

Bias-Related Response Teams: Protecting Students and Protecting Speech
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Many colleges and universities have created Bias-Related Response Teams (Response Team or BRT) in their mission to maintain a supportive and respectful educational environment. But they must balance the use of a Response Team to address bias with their students' First Amendment rights to freedom of speech and expression.

This memorandum highlights how to strike that balance, looking to recent case law for guidance in creating compliant and effective policies. It concludes with a chart explaining several major considerations when designing and implementing a BRT.

Response Teams and First Amendment Case Law

Recent decisions by three U.S. Circuit Courts of Appeal, which are summarized below, highlight the legal risks when this balance proves uneven. Importantly, these decisions generally support the use of Response Teams for limited purposes and provide guidance on how Response Teams should function within higher education institutions. But the courts remain split about the key issues of referral power and voluntary meetings: The Sixth Circuit sharply limited a Response Team's referral power, while the Seventh Circuit declined to follow their lead in writing a sweeping opinion. We can look to these decisions to unpack additional details to consider in shaping compliant policies, such as the name of the team, what to call the parties involved and more.

Despite these splits, a consistent message can be found in their analysis of Response Teams and the impact of a Response Team on students' ability to express their thoughts freely. While all elements of a Response Team are crucial in creating and maintaining a respectful education environment, each case takes care in addressing the issue of referral power and its impact on chilling speech. Although each court comes to a different final decision regarding the specific referral power of the policy in front of them, they all emphasize the need for the referral power to not cause self-censorship and chill speech through the referral of protected speech statements to student conduct or the police.

When institutions evaluate their Response Teams, based on the new guidance stemming from multiple Circuits, they should do so with the advice of counsel. These decisions do not bind courts outside of their jurisdiction, though they may indicate the direction of the law on this topic. Members of Response Team should continually seek training on the First Amendment and its implications for offensive, yet still Constitutionally-protected, speech.

Response Teams: Limits and Possibilities

Courts have supported the use of BRTs to help students receive support when impacted by speech or expressive conduct they find offensive, and to provide voluntary opportunities for students who offend others to reflect on that behavior. But these conversations should stay within

the BRT and not be referred to disciplinary authorities, whether it's the student conduct office or campus safety.

A typical BRT exists to collect reports, assess incidents and provide resources to students impacted by bias incidents, in addition to educating the community at large.¹ The Response Team is typically made up of individuals from across the university community, and in some circumstances the team may include members whose official capacity is to oversee and run the BRT. A BRT response begins after the reporting of an incident. Reports may come in through an online portal, email, phone calls or walk-in appointment. During the reporting process individuals have the choice to remain anonymous or provide self-identifying information.

Once a BRT has received the report, their response to the incident can diverge in multiple directions depending on the incident and the information supplied in the report. The first response path occurs when the university or college can address the incident with a simple and prompt response; for example, in the case of a reported swastika on a bathroom door, the facilities department can be contacted to erase it.²

In the case of a report that requires a more involved response, an investigation into the incident may be launched. If the reporting individual provides their contact information or the contact information of the alleged offender, a member of BRT may send an email to schedule a meeting with both parties. The meeting, which must be voluntary, typically involves conversations about the effects of the incident on other individuals and provides an educational opportunity. Additionally, the BRT may facilitate a conversation between the individuals or refer the incident to a student conduct office or campus safety if the incident involves conduct that may constitute a crime or a violation of the code of conduct.³

As the case law highlights, BRTs should not have any referral authority to refer "bias-related" speech or conduct to disciplinary authorities. Such referral authority may amount to an unconstitutional "chilling" of speech in violation of the students' First Amendment rights. The only exception is where they learn of misconduct during the voluntary process that constitutes a crime or a violation of the code of conduct.

Response Teams also record reported incidents in a public log or annual report which is usually available to the community and in some cases the public. These reports contain the general information on the report, and actions taken by the BRT. This report should not include information that could identify either the reporting party or the alleged offender, if their identifying information was provided in the original report.

Other responsibilities a Response Team may have include educating the greater campus community about bias related issues, assisting in the development of policies and practices for the university related to bias, and aiding in the coordination and response of high-profile or anticipated incidents.

Case Law on Response Teams: The *Speech First* Decisions

While the concept of the Response Team has been around for more than two decades, a recent string of cases in the Fifth, Sixth and Seventh Circuits have provided new guidance on what institutions should consider when evaluating their Response Teams.

These cases were brought by a free-speech advocacy organization called Speech First, Inc., which represents its student members in lawsuits against their colleges and universities when there are policies or practices that are alleged to be infringing on the free speech rights of the students. The first lawsuit initiated by Speech First was against the University of Michigan in 2018, *Speech First, Inc. v. Schissel*.

The Student Conduct Institute has previously reviewed the Sixth Circuit Court of Appeals' decision in *Speech First, Inc. v. Schissel* in the [SCItations blog](#).

