



**CONFIDENTIAL**

# **Title IX Training for Cooper Union**

**Cooper Union**  
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- Served as Bureau Chief of the Queens District Attorney's Office Special Victims Bureau for over 23 years
- Investigated and supervised *thousands* of sexual assault, abuse and harassment cases and trained and educated innumerable attorneys, law enforcement officers, students, parents, faculty, health care professionals and the public at large
- Published The Prosecutor's Manual for Sex Crimes, a how-to guide for investigating and prosecuting sexual assaults
- Served on the New York State Children's Justice Task Force, the New York City Mayor's Committee on Child Abuse and the Mayor's Sex Crimes Task Force
- Adjunct Professor of Law at St. John's University Law School
- Graduate of Indiana University and George Washington University's National Law Center

# Recent Important Federal Mandates and Policy Changes Regarding Campus Sexual Assault

# Title IX

- Title IX of the Education Amendments of 1972, previously known to most of us as the laws governing gender equity in education, mainly in the area of collegiate sports and expenditures, has recently been interpreted by the Federal Department of Education's Office of Civil Rights (OCR) in several documents to explain the meaning of Title IX in the context of sexual misconduct in educational institutions.

# Title IX Enforcement and Challenges



**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....”**

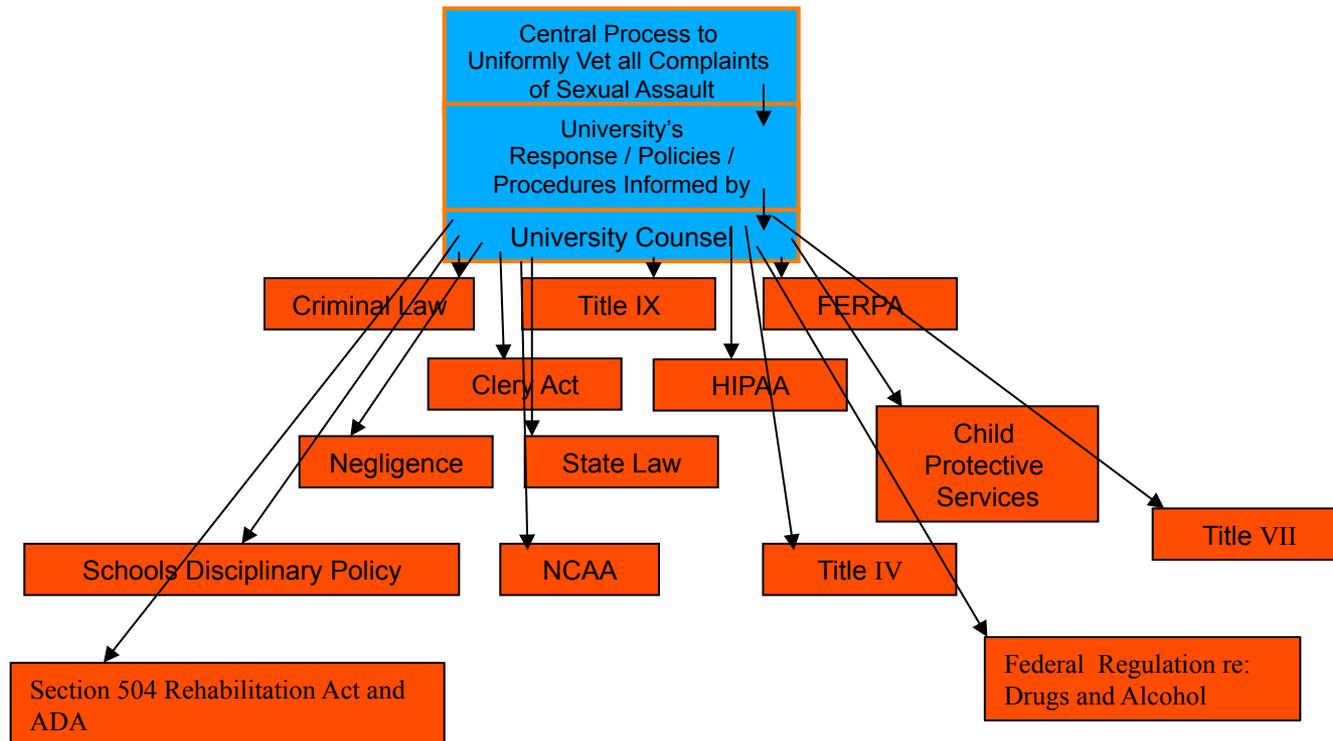
—JUNE 23, 1972



# Title IX of the Education Amendments of 1972

- Has been interpreted by the Federal Department of Education's Office of Civil Rights (OCR)
  - Dear Colleague Letters
  - Consent Agreements with other Schools
  - Recently released FAQs
- “When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred.”
- Investigations must be prompt, thorough, fair, impartial and equitable.
- If the investigation reveals...a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.
- Sexual assault cases must be handled on campus by **trained** people. OCR has specified various specific areas upon which those involved in the university/college sexual assault process should be trained.

# Title IX and other Mandates University must be concerned with....



# Federal guidance on Title IX investigations

- Investigations must be done by individuals trained in the dynamics of sexual assault
- The Office of Civil Rights of the Department of Education has specified certain areas in which investigators should be trained in the following areas:
  - Training or experience in handling sexual violence complaints;
  - The operation of the school's grievance procedures, including information on working with victims of sexual violence;
  - What conduct consists of sexual violence, including same sex violence; the proper standard of review for such cases; information on the definition of incapacity and the role drugs and alcohol play; the importance of accountability for individuals found to have committed these acts;
  - How to make credibility determinations, the effects of trauma on the brain, and the symptoms of post-traumatic stress disorder; and cultural awareness on how sexual violence may impact students differently depending upon their cultural backgrounds. Regular training on these areas must be provided.

