Responses

- Stan – “I've never had that feeling where I was forced, or not forced, but encouraged or pressured to go a certain route or look at things a certain way. It's your decision, especially when I'm serving as the hearing officer. It's like, ‘That's your decision, based on how you come to that determination.’”
- Samantha – “I **never felt any pressure**. Our president always says, "Do what you need to do.”
- Stu – “I think that outside pressure may change the way that we manage the case, as far as the high or low touch. So not necessarily the decision...”





Discussion

Implications

Graduate
Programs

Training and
Trainers

Institutions
and
Supervisors

Field of Higher
Education

Title IX
Practitioners

Training and Trainers

Training Content

- Fundamentals of Hearings and Investigations
- Student Development/Student-Centered Approach
- Bias Identification, Cultural Competency, Gender Equity
- Communication & Trauma-Informed Practice
- Self-Care

Contextualization

Frequency



Institutions and Supervisors

- Hiring Considerations
 - Experience: Feminist/gender studies, sexual assault prevention, knowledge regarding sexual violence
 - Student conduct/legal studies
 - Writing samples
 - Empathy
- Division of Work/Campus Support
 - Resource Allocation
- Supervision and Oversight
 - Connection of work to mission
- Campus Training

Field of Higher Education



Additional accessible training
providers for Title IX training



Advocacy

Title IX Practitioners



Network with other Title IX professionals – especially those from similar institutional types



Mentor and recruit for career field



Not an island; connect & process experiences

Finding the Why

Nicole

I think why I keep doing it, because I truly hope that through this work **we eliminate the need for the job**. I think that, number one, preventing and addressing sexual violence and interpersonal violence is just something inherently that I care about. I think it affects our communities. I think it affects generations. I think we're at a level where we can change people's lives in addressing it at this level and in a college educational setting.

I think us and the roles of Title IX play a **really important role of that in terms of how we treat each other as human beings** and our expectations of each other both in interpersonal relationships and work relationships and otherwise.

I think that's why you keep doing it. I think also holding institutions accountable, **ensuring that the right people are in these positions** to impact the law, the future of what we do as a college.”



Questions

Not Just a Private Matter: Required Sexual Misconduct Reporting for Faculty and Staff at Faith-Based Universities

Chris Riley, J.D.
Andy Little, J.D.
Abilene Christian University



Overview

- 1) Overview of New Requirements
- 2) Comparison to Prior Obligations
- 3) Questions and Practical Considerations
 - a) Employment Status
 - b) Course and Scope
 - c) Reasonable Belief
 - d) Due Process
 - e) Clergy/Communicant Privilege
- 4) Suggestions for Modification

Overview of New Requirements

New Texas Law - Almost all* staff/faculty employees are now legally required to "promptly report" to a university's Title IX office:

- 1) Information regarding the occurrence of an incident that the employee reasonably believes constitutes **sexual harassment, sexual assault, dating violence, or stalking**;
- 2) Alleged to have been committed **by or against** a person who was a **student enrolled at or an employee** of the institution **at the time of the incident**; and
- 3) Must be witnessed or received in the **course and scope** of employment ("an employee performing duties in the furtherance of the institution's interests")

*Modifications and exceptions apply for a few employees and situations

Modifications

1. **Designated as Confidential Resources** - Those designated by university as a person who can speak confidentially about these matters to students (e.g., the Medical and Counseling Care Center and university-level Chaplains)
2. **Legally Privileged** - Those who receive such information "under circumstances that render the employee's communication confidential or privileged under other law."
3. **Healthcare Provider** - Those who receive such information in the course and scope of employment as a healthcare provider, mental health care provider, or other medical provider.

Employees in these categories are **still required to report the type of incident** that occurred but may not include identifiable information.

Exceptions and Consequences

Exceptions - Reporting not required if (1) **employee is the victim** or (2) information was received at a Title IX-related **public awareness event** hosted by university or one of its student organizations.

Individual Consequences - Failure to report results in (1) required **termination** if university determines in accordance with its disciplinary policies that (a) reasonable cause to report existing and (b) employee failed to report and (2) **criminal violation** (e.g., knowing failure is Class B and intent to conceal is a Class A)

University Consequences - Failure to report can result in (1) fines up to **\$2 million dollars** and (2) potential **legal liability** (private lawsuits and DOE) for failure to properly respond

Comparison to Federal Law

Title IX

No responsible employee reporting requirements. Instead, under the new Title IX regulations, “**Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to the **Title IX Coordinator or any [university official]** who has authority to institute corrective measures on behalf of the [university].”

Clery Act

“**Campus Security Authority**” is, an official of an institution who has **significant responsibility for student and campus activities**, including, but not limited to, student housing, student discipline, and campus judicial proceedings. (i.e, “any person who has the **authority and the duty to take action or respond** to particular issues on behalf of the institution.”)

Clery Act Continued

Texas Law

- 1) Employees must report all information witnessed or received directly or indirectly
- 2) No pastoral counselor exception

Clery Act

- 1) CSA must report only non-identifiable information directly reported to them
- 1) Includes exception for “pastoral counselors,” a “person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition”

Analysis

Texas Law

- 1) Is this sexual harassment or assault, stalking or dating violence?
- 2) Committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident?
- 3) Received in course and scope of employment?
- 4) Do any modification or exception apply?

Clery Act

- 1) Is this a Clery reportable crime?
- 2) Is Michelle a CSA (i.e., have significant responsibility for student and campus activities)?
- 3) Do any exceptions apply?

Employment Status?

- What about independent contractors?
- How are adjunct faculty categorized?
 - Uncertainty in many universities as to the status of adjunct faculty
- Do joint-employee relationships exist?

Course and Scope?

- For faith-based schools, is an employee who also serves in some ministerial capacity at a religious organization “performing duties in the furtherance of the institution’s interests” when the person hears about or otherwise discovers the sexual misconduct? Or are they engaging in a pastoral discussion with someone that does not further the institution’s interests?
- What if their employer requires that they attend a local congregation of a certain denomination and they learn of information in that context?

Hypothetical #1

The business school at a university hires a local entrepreneur as an adjunct faculty member. The employment status of the adjunct faculty member is unclear (as opposed to an independent contractor). A student at the university works at the adjunct professor's company, and she mentions a campus-based sexual assault of which she is aware to him while at work one day. He strongly suggests that she should tell the police what she knows, but he does not inform the university's Title IX office. Is he covered by the statute? Should his adjunct relationship be terminated? Should he be prosecuted?

Does it matter where the student informed the adjunct faculty member (at the office rather than at the university)? Does the university's designation of the adjunct as an employee (or contractor) suffice, or will courts make fact-specific inquiries into employment status?

Reasonable Belief?

- When do employees have reasonable belief of sexual harassment?

“Sexual harassment” means unwelcome, sex-based verbal or physical conduct that: (A) in the employment context, unreasonably interferes with with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or (b) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.

- How is a typical university employee to know whether the information that is witnessed or learned by them in the course of their employment is actually sexual harassment? What obligation do they have to probe and investigate?

Hypothetical #2

If a university employee overhears a rude, sexist comment between two students in the common area of a university building, is that sexual harassment that needs to be reported to the Title IX office? Ordinarily, isolated incidents do not give rise to sexual harassment claims under the analogous federal employment statute, Title VII. But is this an isolated incident? Do these two students have long standing antagonism, permeated with misogyny and abuse? How would the employee know the background context for the students' relationship? What level of inquiry or investigation is the employee supposed to perform to satisfy themselves that they do, or do not, have a reporting obligation?

Is the employee, without knowing any additional details, obligated to report these types of incidents to Title IX? What should she do and why?

Hypothetical #3

Given that there are no temporal limits on the underlying conduct giving rise to the reporting obligation, how far back in time must the employee go before an incident does not need to be reported? If an employee finds out from a co-worker that she was the victim of sexual harassment in the mid-1990s, which went unreported at the time, must the employee report the incident? What if the alleged perpetrator of the harassment has left the university?

Due Process?

- Do private institution's disciplinary procedures outline how to address investigations related to these reporting obligations?
- How does this impact various existing processes for employees with contract and tenure?
- If such policies are violated, do institutions have a duty to report the accompanying criminal violations?

Clergy/Communicant Privilege?

- When does this exception apply?

Texas Rule of Evidence 505(a)(1) defines:

Clergy member as “a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or someone whom a communicant reasonably believes is a clergy member.”

Communicant, as “a person who consults a clergy member in the clergy member’s professional capacity as a spiritual advisor.”

There is no requirement that the clergy member be a full-time, ordained minister or religious functionary. And the allowance for clergy status to be established only through the communicant’s perceptions or reasonable beliefs likewise supports an expansive view of the clergy role.

Hypothetical #4

Frank is a tenured professor of religion, who is also a part-time minister at a local church. A student, who has visited the church from time to time, and visited with Frank, signed up for one of his religion classes his senior year in the hopes of learning more, and perhaps even out of a desire for spiritual fulfillment. As the semester progresses, the student confesses to Frank to having been peripherally involved in an incident that occurred his freshman year, where consent may have been lacking in a sexual encounter. The other students involved, the primary alleged offender and the victim, have both graduated and are no longer part of the university community. Must Frank report the incident? If so, what must be reported?

Hypothetical #5

At Religious University, faculty and staff participate, along with students, in yearly Spring Break Service Trips to national and international locations. Faculty and staff use vacation time to attend the trips, but some academic departments cover the cost of the trips to encourage faculty to attend. During the course of a trip, groups meet each night to pray and talk about their day. Following one of these gatherings, a student reveals to Sarah that her roommate, another student at the university, had been sexually assaulted last semester, but made it clear that her roommate does not want anyone else to know. Is the Sarah, a faculty member at RU, legally required to report the information to the university's Title IX office? Even if technically on vacation, is the employee performing duties in the furtherance of the institution's interests?

Changes to Organizational Culture

“Mandatory reporting policies have a strong and negative impact on college and university faculty members, given their teaching and advising relationships with students. After having a disturbing experience that may constitute sexual harassment, a student often goes to a trusted faculty member to discuss the experience and to seek advice . . . The faculty member’s ability to be helpful to the student depends on the trusting nature of the relationship, where the faculty member is able to be a sounding board, to help the student think through various options, and to respect the student’s choice about whether and how to respond to the situation . . . Such overly broad policies compel faculty members to violate confidentiality in their relationships with students.” AAUP, 2019

Unintended Consequences

- Potential reduced reporting to faculty and staff by students that need the most help
- Faculty focus on reporting obligation/punishment (or avoiding receiving reports) vs students needs
- Over-reporting of incidents that do not fall under the statute from students that do not want help

Concluding Considerations

- 1) Administrators should create due process protection
- 2) Administrators could expand “Confidential Employees”
- 3) Legislators should adopt reporting standards similar to CSA/Clery
- 4) Legislators should adopt Clery approach to institutional fines and university control of employee discipline
- 5) Legislators expand consultation with faculty and students impacted

**AN UPDATE ON THE
U.S. DEPARTMENT OF EDUCATION'S
OFFICE FOR CIVIL RIGHTS**

1

**Lynn Rossi Scott
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102
(817) 339-2464
lscott@belaw.com**

PERSONNEL CHANGES

ASSISTANT SECRETARY FOR CIVIL RIGHTS

3

- **Kenneth Marcus resigned in July after two years heading OCR.**
 - **Led overhaul of Title IX rules.**
 - **Vigorous enforcer of Anti-Semitic speech executive order.**
 - **Three times more investigations in 2019 than Obama administration's eight years.**

ASSISTANT SECRETARY FOR CIVIL RIGHTS

4

- **Kenneth Marcus**
 - **Pushed investigations on transgender accommodations.**
 - **Preferential treatment to Zionist group.**
 - **Rescinded Obama era guidelines re affirmative action to increase diversity.**
 - **“His civil rights agenda was his own”.**

ASSISTANT SECRETARY FOR CIVIL RIGHTS

5

- **Kimberly Richey, Acting Asst. Secty OCR**
 - **Principal deputy asst. secty for Civil Rights**
 - **Worked closely with Marcus**

OPEN CENTER

OPEN CENTER 1-21-2020

- **Outreach, Prevention, Education, and Non-Discrimination Center**
- **New, proactive, civil rights center in OCR**

OPEN CENTER RESPONSIBILITIES

- **Provides technical assistance to educational institutions to come into compliance with federal law before the filing of a complaint**

OPEN CENTER

- Staffed by OCR attorneys in Washington, D.C.
- “Provides education, prevention, and outreach”
- “Improved technical assistance” – “high quality, accurate, thorough, and legally sound”

OPEN CENTER

- “Partner with educators and institutions to better protect students”
- “Better resources, more welcoming and supportive of students, families, educators, and communities”

OCR RIGHTS

- **Investigate complaints**
- **Open directed investigations and compliance reviews without a complaint**

OCR WEBSITE IMPROVEMENTS

WEBSITE IMPROVEMENTS

- **Civil Rights Data collection**
- **Student populations data**
- **Discipline data**

WEBSITE IMPROVEMENTS

- **Recent Resolution Search (after October 2013)**
- **Search by institution, statute, type of discrimination, state, and resolution date**

EXECUTIVE ORDER ON ANTI-SEMITISM

EXECUTIVE ORDER ON ANTI-SEMITISM

12-11-2019

16

- **First Executive Order of its kind**
- **(Prior Attorneys General – 2004 and 2010 issued directives to federal agencies)**

EXECUTIVE ORDER ON ANTI-SEMITISM

12-11-2019

17

- **Antisemitism = Race, color, national origin discrimination, not just religion**
- **President acknowledges OCR jurisdiction of anti-Semitism under Title VI**

DEFINITION OF ANTI-SEMITISM

18

- **International Holocaust Remembrance Alliance (IHRA) definition**
- **OK to criticize Israel as you would criticize any other country**

IHRA DEFINITION OF ANTI-SEMITISM

- **Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews**
- **Rhetorical and physical manifestations directed toward Jewish or non-Jewish individuals and/or their property, or toward Jewish community institutions and religious facilities**

ANTI-SEMITISM EXAMPLES

- **Calling for, aiding, or justifying the killing or harming of Jews**
- **Mendacious, dehumanizing, demonizing, stereotypical allegations about Jews ... world Jewish conspiracy; or Jewish control of media, economy, government, or societal institutions**

ANTI-SEMITISM EXAMPLES

- **Accusing Jews, as a people, of being responsible for real or imagined wrong-doing committed by a Jewish or non-Jewish person or group**
- **Denying the Holocaust, its scope, mechanisms, or intentionality of genocide**

ANTI-SEMITISM EXAMPLES

- **Accusing Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust**
- **Accusing Jews of being more loyal to Israel than their own nations**

ANTI-SEMITISM EXAMPLES

- Denying Jewish people their right to self-determination
- Applying double standards to Jews or Israel
- Using symbols or images associated with anti-Semitism

ANTI-SEMITISM EXAMPLES

- **Comparing Israeli policy to that of the Nazis**
- **Holding Jews responsible for Israel's acts**
- **Other implications?**

EXECUTIVE ORDER ON GUIDANCE DOCUMENTS

EXECUTIVE ORDER ON AGENCY GUIDANCE DOCUMENTS 10-9-2019

26

- **Federal regulations require notice and comment rule-making:**
 - **Public notice of proposed rules**
 - **Accept comments**
 - **Consider and respond to significant comments**
 - **Publish final regulations**

NON-BINDING GUIDANCE DOCUMENTS

- **Avoid rule-making procedure**
- **Carry implicit threat of enforcement actions**
- **Insufficient notice to those affected**

PRESIDENT'S CONCLUSION

- **Therefore, guidance documents are non-binding in law and in practice by federal agencies**
- **Legally-binding requirements only through adjudications, contracts, or federal rule-making**

PRESIDENT'S DIRECTIVE TO AGENCIES

29

- Review all guidance documents, rescind as appropriate, and maintain online database of remaining ones
- Database must note non-binding effect
- OMB to design procedures for guidance document creation

OCR INVESTIGATIONS and RESOLUTIONS

OCR's TEXAS TECH INVESTIGATION

06-05-2085

TEXAS TECH COMPLAINT INVESTIGATION

32

- **Opened July 22, 2005**
- **Resolution Agreement – March 7, 2019**

ALLEGATIONS – TEXAS TECH

- Texas Tech changed its race-neutral admissions policy and considered race and ethnicity, starting in 2005.
- Violated strict scrutiny standard because not narrowly tailored to achieve diverse student body.