In *Schissel*, Speech First alleged that the use of a BRT would “investigate, threaten or punish students (including informal punishments) for bias incidents” and that the enforcement of a university policy prohibiting harassing and bullying behavior was overbroad and vague, resulting in the inclusion of protected speech in its prohibition. The District Court denied the motion for preliminary injunction due to lack of standing because Speech First failed to demonstrate that the “BRT poses anything but a ‘subjective chill’ on students’ free speech rights[,]” due to the fact that all meetings with a BRT member were voluntary.⁴ Furthermore, the issue of an overbroad harassing and bullying policy was declared moot due to a policy change by the University.

In a 2-1 decision, the U.S. Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) vacated the District Court’s denial of a preliminary injunction for lack of standing, holding that Speech first had standing because the ability of the BRT to make referrals to the student conduct office or the police about reported conduct objectively chilled speech due to the “implicit threat of punishment and intimidation to quell speech” when students received the email request to voluntarily meet with a member of the BRT.⁵

Since the claim filed by Speech First against the University of Michigan (*Schissel*), Speech First has been the named plaintiff in five subsequent lawsuits. Two of those suits reached the U.S. Court of Appeals in their respective circuits and allow for the comparison of the decisions between different jurisdictions.

First, in the Fifth Circuit (Louisiana, Mississippi, and Texas) in the case of *Speech First v. Fenves*, Speech First was originally denied their preliminary injunction for lack of standing because the District Court concluded “that the students’ self-censorship [was] not based on a well-founded threat of punishment under the University policies that is not ‘imaginary or wholly speculative.’”⁶ Speech First initiated the action against the University of Texas – Austin on behalf of three student members alleging a violation of their First Amendment rights through policies and practices on campus. The group sought a declaratory judgment that the institutional rules, acceptable use policy for internet and technology resources, residence hall manual, and the handbook of operating procedures were overbroad and vague which represented a credible threat of enforcement that would implicate protected speech. The District Court held that the self-

ensorship was imaginary or wholly speculative because Speech First “failed to present sufficient evidence that their members intended to engage in speech proscribed by the language of the challenged University policies[,]” because the examples provided (President Trump, immigration, the Second Amendment, and the #Metoo Movement) were not prohibited by the policies.⁷ In addition, Speech First alleged that the Campus Climate Response Team (CCRT) would receive a reported bias incident, investigate and then issue a formal or informal punishment, yet the District Court found the record made clear the CCRT “does not engage in investigations or punishment of any sort.”⁸

But, the U.S. Court of Appeals for the Fifth Circuit vacated the decision on appeal and held Speech First had standing based on the same rationale used in the Sixth Circuit. The Fifth Circuit relied on *Schissel* and found it untenable that the CCRT “does not engage in investigations or punishment of any sort” because although the CCRT lacks disciplinary authority, they have the power to make referrals and as such “when the CCRT determines there is a possible violation of the university’s institutional rules or policies . . . , the CCRT refers the incident to the appropriate entity” which is “sufficiently proscriptive to objectively chill student speech.”⁹ Additionally, the students’ standing was supported by the fact that the challenged policies would impact the students’ ability to engage in protected speech.

In contrast to *Fenves* and *Schissel*, the U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana, and Wisconsin) upheld a decision by a district court to not grant standing in *Speech First v. Killeen*; however the Seventh Circuit did take great effort to explain the differences between the decisions and why they were compatible. In other words, the Seventh Circuit did not fully reject the reasoning of its sister courts but found no need to issue a sweeping opinion under the narrow facts before it.

In the *Killeen* case, Speech First alleged that the University of Illinois Urbana - Champaign had chilled their “student members’ speech, force[d] these students to engage in self-censorship, and deter[ed] them from speaking openly about issues of public concern” based on practices and policies put in place by the University which included a prior approval rule, the issuance of a no contact directive, and their protocols for responding to reports of “bias-motivated incidents” by the Bias Assessment and Response Team (BART).¹⁰

The Seventh Circuit held that being reported to the BART resulted in “essentially no consequences,” because the offer of meetings was voluntary and a student faced no consequences if they failed to respond to the meeting invitation.¹¹ The Court went on to highlight that a majority of students who received the voluntary meeting invitation declined because students did not have a fear of any consequences for doing so.¹² Additionally, bias-motivated speech alone was not a student conduct violation, so although BART had referral power, a student would not be referred for bias motivated speech but for an actual student conduct violation or violation of the law.

As the differences among these cases suggest, the most contentious issue in the case law stems from a Response Team’s use of its referral power.

In the Fifth and Sixth Circuit decisions, the referral power was at the center of the dispute over whether the BRT chilled speech. Those universities' Response Teams' ability to refer stemmed from the policies that the courts held were overbroad and vague allowing for protected speech to be investigated or punished. The referral power had an objectively chilling effect on speech because the Response Teams could theoretically send an incident of protected speech, such as a student advocating in favor of an unpopular political view or candidate, to a campus conduct process or to the police.

