

## INTRODUCTION

The University Sexual Assault Hearing Board (comprised of Brett Sokolow, John Doe, Jane Roe) met on [date] to hear the charges of Sexual Assault alleged by Complainant against Respondent.

Both parties participated in the hearing, as did five invited witnesses and both investigators. Each party was given a full and fair opportunity to introduce evidence, make open and closing statements, and answer questions.

The Board applied a presumption that the Respondent is not responsible for a violation of University Policy unless a preponderance of the evidence proves that a violation of the Policy occurred. The Board determined unanimously that Respondent violated both policies charged.

## OVERVIEW OF ALLEGATIONS

Complainant alleged that Respondent had non-consensual sexual contact with her breasts, buttocks, and groin, including penetration of her vagina with his fingers, that he caused her to have non-consensual contact with his penis, and that he attempted to insert his penis into her vagina without her consent. Complainant also alleged that she was incapacitated while this conduct occurred, which impacted on her ability to give consent.

## FINDINGS

Complainant asserted she was incapacitated by alcohol and tiredness, and that her lack of capacity impacted on her ability to give consent. The Board found by a preponderance of the evidence that Complainant was not incapacitated as that term is defined in University policy: *“Incapacitated” means lacking the physical and/or mental ability to make informed, rational judgments. A person may be Incapacitated for a variety of reasons, including but not limited to being asleep or unconscious, having consumed alcohol or taken drugs, or experiencing blackouts or flashbacks.*

The Board found that Complainant had the ability to make informed, rational judgments, demonstrated by her described intentional decisions to turn away from Respondent repeatedly during their sexual interaction, as well as her decision to tell Respondent from the outset that she did not want to have sex that night, in addition to her decision to firmly say stop to Respondent and push him off of her once she was aware of his intent to penetrate her with his penis. Complainant stated during the hearing, “When you wake up in the middle of the night you don’t always make the best decisions.” While potentially true, this also suggests that she *was* making decisions, and *was* capable of doing so, even if they were not the best decisions.

The Board found by a preponderance of the evidence that Respondent had sexual contact for purposes of his own sexual gratification with Complainant’s breasts, buttocks, and vulva, and caused her to touch his penis with her hand for purposes of his own sexual gratification, and that he penetrated her vagina with his fingers.

The Board was unable to determine that a preponderance of the evidence proved that Respondent attempted to penetrate Complainant with his penis. The evidence from the parties was equally compelling to the Board on this allegation, meaning that neither account was determined to be more likely than the other. The Board concluded there was sufficient evidence of Respondent’s intent to have intercourse (by his own admission at the hearing),

but not that he attempted to do so. To intend to do something and to attempt to do it are distinguishable and the Board made that distinction in its findings.

### CREDIBILITY

The Board carefully weighed the credibility of the parties. The Board generally found the Complainant to be credible. Her testimony was cogent, consistent, and corroborated after the fact, to an extent, by her disclosures to several witnesses, most importantly LR, to whom Complainant disclosed most details on the day after the incident.

The Respondent was found to be less credible than the Complainant in some of his testimony, though there were many elements of his testimony that were credible. The Respondent's answer to why he stayed in Complainant's room after she told him she was going to sleep was both off-point (the bed was not too small for him) and inherently implausible (he stayed because she did not tell him to leave). The Board also found it inherently implausible when Respondent testified both that he was concerned that things were rushing too fast, and that he "needed to make a move." These statements are inconsistent with each other. The Board read a quote from the Respondent on the very bottom of p. 128 of the investigation report about how cautious he was to be sure to get consent, which Respondent agreed that he said. When Respondent was asked repeatedly by the Board why, despite this quote, he never asked Complainant specifically about any sexual behavior, Respondent was unable to reconcile this inconsistency between his statement and his actions to the satisfaction of the Board. This damaged his credibility and made the Board feel as if he was telling us what he thought we wanted to hear. He later testified -- inconsistently with the above statements about the care he took to ensure consent -- that he believed intercourse would have been consensual based on what the parties had done so far, and what it was leading up to. This shows that he believes consent to one form of sexual activity can imply consent to other forms of sexual activity. Yet, P. 11 of the Policy says exactly the opposite.

