Overview for SF State Administrators:
Understanding Your EO 1095-, 1096- and 1097-Related Responsibilities

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Portions adapted with permission from CSU Chancellor’s Office, General Counsel (2014; 2015; 2016; 2019)
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Scope of the Problem

- 1 in 5 women experience completed/attempted sexual assault while in college
  - 12 sexual offenses, 3 dating violence & 4 stalking reported in 2017 under Clery definitions
  - 138 sexual violence reports filed with the Title IX Coordinator in AY 2017-2018
  - Among SF State students, 17.9% reported experiencing sexual touching without consent; 7.1% stalking; 17% report experiencing a emotionally, physically or sexually abusive intimate relationship
- About 90% of victims know their offenders
- Less than 5% of sexual assaults are reported
- While sexual violence disproportionately affects women and transgender students, more than 6% of men are sexually assaulted in college
- Regardless of victim’s gender, men are disproportionate majority of perpetrators

Sources: US DOJ Reports – Findings from the National Violence Against Women Survey (2000); The Sexual Victimization of College Women (2000); Association of American Universities Campus Climate Survey (2015); ACHA National College Health Assessment (Spring 2018)
CSU Executive Orders

- **CSU Executive Orders currently undergoing review and revision**

Summary of Compliance Duties for Administrators

1. **Clarify** the scope of confidentiality with students & colleagues proactively
   - Prior to disclosure if possible
   - Include the syllabus clause passed by Senate and approved by President
2. **Participate** in all requested training in a timely manner
3. **Elevate** concerning events/incidents to Equity Programs & Compliance ASAP
   - Usual lines of authority do not apply for Title IX- & DHR-related incidents
   - Leave investigation to the Equity Programs & Compliance Office
4. **Refer** victims/survivors when they disclose an incident to appropriate resources on campus
   - If out of danger: Equity Programs & Compliance Office; The SAFE Place; Counseling & Psychological Services; Office of Human Resources/EAP
   - If in immediate danger: University Police Department, local law enforcement
5. **Respond** from the role of an institutional officer, i.e., fiduciary responsibility
   - Document, document, document!
   - Interrupt and intervene
No Matter Where It Happens…

• SF State obligated to review and, if warranted, investigate info regarding possible sexual violence, when it is reported to the university or when it becomes aware of sexual violence, that:
  o takes place on or near campus;
  o is connected with university programs or activities, whether on or off campus, including online or overseas;
  o creates a hostile environment; and/or
  o involves a complainant or respondent who is a current student or employee.

• 93% of crimes against students occur off campus. (US DOJ, 2005: [http://www.bjs.gov/content/pub/pdf/vvcs02.pdf](http://www.bjs.gov/content/pub/pdf/vvcs02.pdf))

Significant Policy Elements

• Broad category of prohibited behavior: **sexual misconduct**
  o Includes any sexual activity engaged in without affirmative consent, where affirmative consent means an informed, conscious, voluntary, and mutual agreement to engage in sexual activity.

• Employees are prohibited from entering into a consensual relationship with any student or employee over whom they exercise direct or otherwise significant academic, administrative, supervisory, evaluative, counseling, or extracurricular authority.

• Both Complainants and Respondents have the right to appeal the finding of an investigation, as well as appeal any sanctions imposed following a finding of responsibility in an EO 1096/1097 incident.
Significant Policy Elements

- While reporting as soon as possible maximizes SF State’s capacity to respond effectively to a reported incident, there is not a time limit for when a Complainant may come forward to report a potential violation of policy.

- Complainants may request an Early Resolution Process when filing a complaint under EO 1096/1097:
  - Purpose is to explore whether the Complainant’s concern(s) can be resolved by SF State without an investigation.
  - Takes place in lieu of an investigation.

- Employees, as well as students, have access to a confidential victim-advocate through The SAFE Place if they wish to have one.

Office of General Counsel Memo* (9/7/18)

- Each party must be given a written report of the evidence and be given the opportunity to question the other.

- Interviews and questioning must be “live”:
  - In cases where credibility of the Parties is a central issue in deciding what facts should be believed (e.g., "word against word" cases), the questioning process must allow the finder of fact to personally observe each Party’s demeanor and behavior during the course of questioning.

