TITLE IX HEARING OFFICER AND DECISION-MAKER TRAINING & CERTIFICATION COURSE

September 2020
ATIXA CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
CONSENT IS...

- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual or intimate activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.
1. Was force used by the Respondent to obtain sexual access?

2. Was the Complainant incapacitated?
   a. Did the Respondent know, or
   b. Should s/he have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?

3. What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?
There are four types of force to consider:

- **Physical violence** – hitting, restraint, pushing, kicking, etc.
- **Threats** – anything that gets the other person to do something they wouldn’t ordinarily have done absent the threat
- **Intimidation** – an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.

  - Consider:
    - Isolation
    - Frequency
    - Intensity
    - Duration

- Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force.
INCAPACITY

• 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 = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
    ▪ But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
  – Partial blackout or “brownout” possibilities must be assessed as well
• What was the form of incapacity?
  ▪ Alcohol or other drugs
    o Incapacity ≠ Impaired, drunk, intoxicated, or under the influence
    o Incapacity = an extreme form of intoxication (alcohol)
  ▪ Administered voluntarily or without Complainant’s knowledge
  ▪ Rape drugs
    – Mental/cognitive impairment
    – Injury
    – Asleep or unconscious
INCAPACITY ANALYSIS

• First, was the Complainant incapacitated at the time of sex?
  – Could the person make rational, reasonable decisions?
  – Could the Complainant appreciate the situation and address it consciously such that any consent was informed –
    ▪ Knowing who, what, when, where, why, and how.

• Second, did the Respondent know of the incapacity (fact)?

• Or, should the Respondent have known from all the circumstances (reasonable person)?
BEHAVIORAL CUES

• Evidence of incapacity may be taken from context clues in the relevant evidence, such as:
  – Slurred speech
  – The smell of alcohol on the breath in combination with other factors
  – Shaky equilibrium; stumbling
  – Outrageous or unusual behavior
  – Passing out
  – Throwing up
  – Appearing disoriented
  – Unconsciousness
  – Known blackout

• Although memory is absent in a blackout, verbal and motor skills are still functioning.
The evidence might also include contextual information to analyze any behaviors by the Complainant that seem “out of the norm” as part of a determination of incapacity:

– Did the Respondent know the Complainant previously?
– If so, was the Complainant acting very differently from previous similar situations?
– Review what the Respondent observed the Complainant consuming (via the report’s timeline).
– Determine if Respondent provided any of the alcohol to the Complainant.
– Consider other relevant behavioral cues.
• If the Complainant was not incapacitated, move on to the Consent analysis (Question #3).

• If the Complainant was incapacitated, but:
  – The Respondent did not know it, AND
  – The Respondent could not have reasonably known it then the policy was not violated for this reason. Move on to the Consent analysis.

• If the Complainant was incapacitated, and:
  – The Respondent knew it or caused it then there is evidence to determine that a policy violation occurred.
  – The Respondent could or should have known it then there is evidence to determine that a policy violation occurred.
CONSENT

Question 3 is the Consent question:

• What clear *words or actions* by the Complainant gave the Respondent permission for each sexual act as it took place?

• If there are clear words or actions (by the standard of proof), there is no sexual assault. If there are no words or actions, or they are not clear, then there is no consent, and the finding is that a sexual assault occurred.

• The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.
CONSENT: RULES TO REMEMBER

• 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, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.
CASE STUDY
I went to a house party with my best friends – Claire, Danielle and Erica – last Saturday. While I was there, I had a couple of beers over the first couple of hours. I met Bobby and he seemed nice. He had just showed up to the party and we started talking. He was a bit flirty – I am not a flirty person – but I was ok with that, having just gotten out of a relationship. And then I don’t remember anything else until I woke up in his room the next morning. I only had my shirt and underwear on. My bra was on the floor. I looked around and he was asleep next to me. I panicked and grabbed my stuff and left. I walked home. I felt uncomfortable “down there,” like something had happened, but I don’t think I had sex. I have had sex before and think I would be able to tell.
Anna’s Statement

• I take medication for depression and I just switched medications to a new one. I am not supposed to drink when I take it, but I have before and not blacked out on my old one. This new one does make me way sleepier faster than my old meds did. I don’t think I was drugged, because I opened all my own drinks – at least the ones I remember.

• When I got home, I told my roommates where I woke up, and they told me that I went up to his room voluntarily. They also told me that I was dancing with him, kissing him publicly, and talking bad about other sororities. Those are all things I never do. I am not the type to do any PDA or hook up with someone I just met. I could get in trouble for talking about other sororities too.
• She also told me that they saw me on the first-floor landing when they were leaving and I was headed upstairs with him. They asked me if I wanted to leave and I told them no, that I was going to his room. Again, this is something I would never do. I must have been blacked out to be acting this way.

