Title IX Training: An Integrated and Coordinated Approach
San José State University

Presented by:
Peter C. Lim, Member
Interim Title IX and Gender Equity Officer

The Institutional Response Group | Cozen O’Connor
Gina Maisto Smith, Chair
Leslie M. Gomez, Vice Chair

February 24, 2023
I
1 Framing The Context
2 The Clery Act
3 The Final Title IX Regulations

II
1 CSU Nondiscrimination Policy: Prohibited Conduct Defined
2 CSU Nondiscrimination Policy: The Three-track System

III
1 Effective Practices: Implementation At SJSU
2 Supportive Measures

IV
1 Obligation To Investigate
2 Formal Complaints
3 Notice of Investigation
4 Basic Requirements of Grievance Processes
5 Evidence Gathering
6 Evidentiary Considerations
7 Evidence Review
8 Investigative Report
FRAMING THE CONTEXT
Framing the Conversation

- We Don’t Know What We Don’t Know
- Flip the Lens
- Embrace the Tension
- Together We are Better than the Sum of our Parts
The Context

Regulatory Framework

Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence

Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution
Central process to uniformly vet all complaints of sexual and gender-based harassment and violence

University’s Response Policies/Procedures
Informed by:
- University Counsel
- Criminal Law (Loc. Law Enforcement)
- Title IX (OCR)
- Clery Act (DOE)
- VAWA (DOE)
- Child Protective Services (CPS)
- FERPA (DOE)
- HIPAA (HHS/CMS/OCR)
- State Laws (AG)
- NCAA
- DOJ
- Open Records
- VFAA (HH/CMS/OCR)
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The Challenge of the Context
Identifying the Parties

Complainant/victim/survivor/reporting party/accuser

Respondent/offender/accused/responding party/perpetrator

Inclusivity & Avoiding Reinforcement of Negative Perceptions/Myths

“He said/she said” vs. “word-against-word credibility assessment”

“Believe” or “feel” vs. “experience” “story” vs. “account”

Individuality

Inclusivity

Respect

Neutral, Non-judgmental

Process Words

Investigation

Review

Assessment
Federal Regulatory Framework

1. Title IX
   - Title IX of the Education Amendments of 1972
     - Prohibits sex discrimination in educational institutions that receive federal funds

2. Clery
   - The Jeanne Clery Act (1990)
     - Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

3. VAWA
   - The Violence Against Women Reauthorization Act of 2013
     - Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees
Implementation Rubric

- Law
- Regulations
- Guidance
- Preamble and commentary
- OCR webinars, charts, blog
- Policy
- Higher education experience
- Institutional values
Title IX passed as part of the Education Amendments of 1972

1972

Clery Act passed requiring institutions of higher education to enhance campus safety efforts

1990

2001 Revised Sexual Harassment Guidance

2001


2013

April 4, 2011: Office for Civil Rights (OCR) releases its “Dear Colleague Letter” (DCL) ushering in a new era of federal enforcement

2011

April 2015: Title IX Coordinator Guidance and Resource Guide

2015

June 2016: Revised Clery Handbook released

2016

November 2018: Notice of Proposed Rulemaking

2018

August 14, 2020: deadline for schools’ implementation of new regulations

2020

2017 Q&A released

2017

October 20, 2014: Department of Education issues final negotiated rules implementing VAWA; effective July 1, 2015

2014

2017 Sexual Harassment Guidance published

1997

April 29, 2014: OCR releases Questions and Answers on Title IX and Sexual Violence

2014

Change in Federal Enforcement Approach

2021

Change in Federal Enforcement Approach

2021 Q&A released

2021

New Regulations imminent
Framing the Context

The Hierarchy

Law
- Title IX

Implementing Regulations
- Title IX Implementing Regulations (2020)

Significant Guidance Documents
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A (Rescinded)
- Preamble to Title IX Implementing Regulations

Guidance Documents
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance (Rescinded)
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation

Resolution Agreements and Advisory-ish Guidance
- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blogs
Recent Court Cases

When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” Doe v. Allee, 242 Cal.Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

“In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” Boermester v Carry, No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020)

“If credibility is in dispute and material to the outcome, due process requires cross-examination.” Doe v. Baum 903 F.3d 575, 585 (6th Cir. 2018)

“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.” Doe v. Univ. of the Sciences, No. 19-2966, 2020 WL 2786840 at *5 (3d Cir. May 29, 2020)
The Courts on Due Process and Fundamental Fairness

- **2017**

- **2018**

- **2019**

- **2020**

The Courts on Due Process and Fundamental Fairness

**Doe v. Brandeis University:** Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accuser, (4) cross-examination of evidence or witness statements, and an effective appeal.

