



Annual

# TITLE IX TRAINING

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OCTOBER 2023



**Part I:  
JURISDICTION &  
KEY TITLE IX DEFINITIONS**



**Part II:  
CLAFLIN UNIVERSITY'S  
TITLE IX POLICY**



**Part III:  
SERVING IN TITLE IX ROLES  
WITH IMPARTIALITY**



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# TRAINING AGENDA

# Jurisdiction & Key Title IX Definitions

PART ONE



# TITLE IX

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No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

# DISCRIMINATION ON THE BASIS OF SEX

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- The University receives “Federal financial assistance”; thus, its education programs and activities are covered by Title IX.
- A university that responds with deliberate indifference to actual knowledge of sexually harassing conduct occurring in its education program or activity has violated Title IX.

*Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998).

- “Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships,...including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”

*Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

# TITLE IX JURISDICTION

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All of the following conditions must be met to trigger Title IX jurisdiction:

- 1) Discrimination on the basis of sex, including sexual harassment as defined under Title IX:
  - ❑ *Quid pro quo* harassment,
  - ❑ Severe, pervasive and objectively offensive harassment, or
  - ❑ Certain criminal conduct: sexual assault, stalking, domestic violence, dating violence
- 2) Occurring in the University's "education program or activity"
- 3) Occurring against a person in the United States.

# SUPREME COURT CASE LAW

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## **Gebser: Teacher-on-Student Harassment**

- High school student sued a school district under Title IX for a teacher's sexual harassment of the student.
- No liability because the district lacked actual notice of the harassment.

## **Davis: Student-on-Student Harassment**

- Student in the fifth grade was the victim of repeated acts of sexual harassment by a classmate over a 5-month period.
- The harassment was both verbal and physical.
- The classmate pleaded guilty to criminal sexual misconduct.
- Multiple victims complained about the classmate's misconduct.
- Harassment allegedly had a concrete, negative effect on the student's ability to receive an education.



# KEY DEFINITIONS: “PARTIES”

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## **COMPLAINANT**

The complainant is an individual who is alleged to be the victim of conduct that could cause sexual harassment.

## **RESPONDENT**

The respondent is an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

## **TITLE IX COORDINATOR**

The Title IX Coordinator is designated and authorized by Clafin to oversee the investigation and adjudication of allegations of sexual harassment under Title IX.

## **ADVISOR**

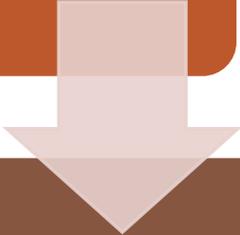
The Advisor conducts cross examination of individuals testifying in a live hearing under Title IX. A party may engage an advisor of the party's choice, but Clafin must appoint an advisor if a party does not have one.

# KEY DEFINITIONS: “SEX”

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Title IX Sexual Harassment covers:

- “gender harassment” and “unwanted sexual attention” (assuming it is sufficiently severe, pervasive and objectively offensive), and
- applies equally to all persons, regardless of sexual orientation or gender identity.



In June 2020, the U.S. Supreme Court held that the term “sex” in Title VII of the Civil Rights Act provided protection against discrimination with respect to sexual orientation and transgender status.

# KEY DEFINITIONS: “PROGRAM OR ACTIVITY”

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**Broad Definition** - Title IX broadly defines the concept of “education program or activity” to include all of the following examples:

- “all of the operations” of Claflin University;
- locations, events, or circumstances over which the recipient exercised substantial control over both the harasser and the context in which the harassment occurs;
- buildings owned or controlled by a University-recognized student organizations; and
- off-campus harassment if Claflin University exercises substantial control over the context and the harasser.

**Cyber-based Harassment** - “[U]se of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications.”

# KEY DEFINITIONS: “SEXUAL HARASSMENT”

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**Sexual Harassment means conduct on the basis of sex that satisfies one or more of the following:**

- 1) An employee of the University conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (a/k/a “*Quid Pro Quo* harassment”);
- 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University’s education program or activity; or
- 3) “Sexual assault” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “Dating violence” as defined in 34 U.S.C. § 12291(a)(10), “Domestic violence” as defined in 34 U.S.C. § 12291(a)(8), or “Stalking” as defined in 34 U.S.C. § 12291(a)(30).

# QUID PRO QUO HARASSMENT

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## Title IX *Quid Pro Quo* Harassment exists where:

- The harassment was performed by an employee of the University;
- The harassment took the form of a bargain for some type of University “aid, benefit, or service” in exchange for any kind of sexual conduct; and
- The sexual contact at issue was “unwelcome.”