The Respondent's testimony that he did not finger the Complainant because doing so was weird or unfamiliar to him did not strike the Board as being inherently plausible, especially when juxtaposed with Complainant's certainty that she felt "at least two fingers" inserted into her vagina and Respondent's testimony at the hearing that "his 'love language' is touch". The Board concluded that a person knows what it feels like when they are being penetrated internally versus rubbed externally and found the Complainant believable in this testimony. Respondent's credibility issues were compounded by his assertion at the hearing that Complainant spread her legs apart to facilitate his access to her groin, especially as this was an added fact revealed at the hearing that Respondent had not disclosed to investigators.

The Board also concluded that Complainant was credible that she told Respondent at the outset of that morning that she did not want to have sex with him, which was inherently plausible in light of testimony from witness KW about boundaries Complainant set for herself when she first arrived at University. Respondent's credibility also suffered because he denied that Complainant turned away from him multiple times, but Complainant's assertion that this occurred was more believable, given that she was able to offer the corroborating details of what Respondent said to her when she turned away, and how he "coaxed" her to turn back toward him by saying that they did not have to do anything she did not want to do, told her to "just breathe" and said, "it's okay". This level of recall and precision on detail makes Complainant's testimony about turning away from Respondent inherently plausible and more credible than his testimony that she did not turn away from him.

Respondent indicated in the hearing that to him, Complainant's "okay" in response to his statement about not having to do anything they did not want to do indicated her consent to all behaviors occurring before and after she said this. This "okay" is not sufficient to meet the "clear and unambiguous" standard as will be discussed below in the Final Determination section.

Respondent testified that Complainant was wearing a shirt and pants to bed, whereas Complainant claimed she never wears pants to bed, and was wearing a t-shirt and her underwear. This description by Complainant was corroborated by her witness, who volunteered that she knows that Complainant always wears a t-shirt and underwear to bed. This made Complainant more credible on this point, and bolstered her credibility overall, with independent corroboration.

Finally, Respondent told the Board that he was never on top of Complainant. Complainant stated multiple times in the investigation report that he was on top of her. To bolster his testimony, Respondent offered that he could not have been on top of Complainant, effectively straddling her, while also taking his underwear down. Respondent stated that that position would have made it completely impossible for him to remove his underwear. The Board considered this statement and determined it was inherently implausible and lacked credibility because it is entirely possible to lower one's underwear in such a position.

#### EVIDENCE NOT RELIED UPON

- Any evidence regarding Complainant's relationship with "Joe".
- Any evidence regarding conversation between the parties about Complainant's dog.
- Any evidence regarding Respondent's character.
- Any evidence of the Complainant's sexual predisposition.
- How Complainant's parents reacted when she told them what happened.
- Any evidence related to Complainant's interactions with witness WW.
- That Complainant invited Respondent to join a group going to dinner sometime after the incident.
- Evidence shared that Respondent's family members had experienced sexual assault.

The Board determined that none of this evidence was relevant to its determination.

#### FINAL DETERMINATION

The Board determined by a preponderance of the evidence that:

- Respondent had contact with Complainant's buttocks that was non-consensual and done for purposes of his own enjoyment (because it was non-consensual).
- Respondent had contact with Complainant's vulva that was non-consensual and done for purposes of his own enjoyment (because it was non-consensual).
- Respondent's penetration of Complainant's vagina with his fingers was without consent.

The Respondent was asked at the hearing what words or actions by the Complainant gave him permission to touch her buttocks. He hedged by trying to redefine the location of the buttocks and his hands, but that's because he had no answer to how he had permission other than from his overall sense of the interaction and the fact that they were kissing. Consent to kissing does not imply consent to fondling. That is not enough to meet the

Policy standard of a “clear and unambiguous agreement” between the parties. Complainant did not reciprocate this act.

The Respondent was asked at the hearing what words or actions by the Complainant gave him permission to touch her vulva. Respondent shared that Complainant moaned softly while he touched her and spread her legs apart. While these could be actions demonstrating consent, physical sensation is not the same thing as permission. Acts may feel pleasurable because of anatomy, but still be non-consensual. Further, the Board determined that Complainant’s demonstrated responses, even if true (she disputed them) did not meet the standard of a “clear and unambiguous agreement” between the parties to engage in that activity.

The above two paragraphs are equally applicable to the Board’s determination regarding penetration by Respondent’s fingers. He denied this action, but for the reasons noted in the credibility analysis above and in our finding, the Board determined it was more likely than not that penetration did occur as the Complainant alleged. For the reasons stated in the above two paragraphs that make the touching of Complainant’s vulva non-consensual, so too is Respondent’s penetration of her vagina with his fingers.