**2016**

**Doe v. Rectors and Visitors of GMU:** A university provide an accused student with notice of the full scope of charges.

**2017**

**Doe v. University of Southern California:** A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

**Doe v. Regents of the University of California**

**Doe v. Trustees of Boston College**

**Doe v. Claremont McKenna College:** When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.

**2018**

**Doe v. Baum:** When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.
The Courts on Due Process and Fundamental Fairness

2019

**Doe v. Allee (USC):** Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.

**Doe v. Rhodes College:** An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

2020

**Doe v. Purdue University:** Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.

**Boermeester v. Carry:** In a DV case, the state court ruled, "...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing."

**Doe v. Rensselaer Poly. Inst.:** Court enjoined RPI from applying its 2018 policy and procedures to conduct alleged to have occurred pre-2020 regulations, despite OCR’s guidance that the 2020 regulations did not need to be applied retroactively.

**Doe v. Univ. of the Sciences:** Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.
THE CLERY ACT
The Clery Act (As Amended by VAWA)

Core Tenets:

- Governs a school’s response to sexual assault, dating violence, domestic violence and stalking (and other crimes)
- Applies to Clery-defined crimes reported to campus security authorities that occur on Clery geography
- Requires procedural and educational components that do not fully align with Title IX requirements
- Requires reporting of crime statistics through
  - Daily crime log
  - Annual security report
- Includes a duty to warn/timely warnings
THE CLERY ACT

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

• **Prompt, fair, and impartial process** from the initial investigation to the final result

• Conducted in a manner consistent with the institution’s policies and transparent to the accuser and accused

• The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**

• The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present

• The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings
THE CLERY ACT

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- Officials are appropriately **trained** and do not have a **conflict of interest or bias** for or against the accuser or the accused
- The proceeding is completed in a **reasonably prompt timeframe**
- Explicit provision noting that institutions may extend their reasonably prompt deadlines for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused **receive simultaneous notification**, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final
THE FINAL TITLE IX REGULATIONS
• 2033 page document issued by the U.S. Department of Education, Office for Civil Rights (OCR) on May 6, 2020
• Includes significant resource materials: a preamble, executive summary, overview of public comments, discussion of directed questions, regulatory impact analysis and other content
• Final regulations are located at page 2008-2033
• Official version (2082 pages) were released May 19, 2020
• Regulations implemented as of August 14, 2020
Regulations Formally Incorporate Sexual Harassment as a Form of Sex Discrimination

• Title IX obligations related to sexual harassment as a form of sex discrimination had not been formally addressed in the regulations

• “These final regulations impose, for the first time, legally binding rules on recipients with respect to responding to sexual harassment.”
“Because these final regulations represent the Department’s interpretation of a recipient’s legally binding obligations, rather than best practices, recommendations, or guidance, these final regulations focus on precise legal compliance requirements governing recipients.”
CSU NONDISCRIMINATION POLICY: PROHIBITED CONDUCT DEFINED
Prohibited Conduct Defined

1. Discrimination
   Discrimination is (an) Adverse Action(s) against a Complainant because of their Protected Status.
   a. Adverse Action means an action engaged in by the Respondent that has a substantial and material adverse effect on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or those reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.
   b. If Adverse Action is taken because of a Complainant's Protected Status, that means the Complainant's Protected Status is a substantial motivating reason (but not necessarily the only reason) for the Adverse Action.
   c. An allegation that an Employee is receiving unequal pay because of their Protected Status (for example, under Equal Pay Act) constitutes a Discrimination Complaint under this Nondiscrimination Policy.

