

Overview for SF State Faculty & Academic Leaders:
**Understanding Your Title IX- &
DHR-Related Responsibilities**

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*Portions adapted with permission
from CSU Chancellor's Office,
General Counsel (2014; 2015;
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Scope of the Problem

- 1 in 5 women experience completed/attempted sexual assault while in college
 - Under Clery definitions: 6 rape, 4 dating/domestic violence & 3 stalking incident reported in 2014; these figures were 9, 4 and 10 respectively in 2015
 - Under Executive Order 1095: 85 Title IX-related reports were filed with Title IX Coordinator in AY 2014-15; this figure was 86 in AY 2015-16
- 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); ACHA National College Health Assessment (Spring 2015)



Summary of Title IX Duties for Faculty

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 potentially concerning events/incidents to the Title IX/DHR office ASAP
 - Usual lines of authority do not apply for Title IX & DHR
 - 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: Title IX 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 duty

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Title IX, Violence Against Women Act & Campus SaVE Act

- Title IX
 - A federal law prohibiting discrimination on the basis of sex in an educational institution's academic, extracurricular and athletic activities
 - Protects all persons, regardless of gender or gender identity, from sexual harassment and sexual violence, which are forms of sex discrimination
 - **VAWA amends Clery Act, which already requires campuses to:**
 - ❖ Report annual crime statistics
 - ❖ Develop and publish prevention policies and procedures
 - **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

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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:
 - takes place on or near campus;
 - is connected with university programs or activities, whether on or off campus, including online or overseas;
 - creates a hostile environment; and/or
 - 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>)

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CSU Executive Orders

- EO 1095: *Systemwide Sex Discrimination, Sexual Harassment, Sexual Misconduct, Dating and Domestic Violence & Stalking Policy* (<http://www.calstate.edu/EO/EO-1095-rev-6-23-15.html>)
- EO 1096: *Systemwide Policy Prohibiting Discrimination, Harassment, Retaliation, Sexual Misconduct, Dating/Domestic Violence & Stalking against Employees & Third Parties and Systemwide Procedure for Addressing Such Complaints* (<https://www.calstate.edu/eo/EO-1096-rev-10-5-16.html>)
- EO 1097: *Systemwide Policy Prohibiting Discrimination, Harassment, Retaliation, Sexual Misconduct, Dating/Domestic Violence & Stalking against Students and Systemwide Procedure for Addressing Such Complaints* (<https://www.calstate.edu/eo/EO-1097-rev-10-5-16.html>)
- EO 1098: *Student Conduct Procedures* (<http://www.calstate.edu/EO/EO-1098-rev-6-23-15.html>)
- *New revisions for EO 1096 and 1097 released October 5, 2016*

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Significant Policy Elements (6/23/15)

- A new category of prohibited behavior added: **sexual misconduct**
 - 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 now have the right to appeal the finding of an investigation, as well as appeal any sanctions imposed following a finding of responsibility in a Title IX incident.

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Significant Policy Elements (6/23/15)

- While reporting as soon as possible maximizes SF State's capacity to respond effectively to a reported incident, there is no longer a time limit for when a Complainant may come forward to report a potential violation of policy.
- Complainants may now 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.
- Employees, as well as students, will have access to a confidential victim-advocate through The SAFE Place if they wish to have one.

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Dear Colleague Letter (May 13, 2016)

- Reiterates civil rights protections for transgender students
- Campus must not treat a transgender student differently from the way it treats other students of the same gender identity
- No medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity
- Requiring students to produce identification documents that reflect their gender identity in order to treat them consistent with their gender identity may violate Title IX when doing so has the effect of limiting or denying students equal educational access
- Must provide transgender students equal access to educational programs/activities even in circumstances in which other students, parents, or community members raise objections or concerns

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SF State Changes to Improve Response

- Senior Deputy Title IX Coordinator/DHR Administrator for employees and 3rd parties has been administratively relocated to Equity Programs & Compliance from Office of Labor Relations
- Services and support of an ombuds will be available to faculty and staff (anticipated start date January 1, 2017)
- Discrimination complaints filed with external agencies will be coordinated through Equity Programs & Compliance (as of 1/1/17)
- Office of Human Relations will be reestablished
 - 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
 - Plan & deliver program interventions to foster civil discourse & social justice

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Key Definitions: Sexual Misconduct

- **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.

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Key Definitions: Sexual Misconduct

- Sexual activity includes, but is not limited to, kissing, touching intimate body parts, fondling, intercourse, penetration of any body part, and oral sex
- Women, men and transgender individuals can be victims
- The Respondent's prior/present relationship to the Complainant is irrelevant.

