The California State University
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2020 Annual Title IX Training Series

Sexual Misconduct and Sexual Assault

October 26, 2020

Systemwide Title IX Compliance
Office of the Chancellor
The California State University

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Sexual Misconduct vs. Sexual Assault

Sexual Misconduct/Sexual Assault

1096/1097 Addendum A

- Sexual Misconduct
  - Sexual activity
  - No affirmative consent
  - Incapacitation

Addendum B

- Sexual Assault
  - Rape
    - No affirmative consent
    - Incapacitation
  - Fondling
    - No affirmative consent
    - Incapacitation
  - Incest
  - Statutory Rape

Sexual Misconduct Under EO 1096/1097/Addendum A

What is “Sexual Misconduct”?

- Engaging in any sexual activity without first obtaining Affirmative Consent to the specific activity is Sexual Misconduct, whether or not the conduct violates any civil or criminal law
- Sexual activity includes, but is not limited to, kissing, touching intimate body parts, fondling, intercourse, penetration of any body part, and oral sex. It also includes any unwelcome physical sexual acts, such as unwelcome sexual touching, Sexual Assault, Sexual Battery, Rape, and Dating Violence

Sexual Assault Under Addendum B

What is "Sexual Assault"?

- Rape
- Fondling
- Incest
- Statutory Rape

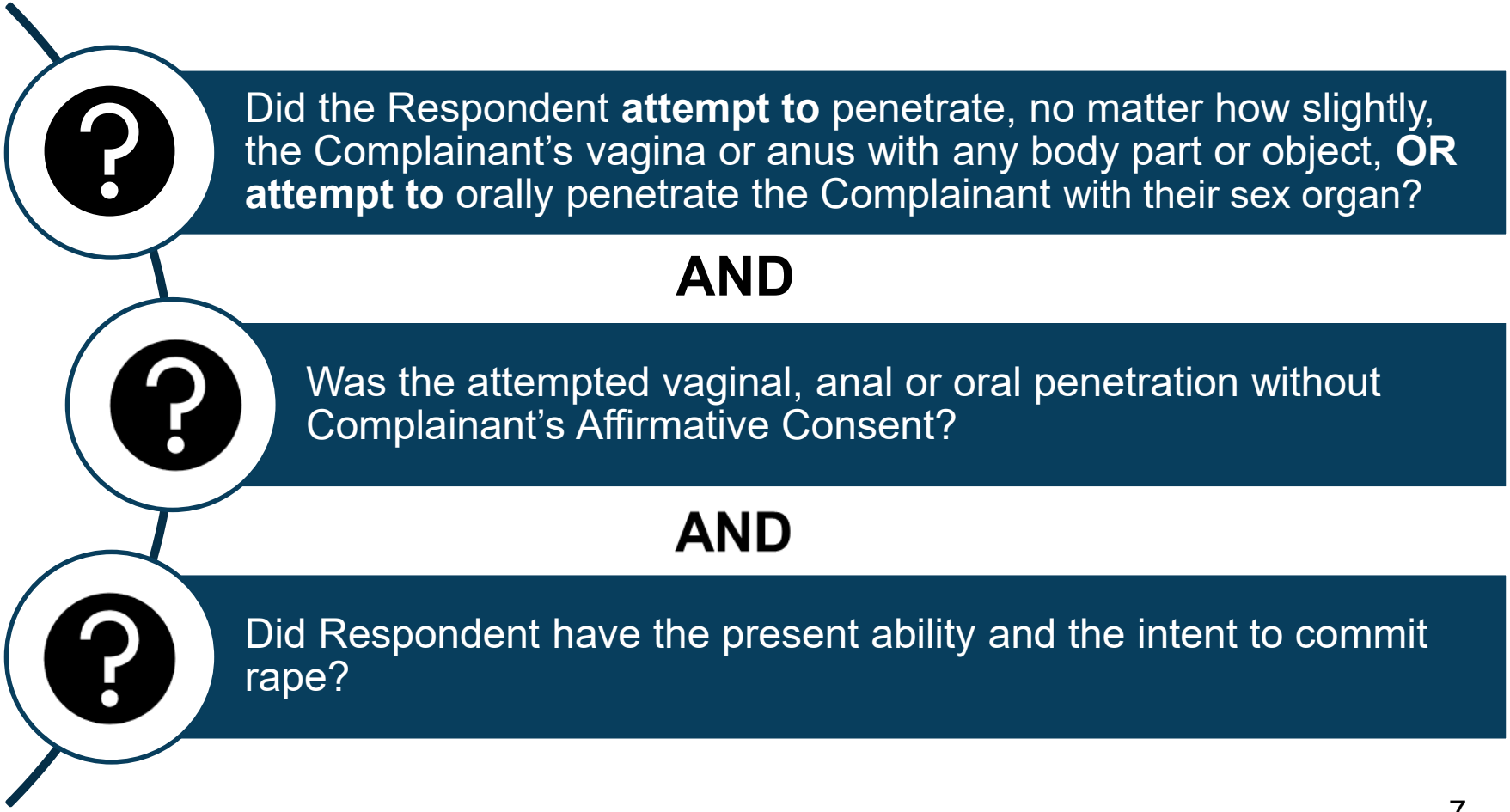
The Elements of Rape (Theory 1)