# Federal guidance

- Proceedings should be completed within a reasonable timeframe
- Without undue delay
- DCL: should be within 60 days
- Parties must be given timely notice of meetings at which either is present, and must have timely access to materials that will be used in the meetings or proceedings
- Standard of evidence is preponderance, as in more likely than not
- Parties can have an advisor and restrictions on advisor can be established (can be an attorney)
- Outcome simultaneously, in writing
- Appeal process must be provided to both
- Interim measures must be available to parties
- Confidentiality must be maintained to the extent that maintaining it will not impair the institutions availability to meet Title IX obligations
- Possible sanctions must be noticed and posted

# Campus Sexual Violence Elimination (SAVE) Act

- Passed last year and became effective March 7, 2014.
- Requires all the same things Cooper Union has been doing re: sexual violence
  - Education, training, provision of support resources
  - And enforcement of policies prohibiting such behavior
  - In addition, it requires schools to particularly address violence in domestic and dating relationships
  - Deal with stalking and dating violence as well

# President's Report on Sexual Assault on Campus, April 2014



Schools

## *Not Alone*

Resources

TOGETHER AGAINST SEXUAL ASSAULT

"Perhaps most important, we need to keep saying  
to anyone out there who has ever been assaulted:  
you are not alone.

We have your back. I've got your back."

*President Barack Obama, January 23, 2014*



**President Barack Obama signs the Presidential Memorandum establishing the White House Task Force to Protect Students From Sexual Assault on January 22, 2014. (Official White House Photo by Lawrence Jackson)**

- NO MORE PSA CAMPAIGN "EXCUSES" :15
- 
- [▶ 1:01](#)
- [NO MORE PSA CAMPAIGN "ANTHEM" :60 - YouTube](#)
- [www.youtube.com/watch?v=j70ha1PUlqk](#)
- [https://www.youtube.com/watch?v=tajpGmYczXU](#)
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# Administration Priority: To Reduce the Incidence of Campus Sexual Assault

*Sexual violence is more than just a crime against individuals. It threatens our families, it threatens our communities; ultimately, it threatens the entire country. It tears apart the fabric of our communities. And that's why we're here today -- because we have the power to do something about it as a government, as a nation. We have the capacity to stop sexual assault, support those who have survived it, and bring perpetrators to justice.*

President Barack Obama, January 22, 2014

## Why We Need to Act, from The President's Report

“One in five women is sexually assaulted in college. Most often, it's by someone she knows – and also most often, she does not report what happened. Many survivors are left feeling isolated, ashamed or to blame. Although it happens less often, men, too, are victims of these crimes. The President created the Task Force to Protect Students From Sexual Assault to turn this tide. As the name of our new website – NotAlone.gov – indicates, we are here to tell sexual assault survivors that they are not alone. And we're also here to help schools live up to their obligation to protect students from sexual violence”

