

**MODULE I**  
DECISION-MAKER  
TRAINING:  
TITLE IX DEFINITIONS OF  
PROHIBITED CONDUCT

OFFICE FOR TITLE  
IX AND  
INSTITUTIONAL  
EQUITY (TIXIE)  
GRAND VALLEY  
STATE UNIVERSITY  
2021



# WELCOME TO MODULE I!

- As you know, the Department of Education issued a 2,083 page rewrite of the Title IX regulations in May 2020, with an implementation date of 14-Aug-2020.
- The Final Rules “radically transform how universities handle sexual misconduct cases by imposing strict new procedural requirements that institutions must follow when addressing such complaints” (NAICU)
- As a result, GVSU adopted a Title IX complaint procedure and revised existing policies and procedures



# DEFINITIONS

- Title IX regulations require each recipient (university) to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
  - *QUID PRO QUO*
  - *SEXUAL HARASSMENT*
  - *SEXUAL MISCONDUCT*
- In your role as a co-investigator you have to know what you are looking for. In your role as a Hearing Panel decision-maker, you have to assess what you see.
- So, to inform the processes of “seeing” and “knowing,” the definition of each of the prohibited conducts will be broken down into key elements.
  - *each of the elements of a definition has to be “seen” in an investigation;*
  - *each of the elements of a definition has to be proven by the evidentiary standard of a preponderance of the evidence in a hearing.*

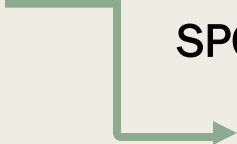
# QUID PRO QUO

**QUID PRO QUO** (something for something):

- *Sexual advances AND/OR*
- *Requests for sexual favors AND/OR*
- *Other verbal or physical conduct of a sexual nature AND*
- *Unwelcome AND*
- *By a person having power or authority over another AND*
- *Submission to such sexual conduct is an explicit term or condition of*
  - rating AND/OR
    - evaluating AND/OR
    - providing a benefit to an individual's educational or employment development or performance.



# SEXUAL HARASSMENT

- *Unwelcome*
  - *Sexual AND/OR*
  - *Sex-based AND/OR*
  - *Gender-based AND*
  - *Verbal AND/OR*
  - *Written AND/OR*
  - *Online AND/OR*
  - *Graphic AND/OR*
  - *Physical conduct that is*
    - *Severe AND*
    - *Pervasive AND*
    - *Objectively offensive AND*
- SP00
- 
- *Effectively denies the person equal access to GVSU's educational programs or activities or employment.*

# SEXUAL HARASSMENT (con't)

- Sexual harassment has to be severe AND persistent AND objectively offensive (SPOO) to create a *hostile environment*.
  - *This sets a considerably higher threshold than the previous policy definition.*
  - *It requires an investigation and a hearing that assess the totality of the circumstances surrounding the complaint.*



# SEXUAL MISCONDUCT

Now to the definitions of sexual misconduct. Please keep in mind that under the new Title IX Policy (A), Federal definitions of prohibited conduct are used.

If you want to read them in their entirety, please follow the links:



- “Sexual assault” as defined in [20 U.S.C. 1092\(f\)\(6\)\(A\)\(v\)](#) (forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation), “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\(a\)\(30\)](#).

Or, better yet, you can read the key elements of each on the following slides.

# SEXUAL MISCONDUCT (con't)



- **PLEASE NOTE:** the Federal labels of acts of sexual misconduct are heteronormative and not exactly *au courant*
- **INTERESTING FACT:** *It took 85 years before the Federal definition of rape changed from “carnal knowledge” to “penetration, no matter how slight, of the vagina or anus with any body part of object or oral penetration by a sex organ of another person, without the consent of the victim.” This 2012 victory for feminist activists meant that for the first time the new definition included any gender of victim and perpetrator, and recognized that rape with an object can be as traumatic as penile/vaginal rape.*
  - **EVEN MORE INTERESTING FACT:** In the 2020 Title IX Rules, “Carnal knowledge” is baaaaack!



