



Association of
Title IX Administrators

December 2020

Consent Construct

Title IX Interactive Mock Hearing

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

FORCE

- 1. Was force used by the Respondent to obtain sexual or intimate access?**
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
 - Consider the impact of power dynamics

FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion** – the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration

INCAPACITY

2. **Was the Complainant incapacitated?**
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
 - What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
 - What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
 - Partial blackout must be assessed as well

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known Blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was Complainant acting very differently from previous similar situations?
 - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
 - Determine if Respondent provided any of the alcohol for the Complainant
 - Other relevant behavioral cues

SOME FACTS ABOUT ALCOHOL

- Most abused drug on college campuses
- Most commonly used date rape drug
- Time – the only sobering tool
- One “drink” per hour
- “Myth of puking”
- Pace of consumption
- Food in the stomach
- Carbonation and alcohol
- Medications and alcohol

COMMON FACTORS

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body weight
- Body type – body fat percentage
- Gender
 - E.g., enzymes, hormones, body fat, and water in body
- Functional tolerance
- Medications
- Illness and dehydration
- Fatigue
- Caffeine
- Genetics
- Ethnicity

INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation Sanction accordingly
 - The Respondent **should have known it** = policy violation Sanction accordingly
 - The Respondent's own intoxication cannot be used as a defense

CONSENT ANALYSIS

3. **What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?**
 - Is there any sexual or intimate pattern or history between the parties?
 - What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
 - This is where getting detail and specifics of intimate behaviors is critical