# The First Report of the White House Task Force to Protect Students from Sexual Assault: Recommendations

- A Checklist for a comprehensive sexual assault policy on campus
- “Trauma-informed” training for school officials
- Better school disciplinary systems “having a single, trained investigator to do the lion’s share of the fact-finding”
- Partnerships with the community
- More transparency
- Improved enforcement of Title IX
- Climate survey

## Goals of the Taskforce

- Identify the scope of the problem on college campuses
- Help prevent sexual assault
- Help schools respond effectively when a student is assaulted
- Improve and make more transparent the federal government's enforcement efforts

# Frequently Asked Questions

- To address many of the questions confronting colleges and universities since the 2011 Dear Colleague Letter.
- What is a school's obligation to respond to sexual violence?
- Who is protected under Title IX?
- Title IX procedural requirements?
- Who are "responsible employees" for the purpose of reporting?
- Confidentiality and a school's obligation to respond to sexual violence;
- Investigations and hearings - what are the rights of the parties?
- What are appropriate interim measures to be implemented prior to a finding of responsibility?
- Considerations in sanctions and remedies and appeals;
- Consequences for retaliation?
- What are the requirements under the Clery Act and Title IX training?

# Now, 88 colleges and universities are under investigation for Title IX violations

- Federal government promised more transparency
- *2014 will go down in history as the year colleges were forced to confront sexual violence among students*
- *A year ago, 25 colleges under investigation; now 88*

# Resolution Agreements

- Between September 2010-present
- Office of Civil Rights, Department of Education agreements with 10 colleges to resolve Title IX complaints filed by students
- They deal with determining a new standard of proof, rules regarding confidentiality, requirements for interim measures, to provide parties with the opportunity to present witnesses and other evidence, to prohibit retaliation, to make support services available to respondent as well as complainant, to require adequate, impartial investigations, to provide arrangements for complainants who do not want to be in the same room as the respondent, and to include Title IX training during student orientation.



# A Typical Case...

- A freshman woman, an architecture student at Cooper Union goes to a party. She has a number of drinks throughout the evening. She spends the last few hours at the party talking to an upper-class Engineering student at Cooper she met for the first time that night. He has also been drinking throughout the party. They leave the party together and walk to her dorm room, where he pours ten shots out of a bottle he pulls out of his backpack. She drinks most of them. She then remembers getting sick on the floor of the room. She remembers that he helps her to lie down on her bed. They wake up in the morning naked in bed together. She cannot remember many of the details of the night following her vomiting on the floor. She does not remember consenting to have sex with this man. She is not sure if they even had sex, but she thinks so. What are her options?
- She leaves and subsequently reports being sexually assaulted.
- What if she goes to the police? To someone at Cooper?
- **Before we even look at the respondent's statement, what is the issue here?**
- He gives his statement and says yes, we were both drunk, but she knew what she was doing. She walked me back to HER dorm room and we took our clothes off totally and got into bed and had sex. She even asked me to make sure I used a condom and when I could not find one, she pulled one out of her purse. I did not sexually assault her. It was consensual.
- **So now what else does the investigator need to know? Think chronologically.**

## Before the party:

- Did she “pre-game”?
- What did she have to drink?
- Over what period of time?
- Who was she “pre-gaming” with?
- What did she have to eat that day?
- Did she exercise?
- How much sleep did she get the night before?
- How does all this compare to her past experience drinking under such circumstances?
- What is her height and weight?
- Was she feeling the effects of the alcohol at the “pre-game”? If so, how so? Would those effects have been visible to others?
- Can she remember everything that happened at the “pre-game”?
- Did anyone take photos at the “pre-game”?

## During the party:

- How much did she have to drink? He? Affects not just her ability to consent but the accuracy of both of their memories.
- How much did he see her drink? Did she tell him about her “pre-gaming”? Was he plying her with drinks? Tells the investigator what he knew then about her capacity.
- How were they interacting at the party? Were they in physical contact? Hugging, kissing, etc.? Was it one-sided?
- Who was around to have observed their interaction at the party? How much they had to drink. How each was handling the alcohol. How they were interacting physically.
- What do each of them, the complainant and respondent, say about how they were handling the alcohol and what did they observe about the other one in this regard? Walking, talking, etc.
- What did they talk about at the party and, most importantly, at the end of it? How did the decision to go back to the responding student’s room come about?
- Did either one say goodbye to their friends before they left? Did they say where they were going? I’m going to hook up, or I’m going home?
- Did they text anyone to say either of these things?
- What did each of them think was going to happen when they got back to his room and why did they think that?
- To their knowledge, did anyone take photos of them at the party?

