

WAC 478-121-610 Consent for purposes of EDFR prohibited conduct.

Consent means that at the time of and throughout the sexual contact, there are words or conduct that reasonably communicate freely given agreement between or among the persons engaging in the sexual contact.

(1) Consistent with WAC 478-121-150, consent cannot be obtained when force or threat is used to gain consent; consent cannot be obtained where the respondent knew or reasonably should have known the complainant was incapacitated; and consent cannot be given or granted by a person who is under the statutory age of consent in accordance with the criminal code of Washington, chapter 9A.44 RCW, Sex offenses. A respondent's use of alcohol or drugs is not a valid defense to a charge of EDFR sexual assault, and a respondent will be held to the standard of a reasonable sober person in evaluating whether the respondent knew or reasonably should have known the complainant was incapacitated.

(2) For the purposes of determining whether consent was present:

(a) Consent cannot solely be inferred from silence, passivity, or a lack of resistance, and relying on nonverbal communication alone may violate the code;

(b) Consent cannot be inferred merely from an existing or previous dating or sexual relationship;

(c) Even in the context of a relationship, there must be mutual consent to engage in sexual contact;

(d) Past consent alone is not sufficient to imply future consent;

(e) Consent given to one person does not constitute consent given to another person;

(f) Consent to one sexual act does not constitute consent to other sexual acts; and

(g) Consent can be withdrawn at any time, and once consent is withdrawn and reasonably communicated, sexual contact must stop immediately.

(3) As used in the definition of consent, incapacity means an individual lacks the ability to understand the facts, nature, extent, or implications of the sexual contact for any reason including, but not limited to, being asleep, unconscious, unaware that the sexual contact is occurring, mentally or physically impaired due to an intellectual or other disability, or mentally or physically incapacitated due to the effects of alcohol or other drugs.

(a) When assessing whether the respondent "knew or reasonably should have known" the complainant was incapacitated, indicators of incapacitation include, but are not limited to, stumbling, falling down, an inability to stand or walk on the complainant's own, slurred speech or incoherent communication, an inability to focus the complainant's eyes or confusion about what is happening around the complainant, combativeness, emotional volatility, incontinence, passing out, or vomiting.

(b) A failure to exhibit any of these behaviors, however, does not necessarily mean that a person is capable of giving consent or is not incapacitated.

[Statutory Authority: RCW 28B.20.130 and 34 C.F.R. Part 106. WSR 21-07-047, § 478-121-610, filed 3/11/21, effective 4/11/21.]