By contrast, in *Killeen*, the Seventh Circuit identified that the University of Illinois Urbana – Champaign's Response Team was not charged with such sweeping authority. The university's student conduct policies made clear that bias motivated speech alone is not a student conduct violation and they explicitly stated their Response Team had no disciplinary power; therefore, when the Response Team made a referral to the student conduct office or police it was due to a possible student conduct violation, possible violation of the law or possible violation of the law that might put a student in imminent danger and was not based on the bias motivated speech.

As a result, the Illinois Urbana – Champaign Response Team's referral power did not objectively chill speech because a student could not be referred or face any consequences for failing to respond to an email, attend a voluntary meeting, or make a bias motivated statement unless it was in conjunction with a possible violation of the student conduct policy, a possible violation of the law, or a possible violation of the law that might put a student in imminent danger.

In contrast, the University of Michigan and the University of Texas at Austin had policies challenged for their overbroad characteristics, ability to be punished for incivility or offensiveness, and lack of clarity on their application and enforcement of verbal harassment policies. The Response Teams' referral power objectively chilled speech due to the possibility of punishment for protected speech by the student conduct office or police under one of the challenged policies due to a referral from a report made to the Response Team.

Considerations When Evaluating a Bias Related Response Team

Public institutions must ensure any policy where a violation may result in a referral from their Response Team complies with the First Amendment to the U.S. Constitution and does not restrict an individual's freedom of speech or expression. Furthermore, schools should include an explicit explanation of when the referral power would be invoked in their description, policies or practices for the Response Team in its designated section of the handbook or website.

As the chart below shows, these decisions offer some guidelines for how courts applying the First Amendment may review Response Teams. Some aspects of a BRT, such as the opportunity for a voluntary conversation about the bias incident, are unlikely to raise Constitutional issues. By contrast, the courts appear to agree that delegating disciplinary action to a BRT, including the power to refer biased speech to conduct officials or campus security, will create a chilling effect on speech that violates students' rights to free expression.

Considerations When Evaluating a Bias-Related Response Team

<p>Response Team Name¹³</p>	<p>Do</p> <ul style="list-style-type: none"> • Consider the name of the Response team and how it could influence expectations or make an implicit suggestion that it will chill protected speech. The following university response team names <u>did not</u> face challenge in the courts. <ul style="list-style-type: none"> ○ University of Texas – Austin: “Campus Climate Response Team” ○ University of Illinois at Urbana – Champaign: “Bias Assessment and Response Team”
<p>Policies and Procedures¹⁴</p>	<p>Do</p> <ul style="list-style-type: none"> • Have publicly available, formalized well documented policies and procedures for each facet of the response team operations including reports, communication, and the providing of resources. • Review the university definitions for terms like “bias,” “harassment,” and “bullying” and ensure they are consistent across campus policies. <p>Don’t</p> <ul style="list-style-type: none"> • Have “bias motivated speech” stand alone as a student code violation.
<p>Members of the Response Team¹⁵</p>	<p>Do</p> <ul style="list-style-type: none"> • Evaluate the role of each member on the Response Team, especially individuals who work in other capacities for the institution. • Ensure that individuals who serve a disciplinary role at the institution or in the community do not maintain a disciplinary role on the Response Team. <ul style="list-style-type: none"> ○ Example: A member of the Campus Police was on the BRT at the University of Illinois at Urbana – Champaign; however, their role on the BRT was not tied to their capacity as a campus police officer nor did they function in any capacity as a law enforcement agent; this separation made their position on the BRT acceptable.
<p>Identifiers for involved parties¹⁶</p>	<p>Do</p> <ul style="list-style-type: none"> • Identify the involved parties with neutral language that does not suggest they are the victim or perpetrator of a bias-related incident. <ul style="list-style-type: none"> ○ Example: Reporting party and Responding party ○ Example: Complainant and Respondent <p>Don’t</p> <ul style="list-style-type: none"> • Use language like “targets” and “initiators.” <ul style="list-style-type: none"> ○ Terms previously used by the University of Texas at Austin which received scrutiny from the Fifth Circuit for their judgmental nature.
<p>Communication and Response with the Reporting Individual¹⁷</p>	<p>Do</p> <ul style="list-style-type: none"> • If the reporting individual is identifiable, contact the individual to see if they would like to schedule a voluntary meeting to discuss the incident and offer support and assistance. <p>Don’t</p> <ul style="list-style-type: none"> • Contact the individual and require a meeting to discuss the incident.

