Office of Legal Affairs: Our Role and Who We Serve

- History of OLA on campus
- Who do we serve?
  - Provide legal advice to campus leadership, faculty and staff (that means you!)
  - Attorneys for the University, not any particular individual
- Coordination with OGC/Oakland
- Attorney-Client Privilege
5 experienced attorneys (principal analyst and executive assistant) with expertise in many subject matter areas in higher education.

- Litigation oversight
- Constitutional issues
- Academic & Student Affairs
- Intellectual property
- Library law
- Employment law
- Disability accommodation
- Title IX/Title VI compliance
- Construction
- Procurement
**What Is Your Role As Chair?**

- **Receive** information – **spot the issue**
- **Refer** individuals to available services
- **Report** to appropriate administrative office
What Is your Authority As Chair?

• You have ability to bind the University
• Important – know what is delegated to you and what is within your authority (e.g., contracting authority)
ACCOMMODATIONS/DISABILITY COMPLIANCE

• Chairs respond directly to requests for accommodation from:
  – Faculty
  – Department Staff

• Chairs may be asked to resolve accommodation issues between faculty and students.

• Always engage in interactive process (keep ball in play)
INTERACTIVE PROCESS

• Generally, individual with disability must:
  – initiate by making a request for accommodation
  – use the designated process
    • Students: Disabled Students Program
    • Staff: Supervisor (PPSM)
    • Faculty: Chair (APM 711)

• It is the Chair’s responsibility to:
  – Decide whether to grant or deny request
  – If granted, to ensure implementation of faculty/staff accommodations

• Note: funding may be available if cost is more than $1,000
FACULTY ACCOMMODATIONS

• APM 711 - Campus Faculty Accommodation Process

• Chair’s decision based on:
  – Medical documentation
  – Appropriate to the individual
  – Feasible for University
MEDICAL DOCUMENTATION

• Confidentiality: disclose only to those who “need to know” (not colleagues)

• Documentation’s purpose is for expert to identify
  – functional limitations of the disability, e.g., cannot stand longer than 20 minutes
  – suggest methods to accommodate, e.g., 15 minute break every 20 minutes

• University is NOT entitled to know diagnosis or treatment

• UHS/Disability Management Services available to interface with doctor, review medical documentation, and make recommendations to Chair
Accommodation must be Appropriate/Feasible

**Appropriate**: addresses mental/physical limitations imposed by disability so as to enable faculty to perform ESSENTIAL FUNCTIONS of job

**Feasible**: not an UNDUE HARDSHIP for the University nor a fundamental conflict with its ACADEMIC STANDARDS or mission (consult with Disability Compliance before denying accommodation request)
STUDENT ACCOMMODATIONS

If student does not have Letter of Accommodation
  – Refer student to Disabled Students Program (DSP)

Consequences of by-passing DSP
  – If department (without DSP) grants the accommodation request
    • University has now “regarded student as having disability”
    • May appear retaliatory if you say no to later request
    • Most importantly, lack of consistency in academic standards (arbitrariness)
    • Exception: conveniences/courtesies accorded all students, e.g., sit in front of class to better see/hear
  – If department (without DSP) denies student’s accommodation request
    • Unfair to student: decision made without expertise or authority
    • Risk of University liability for failing to properly accommodate
DSP LETTER OF ACCOMMODATION

• DSP is designated campus unit for determining student academic accommodation

• Letter of Accommodation (LOA) vs. Informal DSP letters/emails

• LOA is binding on department UNLESS Disability Compliance determines that implementing LOA would:
  a. Fundamentally alter nature of academic program, e.g.,
     – Compromise Academic Standards or
     – Otherwise defeat purpose/operation of program
  b. Cause undue hardship

• There is (almost) always a creative solution to meet both department and student needs
DEPARTMENT EVENTS

• Department is responsible for cost of accommodations (e.g., sign language interpreter or captioner) for its lectures, colloquiums, etc.

• Hold public events in wheelchair accessible locations

• Best practice: include accommodation contact info on event notices

• Campus Access Specialist Danny Kodmur (510) 643-6456
TITLE IX – IT’S NOT JUST ABOUT SPORTS!

- 1972 – Title IX signed into law by President Nixon
- 2002 – renamed the Patsy T. Mink Equal Opportunity in Education Act
- Prohibits discrimination based on sex in education programs and activities that receive federal financial assistance
- Enforced by Office for Civil Rights with Dept. of Education
TITLE IX

• Title IX (20 U.S.C. Section 1681) provides:

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 educational program or activity receiving Federal financial assistance.
WHAT TYPES OF DISCRIMINATION DOES TITLE IX PROHIBIT?