RESOLUTION – TEXAS TECH

- **Texas Tech's Health Sciences Center will no longer consider race or national origin for admissions**

OCR'S VISTA COLLEGE INVESTIGATION

06-18-2340

COMPLAINT INVESTIGATION – VISTA COLLEGE

36

- **Opened - Unspecified**
- **Resolution Agreement – January 3, 2019**

ALLEGATIONS – VISTA COLLEGE

- *Rapid Response Process*
- Vista failed to provide due process for resolution of complaints regarding disability accommodation.
- Vista failed to designate a Section 504 Coordinator

RESOLUTION - VISTA

- **Review and revision of Section 504 notice**
- **Review and revision of Section 504 grievance procedures**
- **Proof of creation, publication, and dissemination**

OCR'S UT AT SAN ANTONIO INVESTIGATION

06-19-2008

COMPLAINT INVESTIGATION - UTSA

40

- **Opened – October 10, 2018**
- **Resolution Agreement – January 24, 2019**

ALLEGATIONS - UTSA

- **Professor shouted, laughed, and harassed student who used ADA automatic door opener for disability**
- **UTSA failed to respond to disability harassment complaint**

RESOLUTION - UTSA

- **Training for professor and Equal Opportunity Services Office on disability harassment and proper procedures**
- **Investigate complaint against professor**
- **Letter of apology to student**

OCR's UT AT SAN ANTONIO INVESTIGATION

06-18-2213

COMPLAINT INVESTIGATION - UTSA

44

- **Opened - May 29, 2018**
- **Resolution Agreement – February 12, 2019**

ALLEGATIONS - UTSA

- **Accessibility issues in housing and dining, shower facilities, sidewalks, ramps, and seating**

RESOLUTION - UTSA

- **New facilities – ADA accessible**
- **Accessibility study of travel paths**
- **Structural modifications within 11 months**

**OCR's LINCOLN COLLEGE of TECHNOLOGY
INVESTIGATION 06-20-2012**

COMPLAINT INVESTIGATION - LCT

48

- **Opened – October 17, 2019**
- **Resolution Agreement – March 18, 2020**

ALLEGATIONS – LINCOLN COLL TECH

- **LCT failed to accommodate a student's service dog by requiring a doctor's note about the nature of her disability and the qualification of her service dog.**

RESOLUTION – LINCOLN COLL TECH

50

- **Revise service animal policy to reflect that staff cannot ask about a person's disability, require medical documentation, require a special identification card, or training documentation for the animal, or ask that a service animal demonstrate its ability to perform a task.**
- **Train staff on policy.**

OCR's AUSTIN COMMUNITY COLLEGE INVESTIGATION 06-19-2074

COMPLAINT INVESTIGATION – AUSTIN CC

52

- **Opened – Unspecified**
- **Resolution Agreement – April 11, 2019**

ALLEGATIONS – AUSTIN CC

- **ACC violated Fall 2016 disability accommodations : waived attendance policy, overhead copies, extended testing, frequent exam breaks, priority seating, testing in designated location, record lectures**

ALLEGATIONS – AUSTIN CC

- ACC placed hold on student's account, preventing Spring 2017 registration, by falsely stating he was math major and did not complete prerequisites. Retaliation for complaints about no accommodations.

RESOLUTIONS – AUSTIN CC

55

- **Allowed to retake Math and Comp Science.**
- **Replace prior grades and recalculate GPA**
- **Removal of account hold**
- **Training on Section 504 and Title II accommodations**

OCR's BAYLOR UNIVERSITY INVESTIGATION

06-19-2074

COMPLAINT INVESTIGATION - BAYLOR

57

- **Opened – December 19, 2018**
- **Resolution Agreement – June 6, 2019**

ALLEGATIONS - PARKING

- **Insufficient number of accessible parking spots**
- **Disabled Parking:**
 - **4 of 155 spaces**
 - **4 of 153 spaces**
 - **1 of 41**

ALLEGATION - CONCERT HALL

- **Inconvenient entry to accessible seating**
- **Through building, out rear exit, re-entry through side door to reach accessible seats**

RESOLUTION - PARKING

- **Self-evaluation of parking**
- **Modify within one (1) year**

RESOLUTION - PATHWAYS

- **Self-evaluation of travel paths**
- **Modify within one (1) year**

**OCR's UNIVERSITY OF HOUSTON AT CLEAR
LAKE INVESTIGATION 06-20-2066**

ALLEGATION - UHCLC

- **Failure to accommodate disability when it did not provide promised academic adjustments and auxiliary aids in Fall 2019 semester**

RESOLUTION - UHCLC

- **Allow student to retake Global Environment and Human Behaviors in Organization tuition-free and fees-free.**
- **If student completes by December 31, 2020, then change grades to reflect new grades.**
- **Employee training on academic adjustments and auxiliary aids and services for students with disabilities**

OCR's UT AT ARLINGTON INVESTIGATION

06-19-2018

COMPLAINT INVESTIGATION - UTA

66

- **Opened – Unknown date**
- **Resolution Agreement – July 17, 2019**

ALLEGATIONS - UTA

- Failure to provide disabled student necessary academic adjustments, tardies/absences, lecture recordings, PowerPoints, reduce distractions, double-time on tests and assignments, and due date extensions

ALLEGATIONS - UTA

- **Professor refused to provide accommodations approved by the Office for Students with Disabilities in the three courses he taught the student**

RESOLUTION - UTA

- **Let student retake all three courses without tuition and fees**
- **Replace prior grades with new grades**
- **Refund tuition and fees for retaken classes**

RESOLUTION - UTA

70

- **Training on Section 504 and ADA
Title II**

**OCR's UNIV. OF NORTH TEXAS INVESTIGATION
06-17-2251**

COMPLAINT INVESTIGATION - UNT

72

- **Received – July 11, 2017**
- **Resolution Agreement – August 27, 2019**

ALLEGATIONS - UNT

- **Failure to provide auxiliary aids and services to disabled student**
- **Retaliation for complaint**
- **Lack of grievance procedures**

FINDINGS - UNT

- **UNT's investigation of complaint was prompt and equitable, took a reasonable time, and notified all parties of outcome**
- **Retaliation conclusion redacted**
- **Insufficient evidence of lack of grievance procedures**

RESOLUTION - UNT

75

- **Training from Office of Disability Access**
- **Allow student to re-enroll, retake courses at no cost, and replace grade with new grade**
- **If re-enrollment, modify academic requirements and provide auxiliary aids**

OCR's UT AT SAN ANTONIO INVESTIGATION

06-16-2045

COMPLAINT INVESTIGATION - UTSA

77

- **Opened – Redacted**
- **Resolution Agreement – September 18, 2019**

ALLEGATIONS - UTSA

- **Student subjected to differential treatment on basis of disability**
- **Retaliation for filing complaint – Grievance process**

FINDINGS - UTSA

- **Provision of auxiliary aids and services violated**
- **No retaliation – Student received process, just disagreed with outcome**

RESOLUTION - UTSA

- **Notify students and staff of alternate testing outside regular hours**
- **Notify instructors of duty to provide academic adjustments**

OCR's TRINITY UNIVERSITY INVESTIGATION

06-17-2006

COMPLAINT INVESTIGATION - TRINITY

82

- **Opened – October 11, 2016**
- **Resolution Agreement – September 19, 2019**

ALLEGATIONS - TRINITY

- **Inaccessible buildings, parking lots, and routes**
- **Lower campus in old quarry – Residence halls, athletic facilities, and dining hall**
- **Upper campus – Academic and administrative buildings**

RESOLUTION - TRINITY

- **Self-evaluation of chapel, open houses, academic building, auditorium, Student Center, library, concert hall, tennis center, stadium, athletic center, dining hall, residence hall, alumni center - Within 120 days**

RESOLUTION - TRINITY

- **Then - One (1) year to plan modifications to facilities**
- **1½ years to complete modifications**

OCR's

WHARTON COUNTY JUNIOR COLLEGE INVESTIGATION

06-19-2219

COMPLAINT INVESTIGATION - WCJC

87

- **Opened – Redacted**
- **Resolution Agreement – October 16, 2019**

ALLEGATIONS - WCJC

- **Disability and race discrimination of student**
- **Professor failed to allow for medical absences and to give extra time**
- **Not allowed to travel with others due to his race**

FINDINGS - WCJC

- **Insufficient evidence of noncompliance**
- **Due to database issue, professor not informed of accommodations approved by ADA Coordinator**
- **Not allowed to travel because he was not enrolled in sufficient credit classes – not discriminatory**

RESOLUTION - WCJC

- **Training session for faculty, disability services staff, and ADA Coordinator regarding disability services**
 - **Can deliver electronically**
- **Allow complainant to retake course with approved accommodations and replace grade**

OCR's SIGNIFICANT NATIONAL CASES

OCR's

UNIVERSITY OF SOUTHERN CALIFORNIA INVESTIGATION

09-18-6901

OCR DIRECTED INVESTIGATION – USC

93

- **OCR opened - May 24, 2018**
- **Resolution Agreement – February 27, 2020**
- **“Sweeping Changes” at USC**

OCR ALLEGATIONS REGARDING USC

94

- Failed to protect female students from student health center gynecologist Dr. Tyndall, employed since 1989

OCR FINDINGS REGARDING USC - 51 PAGES

95

- **5 patients from 2000 – 2009 complained about sex discrimination**
- **Failed to investigate, determine if interim measures necessary, determine if sex discrimination occurred, or prevent recurrence and correct effects**

FINDINGS - USC

- **Notice of possible mistreatment of 4 more – Failed to respond effectively.**
- **No notice of outcome on some investigations.**
- **Patients and staff complained of his inappropriate remarks about patients' bodies.**

FINDINGS - USC

- Failed to investigate allegations of improper pelvic exams, using screen to prevent chaperones from seeing his actions
- Failed to investigate nurse supervisor's complaint about pelvic exams and full-body skin checks

FINDINGS - USC

- Failed to properly investigate sex discrimination after discovering 200+ photos of patients' genitals in gynecologist's office in 2016
- Failed to locate remaining photos Tyndall admitted to taking from 1989 – 2010
- Let him see patients for 1 ½ days after finding photos

FINDINGS - USC

- Failed to maintain record-keeping system to identify and monitor possible sex harassment by employees
- Failed to provide timely response to Tyndall's appeal of 2016 determination regarding Tyndall's sexual misconduct

FINDINGS - USC

100

- **USC did not complete investigation to determine if health center employees:**
 - **Were subjected to sex discrimination by Tyndall**
 - **Required interim protective measures**
 - **Required remedies**

FINDINGS - USC

- **In 2016 Title IX Investigation of Tyndall, Office of General Counsel may have exceeded its advisory role to the point of undermining autonomy and independence of Title IX Coordinator and Title IX Office, impacting scope of investigation and fidelity to Title IX policies**

RESOLUTION – USC - TITLE IX OFFICE

102

- **Independent authority to:**
 - **Respond to sex discrimination reports**
 - **Ensure health services compliance with Title IX**
- **Dedicated investigators**
- **Restructured Title IX office under HR**

RESOLUTION – USC - TITLE IX OFFICE

103

- **Title IX Office to track and monitor every complaint or report and provide to OCR**
- **Evaluate all employees on their Title IX compliance**

RESOLUTION – USC - VICTIM CONTACT

104

- Reasonable efforts to contact nine (9) who complained, current and former patients, and current and former employees who interacted with him
 - Remedy the harm
 - Academic accommodations, counseling, etc.

RESOLUTION – USC - DATA PRESERVATION

105

- **Centralized reporting and processing of complaints**
- **Final findings letters in personnel files of accused and in Title IX data system**

RESOLUTION – USC - TRAINING

106

- **Required training for students, employees, and trustees about sex discrimination**
- **Specialized training for health center employees**

RESOLUTION – USC -DUE PROCESS REVISION

107

- **Notice to parties and witnesses of Title IX procedures**
- **Consider reclassification of witnesses to complainants**
- **Provide notices of outcomes to all parties**

RESOLUTION – USC - DUE PROCESS REVISION

108

- **Due process for all parties**
- **Notice of intent to investigate and right to appeal decision to not investigate**
- **Prohibit retaliation**

RESOLUTION – USC - EMPLOYEE REMEDIATION

109

- **Review all employees' files for sex discrimination complaints**
- **Conduct review of current and former employees to determine if they took appropriate and remedial action when they received complaints or concerns**

ASSISTANT SECRETARY FOR CIVIL RIGHTS – KENNETH MARCUS

110

- **“What we have found at USC is shocking and reprehensible”**
- **“No student should ever have to face the disgusting behavior that USC students had to deal with.”**
- **“I am pleased that President Folt is now committing to major changes, and we will closely monitor the University to make sure it complies with our agreement”**

INTERESTING POINTS - USC

111

- **2018 resolution agreement about sex harassment and sexual violence in 2010 – 2016**
- **Requested “all student complaints or reports of sexual harassment whether written or verbal” 2010 – 2014, but Tyndall documents not provided to OCR**

INTERESTING POINTS - USC

112

- **2018 LA Times article about eight (8) complaints about Tyndall found in his personnel file, chaperone concerns, internal investigation, and findings he violated sex harassment policy**

INTERESTING POINTS - USC

113

- **USC – 6 press releases about Tyndall regarding internal investigations in 2013 and 2016, acknowledging complaints in prior years, and that he should have been removed and referred to authorities years ago**

INTERESTING POINTS - USC

114

- **OCR opened directed investigation**
- **USC admitted not providing documents, blaming miscoding in its case management database**
- **USC realized error during negotiations on first OCR case, but did not then disclose documents during negotiations**

SCOPE OF INVESTIGATION - USC

115

- **OCR reviewed 20,000 pages of documents, interviewed 52 employees and 42 former patients. 12 days of on-site visits, and 1 community meeting**
- **USC did not disclose 3,638 emails containing attorney-client communications and did not provide complete privilege log**

HEALTH CENTER PROTOCOLS IN PLACE - USC

116

- **Complaint system – Letter, email, locked boxes throughout health center, online system**
- **Quality Manager - Surveyed students, reviewed comments, and organized internal committee**
- **Internal Committee – Met monthly to consider patient care complaints**

HEALTH CENTER PROTOCOLS IN PLACE - USC

117

- **Female chaperone during pelvic and breast exams, if male physician**
- **Patients could request chaperone, regardless of sex of physician**
- **Chaperones – Medical assistants, registered nurses, LVN – not assigned to specific physicians**

INVESTIGATION RESPONSIBILITIES - USC

118

- **Office of Equity and Diversity (Title IX Coordinator)**
- **Office of Compliance (HIPAA, ACA, conflict of interest)**
- **Human Resources – Employee Relations**
- **Office of General Counsel**

PROBLEMS HINDERING DISCOVERY - USC

119

- **Personnel records not centralized**
- **Some complaints entered erroneously in database**

USC's INVESTIGATION

120

- **Prior complaints were addressed with Tyndall, but not investigated**
- **2013 effort to terminate employment, but HR required progressive discipline**

USC's INVESTIGATION

121

- **Photos found while Tyndall on vacation in June 2016**
- **Nurse supervisor then alleged sexual harassment of patients**

USC's INVESTIGATION

- Tyndall allowed to see 18 patients before administrative leave
- Paid administrative leave one year during investigation
- Settlement Agreement – Employment terminated

OTHER OUTCOMES - USC

123

- **Criminal felony charges – 29 felony counts for 16 patients**
- **License suspension/surrender by Tyndall**
- **Top-level resignations**

OTHER OUTCOMES - USC

124

- **Top-level reorganization**
- **\$215 million class action settlement for patients**
- **Clery reports – 64 rapes as defined by Clery, 4 fondlings**

UNIVERSITY DUTIES UNDER TITLE IX

125

- Respond promptly and effectively to sex harassment
- Investigate
- Take immediate and effective action to end harassment, prevent recurrence, and remedy its effects
- Interim measures before or during investigation for both reporting and responding parties

UNIVERSITY DUTIES UNDER TITLE IX

126

- **Interim measures = Counseling, course-related adjustments, modification of work or class schedule, campus escort, restrict contact, change work or housing locations, leaves of absence, increase security, monitor certain campus areas, and other accommodations**

UNIVERSITY DUTIES UNDER TITLE IX

127

- Respond if know or reasonably should have known
- Notice = If responsible employee knew or should have known
- Responsible Employee = Authority to address harassment, duty to report to appropriate school officials, or one who student reasonably believes has authority or responsibility

UNIVERSITY DUTIES UNDER TITLE IX

128

- If employee-to-student sexual harassment - School responsible regardless of whether it knew or should have know. (OCR standard; not court liability standard)
- End harassment, prevent its recurrence, and remedy effects

FACTORS TO DETERMINE HARASSMENT

129

- **Type and degree of responsibility, formal and informal, given to employee who provides aid, benefits, or services to students, directs or controls student conduct, or disciplines students**

FACTORS TO DETERMINE HARASSMENT

130

- **Degree of influence of employee over student:**
 - **Where and when harassment occurred**
 - **In light of age and education level and the way school is run, whether it is reasonable to believe employees in a position of responsibility over students, even if not so**

UNIVERSITY DUTIES UNDER TITLE IX

131

- **Stop further harassment**
- **Prevent retaliation**
- **Ensure students know how to report**

UNIVERSITY DUTIES UNDER TITLE IX

132

- **Conduct follow-up inquiries**
- **Respond promptly to address continuing or new problems**
- **Training to larger school community**

OCR's

MICHIGAN STATE UNIVERSITY INVESTIGATION

15-18-6901

DIRECTED INVESTIGATION – MSU

134

- **Opened January 18, 2018 - (OCR February 22, 2018)**
- **Resolution Agreement – September 3, 2019**
- **Record \$4.5 million fine for Clery Act violation; major changes for Title IX procedures**

TWO INVESTIGATIONS - MSU

135

- **Federal Student Aid – Clery investigation**
- **OCR – Reports of sexual violence by former employee and adjunct professor Dr. Larry Nassar**

SECRETARY BETSY DeVOS

136

- **“What transpired at Michigan State was abhorrent, inexcusable, and a total and complete failure to follow the law and protect students.”**

CLERY ACT VIOLATIONS - MSU

137

- **Failure to properly classify reported incidents and disclose crime statistics**
- **Failure to issue timely warnings**
- **Failure to identify and notify campus security and establish crime statistics collection system**
- **Lack of administrative capabilities**

CORRECTIVE ACTIONS - MSU

138

- **Hire Clery Compliance Officer**
- **Establish Clery Compliance Committee with representatives from 20 campus safety offices**
- **Create system of protective measures and expanded reporting**

TITLE IX OCR INVESTIGATION - MSU

139

- **Dr. Larry Nassar's conduct**
- **Dean William Strumpel's handling of reports of sexual violence by Dr. Larry Nassar**
- **Dean Strumpel's conduct**

OCR INVESTIGATION SCOPE - MSU

140

- **5 OCR data requests**
- **Hundreds of sexual assault reports**
- **47 witness interviews**
- **Tens of thousands of documents**
- **Five days of on-site interviews**

ALLEGATIONS - MSU

141

- **Failure to adequately respond to sexual misconduct reports**
- **Failure to implement interim measures to protect students while complaints were pending**

ALLEGATIONS - MSU

142

- **Failure to end harassment, eliminate hostile environment, and prevent recurrence**

ALLEGATIONS - MSU

143

- **No prompt/equitable response to student/employee complaints of sexual assault**