2. Harassment
   Harassment means unwelcome verbal, nonverbal, or physical conduct engaged in because of an individual Complainant's Status.
   a. If a Complainant is harassed because of their Protected Status, that means the Complainant's Protected Status is a motivating reason (but not necessarily the only reason) for the conduct.
      Harassment may occur when:
      i. Submitting to, or rejecting, the verbal, nonverbal, or physical conduct is explicitly or implicitly a basis for:
         i. Decisions that adversely affect or threaten the Complainant's employment, or Complainant's academic status or progress, or access to benefits, services, honors, programs, or activities provided by the university.
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<th>Prohibited Conducts</th>
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<tbody>
<tr>
<td>1</td>
<td>Discrimination</td>
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<td>2</td>
<td>Harassment</td>
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<td>3</td>
<td>Sexual Misconduct</td>
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<td>Sexual Harassment</td>
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<td>5</td>
<td>Sexual Exploitation</td>
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<td>6</td>
<td>Dating Violence, Domestic Violence</td>
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<td>7</td>
<td>Stalking</td>
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<td>8</td>
<td>Prohibited Consensual Relationships</td>
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<td>9</td>
<td>Retaliation</td>
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CSU NONDISCRIMINATION POLICY: THE THREE-TRACK SYSTEM
Education Program or Activity includes all the operations of the CSU as well as locations, events, or circumstances over which the CSU exercised substantial control over the Respondent (Student, Employee, or Third Party) and the context in which the Sexual Harassment occurs. Education Program or Activity also includes any building owned or controlled by the CSU or a student organization that is officially recognized by the CSU.
**Track 1** applies when the alleged conduct:

- Meets the definition of Sexual Harassment as defined in Article VII.C of the Nondiscrimination Policy; and
- Occurred in the United States; and
- Occurred in an education program or activity at the university, as defined in Track 1

**Note:** Articles IV through XI are not applicable to complaints under Track 1. Please reference the above link for the applicable Track 1 Procedures.
THE THREE-TRACK SYSTEM

Track 1

Track 2 applies when the alleged conduct:
- The Complaint is against a Student; and
- The Complaint is one of Sexual Misconduct, Dating Violence, or Domestic Violence; and
- The credibility of one (or both) of the Complainant and the Respondent ("the Parties"), or any witness is central to the determination as to whether the Student violated the Nondiscrimination Policy; and
- The Student is facing a severe disciplinary sanction (expulsion or suspension) if found to be in violation of the Nondiscrimination Policy.

Track 3
Track 3 applies when the alleged conduct:

- Prior to a Notice of Investigation being sent to the Complainant and the Respondent, the Title IX Coordinator/DHR Administrator will determine which Track applies.
- Under Track 1 or 2, the campus will conduct an investigation, and the Complaint will proceed to a hearing unless otherwise resolved. An Investigator will first interview the Complainant, the Respondent, and any witnesses, and gather any documentary evidence. The hearing will occur once an investigation has finished. During the hearing, a hearing officer listens to the witnesses, including the Complainant and the Respondent, and analyzes the evidence, before deciding whether or not the Respondent violated the Nondiscrimination Policy.
- Under Track 3, an Investigator interviews the Complainant, the Respondent, and any witnesses, gathers any documentary evidence, analyzes the evidence, and decides whether or not the Respondent violated the Nondiscrimination Policy. There is no hearing in Track 3 cases.
The Definitions of Prohibited Conduct for Track 1

https://calstate.policystat.com/policy/12891658/latest/#autoid-76kv2
The Three-Track System

Narrow Application Under the New Title IX Regulations (Track 1)

1) The new regulations narrow the definition of Sexual Harassment and require SJSU to dismiss when the alleged conduct does not meet the new definitions.

2) The new regulations require SJSU to dismiss a Formal Complaint when the conduct did not occur within in an education program or activity in the United States.

