



## ATIXA Implementation Guide: 2019 Texas Campus Sexual Assault Bills

In June 2019, Texas passed a series of bills<sup>1</sup> designed to strengthen institutions' responses to sexual harassment, sexual assault, stalking, and interpersonal violence. The laws apply to almost all Texas institutions of higher education, including public, private, and independent institutions.<sup>2</sup> ATIXA has also prepared a summary of the laws, which can be found here.

This implementation guide is designed to provide institutions affected by these laws with a synthesized compilation of relevant information and present the various elements needed to properly implement these new requirements. This guide will be revised as appropriate, including following promulgation of any specific implementing rules by the Texas Higher Education Coordinating Board and final implementation of the pending OCR Title IX regulations.<sup>3</sup>

### Policy and Procedural Requirements: Policy Definitions, Reporting and Intake, and Preliminary Inquiry Matters

- ✓ Policy must apply to students and employees.
- ✓ Policy must include specific, articulated definitions of prohibited behavior:
  - The term **dating violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship.
  - The term **sexual assault** means any nonconsensual sexual act proscribed by federal or state law, including when the victim lacks capacity to consent.
  - The term **stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress.<sup>4</sup>
  - **Sexual harassment**<sup>5</sup> is defined as, “unwelcome, sex-based verbal or physical conduct” that:

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<sup>1</sup> HB 1735; SB 212; and HB 449.

<sup>2</sup> Please consult with local general counsel regarding any questions of applicability, including whether these laws apply specifically to your institution.

<sup>3</sup> The U.S. Department of Education's Office of Civil Rights proposed federal regulations under Title IX in November 2018 under a formal federal Notice of Proposed Rulemaking. At the time of the passage of these Texas laws, OCR had yet to finalize its Title IX regulations.

<sup>4</sup> Literal application of this definition could be a disaster. Texas campuses will need to be careful in applying this standard in a way that is not overbroad. This definition lacks the element of menace that differentiates stalking from bullying, lurking, and other less severe forms of misconduct. As it stands, a court might strike it as overbroad, just on its face. After all, breaking up with someone repeatedly would now constitute stalking under this definition.

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- “in the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment,” and
  - “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.”<sup>6</sup>
- ✓ Policy must include sanctions for violations.
- ✓ Policy must include the protocol for reporting and responding, which must include an electronic reporting option.
  - Electronic reporting option must enable anonymous reports, and
  - The electronic reporting option must be easily accessible on the institution’s homepage.
- ✓ Institutions must designate one or more employees to serve as responsible employees for implementing the policy.
  - This would likely include the designated Title IX Coordinator and any designated deputies.
- ✓ Institutions must designate one or more employees to serve as confidential employees.
  - Institution *may* also designate one or more students as confidential advocates.
    - This role is not defined further in the law. Because student employees are not required to be mandatory reporters under the new state statute, it is unclear what *policy* benefit would result from designating student confidential advocates.
- ✓ Policy must include interim measures, including protection from retaliation and any other accommodations available.
- ✓ Policy must include statements addressing:
  - The importance of prompt medical attention (for treatment and for forensic purposes).
  - A reporting party’s right to receive a prompt and equitable resolution of the report.
  - A reporting party’s right to choose whether to report to law enforcement, and to receive assistance from the institution if desired.
- ✓ Institutions should consider a reporting party’s request not to investigate:
  - Can still investigate consistent with the confidentiality provisions (see below):
  - Factors to weigh:
    - Seriousness of the alleged incident,
    - Whether the institution has received other reports regarding the same responding party,
    - Whether the alleged incident poses a risk of harm to others, and
    - Any other factors the institution deems relevant.
  - When an institution decides not to investigate based on a reporting party’s request, it must still take steps to protect the health and safety of the community and must inform the reporting party of the institution’s decision.

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<sup>5</sup> This bill’s definition of sexual harassment is problematic on several fronts. Perhaps most notable is the omission of an objective offense element, a well-established and accepted component of the sexual harassment framework in both the Title VII and Title IX contexts. Also of note is the conflict between the “sufficiently severe, persistent, **or** pervasive” standard in the Texas language and that included in OCR’s proposed Title IX regulations, which references conduct that is “severe, pervasive, **and** objectively offensive.” (Emphases added). Interpretations of this definition may be unable to satisfy both the lower standard Texas seeks to apply and to maintain First Amendment protections the narrower federal standard is meant to ensure.