ALLEGATIONS - MSU

144

- **Employee acting as university employee created sexually-hostile environment for students**
- **University failed to promptly and effectively respond to notice of sexually-hostile environment**

ALLEGATIONS - MSU

- **Failure to stop hostile environment and prevent recurrence caused students to continue to be sexually harassed**
- **University failed to appropriately respond to sexual harassment by Dean Strumpel, Nassar's supervisor**

ALLEGATIONS - MSU

146

- **2015 Resolution Agreement - Required review of all complaints from 2010 – 2015 to determine if all were investigated properly and equitably**
- **University identified 55 complaints it did not investigate properly, then 11 months later, provided 2014 complaint regarding Nassar**
- **Three months later, located 8 more complaints regarding Nassar**

PRIVATE LAWSUITS FILED REGARDING NASSAR vs. MSU

147

- **December 2016 – California state court**
- **January 2017 – W.D. Michigan federal court**
 - **\$500 million civil court settlement**

DR. NASSAR

148

- **1993 - D.O. degree from MSU**
- **1993 – 1996: Unpaid clinical instructor, working on fellowship**
- **1997 – 2016: Professor, provided medical services**

DR. NASSAR

149

- **1997 – 2016: Team physician, Women's Gymnastics**
- **1996 -2014: National medical coordinator for USA Gymnastics**
- **2017: Pled guilty to 10 counts of criminal sexual conduct and child pornography**

COMPLAINT HISTORY

150

- **August 2016: Former youth gymnast reported sexual assault from 2000**
 - **Immediate media attention**
- **February 2018: MSU had 190+ sexual misconduct complaints dating back to 1989**

PRIOR REPORTS OF NASSAR MISCONDUCT

151

- **1997: Told then-Head Coach about inappropriate touching; Coach said serious consequences for student and Nassar**
- **1998: Students referred to Nassar as “happy fingers”, and discussed his “crotch massages” in presence of athletic trainer**

PRIOR REPORTS OF NASSAR MISCONDUCT

152

- **1999: Complaint to coach and trainers – They said he is Olympic doctor and knows what he is doing**
- **2000: Complaint to trainers – They said not sexual abuse**

PRIOR REPORTS OF NASSAR MISCONDUCT

153

- **2002: Complaint to teammate regarding sexual assault – denied to trainer**
- **2013: Mother said student uncomfortable and refused Nassar appointment. Dr. said, “We get that a lot.”**
- **2014: Sexual assault with athletic trainer present. She asked and trainer said everything was fine**

PRIOR REPORTS OF NASSAR MISCONDUCT

154

- **2014: Post-grad student complained to Sports Director regarding sexual assault – Reported to Title IX officer and investigation conducted.**
- **Suspended Nassar 1 month, but he returned and saw 249 patients during investigation.**
- **Determined legitimate medical treatment**

PRIOR REPORTS OF NASSAR MISCONDUCT

155

- **2015: Reports to doctors and receptionists about “inappropriate touch”**
- **2016: Youth gymnast allegation**
- **All employees denied or could not recall any reports or concerns**

MSU's TITLE IX INVESTIGATION OF 2016 COMPLAINT

156

- **Nassar fired**
- **Violation of University policies**
- **5 investigations – Conclusions of policy violations in all 5**

DEAN STRUMPEL'S BEHAVIOR

157

- **1998: Senior Associate Dean**
- **2002 – 2018: Dean**
 - **Retired prior to start of tenure revocation process**
 - **After criminal charges of criminal sexual conduct, neglect of duty**

DEAN STRUMPEL's CONDUCT: 2004

158

- Pointed to student and said, “You probably take birth control.”
- “Yes Sir, Ma’am, Sir, I can’t tell; What’s your question?”
- Asked student in clinical skills class to perform digital rectal exam on him in another room

DEAN STRUMPEL's CONDUCT: 2004

159

- Required four students to perform pelvic exams on 19-year-old female models
- In class of 151, offered \$50,000 to anyone who would perform digital rectal exam

DEAN STRUMPEL's CONDUCT: 2005 and 2010

160

- In spite of 360-degree reviews, all with sexist/chauvinist behavior complaints, reappointed as Dean in 2005 and 2010, but told him to stop the comments

2015 - 360 REVIEW COMMENTS

161

- Interjected sex into all conversations
- Stared at female body parts
- Bragged about sleeping with underage females in Thailand
- Joked about strip clubs, nude school photos, female attire, and extramarital affairs
- Reappointed as Dean, but told to stop comments

2016 – ORIENTATION SPEECH

162

- Told male students “if they can’t get female students in bed, they are losers”
- “Because we’re doctors, we can get into a lady’s pants”
- Was “jet-lagged from overseas trip and recent drinking incident with 4th year medical student”

NO REPORTS TO TITLE IX OFFICE UNTIL 2017

163

- Female students reported sex solicitation in exchange for academic assistance
- Multiple reports of inappropriate comments, staring, seeking liaisons with young female students
- Failure to vigorously supervise Nassar

MSU RESOLUTION AGREEMENT

164

- **All current attorneys must recuse selves from Title IX matters**
- **No Title IX, medical, scientific, or policy expert or investigator shall have conflict of interest or bias for or against complainant or respondent**

MSU RESOLUTION AGREEMENT

165

- **Title IX Office to report to President and oversee all Title IX investigations**
- **3 years – 3rd party consultant will review Title IX grievance process to determine if policies are being followed. Every 6 months update**

MUST RESOLUTION AGREEMENT

166

- **Title IX process structure to be revised and implemented after approval**
- **3 years – Provide OCR all completed Title IX complaint files, final reports, and written determinations**
- **Non-discrimination notices posted prominently and continuously**

MSU RESOLUTION AGREEMENT

167

- **MSU Board Chair and President receive report of all open and recently resolved Title IX complaints against employees, final reports, and written determinations**
- **MSU statement that reports received by all responsible parties will go to Title IX Office**

MSU RESOLUTION AGREEMENT

168

- All parties can provide expert witnesses in investigations
- Preliminary investigation report, comment period, then final report

MSU RESOLUTION AGREEMENT

169

- Establish procedures for newly-discovered evidence
- Designate “responsible employees” and require them to report complaints to Title IX Office
- Prohibit retaliation

MSU RESOLUTION AGREEMENT

170

- **Include Title IX reports in employees' personnel files, including summary of allegations so can identify behavior patterns**

MSU RESOLUTION AGREEMENT

171

- **Review all employees who received complaints and failed to act, including President, Provost, Vice Presidents, general counsel, heads of teams, and anyone else mentioned in complaints**

MSU RESOLUTION AGREEMENT

172

- **Actions:**
 - **Discipline, tenure revocation, title revocation, demotion, reassignment, trespass, withdraw benefits, reduce pay, remove housing, remove as administrator**

MSU RESOLUTION AGREEMENT

173

- Address negative impact of employees' conduct on students and employees
- Remedies:
 - Counseling, grade adjustments, tuition reimbursement, retake classes without penalty or cost, academic assistance, change performance evaluation

MSU RESOLUTION AGREEMENT

174

- **Climate assessment of youth programs and offer services to those affected, notice of nondiscrimination**
- **Title IX Training**
- **Invitation to victims to contact Title IX Office and entitlement to remedies**

MSU RESOLUTION AGREEMENT

175

- **Open or complete all investigations regarding Nassar and Strumpel and offer remedial action**

OCR'S PENNSYLVANIA STATE INVESTIGATION 03-14-6001

ALLEGATIONS – PENN STATE

177

- **Initiated – January 2014**
- **Concluded – March 26, 2020**

ALLEGATIONS – PENN STATE

178

- **Former Asst. Football Coach Jerry Sandusky sexually abused minors**
- **High ranking university officials failed to adequately respond**

ALLEGATIONS – PENN STATE

179

- Ignored student complaints from 2015 – 2018
- In 2019 – 2020, policies failed to provide notice of procedures, ensure adequate investigations, provide complaint procedures, provide prompt complaint process

ALLEGATIONS – PENN STATE

180

- **Interim suspensions, no discipline**
- **Excluded live testimony in hearings**
- **Administrative directives to accused, no discipline**
- **Failed to maintain adequate records**

RESOLUTIONS – PENN STATE

181

- Give OCR a list of all sexual harassment complaints from 2017 to 2019, with contact info
- Give OCR all case files from 2019 – 2021
- OCR will review and inform Penn State of corrective action needed on each file

RESOLUTIONS – PENN STATE

182

- **Revise all Title IX policies across all departments, to ensure they are legally-compliant, cross-referenced, linked, internally consistent, and do not contain any conflicting information.**
- **Keep adequate records**

RESOLUTIONS – PENN STATE

183

- **Title IX staff training in all departments handling complaints, senior level administration, police.**
- **Youth programs notice and procedures re Title IX**

TEXAS S.B. 212

REPORTS REQUIRED - TEX. ED. CODE SECTION 51.252

185

- **Employee of private or public IHE, who, in the course and scope of employment, witnesses or receives information regarding information reasonably believed to be sexual harassment, sexual assault, dating violence, or stalking by a student or an employee, shall promptly report to Title IX Coordinators.**

REPORT CONTENT – TEX. ED. CODE SECTION 51.252

186

- Report must include all known relevant information known to the reporter, and redress of incident, including if victim desires confidentiality**
- Employee whose job allows employees to speak confidentially, reports type of incident, and shall not violate student's privacy expectation**

REPORT EXCEPTION – TEX. ED. CODE SECTION 51.252

187

- **Employees need not report, if:**
 - **They are victims**
 - **They learn of report at a public awareness event**

REPORT TO CEO – TEX. ED. CODE SECTION 51.253

188

- **Every three (3) months, Title IX Coordinator must provide CEO a written report regarding:**
 - **Investigation of reports**
 - **Disposition of disciplinary process**
 - **Decision not to initiate discipline**

REPORT TO CEO – TEX. ED. CODE SECTION 51.253

189

- If person is in imminent danger, Title IX Coordinator shall immediately report to CEO**

CEO REPORTS – TEX. ED. CODE SECTION 51.252

190

- **At least once during the fall and spring semester, CEO reports to Board and posts on website the reports received:**
 - **No personal identification**
 - **Number of reports received**
 - **Number of investigations conducted**
 - **Number of dispositions of disciplinary processes**
 - **Number of reports not disciplined**
 - **Disciplinary actions taken**

CEO REPORTS –

TEX. ED. CODE SECTIONS 51.253 AND 51.254

191

- If fewer than 1,500 students, CEO only reports if more than 5 reports
- Immunity for good faith reports, investigations, and testimony

FAILURE TO REPORT – TEX. ED. CODE SECTION 51.255

192

- **Knowing failure to report, with intent to harm or deceive**
- **Class B misdemeanor**
- **Class A misdemeanor if intent to conceal**
- **IHE terminates employee**

VICTIM CONFIDENTIALITY – TEX. ED. CODE SECTION 51.256

193

- Except for those receiving reports who must conduct the investigations; law enforcement who conduct investigations; alleged perpetrator, to extent required by other law; potential witnesses as necessary to investigate
- Victim may use pseudonym with police

RETALIATION AND TRAINING – TEX. ED. CODE SECTIONS 51.257 AND 51.260

194

- No discipline for good faith reports, or for cooperating with investigations or proceedings, unless perpetrator or assisted perpetrator
- Training to be developed

**AN UPDATE ON THE
U.S. DEPARTMENT OF EDUCATION'S
OFFICE FOR CIVIL RIGHTS**

195

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Information Security in Texas Public Higher Education Institutions -What You Need to Know-

Charlotte Russell, Chief Information Security Officer

Rich Anderson, Information Security Director

University of North Texas

October 27, 2020



State of Texas Cybersecurity Strategy Overview

State of Texas Goals

ENGAGEMENT

Foster State and Agency Leadership Engagement for Cybersecurity Initiatives

TOOLING

Provide proactive cybersecurity defense through insight and technology

STAFFING

Ensure adequate knowledge, skills and experience of the cybersecurity workforce

Challenges

Leadership is unaware of cybersecurity challenges

Implementing latest-and-greatest technologies, while appealing, can be difficult due to technical, cultural, and financial impacts of the technology.

Competition between public and private sector for skilled cybersecurity professionals leaves state government at a disadvantage when it comes to attracting and retaining high-caliber staff

Expected Outcomes

Leadership understands cybersecurity challenges and risks; Stronger cybersecurity program with culture of awareness

Improved systems protection and threat identification; Security programs that keep up with current technologies and reduced risk of adverse cybersecurity events

Clearly defined cybersecurity roles and responsibilities; Resilient security program defined by a stable workforce



State of Texas Cybersecurity Strategy Overview

State of Texas Goals

RESPONSE

Minimize the detection and response time for security incidents

OUTREACH

Establish a cybersecurity outreach program to increase awareness of cybersecurity best practices

Challenges

Some organizations do not have adequate resources to deal with incidents and do not regularly test incident response plans

Lack of understanding of importance of cybersecurity

Expected Outcomes

Decreased time between event occurrence and detections, between detection and response, and reduced severity of incidents through more efficient incident response processes

Increased end-user awareness



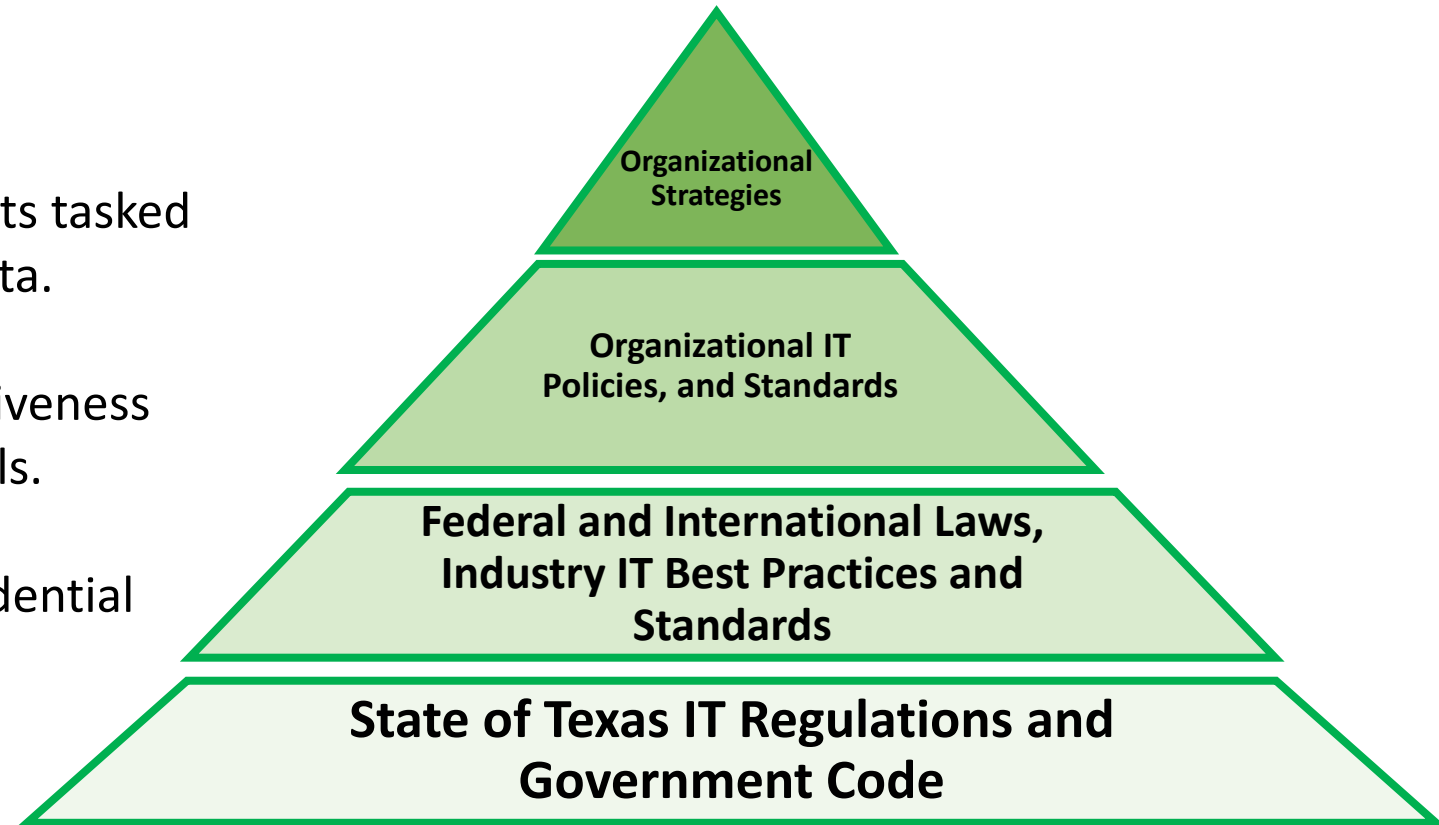
State of Texas Cybersecurity

GOALS

Improve the defensive posture of governments tasked with protecting and securing citizen data.

Improve organization's cybersecurity effectiveness through alignment with statewide goals.

Protect and secure the sensitive and confidential information of our citizens.