Did the Respondent penetrate, no matter how slightly, the Complainant's vagina or anus with any body part or object, OR orally penetrate the Complainant with their sex organ?

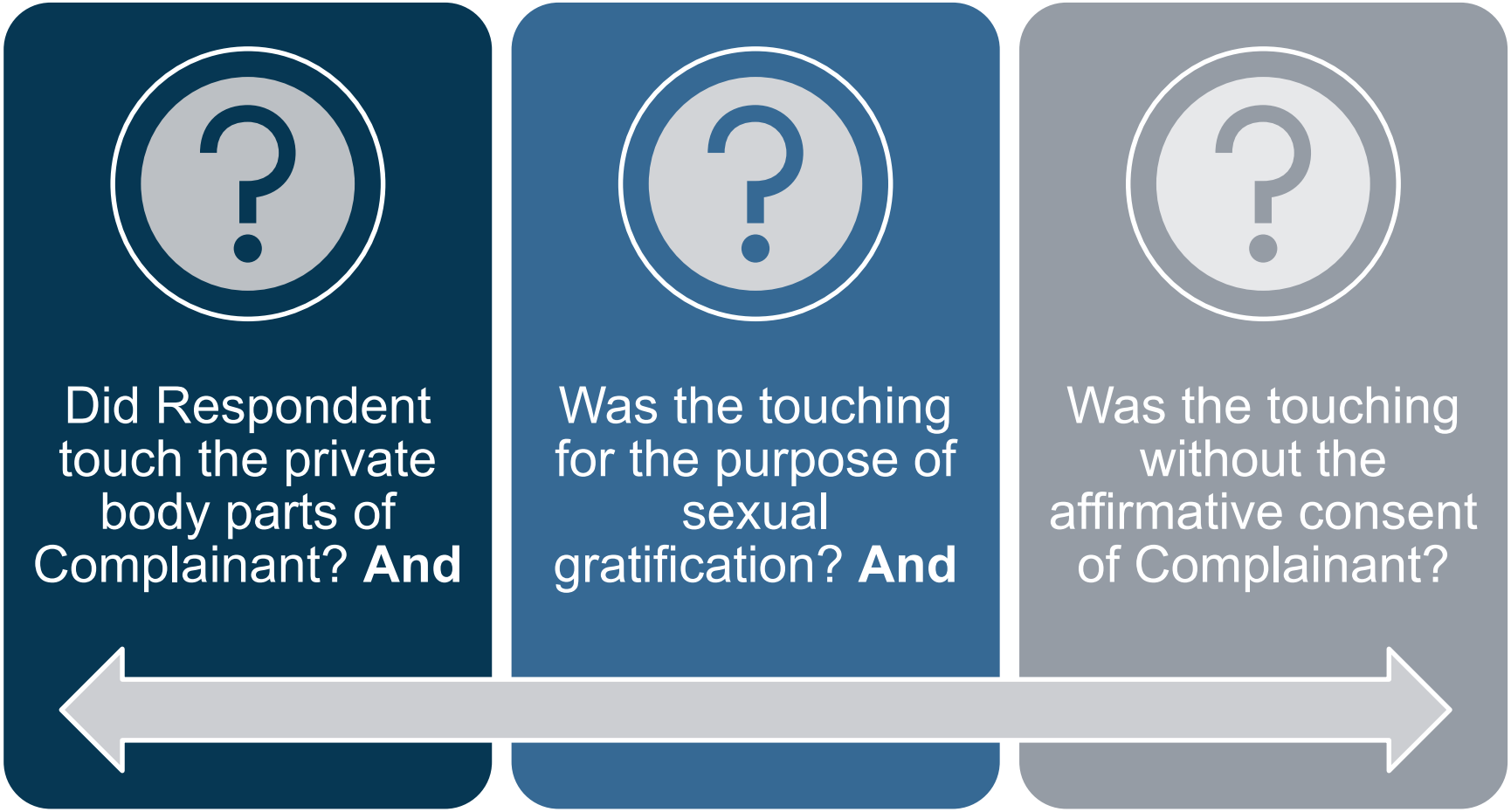
AND

Was the vaginal, anal or oral penetration without Complainant's Affirmative Consent?

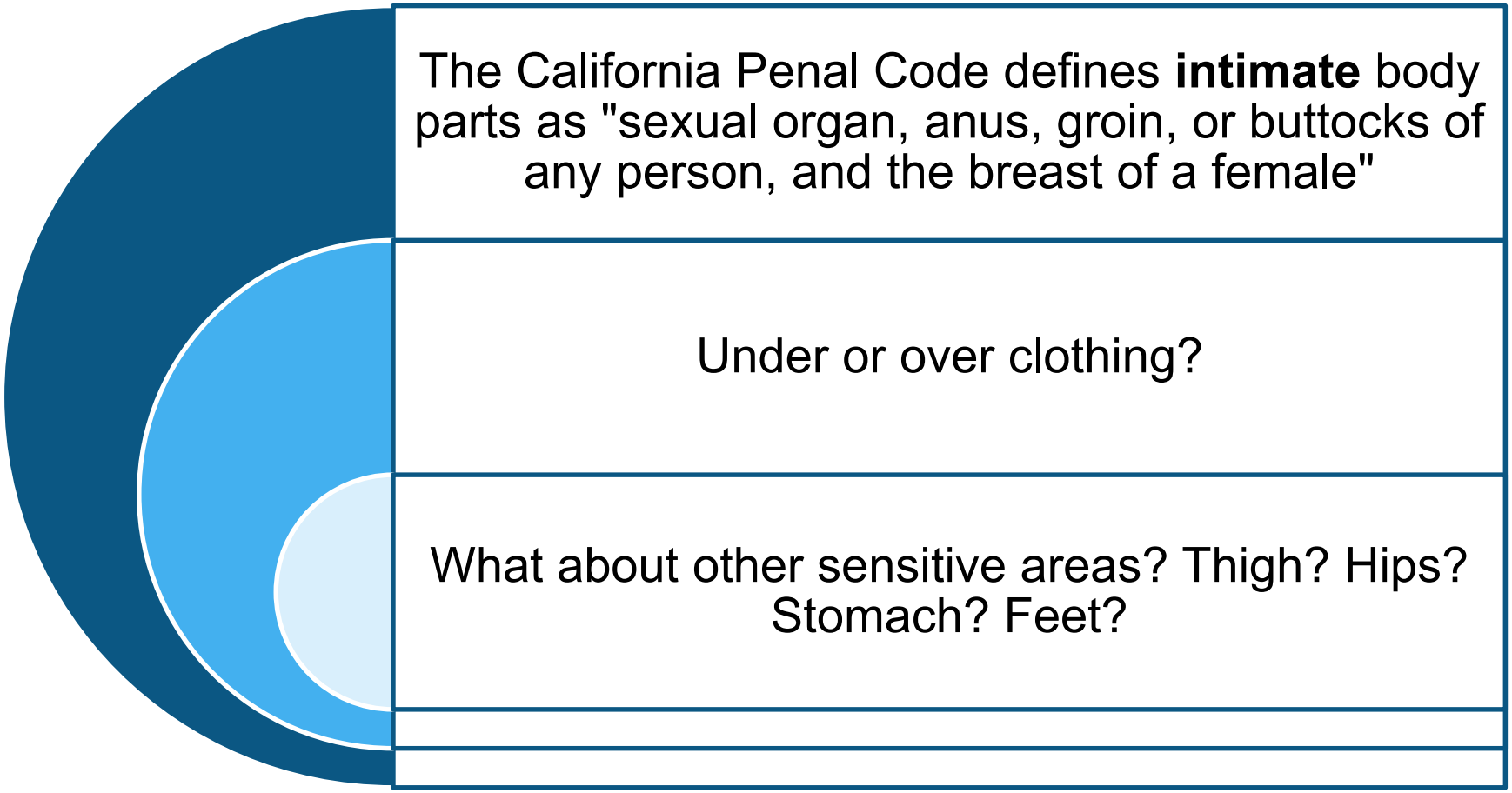
The Elements of Rape (Theory 2)