## Covers a Broad Range of Sex-Based and Sexual Conduct

- “*Quid pro quo* harassment should be interpreted broadly.”
  - Dep’t of Educ., preamble, p. 447, n. 644 (emphasis added).
- Conduct falling far short of sex may form the basis a *quid pro quo* claim, e.g., “sex-based or other sexual conduct (such as back rubs or touching students’ shoulders or thighs).”
  - Preamble 447, n. 643.

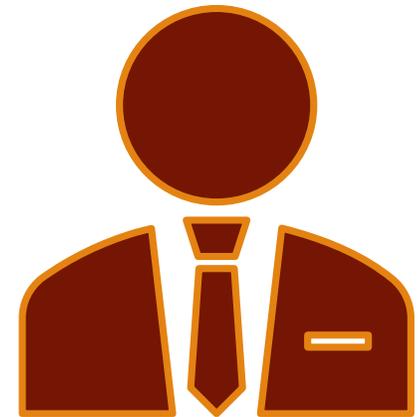
# QUID PRO QUO: EMPLOYEE REQUIREMENT

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*Quid Pro Quo* Harassment does not exist under Title IX unless it is carried out by an employee of Clafin University. Thus, none of the following categories of people can engage in *quid pro quo* harassment under Title IX:

- Non-employee students
- Volunteers
- All others not deemed to be a University's employee

If the respondent is not an employee of the University, the *quid pro quo* analysis should end.



# QUID PRO QUO: BARGAIN REQUIREMENT

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*Quid Pro Quo* Harassment can occur where the “bargain” proposed is communicated expressly or impliedly.

- Context matters when inferring a *quid pro quo* “bargain” has been proposed.
  - “the age and position of the complainant is relevant to this determination.”

– Preamble, p. 447, n. 643.

- a power imbalance in the respondent-complainant relationship may, in some circumstances may allow such an inference.

– Preamble, p. 446, n.642.



# QUID PRO QUO: UNWELCOME REQUIREMENT

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For Title IX purposes, *Quid Pro Quo* Harassment must involve conduct that was “unwelcome” when it occurred as determined from the complainant’s subjective perspective.

Acquiescence does not necessarily undermine a *quid pro quo* claim.

The Department of Education has explicitly recognized that “*quid pro quo* harassment does not depend on whether ‘the student resists and suffers the threatened harm or submits and avoids the threatened harm...’”

– Preamble p. 448, n. 645.



# ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

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Is this an example of *quid pro quo* harassment under Title IX?

A Claflin student studying abroad in Europe is told by a professor that the student will receive an “A” in the professor’s class if the student allows the professor to perform oral sex on the student.

**NO**

A University dean tells a University professor that the dean will approve the professor’s leave request in exchange for sex, which the professor does not consider welcome.

**YES**

A University professor offers to pay for an adjunct instructor’s ticket to attend the NCAA Final Four basketball games in exchange for sex.

**NO**

# ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

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Is this an example of *quid pro quo* harassment under Title IX?

A student-member of University-recognized fraternity tells a Freshman classmate that he will be accepted into the fraternity if he engages in oral sex, which the Freshman classmate does not want.

**NO**

A coach employed by the University offers a 15-year old volleyball star an athletic scholarship in exchange for sex.

**YES**

# SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE

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To qualify as sexual harassment under Title IX, the following elements must be satisfied under a “Reasonable Person” standard:

**NOTE:** The Title IX standard differs from the Title VII standard for harassment.

The conduct must be based on sex;

The conduct must be unwelcome;

The conduct must effectively deny access to an education program or activity because it is so:

severe;

pervasive; *and*

objectively offensive.

# ANALYSIS OF “UNWELCOME CONDUCT”

- Title IX Sexual Harassment includes both:
  - unwelcome conduct of a sexual nature
  - unwelcome non-sexual conduct that targets a particular sex.
- The Title IX Coordinator should determine whether the allegations, if true, would indicate that the alleged conduct was unwelcome by the complainant when it occurred.
- When investigating a formal complaint, the investigator should ask whether each act of alleged harassing conduct was welcome or unwelcome by the complainant when it occurred.