• Discrimination based on sex
  – Sexual harassment and violence
  – Failure to provide equal opportunity in athletics
  – Discrimination based on pregnancy and parenthood (See NWLC 2012 report)

• Retaliation

• Don’t forget about Title VI
OVERLAP BETWEEN VARIOUS LAWS
RENEWED FOCUS ON SEXUAL VIOLENCE

• High-profile sexual assault complaints and incidents on college campuses including UC Berkeley:
  — June 2014 - 64 Colleges under investigation by OCR
  — May 2014 - 55 universities under investigation by Clery
  — 2013-14 CSA Audit of UCB/UCLA

• April 2014 OCR guidance – Questions/Answers on Title IX and Sexual Violence

• “Not Alone” - White House Task Force Report
  — Notalone.gov – White House website focused on survivor information and support
RENEWED FOCUS ON SEXUAL VIOLENCE

• Federal and state legislation
  • SB 967 – Affirmative Consent Standard
  • HR 5269 - HALT (Hold Accountable/ Lend Transparency)
• Student activism
  • Know Your IX
  • 6000/7000 in solidarity
• Tremendous press coverage
RENEWED FOCUS ON SEXUAL VIOLENCE

UCB RESPONSE:

• Tone from the Top
  ▪ Chancellor Dirks commitment
  ▪ Letters to campus community

• Enhanced survivor resources
  ▪ One Stop Website:
    ❖ Survivorsupport.berkeley.edu
  ▪ Confidential Survivor advocate
  ▪ Additional investigators

• Prevention/Education Efforts

• Stop Violence campaign

• Feb. 24, 25 - National Conference on Campus Sexual Assault/Violence
TITLE IX – OVERSIGHT

Office for Civil Rights – primary enforcement agency

BUT OTHERS ARE INTERESTED TOO:

- AUDITS - California State Auditor, NASA, NSF, Energy, Education (Title IX compliance for women in sciences)
- Department of Fair Employment & Housing (CA)
- Equal Employment Opportunity Commission - (Federal)
- OFCCP – affirmative action and equal employment opportunity for those who do business with the Federal government.
The University has a duty to promptly respond to complaints of sexual harassment and sexual violence in a way that stops the harassment, prevents its recurrence and remedies its effects.
Title IX: What Are the Issues?
Dynamics of Sexual Assault

- Nature of victimization
- Counter-intuitive victim behaviors
- Delay in reporting
- Wavering level of cooperation/recantation
- Role of drugs and alcohol
- Most sexual assaults committed by someone known to the victim
- Most sexual assaults are achieved through threats, intimidation, and exploiting vulnerabilities or incapacitation
- Likelihood of repeat offenders and undetected predators
- Little to no physical or forensic evidence
- Most common defense is consent
- Decisions based solely on credibility
- Inability to completely eliminate occurrence
- Emotionally charged and incendiary in nature
Title IX: What Are the Issues?

The Student Perspective

- Don’t know how to find information
- Don’t know what to expect in process
- Lack of clarity in policy
- Not being informed of all available options
- Not being treated fairly
- Feeling judged or isolated
- Inadequate support during and after the process
- Lack of transparency in the process
- Dissatisfaction with outcomes
Title IX: What Are the Issues?

The Student Perspective

• Failure to Warn/Log/Report
• Complainants Discouraged From Reporting
• Parties Not Informed of Rights in Process
• Failure to Provide an Adequate, Reliable, and Impartial Investigation
• Adjudication Lacks Fair, Informed Process
• Harassment During the Adjudication Process
  – Inadequate Training of Implementers
  – Inadequate Training of Hearing Panels
Title IX: What Are the Issues?

The Student Perspective

- The Complaint Process not Prompt and Equitable
- Failure to Accommodate Documented Disabilities
- Inadequate Sanctions
- Inconsistent Granting of Appeals
- Unequal Access to Appeals
- Retaliation Concerns
- Inadequate Education and Prevention Programs
- Rape Myths Perpetrated by Administration
- Lack of Communication and Coordination that Compound the Impact on Students
Title IX: What Are the Issues?

The Student Perspective

• Faced with an overly legalistic process with no one to translate policy into terms the student can understand

• Feeling like you have to be your own attorney (or get one) and prove your own case, rather than the college or university having the responsibility to ask the questions and gather whatever evidence is necessary to figure out what happened.
Title IX: University Concerns

- Personal/Emotional Concerns
- Resources
- Policy Concerns
- Implementation and Process Concerns
- Reporting
- Training
- Getting It Right
- Confidentiality and Complainant/No Consent
- Investigations
- Disclosure of outcomes
- Evaluating Credibility
- Coordination of Constituencies
- Legal Concerns
WHAT DO I SAY?
**Title IX – What do I say?**

- Do not promise confidentiality
- Refer to confidential resources
- Report to OPHD (Denise Oldham, Title IX Coordinator)
- Academic accommodations may be required
TITLE IX – What Should You Do?

• RECEIVE Complaints – no promises of confidentiality
• REFER to Resources
  - Title IX - Report
  - UCPD - crimes
  - Gen Eq - support/advocacy
  - Office of Legal Affairs

• CONFIDENTIAL RESOURCES
  - Confidential Survivor Advocate
  - UHS - counseling/medical
  - Student Ombudsperson

• REPORT - to Title IX, CSC, UCPD, Legal
TITLE IX – What Should You Do?