- The Investigator is the finder of fact:
  - Role of the Coordinator/Administrator is limited to (i) reviewing whether the Investigator complied with procedural aspects of EO 1096/1097, and (ii) verifying whether the facts, as determined by the Investigator, establish a violation of EO 1096/1097 by a preponderance of the evidence standard.

Gender Identity Discrimination Prohibited

- Institutions of higher education must provide equitable educational access to students who are pregnant, nursing or parenting.
  - Visit http://titleix.sfsu.edu/content/pregnant for more information.
  - Students who need academic accommodations while experiencing pregnancy or immediately after childbirth should visit the Disability Programs & Resource Center (dprc@sfsu.edu) in SSB 110
- We must treat students equitably, regardless of gender.
  - SF State continues to expand the number of restrooms that are gender inclusive. Please visit http://titleix.sfsu.edu/content/all-gender-restrooms for the most updated list.
  - Preferred name should be used in all cases, without requiring ID

SF State Changes to Improve Response

- Senior Deputy Title IX Coordinator/DHR Administrator for employees and 3rd parties was administratively relocated in July 2017 to Equity Programs & Compliance from Office of Labor Relations
- Services and support of an ombuds (Dean of Equity Initiatives, Dr. Christina Sabee) is available to faculty and staff (as of July 1, 2017)
  - Is not granted confidentiality under EO 1096 so this arrangement is viable
- Discrimination complaints filed with external agencies are coordinated through Equity Programs & Compliance (as of 7/1/17)
- Division of Equity and Community Inclusion
  - Offer proactive education & outreach to improve campus climate
  - Provide training/technical assistance to reduce incidents of discrimination
  - Implement institutional/systemic strategies to promote equity & inclusion
Equity Programs & Compliance

Prohibited Conduct

- **Sexual Misconduct** - any sexual activity without first obtaining Affirmative Consent to the specific activity, whether or not the conduct violates any civil or criminal law.
  - Includes any unwelcome physical sexual acts such as Sexual Assault, Sexual Battery, Rape or Dating/Domestic Violence
  - May include use of physical force, violence, threat, or intimidation, ignoring the objections of the other person, causing the other person’s intoxication or incapacitation through the use of drugs or alcohol, or taking advantage of the other person’s incapacitation (including voluntary intoxication) to engage in sexual activity.

Affirmative Consent

- An informed, affirmative, conscious, voluntary, and mutual agreement to engage in sexual activity
  - Each person involved in the sexual activity is responsible to affirm consent of the other participant(s), even if they are intoxicated or incapacitated
  - Lack of protest or resistance does not affirm consent, nor does silence
  - Must be voluntary and given without coercion, force, threats or intimidation
  - The existence of a dating/social relationship or past sexual activities between those involved, cannot be assumed to be an indicator of affirmative consent
  - A request to use a condom or birth control does not, in and of itself, constitute consent
  - Consent can be withdrawn or revoked at any time, and once withdrawn, sexual activity must stop immediately
  - Consent to one form of sexual activity (or one sexual act) does not constitute consent to other forms or instances of sexual activity
Affirmative Consent - continued

- Cannot be given by a person who is incapacitated, defined as an individual who:
  - Is asleep or unconscious
  - Due to the influence of drugs, alcohol or medication cannot understand the fact, nature or extent of the sexual activity
  - Lacks the physical and/or mental ability to communicate or to make informed, rational decision
  - Is a person with a medical or mental disability who lacks the capacity to give consent.
  - Is a minor (a person under 18 years old) – even if they give consent

- Incapacitation due to alcohol or other drugs depends on extent of impact to the person’s decision-making ability, awareness of consequences, and ability to make informed judgments.