3) The new regulations require SJSU to dismiss if the Complainant is not participating in or attempting to participate in the education program or activity at the time the Formal Complaint is filed.
INVESTIGATIONS UNDER THE CSU NONDISCRIMINATION POLICY
(Applies To All 3 Tracks)
<table>
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<th>Step</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Formal Complaint</strong></td>
<td>Filed by Complainant or Signed by Title IX Coordinator</td>
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<tr>
<td><strong>Notice of Allegations</strong></td>
<td>With sufficient detail and time for a party to prepare for an initial interview</td>
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<td><strong>Investigation</strong></td>
<td>Thorough search for relevant facts and evidence</td>
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<td>Conducted by a trained investigator who is free from conflicts of interest or bias</td>
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<td><strong>Evidence Review</strong></td>
<td>Of any evidence that is directly related to the allegations</td>
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<tr>
<td><strong>Written Responses to Evidence</strong></td>
<td>10-day review period, Parties may submit written response</td>
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<tr>
<td><strong>Investigative Report</strong></td>
<td>Fairly summarizes relevant evidence, Includes inculpatory and exculpatory evidence</td>
</tr>
<tr>
<td><strong>Written Responses to Report</strong></td>
<td>10-day review period, Parties may submit written response</td>
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CAMPUS LEVEL IMPLEMENTATION
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<th>Fall 2021</th>
<th>Fall 2022</th>
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<tr>
<td>Live trainings</td>
<td>6</td>
<td>42</td>
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<td>Tabling events</td>
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Fully Staffed Title IX Office

Karina Hernandez  
Title IX Analyst

Wendi Liss  
Interim Deputy Title IX Coordinator

Peter Lim  
Interim Title IX & Gender Equity Officer  
Interim Deputy Title IX Coordinator

Andrew Nguyen  
Interim Title IX Project Manager

Mary Keating  
Title IX Investigator

Arielle Egan  
Title IX Investigator
Redesigned Website for the Title IX Office

A Safe Campus Starts With You
Help keep SJSU free from sexual harassment, sex discrimination and gender inequality of all types. SJSU’s Title IX and Gender Equity Office is committed to protecting all people regardless of their gender or gender identity from sex discrimination, which includes sexual harassment, sexual misconduct, dating/domestic violence, stalking, pregnancy and pregnancy-related conditions.

Reporting a Title IX Incident
If you or someone you know has experienced sex discrimination or sexual misconduct, we encourage you to file a report or contact the Title IX and Gender Equity Office.
New Title IX Informational Materials

Important Informational Materials

The Title IX and Gender Equity Office is available to answer your questions. We have also created the following informational materials to help you understand certain aspects of our work. The informational materials are as follows:

- Confidential and Non-confidential Resources Flyer [pdf]
- Complainant Rights and Options Trifold [pdf]
- Respondent Resource Guide [pdf]
- Reporting Options Flyer [pdf]
- Resolution Options Flowchart [pdf]
- Formal Resolution Flowchart [pdf]
- Informal Resolution Flowchart [pdf]
- Guide for Responsible Employee and Confidential Resources [pdf]
- Wellbeing Attendant Policy: Wallet Card [pdf]
Improvements to the Quality and Timeliness of Investigations

<table>
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<tr>
<th>Timeframe When the Notice of Investigation Was Issued</th>
<th>Average # of working days to issue the Preliminary Investigation Report</th>
<th>Average # of working days to issue the Final Investigation Report</th>
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<tbody>
<tr>
<td>Reporting Period 1 (09/21/21 to 12/31/21)</td>
<td>165 (Representative sample size = 3 investigations)</td>
<td>184 (Representative sample size = 2 investigations)</td>
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<tr>
<td>Reporting Period 2 (01/01/22 to 06/30/22)</td>
<td>77  (Representative sample size = 7 investigations)</td>
<td>122 (Representative sample size = 6 investigations)</td>
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<tr>
<td>Reporting Period 3 (07/01/22 to 12/31/22)</td>
<td>84  (Representative sample size = 3 investigations)</td>
<td>126 (Representative sample size = 1 investigation)</td>
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Additional Updates

