Unpacking Incapacitation

Learning Outcomes

- Reflect on policy and reporting implications as well as educational programming.
- Understand that findings regarding incapacitation require a two-step process.
- Recognize the impact that alcohol can have on consent.
- Identify the differences between impairment, intoxication, and incapacitation.
- Understand the various ways in which a person can be incapacitated.
- Examine the general definition of consent.

Consent

- When is touching ok?
- When is sexual touching ok?
- How do you know if you have consent to sexual touching?
- How do you know when consent is withdrawn?

Consent Can Be

- Communicating before you change the type or degree of sexual activity with phrases like “Is this OK?”
- Explicitly agreeing to certain activities, either by saying “yes” or another affirmative statement, like “I’m open to trying.”
- Using physical cues to let the other person know you’re comfortable taking things to the next level.
- Consent is sexual permission. It is given through verbal communication. It can also be inferred through body movement and reciprocation. It is ongoing and can be revoked at any time.
- Consent is not present when there is a temporary or permanent mental or physical condition resulting in a lack of awareness that the sexual act is taking place.
- Consent is never present when someone is unconscious or in and out of consciousness due to sleep or the intake of alcohol or controlled substances.
- Consent is also not present if threats, coercion, or force are used.
- Consent cannot be present if a person cannot legally consent (age, cognitive ability).
Consent is NOT

- Refusing to acknowledge “no,” or taking it as a challenge.
- Assuming that wearing certain clothes, flirting, or kissing are an invitation for anything more.
- Able to be provided by someone being under the legal age of consent, as defined by the state.
- Able to be provided by someone being incapacitated because of drugs or alcohol.
- Pressuring someone into sexual activity by using fear, intimidation, coercion, or threats.
- Assuming you have permission to engage in a sexual act because you’ve done it in the past.

Incapacitation

- “A state of being that prevents an individual from having the capacity to give consent. For example, incapacitation could result from the use of drugs or alcohol, a person being asleep or unconscious, or because of an intellectual or other disability.”
- “Incapacitation means a person cannot understand the fact, nature, or extent of the sexual activity. An incapacitated person lacks the physical and mental capacity to make informed, reasonable decisions, or judgements regarding the sexual activity. A person who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening.”
- “Incapacitation is when a person temporarily is incapable of appraising or controlling their conduct.”
- “The inability to make rational, reasonable decisions, or judgements regarding one’s well-being or welfare.”

Incapacitation includes those who may be suffering from a temporary or permanent mental or physical conduction, asleep, unconsciousness, or unaware of the sexual act is taking place.

What’s a drink?
What's a drink in college?

Impact of Alcohol Consumption Levels

Cognition (new brain)
* judgment
* inhibition
* personality
* intellect
* emotion

Psychomotor functions
* muscular coordination
* balance
* eye focus
* speech

Involuntary functions
* vomiting
* blackout
* pass out
* respiration

Levels of Impact for Alcohol Consumption

Impairment
- The state of being diminished or weakened due to the consumption of alcohol.
- Alcohol is nervous system depressant.
- Impairment begins as soon as alcohol enters the bloodstream.
- Impairment increases with consumption of alcohol.

Intoxication
- An act or instance of inebriation; drunkenness.
- Intoxication is legally met when an individual’s blood alcohol level reaches .08 or greater.
- Question: Can two drunk (intoxicated) people legally have sexual intercourse?

Incapacitation
- "A state of being that prevents an individual from having the capacity to give consent. For example, incapacitation could result from the use of drugs or alcohol, a person being asleep or unconscious, or because of an intellectual or other disability."
- "Incapacitation means a person cannot understand the fact, nature, or extent of the sexual activity. An incapacitated person lacks the physical and mental capacity to make informed, reasonable judgements about whether or not to engage in sexual activity. A person who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening."
- "Incapacitation is when a person temporarily is incapable of appraising or controlling their conduct."

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Incapacitation

- Unable to understand the fact, nature, or extent of sexual activity...
- Unaware that sexual activity is occurring...
- States of incapacitation include, but are not limited to, unconsciousness, sleep, and blackouts. Incapacitation may result from the voluntary or involuntary consumption of alcohol and/or other drugs. Where alcohol or other substances are involved, incapacitation is determined by how the substance impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. For purposes of this Policy a person is not incapacitated merely because the person has been drinking or using drugs.

Factors that influence an individual's Blood Alcohol Concentration (BAC):
- Time
- Amount of alcohol consumed

Factors that impact presentation:
- Amount:
  - Food
  - Sleep
- Altitude
- Menstruation
- Consumption of drugs (prescription or illicit.)

Estimating BAC

- Smell of alcohol about the person
- Slurred speech
- Bloodshot eyes
- Cannot stand
- Cannot walk without assistance
- In and out of consciousness
- Blackout
- Vomiting
- Out of control behavior
Incapacitation

- It does not always correlate to a specific BAC and could be a result of drug use (subjective).
- It is demonstrated in a variety of ways:
  - In an individual's ability to make informed decisions.
  - In an individual's ability to understand space, time, nature of the act, and other facts.
  - In an individual's ability to understand consequences.

An individual is incapacitated for purposes of sexual misconduct policy when they lack the mental capability to understand:
1. Who is having sex with them? (Name, more than 1?)
2. When are they having sex? (What time is it?)
3. Where are they having sex? (What is my location?)
4. How am I having sex? (Is someone having sex with me in a way I do not like/am not aware of?)
Consent must be informed. An individual who does not know even one of the above could be incapacitated.

Additional Considerations

- Blacked out v. passed out
- Self-incapacitation
- Second step of incapacitation assessment:
  - Did the respondent know incapacitated, or would a reasonable person know?

Blackout vs. Pass Out

- Fragmentary blackout
- En bloc blackout
- Pass out

Impact of Alcohol Consumption Levels

- Does it matter whether the complainant self-incapacitates, or the alleged student incapacitates the complainant?
  - If yes, when might it matter?
  - If no, why not?
If we are trying to determine incapacitation, the investigation must also focus on:
- Did the respondent know the other person was incapacitated?
- Would a reasonable person know the other person was incapacitated?