## On the way to her room:

- If it was cold out, did they get their coats before they left?
- Where was his room i.e. location of her dorm vis a vis the location of the party? How far did they have to walk? Is it a difficult walking route?
- What floor was her dorm room on? How many floors did they have to ascend?
- What do each of them say about their ability to walk that route?
- Were there any witnesses to how they were walking, especially how they ascended the stairs?
- Were they talking as they walked? About what? What is the relevance of the man recalling a lot of things the woman told him as they walked, but her not remembering having told him those things at all? You want to know whether, even though she does not remember telling him those things, they are true? This will be true for any conversation they had in his room as well.
- Did either of them get sick at any point during the walk? (You want to ask this about when they were back at the party and later at her dorm room too.)

## In her room:

- Was anyone else there when they first got there?
- Details from the moment they walked into the room about exactly what happened.
- What was the conversation throughout, including during sex and right after sex?
- How did their clothes come off? Who took what off? Did she have any trouble getting them off? Were they thrown on the floor or folded neatly?
- Specifics of how the sexual interaction began and proceeded right through the end. This includes positioning throughout. Was she interacting in any way? Initiating or responding to what he was doing?
- What was her emotional state throughout? His?
- Was a condom used? How did that come about?
- What is her last clear memory? Why does she think she either fell asleep or otherwise became unconscious at that point , as opposed to suffering a blackout?
- How was she feeling physically and mentally throughout the time the time she was in his room? Did she feel her ability to make rational reasonable decisions was impaired? If so, how so? What does she think about this was visible to him?
- What does he say in this regard?

## After the alleged assault:

- What was said between them in the morning?
- Where did she find her clothes and in what condition?
- Did she leave anything behind when she left, a piece of clothing, jewelry, purse?
- Did she see anyone as she left his room?
- Where did each of them go that morning/that day and what did they do?
- Did they tell anyone what happened the night before? Who? When? Where? What exactly was said? What was the reaction of the person they told?
- Did they text/email/Facebook etc. anyone about what happened the night before or even just about how they were feeling the next day?
- Did she get medical treatment anywhere?
- Any behavioral changes since the incident? Psychological? Emotional? Physical?
- Have they had contact since that morning? If so, need details.
- When did she decide to report and how did that come about? Why delay, but preface this.

## Questions the investigator might want to know about alcohol use...

- How much do you each remember having to drink?
- Amount that you usually drink?
- How often do you drink this much?
- Had you taken any prescription medications? Any other drugs?
- What effects did you feel, physical, mental and emotional?
- Memory loss: complete, gaps in time, or clear memory of whole evening?
- If this is a situation where complainant was unconscious: Has this happened before? If so, how often?
- Blackouts: Has this occurred in the past? If so, how often?
- What is your last clear memory? What else do you have any memory of? When did you begin to have a clear memory again and what do you remember about that?

## Other evidence likely to be reviewed

- Surveillance video, pass card info
- Texts, emails, Facebook messages
- Photos (from cell phones, Facebook, Instagram)
- They may provide corroborating or inconsistent evidence
- If inconsistent with what the complainant/respondent has just told the investigator, the investigator must ask for an explanation
- If there are inconsistent statements in the reports, must search for an explanation from both parties

# Role of Campus Security vs. Role of the Police in Case Enhancement

## **Criminal Justice Response/ University sexual assault investigator**

- Full complainant interview
- Contacting CSU and Obtaining search warrants
- “Controlled” Communications (calls, meets, Internet, etc...)
- Telephones: call history, text Messages, camera function, cell site history
- Computers/ Video cameras: Their use in the crime, social media websites
- Additional witness interviews (There are always additional avenues to investigate)
- Full crime scene processing/warrant
- Interview all other witnesses

