Sexual Harassment – Implementing the New OGC Policy

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UT System Office of General Counsel’s Educational Seminars
The Model Policy
Overview

• The Policy—what triggers it
• Key players in the complaint process
• Key issues in the investigative process
• Key issues in the disciplinary process
Precedence of OGC Model Policy – Why do we have it?

- UT System Regents’ *Rules and Regulations*, Rule 30105, *Sexual Harassment and Misconduct and Inappropriate Consensual Relationships*

- Institutions must adopt policies and procedures prohibiting sexual harassment for publication in *Handbook of Operating Procedures*

- Substantial Compliance with OGC model policies (i.e., minimum standards)
Scope of Claims Investigated—More than Sexual Violence and Sexual Assaults

- Domestic Violence
- Dating Violence
- Stalking

See Definitions and Examples Section of Policy

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To Whom Does the Policy Apply?

• Administrators
• Faculty
• Staff
• Students
• Any third party within University’s control
Reporting Complaints of Sexual Harassment/Sexual Violence
Where does a Complainant Report?

- Title IX coordinator or designee
- Responsible Employee
- Law Enforcement
- Confidential Resources (i.e. Pastor, Victim’s Advocacy Center, Counseling Center)
The “Responsible Employee”

• Who is a “Responsible Employee”?  
  ➢ Administrators, faculty, supervisory staff, resident life directors and advisors, graduate teaching assistants or anyone else who student *reasonably believes* has duty to report  
    ✓ NOT employee with confidentiality obligations

• What triggers reporting?  
  ➢ “Knew or should have known” of sexual violence/assault, domestic violence, dating violence or stalking

• Where does the R.E. report?  
  ➢ Title IX Coordinator (or designee)  
    ❖ Role of Title IX Coordinator vs. Judicial Affairs  
    ✓ Communication is Key

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Confidential Reports

- Professional/pastoral counselors, physical and mental health care providers, student health centers and victim advocates

  - Confidentiality laws protect them from reporting incidents of sexual harassment

  - Must have student consent to report

- Allows students to seek the help they need
The Investigative Process
Beginning the Investigation

• Begin the investigation promptly.

• The investigator(s) will be assigned by the Title IX Coordinator or the individual determined by institutional policy/practice.

• Consider having at least one male and one female on the investigative team. They should both be present throughout the initial intake interview and each part of the investigation.

• One individual should be designated the “note taker.”

• The investigator is a neutral party.

• The investigator is NOT a counselor, but is there to provide information, acknowledge the emotions that are felt, and refer that person to the proper resources if a need for counseling is indicated.

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Creating a Strategy for Action

- Refer to the Policy for timelines and deadlines.
- If there is a concurrent police investigation, your investigation may need to be delayed (within reason).
- Prior to starting the investigation, the investigator should create a preliminary timeline that includes general time frames for interviewing witnesses, gathering documents, completing a draft report, etc.
- Prepare questions in advance for relevant witnesses.
- If any concerns exist about completing the investigation in the required time, the investigator should notify the Title IX coordinator or designee.
Interviewing the Complainant

• The first step in the investigation will be interviewing the complainant, if the intake person is different from the investigator. Set aside at least two hours.

  ➢ May be embarrassed, upset. Allow conversation to wander.
  ➢ Efficiency is not the goal of the interview. Establish rapport and a comfortable environment.
  ➢ OGC recommends that the investigator not record the interview.

• Tell the complainant he/she may bring an advisor to the interview.

• Begin the interview by describing its purpose, the institution’s commitment to eradicating sexual harassment and sexual misconduct, and its non-retaliation policy.

• Do not promise absolute confidentiality.

• Discuss interim measures.

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Notifying the Accused

• “When” to notify the accused = strategic decision.

• In some circumstances, best to notify accused right away; in other circumstances, interviewing witnesses and accumulating evidence first may be best.

• Discuss interim measures, if applicable.

• Remind the accused about confidentiality and non-retaliation.
Concluding the Investigation and Evaluating the Evidence

- Ensure that all evidence has been examined and all leads exhausted.

- Remember the standard of proof: “greater weight of the credible evidence.”

- In situations where there are no other witnesses, look at all the facts and circumstances.
  - The investigator should assess credibility of both parties
  - Review statements for internal consistency
  - Consider the timing of the complaint in relation to the occurrence of the behavior

- In situations with witnesses, evaluate the testimony, credibility, and other evidence.

