

Welcome to *Speech Spotlight*, a new initiative of the University of California National Center for Free Speech and Civic Engagement. This initiative is intended to help members of higher education communities gain new insights into speech and civic engagement-related issues on university and college campuses. Each installment will address a specific topic by clarifying the issues, reframing the debate and raising critical questions to facilitate constructive discussion and effective action.

Our inaugural “chapter” focuses on bias response teams (BRTs)¹ – what they are, what they aim to accomplish, their effectiveness (or lack thereof) and why free speech advocates are concerned that BRTs chill speech on campus. The controversy around BRTs highlights a question that underlines virtually all campus expression debates: How do higher education institutions balance the robust and open exchange of ideas (even offensive ones) with the values of inclusion and equity?

Background

While bias response teams (hereafter referred to as “BRTs”) have existed on university and college campuses since the early 1980s, they have proliferated in recent years² (a [2017 FIRE report](#) identified 231 BRTs at public and private institutions) as a response to the increasing number of bias or hate-related incidents on campus. A [2019 report by the Lawyers’ Committee for Civil Rights under Law and the Fund for Leadership, Equity, Access and Diversity](#) correspondingly highlights the rising number of incidents targeting students of color, different sexualities and religions. These include the [proliferation of white supremacist literature](#) on campus, racial slurs written in public spaces and dormitories and incidents of hate speech.³

There is no standard definition of a bias incident. The majority of definitions include categories found in anti-discrimination statutes (race, ethnicity, sex, sexual orientation, gender, disability,

¹ BRTs also are known as Bias Assessment and Response Teams (“BARTs) or Bias Incident Report Teams (“BIRTs”) or Campus Climate Response Teams (“CCRTs”).

² A Balancing Act: Whose Interests Do Bias Response Teams Serve?, <https://muse.jhu.edu/article/704810>

³ <https://www.insidehighered.com/news/2019/02/25/hate-incidents-still-rise-college-campuses>;

religion, etc.), while a minority include political affiliation or speech as a potential bias.⁴ Generally, the term refers to “acts of bias that impact campus climate but are not violations of law or policy” such as protests, displays and events that are hostile to various diverse groups and are considered to have a damaging effect on the general campus climate and/or on particular groups on campus.⁵ BRTs are charged with responding to reports of these types of occurrences.

The primary function of most BRTs is to respond quickly to complaints in order to support those who feel aggrieved by particular incidences of conduct or speech and either to counsel them directly or to suggest campus resources that can provide assistance. Many teams only keep records of the reports, but others conduct investigations and hold meetings with the various parties involved in a complaint.⁶ Follow-up actions might include reaching out to individuals who file these reports in order to support them; engaging the subjects of reports in voluntary, educational conversations; and monitoring trends in campus climate to inform educational efforts.⁷

Team composition varies but typically includes administrators, staff and students. Some include faculty or members of campus police departments. Often, BRTs are under the auspices of a campus diversity, equity and inclusion office, and they either have members from, or coordinate with, other campus units. In the vast majority of cases, BRTs do not have the power to discipline or sanction any campus community member.⁸

Detractors and Advocates

Despite their lack of disciplinary authority, BRTs have been accused of acting as [speech police](#) and turning [campuses into miniature surveillance states](#). Critics argue that, even without the

⁴ Foundation for Individual Rights in Education, <https://www.thefire.org/research/publications/bias-response-team-report-2017/report-on-bias-reporting-systems-2017>

⁵ A Balancing Act: Whose Interests Do Bias Response Teams Serve?, <https://muse.jhu.edu/article/704810>

⁶ <https://publicintegrity.org/federal-politics/bias-response-teams-criticized-for-sanitizing-campuses-of-dissent/>

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<https://www.insidehighered.com/views/2019/06/17/truth-about-bias-response-teams-more-complex-often-thought-of-pinion>

⁸ *Id.*

specter of punishment, the existence of the reporting structure can lead to self-censorship – students and other campus constituents refraining from expressing themselves, afraid of being reported for saying something that might be offensive.