Texas Administrative Code Title 1, Part 10, Chapter 202, Information Security Standards, aka TAC 202.70- 202.76





Information Security Program





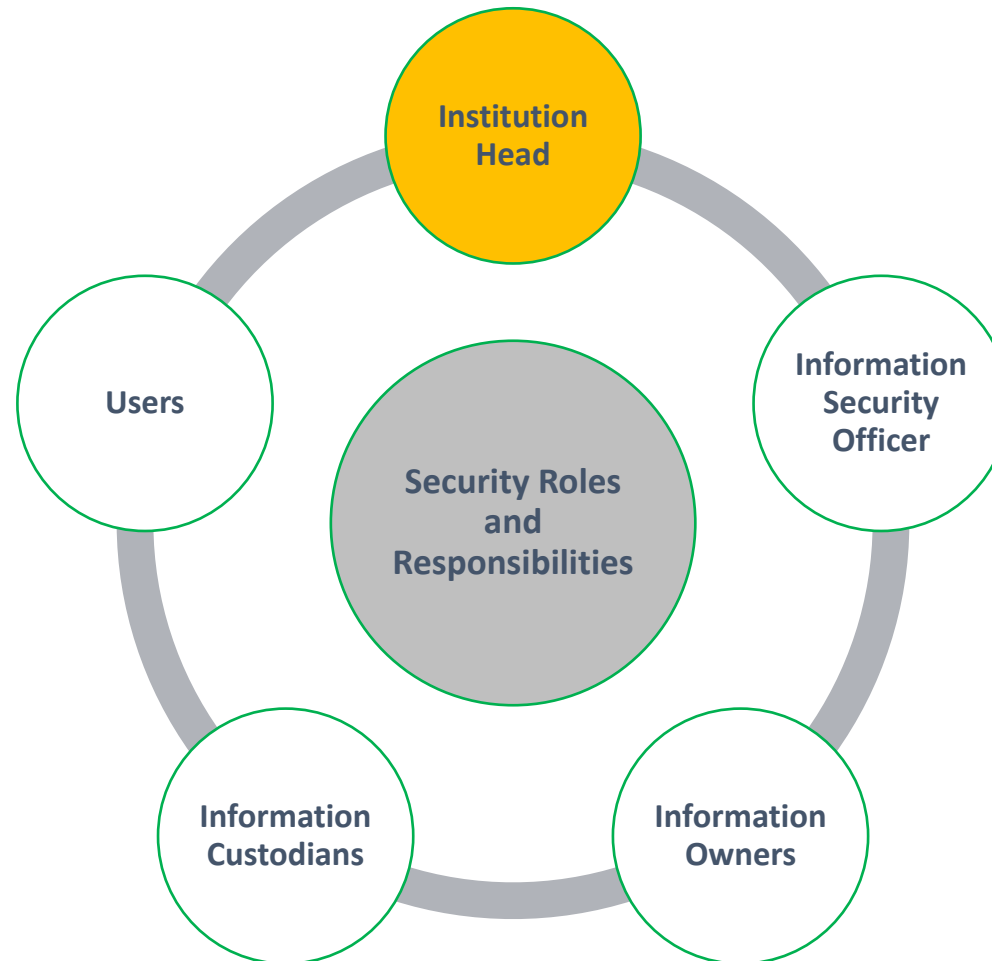
Information Security Roles- TAC 202.70 – 202.72





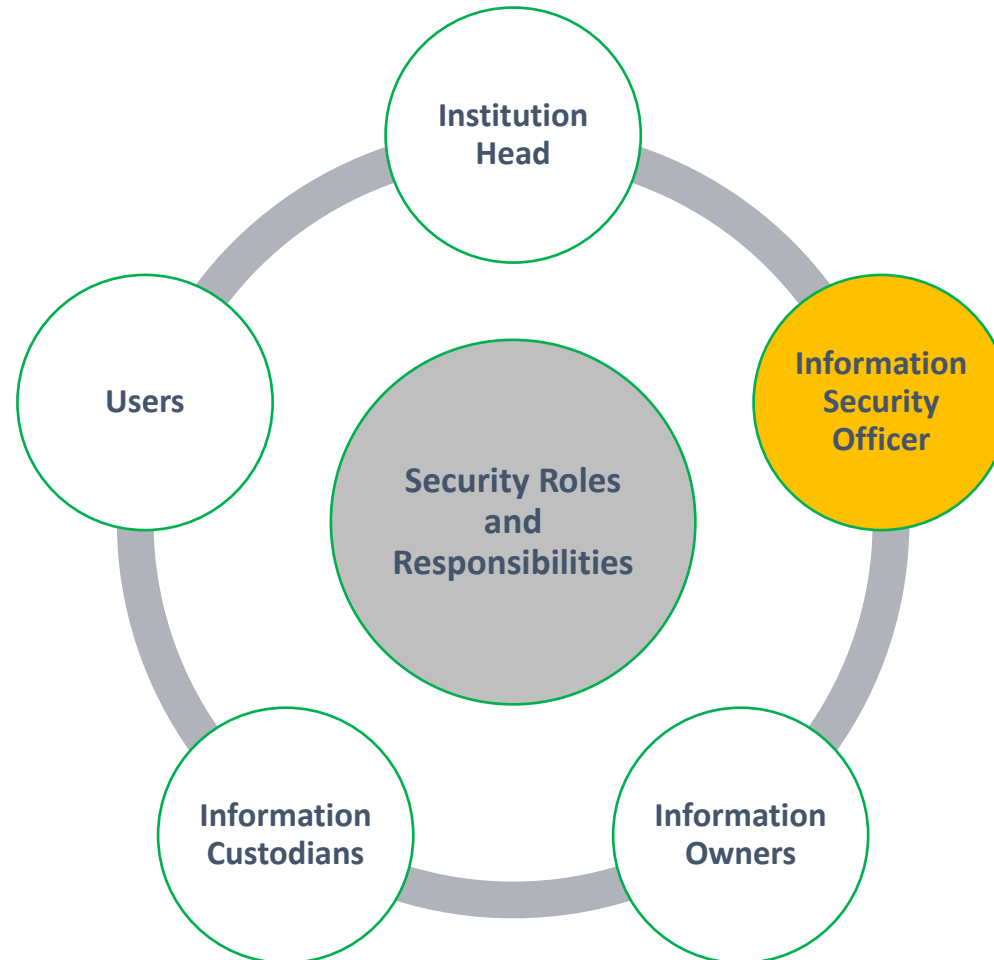
Institution Heads- TAC 202.70

Chancellor and President of University



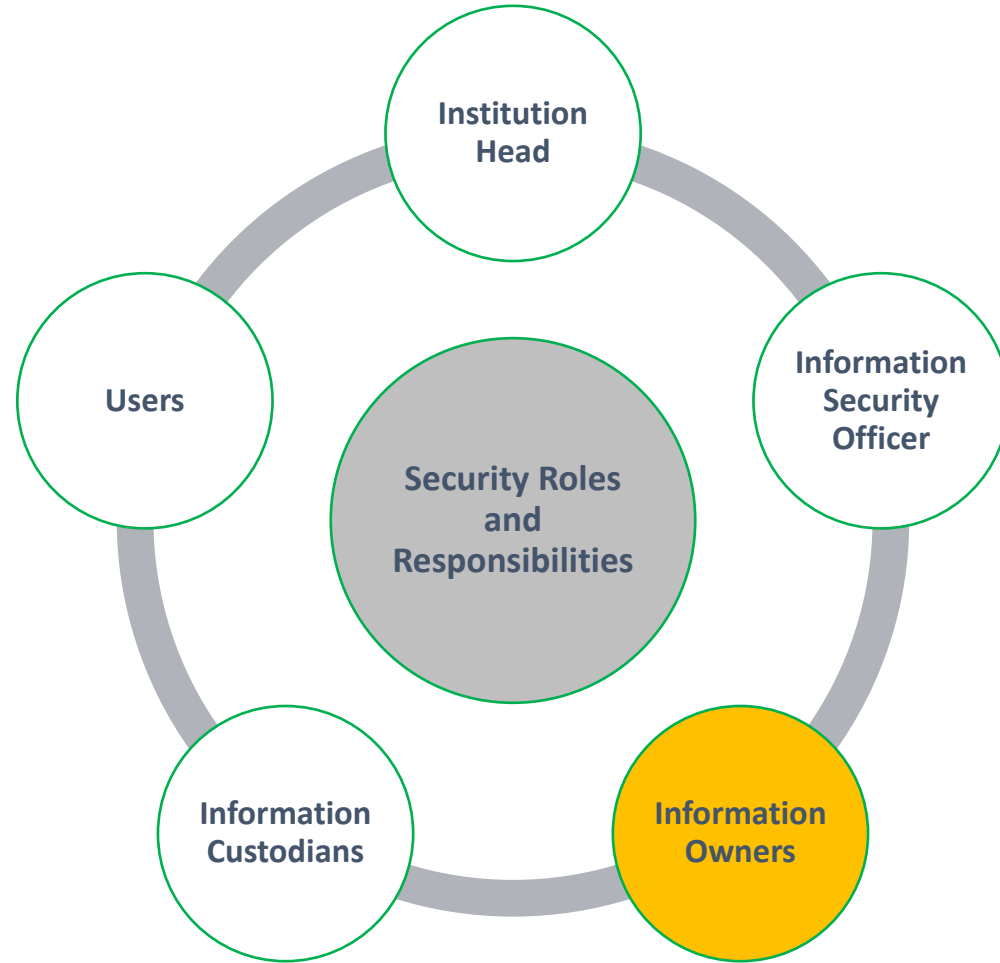


Information Security Officer- TAC 202.71





Information Owners (Data Owners)- TAC 202.72





Information Custodians- TAC 202.72



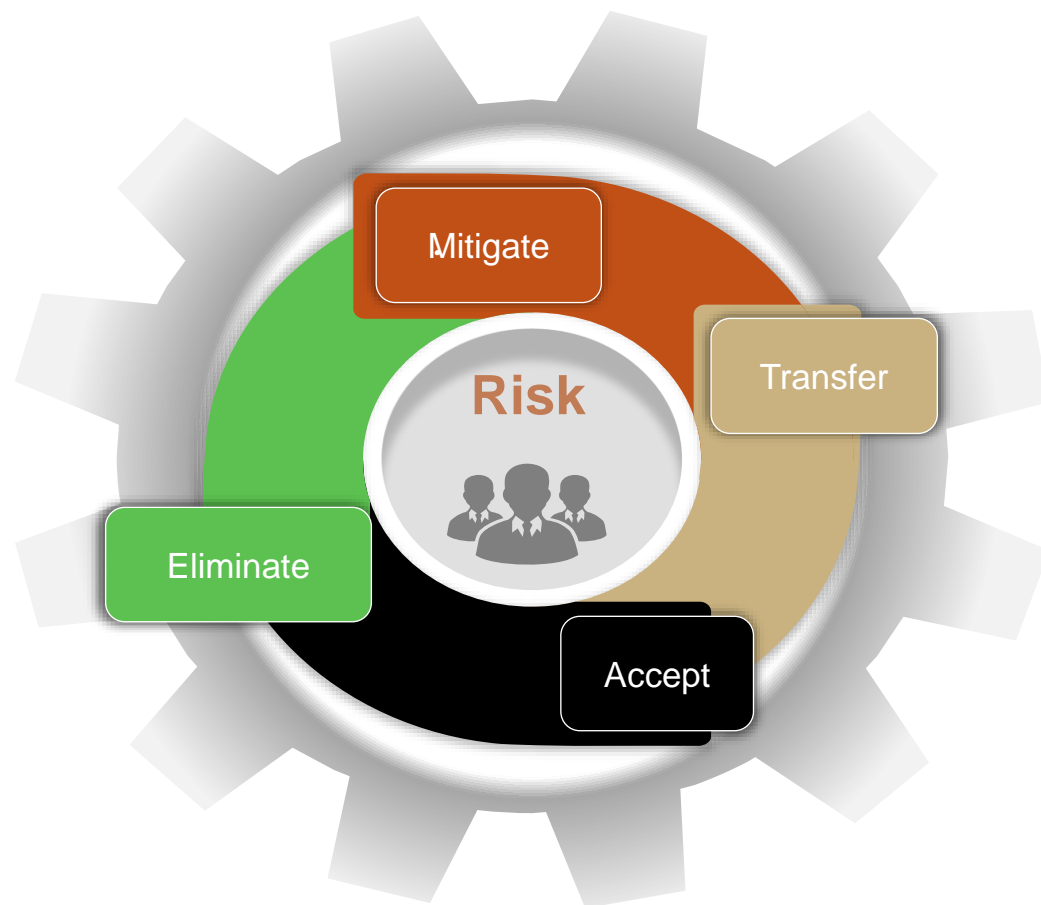


Users of Information and Technology- TAC 202.72





Security Risk Assessment- TAC 202.75





Security Reporting- TAC 202

Information Security
Officer

Institution Head
Chancellor and President

- Effectiveness of Information Security Program
- Risk Assessments
- Security Requirements and Requests
- Exceptions

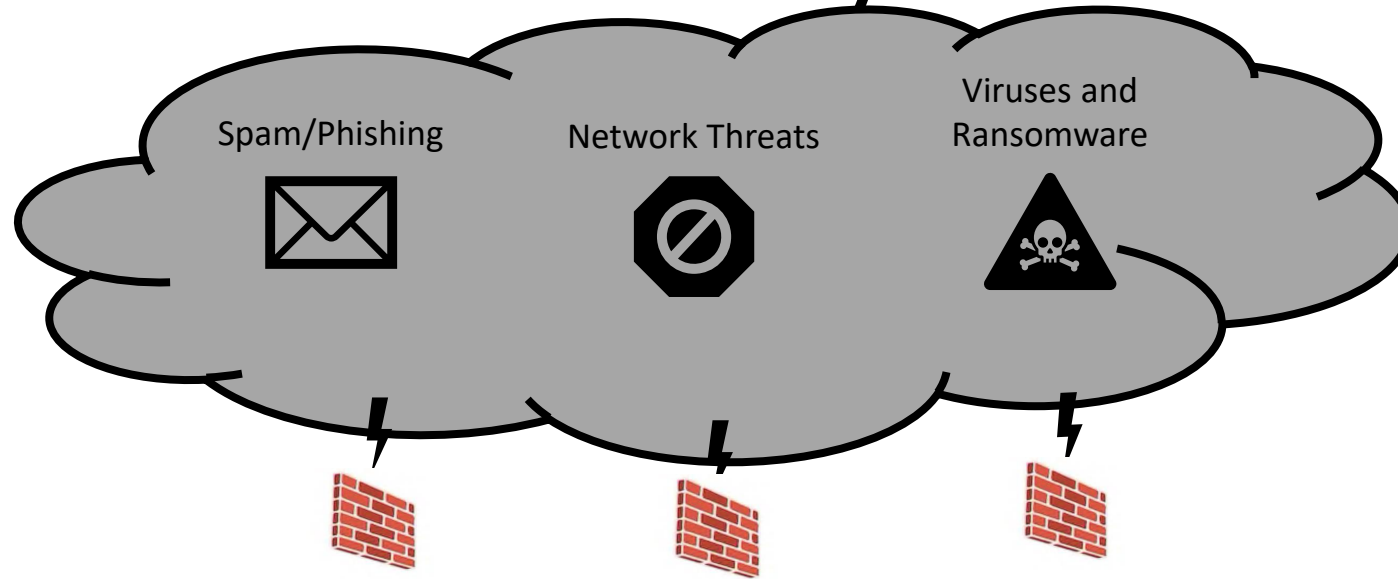
State of Texas

- Risk Assessments
- Incident Reports
- Biennial Security Plans
- Vulnerability Reports

