



DELIBERATION STATEMENT OF DECISION MAKER

To: [Redacted]

From: [Redacted]

Date: June 6, 2022

Re: Complainant [Redacted]
Respondent [Redacted]

This Deliberation Statement sets forth my decision following the investigation and hearing of the complaint of Complainant [Redacted] against Respondent [Redacted].

I. Allegations potentially constituting violations of [Redacted] Relationship Violence, Sexual Misconduct, and Stalking Policy and Procedure (Interim Policy) (“Policy”)¹

On Friday, December 3, 2021, Respondent touched Complainant’s breasts, buttocks, and vaginal area without her consent; Respondent grabbed Complainant’s hand, put it inside his pants, and placed in on his penis without her consent; Respondent pulled Complainant on top of her and placed his penis in her vagina without her consent; Respondent flipped Complainant over onto her knees and inserted his penis into her vagina without her consent, and after a few minutes, restrained her by holding her arms behind her back; Respondent inserted his fingers and penis into Complainant’s anus without her consent;

¹ The allegation is taken from the Investigative Report Summary: Final Report (“Final Report) prepared by [Redacted] [Redacted] hich was shared with the parties on March 25, 2022. The Final Report and all attachments to the Final Report are incorporated by reference in this Deliberation Statement.

IV. Determination of Allegations and Rationale for Determination

The allegations for determination in this matter are as follows:

On Friday, December 3, 2021, Respondent touched Complainant's breasts, buttocks, and vaginal area without her consent; Respondent grabbed Complainant's hand, put it inside his pants, and placed it on his penis without her consent; Respondent pulled Complainant on top of her and placed his penis in her vagina without her consent; Respondent flipped Complainant over onto her knees and inserted his penis into her vagina without her consent, and after a few minutes, restrained her by holding her arms behind her back; Respondent inserted his fingers and penis into Complainant's anus without her consent; Respondent coerced Complainant to get on her hands and knees and expose her vaginal area so he could look at her while he masturbated to ejaculation.

The relevant policy definitions are as follows:

Non-Consensual Sexual Penetration

Any vaginal or anal intercourse, cunnilingus, fellatio, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person's body, without consent. Emission of semen is not required.

Non-Consensual Sexual Contact

Any intentional touching of a person's breasts, inner thighs, buttocks, groin, or genitals without consent. Touching may be over or under the clothing and may include the Respondent touching the Complainant or the Respondent making the Complainant touch the Respondent.

The Policy defines consent at "the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon sexual acts." In evaluating consent, the Policy instructs me to consider the presence of any force, threat of force, or coercion; and, whether the communication (through words and/or actions) between the parties would be interpreted by a reasonable person as a willingness to engage in a particular sexual act.

The Policy further states that consent cannot be gained by force or coercion. Force is the use or threat of physical violence or intimidation to overcome an individual's freedom of will to choose whether or not to participate in sexual activity. Coercion is conduct, including intimidation and/or expressed or implied threats of immediate or future physical or other harm to the complainant or others, that would reasonably place an individual in fear and that is employed to compel someone to engage in sexual activity. As relevant to this matter, the Policy also states that consent can be withdrawn or modified at any time, and sexual contact must cease immediately once consent is withdrawn. In addition, consent cannot be inferred from silence, passivity, or lack of resistance.

As noted in the Findings of Fact section above, the evidence is insufficient to establish that Respondent touched Complainant's breasts and buttocks or that he grabbed Complainant's hand, put it inside his pants, and placed in on his penis without her consent. The evidence likewise fails to establish that Respondent engaged in digital-anus or penis-anus penetration.

The remaining question for analysis under the Policy is whether Respondent violated the Policy when he engaged in vaginal intercourse, in other words, whether Complainant consented, as defined by the Policy, to the vaginal intercourse. I find that Complainant's Snapchat message response ("yeah") to Respondent's question (if she was "down to fuck") satisfies the Policy's definition of consent. Complainant stated that, at least at the time she wrote that message, she was planning to engage in sexual intercourse with Respondent. Her communication of that intention was clear and unambiguous. The evidence shows that Complainant was informed as to what "down to fuck" meant, as the parties then discussed details about the intercourse, such as that they would use a condom. There is no evidence that Complainant sent that message involuntarily or that it was against her will. In light of these facts, Respondent reasonably relied on Complainant's message to understand that she was consenting to sexual intercourse.

While in some circumstances, prior messages exchanged between parties may fail to satisfy the Policy's definition of consent due to lack of specificity in the words of the messages, the length of time that passed between the messages and the sexual encounter, or ambiguity in the parties' actions in between the messages and the sexual encounter, here there is no evidence that any of those factors are in play. The parties' messages were specific—sexual intercourse that very same night requiring a condom was envisioned by both parties. It was only a matter of hours in between the parties' exchange of those messages and Respondent's arrival at Complainant's room. And, there was no ambiguity in the parties' actions in between the messages and the sexual encounter. Within five minutes of Respondent arriving at Complainant's room, the two were lounging on her bed with their bodies touching. They began kissing shortly thereafter, a reasonable precursor to sexual intercourse. Complainant then assisted Respondent in removing her clothes, and Complainant was on top of Respondent for their first position of intercourse.