Elements of Fondling



What is a private body part?



For the purpose of sexual gratification

- An individual says that they accidentally contacted another individual's buttocks in a busy elevator as they move to allow another person to enter the elevator. **For the purpose of sexual gratification?**

(How do we know it was accidental touching?)

Elements of Statutory Rape

Did Respondent have sexual intercourse with Complainant? **And**

Was Complainant under the age of 18 years, when Respondent had sexual intercourse with Complainant?

Elements of Incest

Was there sexual intercourse between Complainant and Respondent? **And**

Are Complainant and Respondent related to each other within the degrees wherein marriage is prohibited by law?

Degrees wherein marriage is prohibited by law

1. Parents and children
2. Grandparents and grandchildren, or anyone else with an ancestor-descendant relationship (like great-grandparents and their great-grandchildren)
3. Siblings
4. Half-siblings; and
5. Uncles/aunts and nieces/nephews

CA Family Code 2200 – marriages between parents and children, ancestors and descendants of every degree, and between siblings of the half as well as the whole blood, and between uncles or aunts and nieces or nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.

Likely Not Covered under Addendum B

"With respect to violative acts such as commenters' examples of administration of a date rape drug, touching a non-private body part with the perpetrator's body part, and so forth, such acts constitute criminal acts and/or torts under State laws and likely constitute separate offenses under recipient's own codes of conduct."

(FR 30174)

Likely Not Covered under Addendum B

1. Kissing without consent
2. Respondent forces the Complainant to touch Respondent's genitalia with Complainant's hand
3. Respondent touches Complainant's cheek with Respondent's genitalia without consent
4. Respondent adds Rohypnol to Complainant's drink (with no further conduct)