<sup>6</sup> There is some gray area here as to how this would protect – if at all – dual enrolled students taking college courses at their high school.

- ✓ Institutions must allow students (reporting or responding party) to drop a course without any academic penalty when both students are enrolled in the same course.
- ✓ Institutions must, whenever possible, offer distinct counselors to reporting and responding parties.
- ✓ Policy must be published in all student and employee handbooks and posted on a dedicated and easy-to-find website.
- ✓ Policy must be approved by the institution's governing board and must be reviewed by the institution at least every other year (this will presumably mean each even year, 2020, 2022, 2024, etc.)
  - Institutions will want to consider record-keeping protocols that offer proof of this review process.
- ✓ Institutions must ensure confidentiality for the following persons:
  - Alleged victim,
  - A person who reports,
  - A person who participates in an investigation,
  - A responding party,<sup>7</sup>
- ✓ "Confidentiality" means that a person's identity remains confidential unless the disclosure is:
  - Necessary to investigate the report,
  - Made to law enforcement if necessary to conduct a criminal investigation,<sup>8</sup> and/or
  - Made to a health care provider in an emergency.
- ✓ Institutions must enter into a Memorandum of Understanding (MOU) with one or more: local law enforcement, victim advocacy groups, hospitals, and/or medical response providers.
  - MOUs should facilitate effective communication and coordinate responses to allegations.
- ✓ Institutions must coordinate and consult with disability services office and advocacy groups for people with disabilities to enhance accessibility in complying with this law.

#### Policy and Procedural Requirements: Disciplinary Matters and Post-Determination Matters

- ✓ All parties must have an opportunity to present witnesses and other relevant evidence.
  - The law is silent on *when* this must occur. ATIXA recommends that this occur throughout the investigation. Investigators should always ask parties about any witnesses they would like to include in the investigation who may have pertinent information. Similarly, investigators should always ask about, and follow up on, any and all relevant evidence.
- ✓ All parties must have reasonable and equitable access to all relevant evidence in the institution's possession, including statements, communications, social media posts, or physical evidence. Materials may be redacted as necessary to comply with any applicable state or federal confidentiality law.
  - Again, the law is silent on *when* this must occur, stating simply that it must happen during the disciplinary process. ATIXA recommends this information be provided to parties when a draft investigation report is completed, but prior to its finalization. This practice provides an opportunity to pose questions and/or a substantive response to the report/evidence before it becomes finalized. No other interpretation will adequately protect due process, the ostensible purpose of this provision.
- ✓ Institutions may not take disciplinary action against a reporting party, third-party report, or witness who makes a good faith report.

<sup>7</sup> This provision conflicts with the FERPA release of outcomes provision for crimes of violence.

<sup>8</sup> Under FERPA, ATIXA recommends requesting a subpoena prior to disclosing information to law enforcement in most cases.

- ✓ Institutions must grant “amnesty” and decline to take any disciplinary action for other policy violations that may come to light during a disciplinary process under this policy (such as violation for alcohol use, for example) so long as it’s not a violation typically punished by suspension/expulsion<sup>9</sup>. This amnesty applies to reporting parties and witnesses, so long as the report is made in good faith. This provision does not apply to a student’s own commission of sexual misconduct.
- ✓ Institutions must continue to take reasonable steps to protect parties from retaliation and harassment during the process.
- ✓ If a student withdraws or graduates during a pending process, an institution must continue the resolution process on an expedited basis to render a final determination on responsibility.<sup>10</sup>
- ✓ Upon request, an institution must provide to another institution information relating to a determination of responsibility of sexual harassment, sexual assault, dating violence, or stalking.<sup>11</sup>

### Transcript Notations

- ✓ Institutions must implement the practice of placing a “hold” on a student’s transcript at the beginning of a formal investigation, as well as when a student withdraws or graduates during the disciplinary process.<sup>12</sup>
- ✓ When the result of a disciplinary process is that a student is “ineligible to reenroll,” (including for all disciplinary action, not just under this policy), the institution will note the following on the transcript: “student is ineligible to reenroll in the institution for a reason other than an academic or financial reason.”
- ✓ Institutions must ensure a mechanism by which students can seek to remove notations:
  - If they become eligible to reenroll, or
  - An institution determines that “good cause” exists to remove the notation.

