

Legal Issues in Advising

Advisor Training
February 25, 2015

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Office of the University Counsel

- Our client is MTSU – we represent the legal interests of the institution.
- We assist the administration and you, in your professional capacity.
- If you have questions for the OUC, please first contact your chair or dean.



General Advice

- Be consistent
- Be fair
- Follow policy:
<http://www.mtsu.edu/policies/>
A to Z Link under “P”
- Ask questions (as far in advance as possible)



Title IX

How to Address Allegations of Sexual Assault, Sexual Harassment, and Sexual Violence

What is Title IX?

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

What is Title IX?

What does it prohibit?

- Discrimination on the basis of sex
- Sexual harassment
- Sexual violence
 - Sexual assault
 - Stalking
 - Dating violence
 - Domestic violence

Sexual Harassment

Sexual harassment is a form of sex discrimination prohibited by Title IX.

Sexual harassment is unwelcome conduct of a sexual nature including:

- o sexual advances,
- o requests for sexual favors, and
- o other verbal, nonverbal or physical conduct of a sexual nature.

Violation of Title IX

A hostile environment is created when conduct (sexual harassment or sexual violence) is sufficiently serious that it denies or limits a student's ability to participate in, or benefit from, the institution's programs.

If a "responsible employee" knows of such conduct, we must respond.

Examples of Sexual Harassment

- o *Quid pro quo* - work or educational benefits in return for sexual favors;
- o Suggestive or inappropriate communications, emails, notes, letters, or other written materials displaying objects or pictures which are sexual in nature;
- o Sexual innuendoes, comments, and remarks about a person's clothing, body, or activities;
- o Humor and jokes about sex that denigrate men or women;
- o Sexual propositions, invitations, or pressure for sexual activity;
- o Use in the classroom of sexual jokes, stories, remarks, or images that are in no way, or only marginally relevant to, the subject matter of the class;
- o Implied or overt sexual threats;
- o Suggestive or obscene gestures;
- o Patting, pinching, and other inappropriate touching.

Sexual Violence

Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol.

Sexual violence includes rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

What is Sexual Assault?

Sexual Assault: Sexual contact without consent where the accused knows, or has reason to know, that the victim did not or could not consent.

- o Includes accused touching the victim **and** forced touching of the accused by the victim.

Sexual contact includes, but is not limited to:

- o Intentional touching of intimate parts; or
- o Intentional touching of the clothing covering the immediate area of intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

Examples of Sexual Assault

- o Sexual assault – rape, sodomy, sexual assault with an object, fondling;
- o Engaging in sexual contact after the victim has said "No";
- o Sexual intercourse or sexual contact when the person is incapacitated due to alcohol or drugs – legally unable to give consent;
- o Includes any of the above between people of the opposite sex or the same sex.

What is Stalking?

Willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Harassment means conduct directed toward the victim that includes, but is not limited to, repeated or continuing nonconsensual contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress.

Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

What is Dating Violence?

Dating Violence: Violence against someone the accused is dating or has a sexual relationship with or has dated or had a sexual relationship with in the past.

- o Does not include fraternization between two individuals solely in a business or non-romantic context.

Violence includes, but is not necessarily limited to:

- o Intentionally inflicting, or attempting to inflict, physical injury on the victim;
- o Physical restraint;
- o Placing the victim in fear of physical harm to victim or victim's pets; or
- o Malicious damage to the victim's personal property (including pets).

What is Domestic Violence?

Domestic Violence: Violence against a person when the victim and accused are: current or former spouses; living together or have lived together; related by blood, adoption, or marriage; or children of a person in a relationship described above.

Violence includes, but is not necessarily limited to:

- o Intentionally inflicting, or attempting to inflict, physical injury on the victim;
- o Physical restraint;
- o Placing the victim in fear of physical harm to victim or victim's pets; or
- o Malicious damage to the victim's personal property (including pets).

Consent

An informed decision, freely given, made through mutually understandable words or actions that indicate a willingness to participate in mutually agreed upon sexual activity.

Consent, con't.

Consent cannot be given by an individual:

- who is asleep;
- unconscious; or
- mentally or physically incapacitated, either through the effects of drugs or alcohol or for any other reason; or
- is under duress, threat, coercion, or force.

Consent, con't.

- Past consent does not imply future consent.
- Silence or an absence of resistance does not imply consent.
- Consent can be withdrawn at any time.

Responsible Employee

- A Responsible Employee includes any employee:
- o who has the authority to take action to redress sexual violence;
 - o who has been given the duty of reporting incidents of sexual violence or any other misconduct by students; or
 - o whom a student could reasonably believe has this authority or duty.

Academic advisors are specifically designated as Responsible Employees.