# SEXUAL ASSAULT

## 1. RAPE:

- *carnal knowledge of a person (i.e. penile penetration)*
- *against that person's will (non-consensually), OR*
- *when the person is incapable of giving consent because of age (below 16 years in Michigan), OR*
- *is temporarily or permanently mentally or physically incapacitated.*

## 2. SODOMY:

- *oral or anal sexual intercourse with another person,*
- *against that person's will (non-consensually), OR*
- *when the person is incapable of giving consent because of age (below 16 years in Michigan), OR*
- *is temporarily or permanently mentally or physically incapacitated.*

# SEXUAL ASSAULT (con't)

## 3. SEXUAL ASSAULT WITH AN OBJECT:

- *the use of an object or instrument to penetrate,*
- *however slightly,*
- *the genital or anal opening of the body of another person,*
- *against that person's will (non-consensually), OR*
- *when the person is incapable of giving consent because of age (below 16 years in Michigan), OR*
- *is temporarily or permanently mentally or physically incapacitated.*

# SEXUAL ASSAULT (con't)

## 4. FONDLING:

- *the touching of the private body parts of another person (buttocks, groin, breasts),*
- *for the purpose of sexual gratification,*
- *against that person's will (non-consensually), OR*
- *when the person is incapable of giving consent because of age (below 16 years in Michigan), OR*
- *is temporarily or permanently mentally or physically incapacitated.*

# SEXUAL ASSAULT (con't)

## 5. INCEST:

- *non-forcible sexual intercourse,*
- *between persons who are related to each other, AND*
- *within the degrees wherein marriage is prohibited by state law.*
  - [Michigan Legislature - Section 551.3:](#) "A man shall not marry his mother, sister, grandmother, daughter, grand-daughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree."

# SEXUAL ASSAULT (con't)

## 6. STATUTORY RAPE:

- *non-forcible sexual intercourse,*
- *with a person who is under the statutory age of consent of 16 years in the state of Michigan.*

■ **NOTE:** This offense only applies if conduct is “consensual” with a minor. If forced or against the will of the minor, revert to Rape definition

# DATING VIOLENCE

## ■ DATING VIOLENCE:

- *violence, committed by a person,*
- *who is in or has been in a social relationship of a romantic or intimate nature with the Complainant, AND*
- *where the existence of such a relationship shall be determined based on a consideration of the following factors:*
  - *length of the relationship,*
  - *type of relationship,*
  - *frequency of interaction between the persons involved in the relationship.*

# DOMESTIC VIOLENCE

## DOMESTIC VIOLENCE:

- *Violence committed by a person who is,*
- *a current or former spouse, OR*
- *intimate partner of the complainant, OR*
- *who shares a child in common with the Complainant, OR*
- *cohabitates with or has cohabitated with the Complainant as a spouse or intimate partner, OR,*
- *who is a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, OR*
- *by any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.*

# STALKING

## STALKING:

- *engaging in a course of conduct,*
- *directed at a specific person,*
- *that would cause a reasonable person to fear for the person's safety, OR*
- *the safety of others; OR*
- *suffer substantial emotional distress.*

**NOTE:** *The definition includes stalking that occurs online or through messaging platforms (cyberstalking) when it occurs in the school's education program or activity.*



# RETALIATION

## RETALIATION:

- *No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.*
- *The exercise of rights protected under the First Amendment does not constitute retaliation.*

*TIME FOR A BREAK. . .*

. . . To ponder the future. . .





# CONSENT

- Central to each definition of sexual misconduct is the notion of consent.
- The Title IX Rules do not define consent nor do they require the adoption of any specific definition.
  - *GVSU, for the time, will retain its policy definition of consent.*
- The Title IX Rules do, however, require training on how to apply our definition of consent consistently and impartially.
- This application not only assists in your role as co-investigator, but in your role as a Hearing Panel decision-maker.

