



## Don't Mess With Texas:

### New Texas Laws Expand Requirements for All Public and Private Institutions Starting This Fall

In June, Texas Governor Greg Abbott signed into legislation a set of new state laws designed to substantially strengthen institutions' responses to sexual harassment, sexual assault, stalking, and intimate partner violence. The laws create specific obligations on both private and public higher education institutions in the state and serve as some of the strongest state-based reform measures in recent memory. In addition to the below summary of the three laws, ATIXA has prepared an [implementation guide](#) for Texas institutions.

#### HB 1735: Prevention, Policy, and Response to Sexual Misconduct

HB 1735 imposes broad policy requirements, applicable to both students and employees. Each institution must adopt a policy, which is to be approved by the institution's governing board, that prohibits sexual harassment, sexual assault, intimate partner violence, and stalking. Specifically, policies and protocols must include:

- Definitions of prohibited behavior;
- Sanctions for violations;
- A clear protocol for reporting and responding to incidents, including an electronic reporting option;
- Clear designation of one or more employees as responsible for Title IX;
- Clear designation of one or more employees as confidential resources. The institution may also identify one or more students as "confidential advocates";
- ✓ A mechanism to consider a reporting party's request not to investigate by evaluating several factors, including: the seriousness of the reported 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;
- Provision of interim/protective measures, including protecting reporting parties from retaliation;
- Specific policy statements to include:
  - The importance of prompt medical attention (including for forensic purposes),
  - A reporting party's right to choose whether to report to law enforcement (with the institution's assistance, if desired);
- Provision of counseling and mental health services to the reporting and responding parties, when practicable; and
- A mechanism to permit the parties to drop a course in which they are both enrolled without any academic penalty.

The law also requires specific elements for disciplinary processes:

- The parties must have a prompt opportunity to present witnesses and other relevant evidence;

- The parties must have access to all relevant evidence that the institution possesses, the material may be redacted if needed to comply with federal or state confidentiality laws;
- If a responding party withdraws or graduates during a pending disciplinary process, the institution must complete the disciplinary process on an expedited basis, and must hold the student's transcript until the process is complete;
- Institutions must provide information regarding a determination of responsibility to another institution where a responding party seeks to enroll, upon request; and
- Institutions must provide "amnesty" for other conduct code infractions by parties or witnesses that come to light during a disciplinary process, so long as the underlying offense would not typically be punished by suspension or expulsion.

HB 1735 also underscores the importance of prevention training and education. Incoming students must attend training, either in person or online, before or during their first semester. Training should emphasize reporting mechanisms and the various policy provisions detailed above, provide contact information for the Title IX Coordinator and confidential resources, and highlight the importance of prompt medical attention and the availability of law enforcement resources. Institutions must also ensure comprehensive prevention programming and outreach directed at the entire community, including: victim empowerment, public awareness, bystander intervention, risk reduction, reporting protocols, and contact information for key staff. Campus security/police must complete training on how to properly conduct trauma-informed investigations.

Lastly, HB 1735 creates confidentiality protections for reporting parties, third-party reporters, and responding parties when the allegations are determined to be "unsubstantiated or without merit." Disclosures can be made to law enforcement when necessary during an investigation, and to health care providers in an emergency. The law promotes better integration between Title IX related processes and disability services for students or employees with documented disabilities.

Institutions who fail to comply with HB 1735 could face a reduction in state funding and/or administrative penalties of up to \$2 million.

#### SB 212: Mandatory Reporting for All Employees, Including Possible Criminal Prosecution for Failure to Report

SB 212 requires all employees to report all known incidents of sexual harassment, sexual assault, intimate partner violence, and stalking to the Title IX Coordinator. Confidential employees, described above, are only obliged to report the *type* of incident for statistical purposes, and may otherwise honor a reporting party's expectation of privacy. Student employees are exempt from the law.

Mandatory reporters must share all information they know about the incident, including whether the reporting party wishes to remain confidential. It also does not apply to situations where the employee is the reporting party, nor to disclosures made at Take Back the Night or similar events.

The law, which is believed to be the first-of-its-kind, imposes criminal penalties on employees who fail to make a report. Knowingly failing to make a required report could be prosecuted as a Class B misdemeanor, which could carry with it a penalty of up to 180 days in jail and/or a maximum fine of \$2,000. Intentional concealment would be an aggravating factor that could be prosecuted as a Class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000). Institutions must terminate an employee who is determined through internal disciplinary processes to have violated their obligations under this law. SB 212 also contains civil and criminal immunity for any person who makes a report or assists in an investigation in good faith.

Mandatory reporters are also granted amnesty for any institutional policy violations that would not ordinarily be punished by suspension or expulsion.

The law requires the aggregation of data to be shared with senior officials of the institution. At least every three months, the Title IX Coordinator must submit a written report to the institution's chief executive officer on all reported incidents. The report must summarize, without disclosing any personal information, the number of reports, investigations, the disposition of any disciplinary processes, and any reports that did not result in a disciplinary process. At least twice per year, the CEO must submit to the institution's governing board (and the public at large, through a website), a written summary aggregating the same data. The message here is that the senior leadership of the institution is expected to take a "hands-on" approach to these issues and engage in proper oversight of institutional responses.

The law also contains provisions to promote confidentiality akin to those described in HB 1735 and to prohibit retaliation.

#### HB 449: Student Transcript Notations

HB 449 requires transcript notifications in certain circumstances. Note that this new law applies to all applicable student disciplinary action and not just sexual misconduct. If a student is ineligible to reenroll due to disciplinary reasons, the transcript should include a notation stating that the "student is ineligible to reenroll in the institution for a reason other than an academic or financial reason." If a student withdraws pending disciplinary process that could result in suspension or expulsion, the institution may not conclude the process before rendering a determination of responsibility. In the intervening period, the institution should hold a student's transcript until the process concludes. A student may request to remove a notation if they become eligible to reenroll or if the institution determines "good cause" to remove the notation.

#### Implementation Timeline and Forthcoming Rulemaking

Different dimensions of these three laws go into effect on different dates. The transcript notation provision takes effect immediately for Fall of 2019. The large suite of policy and procedural requirements of HB 1735 take effect on September 1, 2019; however, institutions have until August 1, 2020 for required policy revisions. The mandatory reporter provisions also go into effect on September 1, 2019; however, the potential for criminal prosecutions does not take effect until January 1, 2020.

ATIXA will continue to monitor the implementation process, which will include forthcoming rules promulgated by the Texas Higher Education Coordinating Board. This Board will also be forming advisory committees to assist in formulating rules.

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