# ANALYSIS OF “SEVERITY”

- Many factors may weigh on whether conduct is “severe” under the second prong of the Title IX definition:
  - **Ages of the parties**
  - **Number of parties involved**
  - **Disability status of parties**
  - **Positions of authority of the involved parties**
  
- The Department of Education identifies the following examples of conduct that may not satisfy the “severity” requirement:
  - **Rubbing a student’s back** (Preamble, p. 447, n. 643)
  - **Discussion of “sexual issues even if that offends some people who hear the discussion”** (Preamble, p. 460)
  - **“Vulgar or indecent” speech** (Preamble, pp. 460-61)
  - **Microaggressions** (Preamble, p. 495)

# ANALYSIS OF “PERVASIVENESS”

- Merriam-Webster defines “pervasive” as “existing in or spreading through every part of something.”
- The Department of Education refused to remove the “pervasive” requirement despite concerns raised that a single incident of severe harassment may never satisfy the requirement.
- The Dept. of Ed. Provides the following examples of possible “pervasive” conduct involving a single action:
  - Disseminating “revenge porn”
  - Conspiring to sexually harass people (such as fraternity members telling new pledges to “score”),
  - Other unwelcome conduct that harms and humiliates a person on the basis of sex, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement

# ANALYSIS OF “OBJECTIVELY OFFENSIVE”

- Whether conduct is “objectively offensive” must be evaluated from the perspective of “a reasonable person in the complainant’s position.”
- This standard may be satisfied regardless of whether the respondent intended to offend.
- This exercise must not rely on sex stereotypes, such as considering offensiveness from a “male perspective” or “female perspective,” applying a “boys will be boys” approach, etc.

# ANALYSIS OF THE IMPACT ON EDUCATIONAL ACCESS

- No concrete injury is required, but evidence of unequal educational access may include:
  - **Skipping class to avoid a harasser;**
  - **A declining GPA;**
  - **Difficulty concentrating in class.**
- What is not necessary to satisfy this requirement?
  - **Failing a class;**
  - **Dropping out of school;**
  - **Experiencing any “particular symptoms” following alleged harassment.**
- The nature of the relationship between the harasser and victim can be critically important to this analysis.

# RESPECTING ACADEMIC FREEDOM

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Sexual harassment under Title IX must be understood in a manner that respects academic freedom and First Amendment rights.



The Department endorses a different standard when speech—rather than conduct—is alleged as sexual harassment:



**Speech-based harassment** is subject to First Amendment limitations that limit the scope of Title IX's prohibition of such harassment.

- *Quid pro quo* exception: "While *quid pro quo* harassment...involves speech, the speech is, by definition, designed to compel conduct"; thus, it can constitute *per se* actionable harassment.
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**Conduct-based harassment** does not raise the same First Amendment concerns.

# SEXUAL ASSAULT

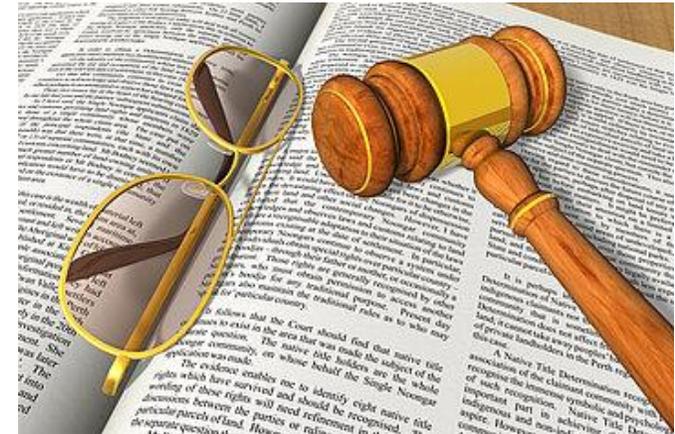
All forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system constitute sexual assault under Title IX.

Examples:

- **Forcible rape and attempted rape** (Preamble, p. 541)
- **Forcible sodomy**
- **Forcible Fondling**
- **Sexual assault with an object**
- **Statutory rape**
- **Incest**

The offenses constituting sexual assault depend on the absence of consent of the victim.

The intent of the respondent is relevant to only one form of sexual assault: Fondling, which is touching another person “for the purpose of sexual gratification.”