• I called the Title IX office and reported the assault.
• Anna’s friends all confirm the following:
  – Anna is typically shy and a rule follower.
  – Anna makes fun of other people who engage in PDA.
  – Anna looks down on women who hook up with people they just met and considers it “unsafe.”
  – Anna is a Rho Chi, and takes her responsibilities very seriously.
  – Anna is not a heavy drinker, and is often the DD.
• Anna’s friends all confirm the following about that night:
  – Anna didn’t appear to be drinking excessively.
  – Anna was very flirty with Bobby. She was hanging on him, kissing him, dancing with him, etc.
  – Anna was vocal about her dislike of some chapters.
  – When they were leaving, Anna came up the stairs with Bobby. Claire asked if Anna wanted to leave with us, since we all came together. Anna said, “No, I am going upstairs with him.” We all thought that was WAY out of character for her, and Erica asked if Anna was sure she didn’t want to go. Anna said “No,” and walked upstairs with him. No one saw her until the next morning. She had to be incapacitated to be acting the way she was.
I was out that night with a buddy after work and class, and we went to eat before heading to the party. I was pretty tired from a long week of class and work. I had a couple of drinks with dinner. When we got to the party, I grabbed a beer and went to the basement. It was pretty crowded down there and I went over to a table that was in the corner. Anna was there, so we started talking. I met her once about a month ago at a party, but she didn’t remember me. I wasn’t surprised, because we only had talked that night for about 10 minutes before I left. We hit it off and she was VERY flirty. She stood very close, and, at one point, grabbed me by the hand and started to dance with me.
• We both had a couple of beers and she was getting friendlier and actually pulled me in and kissed me a couple of times. We were talking about Greeks, and she was talking a fair amount of trash about some of the other chapters. I was a bit surprised, since some girls from those chapters were at the party, but I don’t think they heard her.

• After a little while, I asked her if she wanted to go up to my room for some privacy – all of this kissing in front of everyone was getting a little weird, I don’t usually do that. She said “Sure, let’s go.” and took my hand and headed toward the stairs.
• When we got to the first floor, 3 of her friends came over and asked her if she wanted to leave. She told them “No, I am going upstairs with him to his room.” Her other friend asked if she was sure and she said yes and started up the stairs. Then they left. I followed her up and showed her where my room was.

• As soon as we got in the door, we started kissing again. She started undoing my shirt and I did the same to hers. Once our shirts were off, she took off her bra. We were kissing and touching each other, but I have to admit, I was exhausted. And the beers weren’t helping.
• She was grabbing my penis over my shorts, and...and this is embarrassing, I couldn’t get it up. I could tell she could tell, and she undid my shorts and tried to get it going with her hand. I tried to help with my hand, but I was just too tired and a bit drunk, but not out of control. She stopped and took her shorts off, and I started rubbing her crotch. She was not getting wet, so I stuck my hand in her underwear to see if that would help. She turned her back to me and was pressing against me and her hands were up against the wall. I kept rubbing her, but nothing was happening for her either. She turned around and grabbed me again and started to act like she was going to go down on me, but I stopped her because, I could tell it just wasn’t going to happen.
• We walked over to the bed and neither of us said anything. She put her shirt back on and laid down, and I laid down next to her. I am not sure how long she was awake, but I passed out almost immediately.

• When I woke up the next morning, she was gone. And then I got an email from the Title IX Office saying that I had been accused of sexual assault.
• Use the consent analysis to walk through this case. If you have questions or need more information, message me in the chat.

• Designate a member of your group as the spokesperson.
EVIDENCE
UNDERSTANDING EVIDENCE

• The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.

• If the information helps to prove or disprove a fact at issue, it should be admitted.

• If credible, it should be considered.
  – Evidence is any kind of information presented with the intent to prove what took place.
  – Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.
• No restriction on parties discussing case or gathering evidence

• Equal opportunity to:
  - Present witnesses, including experts
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination

• No limits on types/amount of evidence that may be offered except that it must be relevant.

• Parties may have access to all gathered evidence that “directly relates” to the allegations available for reference and use at the hearing, but they must make the case for its relevance.
ASK YOURSELF

Is it relevant?

Is it reliable?
(Is it credible?)

Will we rely upon it as evidence supporting a rationale/the written determination?
Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue. Regarding alleged policy violation and/or Regarding a party or witness’s credibility.

The investigator will have made initial relevance “decisions” by including evidence in the investigation report...

But relevance is ultimately up to the decision-maker, who is not bound by the investigator’s judgment.

All relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory.
If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.

The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or ask them not to make one)

Should you ask for it or ask the investigator to clarify their recommendations?
UNDERSTANDING EVIDENCE

• Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
  – Documentary evidence (e.g. supportive writings or documents).
  – Electronic evidence (e.g. photos, text messages, and videos).
  – Real evidence (i.e. physical objects).
  – Direct or testimonial evidence (e.g. personal observation or experience).
  – Circumstantial evidence (i.e. not eyewitness, but compelling).
  – Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).

• Decision-makers should typically disregard:
  – Character evidence (generally of little value or relevance).
  – Impact statements (typically only relevant in sanctioning).
SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

• Evidence of the Complainant’s prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
  – Offered to prove that someone other than the Respondent committed the conduct alleged, or
  – Concerns specific incidents of the Complainant’s sexual behavior with respect to the Respondent and is offered to prove consent

• Even if admitted/introduced by the Complainant.

• Does not apply to Respondent’s prior sexual behavior or predisposition.
ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions required for:

• Records made or maintained by a:
  – Physician
  – Psychiatrist
  – Psychologist

• Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.
  – This is complex in practice because you won’t know to ask for permission unless you ask about the records first.
QUESTIONS?
CONTACT INFORMATION

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