

Analyzing Consent in Title IX Investigations

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Regardless of your role, you will need to think about analyzing consent

COORDINATOR

INVESTIGATOR

DECISION
MAKER



How does this tie to your work?

Title IX Coordinators:

- Communicating with parties
- Asking good questions of investigators
- Giving feedback on reports
- Conferring with decision makers
- Educating your community/students

How does this tie to your work?

Investigators:

- Planning for interviews
- Asking good questions in interviews
- Writing good reports by providing the information decision makers need
- Communicating with students

How does this tie to your work?

Decision makers:

- Analyzing information
- Asking good questions during hearings
- Being efficient and effective when deliberating

Context for Analyzing Consent

Investigation goals and
philosophy

Investigation Legal Requirements

Regs say the institution must gather evidence “sufficient to reach a determination of responsibility.”

Preamble says institutions must “undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.”

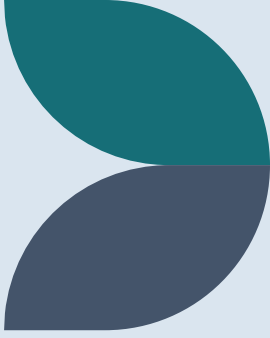
Investigation goals, philosophy, and background info

1. An investigation involves an **impartial collection of information** aimed at assisting the decision-maker in arriving at a conclusion.



Investigation goals, philosophy, and background info

2. Transparency—Parties should know about the evidence collected and should have the opportunity to respond to everything.



Investigation goals, philosophy, and background info

3. Goal is to be thorough, complete, and fair to all parties.

I take in and review anything offered (for the most part) unless it is clearly beyond the scope of the investigation or not related.

Because a Title IX investigation is not a criminal investigation, we may not have access to some kinds of information or some witnesses.

General Principles about Consent Analysis

Whether consent exists depends on the circumstances.

Difficult to give definitive guidance on whether certain communications or behaviors demonstrate consent.

Basic Consent Definitions

(two examples)

Consent means the mutual understanding of words or actions freely and actively given by two informed people that a reasonable person would interpret as a willingness to participate in mutually agreed upon sexual activity.

Consent is words or overt actions by a person clearly and **affirmatively** communicating a freely-given, present agreement to engage in a particular form of sexual contact. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in the mutually agreed-upon sexual contact. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent.

Usual Qualifiers

- Silence or non-communication should never be interpreted as effective consent.
- Consent is not effective if the recipient party is incapacitated, asleep, or unconscious.
- Consent is not effective when force, threat, or coercion is used.
- Past consent is not future consent.
- Consent to one type of sexual activity does not imply consent to other types of sexual activity.
- Consent can be withdrawn at any time.
- Consent must be “informed.”

From one Policy

A person can only provide consent when that person:

- Acts freely and voluntarily, **without coercion or force** or otherwise feeling unduly pressured, threatened, intimidated;
- Is **informed** about the nature of the sexual contact involved;
- Is **not incapacitated**, whether from alcohol, other drugs, or other causes, such that they cannot understand the fact, nature, or extent of the sexual contact;
- Is **conscious**;
- Is of **legal age** to consent (16 years old in Minnesota with some exceptions for younger individuals who are close in age).

These requirements for consent mean that sexual contact with someone who is threatened, coerced, intimidated, uninformed, incapacitated, asleep or otherwise unconscious, or not of legal age, is, by definition, sexual assault.



First: Pay attention to the words of the basic consent definition

Consent means the mutual understanding of words or actions freely and actively given by two informed people that a reasonable person would interpret as a willingness to participate in mutually agreed upon sexual activity.

Evaluating basic consent: What to look for/questions to consider?

What words were exchanged?

What actions did each party engage in?

Evidence of “actively given” consent—e.g., how were words/actions conveyed? Enthusiastic participation?

Would a reasonable person interpret those words or actions to mean consent?

Does this all add up to “mutual agreement” to engage in the activity?

Qualifier One: Silence does not equal consent.

Absence of “no” does not mean “yes.”

Includes inaction—e.g., not pushing away, not trying to leave, not “fighting back” does not mean yes.