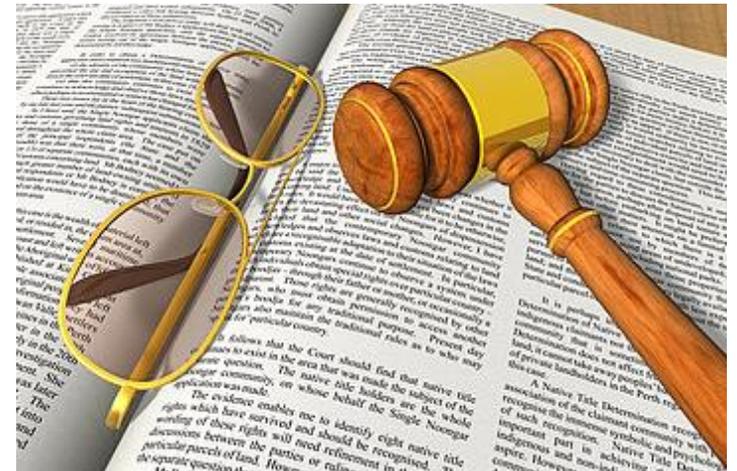
# DOMESTIC VIOLENCE

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The term “domestic violence” is defined by statute to mean:

Felony or misdemeanor crimes of violence committed by:

- a current or former spouse or intimate partner of the victim,
- a person with whom the victim shares a child in common,
- a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.



See 34 U.S.C. § 12291(a)(8)

**NOTE:** Must be “on the basis of sex” to trigger Title IX

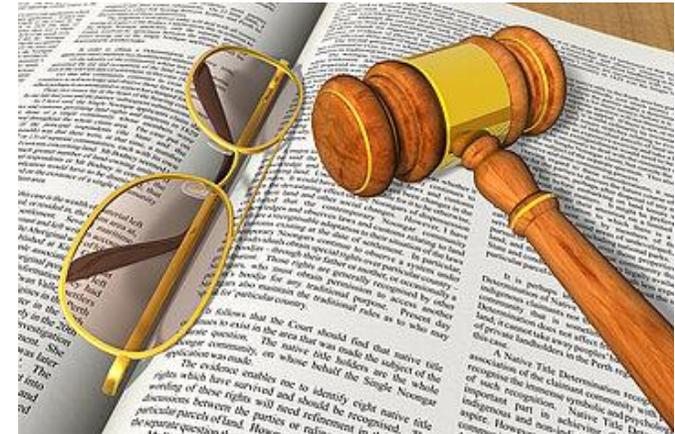
# DATING VIOLENCE

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The term “dating violence” is defined by statute to mean:

Violence committed by a person

- a) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- b) where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - i. the length of the relationship,
  - ii. the type of relationship, and
  - iii. the frequency of interaction between the persons involved in the relationship.



See 34 U.S.C. § 12291(a)(10)

**NOTE:** Must be “on the basis of sex” to trigger Title IX

# STALKING

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The term “stalking” is defined by statute to mean:

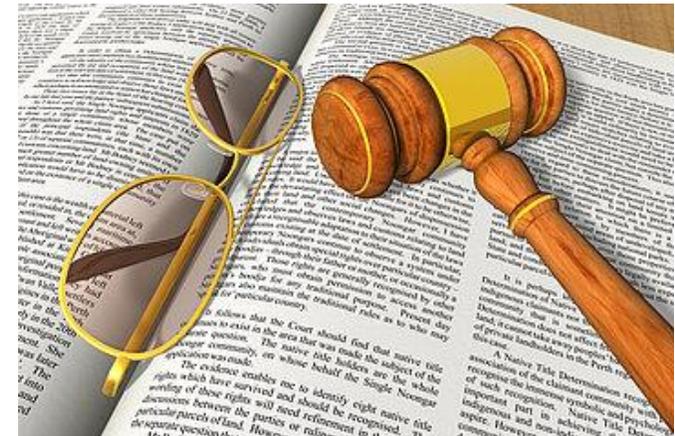
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- a) fear for his or her safety or the safety of others; or
- b) suffer substantial emotional distress.

*See* 34 U.S.C. § 12291(a)(30)