## **Campus security first responder**

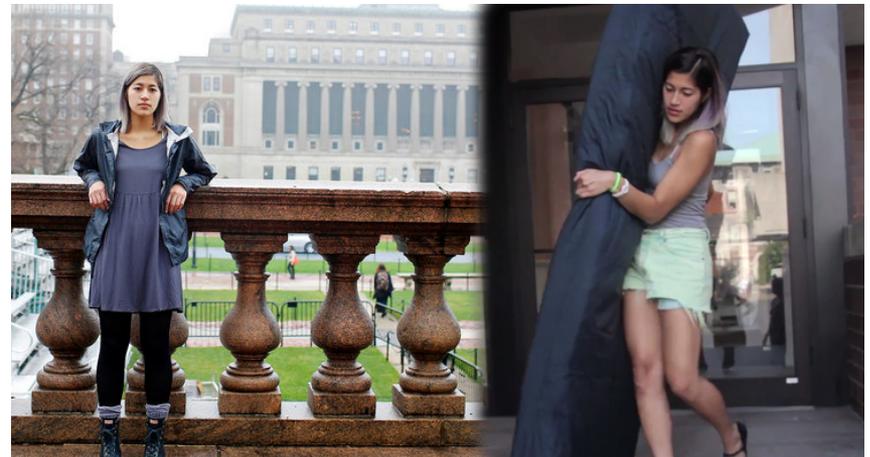
- Canvass
- Crime scene processing: notes, photos, sketches
- Video surveillance tapes, swipe card records
- Bare facts Complainant interview
- If respondent says anything, write it down, but no full blown interview
- Interview outcry witness
- Assess safety of all parties
- Report

# How can an effective investigation be done in a climate like this?

- Huge amount of publicity around the failures of investigations of sexual assault on campus
- Enormous scrutiny and second guessing
- Title IX Complaints filed across the country



sexual assault  
violators on campus





# Balance and Equity must be ever-present

- The investigation may include, but is not limited to, conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable; reviewing student and personnel files; and gathering and examining other relevant documents or evidence. While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. **A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.**
- Specifically: Throughout the investigation, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- Questions and Answers on Title IX and Sexual Violence, F-1, p. 24-26.

## Goals of the Title IX investigation

- To seek the truth
- To maintain a compassionate and sensitive approach to all involved
- To be fair, impartial, reliable and thorough
- To maintain professionalism and consistency in process, procedures and communications
- To impose accountability for conduct that violates community standards and campus policies

## Where do we begin?

- Dispense with the myths
- Think about the facts of this case and this case only
- The rest is just noise

# Common Myths about Sexual Assault: Federal mandates include training that these are myths, not reality

- A “real” rape involves a male stranger who jumps out of the bushes with a weapon and sexually assaults a female causing visible injuries and the victim immediately reports the assault
- True stranger vs. acquaintance sexual assault breakdown
  - 80 – 90% of sexual assault involves an acquaintance
  - People who have been in a “prior sexual relationship” can be sexually assaulted
  - Perpetrators and complainants can be any sex, ethnicity, religion, age, economic status, marital status, sexual orientation, appearance
- Sexual assaults often involve the use of weapons
- Sexual assaults often cause visible physical injury
- Real sexual assault victims report their assaults right away
- Going back to another’s room means one wanted to have sex
- How one is dressed indicates one’s desire to have sex
- A request that a condom be used means that one wanted to have sex
- Physical arousal and/or orgasm means someone consented

**Can't evaluate this case without  
understanding the dynamics of sexual  
assault**

# The investigators and decision-makers must keep in mind that sexual assault is unique....

- Unique victimization (contrast with a robbery)
- Focus is on the complainant:
  - What was the complainant doing?
  - Did the complainant do something to bring this on?
  - What was the complainant thinking?
  - What was the complainant wearing?
- Usually accompanied by drugs or alcohol on campus
- Most complainants know attacker (again, compare to robbery)
- Force not traditional (no gun, knife, etc.)
- Usually no corroborating evidence, so the decision about what happened is based solely on credibility of the two parties
- Usually a delay in reporting
- Defense is almost always consent
- So emotional!
- So personal!
- Who recants in a robbery case?

## And an understanding of why people commit acts of sexual violence....

- Power, control, anger
- Sense of entitlement: What do you mean, you don't want to have sex with me?
- Lack of empathy for victim: she asked for it, she was drunk
- Sexual gratification is generally a minor motivator

## How might someone respond to the immediate threat of assault?

- Fight
- Flight
- Freeze
- Negotiate
- Accommodate

## How might the complainant respond immediately after the assault?

- Confused, angry, embarrassed, humiliated
- Foggy memory
- No memory but woke up naked and sore
- This isn't supposed to happen to me
- I can't believe he did that! I actually liked him.
- What did I do to make him think that was ok?
- Why didn't he listen to me?
- No action, frozen, does nothing
- Re-living the event
- Feeling angry and violated
- Feeling friends and family unsupportive, whether or not they are
- Anxiety over costs associated with trauma
- Sense of betrayal, loss of trust/safety in community one was attached to.
- Symptoms of Rape Trauma Syndrome