- Consult with administration, legal counsel, experts as needed.
Preparing the Report

- Review the Complaint.
- Develop findings of fact.
  - List the evidence and what it shows.
  - Assess credibility within the report.
  - Make a determination as to whether the evidence preliminarily establishes a violation of policy is more likely than not to have occurred.
- Make your conclusion regarding policy violations, and cite concretely the reasons for this conclusion in your written report.
- Refer the complaint and your findings to the Title IX Coordinator.
Accessibility and Confidentiality of the Report

• Prepare the report in a manner that protects the confidentiality rights of the parties and witnesses.
  ➢ Use key rather than include PII

• Review Privacy Considerations
  ➢ Students involved = FERPA
  ➢ Witnesses = Common Law privacy
  ➢ Complainant = Common Law privacy
  ➢ Respondent = Due Process

• Allow complainant and respondent to inspect the report or, at University’s discretion, provide a summary of findings to both parties.
Key Issues in the Disciplinary Process
Determining Which Policy is Applicable

• Who is the Respondent?
  - Student = Student Disciplinary Procedures
  - Faculty = Regents’ Rules and Regulations regarding termination of faculty
  - Classified staff = Classified Staff Disciplinary Procedures
  - Administrative and Professional (A&P) staff = most likely no specific procedure
  - Visitor = Most likely no specific procedure

• What if Respondent is an employee and a student?
  - Factors to consider:
    ✓ Context in which violation occurred
    ✓ Primary status of Respondent
  - E.g. Respondent is both a maintenance worker and a student
Timely Hearings

• OCR Expectations
  ➢ Prompt and Equitable Response
    ✓ Complexity of investigation
    ✓ Severity and extent of alleged conduct
  ➢ Generally 60 days to complete the process:
    ✓ complaint
    ✓ investigation
    ✓ hearing to determine violation
    ✓ sanction and remedies
Imposing Discipline

- Student Discipline
  - Administrative Disposition to determine if case can be resolved
  - Administrative Disposition in cases under SH/SA policy requires *both parties agree* to:
    - Findings
    - Sanctions
    - Waiver of hearing and appeal
  - 10 days notice of hearing
  - Rules regarding requests for postponement
    - Agreement of Parties
    - Hearing Officer for “Good Cause”
- Lessons Learned = Set the hearing and stick to it. *Do not delay.*
- Faculty or Staff Discipline
  - See applicable disciplinary policies
Conducting the Student Discipline Hearing

- Pre-hearing issues
  - Time limitations
  - Submitting questions in advance
- Presence of Complainant
  - In person (visible or behind a screen)
  - Skype
  - Phone
- Presence and Role of a Representative
- Questioning the Complainant and Respondent
  - Questions submitted in advance to Hearing Officer
  - Active role of Hearing Officer
    - Ask questions
    - Discover the truth
- Evidence of complainant’s sexual history limited
Deciding the Discipline Case

• Burden of Proof:
  - greater weight of credible evidence = more likely to have occurred than not.

• Consent
  - voluntary, mutually understandable agreement for each instance of sexual activity:
    - consent to one act does not imply consent to another
    - past consent does not imply future consent
    - any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent
  - Not voluntary if:
    - physical force
    - incapacitation
Deciding the Student Discipline Case (Continued)

• Policy adopts “no means no” (plus)
  - Any expression of an unwillingness to engage in any instance of sexual activity establishes a \textit{presumptive} lack of consent.

• Policy does not adopt “yes means yes”
  - Why not?
    - \textbf{Remember:} This policy extends to committed relationships and there are circumstances where a party does give “affirmative” consent throughout every step of the sexual encounter.
    - Must evaluate the totality of the circumstances.
Sanctions and Other Effective Remedial Action

- **Sanctions**
  - Expulsion
  - Suspension
  - Counseling
  - Alcohol Education
  - Community Service
  - Anger Management
  - Restitution

- **Other Remedial Action**
  - Counseling
  - Escort
  - Class schedule
  - Group education

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RESOURCES

• OGC Model Policies
  – http://www.utsystem.edu/ogc/general/modelpolicies.htm
WRAP UP

• More QUESTIONS? (if time!)
• This is one presentation in a series of seminars that OGC will be offering this year.
• For more information on Title IX please contact OGC at (512) 499-4462.
• We will be emailing you a written set of all of the questions (and answers) we didn’t get through today.
Thank you for your support

• We hope you will tune in again next month!

• If you would like to set up a training on another legal topic through the UT System Office of General Counsel, please contact Tamra English (tenglish@utsystem.edu) or Jason King (jking@utsystem.edu).