- Continued collaboration with the DOJ: October 2022 Campus Visit
- The New Wellbeing Attendant Policy
- The Title IX Office’s Marketing Campaign
- Regular Campus-Wide Updates on the Title IX Office
EFFECTIVE PRACTICES: IMPLEMENTATION AT SJSU
Key Elements of Effective Practices

- Title IX Coordinator
- Integration of Reporting Responsibilities
- Trauma-Informed Investigations
- Multi-Disciplinary Team
- Uniform Policy and Procedures
- Communication & Documentation
- Privacy vs. Confidentiality
- Centralized Reporting and Response
- Education and Prevention
Key Elements of Effective Practices

• Title IX Coordinator
  1. Independent
  2. Appropriately resourced

• Coordinated multi-disciplinary response team
  1. Coordination of information
  2. Coordination of personnel

• Privacy v. confidentiality
  1. Distinction between confidential resources and reporting options
  2. Informed reporting

• Integration of reporting responsibilities:
  1. Responsible Employee
  2. Campus Security Authority
  3. Mandatory reporter of suspected child abuse
Key Elements of Effective Practices

• Uniform policy and procedures for resolution:
  1. Complainant autonomy/agency
  2. Fair and impartial practices
  3. Remedies-based options
  4. Sanctions-based options

• Centralized reporting and review process
  1. Consistent institutional responses
  2. Tracking and monitoring of incidents and climate

• Trauma-informed investigations and practices

• Communication
  1. Consistency and transparency
  2. At the individual and community level

• Education, prevention and training program
The Title IX Coordinator

- Coordinates the recipient’s compliance with Title IX
- Title IX coordinator must have appropriate authority, access, autonomy, and resources
- Oversees all Title IX complaints
- Identifies and addresses any patterns or systemic problems
- Meets with students and employees as needed
- Should not have other job responsibilities that may create a conflict
- A school may designate more than one coordinator
  1. Must have clearly delineated responsibilities
  2. Must have titles reflecting supporting role
## Personnel

<table>
<thead>
<tr>
<th>Individual</th>
<th>Structural</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Personal preparation</td>
<td>• The gift of time</td>
</tr>
<tr>
<td>• Values-based approach</td>
<td>• Tone at the top</td>
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<tr>
<td>• World class effort</td>
<td>• Team building</td>
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<tr>
<td>• Humility</td>
<td>• Resources – budget, staffing, materials, professional development</td>
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<tr>
<td>• Cultural competency</td>
<td>• Commitment and consistency</td>
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<tr>
<td>• Warm-heartedness</td>
<td>• Clear expectations and enforcement</td>
</tr>
<tr>
<td>• Listen more, speak less</td>
<td>• Development of compassionate compliance</td>
</tr>
<tr>
<td>• Be collaborative</td>
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</tr>
</tbody>
</table>
EFFECTIVE PRACTICES: IMPLEMENTATION AT SJSU

Title IX Multi-Disciplinary Team

Core stakeholders
• Title IX Coordinator
• Student conduct
• Campus safety/police
• Human resources
• Dean of faculty

Additional campus stakeholders
• Counseling
• Health center
• Advocacy

Community partners
• Law enforcement
• Prosecutor
• Hospital/Medical Providers
• Community crisis or advocacy centers
  • Rape Crisis Counselors
  • Domestic Violence Counselors
Policy Considerations

- Easily accessible, identifiable and locatable
- Uniform definitions and high level principles
- Consistent application across the institution
- Procedures may vary by respondent (student, staff, faculty, third party)
- Areas of concern:
  - Intersection between Title IX and Clery
  - Intersection with tenure processes
  - Intersection with collective bargaining agreements
Privacy vs. Confidentiality

- Ensure policies clearly identify reporting options and support resources both on and off campus
- Delineate confidential resources vs. non-confidential reporting options in policy and training
- Ensure all employees are familiar with Title IX reporting expectations
- Offer clear and easy to follow guidance about what happens when a report is received
- Foster a climate that encourages reporting by providing consistency in message, policy, procedure, and outcome
Confidential Resources