Responsible Employee, con't.

- o You are a Responsible Employee.
- o You have a duty to report incidents of misconduct.
- o If a responsible employee fails to make required report, they are subject to disciplinary action.
- o Also, possibility of individual liability if a responsible employee fails to take appropriate action.

Responsible Employee, con't.

When you know, or reasonably should know, about incidents of sexual harassment and sexual violence, you **must** report.

Provide all details and facts – names of those involved, date, time, location, etc. – to Title IX Coordinator.

Reporting – Confidentiality

Before the student reveals info, tell him/her about:

- Your obligation to report any details shared.
- The student's option to report to Title IX team for a formal investigation.
 - The student has the option to **request** that MTSU maintain his/her confidentiality.
 - But, in some instances, the Title IX Team may not be able to keep information confidential.
- The student's option to share the info in complete confidence.
 - Counselors and health care providers can keep information completely confidential.
- The student's option to report to law enforcement.

Reporting – Confidentiality

The student's option to share the information confidentially:

- MTSU Counseling Center 898-2670
KUC 326 – S
- Domestic Violence and Sexual Assault Center
24 hour crisis line: (615) 494-9262
- MTSU Student Health Services 898-2988
1848 Blue Raider Drive

Reporting

The student's option to report the incident to law enforcement:

- MTSU University Police 898-2424
- Murfreesboro Police 893-1311
- Rutherford County Sheriff 898-7770

Reporting

- If the student reveals the information to you, it is your obligation to report all details.
- Because you are a "Responsible Employee," you must report.
- There is no confidentiality between students and their advisors.

Reporting

- You do not need to determine whether the alleged sexual harassment or sexual violence actually occurred, or that a hostile environment was created, before reporting an incident.
- If you know about an incident of sexual harassment/sexual violence, report it.

Reporting

- Title IX Coordinator:
 - Marian V. Wilson, Ph.D.
898-2185
marian.wilson@mtsu.edu
Investigates complaints involving faculty, staff and visitors.
Monitors and oversees Title IX implementation.
- Title IX Deputy Coordinators:
 - Athletics
Diane Turnham, 898-2938
diane.turnham@mtsu.edu
 - Students
Laura Sosh-Lightsy, 898-2750
laura.lightsy@mtsu.edu

Investigatory Process

- Investigation
- Interim Steps
- Remedies
- Potential Disciplinary Hearing

Americans with Disabilities Act

Americans with Disabilities Act, as amended

Purpose - to ensure that all individuals have equal access to the benefits of educational programs and activity.

Individuals with disabilities may require reasonable accommodation in order to provide this.

ADAAA, con't.

Disability and Access Center (DAC)

<http://www.mtsu.edu/dac/index.php>

DAC determines if a student is disabled, if he/she needs accommodation, and if so, what the reasonable accommodation will be.

FERPA

Family Educational Rights
and Privacy Act

What is FERPA and to whom does it apply?

- Federal law enacted in 1974 called "Family Educational Rights and Privacy Act"
- Purpose is to protect the privacy rights of student education records and to ensure the accuracy of those records
- Applies to currently enrolled or formerly enrolled students (regardless of age or parental dependency status)
- Applies to all institutions that receive Department of Education funds

What rights does FERPA afford students?

- o Right to inspect and review the record (all parts with two exceptions)
- o Right to request an amendment to the record that the student believes is inaccurate or misleading or violation of his/her privacy rights (recording error not substantive decision) and to request a hearing if request to amend is not granted
- o Right to consent to disclosure of personally identifiable information

What rights does FERPA afford students? con't.

- o Right to know what institution has designated as public/directory information and the right to request suppression of public/directory information
- o Right to know that school officials may access records and the criteria for determining that a school official has a legitimate need to know the information
- o Right to file a complaint with the Family Policy Compliance Office in the U.S. Dept. of Education

Is it an education record?

Most records from which a student can be personally identified and which are maintained by the institution regardless of its form (e.g., handwritten, print, database, disk, email, files, graded materials, class lists, individual student class schedules, financial aid records)

Things that are not Education Records

- o Information that is not recorded anywhere – only exists in your brain
- o “Sole possession” records – only possessed by maker for use as a memory aid.
- o Law enforcement records – MTSU police reports naming students
- o Employment records – employees who are also students
- o Alumni records – records created after student is no longer in attendance

If it is an education record, can you disclose it?

NO!

