Legal Issues

New Faculty Orientation
September 4, 2015

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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
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.
Sexual Harassment

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

Sexual harassment is unwelcome conduct of a sexual nature including:

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

- *Quid pro quo* – work or educational benefits in return for sexual favors;
- Suggestive or inappropriate communications, emails, notes, letters, or other written materials displaying objects or pictures which are sexual in nature;
- Sexual innuendoes, comments, and remarks about a person’s clothing, body, or activities;
- Humor and jokes about sex that denigrate men or women;
- Sexual propositions, invitations, or pressure for sexual activity;
- 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;
- Implied or overt sexual threats;
- Suggestive or obscene gestures;
- 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.
Examples of Sexual Violence

- Sexual assault – rape, sodomy, sexual assault with an object, fondling, incest, or statutory rape;

- Engaging in sexual contact after the victim has said “No”;

- Sexual intercourse or sexual contact when the person is incapacitated due to alcohol or drugs – legally unable to give consent;

- Includes any of the above between people of the opposite sex or the same sex.
What is Sexual Assault?

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

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

Sexual contact includes, but is not limited to:

- Intentional touching of intimate parts; or
- 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.
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.

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

Violence includes, but is not necessarily limited to:

- Intentionally inflicting, or attempting to inflict, physical injury on the victim;
- Physical restraint;
- Placing the victim in fear of physical harm to victim or victim’s pets; or
- 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:

- Intentionally inflicting, or attempting to inflict, physical injury on the victim;
- Physical restraint;
- Placing the victim in fear of physical harm to victim’s pets; or
- 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 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

- Past consent does not imply future consent.
- Silence or an absence of resistance does not imply consent.
- Consent can be withdrawn at any time.
A Responsible Employee includes any employee:

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

Faculty are specifically listed as individuals who are likely to receive reports of sexual violence.
you are a responsible employee.

you have a duty to report incidents of misconduct.

if a responsible employee fails to make a required report, they are subject to disciplinary action.

also, there is the possibility of individual liability if a responsible employee fails to take appropriate action.
Responsible Employee

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.
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.
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

- There is no confidentiality between students and faculty.

- 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.
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
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 – Confidentiality

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
Consensual Relationships

- Not prohibited but strongly discouraged.
- Inherent inequality of power.
- Undue favoritism or perception of such, abuse of power, compromised judgment or impaired objectivity.
- Conflict of interest if supervises or evaluates.
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.
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.
MTSU has designated the Disability & Access Center (DAC) to determine reasonable and appropriate accommodations for students with qualifying disabilities as defined in Title II of the Americans with Disabilities Act (ADA AA) and Section 504 of the Rehabilitation Act. Accommodations cannot fundamentally alter any essential elements of a course.

STUDENT is registered with the Disability & Access Center. The following accommodation(s) has/have been approved by the DAC. Absent evidence that the accommodation(s) will fundamentally alter any of the essential elements of the course, they should be considered required (instructor should immediately contact DAC with questions or concerns regarding any accommodation):

- Reduced Distraction Environment for Exams/Quizzes
- 50% Extended Time for Exams/Quizzes
- Note Taker (For information on the note taker policy, please visit http://mtsu.edu/dac/note-takers.php)
- Due to the nature of the disability, this student needs to record lecture. The student understands that they will not release the recordings or transcriptions of class lectures or otherwise hinder the professor’s ability to obtain a copyright on said lecture. Violation will result in a loss or reduction in accommodations and services.

The student and instructor should discuss accommodation(s) to determine appropriate implementation. The DAC is a resource for consultation and any necessary direct intervention, e.g., test proctoring.

Should the student choose to pursue a revision of the listed accommodation(s), including exercising the right to rescind, that request must be made to the DAC. Accommodations should continue to be implemented, as listed, until the instructor receives written notification of the change.

More useful information can be found at http://www.mtsu.edu/dac/staff-tips.php.