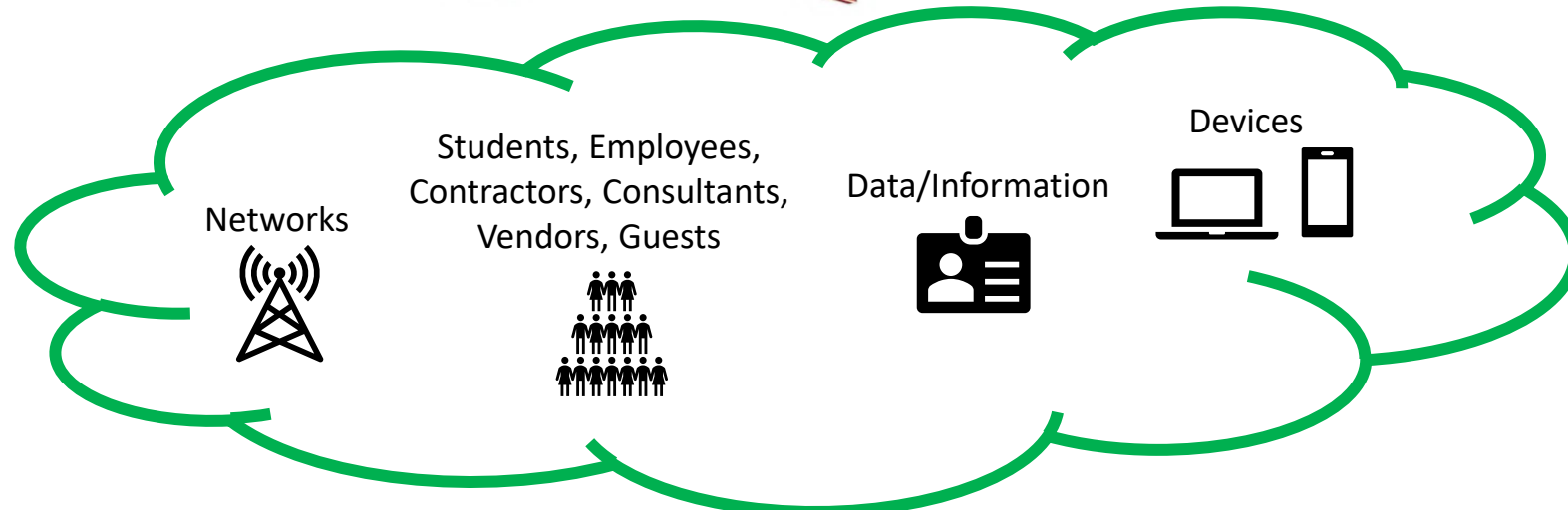


External Security Threats

External Threats



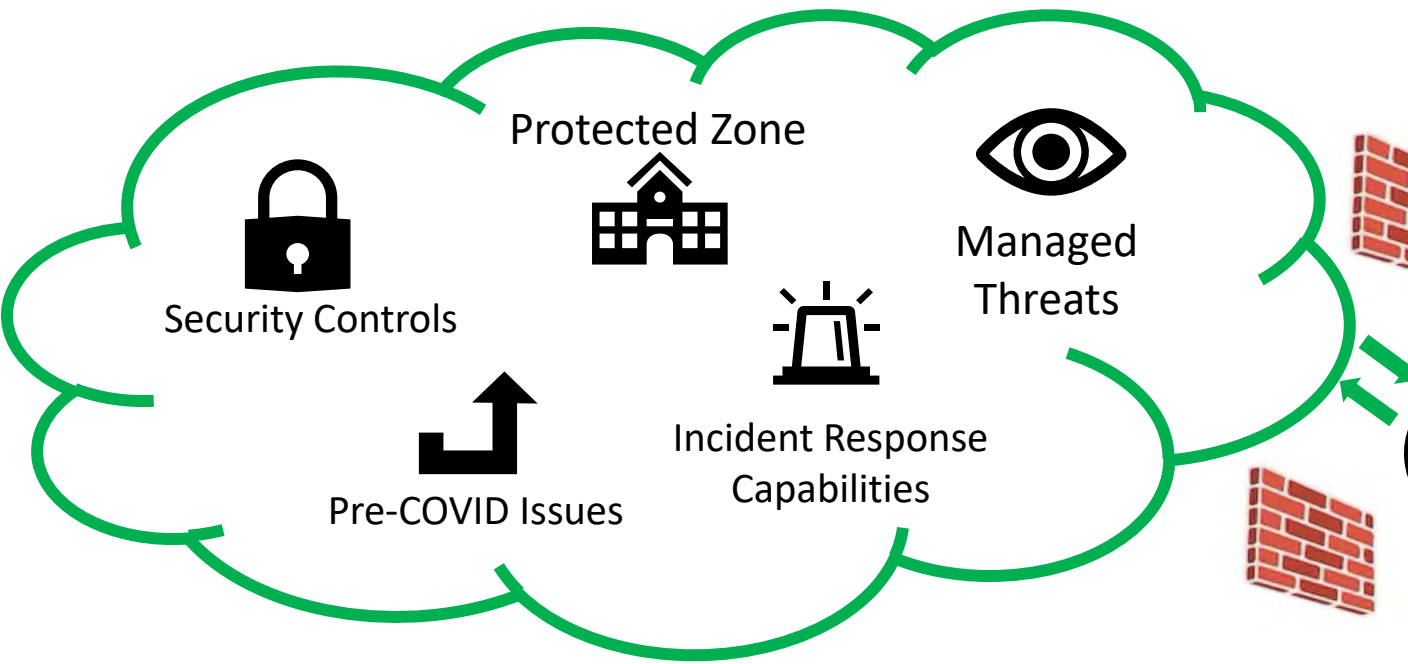
Managed Security



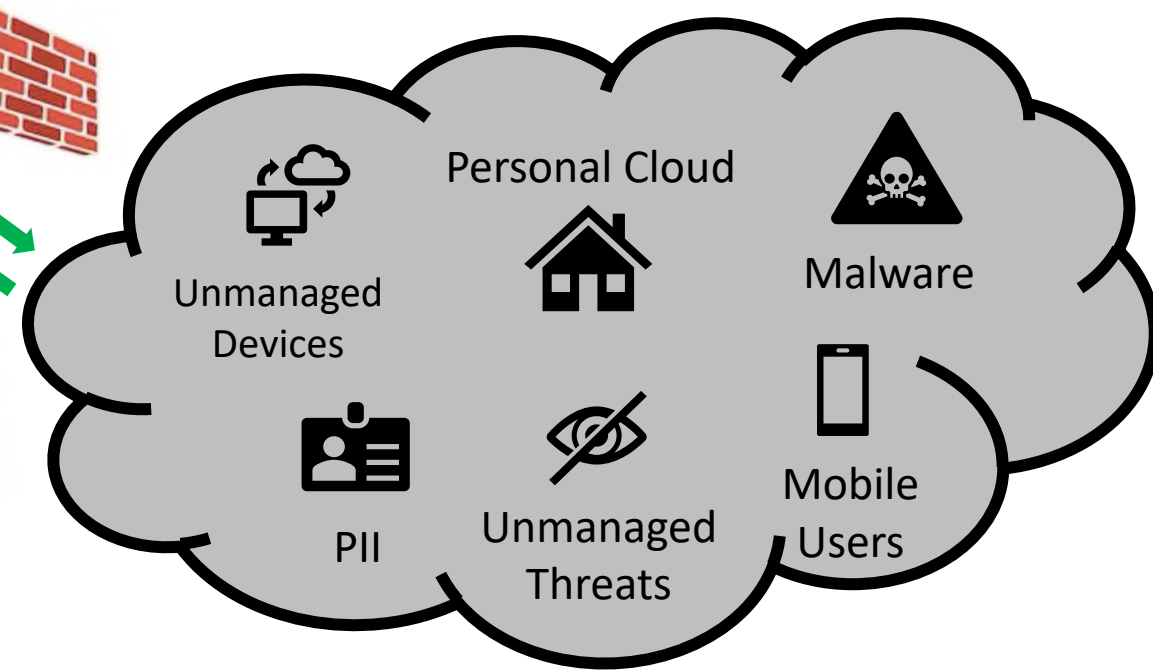


Internal Security Threats

Managed Security



Internal Threats



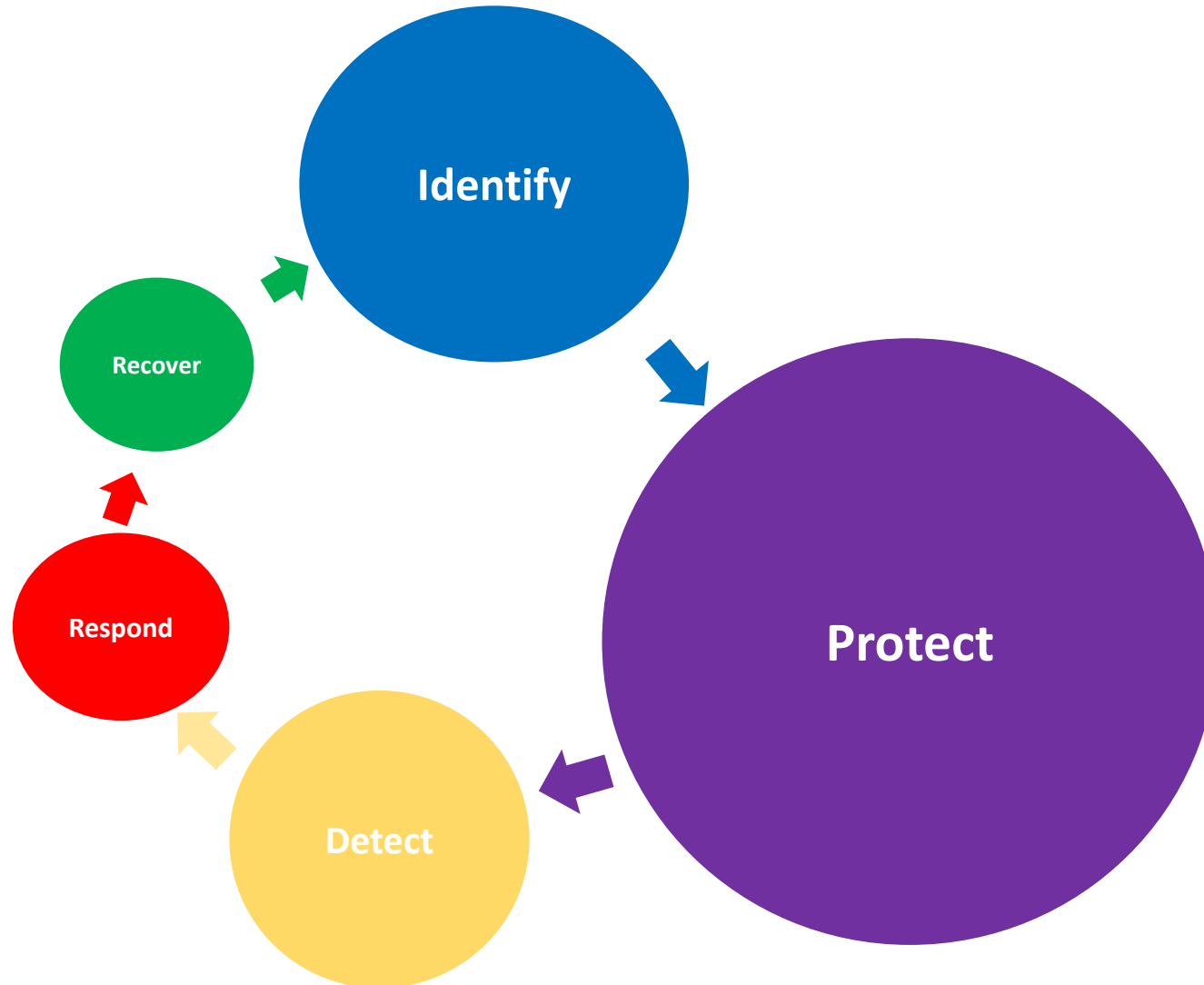


Security Controls: Texas Cybersecurity Framework (TCF)

TCF Capability	Description	Security Objectives (40)	
Identify	Develop the organizational understanding to manage cybersecurity risk to systems, assets, data, and capability	<ul style="list-style-type: none"> ✓ Privacy and Confidentiality ✓ Data Classification ✓ Critical Information Asset Inventory ✓ Enterprise Security Policy, Standards and Guidelines ✓ Control Oversight and Safeguard Assurance ✓ Information Security Risk Management 	<ul style="list-style-type: none"> ✓ Security Oversight and Governance ✓ Security Compliance and Regulatory Requirements Management ✓ Cloud Usage and Security ✓ Security Assessment and Authorization/Technology Risk Assessments ✓ External Vendors and Third Party Providers
Protect	Develop and implement appropriate safeguards to ensure protection of assets	<ul style="list-style-type: none"> ✓ Enterprise Architecture, Roadmap & Emerging Tech ✓ Secure System Services, Acquisition and Dev ✓ Security Awareness and Training ✓ Privacy Awareness and Training ✓ Cryptography ✓ Secure Configuration Management ✓ Change Management ✓ Contingency Planning ✓ Media ✓ Physical Environmental Protection 	<ul style="list-style-type: none"> ✓ Personnel Security ✓ Third-Party Personnel Security ✓ System Config Hardening & Patch Mgmt ✓ Access Control ✓ Account Management ✓ Security Systems Management ✓ Network Access and Perimeter Controls ✓ Internet Content Filtering ✓ Data Loss Prevention
Detect	Develop and implement the appropriate activities to identify the occurrence of a cybersecurity event.	<ul style="list-style-type: none"> ✓ Malware Protection ✓ Vulnerability Assessment ✓ Security Monitoring and Event Analysis 	
Respond	Develop and implement the appropriate activities to take action regarding a detected cybersecurity event.	<ul style="list-style-type: none"> ✓ Cyber-Security Incident Response ✓ Privacy Incident Response 	
Recover	Develop and implement the appropriate activities to maintain plans for resilience and to restore any capabilities or services that were impaired due to a cybersecurity event.	<ul style="list-style-type: none"> ✓ Disaster Recovery Procedures 	



Security Safeguards





Information Security Program





Questions




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Supporting Undocumented Students by Enhancing Individual and Institutional Undocu-Competence



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Our Time Together

- ▷ Policy landscape
 - ▷ State
 - ▷ Federal
- ▷ Undocumented college student experience
- ▷ Undocumented students' assets
- ▷ Undocu-competence
 - ▷ Institutional
 - ▷ Individual
- ▷ Limitations and possibilities of undocu-competence
- ▷ Discussion

Undocumented students in the United States

- ▶ Live in the U.S. without citizenship, valid visas, or valid work permits (Passel & Cohn, 2010)
- ▶ Estimated 98,000 undocumented high school graduates each year (Zong & Batlova, 2019)
- ▶ Face unique, significant barriers to success in postsecondary education



Undocumented students' "stories are not those of defeat;
they are stories of resilience and resistance"
(Negrón-Gonzales, 2017, p. 109).

Policy Parameters

Federal policy landscape

- ▷ *Plyler v. Doe* (1982)
 - “By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation” (*Plyler v. Doe*, 1982, p. 224).
- ▷ Title IV of the Higher Education Act of 1965
 - Implicitly bans undocumented immigrants from receiving federal aid
- ▷ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) & Personal Responsibility and Work Opportunity Act (PRWOA)
 - Explicitly bans undocumented immigrants from all federal public benefits

Policy Parameters

Federal policy landscape

- ▶ Deferred Action for Childhood Arrivals (DACA)
 - Congressional failure to pass an inclusive comprehensive immigration reform package
 - Executive Order issues in 2012 under President Obama (only after years of fierce immigration activism)
 - Eligible undocumented immigrants could work / pursue work without fear of deportation
 - Challenged in the courts after the Trump administration's attempted rescinding of the program
 - DACA is here to stay, for now...
- ▶ Disparate and Evolving In-State Resident Tuition (ISRT) policies

Policy Parameters

State policy landscape

- ▷ Disparate and Evolving In-State Resident Tuition (ISRT) policies
 - 20 states and D.C. have tuition equity laws for undocumented students
 - Texas in 2001
 - Many states have no laws on the books
 - College and universities develop their own policies
 - 3 states ban ISRT eligibility for undocumented immigrants
 - 2 states also ban undocumented immigrants from attending public institutions, including community colleges

State legislation granting undocumented students in-state resident tuition (ISRT) is “perhaps the most relevant immigrant college access-related policy of the last three decades” (Oseguera et al., 2010, p. 38).

Undocumented Students on Campus

Undocumented students' lived experiences in higher education:

- ▶ Financial barriers to access (Abrego, 2008; Castro-Salazar & Bagley, 2010; Contreras, 2009; Suárez-Orozco et al., 2015)
- ▶ Evolving relationship to undocumented status; fear of disclosing (Gonzales, 2016; Munoz & Maldonado, 2012; Suárez-Orozco et al., 2011)
- ▶ Hostile campus climates (Muñoz & Maldonado, 2012; Nienhusser et al., 2016; Suárez-Orosco et al., 2015)
- ▶ Uninformed and insensitive staff and faculty (Contreras, 2009; Nienhusser et al., 2016)
 - Important to note that supportive staff and faculty as well as collaborative relationships with community organizations help undocumented students succeed (Cervantes et al., 2015; Chen & Rhoads, 2016)

Undocumented Students' Assets

Undocumented students' lived experiences in higher education:

- ▶ High level of agency, self-efficacy, and resourcefulness (Gonzales, 2016; Jimenez-Arista & Koro-Ljungberg, 2017; Negrón-Gonzales, 2013)
- ▶ Strong sense of social responsibility; high level of participation in civic engagement and activism (Borjian, 2018; Cervantes et al., 2015; Flores, 2016; Morales et al., 2011; Pérez Huber, 2015; Muñoz, 2016)

For many undocumented college students, despite the structural circumstances they find themselves in, there is a “desire to persist in postsecondary education in hopes of one day gaining validation as contributing members of American society” (Morales et al., 2011, p. 277).

Undocu-Competence

Growing call for undocu-competence: capacity to serve, support, and advocate for undocumented students (Neinhusser & Espino, 2017; Tapia-Fuselier, 2019; Tapia-Fuselier & Young, 2019; Valenzuela et al., 2015)

Institutional Level

- ▷ Institutional Undocu-Competency (Valenzuela et al., 2015)
- ▷ Undocufriendly campuses (Suarez-Orosco et al., 2015)
- ▷ Undocumented Student Resource Centers (Cisneros & Valdivia, 2018)
- ▷ Undocu-Competent Institutional Responses (Tapia-Fuselier & Young, 2019)

Undocu-Competence

Growing call for undocu-competence: capacity to serve, support, and advocate for undocumented students (Neinhusser & Espino, 2017; Tapia-Fuselier, 2019; Tapia-Fuselier & Young, 2019; Valenzuela et al., 2015)

Individual Level

- ▷ Undocumented/DACAmented Status Competency (Neinhusser & Espino, 2017)
- ▷ UndocuAlly training effectiveness (Cisneros & Cadenas, 2017)

Limitations & Possibilities

Limitations

- ▷ Undocu-competence – the framing of “competence” might indicate that there’s a point at which to arrive; yet, this work is never done
- ▷ Examining efforts at institutionalizing undocu-competence (i.e., USRCs) may reveal they are only institutionalized(ish) (Tapia-Fuselier, 2020)
- ▷ For undocumented students, undocu-competent spaces (i.e., USRCs) may be safe spaces *to* ask questions, seek support, and build community; however, they are not safe spaces *from* oppressive immigration practices (Tapia-Fuselier, 2020)

Limitations & Possibilities

Possibilities

- ▷ Undocu-competence may be best achieved through inside-outside strategies (Tapia-Fuselier, 2020)
 - A movement-building and organizing tactic that seeks to build coalition between those working inside and outside formal power structures in order to achieve social change; a both/and approach rather than an either/or approach
 - The energy to support undocumented students exists on the *inside* and on the *outside* of college campuses and is being tapped into
 - An inside-outside strategy would mean that the progress being made on the *inside* (i.e., establishing and sustaining a USRC on a college campus) is encouraged by and held accountable to the *outside* (i.e., local immigration activists)

Discussion:

1. How are you building your individual undocu-competence?
2. How are your campuses building undocu-competence?
3. What's next?

Thanks!



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“It’s kind of a big deal.”

SB212, Title IX, and Sexual Violence Reporting Requirements for Texas’ Institutions of Higher Education

Dr. Zach Taylor
Institutional Support Consultant





Abstract

In a response to the #metoo movement and unclear Title IX guidelines forwarded by the U.S. Department of Education, the Texas Legislature recently enacted Senate Bill 212 (SB212), a bill aimed at increasing the reporting of sexual violence on college campuses in Texas. In this brief, we report on institutional Title IX guidance just before SB212's January 1st, 2020 implementation date, as SB212 drastically increases the reporting requirements and penalties associated with failures to comply. These penalties include immediate termination of the institutional employee and a Class A or Class B misdemeanor charge if the employee does not promptly make the report or attempts to conceal a report, as determined solely by the institution. Implications for campus safety, graduate student employee responsibilities, and future sexual violence legislation is addressed.