Types of Sexual Misconduct

- **Sexual Assault:** An attempt, coupled with the ability, to commit a violent injury on another because of that person’s gender or sex
- **Sexual Battery:** Any willful/unlawful use of force or violence upon another because of that person’s gender or sex as well as sexual touching against that person’s will for the purpose of sexual arousal, gratification, or abuse
- **Rape:** Non-consensual sexual intercourse that may involve the use or threat of force, violence or immediate bodily injury, or threats of future retaliation and duress; any sexual penetration, however slight, is sufficient to constitute rape
  - **Acquaintance Rape** is committed by an individual known to the victim, including a person the victim may have just met
Prohibited Conduct - continued

- **Domestic violence**: Abuse committed against someone who is a current or former spouse; current or former cohabitant; someone with whom the Respondent has a child; someone with whom the Respondent has or had a dating or engagement relationship; or a person similarly situated under California domestic or family violence law.

- **Dating violence**: Abuse committed by a person who is or has been in a social or dating relationship of a romantic or intimate nature with the victim; this may include someone the victim just met.

Prohibited Conduct - continued

- **Stalking**: Engaging in a repeated Course of Conduct directed at a specific person that would cause a reasonable person to fear for their or others’ safety or to suffer Substantial Emotional Distress.
  - **Course of Conduct**: Two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through 3rd parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property;
  - **Substantial Emotional Distress**: Significant mental suffering or anguish that may, but does not necessarily require, medical or other professional treatment or counseling.
Sexual Harassment

- Unwelcome verbal, nonverbal or physical conduct of a sexual nature that includes but is not limited to sexual advances, requests for sexual favors, any other conduct of a sexual nature, offering employment benefits or giving preferential treatment in exchange for sexual favors, or indecent exposure, where:
  - **Quid Pro Quo**: Submission to, or rejection of, the conduct by the Complainant is explicitly or implicitly used as the basis for any decision affecting a term/condition of or decision about the Complainant's employment (1096), academic status/progress, or access to benefits/services, honors, programs, or activities available at or through the University (1097);
  - **Hostile Environment**: The conduct is sufficiently severe, persistent or pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of the Complainant, and is in fact considered by the Complainant, as creating an intimidating, hostile or offensive environment.

Discrimination

- **Discrimination** means **Adverse Action** taken against a student, employee or 3rd party by the CSU, or by a CSU employee or student, because of a **Protected Status**.
- **Adverse Action** means an action that has a substantial and material adverse effect on the Complainant's employment or ability to participate in a University program or activity free from discrimination, harassment or retaliation.
  - Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.
- **Protected Status** includes Age, Disability, Gender, Genetic Information, Nationality, Marital Status, Race or Ethnicity, Religion, Sexual Orientation, and Veteran or Military Status.
Retaliation

- Adverse Action taken against someone because they have or are believed to have:
  - Exercised rights under this Executive Order;
  - Reported or opposed conduct which they reasonably and in good faith believes is in violation of EO 1095/1096/1097;
  - Assisted or participated in a policy-related investigation/proceeding regardless of whether the complaint was substantiated;
  - Assisted someone in reporting or opposing a violation of EO 1095/1096/1097 or retaliation.

- Retaliation may occur whether or not there is a power or authority differential between the individuals involved.

Focus: Veteran or Military Status

- Reiterate that these constitute a protected status.
- Nature of this status “feels” different from gender, age, race, etc.
  - “It’s a personal choice”
  - Metaphors invoking the military are not considered as socially taboo.
- Factors which may impact vulnerability to discrimination claims:
  - History of institutions of higher education leading resistance to and protest of US military action
  - Perceived tension between “higher ed” culture and norms versus “military” culture and norms.
Focus: Disability - Protected Status

- Disability, as defined in CA Government Code § 12926 and the federal Americans with Disabilities Act (ADA), 2008 Amendments:
  - Having a physical or mental condition that limits a major life activity. “Limits” means making the achievement of a major life activity difficult, determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the measure itself limits a major life activity. A “major life activity” is broadly construed and includes physical, mental, and social activities (such as walking, talking, seeing, hearing) and working; or
  - Having a known history of a qualifying impairment; or
  - Being regarded or treated as having or having had a qualifying impairment; or
  - Being regarded or treated as having or having had such an impairment that has no presently disabling effects but may become a qualifying impairment in the future.
- Includes HIV/AIDS; temporary medical condition may be considered a disability (Summers v. Altarum, 2013) – obligation to accommodate
- See https://www.dol.gov/odep/pubs/fact/employ.htm for more info

Is it a “Title IX” Incident?