- Students or employees wishing to obtain confidential assistance may do so by speaking with professionals who are obligated by law to maintain confidentiality.
- Confidential resources generally include medical providers, mental health providers, clergy, and rape crisis counselors.
- Exceptions to confidentiality include:
  - Mandatory child abuse reporting
  - Tarasoff imminent risk of harm to self or others
  - State felony or sexual assault reporting
Confidential Resources vs. Reporting Options

**Confidential Resources**
- Medical services
- HIPAA
- Mental health/counseling
- Clergy
- Rape crisis counselor

**Structural Challenges**
- Employees with multiple hats, e.g., counselor and administrator

**Reporting Options**
- Emergency for safety, physical, or emotional
- Dedicated campus access points
  - Title IX
  - Campus safety/police
  - Student conduct
  - Human resources
- To any school employee
- Anonymous
- Law enforcement
**Integration and Coordination**

- **Title IX Coordinator**
- **RA**
- **Coach**
- **Faculty**
- **Security**
- **Dean**
- **Employee**
- **Student Conduct**

**Initial Assessment**
- Immediate safety & well-being
- Gather basic facts
- Notify of right to contact or decline to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Enter into daily crime log
- Assess for timely warning
- Offer supportive measures
- Provide process options
- Discuss right to advisor of choice
- Assess for pattern
- Ascertain complainant’s wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety
Central Review Process Multi-disciplinary Team

Title IX Coordinator → Campus Police

Student Conduct (or staff/faculty processes)
Centralized Review Process

• Coordination of information and personnel
  – Clearly delineated roles and responsibilities
  – Build in regular and open lines of communication
  – Sequence events in advance
• Separate support and advocacy from investigation and adjudication
• Design and use template communications

• Central tracking for patterns
• Documentation/records
• Ensure consistent implementation of:
  – Interim measures
  – Determination whether to proceed
  – Investigative practices
  – Sanctions
  – Community remedies
• Transparency in outcomes
Effective Practices: Implementation at SJSU

Title IX Intake and Assessment

- Assess immediate safety and well-being
- Gather basic facts
- Notify of right to contact law enforcement and seek medical treatment
- Notify of importance of preservation of evidence
- Tend to Clery responsibilities:
  - Enter into daily crime log
  - Assess for timely warning
- Assess and implement interim measures
- Provide policies, process options, resources and supports
- Assess for pattern
- Ascertain complainant’s wishes
- Discuss barriers to proceeding
- Evaluate individual vs. campus safety
SUPPORTIVE MEASURES
The Title IX Coordinator must promptly contact the complainant to:

- Discuss the **availability** of supportive measures as defined in § 106.30,
- Consider the **complainant’s wishes** with respect to supportive measures,
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- Explain to the complainant the process for filing a formal complaint.
Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

Title IX Regulations § 106.30(a)
Supportive Measures

May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Title IX Regulations § 106.30(a)
Supportive Measures

- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Title IX Regulations § 106.30(a)
• Must maintain records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment

• Must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity

• If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Title IX Regulations §§ 106.45(b)(10)(i)-(ii)
Emergency Removal for Students

- Must undertake an individualized safety and risk analysis and determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Title IX Regulations § 106.44(c)
Emergency Removal

Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient’s community where an immediate threat exist.
Emergency Removal

- The Department notes that the final regulations expressly allow a recipient to remove a respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal.

- Recipients may also implement supportive measures that restrict students’ or employees’ contact or communication with others.

- Recipients thus have avenues for addressing serial predator situations even where no victim chooses to participate in a grievance process.

Title IX Regulations; Preamble 85 F.R. 30348
Administrative Leave

- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

- This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.
Practical Considerations & Challenges

- Limited scope allowable for emergency removal
  - Can you remove under code of conduct for lesser standard?
- What are the criteria for appropriate and reasonably available?
- What are measures to protect safety or deter sexual harassment?
- What supportive measures do you have to offer to a non-student/non-employee?
- Ensuring accurate documentation
Offering Supportive Measures

- Criteria for when the Title IX Coordinator files the formal complaint
- Process for evaluating dismissal
- Appeal from dismissal
- Proceeding under other policies
  - Policy frameworks
  - When is charging under a code of conduct retaliation?
- Timing of analysis for dismissal
OBLIGATION TO INVESTIGATE
Understanding Two Key Provisions

Offer Supportive Measures upon Knowledge ("Report")

Pursue Investigation and Adjudication in Response to a "Formal Complaint"
The new regulations distinguish and separate a recipient’s obligation to respond to a report of sexual harassment from a recipient’s obligation to investigate formal complaints of sexual harassment.