• As Dept. Chairs, set the tone for the department
• Ensure that you are educated about University policies/procedures
• Encourage others (faculty, GSI, etc.) in your department to meet education obligations
  – AB 1825: online or in person
  – Understand student training
  – APM 015: Conflicts of interests arising from consensual relationships
• Establish relationship with Title IX Coordinator
PRIVACY AND OTHER FERPA ISSUES

REGULATIONS THAT GOVERN PRIVACY OF STUDENT RECORDS:

- Federal Family Educational Rights and Privacy Act (educational records)
- UCOP Policy Applying to the Disclosure of Information from Student Records
- UC Berkeley Policy Regarding Disclosure of Information from Student Records
- California Information Practices Act (non-educational records)
- Verbal communications are not records, but privacy is still important with regard to things that have not been written down.
What constitutes a regulated “record?”

- Most records about the student maintained by any office for any purpose
- Generally not covered are personal notes and other personal records that are not available to anyone other person
PRIVACY AND OTHER FERPA ISSUES

Who can see records?

- Records can be shared within UC Berkeley when the person requesting the record has a “legitimate educational interest” in seeing the record.
- The record is relevant and necessary to the accomplishment of some task or determination.
- The person requesting the record has employment responsibility or other subject matter assignment related to the task or determination.
- Students are generally entitled to see the records that are maintained about them.
PRIVACY AND OTHER FERPA ISSUES

What About Emails?

• Emails are “where the action is”
• Emails are, generally, records
• Emails should be considered permanent and “un-deletable”
• Same goes for text messages and real-time chat messages
• In a legal dispute, as opposed to “real life,” emails are more analogous to letters on letterhead than they are to casual conversations
• Be aware of the Public Records Act
• Bottom line: The only effective time to edit an email is before you hit the “send” button
CASE STUDY #1: THE STUDENT WITH AN INTERESTING PAST

An instructor forwards you an email trail. The substance of the emails includes the following:

The instructor believes that one of the students in his class is dangerous. The instructor forwards to an advisor an essay that the student wrote, which is not responsive to the writing prompt—it discusses gun ownership and the importance of the Fourth Amendment to the maintenance of a free American society. The advisor then enters a Google search on the student, and finds news articles indicating that the student had been acquitted of criminal murder charges in 2012. The instructor consults his aunt, an attorney, about the situation, and sends her a copy of the essay. There is an email from the aunt stating that based upon the “alarming content of the essay” and the student’s “criminal history,” the department chair should warn the whole department about the student’s “past and weapons obsession” in order to “mitigate the risk that the student represents.”
A student has made a last minute request that an instructor give the student two extra weeks to turn in an assignment because the student’s brother has just died in an accident. This is the third time the student has sought an extension because of an alleged family emergency since the beginning of the semester, and the instructor is suspicious. The instructor emails the student’s college advisor to ask if the student has told the college advisor about this alleged family tragedy. The college advisor responds that she cannot discuss the student’s personal situation with the instructor “because of FERPA” and because “my conversations with students regarding personal matters are understood to be confidential.”
ACADEMIC PERSONNEL REVIEWS: WHAT’S THE WORST THAT COULD HAPPEN?

*Academic personnel lawsuits are no fun at all:*

- Expensive, even if you win ($500,000 through trial) and especially if you lose (7 figures)
- Extraordinarily disruptive and time consuming: discovery, depositions, meetings, trial
- Often result in disclosure of confidential review materials (plaintiff’s and others’)
- Can create or intensify departmental divisions
- Damage departmental reputation
- Second-guessing, and possible reversal, of academic judgments by lay jury
WHY DO DISAPPOINTED CANDIDATES SUE?

- A belief that the process was “unfair”
  - Not treated equally
  - Outcome was a surprise
- Lack of support through process
- Unsupportive or divisive departmental climate
- Cousin is a lawyer
WHAT ARE GROUNDS FOR SUIT?

• Not merely that decision was “incorrect” — Courts generally defer to academic decision-making
• Plaintiff must generally show either:
  – Significant procedural irregularities altered outcome or
  – Unlawful factors influenced decision
    • Discrimination (gender, race, disability, age)
    • Retaliation for reporting discrimination, illegal activity, free speech
  – Resolution of these claims can undermine normal deference to the University decision-making
“Bad Facts”

Despite legal rules, juries tend to ask “was the process fair?” Bad facts include:

- Procedures not explained to candidate
- Procedural errors (even small ones)
- Inconsistent procedures
- Inconsistently applied promotion standards
- Lack of notice of problems, chance to correct
- Evidence of pre-determined outcome
- Evidence of decision-maker or reviewer bias
More Bad Facts

- Divided department
- Uncollegial, unsupportive departmental climate
- Prior discrimination allegations
- “Stray comments”—references to race, gender, age
HEADING OFF THE BAD FACTS

• *Documented* efforts to mentor candidates through the process

• *Clear and candid* assessment of progress and expectations

• Attention to procedural details, quick correction of errors

• Documentation of rationale for and notice of changes in process or standards

• Prompt response to/reporting of complaints that could be the basis for retaliation claims
QUESTIONS & ANSWERS
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