Others assert these reporting systems encourage [hyper-sensitivity](#) by stoking a fear of being reported. A recent [article](#) in the *Wall Street Journal* highlighted the following example to make this point: A male student at University of Utah was joking with his friends in the library and complained that his computer battery was dying. His friend gave him a power cord which turned out to be incompatible with his computer. When the friend said to jam the cord into the power socket anyway, the male student whispered loudly, “That’s rape. I’m not raping my computer.” A female student overheard and filed a complaint.

Complaints are not always about student conduct; they can concern any campus community member. In one incident report filed, a 22-year-old female student reported a professor for assigning too many classic works on economics written by men. She claimed the selections created a “hostile learning environment.”⁹

Examples like these are often used by BRT critics to suggest they are nothing but a police force against ideological opponents of progressives. While BRTs usually cannot enforce disciplinary action, such detractors argue that the ability to launch an investigation, compel meetings and keep public records are enough of a consequence to chill speech. There are also examples (as in the case of the [University of Northern Colorado](#)) of BRTs exceeding their intended authority and improperly compelling punishment. [Opponents](#) of BRTs point out there is usually no process by which accused parties can clear their name from the record or absolve themselves of perceived guilt.

Another claim raised against BRTs is that relying on them for intervention precludes students from [developing the necessary skills](#) for having challenging conversations. The problem, according to this school of thought, is that BRTs encourage “students to ask the administration to

⁹ <https://www.wsj.com/articles/bias-teams-welcome-the-class-of-1984-11565045215>

solve problems instead of solving them amongst themselves.”¹⁰ Rather than fostering open dialogue, these students contend, BRTs force students into university-led adjudication processes.

Proponents counter by pointing out how monitoring complaints enables college leadership to assess the campus climate and to identify more effective ways to support students who feel targeted or marginalized. Some schools publish annual updates that highlight the number and types of incidents. For example, in its most recent [Bias Response Team and Assessment Report](#), University of Illinois at Urbana-Champaign shared that it received 265 reports based on 128 unique incidences during fiscal year 2018. This publication documented not only what was reported, but also what action was taken. One entry reads: “There were three reports about 4/3/2018 being called “Punish a Muslim Day,” which encouraged acts of violence against members of the Muslim community. Members of the team reached out to reporting parties, and UIPD posted a statement to its Facebook page and increased patrols around mosques and high traffic areas on campus.” In this case, information acquired through the BRT reporting process led to tailored university action to prevent potential hate speech or hate crimes.

Many students also note it is empowering to have a place to turn to for help when they encounter situations they perceive as racist, discriminatory and unjust. BRT supporters note that many teams do not mandate further involvement by the complaining and accused parties, thereby reducing the potential for these mitigation techniques to become coercive.

A recent example at University of Mississippi shows how bias complaint systems can bring troubling and destructive incidents to light. After a bias complaint was filed through the university’s reporting program, an Instagram photo surfaced of three students smiling while brandishing guns in front of a bullet-riddled memorial sign for Emmett Till. Till’s brutal murder in 1955 (Till was 14) served as a catalyst for the civil rights movement. Because the photo was deemed not to pose a specific threat or violate any university policies, the university pursued no legal or disciplinary action against the students. However, the three Ole Miss students were

¹⁰ <https://www.campusreform.org/?ID=6860>

[suspended by their fraternity](#) in June. This example highlights how BRTs can encourage students themselves to take actions that promote an open and inclusive campus environment.

What Do The Courts Have To Say About Bias Response Teams?

Not surprisingly, these divergent perspectives on bias response teams have led to litigation. [Speech First](#), a non-profit organization that advocates for free speech on campus, has filed lawsuits challenging the functioning of BRTs at three universities. Trial courts denied the requested injunctions in all cases.

Speech First v. Schlissel

Speech First initially sued the University of Michigan in 2018 on behalf of students who contended that university policies and its BRT chilled speech. The [complaint](#) alleged the university had adopted policies prohibiting and punishing speech protected by the First Amendment. Speech First argued that University of Michigan's policies on "harassment," "bullying" and "bias" were so vague and overbroad they encouraged students to limit their speech out of fear that they might be subject to disciplinary sanction. While the litigation was ongoing, the university revised the challenged policies. It further asserted that BRT participation was voluntary, that no students had been disciplined and that a preliminary injunction, if issued, would prevent enforcement of policies against harassment and bullying.¹¹

The United States Department of Justice filed a [statement of interest](#) on behalf of Speech First, noting the department's commitment to the principles of the First Amendment and claiming that "freedom of speech and expression on the American campus are under attack."