Framing the Issue

- Recently:
 - Heightened sense of security and activism on college campuses regarding sexual harassment and sexual violence.
 - Litany of lawsuits alleging that college students have either
 - Been assaulted on campus and institutions have not done their due diligence through Title IX reporting
 - Or that students have been falsely accused and punished by a university that has overreached its legal authority (Stripling, 2019).
 - U.S. Department of Education Secretary Betsy DeVos recently introduced legislation that would relax reporting requirements on college campuses (Kreighbaum, 2019).
 - Largely places burden of proof on victim/complainant.





Framing the Issue in Texas

- In Texas:
 - Sexual assault and violence scandals at Baylor University, Texas State University, the University of Texas at Austin (UT-Austin), and Texas A&M University has catalyzed the Texas Legislature to take matters into their own hands (Rock, 2020).
 - Texas Legislature introduced Senate Bill 212 (SB212) in January 2019 and partially enacted the bill on September 1, 2019, with the full bill enacted on January 1, 2020.

A BILL TO BE ENTITLED
AN ACT
relating to a reporting requirement for certain incidents of sexual harassment, sexual assault, dating violence, or stalking at certain public and private institutions of higher education; creating a criminal offense; authorizing administrative penalties.



Texas Leg and UT Austin

- The Texas Legislature gave colleges and universities a compliance window from September 1, 2019 to January 1, 2020 = period for training before penalties.
- SB 212 redefines mandatory reporting requirements on college campuses, as “postsecondary employees” will be subject to immediate termination and be charged with a Class A or Class B misdemeanor for a “failure to report or false report” (SB212, Sec. 51.255).
- SB 212 was unclear in several ways
 - How an “employee of a postsecondary educational institution” (SB 212, Sec. 51.251(3)) is defined
 - When these employees are and are not acting in their official capacity
 - Specifically what conduct must be reported.
- UT-Austin’s Title IX office held a SB 212-focused training session in December 2019, just before the January 1, 2020 enactment of SB212’s penalties.
 - Institutions and their Title IX offices will both process reports and assess failures to report and false reports, per SB 212 guidelines (SB 212, Sec. 51.255).
 - SB 212 contradicts the U.S. Department of Education’s proposed Title IX regulations (Schneider & Duggins-Clay, 2019).



Data Collection and Analysis

- UT Austin’s “Title IX Basics Workshop” was held on December 11, 2019.
- Title IX office advertised the workshop as a non-mandatory, open forum for interested parties, including full-time, part-time, and student employees.
- Workshop was facilitated by UT-Austin’s Title IX Deputy and Education Coordinator.
- A member of the research team (also an institutional employee) attended the session and recorded the audio of the workshop.
- The research team then transcribed the audio from the workshop and uploaded this transcription into a shared online folder for collaboration and analysis.
- The Title IX workshop directly addressed SB212 and provided guidance regarding SB 212’s mandatory reporting, definitions of responsible employees, Title IX reporting criteria and requirements, and penalties for failing to report and falsifying a report.
- The research team decided to code the Title IX workshop transcription by the “five categories of people considered university affiliates: faculty and staff, students, contractors, applicants, and campus visitors” (UT-Austin, 2019).
- Merged these categories into implications for three main campus constituencies, given the Title IX workshop’s primary focus: faculty and staff, students, and other campus stakeholders.
- Added one additional category of analysis--implications for future sexual violence legislation--as SB212 extends Title IX sexual harassment, sexual assault, and stalking, while contradicting U.S. Department of Education changes by DeVos (Kreighbaum, 2019).



Implications for Faculty and Staff

- First, SB212 only states that postsecondary employees “shall promptly report the incident” (SB212, Sec. 51.252(a)) to the institution’s Title IX coordinator or deputy Title IX coordinator.
 - No definition or elaboration on what “promptly” means
 - Title IX facilitator: the Title IX office will “strongly encourage people to make their reports over our online form” as “we [the Title IX office] do not have the capacity to take a lot of reports over the phone, in person, or even in email” (UT-Austin, 2019).
 - What about technology issues? Appeal processes? Untimely reporting?
- What is reportable and where
 - SB212 includes a vague definition of “stalking” (SB212, Sec. 51.251(7)) and no definition of “dating violence” (SB212, Sec. 51.252), even though dating violence is listed underneath SB212’s reporting required for certain incidents.
- SB212 requires that employees make reports when they “receive information” without any guidance as to where that information is received and where the information pertains to (e.g., specific location of campus, an online class, a location across town or in another country).
 - The Title IX workshop facilitator reasoned that “hearsay is reportable” and if an employee has “some indication that it was an incident of a sexual or romantic nature,” that employee must make a prompt report (UT-Austin, 2019).



Implications for Faculty and Staff

- All employees must report incidents separately, even if one employee has already made a report of which others are aware (UT-Austin, 2019).
- If five employees are aware of a single incident involving one student, all five employees must make separate reports, resulting in “lots of duplicates, basically” (UT-Austin, 2019).
- The employee can “receive information” from a student or fellow employee at any time and any place, and that information can be “decades and decades old” (UT-Austin, 2019).
- An employee must make a prompt report no matter when or where they received the information and no matter how far in the past an incident occurred.
- Definitions of an employee’s “official capacity.” The Title IX workshop facilitator asserted that postsecondary employees are in their “official capacity regardless of time or location” if the employee is “otherwise representing the university” (UT-Austin, 2019).
- Employees are in their official capacity when teaching online classes, attending conferences as an institutional representative, or studying abroad (UT-Austin, 2019).
- Employees must promptly report incidents to their Title IX office whenever they “receive information” (UT-Austin, 2019), rendering it difficult to discern when an employee is a private citizen or a postsecondary employee as defined by SB212.



Implications for Students and Student Employees

- “TAs, GAs, and any student employee in a role that supervises or advises other students” are required to promptly report but are “exempt from SB212 penalties” (UT-Austin, 2019).
- Student employees do not report Title IX incidents to their supervisors but must make prompt reports to the Title IX office using the online form.
- “dating violence” (SB212, Sec. 51.252) = the Title IX facilitator reasoned that employees must report “relationship problems,” even if the employee lacks details of the situation (e.g., names, locations, dates, times) (UT-Austin, 2019).
- Employee reporting is not confidential, meaning that who makes Title IX reports is public record. Therefore, a student employee may need to make a report regarding a fellow student, and the student will have access to what student employee made the report.
- The “onus is on the complainant to decide whether or not they actually want to pursue legal recourse” and that the institution has no legal obligation to engage with the legal system (UT-Austin, 2019).
- The Title IX workshop facilitator articulated that students are eligible for both academic and personal accommodations if they are the victim of gender-based discrimination under Title IX and/or sexual violence under SB212.
- At UT-Austin, the Title IX workshop facilitator outlined several categories of resources: “confidential,” “non confidential,” “private,” and “community” (UT-Austin, 2019). Under SB212, sexual harassment must be “severe, persistent, or pervasive” enough to “interfere with a student’s ability to participate in or benefit from educational programs or activities” (SB212, Sec. 51.251(6B)).



Implications for Other Stakeholders

- **Implications for Other Campus Constituencies**
- “Pretty much anyone with a reason to be on campus” falls under the protection of Title IX, but only employees and students are subject to SB212 (UT-Austin, 2019).
- “applicants” to the institution and whether “applicants” are students = only when students enroll in classes and pay their tuition bill are they considered students (UT-Austin, 2019).
- Campus visitors = if an employee receives reportable information, the employee should make the report, regardless if the subject of the report is an employee, student, student employee, or “anyone with a reason to be on campus” (UT-Austin, 2019).
- **Implications for Future Sexual Violence Legislation**
- Secretary DeVos asserted that Title IX offices may not need to investigate violations that occur off-campus or violations that did not occur within an institution’s program or activity (Kreighbaum, 2019) = SB 212 requires employees to report all Title IX violations no matter where or when they occur, including off-campus settings and potentially years or decades in the past.
- SB212 = vague or absent definitions of “stalking” (SB212, Sec. 51.251(7)) and “dating violence” (SB212, Sec. 51.251(2)), even though failure to make a prompt report could cost an employee their job and livelihood.



Directions Forward

- How key terms are defined and how institutional Title IX offices mandate reporting.
- SB212 requires that a postsecondary educational institution terminate one's employment if the employee "fails to promptly make the report without good cause, as determined by the institution" (SB212, Sec. 51.255(a1)).
- Both institutions and state-level lawmakers should review Clery Act data and any SB212-related terminations to understand how institutional Title IX offices handle SB212 reporting requirements and how to best protect students and campus employees from sexual violence.
- Of SB212, the Title IX workshop facilitator remarked that, **"This is a new bill...and it's a big deal"** (UT-Austin, 2019).
- Teaching the educational community about mandatory reporting, Title IX guidelines, and emerging implications for campus safety. Future research could examine Clery Act reports issued by Texas' postsecondary institutions
- Understand what types of incidents are reported, how promptly the reports were made, and how employees are and are not punished for failing to make reports or falsifying reports.
- Researchers must continue to engage with students on an everyday basis to both learn from lived experiences of sexual violence on campus and off, and also educate these students on the resources available on campus and off.



Discussion and Q&As

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HUSCH BLACKWELL

Hate Speech and the First Amendment

The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



What is “speech”?



- Spoken words
- Written words
- Expressive imagery, movies, and other art
- Clothing with messages
- Expressive performance

Unprotected speech



- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Child pornography
- Defamation, slander, libel
- Obscenity*

Is "hate speech" unprotected speech?

Yes

No

It depends

Start the presentation to see live content. Still no live content? Install the app or get help at PollEv.com/app

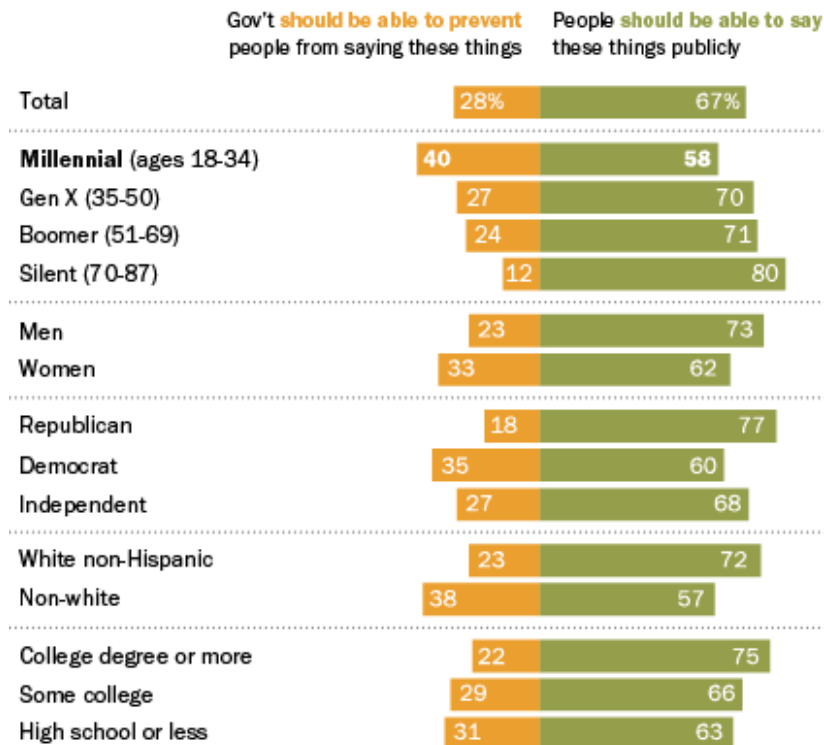
Hate speech

- No general “hate speech” exception to the First Amendment
- “Hate speech” may constitute one of the defined categories of unprotected speech



U.S. Millennials More Likely to Support Censoring Offensive Statements About Minorities

Statements that are offensive to minority groups



Source: Spring 2015 Global Attitudes survey.

Bedrock principle

“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar, or profane.”

Dambrot v. Central Michigan University (E.D. Mich. 1993)



Is "hate speech" unprotected if it constitutes protected status harassment?

Yes

No

It depends

Expression of “offensive” speech

“Free speech rights apply in the classroom (e.g., classroom lectures and discussions... In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

Example

Student A who supports increased immigration restrictions posts on social media that “Illegal aliens from foreign countries should go to jail. We must keep disease-infected criminal aliens out. Congress must act now!” Student B of Guatemalan heritage is greatly offended, feels harassed, and files a complaint with the school.

Can the school punish Student A for engaging in prohibited harassment?

Yes

No

Example

Student A who supports immigration restrictions goes to Student B's dorm, stands outside Student B's door, and shouts "go home you disease-infested alien." Student A also shouts "dirty foreigner" and points at Student B every time he sees him in a class.

Can the school punish Student A for engaging in prohibited harassment?

Yes

No



Key concepts



- Hierarchy of speech
- Viewpoint discrimination
- Fora analysis
- Time, place, and manner restrictions

Texas Senate Bill 18

- Common outdoor areas of campus are “traditional public forums”.
- Permits expressive activities in traditional public forums as long as activities are not (i) unlawful; or (ii) materially and substantially disruptive.
- Permits reasonable tailored time, place, and manner restrictions.



Do schools have greater ability to regulate employee speech?

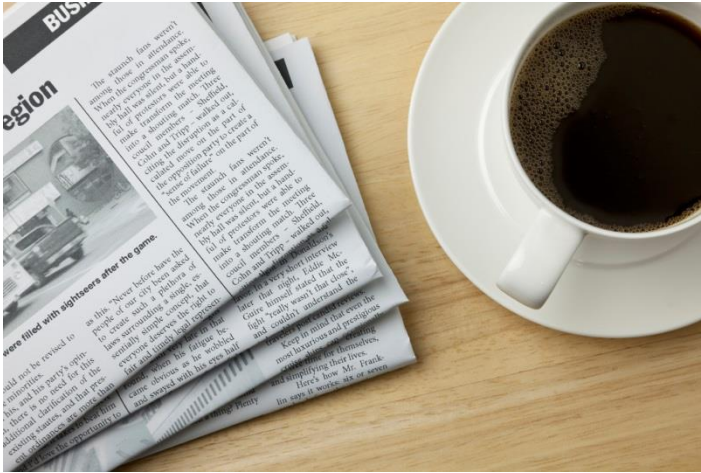
Yes

No

Pickering v. Board of Education

- Foundational case for evaluating employee speech
- Applies to all types of state employees (teachers, prosecutors, professors, etc.).
- Established a two-part test:
 - 1. Is the employee speaking as a citizen on a matter of public concern?
 - 2. Does the employer have an adequate justification for treating the employee differently from any other member of the public?

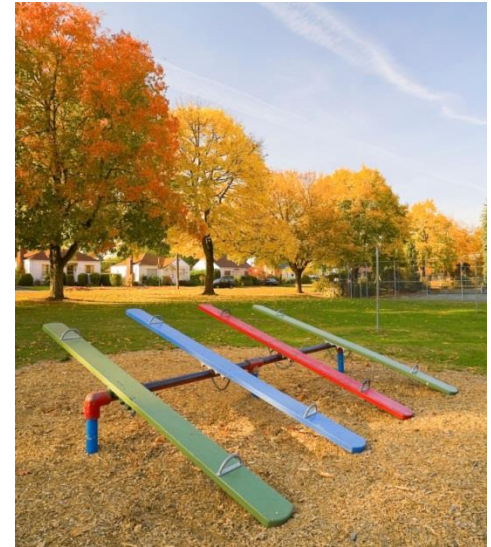
1. Matter of Public Concern



- If the employee is not speaking on a matter of public concern, then there is no First Amendment protection.
- Evaluate the “content, form, and context,” which is a very fact-specific analysis. *Connick v. Myers*

2. Balancing Test

- If the employee is speaking on a matter of public concern, the question then is whether the employer has an adequate interest in regulating that speech
- Most commonly, the interest recognized is a disruption in the functioning of the office or entity



Garcetti v. Ceballos

- Added a new—and initial—step to the inquiry
- Before progressing to *any* of the *Pickering* analysis, courts must first ask whether the speaker was speaking “pursuant to their official duties”
 - If so, that person is not speaking as a citizen for First Amendment purposes, and the employer can regulate the speech
- This framework presents obvious concerns for academic institutions and academic freedom

Example

Admissions counselor meeting with prospective student makes derogatory remarks and uses slurs about women and racial minorities. Prospective student is not offended, but it is reported because a co-worker overheard it.

Is the admission counselor's speech protected?

Yes

No

Example

Faculty member whose research interests include communication and speech writes paper on the origin and use of certain religious epithets, including highly offensive terms to Jews, Muslims, and Catholics.

Is the faculty member's publication protected speech?

Yes

No

Start the presentation to see live content. Still no live content? Install the app or get help at PollEv.com/app

Private institutions



- Not bound by the First Amendment
- Scope of speech protection defined by policy
- Can regulate some speech based on viewpoint

Higher Education Act

“It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this chapter”

Title I, Section 112

ED's New Speech Rule



- Conditions grant money on compliance with First Amendment (publics)
- Conditions grant money on compliance with institutional speech policies (privates)

Questions



A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876

Title IX

Chad Timmons
Shareholder

Abernathy, Roeder, Boyd & Hullett, P.C.

TITLE IX

Abernathy, Roeder, Boyd & Hullett, P.C.



Presentation Agenda

Abernathy, Roeder, Boyd & Hullett, P.C.

- New Definitions
- Response Protocols
- Emergency Removals
- Investigations
- Procedural Requirements
- Dismissals
- Hearings
- Informal Removals
- Evidence
- Decisions
- Training
- Appeals
- Retention
- Scenarios

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Friday, Aug 14th 2020

Who is Involved in the Process?

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New Terminology

Complainant: Person alleged to be the victim of sexual harassment.

Respondent: Person alleged to be the perpetrator of sexual harassment.

