Now & Next
Higher Education Alert

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When campus incidents become criminal investigations: Institutional roles, records, and governance

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Part one of our three-part series examines how schools can prepare for overlapping investigations, preserve evidence, and manage legal obligations.



What's the impact?

- Decisions in a campus investigation can affect parallel criminal, civil, and regulatory proceedings, making advance planning and clear decision-making responsibilities essential.
- Preserving original evidence and documenting the institution's response can strengthen decision-making and reduce the risks of an incomplete or inconsistent record, as well as protect a reputation.
- Law enforcement requests do not automatically authorize disclosure of protected records. Schools should establish protocols for information sharing and employee representation.

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A serious campus incident can simultaneously raise criminal, institutional, civil, and regulatory implications for the school, each with their own distinct purpose, standard, and obligation. Managing those processes requires an institutional framework developed for if, or when, an incident takes place.

One incident, several systems

For colleges and universities, as well as independent and other private K–12 schools, a serious incident on or around campus may trigger more than one investigation. Allegations of sexual misconduct, hazing, assault, child abuse, or employee misconduct may prompt a law-enforcement inquiry along with a Title IX, student-conduct, and/or employment investigation. Theft, fraud, vandalism, cyber intrusion, or evidence tampering may also lead to civil litigation or regulatory scrutiny. These processes may involve the same events and witnesses, but they serve different purposes, apply different legal standards, and have potentially very different implications for an institution, its personnel, its funding, and its public perceptions.

How law enforcement first learns about an incident can shape the institution's initial response and level of involvement. For instance, campus police may investigate and refer a matter to a local prosecutor, or a student, employee, parent, or other witness may make a report directly to law enforcement. State law may also *require* the institution or an employee to report certain conduct, such as suspected child abuse. Civil litigation, media coverage, regulatory inquiries, or new evidence may also result in a law enforcement investigation long after incidents occur. The institution's obligations will depend in part on what happened, who was involved, whether and how law enforcement becomes involved, and the applicable law governing the institution and the conduct.

Institutional leaders must account for how decisions in one process can affect the record, timing, obligations, and information available in the others. A coherent response, therefore, requires more than a capable investigator. It requires an institutional structure that preserves the underlying information, assigns responsibility for decisions, and distinguishes the legal obligations that apply to each process.

The institution's role is not fixed

Within these overlapping processes, an institution may be a reporter, a witness, and/or a custodian of relevant records. It may also become a subject of investigative scrutiny both in and outside of the institution. These roles are not mutually exclusive. For instance, a college may report an incident, support a criminal investigation, and conduct its own review while police and prosecutors examine both the underlying allegation and whether administrators fulfilled reporting, preservation, supervisory, or other legal duties.

A change in law enforcement or regulators' approach toward a school does not, by itself, indicate a finding of wrongdoing. However, a flawed investigation, policy violation, or decision a prosecutor disagrees with[1] may lead to greater scrutiny or adverse consequences for an institution if not handled properly.

The institution's role may also vary among offices and components. Campus police, student life, counseling, Title IX, residential life, human resources, information technology, and senior administrators may each hold part of the record relevant in a criminal, civil, or administrative inquiry. Each may also have distinct responsibilities for addressing, investigating, and responding to an incident. An effective governance framework identifies those responsibilities in advance, establishes when roles should be coordinated or kept separate, and provides a way to bring the relevant information together when the institution's role changes.

Investigative record is institutional infrastructure

Because the institution's role and potential exposure can shift, the quality of its record matters. A central challenge in campus matters is preserving the underlying evidence, rather than relying on a final investigative report or summary. The relevant record may include original recordings, transcripts, interview notes, witness statements, messages, photographs, video, physical evidence documentation, and communications among institutional offices. These materials may be spread across systems and departments, and some may have been created for different purposes.

Over time, the institution should be able to reconstruct what information it received, when it was received, who reviewed it, what steps were taken in response, and what was provided to law enforcement or other authorities. This requires a coordinated documentation and preservation process. It also requires care in preparing summaries: The source material should remain identifiable, and each summary should accurately reflect the underlying evidence. A summary does not replace the source record when a later investigator tests how a conclusion was reached.

This is not merely a litigation-hold issue. A reliable record supports institutional decision-making among investigations, employment matters, student proceedings, civil claims, and regulatory review. It also reduces the risk that later leadership or counsel will have to reconstruct an earlier response from incomplete files and individual recollections.

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[1]Law enforcement's focus is generally in determining whether a criminal offense has been committed. Criminal liability requires proof of each element of the applicable offense, including any required mental state. For an omission-based offense, a legally recognized duty to act may also be necessary. In evaluating both incident investigation and preservation obligations, institutions should be aware of avoiding actions or steps that could give rise to an allegation that the school has obstructed or otherwise impeded a criminal inquiry.

Parallel proceedings require deliberate coordination

A reliable record is especially important when proceedings run in parallel. Criminal investigations often overlap with Title IX, student conduct, employment, civil, and regulatory proceedings, which may examine the same events but are designed to answer different questions. A decision not to pursue criminal charges does not necessarily end the institution's obligations. Conversely, an institutional finding does not necessarily reflect criminal liability.