### Training and Education for the Institutional Community

- ✓ Training is required for all incoming first year and transfer students.
  - May be conducted be online or in person.
  - Must explain the policy, protocol for reporting.
  - Must address the importance of prompt medical attention (including for forensic purposes) and the availability of law enforcement resources.
  - Must provide name, office location, and contact information for the Title IX Coordinator.
  - Must provide name(s), office location, and contact information for the confidential employees.
  - Must provide the names of designated student advocates, if any.
- ✓ Other training and education requirements apply to institutions more broadly than just incoming students.

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<sup>9</sup> The law is silent here on the cumulative effect of sanctions for prior misconduct, the result of which could be suspension/expulsion for minor misconduct if it is – let’s say – a third offense. This provision could logically be read to still permit amnesty in such a situation.

<sup>10</sup> The implications of this provision are murky. Does this imply a withdrawn student does not have the ability to participate further in the resolution process? Why would an institution permit someone to graduate if a process was pending? How expedited is expedited? What corners are to be cut, and to what effect? In many cases, withdrawal facilitates a remedy without completing a process. This may remove a responding party’s incentive to withdraw, depending on interpretation, for better or for worse.

<sup>11</sup> Upon request from whom? Another institution? A third-party?

<sup>12</sup> Hopefully, the regulations for this law will clarify how this will work. What will the effect of the hold be? How long will it last? If we can hold the transcript, why not put a hold on the graduation itself?

- The policy, protocol, and Title IX Coordinator’s information (name, office location, and contact information,) must be emailed to each student at the beginning of every semester/term.
- Programming must include:
  - Victim empowerment;
  - Public awareness;
  - Bystander intervention;
  - Risk reduction;
  - Reporting protocols; and
  - Contact information for key staff.

### Training for Specific Types of Employees

- ✓ Peace officers employed by institutions must complete training on trauma-informed investigations of reports of sexual harassment, sexual assault, dating violence, and stalking.
- ✓ Institutions should ensure their existing mandatory reporter training programs reflect the new aspects introduced by the Texas law. “Mandatory reporter” obligations apply to all employees (but not student employees or confidential employees). Employees must understand the scope of their reporting duty:
  - When they witness or receive information.
  - In the “course and scope” of their employment.
  - The obligation to report situations or incidents that employees reasonably believe would constitute a violation of the policy (victim can be either a student or employee).
  - Reports communicated must include all known relevant information about the incident, any redress so far, and whether the reporting party has expressed a desire for confidentiality,
  - The reporting duty does not apply:
    - To an incident in which the mandatory reporter was a victim themselves, and/or
    - When the disclosure was made at a Take Back the Night or other public awareness event.
  - Criminal liability exists for knowingly failing to make a required report. Intent to harm or deceive is an additional aggravating factor in any criminal prosecution.
  - The institution will terminate any employee who the institution determines has knowingly failed to comply with the reporting requirement.
- ✓ Confidential Reporters (who are designated in the institution’s policy), must also receive training on their duties. The below applies to health care providers employed by the institution.
  - Need not make mandatory reports described above but must still provide aggregate, non-identifying data to the Title IX Coordinator for statistical purposes.
  - May not disclose any communication made by a reporting party unless the person consents or the employee is otherwise required to make a disclosure under state or federal law.

### Institutional Reporting

- ✓ At least once every three months, the Title IX Coordinator must submit a written report on all reports received to the institution’s chief executive officer. This report must include information regarding the investigations, dispositions of any disciplinary processes arising from those reports (if any), and any reports for which the institution did not initiate a disciplinary process.
- ✓ At least once during each fall or spring semester, the institution’s CEO must submit to the institution’s governing board, and post on the institution’s website, a report regarding reports received by the

institution. An institution of fewer than 1,500 students must only submit this report if it has received more than five reports. The report must not identify any person, and must include:

- Number of reports received;
  - Number of investigations conducted;
  - The disposition, if any, of any disciplinary processes;
  - The number of reports for which the institution determined not to initiate a disciplinary process; and
  - Any disciplinary actions taken.
- ✓ An institution's CEO must annually certify in writing to the Texas Higher Education Coordinating Board ("Coordinating Board") that the institution is in "substantial compliance" with the law.
- If an institution is *not* in substantial compliance:
    - The Coordinating Board may assess an administrative penalty against the institution not to exceed \$2 million. In determining the appropriate penalty sum, the Coordinating Board will consider the nature of the violation and the number of individuals enrolled at the institution.
    - If such a penalty is assessed, the Coordinating Board will notify the particular institution of its reasons for the penalty imposed.
    - The Coordinating Board must notify the Governor, Lt. Governor, Speaker of the House, and standing legislative committees.

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