This is a confidential record that should be maintained for the duration of the course and should not be released to a third party.
Reasonable accommodations will be required unless it can be shown that making such modifications would fundamentally alter the nature of the course or exercise.

Don’t have to waive courses or other academic requirements if it can be demonstrated that these are essential to the program of study.
The instructor has the primary responsibility for maintenance of academic integrity and controlling classroom behavior, and can order the temporary removal or exclusion from the classroom of any student engaged in disruptive conduct or conduct that violates the general MTSU rules and regulations for each class session during which the conduct occurs.
Extended or permanent exclusion from the classroom, beyond the session in which the conduct occurred, or further disciplinary action can be effected only through appropriate procedures of the institution. If an instructor wishes to remove a student from the classroom for a longer period of time or permanently, he/she must refer the student to the Office of Judicial Affairs and Mediation Services.
Disruptive Students, con’t.

Disruptive behavior – examples:

Obstructs or disrupts the learning environment (e.g., offensive language, harassment of students and professors, repeated outbursts that disrupt the flow of instruction or prevent concentration on the subject taught, failure to cooperate in maintaining classroom decorum, etc.);
Disruptive behavior – examples, con’t.

- Continued use of any electronic or other noise or light emitting device which disturbs others (e.g., laser pointers, disturbing noises from cell phones, laptop computers, games, etc.);

- Text messaging.
- Balance the responsibility to maintain classroom decorum with the rights of students to express their disagreement with points of view of others.
- If the debate or discourse proceeds with some degree of civility and allows the subject matter for the day to proceed, such expressions should not be characterized as disruptive. Exercise professional judgment in determining when conduct becomes disruptive such that the student may be excluded from the classroom.
Disruptive Students, con’t.

- Include in your syllabus behavior that is expected and behavior that may result in a student being removed from class.
- Set the example. Be respectful of students and their right to voice dissenting or opposing viewpoints.
- Address the misconduct/disruption immediately. Ask the student to alter his/her behavior. Tell him/her that he/she will be removed if he/she does not.
Disruptive Students, con’t.

- If the conduct threatens the safety of others, contact MTSU University Police at 2424.
- If conduct continues, you may direct the student to leave the classroom. If the student refuses, you may want to call MTSU Police.
- Document the incident as soon as possible. Include as much detail as possible.
- Send documentation to department chair.
- If conduct is severe or persists, consider filing a disciplinary complaint.
“Odd” or “Creepy” Students

Not, in itself, a basis for disciplinary action.

Student Assistance Coordinating Committee
http://www.mtsu.edu/countest/sacc/index.php
A resource and point of contact concerning students who may be distressed, depressed, disruptive, or otherwise problematic.

Dr. Jane Tipps, Counseling Services, 898–2670
Review the information at
http://www.mtsu.edu/judaff/disruptive.php
and
http://www.mtsu.edu/judaff/referrals.php
and complete the form online at:
Academic Misconduct

- Plagiarism. The adoption or reproduction of ideas, words, statements, images, or works of another person as one’s own without proper attribution. This includes self-plagiarism, which occurs when an author submits material or research from a previous academic exercise to satisfy the requirements of another exercise and uses it without proper citation of its reuse.
- Cheating. Using or attempting to use unauthorized materials, information, or aids in any academic exercise or test/examination.
- Fabrication. Unauthorized falsification or invention of any information or citation in an academic exercise.
May assign an appropriate grade for the academic exercise or exam, or an F in the course, as is proportional to the nature and extent of academic misconduct.

In every case, you must fill out an Academic Misconduct form.
Academic Misconduct, con’t.

Academic Misconduct Policy: http://www.mtsu.edu/policies/student-affairs/III-00-08.php
Provost’s webpage: http://www.mtsu.edu/provost/acadmisconduct.php
Information on referrals: http://www.mtsu.edu/provost/referrals.php
WHAT IS FERPA AND TO WHOM DOES IT APPLY?