# Barriers to reporting at all

- No one will believe me
- What will people do to me if I report?
- Everyone will know it is me!
- Everyone will blame me!
- People will ask me, “What’s the big deal?”
- My roommate thinks it is all my fault
- This happened in my room...it is my fault
- I was so drunk, he will blame it on that
- I made the first move and I changed by mind.
- Not the first time, shame on me
- My friend group!
- Will he get kicked out of school?

# Why do people commit act of sexual violence?

- Power, control, anger
- Sense of entitlement: What do you mean, you don't want to have sex with me?
- Lack of empathy for victim: she asked for it, she was drunk
- Sexual gratification is generally a minor motivator

## How might the offender respond immediately after the assault?

- That went well
- I hope he/she is cool with it
- He/she needed some convincing but then seemed to go along with it
- I'll text her to show that I don't feel awkward about it

## Counter-intuitive behaviors

- While the complainant is deciding whether to bring forward a complaint, and the respondent is thinking nervously about what happened, both parties may behave "normally" around each other.
- She may even try to contact him to convince herself this did not really happen
- He may contact her to pretend like nothing happened
- Delay
- Or not report at all (60-90% don't)

**How would this case be analyzed?**

## Cooper Union's Policy Defines Consent As:

- Active, knowing and voluntary exchange of affirmative words or actions which indicate a willingness to participate in the activity
- Freely and actively given
- Lack of objection is not consent
- Incapacity is a state where someone cannot make rational, reasoned decisions
- Sex with someone whom you know, or reasonably should know is mentally or physically incapacitated constitutes a violation of the policy

## Consent....

- Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse).
- A current or previous dating relationship is not sufficient to constitute consent.
- Past consent to engage in sexual activity cannot be presumed to be consent to sexual activity in the future.
- The existence of consent is based on **the totality of the circumstances**, including the context in which the alleged incident occurred and any similar previous patterns that may be evidenced.

## Silence?

- Silence or the absence of resistance alone is not consent.
- A person can withdraw consent at any time during sexual activity by expressing in words or actions that he or she no longer wants the act to continue, and, if that happens, the other person must stop immediately.

## What does it mean to be incapacitated under Cooper Union's policy?

- Incapacitation is a state where someone cannot make rational, reasonable decisions. What does this mean?
- They lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why or how” of the sexual interaction).
- This policy also covers a person whose incapacity results from mental disability, sleep, unconsciousness, physical restraint, or from the consumption (voluntary or otherwise) of incapacitating drugs or quantities of alcohol.

**It is not an excuse that the individual respondent was intoxicated and, therefore, did not realize the incapacity of the other.**

# The Intoxication Spectrum

- “Out cold” on the one end and “totally fine” on the other
- Where is the line between the two?
- How about on verge of losing consciousness?
- How about enough drinks to be a little “high”?
- When does impaired judgment become incapacitation?
- Is it when you are “legally” intoxicated, i.e., over .08 BAC?
- Intoxication is not the same thing as incapacitation.
- Determining incapacity requires an analysis of whether one can “*make a rational, reasonable decision.*”

# Date Rape Drugs and Voluntary vs. Involuntary Intoxication

- Prevalence or lack thereof
- Involuntary – someone puts something in the complainant’s drink in order to incapacitate him/her
- Voluntary – the complainant purposely takes a drug that incapacitates him/her
  - Recreationally
  - Prescription drugs
- The level of incapacitation is the question when determining consent, not how that came about although the latter may tell you about the respondent’s motives and would certainly indicate that he/she “knowingly” engaged in sexual activity with someone who was incapacitated.

# What are the signs of someone who is too intoxicated to make a rational, reasonable decision and therefore give valid consent?