The U.S. District Court judge [ruled](#) in favor of University of Michigan, citing no implicit threat to a student's right to free speech. In September 2019, the 6th Circuit Court of Appeals [vacated](#) the district court's decision, [arguing that](#) a BRT's power to make referrals and initiate disciplinary processes is enough of a threat to chill speech.

Dissenting Judge Helene White [noted](#) the record showed no evidence that any of the anonymous students had interactions with the BRT or that such interactions were imminent. She highlighted

¹¹ <https://publicaffairs.vpcomm.umich.edu/speech-first-inc-v-mark-schlissel/>

the fact that the team rarely issued invitations, and that even when they did, only one student had ever accepted. Although Judge White would have dismissed the appeal, the majority sent the matter back to the trial judge to render a new decision as to whether to issue a preliminary injunction.

In late October 2019, Speech First and University of Michigan announced a [settlement](#) to permanently end the University’s Bias Response Team in favor of the University’s new [Campus Climate Support Program](#) (CCS) which, in contrast to the BRT, will not reach out to the subjects of complaints filed. Like their BRT, though, the CCS provides the University of Michigan community with “support for those who may have been targets of or affected by campus climate concerns” and does not have any disciplinary authority.¹²

Speech First Inc. v. Gregory L. Fenves

Speech First also sought to enjoin University of Texas at Austin’s version of a BRT (called a Campus Climate Response Team (CCRT) in 2018, [arguing](#) that subjective terms such as “offensive,” “biased,” “uncivil” and “rude” gave the CCRT broad discretion in determining what speech is in violation of university policy. Speech First claimed there was a substantial risk such policies would be enforced in a discriminatory manner, targeting viewpoint-based speech on controversial, often political, issues.

The university responded that since students faced no disciplinary action by CCRTs, there was no threat of self-censorship – and that no injunction was needed to protect them. Based on the evidence that CCRTs did not have authority to discipline students, the trial court judge [found](#) no credible threat of punishment or self-censorship and held that, therefore, the university’s policies would not impact students’ free speech rights. Speech First has appealed this decision, and several organizations, including the [Cato Institute](#), have filed amicus briefs on their behalf.

¹² For more information on the settlement:

<https://www.mlive.com/news/ann-arbor/2019/10/university-of-michigan-ends-bias-response-team-in-free-speech-lawsuit-settlement.html> and

<https://record.umich.edu/articles/speech-first-agrees-to-settle-lawsuit-over-free-speech-at-u-m/>

Speech First, Inc. v. Timothy Killeen

Speech First filed its third [case](#) in May 2019 against the University of Illinois at Urbana-Champaign, taking issue with the university's leafletting policy, which prevented students from posting or distributing materials for non-campus political candidates without first obtaining permission. The plaintiffs also protested "no-contact" directives that prevented accused students from communicating with those who had criticized them. At issue was a dispute between a student who had advocated an unpopular viewpoint and the author of a college press article in opposition. The two students were instructed to avoid further communication. Plaintiffs also questioned imposition of educational conditions such as mandated community service, classes and writing assignments.

These lawsuits highlight not only the types of issues that arise in debates about the role and value of BRTs, but also the variation between campus policies.

How effective or damaging are BRTs?

Though higher education research has addressed the pervasiveness of discrimination and bias, there is little empirical research on the creation and operation of BRTs on campus. [One study](#) examined the philosophies and perspectives of bias response team leaders at 19 institutions. It identified a "tension or even disconnect...between the theory and practice of bias response teams." This study noted that, "while bias response team leaders most often espoused educational philosophies, the examples of work they shared often reinforced a punitive or criminal justice approach and/or informed an institution's public relations efforts."