(Unless FERPA says you can)

Directory Information can be Disclosed

Set by MTSU Policy No. III:00:01 Access to Education Records

- o Name
- o Address, email address, telephone listing
- o Photograph
- o Year and place of birth
- o Major field of study
- o Enrolled hours
- o Student level (freshman, sophomore, etc.)
- o Participation in officially recognized activities and sports, weight and height of members of athletic teams
- o Dates of attendance
- o Degrees and dates conferred
- o Honors and awards and dates received
- o Most recent educational agency or institution attended by the student

Directory Information Use/Release

Must allow students opportunity to limit release of directory information

- o Registrar's office maintains records of all students who have requested non-disclosure
- o On SPAIDEN, the Confidential box is checked when a request is received; this causes the "Warning: Information about this person is confidential" message to display in Banner
- o In RaiderNet, on the Class List Summary and Class List with Student Detail links, a student who has requested non-disclosure will have "Confidential" after their name
- o If you receive an inquiry about a student who has requested non-disclosure, your response is "There is no information available about this person."
- o If student has not requested non-disclosure, we may release directory information

Who can view Non-directory Information?

The student always has access.

- o Mandatory - must allow the student to view
 - But we get 45 days to allow them to do so
- o Two exceptions:
 - Financial records of parents
 - Confidential letters of recommendation

Who can view Non-directory Information? con't.

Any outside party that has the student's written consent

- o Consent must:
 - Have a written signature and be dated;
 - Specify the records to be disclosed;
 - State the purpose of the disclosure; and
 - Identify to whom the disclosure can be made.
- o Permissive, do not have to release
- o Forward consents to Registrar's office, they will forward to University Counsel for review
- o Registrar will keep a copy of the consent in the education record

Who can view Non-directory Information? con't.

"School officials" with a "legitimate educational interest"

- o "School officials"
 - MTSU or TBR employees
 - Contractors (with appropriate contractual language)
 - Participants on official committees (i.e., disciplinary committees)
- o "Legitimate educational interest" – often referred to as "need to know"
 - Interest in reviewing student education records for the purpose of performing assigned institutional research, educational or administrative function
 - Guiding principle – If you need the data to perform your job duties, you should have access to it.

Who can view Non-directory Information? con't.

- o Parents of a dependent student as defined by the IRS code, who have claimed the student as a dependent on their most recent tax forms (must present a certified tax form)
- o A person in response to a lawfully issued subpoena or court order
 - Must give notice to student, etc.
 - Send all subpoenas for education records to Registrar

Other Exceptions

- o Health or safety emergency
- o If the student sues MTSU or MTSU sues the student
- o For audit/evaluation of educational programs (to Comptroller General of the U.S.; The U.S. Attorney General; The Secretary of the Dept. of Education; State and local educational authorities)
- o To other schools where student is enrolled or wants to enroll
 - But only for purposes of the enrollment
 - Determine identity of person requesting, if via phone, i.e. ask the person to send you an e-mail from their school e-mail account

What about Parents?

- Parents are considered a “third party” and do not have a right to student information (subject to the exception noted previously)
- May release directory information to them
 - But not if the student has opted out
- Refer all parental inquiries to the University College Advising Center/MT One Stop

What if a student seems in crisis?

- The health or safety emergency exception allows the release of private student data to any party determined to be able to assist the student
- Must document in the student’s record what was released, to whom, and for what reason
- Consult with Registrar and University Counsel before determining to release information

Guiding Principles regarding Private Student Information

- School officials shall not disclose personally identifiable information about a student nor permit inspection of those records without the student’s written permission unless it is allowed in one of the exceptions mentioned
- You have a legal responsibility to protect confidentiality of student records
- Only access what you need to know to do your job
- Curiosity does not equal legitimate need to know

What if you inadvertently release private data?

- o Notify your supervisor, Registrar and University Counsel
- o If possible, remove the material from public view

Communicating with Students

- o E-mail should only be sent from a MTSU e-mail account to a MTSU e-mail account or within D2L.
- o A student's e-mail address can be found on GOAEMAL in Banner, on the Class Email List in RaiderNet, or in the online directory.
- o All e-mails are considered education records and subject to FERPA regulations.
- o Grades can be sent to and from institutional e-mail accounts, including D2L, to individual students.

Communicating with Students, con't.

- o You can use Twitter, Facebook, and other social media to communicate. However, be sure that you are not disclosing PII or any part of a student's education record.
- o Be sure that any device you use to communicate with students or to store student data is secure, i.e. your desktop/laptop computers, tablets, smart phones. Password protection is the easiest way to do this. Also remember to protect items like flash drives.

Tennessee Open Records Act

- In contrast to FERPA, state records are open to Tennessee citizens for inspection or copying.
- Concerns records made and maintained in the course and scope of business.
- Includes employment records.
- FERPA (federal) trumps Open Records law (state).
- http://www.mtsu.edu/policies/pdfs/general_policies.pdf

Questions?

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