<p>Communication and Response with the Alleged Offender¹⁸</p>	<p>Do</p> <ul style="list-style-type: none"> • If the alleged offender is identified, a BRT staff member may contact the individual and offer to schedule a voluntary meeting to discuss the incident. • Use standardized language when reaching out to the individual.¹⁹ <ul style="list-style-type: none"> ○ Example: standardized email template when inviting a student to a voluntary meeting • Explain the behavior that drew attention and provide an opportunity for the individual to reflect on their behavior and its impact on other students. • Keep all interactions private unless explicit permission has been provided by the alleged offender to share the interaction. • Ensure that students on-campus are not afraid of being referred or facing punishment for failure to respond or decline a meeting, so that when they receive an email about a voluntary meeting they understand it to be completely voluntary with no underlying threat. <p>Don't</p> <ul style="list-style-type: none"> • Require the alleged offender to meet • Threaten or enforce disciplinary consequences (implicitly or explicitly) if an individual declines to meet or fails to respond.
<p>Disciplinary Actions²⁰</p>	<p>Do</p> <ul style="list-style-type: none"> • Ensure the BRT has no authority to discipline students, such as imposing punishments or sanctions. <p>Don't</p> <ul style="list-style-type: none"> • Record correspondence and meetings with the BRT in students' academic or disciplinary records. • Require alleged offenders to change their behaviors. • Issue sanctions if an alleged offender fails to respond, meet with BRT or change their behavior.
<p>Referrals²¹</p>	<p>Do</p> <ul style="list-style-type: none"> • Allow for BRT to make referrals to a student conduct office for investigations if the individual's behavior may have violated the student conduct code, where the student conduct code is clear that "bias motivated speech," standing alone, is not a student conduct violation. • Allow for BRT to make referrals to the police for investigations if the individual's behavior may have violated the law or where there is a potential violation of the law, such as one that might put a student in imminent danger. • Have a clearly stated policy that describes the circumstances when an incident may be referred to a student conduct office or law enforcement.²² <p>Don't</p> <ul style="list-style-type: none"> • Allow for referrals to student conduct office or the police for "bias motivated speech" alone. • Allow for the BRT to determine if punishment is warranted and make a referral to student conduct office or Police.

<p>Publicly Available Bias Report Logs and Annual Reports²³</p>	<p>Do</p> <ul style="list-style-type: none"> • Remove all personally-identifiable information from each report before publishing. • Include general information on the type of conduct reported, where the conduct occurred, and what actions have been taken to address the reported incidents. • Include a statement to inform the reader that the inclusion of incidents in the log does not mean that there was a finding of bias, especially if universities and colleges include every reported incident in their log.²⁴ <p>Don't</p> <ul style="list-style-type: none"> • Include information that could identify a group or individual based on location of the bias incident, or other personally-identifiable information.
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¹ Joseph W. Yockey, *Bias Response on Campus* (2019). 48 *Journal of Law & Education* 1 (2019), U Iowa Legal Studies Research Paper #2020-13, Available at SSRN: <https://ssrn.com/abstract=3607539>.

² *Speech First, Inc. v. Killeen*, 968 F.3d 628, 633 (7th Cir. 2020).

³ Yockey, *Bias Response on Campus* 3 (2020).

⁴ *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700, 710 (E.D. Mich. 2018).

⁵ *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019).

⁶ *Speech First, Inc. v. Fenves*, 384 F.Supp.3d 732, 743 (W.D. Tex. 2019).

⁷ Fenves, 384 F.Supp.3d at 743-44.

⁸ Fenves, 384 F.Supp.3d at 743.

⁹ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 334 (5th Cir. 2020).

¹⁰ Killeen, 968 F.3d at 632.

¹¹ Killeen, 968 F.3d at 640.

¹² Killeen, 968 F.3d at 643.

¹³ *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019)

¹⁴ Ishan Bhabha & Erica Turret, *Campus Bias Response Teams: Lessons from Litigation and Practical Guidance*, 19 *NACUA Notes* 1, 6-8 (2021) (additional considerations for Bias Response Teams).

¹⁵ Killeen, 968 F.3d at 634, 641.

¹⁶ Fenves, 979 F.3d at 338.

¹⁷ Killeen, 968 F.3d at 633; Schlissel, 939 F.3d at 762.

¹⁸ Killeen, 968 F.3d at 633-34, 643; Schlissel, 939 F.3d at 765.

¹⁹ Bhabha & Turret, *Campus Bias Response Teams*, 19 *NACUA Notes* 1, 6-8.

²⁰ Killeen, 968 F.3d at 634.

²¹ Killeen, 968 F.3d at 643.

²² Bhabha & Turret, *Campus Bias Response Teams*, 19 *NACUA Notes* 1, 6-8.

²³ Killeen, 968 F.3d at 643; Schlissel, 939 F.3d at 762.

²⁴ Bhabha & Turret, *Campus Bias Response Teams*, 19 *NACUA Notes* 1, 7.