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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

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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.

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Types of Sexual Misconduct

- o **Sexual Assault:** An attempt, coupled with the ability, to commit a violent injury on another because of that person's gender or sex
- o **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
- o **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

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Prohibited Conduct

- o **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.
- o **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

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Prohibited Conduct

- o **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

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Sexual Harassment

- o 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.

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Sexual Harassment

- o Sexual Harassment could include
 - Being forced to engage in unwanted sexual contact in exchange for a raise or promotion;
 - Being subjected to video exploitation or a campaign of sexually explicit graffiti; or
 - Frequently being exposed to unwanted images of a sexual nature in the work environment.
- o Sexual Harassment also includes acts of verbal, non-verbal or physical aggression, intimidation or hostility based on gender or sex-stereotyping, *even if those acts do not involve conduct of a sexual nature.*

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Discrimination

- o 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.
- o 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.
- o Protected Status includes Age, Disability, Gender, Genetic Information, Nationality, Marital Status, Race or Ethnicity, Religion, Sexual Orientation, and Veteran or Military Status.

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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.**

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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)

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Academic Freedom & Title IX/DHR

- 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
- In the instructional setting, if the speech arises out of the creative process, informs the intellectual development and learning of students, is grounded in pedagogical purpose, and is not directed specifically at any student, then it is protected (see *Lyle v. Warner Brothers Television Productions*, Supreme Court of California, April 20, 2006)
- “Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.” (University of Chicago Freedom of Expression Committee Report, 2015)

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Academic Freedom & Title IX/DHR

- “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.” (USDOE Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 2001, p. 22)
- “In the language of rights, yes, drinking is a problem, but there's no problem, because everyone should take care of himself or herself. In the languages of caring and community, on the other hand, drinking is a problem, because we are all interconnected, involved, and affected by each other's behaviors and because we all, through the norms we establish and the values we live, influence each other's choices.” (Keeling, 1994)

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Campus Title IX Coordinator

- ❑ Each campus required to have just one
- ❑ May have one or more deputy coordinators
 - ❖ Each deputy must report to/be supervised by T9C
 - ❖ Accountability trumps reporting lines
 - ❖ Covers from “soup to nuts”
- ❑ Ultimately responsible campus-wide:
 - ❖ Training, education & prevention
 - ❖ Investigations, sanctions & notifications
 - ❖ Victim support & remedies



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Education & Training

- **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 and coaches
- **Annual employee training**
 - ❖ For those involved in implementing Title IX policy/procedures
- **Annual mandatory notices**
 - ❖ Inclusion of applicable EO 1095 attachments in publications



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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



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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-base basis
- The University strongly encourages victims to report sexual violence directly to the campus Title IX Coordinator or designee
- 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



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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

Due 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

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Investigations: General Parameters

- Title IX Coordinator oversight is required throughout
- Experienced investigators who are trained on a regular basis
- Neutral, unbiased, thorough and no conflict of interests
- *Preponderance of the evidence standard applies, i.e., 50% plus a feather*



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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)

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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



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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 levied 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

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How Can You Make An Impact?

- Know how to quickly access applicable CSU Executive Orders & University policies
- Program names, numbers & emails of key points of contact in your phone
- Listen actively & leverage teachable moments to promote reflection, discussion & learning on issues of
 - gender inequity & discrimination
 - social justice with regard to all marginalized identities, e.g., disability
 - root causes of sexual violence
- Role model intervention/interruption behaviors: the “power of one”
- Conduct an environmental scan within your work team, unit or department
 - Elevate potential areas of concern to the Title IX/DHR personnel
 - Engage in regular dialogue, self-inventory and improvement efforts
- For more on faculty involvement: <http://www.facultyagainstrape.net>

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Who To Contact – Referral Guide:

- If the complainant/victim is a student, regardless of the who the perpetrator is or where the incident occurred:
 - **Mary Ann Begley**, Interim Associate VP & Dean of Students (Email: begley@sfsu.edu); Mobile: (415) 336-5331
- If the complainant/victim is a CSU employee or 3rd party, regardless of who the perpetrator is or where the incident occurred:
 - **Katon Dalton**, Equity Programs & Compliance Manager (Email: kdalton@sfsu.edu; Mobile: 415-235-5555)
- If unsure who to contact, if primary contact cannot be reached, or if unclear if an incident falls under EO 1095/1096/1097:
 - **Luoluo Hong**, VP for Student Affairs & Enrollment Management (Email: luoluo@sfsu.edu; Mobile: 415-666-6313)
- See <http://titleix.sfsu.edu/Title-IX-Organization-Chart> for updates

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THANK YOU!

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

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