- Executive Orders 1096/1097 are used to guide campus response to both incidents of alleged Title IX violations and incidents of alleged Discrimination, Harassment & Retaliation
- While all violations of Title IX are by definition violations of EO 1096/1097, not all violations of EO 1096/1097 are Title IX violations
- Title IX incidents refer specifically to the following:
  - Sexual harassment
  - Discrimination on the basis of sex, gender and/or gender identity
  - Sexual misconduct (sexual assault, sexual battery, rape, dating/domestic violence, and/or stalking
Title IX, Violence Against Women Act & Campus SaVE Act

• Title IX
  o A federal law prohibiting discrimination on the basis of sex in an educational institution’s academic, extracurricular and athletic activities
  o Protects all persons, regardless of gender or gender identity, from sexual harassment and sexual violence, which are forms of sex discrimination
  o VAWA amends Clery Act, which already requires campuses to:
    ◦ Report annual crime statistics
    ◦ Develop and publish prevention policies and procedures
  o Campus SaVE Act:
    ◦ Clarifies that “sexual violence” now also includes domestic violence, dating violence and stalking
    ◦ Requires policies that address and prevent sexual violence through specified training, education, and discipline procedures

Academic Freedom & Title IX/DHR

  o Academic freedom does not mean individuals can say whatever, whenever
    ▪ Time, place and manner of expression can be reasonably regulated
    ▪ Expression that violates the law can be restricted
    ▪ Most hate speech is still protected speech
  o If the speech arises out of the creative process, informs student learning, is grounded in pedagogical purpose, and is not directed specifically at any student, then it is protected (Lyle v. Warner Brothers Television Productions, Supreme Court of CA, April 20, 2006)
  o “Title IX is intended to protect students from sex discrimination, not to regulate content of speech...The offensiveness of a particular expression as perceived by students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program” (emphasis added).” (USDOE OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 2001, p. 22)
### Training & Outreach

- **Orientation programs**
  - New students
  - New faculty/staff

- **Ongoing prevention & awareness campaigns**
  - Refresher for all students (including transfer, graduate, online, and extended education, regardless if credit is awarded or not)
  - All faculty & staff (including lecturers and grants/contracts staff)
  - Residence hall paraprofessionals & staff
  - Members of fraternities & sororities
  - Student-athletes, coaches & intercollegiate athletics staff

- **Annual employee training**
  - For those involved in implementing EO 1096/1097/1098 policy/procedures

- **Annual mandatory notices**
  - Inclusion of applicable EO 1095 attachments in publications

- **Violence prevention, bystander intervention programming and ongoing education to reduce sexual misconduct**
  - Provided by Health Promotion & Wellness

### Confidentiality & Sexual Misconduct

**Three separate categories of reporters:**

- Physicians, mental health counselors, sexual assault/domestic violence advocates, clergy, etc.
  - Must maintain **complete** confidentiality

- Law enforcement employees
  - May maintain **partial** confidentiality

- Title IX Coordinator and all other employees (including ombudsperson)
  - Can only provide **minimal** confidentiality
  - Exception: union representatives
Duty to Report: The CSU Bottom Line

- Except as noted by policy, any Employee who knows or has reason to know of allegations/acts that violate EO 1095/1096/1097 shall promptly inform the DHR Administrator or Title IX Coordinator.
  - All info must be disclosed, including the names of the Parties, even where the person has requested confidentiality.
  - The DHR Administrator/Title IX Coordinator will determine whether confidentiality is appropriate given on a case-by-case basis.
- The University strongly encourages victims to report sexual violence directly to the campus Title IX Coordinator or designee.
- To reduce retaliation, please [do not use the chain of communication](#).
- If a victim seeks assistance or support at The SAFE Place they retain control regarding the outcome of a disclosure.
- We are ultimately incident responsive, not complaint driven – even if we do not investigate, we may have a duty to inquire & intervene.