- If students would like supportive measures but do not wish to initiate an investigation...they may make a report of sexual harassment.
- If students would like supportive measures and also would like the recipient to initiate an investigation...they may file a formal complaint.
Resolution Process

Formal Complaint

Informal Resolution

Formal Resolution

Notice
Intake
Formal Complaint
Decision
Investigation
Hearing
Appeal
“The final regulations promote clarity as to recipient’s legal obligations, and promote respect for each complainant’s autonomy, by distinguishing between a complainant’s report of sexual harassment, on the one hand, and the filing of a formal complaint that has initiated a grievance process against a respondent, on the other hand.”

“The Department acknowledges that a recipient should respect the complainant’s autonomy and wishes with respect to a formal complaint and grievance process to the extent possible.”
Balancing a recipient’s obligation to respond to instances of sexual harassment with a complainant’s autonomy

- A rigid requirement such as an investigation in every circumstance may chill reporting of sexual harassment...
- A student may receive supportive measures irrespective of whether the student files a formal complaint...these final regulations encourage students to report sexual harassment while allowing them to exercise some control over their report.

Title IX Regulations; Preamble 85 F.R. 30190
OBLIGATION TO INVESTIGATE

• Formal complaint:
  A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and Requesting that the recipient investigate the allegation of sexual harassment

• Once a formal complaint is filed, a recipient must investigate the allegations in that complaint
  The Department believes that where a complainant has chosen to file a formal complaint, or the Title IX Coordinator has decided to sign a formal complaint, the recipient must investigate those allegations regardless of the merits of the allegations. (emphasis in original)

Title IX Regulations §106.30 Definitions and §106.45(b)(3) Dismissal of a formal complaint; 85 F.R. 30574
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Decision

Notice
- Jurisdiction & Scope
- Supportive Measures & Documentation
- Option to File a Formal Complaint
- Written Notice of Rights and Resources (VAWA)

Intake

Formal Complaint
- Actual Knowledge: TIX Coordinator
- Actual Knowledge: Official with Authority
- Responsible Employee Considerations

Discretionary Dismissal

Mandatory Dismissal

Informal Resolution
- See § 106.45(b)(5)

Investigation
- Responsible Employee Considerations

Hearing
- Procedural Irregularity
- New Evidence
- Conflict of Interest

Appeal

Student Complainant Withdraws
- Respondent No Longer Affiliated
- Evidence Unavailable

Not Education Program or Activity
- Conduct Not Sexual Harassment
- Conduct Occurred Outside the U.S.

Student Procedures
- Faculty Procedures
- Staff Procedures

Actual Knowledge: TIX Coordinator
- Actual Knowledge: Official with Authority
- Responsible Employee Considerations

Document Signed by Complainant
- Document Signed by TIX Coordinator

Live Hearing (Can be Virtual)
- Separate Decision Maker
- Preponderance or Clear and Convincing
- Must Allow Cross-Examination by Advisor
- All Questions on Cross Subject to Relevancy Determination
- Cannot Consider Statements not Subject to Cross
- Must Provide Advisor
Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.
Basic Requirements

- Require an objective evaluation of all relevant evidence
  Including both inculpatory and exculpatory evidence
  Credibility determinations may not be based on a person’s status

- Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)
Basic Requirements

- **Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Include reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause.
- Describe the range (or list) of possible disciplinary sanctions and remedies.

Relevant Regulations Sections:
- Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
- Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
- Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)
Basic Requirements

State whether the **standard of evidence** to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard,

- Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
- Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i)
BASIC REQUIREMENTS OF GRIEVANCE PROCESSES

Practical Considerations & Challenges

How does the standard of evidence alignment impact:
- Faculty codes
- Staff procedures
- Collective bargaining agreements

Creating an evidentiary code