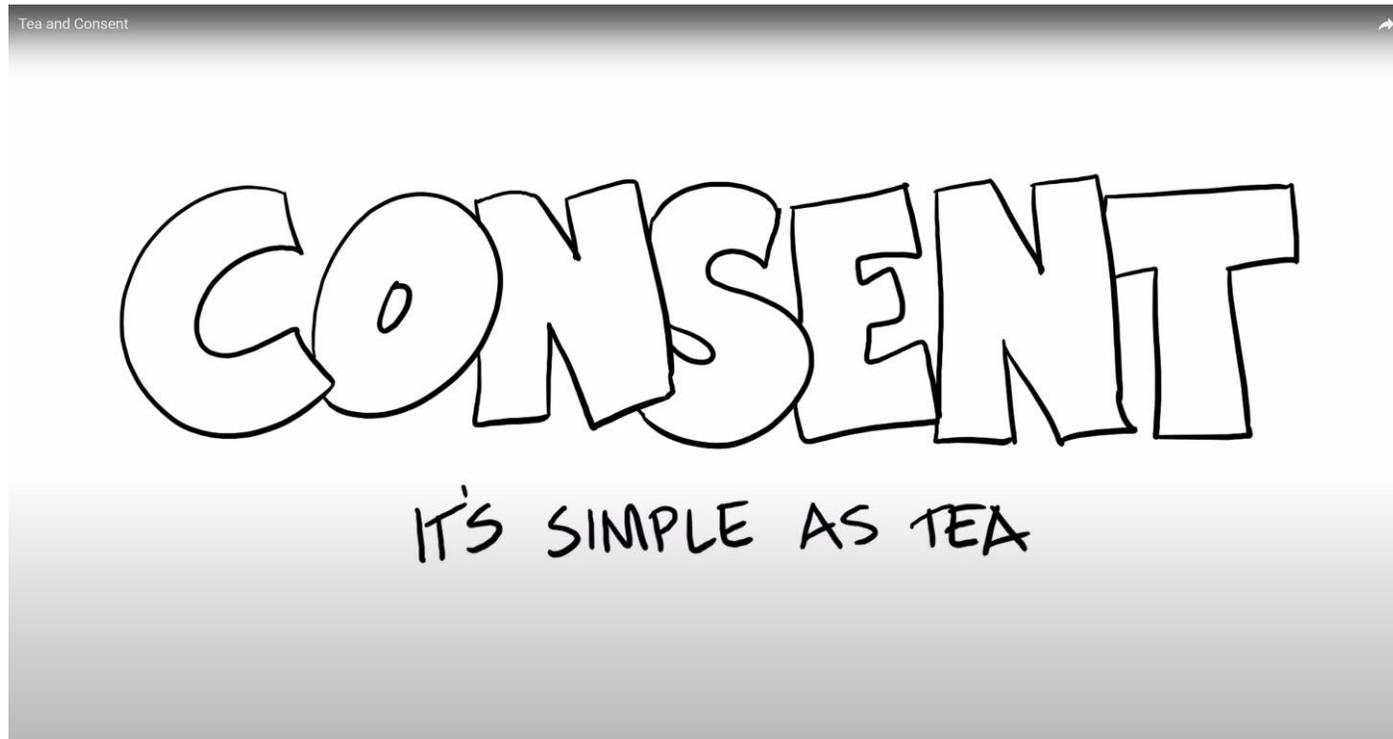
Stalking must be “on the basis of sex” to constitute Title IX sexual harassment.

Other forms of stalking that are not sex-based (e.g., stalking an athlete due to celebrity worship rather than sex), no Title IX violation occurs.



# ILLUSTRATION OF CONSENT

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<https://youtu.be/pZwvrXVavnQ>

# INSUFFICIENT EVIDENCE OF CONSENT

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- ❑ The absence of a “no” does not permit an inference of consent.
- ❑ Consent to some sexual acts does not constitute consent to others
- ❑ Past consent to a given act constitute present or future consent.
- ❑ Consent cannot be obtained by threat, coercion, or force.
- ❑ Consent cannot be obtained from someone who is asleep or otherwise mentally or physically incapacitated, whether due to alcohol, drugs, or some other condition.

# CONSENT

For purposes of the Title IX Policy, the term “consent” means a knowing, voluntary agreement to engage in a specific form of sexual contact with another person.

- Clear "yes," verbal or otherwise, is necessary.
- Must be ongoing throughout a sexual encounter and can be revoked at any time.
- The clearest way to establish consent is through explicit, direct communication between (or among) the parties about the decision to engage in sexual activity.

# INCAPACITATION

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Incapacitation means a person's physical and/or mental inability to make informed, rational judgments to the extent that the individual is incapable of giving consent.

## **Circumstances That May Cause Incapacitation:**

- ❖ Uses of force or coercion
- ❖ Unconsciousness
- ❖ Significant illness
- ❖ Drug and alcohol abuse (e.g., blackouts due to intoxication, etc.)
- ❖ Disability status

# ANALYZING CONSENT DISPUTES

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If consent is placed in dispute by a party, all relevant facts and circumstances should be considered.

Examples:

- the presence or absence of affirmative words or actions indicating a willingness to engage in sexual contact,
- whether a reasonable person would have understood the words and acts at issue as expressing consent; and
- whether there are any circumstances, known or reasonably apparent to any of the involved parties, demonstrating incapacitation or any other inability to make a voluntary choice to engage in sexual contact.