- Unsteady on their feet, dizzy, falling down, holding onto things or people to keep balance
- Inability to move parts of the body
- Not speaking clearly, slurring words, repeating themselves, saying stupid things
- Seemingly unaware of their surroundings
- Being overly loud, obnoxious
- Falling asleep, nodding out
- Inability to resist if they wanted to
- Vomiting, nausea
- Urinating on themselves
- Making stupid decisions or unable to make any decisions
- Unable to exercise reasonable judgment about what they are doing

## Other things to recognize in cases involving incapacity

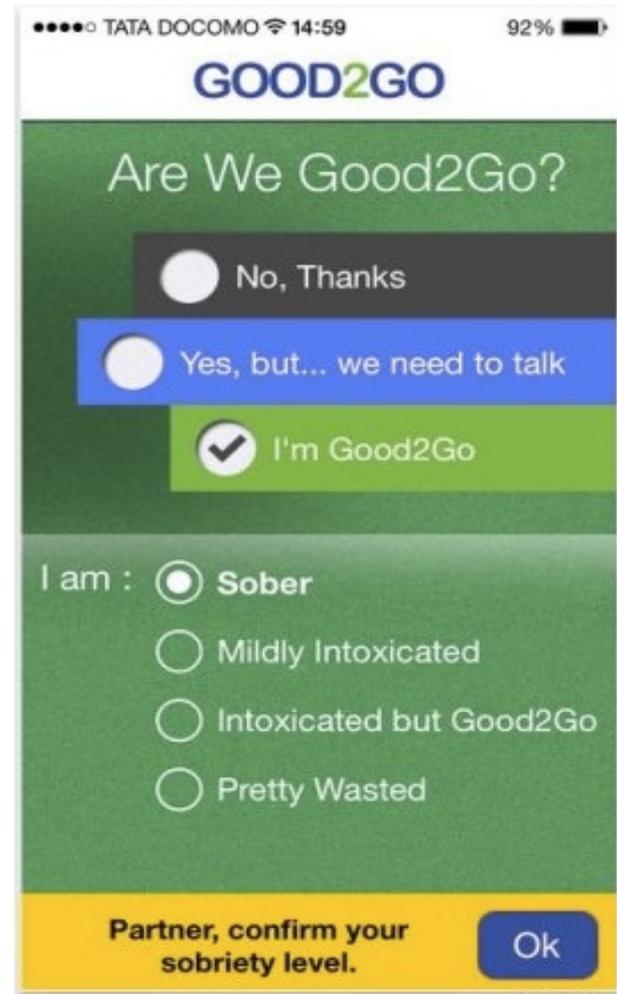
- Presence of one or more of these cues does not necessarily indicate incapacity, nor does the absence of these cues necessarily indicate capacity.
- Effect of alcohol on memory: Alcohol can prevent the encoding of memory, so sexual trauma combined with lots of alcohol can lead to no memory of an assault.

# Respondent's Intoxication

- How does his/her intoxication by drugs or alcohol affect these cases?
- What if, because of intoxication, the respondent failed to look for signs of affirmative consent?
- What if, because of intoxication, he/she missed the signs of lack of consent, i.e., that the complainant was indicating “no” or was too incapacitated to do so?
- *Many schools use the following as guidance:* Alcohol and other drugs can lower inhibitions and create an atmosphere of confusion over whether consent is freely and affirmatively given. The **perspective of a reasonable person** will be the basis for determining whether one should have known about the impact of alcohol and other drugs on another person's ability to give consent. The use of alcohol and other drugs never makes someone at fault for being sexually assaulted. **It is a reasonable non-drunk person standard.** What would a reasonable non-drunk person have understood from the things he/she should have seen, heard, felt, etc., had he/she not been so intoxicated?



Circleof6



Good2Go

# Gauging Consent

- **Red:** Signs You Should Stop
  - You are too intoxicated to gauge or give consent.
  - Your partner is asleep or passed out.
  - You hope you partner will say nothing and go with the flow.
  - You intend to have sex by any means necessary.
- **Yellow:** Signs You Should Pause and Talk
  - You are not sure what the other person wants.
  - You feel like you are getting mixed signals.
  - You have not talked about what you want to do.
  - You assume that you will do the same thing as before.
  - Your partner stops or is not responsive.
- **Green:** Keep Communicating
  - Partners come to a mutual decision about how far to go.
  - Partners clearly express their comfort with the situation.
  - You feel comfortable and safe stopping at any time.
  - Partners are excited!

## Conclusions reached as to the violation of policy, or not

- Report submitted to Title IX coordinator
- Report includes finding as to whether policy was violated
- Sanctions determined by the Title IX coordinator and Student's Dean
- Appeal based upon only new evidence, procedural error, or that the sanctions imposed were inappropriate