Complainant described feeling obligated to follow through with the sexual intercourse. If this feeling of obligation was due to some undue pressure or coercion on the part of Respondent, it could certainly abrogate any appearance of consent or her compliance with the sexual activity. Asked at the hearing what her feeling of obligation was based on, Complainant said she felt obligated because she had told him yes via Snapchat message, and she then felt obligated to do it. Recognizing that Complainant was struggling with her own internal, non-verbalized change of heart, her feeling of obligation cannot be attributed to anything Respondent did or said, or to any other external factor; it cannot, therefore, serve to annul the consent she had previously communicated to Respondent and upon which he reasonably relied. While Complainant's description of Respondent restraining her arms could constitute the kind of force that would abrogate any apparent consent, the preponderance of the evidence failed to establish that he was the initiator of that conduct, as noted above; I therefore have not relied on the claim of arm restraint as force in my determination.

Under the Policy, a person may withdraw their consent to sexual activity at any time, and the other person must immediately cease the sexual activity upon that withdrawal. But a person is not required under the Policy to be able to read the thoughts of another person. While the exact point at which Complainant said she withdrew her consent to the sexual intercourse varied, she has consistently said that at least by the time the parties were engaging in intercourse, she had withdrawn her consent. However, by Complainant's own account, she did not verbalize that withdrawn consent to Respondent at any time. At the hearing, Complainant said she tried to "show" her lack of consent by moving her head to deny Respondent's kiss and by repositioning herself by moving forward or to the side. As Complainant did not mention doing either of these actions in her written statement, in her original interview with the investigators, in her follow-up interviews, or in her responses to reviewing her interview summary or the draft or final investigation reports, I do not find this assertion credible. Rather, the preponderance of the credible evidence establishes that Respondent came over to Complainant's room to do exactly what the parties explicitly agreed to do, Complainant did not verbalize that her mind had changed, and Complainant participated in actions that would reasonably indicate she still wanted to have sex, such as assisting in removing her own clothes and getting on top of Respondent to commence penetration.

The Policy also prohibits a person from relying on someone's silence or lack of resistance as consent. Here, Complainant was silent regarding the sexual intercourse, and she did not resist. But Respondent was not relying on her silence or lack of resistance as a sign of consent; rather, he was relying on her explicit, written consent given just an hour or two prior that she agreed to engage in sexual intercourse that night.

Complainant's allegations also included that Respondent coerced her to get on her hands and knees and expose her vaginal area so he could look at her while he masturbated to ejaculation. While this claim does not fall into the two categories of conduct Respondent was officially charged with—non-consensual sexual penetration and non-consensual sexual contact—I find it is appropriate to address this claim because of its connection to the charged misconduct and because it was specifically listed in the notice letter. According to Complainant, the coercion Respondent used was as follows: he first asked to ejaculate in her mouth, and when she said no, he respected her lack of consent; he then told her to get in a certain position so that he could view her anus and genitals from behind, and she did get in that position. While it is reasonable that Complainant may not have liked being told what to do, her account of this moment includes no element of coercion. As noted above, the Policy defines coercion as intimidation or threats of immediate or future physical or other harm that would reasonably place an individual in fear and that are employed to compel someone to engage in sexual activity. Especially following Respondent's acceptance of Complainant's refusal to engage in oral sex, I do not find his instruction to her to get in that position to constitute coercive conduct, as Respondent did not do anything to make Complainant think she could not refuse to get in that position, just as she had refused to engage in oral sex.

I note that in reaching this determination, I do not intend to disregard or diminish Complainant's experience. Based on the information collected, I was persuaded that Complainant was

genuinely impacted by her encounter with Respondent, and I was likewise persuaded that Complainant raised her concerns with the University in good faith. My considerations and determination are constrained by the credible evidence available to me, and based on that evidence, I do not find that Respondent engaged in non-consensual penetration or non-consensual contact as defined and prohibited by the Policy.

V. Remedies for Complainant

Complainant may seek supportive measures from the Title IX Office as needed.

VI. University's Process and Grounds for Appeal

Either party may appeal this determination on one or more of the following grounds:

- 1) Procedural irregularity that significantly altered the outcome of the matter;
- 2) Bias or conflict of interest that significantly altered the outcome; or
- 3) New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that significantly altered the outcome of the matter.
 - Evidence that was known to a Complainant or Respondent prior to the Notice of Outcome but withheld by that individual during the investigation, and was not raised does not constitute new information.
 - A Party's claim that they did not know about specific evidence contained within the Notice of Outcome or that they did not have an opportunity to respond to certain information within the Determination, including the analysis of the evidence or any statements does not constitute the discovery of new information or evidence.

Appeals of the determination must be submitted to the Title IX Coordinator within seven days of receiving the Notice of Outcome.

Additional important information about appeals can be found in [Appendix A](#) to the Policy.

VII. Closing

With the submission of this Deliberation Statement, I respectfully conclude my work on this matter.