Consent *can* be based just on actions.

But if there are no affirmative words and no affirmative actions, there is no consent.

Qualifier Two: Incapacitation, sleep, unconsciousness

- Sleep is a fairly straightforward case (although parties may not agree about whether a person was asleep)
- Lack of consciousness is also a fairly straightforward case (but not to be confused with blackout).
- Incapacitation is the hard case (and much more common).

Incapacitation

Incapacitation means an individual has a physical and/or mental inability to make informed, rational judgments, and that inability is known or reasonably should have been known to the individual initiating sexual contact.

Knowledge of incapacity is evaluated based on a reasonable person standard. Accordingly, if a person has sexual contact with someone whom that person knows to be, or whom a reasonable person would know to be, incapable of making a rational, reasonable decision, that contact is without consent.

Evaluating incapacitation

Two step process:

1. Was the person incapacitated?
2. Would a reasonable person have known they were?

Was the person incapacitated?

Determining whether an individual is incapacitated, and therefore unable to give consent, requires an assessment of whether the person is physically helpless or substantially incapable of:

- Making decisions about the potential consequences of sexual contact;
- Appraising the nature of their own conduct; or
- Communicating consent or lack of consent to engage in sexual contact.



Was the person incapacitated?

Incapacitation is a state beyond drunkenness

Key considerations:

Whether the person knew

- who they were with
- what they were doing
- where they were

Other clues:

- Could they participate in conversation?
- What did their texting look like?
- Could they find their way home?
- Did they make mistakes with access card, dorm location, phone use?
- Some stumbling, slurring speech, vomiting are signs to look for, but may not be enough to find incapacitation, depending on other circumstances.

If the person was not incapacitated, but was “only” very drunk, then go back to basic consent analysis.

Would a reasonable person have known the person was incapacitated?

What information did the responding party have available?

Analysis here often hinges on witness testimony or documentary evidence like videos.

Being too drunk to recognize the signs of incapacitation is not an excuse (reasonable person standard).



A note on blackout

If a reporting party states that they were in a blackout state, I generally take that at face value and determine that they were incapacitated.

But it's possible to be in a blackout state and not appear to be incapacitated. (E.g., it is possible to drive a car in a blackout state.)

It can be difficult for another person to realize someone is in a blackout state.

Thus, whether a reasonable person would/should have known about the incapacitation often becomes the central question in these cases.

Tying back to consent

Which issue to address first:
incapacitation or basic consent?

Discussion Scenario

Michael and Jenna dated for six months last year but are now broken up. While dating, they attended their college's "spring fling"—an outside music festival that starts at 2 p.m. and goes until 10 p.m. They started drinking vodka (which Michael provided) from water bottles when they arrived at the festival around 2 p.m. Jenna told the investigator that she "kept drinking from my bottle pretty regularly" until around 7 p.m., when she and Michael left the festival. She said she also drank water during this time, but she did not eat anything. (Jenna is 5'6" and weighs 115 pounds.) The water bottle was a standard 16-ounce bottle, and it was empty by 7 p.m. The day was unseasonably warm and sunny, and they both got sunburned. When they left the festival at 7 p.m., they went to Michael's room, where they had sex. Michael agrees with this account of the day. Jenna tells the investigator she was blacked out at that point, does not remember having sex with Michael, but does remember waking up naked in his bed around midnight. At that point, they joked about her being "really wasted" while they were at the festival. Michael says he remembers joking about that, but says Jenna was walking and talking "pretty normal" when they went to his room—she was just "a little goofy and more outgoing." Michael produces texts from Jenna with a timestamp of 5:38 p.m., indicating she had gone to the bathroom and was trying to find him. The texts are coherent.

Qualifier Three: Force, Threat, Coercion, Intimidation

Force and threat are usually easier to analyze.

Coercion and intimidation are more nuanced.

Examples

- Causing deliberate incapacitation
- Threatening harm to self if the other party does not engage in sexual contact
- Threatening to disclose an individual's sexual orientation
- Threatening to reveal personally sensitive information
- (Unreasonably) repeated requests for a sexual act—but how many?

Questions to consider

What about threats to break up?