OLD DEFINITION

Previously, the regulations described sexual harassment as
“unwelcome conduct of a sexual nature.”

Definition – Sexual Harassment

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The new Title IX regulation provides for a *narrower definition* of sexual harassment that constitutes sex discrimination. The new definition has **(3) types of sex-based conduct** which would constitute sexual harassment:

Sexual assault, dating violence, domestic violence, and stalking;	“Unwelcome conduct that is <u>so severe, pervasive and objectively offensive</u> that it effectively denies a person equal educational access; AND	An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo).
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When is a Response Required?

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Response
Required



The School has **actual knowledge** of sexual harassment;



The alleged sexual harassment **occurred within the School's education program or activity**; AND



The alleged sexual harassment was against a person in the United States.

When Must a School Respond?

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- **“Actual knowledge”** For postsecondary institutions, the Final Rule allows for the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.
- Notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the complainant's behavior, charges a school with actual knowledge.

- **“Education program or activity”** includes situations over which the School exercises substantial control.
- Substantial control over activities includes field trips, academic conferences, or other school-sponsored travel. Substantial control also applies to school-owned buildings or buildings controlled by student organizations that are official recognized by the School (fraternity or sorority house).

The new regulations establish a first response protocol for Title IX Coordinators. Specifically, if anyone reports sexual harassment, the Title IX Coordinator must:

- Promptly contact the Complainant to confidentially discuss the availability of **supportive measures**.
- Explain that supportive measures are available with or without the filing of a formal complaint.
- Explain to the Complainant the process for filing a formal complaint.

What are Supportive Measures?

- Individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.
- Can include counseling, extensions of deadlines or other course-related adjustments, changes in work locations, leaves of absence, escort services, modifications in class or work schedules, restrictions on contact between the parties and/or increased security in certain areas of the campus.
- Cannot be punitive or disciplinary.
- Completely removing a respondent from an activity would likely be considered *punitive* except in emergency removals.
- Must be provided free of charge to the Complainant.



- Title IX regulations do not prohibit immediate removal of a respondent from the education program or activity on an emergency basis.
 - This is only if the School conducts an individualized safety and risk analysis and determines emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety.
 - The School must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal.

What is a formal complaint?

- A formal complaint is a document filed by the Complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation into the allegations.

- An administrator designated as the Title IX Coordinator to coordinate efforts to comply with Title IX responsibilities.
- The Title IX Coordinator's information including title, address, email and phone number must be given to:
 - Students;
 - Employees;
 - All unions
 - Applicants for admission; and
 - Applicants for employment

TITLE IX




Schools must investigate allegations in any formal complaint and **send written notice** to the Complainant, Respondent, and their parents of the allegations upon receipt of a formal complaint.





NOTICE

Written Notice

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- 
- Include presumption of innocence at the onset of the grievance process;
 - Inform both parties of the School's grievance process;
 - Include whether there is an opportunity for an informal resolution process;

- 
- Include key details of the allegations of sexual harassment including parties involved, date and location of the alleged incident (if known), and the alleged conduct that constitutes sexual harassment;
 - Include a statement that the parties are entitled to an advisor of their choice;
 - Notice that the parties can inspect and review certain evidence;

- 
- Include information regarding any provisions from the Code of Conduct (if one exists) regarding making false statements during the grievance process; and
 - If in the course of an investigation, the School decides to investigate allegations about the Respondent or Complainant that were not included in the original notice, notice of the additional allegations must be provided in writing to the parties.

- The burden of gathering evidence during the investigation remains on Schools.
- Schools must provide equal opportunity for the parties to present facts, witnesses, and any other evidence.
- Schools cannot restrict the ability of the parties to discuss the allegations or gather evidence.
- Both parties must be allowed an opportunity to select an advisor who may be, but does not need to be, an attorney.
- Schools must send written notices of any investigative interviews, meetings, or hearings.
- Each party **must be allowed** to submit written questions for witnesses and must be provided with the answers. The parties should be given additional time for limited follow-up questions.

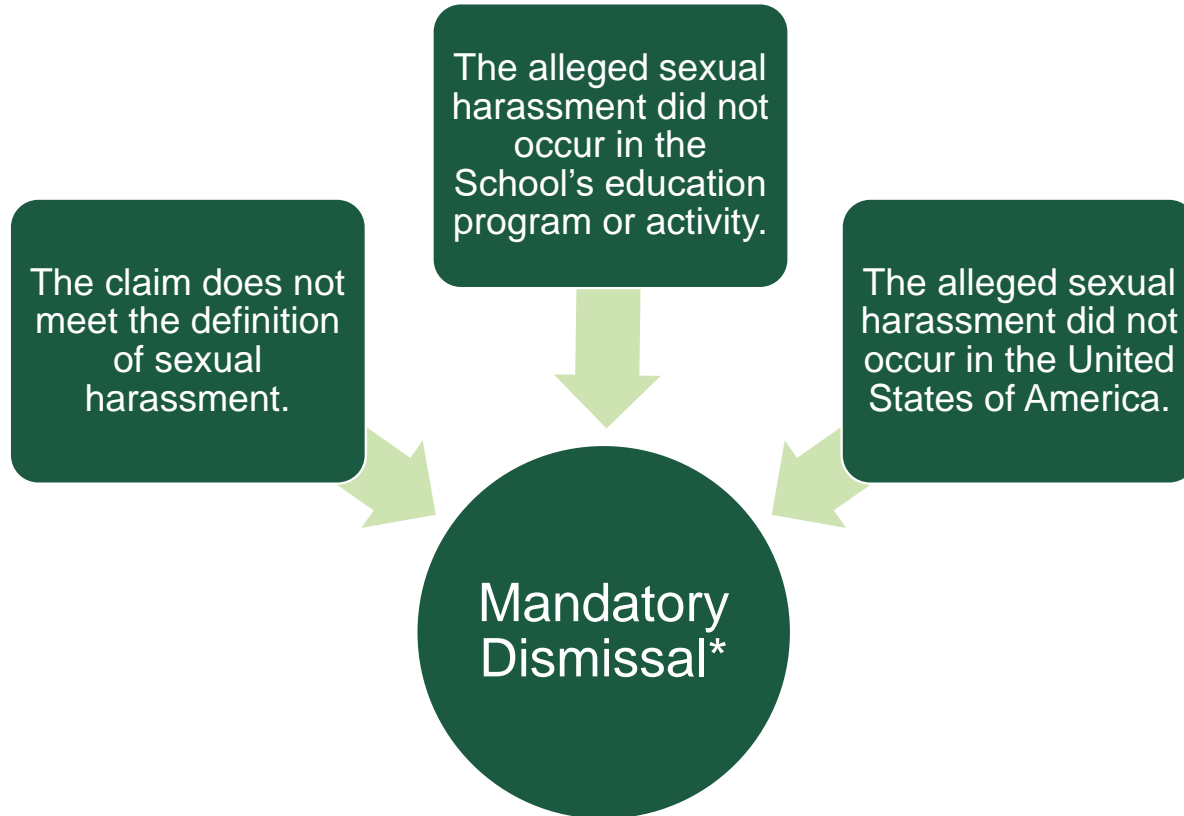
- Schools are required to disclose to the parties and their advisors any evidence directly related to the allegations and an investigative report that summarizes relevant evidence with at least ten days for the parties to inspect, review, and respond.
- Schools cannot access any medical, psychological, or similar treatment records without written consent.
- The Investigator cannot be the Title IX coordinator and cannot be the Decision Maker.



- A presumption of innocence is required throughout the process. The Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process.
- Written notice of allegations and an equal opportunity for the parties and their advisors to review the evidence is required.
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process.
- Provide remedies when a respondent is found responsible. The remedies must be designed to maintain the Complainant's equal access to education.
- An equal opportunity must be available for parties to appeal on specified grounds.

Mandatory Dismissals

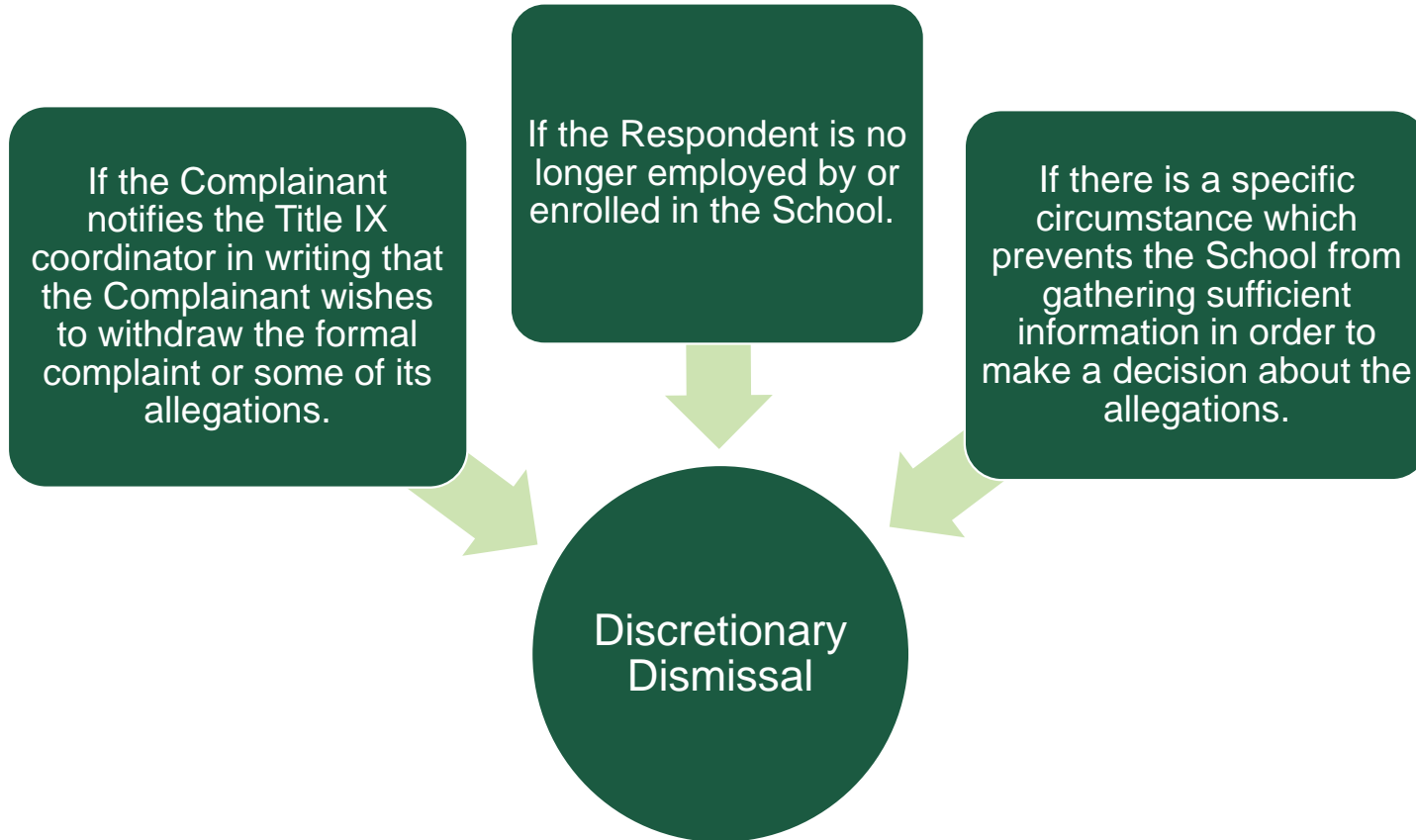
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*Schools can still investigate these claims under their Code of Conduct.

Discretionary Dismissals

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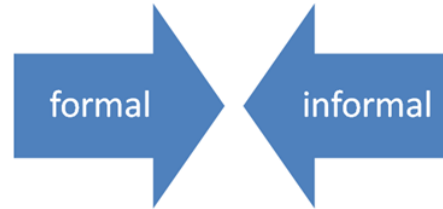


- Postsecondary institutions are required to provide a “live hearing with cross-examination”.
- At the live hearing, the Decision Maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.



- Cross-examination must be at a live hearing and conducted directly, orally and in real time by the party's advisor of choice and never by a party personally.
- If the party does not have an advisor present at the live hearing, the School must provide, free of charge, an advisor of the School's choice. The person is not required to be an attorney but can be one.

- At the request of either party, the School must provide for the entire hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.
- Only relevant cross-examination questions can be asked. The Decision Maker must determine whether the question is relevant and explain to the party's advisor asking the cross-examination questions any decision to exclude a question that is not relevant.



- Schools are not required to but are able to facilitate a resolution through an informal process. With the exception of one type of claim, schools can provide parties with written notice of the allegations, the requirements of the informal resolution process, and any consequences from participating (i.e. records that will be maintained and could be shared), and obtain voluntary written consent to use the informal resolution process.
- Informal resolutions must be before a neutral third party who is trained.



Schools **cannot** offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. This is because of the power differentials inherent in such circumstances.

- The new Title IX legislation provides rape shield protections to complainants.
- All questions and evidence about a complainant's prior sexual behavior will be deemed irrelevant.
- It will only be allowed to prove that someone other than the respondent committed the alleged misconduct, or it can be offered to prove consent.

Schools can choose which standard of evidence they want to use – but must use the same standard for all proceedings with students and employees.

Clear and Convincing Evidence

Preponderance of Evidence



Clear and Convincing

Higher standard of proof.

Evidence being presented must be “highly” and substantially more probable to be true rather than untrue.

Preponderance of Evidence

More likely than not, or anything above a “fifty-fifty” likelihood of guilt.

Standard under the old rule.

The Decision Maker needs to objectively evaluate the evidence and reach a conclusion regarding the sexual harassment claims.

- The Decision Maker **cannot** be the same person who conducted the investigation and cannot be the same as the Title IX Coordinator.
- Decision Makers must be free from conflicts of interests or bias for or against either party.
- Decision Makers must receive special training on how to be impartial and how to determine what evidence is relevant.
- The Decision Maker must issue a written decision (even if there is no hearing).

The written decision must include the following:

- ✓ The portion of the School's policy that was violated.
- ✓ A description of all the procedural steps that were taken by the School. This includes all the interviews that were conducted.
- ✓ A findings of facts section.
- ✓ A section that draws a conclusion after the finding of facts.
- ✓ A statement or rationale for the ultimate determination.

- ✓ Any disciplinary actions the School will impose on the Respondent and state if any remedies are provided to the complainant.
- ✓ A statement and rationale for any remedies provided to the Complainant, and an explanation of how that remedy will restore or preserve equal access to education.
- ✓ A statement of the procedures, the right to appeal, and permissible basis for appeal.
- ✓ The written determination must be sent simultaneously to the parties.

- The new regulations place a heavy emphasis on training. Schools must ensure **Title IX Coordinators, Investigators, Decision Makers, and any person who facilitates an informal resolution process** receive training on the following:
 - The definitions of prohibited conduct, including harassment;
 - How both the informal and formal processes work;
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias; and
 - How to apply the rape shield protections provided for complainants.



Schools must make all materials used to train Title IX personnel publicly available on the School's website or, if the School does not maintain a website, make these materials available upon request for inspection by members of the public.

Schools must offer both parties an opportunity to appeal a determination regarding:

- Responsibility; and
- A school's dismissal of a formal complaint.

Both parties can appeal for the following reasons:

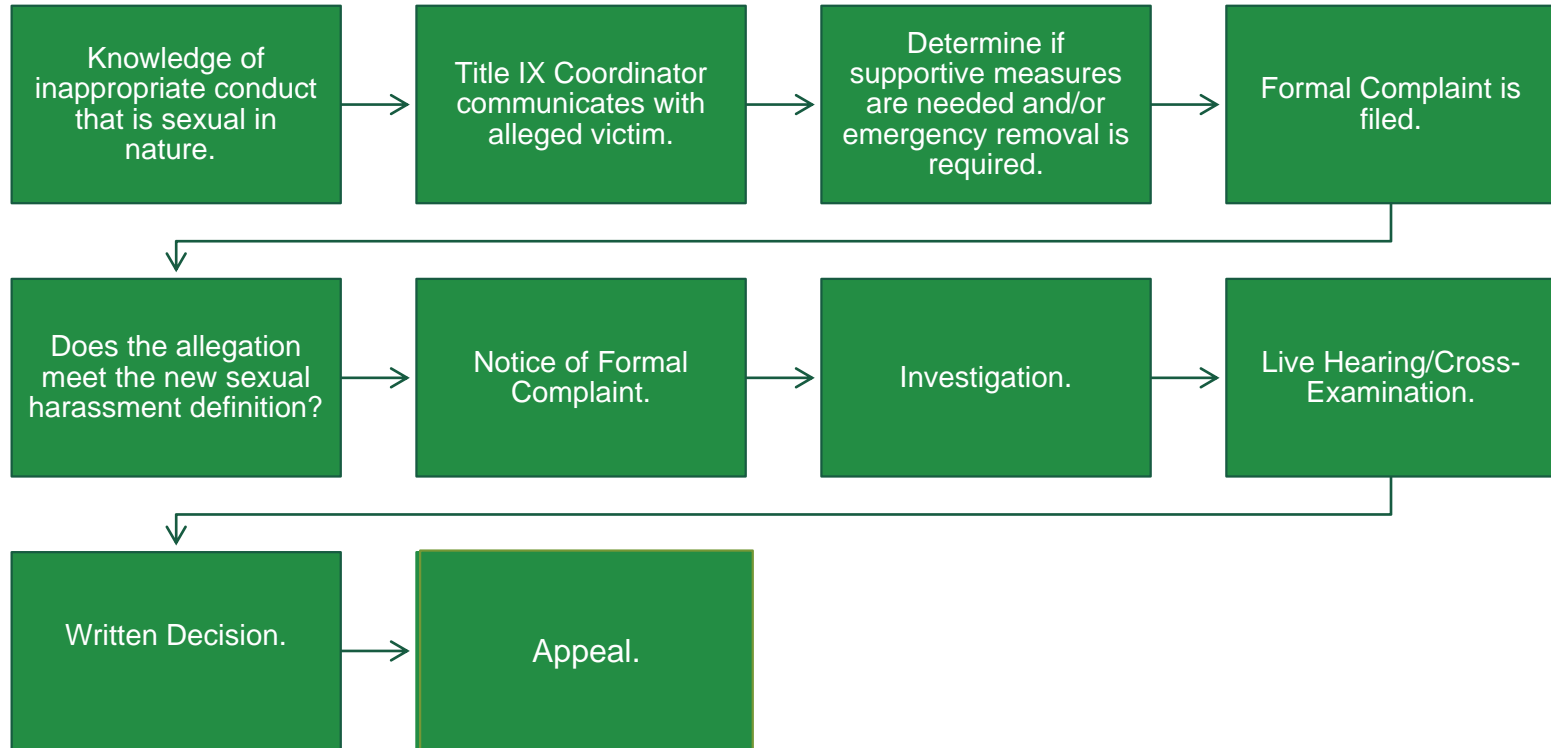
- Procedural irregularity that affected the outcome of the matter;
- Newly discovered evidence that could affect the outcome of the matter; and/or
- Conflict of interest or bias by Title IX personnel that affected the outcome of the matter.