Elements of the Investigation

**Trauma-Informed Response for the Complainant**
- Accessible support resources
- Interim and ultimate remedies
- Confidential advocacy and assistance
- Protection from retaliation
- Choice to participate in the investigation
- Parity in due process
- Timely intervention and investigation

**Fair Process Rights for the Respondent**
- Notified of charges
- Explanation of evidence used to determine finding
- Opportunity to provide evidence
- Have an advisor of choice
- Hearing on the proposed discipline
- Opportunity to appeal
Investigations: General Parameters

- Title IX Coordinator oversight is required throughout
- Experienced investigators who are trained on a regular basis
- Neutral, unbiased, thorough and conflict of interests minimized
- Preponderance of the evidence standard applies, i.e., 50% plus a feather

Student Complaint Timeline

- Intake interview – within 10 working days after receipt of complaint
- Notice of investigation decision – within 10 working days
- Investigative report completed – within 60 working days
- Notice to both parties – within 10 working days
- Appeal of finding to be submitted to CO – within 10 working days
- Response on appeal (with extension allowed) – within 30 working days
- Timeline may be extended by investigator/appeal officer or mutual agreement of the parties for reasonable time period not to exceed an additional 30 working days for either investigation or appeal review
- Possible total number of working days = 190 (approx. 9-1/2 months)
Investigations: Coordination
With Criminal Proceedings

- May not wait for conclusion of police investigation (University or local)
  - May need to wait while police gather evidence
  - Must promptly resume and complete Title IX investigation
- Title IX Coordinator should be granted access to University police investigation notes and findings
- Can coordinate with local law enforcement

Findings of Responsibility

- For students - sanctioning for violating CSU Student Conduct Code is addressed via Executive Order 1098 by the Student Conduct Administrator
- Represented employees – outcomes are determined in accordance with the prevailing collective bargaining agreement in close consultation with Human Resources and/or Faculty Affairs
- MPP employees – appointees are “at will” and consequences are determined administratively, commensurate with the finding of responsibility
**How Can You Make An Impact?**

- Know how to access applicable CSU Executive Orders & campus policies
- Program names, numbers & emails of key points of contact in your phone
- Listen actively & leverage teachable moments to promote learning about
  - gender inequity & discrimination
  - social justice with regard to all marginalized identities, e.g., disability
  - root causes of sexual violence
- Recognize and exercise fiduciary responsibilities as an MPP administrator
- Role model intervention/interruption behaviors: the “power of one”
  - Division of Equity & Community Inclusion can provide technical assistance
- Conduct an environmental scan within your work team, unit or department
  - Elevate potential areas of concern to the Equity Programs & Compliance personnel
  - Engage in regular dialogue, self-inventory and improvement efforts

**Who To Contact – Referral Guide:**

- If the complainant/victim is a student, regardless of the who the respondent is or where the incident occurred:
  - **Katon Dalton**, Manager, Equity Programs & Compliance; Sr. Deputy Title IX Coordinator/DHR Administrator for Students (kdalton@sfsu.edu; cell: 415-338-2967)
- If the complainant/victim is a CSU employee or 3rd party, regardless of who the respondent is or where the incident occurred:
  - **Dr. Christina Sabee**, Dean of Equity Initiatives; Sr. Deputy Title IX Coordinator/DHR Administrator for Employees & 3rd Parties (csabee@sfsu.edu; cell: 415-338-2032)
- If primary contact cannot be reached, or if unclear whether an incident falls under EO 1095/1096/1097:
  - **Sara Lewis**, Assistant Manager, Equity Programs & Compliance (saral@sfsu.edu; cell: 415-338-6053)
  - **Dr. Luoluo Hong**, VP for Student Affairs & Enrollment Management; Title IX Coordinator & DHR Administrator (luoluo@sfsu.edu; cell: 415-666-6313) – also receives & reviews Consensual Relationship Disclosures

*See [http://titleix.sfsu.edu/Title-IX-Organization-Chart](http://titleix.sfsu.edu/Title-IX-Organization-Chart) for updates*
THANK YOU!

For more information, please visit http://titleix.sfsu.edu

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