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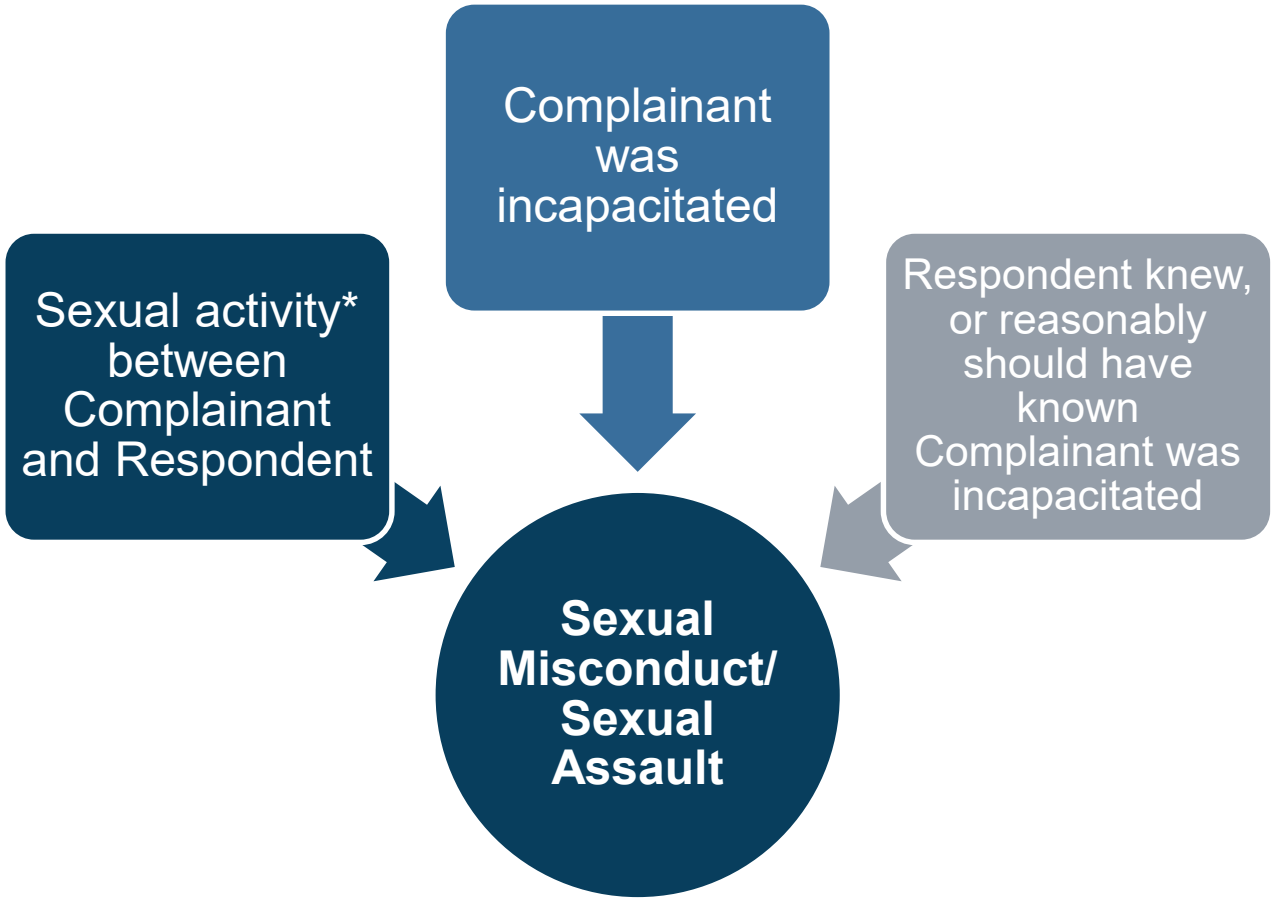
Affirmative Consent and Incapacitation

Affirmative Consent for 1096/1097 and Addendum A and Addendum B

What is “Affirmative Consent”?