# GVSU POLICY DEFINITION OF CONSENT

- “Consent is affirmative, informed (knowing), voluntary (freely given), and clearly communicated by word or action. Consent can be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.”
  - *When evaluating whether the Complainant has given consent, GVSU will also consider the presence of physical violence, threats, intimidation, and/or coercion.*
  - *Individuals may experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.*
- “Consent cannot be obtained by taking advantage of the *incapacitation* of another, where it was known, or reasonably should have been known, that the other was incapacitated.”

**NOTE:** The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

# INCAPACITATION

*Incapacitation is such that it renders the person incapable of self-care and protection and occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give informed (knowing) consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).*

- Incapacitation could be the result of alcohol, other drugs, sleep or unconsciousness, a temporary or permanent physical or mental health condition, or involuntary physical restraint.

**NOTE:** *the messaging about incapacitation is inconsistent on campus. Despite that, the policy definition must always be used.*

# INCAPACITATION ANALYSIS

Was the Complainant incapacitated at the time of sex?

- *Could the Complainant make rational, reasonable decisions?*
- *Could the Complainant appreciate the situation and address it consciously such that any consent was informed?*
  - That requires knowing who, what, when, where, why, and how.
- Did the Respondent know of the incapacity (factual), OR
- Should the Respondent have known from all the circumstances (*i.e.* would a reasonable person have known)?

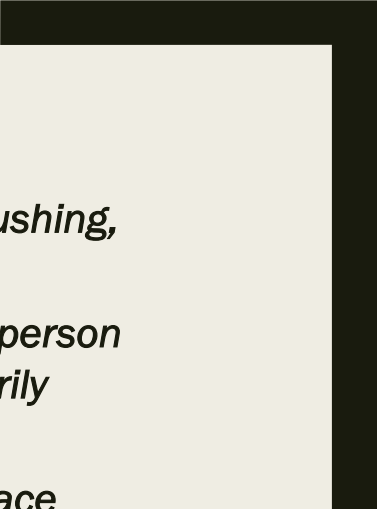
# INCAPACITATION ANALYSIS (con't)

- How do we determine what a Respondent *should have* known?
- Apply a knowledge construct:
  - *Assess the evidence of incapacitation: slurred speech, stumbling, passing out, vomiting, disorientation, outrageous or unusual behavior, unresponsiveness, as examples.*
  - *Determine:*
    - whether the Respondent knew the Complainant previously and if so,
      - *if the Complainant was acting differently from previous similar situations;*
    - what the Respondent observed the Complainant consuming;
    - what others told the Respondent about the Complainant's consumption and/or behavior;
    - whether the Respondent supplied the alcohol and/or drugs to the Complainant.

# INCAPACITATION ANALYSIS (con't)

- If the Complainant was **not** incapacitated, move on to the analysis of consent vis-à-vis the policy definition.
- 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 then there is evidence to determine that a policy violation occurred.*





## IN RE: PHYSICAL VIOLENCE, THREATS, INTIMIDATION AND COERCION

- **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:** implied threat that menace and/or cause reasonable fear
- **Coercion:** unreasonable amount of pressure for sexual access. In this case consider:
  - Isolation
  - Frequency
  - Intensity
  - Duration

The use of any one or more of these **nullifies consent** for each of the sexual misconduct acts under Title IX Policy (Policy A).

# “DO I HAVE TO MEMORIZE THESE?”

- No, and they won't be on the test either, so no whining.
- It would be helpful, though, if you carefully reviewed the elements of the prohibited conduct you will be dealing with when you agree to serve as a decision-maker on a Hearing Panel.
- The final investigation report will state on the first page what prohibited conduct has been investigated and its analysis section will parse out each element of the definition, as well as deal with consent, incapacitation and violence, threats, intimidation and coercion.

# TIX TEAM MISSION. . AND THANKS!

- With our TIXIE value statement in mind, we will be holding in-person discussions that will provide the opportunity to engage in critical thinking, knowledge sharing, empathic engagement, imagination, discernment and examination of the materials in Modules I, II and III.
- And, oh, yeah, the in-person sessions will be a great opportunity to see each other again!
- **We thank you for your commitment to Title IX!**