The Board found that the evidence for the other allegations made by Complainant was not sufficient to meet the preponderance of the evidence. The evidence indicates that Complainant continued the kissing and intimate encounter with Respondent after he touched her breasts, making it ambiguous whether his touching of her breasts was without consent. Respondent placed Complainant’s hand on his penis, which was without consent, but Complainant testified that she continued to touch his penis thereafter and was not compelled to do so by him. She stated she did so unenthusiastically, but University Policy does not require enthusiasm for a sexual act, only that words or actions demonstrate permission. Here, Complainant’s actions demonstrate consent, however grudgingly she described it to be at the hearing.

Overall, the Board’s conclusion was rooted in the credibility analysis above, but also in our sense that Respondent has a fundamental misunderstanding of how consent works. He was able to verbalize it accurately at the hearing, but in practice with the Complainant, he demonstrated that he was willing to stop when he met resistance but unwilling to clearly obtain permission before he acted. Respondent repeated this misconception at the hearing several times, showing that he could not conceptualize or operationalize the difference between the obligation to get a “yes” and the willingness to stop when he got a “no.” University’s consent policy is not resistance based, and stopping when you get a “no”, while necessary and expected, is not enough.

As noted above, the Board did not find that Respondent attempted to sexually penetrate Complainant with his penis. Because of that finding, the Board need not determine if that act was consensual. Complainant’s description was too vague as to whether Respondent touched her with his penis, attempted to place it in her vagina, or in fact did so, for the Board to determine what the preponderance of the evidence showed. She was clear that she pushed him off, and he stopped. Respondent testified that he intended to penetrate Complainant with his penis, and his testimony made it clear he assumed he had consent to do so, rather than that he in fact obtained clear and unambiguous permission to do so. He neither asked nor checked with her to ensure his act would be okay with her. He did not penetrate her with his penis.

The Board agreed that had Complainant not stopped him and had he proceeded at that time he would have raped Complainant. Yet, Respondent testified that he intended to use a condom that he brought with him and had in his wallet (he reasonably corroborated this at the hearing by producing the unused condom from his

wallet), and that the wallet was across the room. Thus, it was possible that Respondent's removal of his penis from his underwear and his actions to touch her with it (if that occurred) preceded his intent to get up, get the condom, and put it on, all of which would have given Complainant an opportunity to express non-consent, though it is also clear she did not express consent. The Board was unable to conclude whether this testimony about the condom was more likely than not what would have transpired had Complainant not stopped the Respondent.

The testimony of both parties corroborated Complainant's allegations in that she would not have needed to say stop and push Respondent off if she did not reasonably perceive that he was about to penetrate her. Yet, we cannot conclude that he actually made that attempt, though it is clear he intended to, at some point (perhaps after obtaining the condom) and in some fashion (protected or unprotected).

### SANCTION RECOMMENDATIONS

The Board recommends that Respondent be sanctioned according to the following terms, largely based on the Board's perception that while Respondent did not have consent, he was persuasive that he believed that he did:

- Respondent to be suspended from University for a minimum of one year, starting at the end of the Spring 2021 term.
- Respondent will be eligible to petition to return for the 2022-2023 school year upon a demonstration acceptable to the Title IX Office that he understands the University Sexual Misconduct Policy and has internalized and can operationalize how consent is to be requested, given, and received with future sexual partners.
- Respondent to complete appropriate consent education as directed by the Title IX Office.
- Respondent, upon any return to University as a student, shall be ineligible to hold any elected or appointed office of responsibility.

These sanctions were chosen by the Board as proportional to the severity of the violation and in consideration of the safety of the campus community and the Complainant's safety as she completes her education on campus. The Board determined that it is important that the Respondent takes time away from campus to address his behavior before being eligible to return to the campus community. The Board did not see evidence that he should remain on campus at this time. The Respondent has indicated that he intends to transfer out. Regardless of whether he attempts to return at some point, or goes elsewhere, the Board wants him to understand that it unanimously believes that his understanding of consent is fundamentally deficient. The Board hopes that he will take this message to heart and reform the ways that he communicates with, checks in with, asks, and respects his sexual partners, especially in light of the career path his impact statement indicates he has mapped out for himself.