Schools must keep the following records for a minimum of seven (7) years:

- Records of an investigation;
- Records of any appeals and materials from the appeal;
- Records of any informal resolution process;
- Title IX training materials; and
 1. Title IX coordinators, investigators, decision makers, and any employee designated to facilitate an informal process.
 2. Schools must also post the training material on their websites, or, if a school does not maintain a website, otherwise make the materials available to the public.
- Records of any supportive measures taken.
 1. If no supportive measures were taken, the School should document why supportive measures were not needed.

Title IX Flow Chart

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The Title IX Coordinator has reached out to the alleged victim and offered supportive measures. Which one of the following is **not** an appropriate supportive measure?

- A. Counseling.
- B. Schedule Change.
- C. Expelling the alleged perpetrator.
- D. Allowing the alleged victim to have additional time to finish a project.

~~A. Counseling.~~

~~B. Schedule Change.~~

C. Expelling the alleged perpetrator.

~~D. Allowing the alleged victim to have additional time to finish a project.~~

The Complainant wishes to file a formal complaint. What is needed for a formal complaint?



- Document filed by a complainant or signed by the Title IX Coordinator;
- Allegation of sexual harassment against a respondent; and
- Request that the School investigate the allegations of sexual harassment.

Now that you have a formal complaint, how many employees are potentially required for this process from start to finish (filing of the complaint to appeal)?

Scenario

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The allegations state the incident occurred after school hours in the classroom. Is the School required to dismiss the complaint because it was after hours?

NO!

“Education program or activity” includes situations over which the School exercised substantial control. The classroom is in a building owned by the School. The School is considered to have have substantial control over any building it owns.

During the course of the investigation, the Complainant files a second formal complaint against the same Respondent alleging an incident of sexual harassment that occurred while the students were on a group trip to Europe.

➤ What should the School do?

- The School should dismiss the claim because the incident did not occur in the United States. This would be a mandatory dismissal.
- This does not preclude the School from investigating the allegations under the School's code of conduct.

Can the School facilitate an informal resolution process in this case?



YES!

- While Schools are not required to have an informal resolution process, they can choose to. In this example, because the allegations are not between an employee and a student, the School can facilitate informal resolution.

Questions?

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THANK YOU!

A | R | B | H

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Legal Aspects of Neurodiversity in Higher Education

Katy Washington, J.D., Ph.D.

Texas Higher Education Law Conference

Oct. 26-28, 2020

Order of Discussion

- What is neurodiversity?
- Barriers and Impact
- Legal Foundations and Considerations
- Best Practices

What is Neurodiversity?

- Ranges from being a single variation in thinking or actions (a person who is a little "quirky") to more involved neurological diversity, usually warranting a diagnosis of Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Tourette Syndrome, and/or ..dyslexia and dyscalculia.

LEAP. (2017, November 02). Retrieved February 14, 2018

- A concept and social movement that advocates for viewing autism as a variation of human wiring.
- While known widely as a concept applied to the autistic community, individuals with other atypical forms of neurological wiring... may also identify with a neurodiversity framework.

<https://neurodiversitysymposium.wordpress.com>

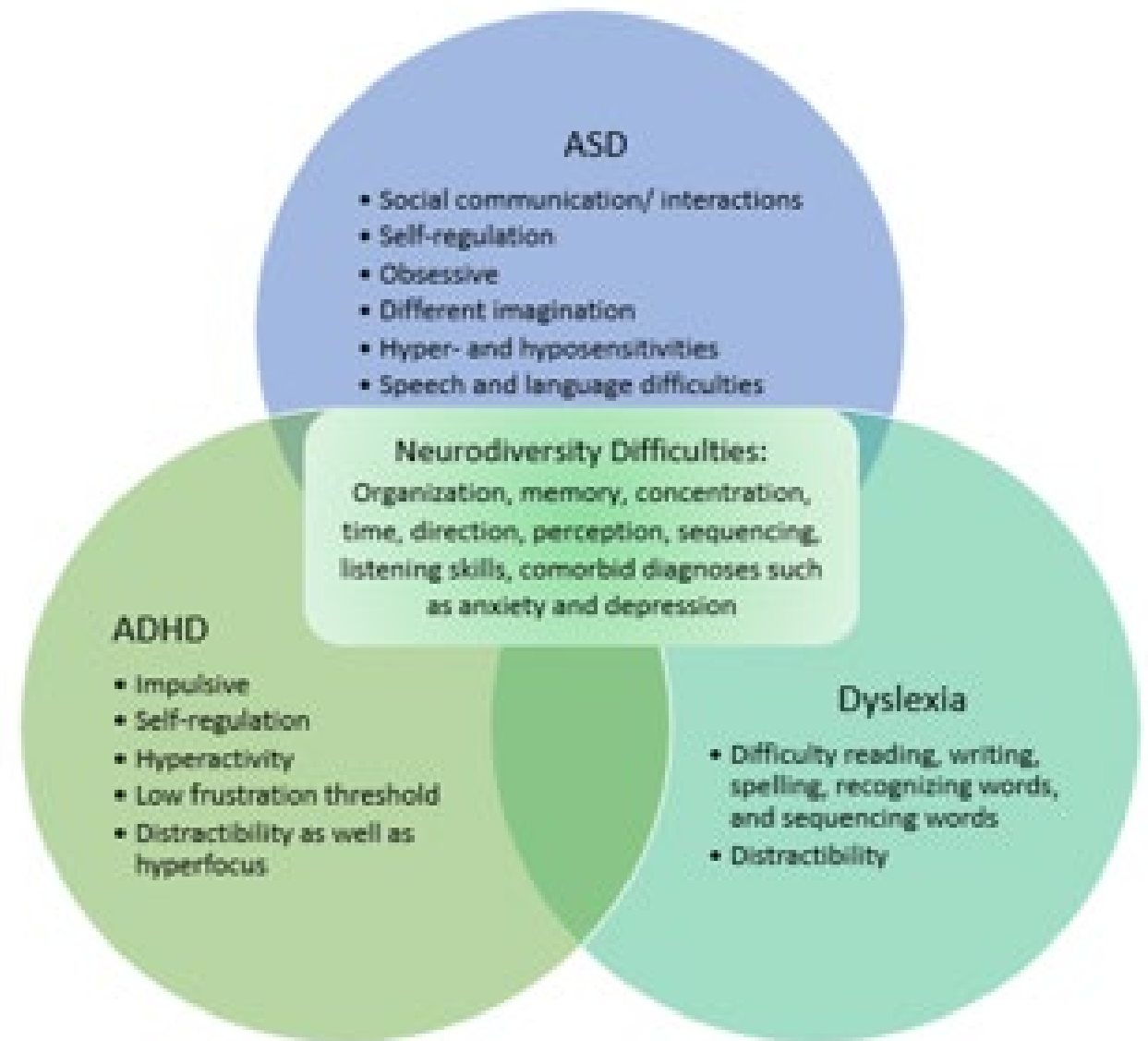
Barriers and Impact

- The Make-Up of Neurodiversity
- Impact in Academic Environment
- Impact in Employment



The Make-Up of Neurodiversity

- Neurodiversity is an umbrella term for a range of different neurological challenges referred to as specific learning disabilities and development disorders.



Impact in Academic Environment

- Students with ASD may experience problems with:
 - Social skills and communication
 - Unexpected change/deviation from syllabus or scheduled events (i.e., tests)
 - Sensory sensitivity
 - Subject preoccupation
 - Time management
- Which may manifest as noticeable problems with:
 - Participation in class, group work, presentations
 - Being overwhelmed
 - Initiation issues
 - Deadlines
 - Taking notes during lecture
 - Generalizing skills and concepts





Impact in Employment Environment

- Employees with ASD may experience problems with:
 - Social skills and communication
 - Unexpected change/deviation from the routine work day
 - Sensory sensitivity
 - Subject preoccupation
 - Time management
- Which may manifest as noticeable problems with:
 - Participation in group projects
 - Being overwhelmed
 - Issues with initiation and setting work priorities
 - Deadlines
 - Generalizing skills and concepts

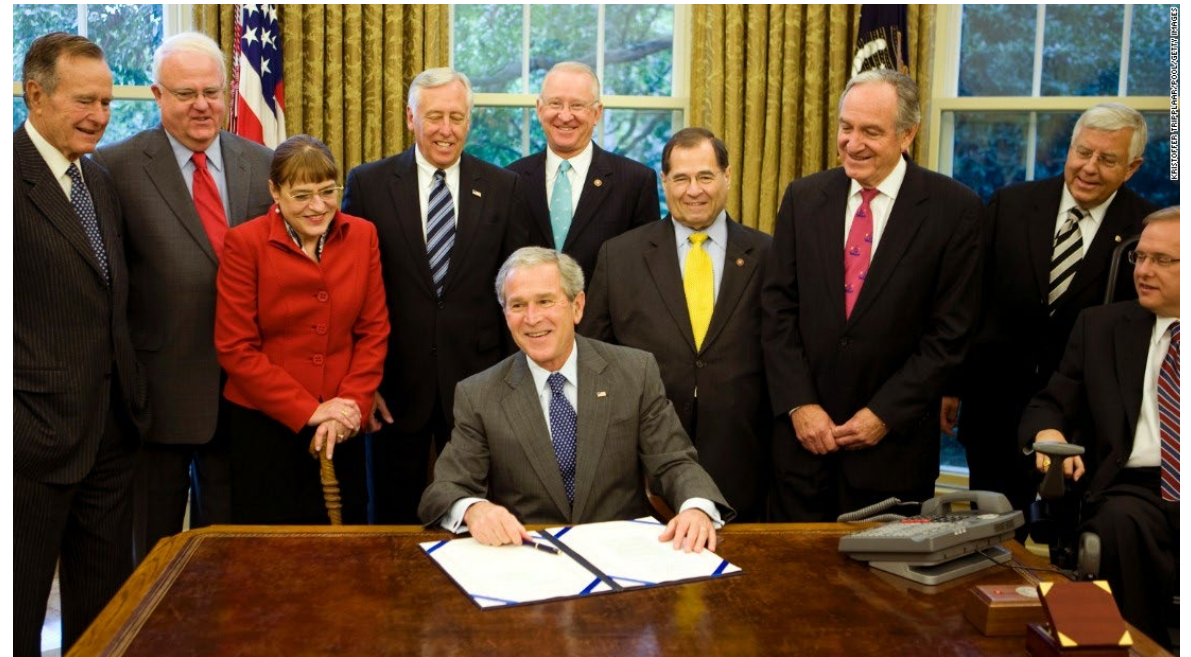


Legal Foundations and Considerations

- Federal Laws
 - Section 504
 - Americans with Disabilities Act
- High School versus College

Legal Considerations

- Section 504 of the Rehabilitation Act of 1973
- Americans with Disabilities Act (ADA) As Amended
 - **Title I** - Employment
 - **Title II** - Public Services: State and Local Government
 - **Title III** - Public Accommodations and Services Operated by Private Entities





High School versus College

- Behavioral issues often present the most challenges
- H.S. - “Manifestation Determination”

	IDEA	ADA
Type of law	Education, entitlement	Civil rights statute, eligibility
Responsibility	Parent and school	Student
Ensures	Success	Equal access
Services	Evaluation, remediation, special accommodations	Reasonable accommodations
Focus	Diagnostic label	Level of functional impairment
Disability	One of 13 categories	Impairment in major life activity

Image from Brown, J.T., Wolf, L.E., & Sullivan, L. (2018). Student with autism: Challenges with conduct and title IX. *Disability Compliance for Higher Education*, 23 (7).

Best Practices

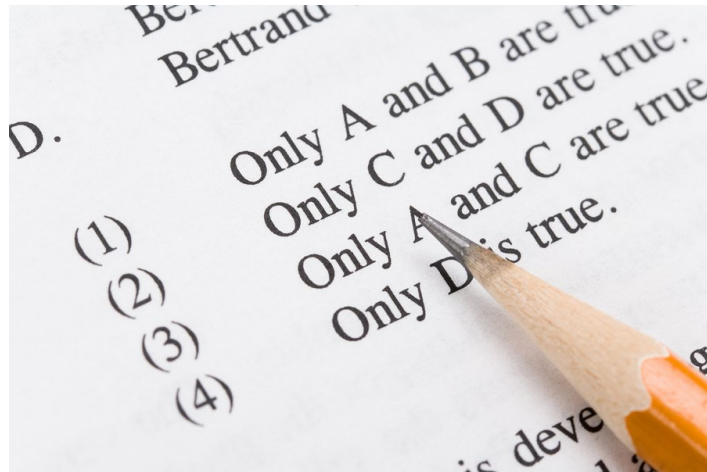
- Accommodations
- Utilizing Principles of Learning
- Best Practices
 - For Campuses
 - For Neurodiverse Employess



Examples of Academic Accommodations

- Classroom

- Note-taker
- Priority seating
- Modification of class and group participation



- Testing

- Extended time on exams
- Distraction-reduced testing environment
- Noise-reducing devices (e.g., ear plugs, noise-canceling headphones, etc.)

Examples of Workplace Accommodations

- Social Barriers

- Behavior
- Coworker Interactions
- Speaking/Communicating

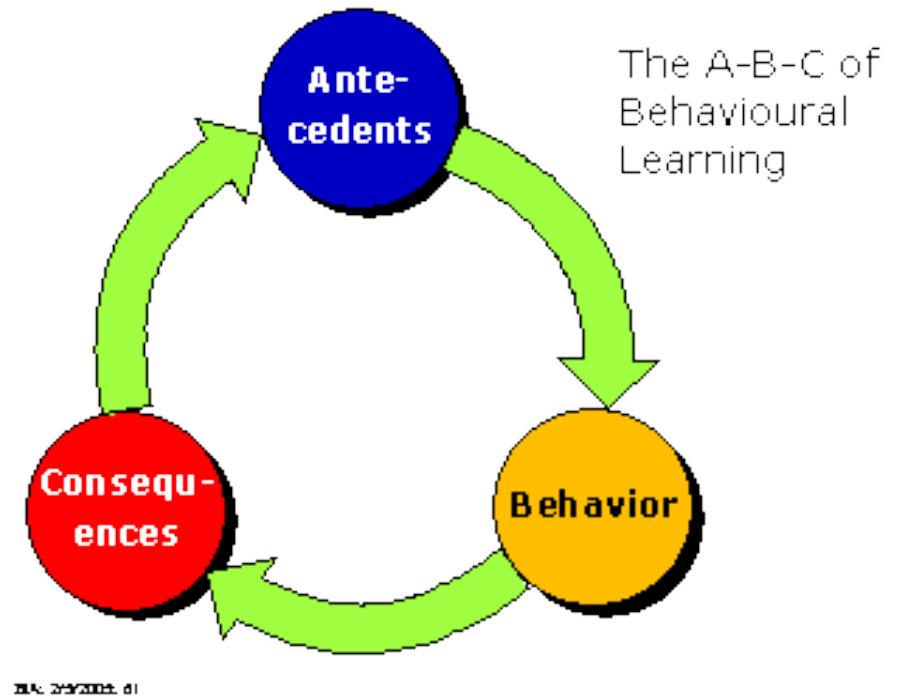
- Work Barriers

- Time Management
- Executive Functioning
- Attentiveness and Concentration



Best way to shape behavior

- Positive reinforcement
- Two keys to learning
 - Antecedents
 - Consequences
- Improve Outcomes
 - Coaching
 - Clarity
 - Consistency



Best Practices for Campuses Beyond Legal Compliance

- Use of **learning theories** (Positive reinforcement)
- **Campus referrals and support programs** (DOS, COUN, campus neurodiversity programs, etc.)
- **Collaborations** (Housing, DOS, faculty success, student affairs programming, etc.)
- **Disability Resources Office** (Neurodiversity-friendly processes and information; workshop offerings for students, college faculty and staff, and DRO staff; etc.)

Best Practices with Neurodiverse Employees

- **Communicate effectively**
 - Put instructions in writing.
 - Avoid any indirect pattern of speech.
- **Provide clear expectations**
 - Provide detailed behavior-based guidance and feedback
 - Assist employees in assigning priority to assignments
- **Provide approved accommodations**
 - Be open to the employee's self-accommodations

Situations and Solutions from JAN

A professor with autism spectrum disorder had difficulty keeping daily office hours and experienced anxiety because the timing of students' consultations was unpredictable.

- JAN suggested modifying the schedule as an accommodation, for example the professor could reduce the number of days he has office hours, but have more office hours on those days. JAN also suggested adjusting the method by which students obtain appointments, asking students to schedule at least one day in advance and when possible, allow the professor to conduct consultations electronically, by phone, or by instant messenger. In addition, JAN suggested documenting each student consultation to ease the professor's anxiety about the meeting and to refresh his memory about previous meetings with the student.

Questions?



References

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