- Informed, affirmative, conscious, voluntary, and mutual agreement to engage in sexual activity
- Consent must be ongoing throughout a sexual activity and can be revoked at any time, including after penetration
- Consent to one form of sexual activity (or one sexual act) does not constitute consent to other forms of sexual activity
- Consent given to sexual activity on one occasion does not constitute consent on another occasion
- **Affirmative Consent can never be given by a person who is determined under CSU policy to be “Incapacitated”**

Incapacitation for 1096/1097 and Addendum A and Addendum B



Incapacitation for 1096/1097 and Addendum A and Addendum B

Affirmative Consent cannot be given by a person who is incapacitated.

- Was the Complainant under the influence of drugs, alcohol or medication?
- Was the Complainant asleep or unconscious (regardless of drug, alcohol or medication consumption)?
- Could the Complainant understand the fact, nature or extent of the sexual activity?
- Did the Complainant have the physical and/or mental ability to make informed, rational decisions?
- To what extent was the Complainant's **decision-making ability** and **ability to make informed judgments affected**?
- To what extent was the Complainant's **awareness of consequences** affected?

A person's own intoxication or incapacitation from drugs or alcohol does not diminish that person's responsibility to obtain Affirmative Consent before engaging in sexual activity.

Potential Evidence Beyond Statements

Text messages, DMs, SnapChat

Pictures/videos that the parties or witnesses may have taken

Police report (preferable that officer participates)

Video footage – depending on facts as alleged – for example, did C and R walk back to the dorms – if so, can UPD search for video footage?

SART Report (limitations because SANE will likely not testify)

Receipts, for example from a ride sharing app

If you know it's out there, ask for it. If you are not able to obtain the evidence for some reason, document this in the investigation report.

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Breakout Room Scenarios

Scenario #1 – Jerry and Nicky

Jerry, an employee at CSU Sunnydale, makes the following allegations to the Title IX office:

Nicky and Jerry both work in the Development office. During a recent staff meeting, Nicky reached under the table and placed their hand on Jerry's inner thigh and then on Jerry's lower stomach.

1. **Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**
2. **What other questions do you need to ask in order to have enough information to make your determination?**

Scenario #2 – Jordan and Taylor

A faculty member reports the following to the Title IX office:

Two students at CSU Gotham, Taylor and Jordan, recently got into a physical fight in a hallway of the biology building, during which Taylor pushed Jordan against the wall, grabbed Jordan's genitalia and threatened to "knock them out" if they come anywhere near them again.

1. **Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B? Please explain why.**
2. **What questions will you ask to determine if the touching was for the purpose of sexual gratification?**

Scenario #3 – Ash and Kai

A student at CSU Springfield, Kai, is sexually aroused by looking at and touching other people's feet. Kai is open about this with their friends. One day while Kai and their friend Ash are studying together, Kai suddenly grabs Ash's bare foot and begins massaging it. Ash reported this to the Title IX office and is requesting that the office investigate.

1. **Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**
2. **What questions do you need to ask in order to have enough information to make your determination?**

Scenario #4 – Andy and Evan

A student, Andy, makes the following allegations to the Title IX office at CSU Hawkins:

On arrival at a party held at a fraternity house, Andy took a shot of whisky from a bottle that their friend, Mal, had brought with them. Andy then had a full solo cup of juice mixed with alcohol that was available for all party attendees in the kitchen. Andy says that they have been diagnosed with anxiety and that it was particularly severe that day, so they were hoping that having a few drinks would relax them. Andy recalls taking two more shots of whisky. Andy thinks that they then passed out in a bedroom. They recall waking up to find that another party attendee, Evan has put Andy's hand on Evan's penis. Evan then puts Andy's penis in their mouth.

1. **Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**

2. **What initial questions would you want to ask Andy?**

Scenario #5 – Hayden and Rory

Rory and Hayden, both students at CSU Metropolis, are watching a movie together in Rory's on-campus dorm room. Rory begins kissing Hayden without Hayden's affirmative consent. Rory asks Hayden to give them oral sex. Hayden says they are not sure if they want to. Rory forcibly puts their penis in Hayden's mouth.

1. **Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**
2. **Please explain why**

Questions?

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