[Another study](#) showed that while BRTs aimed to work through proactive educational measures, they, in fact, focused primarily on individual incidents. This emphasis seemed to indicate that BRT members were primarily engaged in maintaining the appearance that the university was responding to bias incidents rather than implementing meaningful culture change.¹³

What To Keep In Mind

As demonstrated above, the extent to which a BRT can be helpful or damaging depends greatly upon a number of factors including the particular circumstances of a university's climate, as well

¹³ <https://muse.jhu.edu/article/710764>

as the responsibilities and membership of the team. When considering whether or how best to form a BRT, it is important both to consider the potential chilling effects it can pose and to implement procedures that encourage the team to act proactively through education. While protecting the freedom of speech and open inquiry should be among the highest priorities of any university, it is equally important to consider and address the substantial harm offensive and hateful speech can have. As is often the case, a careful balance is necessary. When thoughtfully implemented, a BRT may be an effective method to strike such a balance.

If your institution of higher education is considering forming a bias response team, what questions might you consider?

- a. What are the objectives of the team, and what principles underlie those goals?
- b. How are key terms such as “bias” and “bias incident” defined (i.e. only non-criminal speech/conduct? If yes, what will the team do with criminal complaints that arise)?
 - a. In many of the examples above, overly vague definitions of terms like “harassment” or “bias” have been the root of campus or legal disputes.
- c. What tools will the team have at its disposal (i.e. information gathering, ability to request meetings, referral procedures)?
- d. Will the team adjudicate claims or simply provide resources and facilitate discussion?
 - a. Under what circumstances, if any, will a complaint be removed from the record?
- e. Who will be selected to be part of the team? How will you ensure that diverse campus communities are represented?
- f. What training will team members receive? Who will conduct said training/s?
- g. How transparent will the team be with information about the number and types of incidents reported? Under what situations will complaints be made public?
- h. How will the campus ensure that the threat of being reported to a BRT does not lead to self-censorship on the part of campus community members?
 - a. What measures will the BRT take to encourage productive dialogue on campus and prevent itself from being used as a tool of division?

- i. What steps will be taken to ensure the campus community knows of the BRT, its power/limitations and the best ways to use it as a resource?
- j. How will the campus assess the effectiveness of a BRT's work?

WHY IT MATTERS



Thoughts from Erwin Chemerinsky

Co-Chair, UC National Center for Free Speech and Civic Engagement

Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law

College and university administrators have the legal and ethical duty to respond to incidents of hate and bias. But they must walk a very difficult line. Speech cannot be punished on the grounds that it is offensive, or even hateful. Every hate speech code to be considered by a court has been invalidated. At the same time, though, the failure to respond to such incidents contributes to a hostile environment and even can be the basis for liability for “deliberate indifference.”

One solution that many campuses have implemented is to create Bias Response Teams. They are controversial. Defenders see them as a way in which campuses can be prepared to deal with incidents and respond quickly to them. They point to instances in which they have been used effectively and without punishing speech. Opponents argue that Bias Response Teams are speech police and chill controversial expression. They identify instances in which there have been overreactions to speech which does not deserve punishment or censure.

Predictably, there have been lawsuits challenging the existence of the Bias Response Teams. One involved the University of Michigan. The federal district court dismissed the case for lack of standing, concluding that no one was injured by the Bias Response Team. In a 2-1 decision in September 2019, the United States Court of Appeals for the Sixth Circuit reversed in *Speech First, Inc. v. University of Michigan*. The case subsequently settled.

Campus administrators understandably worry about what the case means for their Bias Response Teams. To be clear, the Sixth Circuit did not hold that the Bias Response Team violated the First Amendment. The Court ruled only that

the plaintiffs had standing to bring the lawsuit. This, of course, can be a precedent cited elsewhere to allow such suits to go forward. But the constitutionality of Bias Response Teams remains unresolved.

My sense is that ultimately it will depend on what the Bias Response Team does and what authority it possesses. The First Amendment certainly is not violated by campuses responding to incidents of bias and hate. Campuses have the authority – and often the legal duty – to investigate incidents of bias and hate. Nor does the existence of an institutional mechanism to do so offend the First Amendment.

Campus officials also have free speech rights and can use them to condemn incidents of bias and hate on campus. As Justice Oliver Wendell Holmes said long ago, the best response to the speech we don't like is more speech.

As long as the Bias Response Teams are limited to investigating and expressing views, I do not see any First Amendment problems. But if the Bias Response Teams have power to impose sanctions or punishments of any kind, then there are likely to be serious constitutional issues.