- Purpose is to protect the privacy rights of student educational 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?

- Right to inspect and review the record (all parts with two exceptions)
- 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 a substantive decision) and to request a hearing if request to amend is not granted
- Right to consent to disclosure of personally identifiable information
WHAT RIGHTS DOES FERPA AFFORD STUDENTS?

- Right to know what institution has designated as public/directory information and the right to request suppression of public/directory information
- 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
- 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

- Information that is not recorded anywhere – only exists in your brain
- “Sole possession” records – only possessed by maker for use as a memory aid.
- Law enforcement records – MTSU police reports naming students
- Employment records – employees who are also students
- 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

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

Must allow students the opportunity to limit release of directory information

- Registrar’s office maintains records of all students who have requested non-disclosure
- 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
- 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
- If you receive an inquiry about a student who has requested non-disclosure, your response is “There is no information available about this person.”
- If student has not requested non-disclosure, we may release directory information
WHO CAN VIEW NON-DIRECTORY INFORMATION?

The student always has access to his/her education records.

- Mandatory – must allow the student to view

- Two exceptions:
  - Financial records of parents
  - Confidential letters of recommendation
WHO CAN VIEW NON-DIRECTORY INFORMATION?

Any outside party that has the student’s written consent:

- 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.

- Permissive, do not have to release

- Forward consents to Registrar’s office, they will forward to University Counsel for review

- Registrar will keep a copy of the consent in the education record
WHO CAN VIEW NON-DIRECTORY INFORMATION?

“School officials” with a “legitimate educational interest”
  ◦ “School officials”
    ▪ MTSU or TBR employees
    ▪ Contractors (with appropriate contractual language)
    ▪ Participants on official committees (i.e., disciplinary committees)
  ◦ “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?

- 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)
- 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

- Health or safety emergency
- If the student sues MTSU or MTSU sues the student
- 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)
- 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 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?

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

- E-mail should only be sent from a MTSU e-mail account to a MTSU e-mail account or within D2L.
- 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.
- All e-mails are considered education records and subject to FERPA regulations.
- Grades can be sent to and from institutional e-mail accounts, including D2L, to individual students.
COMMUNICATING WITH STUDENTS

- 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.

- 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/general-policies/I-03-01.php](http://www.mtsu.edu/policies/general-policies/I-03-01.php)
State Employee Immunity
Personal Liability

- State employees are immune from suit for negligent acts within the course and scope of their employment.

- If sued, would be represented by Attorney General’s Office, and would not be personally liable for any damages or costs.

- Claims Commission, Division of Claims
Personal Liability

NO coverage if act was:

- Unlawful
- Grossly negligent
- Outside scope and course of employment
- Willful, intentional, malicious
- Performed for personal gain
CONTRACTS AND SIGNATORY AUTHORITY

No authority to bind MTSU unless it’s been specifically delegated in writing.

May result in personal liability.

MT$ource: contract routing process.

Visit Contract Office website for further information.
CONFLICTS OF INTEREST

- MTSU Policy I:01:25 Ethics and Code of Conduct
- TBR Policy 1:02:03:10 Conflict of Interest

MTSU policy sets out:
- Professional Values
- Employment Responsibilities
- Conflict of Interest
- Professional Development
- Integrity of Information
- Reporting Fraud, Waste or Abuse of University Resources
CONFLICTS OF INTEREST, cont’d.

University resources are state property to be used only within the scope of employment, not for personal gain or benefit.

“Self-dealing” and textbooks.

Avoid conflicts of interest or even the appearance of impropriety.
OUTSIDE EMPLOYMENT

Any outside professional employment or business activity:

- Must not interfere with assigned duties
- Must not be a conflict of interest or compete with MTSU’s programs
- Must not be represented as connected to MTSU

Provide prior notice to department head of activities via form; will determine if there is conflict or interference with duties.

Questions?

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