

SUPPLEMENTAL MATERIALS

Special Called Board Meeting

AGENDA ITEM III-A (3)

Consideration of adopting the Negotiated Rulemaking Committee's recommendation to the Board relating to proposed repeal of Chapter 3, Subchapter A, Sections 3.11 – 3.15 and proposed new rules for Chapter 3, Subchapter A, Sections 3.1 – 3.20 of Board rules, concerning required reporting rules and policies regarding certain incidents of sexual harassment, sexual assault, dating violence, and stalking at postsecondary educational institutions (*Senate Bill 212 and House Bill 1735, 86th Texas Legislature, Regular Session*)

RECOMMENDATION: Approval

Background Information:

The intent of the revised Subchapter is to establish provisions enacted by House Bill 1735 and Senate Bill 212, 86th Texas Legislature, Regular Session. The proposed revised Chapter 3, Subchapter A establishes the requirements for policies and procedures regarding sexual misconduct at postsecondary educational institutions. A negotiated rulemaking committee met on September 23, 2019, and on October 16-17, 2019, and provided the Board with recommended rules regarding incidents of sexual misconduct at institutions of higher education. The Title IX Training Advisory Committee met electronically and endorsed the recommended rules regarding incidents of sexual misconduct at institutions of higher education. Legislation requires that the Board have rules in place by January 1, 2020.

– Dr. Stacey Silverman, Interim Assistant Commissioner for Academic Quality and Workforce, will present this item and be available to answer questions.

Date approved by the Commissioner for publication in the *Texas Register*: November 1, 2019.

Date published in the *Texas Register*: November 1 and 8, 2019.

The 30-day comment period with the *Texas Register* ended on: December 1 and 8, 2019.

A public comment was received from Doctors Hospital at Renaissance, Ltd, (DHR Health) on November 25, 2019.

Comment: DHR Health recommends that Section 3.5(a) be altered by inserting language in the proposed rule that would require the reporting of incidents only when the employee receiving the information has reason to believe the information is reliable.

Staff response: The Negotiated Rulemaking Committee discussed at length when an employee would need to report incidents, given the potential of erroneous reporting. After much discussion, including discussion of the "reasonable person standard" expected of a hypothetical reasonable person, the committee determined that an employee should promptly

report the incident to the institution's Title IX coordinator or deputy Title IX coordinator, if the employee "reasonably believes" that the incident constitutes sexual harassment, sexual assault, dating violence, or stalking. In this regard, Section 3.5(a) states the following (focus highlighted):

"An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is 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 shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator."

Veracity of reports are to be determined by the Title IX Coordinator. The Title IX Coordinator is charged with determining whether, as illustrated, "innuendo, rumors, gossip, second-hand or third-hand information," with or without substantiation, would necessitate consideration when identified as constituting sexual harassment, sexual assault, dating violence, or stalking pursuant to this new Texas mandate or constitute a matter required to be reported pursuant to other federal law or applicable institutional policy.

Thus, no change is recommended.

A public comment with five substantive comments was received from The University of Texas at Austin (UT Austin) on December 6, 2019.

Comment: UT Austin recommends that Section 3.3 be altered by inserting a definition of "employee" that excludes volunteers.

Staff response: The enabling statutes do not indicate that volunteers should be excluded from consideration as employees, and the Negotiated Rulemaking committee followed the statutes closely when drafting the rules.

Thus, no change is recommended.

Comment: UT Austin recommends that Section 3.3(c) be altered by adding a definition of "domestic violence" and indicating if that is included in the required reporting.

Staff response: The enabling statutes do not include "domestic violence" in the list of incidents that must be reported, and the Negotiated Rulemaking committee followed the statutes closely when drafting the rules.

Thus, no change is recommended.

Comment: UT Austin recommends that Section 3.5(c)(1)(A) be altered to clarify that staff and faculty may also speak to "confidential employees" with the same expectation of privacy as students of the institution.

Staff response: In the statute, Texas Education Code, Section 51.252 provides an exception for employee required reporting in Subsection (c) for employees who are designated as confidential resources "with whom students may speak confidentially". Therefore, the exception in the statute only covers student communications with confidential resources and does not extend the exception to faculty and staff. The Negotiated Rulemaking committee followed the statute closely when drafting the rules.

Thus, no change is recommended.

Comment: UT Austin recommends that Section 3.11(b) be altered by adding the word "final" to clarify that the obligation to provide information to another institution is in relation to a final determination, which ensures that the integrity of disciplinary process determinations is better protected.

Staff response: Staff concurs with this recommendation. Staff suggests modifying Section 3.11(b) by inserting the word "final" as shown below:

(b) On request by another postsecondary educational institution, a postsecondary educational institution shall, as permitted by state or federal law, including the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, provide to the requesting institution information relating to a **final** determination by the institution that a student enrolled at the institution violated the institution's policy or code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking.

Comment: UT Austin recommends that Section 3.14(b) be revised by providing clarification that some employees may be designated by institutions as "confidential employees" when they are serving in some capacities but not so designated while serving in other capacities.

Staff response: The enabling statutes do not provide a basis for designating certain employees as confidential at some times but not at others. This recommendation would also be complex and difficult to implement.

Thus, no change is recommended.

Consistent with the rules of negotiated rulemaking, the comments from Doctors Hospital at Renaissance, Ltd, (DHR Health) and The University of Texas at Austin were forwarded to the Negotiated Rulemaking Committee on December 3, 2019, and December 9, 2019, respectively, along with explanations that as committee members, they could accept, reject, or modify the staff recommendations. Committee members voted via email through December 10, 2019 at 12:00 p.m. and subsequently engaged in a pre-arranged audio conference call on December 10, 2019, from 1:00 p.m. – 2:30 p.m. for final discussions and votes. After discussions on the conference call, consensus was reached to accept staff's proposed responses to the comments, with some suggested modifications to staff's response language on two responses for clarity. The above responses reflect the committee's consensus decisions.

Approved by the Office of General Counsel  Date: 12/10/19