A prosecutor may ask an institution to defer an interview or disciplinary step to avoid compromising evidence or witness testimony. Such a request does not automatically require the institution to suspend its own proceedings, because it is important to remember that the school's other regulatory and legal obligations do not stop simply because a criminal inquiry is underway. For example, in Title IX matters, the institution must also follow the regulatory requirements, controlling court orders, and its own applicable grievance procedures. The institution should always evaluate any request to defer or suspend an internal investigative or disciplinary step with counsel, considering the applicable law, institutional policies, contractual commitments, and interests of the parties involved. When a delay or accommodation is needed, both the request and the rationale for that delay should be clearly documented.

The long-term objective is to establish a consistent process for evaluating sequencing questions, not a rule that criminal matters must always take priority or that institutional proceedings must always proceed unchanged. The right approach will depend on the facts and the governing requirements. Institutions are better positioned to make those judgments when decisionmakers, the consultation process, and documentation expectations are established in advance.

Employee interviews and the boundaries of representation

Employee interviews can create an additional challenge and potential tension. When a current or former employee is interviewed in connection with a criminal or governmental investigation, the institution should clarify and communicate whom counsel represents before witness interviews. Their interests may diverge when investigators are examining the employee's own knowledge, reporting decisions, supervisory conduct, or handling of evidence, or when the employee is alleged to have engaged in the conduct. In those circumstances, separate counsel may be appropriate.

Where appropriate, institutional counsel should clarify that counsel represents the institution, the institution controls its attorney-client privilege, and information may be disclosed as permitted or required by law.

These explanations, commonly referred to as corporate-representation or *Upjohn* warnings, should be tailored to the circumstances with counsel's guidance.

At public institutions, employee interviews that result in compelled statements may also raise admissibility issues in a subsequent criminal proceeding under the longstanding principles of *Garrity v. New Jersey*. These interviews may require separate warnings that address the employee's constitutional rights.

A consistent approach to employee interviews helps avoid confusion about representation and reduces the likelihood that institutional and individual interests will be treated as interchangeable.

Information sharing requires a legal framework

Coordination with law enforcement also raises questions about what information may be shared and on what basis. Institutions should distinguish between compulsory process — such as a subpoena, warrant, or court order — and an informal request for voluntary cooperation. The issuing authority, legal basis, scope, deadlines, notice requirements, and possible grounds to object or narrow the request all matter. A designated process for receiving requests, coordinating collection, reviewing records, and approving disclosures helps ensure that legal and confidentiality issues are addressed consistently.

Beyond the nature of the request, schools must remember their obligations to protect the information sought. For institutions subject to the Family Educational Rights and Privacy Act (FERPA), a request from law enforcement does not automatically authorize disclosure of student education records. Records created and maintained by an institution's law enforcement unit for a law enforcement purpose are excluded from FERPA's definition of education records under 34 CFR §99.8. A campus police report that is shared with and maintained by Title IX or student affairs may, however, qualify as an education record in that office's hands. Under 34 CFR §99.31(a)(9), a judicial order or lawfully issued subpoena may permit disclosure, generally after reasonable efforts to notify the student in advance, unless an exception to the notice requirements applies. For example, the health-or-safety emergency exception in 34 CFR §99.36 is limited and should not be used as a routine basis for disclosure in a retrospective criminal investigation.

FERPA exceptions generally permit disclosure, rather than require it. Institutions must therefore consider not only what may be produced, but also what remains protected by FERPA, attorney-client privilege, work-product protection, personnel record restrictions, or other applicable law. A well-designed response protocol allows the institution to distinguish legal compulsion from voluntary cooperation and review potentially protected materials before production.

Building a durable institutional response

These issues point to a broader need for an integrated response framework. An effective framework is more than a list of emergency contacts. It connects reporting pathways,

preservation practices, responsibility for government requests, employee-representation issues, insurance obligations, and public communications.

Insurance review may include notice and cooperation requirements under directors-and-officers, educators' legal, employment practices, cyber, or general liability, or abuse-or-molestation coverage, as relevant. Indemnification and advancement obligations may also matter when an official or employee requires separate counsel.

Public communications are part of the same governance challenge. High-stakes matters may attract attention from students, employees, parents, alumni, regulators, media, and the wider community. Legal, communications, student affairs, human resources, campus safety, academic affairs, and institutional leadership should have a clear process for coordinating statements. Communications should avoid characterizing witness credibility, disclosing protected student or personnel information, or creating inconsistencies with the investigative record.

The strongest institutional framework is one that can operate among departments and through changes in personnel. Clear reporting and escalation paths, reliable preservation practices, a designated channel for government requests, and documented decision-making make it easier to manage a matter that evolves over months or years. These systems are most useful when they are designed and tested before an incident requires them.

This is the first installment in a three-part series by Nixon Peabody's Higher Education team about campus matters and criminal investigations. The second installment will examine mandatory reporting, historical allegations involving minors, and the circumstances in which an administrator's response may create individual exposure.

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