What does intimidation look like?

Qualifier Four: Past consent does not equate to present consent

Easiest example is “we did this last week, so it must be okay now.”

What about these examples?

- We agreed over text yesterday that we'd have sex tomorrow night.
- We met on Tinder, where assumption is we will hook up.
- We've been in a relationship for over a year, and this is what we always do.

Qualifier Five: Consent to one act is not consent to a different act

Beware of “leveling up”:

- They were enthusiastic about kissing, so I thought I could touch their breasts/butt/groin.
- We’d already done oral, so I thought vaginal was okay.

This is tricky. Person making the next move bears the burden of establishing consent.

Discussion Scenario

Kris and Petra met on Tinder, where they exchanged messages and agreed to meet up “for some naked smash.” Petra went to Kris’s dorm room, where they conversed for a few minutes, then started making out while lying down on Kris’s bed. During the investigation, Petra reported that they each removed their own clothing. Petra told the investigator they “both just started kissing” and that she “didn’t mind” when Kris started touching her chest and buttocks. She said they were “both into it,” but then Kris started putting their fingers into her vagina, which she did not consent to and did not want. She said she told Kris to stop, but they took “a really long time” before they removed their fingers. She said she thinks she had to tell Kris to stop “at least twice.” Petra said she then told Kris she was not okay with what was happening, and she got up, got dressed, and left. Kris told the investigator that Petra “essentially agreed” in their Tinder messaging to have sex, so “anything was on the table.” Kris also said Petra was “enjoying herself and into it” and that they understood from Petra’s participation in the touching and kissing that she consented to vaginal contact. Kris said that as soon as they heard Petra say “stop doing that,” they removed their fingers from her vagina.

Qualifier Six: Consent can be withdrawn

Any words or overt actions can communicate withdrawal of consent.

Possible signs of consent withdrawal

Words: no, stop, I don't want to do that, get off

Actions: moving hands away, pushing body away, going limp, rolling or turning away

Qualifier Seven: Parties must be “informed” about the act

This could cover

- Lying about use of birth control/condoms
- Lying about existence of STDs
- Lying about identity

Assessing Credibility

Credibility: The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Inherent plausibility

Is the testimony believable on its face?
Does it make sense?

Demeanor

Did the person seem to be telling the truth or lying?

Motive to falsify

Did the person have a reason to lie?

Past record

Did the alleged harasser have a history of similar behavior in the past?

Corroboration

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



None of these factors are determinative as to credibility

For example:

- the fact that there are no eye-witnesses does not defeat a complainant's credibility.
- the fact that the respondent engaged in similar behavior in the past does not necessarily mean they did so again.

Assessing Credibility Contd.

Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information– substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)

A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.



A Note about Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.



A Note about Memory



Memory errors do not
necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory

Assessing Credibility: Final Thoughts

- It's important to have **reasons** supporting credibility decisions.
- Remember that **unlikable** is not the same as **not credible**.
- Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.
- Reach conclusions based on the evidence/information provided, **NOT** based on speculation, rumors, character assessment, etc.



Scenario

The Complainant, Alex, tells you he vaguely remembers kissing the Respondent, Justin, in the yard outside a campus house where a party was occurring on the night in question. Alex says he thinks he initiated and consented to the kissing. He says he did not consent to Justin unzipping his pants and touching his penis, and he remembers that when Justin did this, he pushed Justin away. He says Justin was quite intoxicated and fell to the ground at that point but was uninjured. He says Justin swore at him, then got up and walked away. Alex says he does not remember much about the evening, including how he got to the party, but he remembers this interaction because it was so upsetting to him and “sobered him up” for a few minutes. He does not remember how he got home from the party.

Justin tells you they were drunk but “functional” at the party. They tell you they talked with Alex at the party inside the house for a few minutes but did not meet up with Alex outside the house. Justin says they left the party on their own around midnight and walked home.

After you had initial interviews with each party, another student who lives in the house where the party occurred comes to see you. She tells you she heard through the campus rumor mill about the incident between Alex and Justin. She gives you Justin’s key ring, which includes his campus ID card, which she says she found in the side yard of the house the next day.

Q & A



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