

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

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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: there has been a heightened sense of security and activism on college campuses regarding sexual harassment and sexual violence.
- Litany of lawsuits alleging that college students have either: (A.) been assaulted on campus and institutions have NOT done their due diligence through Title IX reporting. (B.) or that students have been falsely accused and punished by a university that has overreached its legal authority (Stripling, 2019).
- US 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, and the University of Texas at 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 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 Legislature

- The Texas Legislature gave colleges and universities a compliance window of Sept.1, 2019 to Jan. 1, 2020 = period for training before penalties.
- SB212 has redefined the mandatory reporting requirements on college campuses, as “postsecondary employers” 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).
- SB212 was unclear in several ways:
 - A. how an “employee of a postsecondary educational institution” (SB212, Sec.51.251(3)) is defined
 - B. when these employees are and are not acting in their official capacity
 - C. specifically what conduct must be reported

Texas Legislature

- Institutions and their Title IX offices will both process reports and assess failures to report and false reports, per SB212 guidelines (SB212, Sec.51.255)
- SB212 contradicts the U.S. Department of Education's proposed Title IX regulations (Schneider & Duggins-Clay, 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”
- 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

Implications for Faculty and Staff

- 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)
- 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
- All employees must report incidents separately, even if one employee has already made a report of which others are aware
- 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”

Implications for Faculty and Staff

- The employee can “receive information” from a student or fellow employee at any time and any place, and that information can be old
- An employee must make a prompt report no matter when or when they received the information and no matter how far in the past an incident occurred
- Definitions of an employee’s “official capacity,” postsecondary employees are in their “official capacity regardless of time or location” “if the employees is otherwise representing the university
- Employees are in official capacity when teaching online classes, attending conferences as an institutional representative
- Employees must promptly report incidents to their Title IX Office whenever they “receive information”

Implications for Faculty, Staff and Student

- Rendering it difficult to discern when an employee is a private citizen or a postsecondary employee as defined by SB212
- “dating violence” (SB212, Sec.51.252) = employees must report “relationship problems,” even if the employee lacks details of the situation (e.g. names, locations, dates, times)
- Employee reporting is not confidential, meaning that who makes Title IX reports is public record.
- 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
- SB212- sexual harassment must be “severe, persistent, or pervasive” enough to interfere with the student’s ability to participate 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
- “applicants” to the institution and whether “applicants” are students = only when students enroll in classes and pay their tuition bill are they considered students
- Campus visitors = if an employee receives reportable information, the employee should make the report, regardless if they subject of the report is an employee, student, student employee, or “anyone with a reason to be on campus”

Implications for Other Stakeholders

- Implications for future sexual violence legislation
- 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
- SB212 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

- 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.
- THIS IS A NEW BILL.... AND IT IS A BIG DEAL
- Teaching the educational community about mandatory reporting, Title IX guidelines, and emerging implications for campus safety.
- Understand what types of incidents are reported, how promptly they were made, and how employees are and are not punished for failing to report

How to Conduct an Effective Workplace Investigation

- 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 the employee to discipline
- Retaliation against complainant can subject employee to discipline
- Computer Use Policies
- Clear notice to employees that emails can and may be reviewed and intercepted

Steps to an Effective Investigation

- 1. Choosing 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?

Steps to an Effective Investigation

- 2. Review personnel files of those involved
- 3. Review policies and other relevant documents
- 4. Review emails 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

Steps to an Effective Investigation

- Guide to conducting employee interviews
- Use witness confidentiality form
- Determine 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
- 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 CBC. Internal investigations are a key part of CBC'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 request fully and truthfully. Being untruthful may result in disciplinary action.

Investigation Confidentiality Agreement

- 2. Confidentiality – you agree to keep confidential anything discussed with you as part of the investigation, including the fact that an investigation is underway. Failure to maintain confidentiality may also result in disciplinary action.
- 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.

Investigation Confidentiality Agreement

- 4. No obstruction – you agree not to interfere or obstruct the investigation. You must retain any records, information or documents stored on your computer and keep all records relating to the investigation until advised otherwise. Destruction of records or failure to retain may result in disciplinary action and/or 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, contact the person conducting the interview

Investigation Confidentiality Agreement

- 6. No retaliation – you agree not to retaliate against or threaten retaliation against any CBC employee who makes a complaint or cooperates in this investigation.
- 7. This agreement should be interpreted to prohibit an employee from disclosing or discussing information regarding the employee's own conditions of employment as well as conditions of employment of other employees as permitted by local, state, or federal guidelines.

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)

Case Study

- Meeting with Jane Doe – February 13, 2020
- C. Wallis and Doe present
- RE: Allegations of improper conduct
- 1st incident – Monday, 3/2/2020; Mike Stewart asked her to have sex with him as they were leaving 10:00 faculty meeting
- 2nd incident – Tuesday, 3/3/2020; Stewart made motion with tongue at her; may have been witnessed by Sue Meyers
- Anything else to report? No
- Follow-up – Sue Meyers, faculty meeting attendance roster

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 legal jargon
- Try to get chronological explanation
- Avoid compound questions (combination of more than one question into what seems to be a single question) and avoid opinions
- Support conclusions with facts and preserve evidence

Interview Techniques

- The Bad and the Ugly
- Record objective observations, not conclusions (blushed, raised voice, no eye contact, etc) NOT APPEARS TO BE LYING
- Do not make legal conclusions such as “inappropriate or unprofessional” NOT “harassment or discrimination”
- Do not discuss theories or speculations with the interviewee
- Do not forget to: Review your notes and ask “Is there anything else I should know?”
- Remind the person to circle back to you if they recall anything additional, witness anything concerning, or see any evidence of retaliation.

Interviewing the Complainant

- Who, what, when, where, why, how, want and 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
- 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?

Interviewing Other Witnesses

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

Interview the Accused

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

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

Make decision and write a final report

- Avoid creating causes of action for the accused
- Keep conversations private, need to know basis
- Proofread carefully
- If attorney is involved – “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/ Corrective Steps

- Take appropriate corrective action
- Prompt
- Appropriate
- Reasonable
- What is reasonable corrective action?
- Consider severity, frequency, duration of conduct
- It should stop the offensive behavior
- Should be proportional to the offense
- If applied 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