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[Special thanks to Dr. Jennifer R. Hammat, University Title IX Coordinator, George Mason University for providing this example.]

DATE: March 28, 2018
RE: Investigative Report: Sexual Assault
Respondent, Mark Jones (school id number)
Complainant, Sally Smith (school id number)

I. BACKGROUND AND REPORTED CONDUCT

On November 9, 2017, Sally Smith (COMPLAINANT), Student, Anytown University (AU) reported to Jane Johnson, University Title IX Coordinator, AU, that she had been Sexually Assaulted by Mark Jones, Student, AU, (RESPONDENT) on October 19, 2017. According to the Complainant, she went to a party on October 19, 2017, and after the party, she went over to visit the Respondent at his apartment. She thought other people were going to the Respondent’s apartment as well. When she arrived at his house, he kissed her. She told him she didn’t think that was a good idea. He continued to kiss her. When he asked if she wanted to go upstairs to hang out with other people, she said yes. When they arrived upstairs, the other people left the room, and it was then that the Respondent touched the Complainant’s breasts, buttock, groin, and genitals without the Complainant’s consent.

II. JURISDICTION

Compliance, Diversity, and Ethics (CDE) house the Title IX Office which has campus-wide responsibility for investigating alleged violations of Policy 1111: Sexual and Gender-Based Harassment and Other Interpersonal Violence. CDE responds to claims of sexual assault, sexual exploitation, intimate partner violence, stalking, sexual harassment, gender-based harassment, retaliation and complicity brought forward by students, employees or third parties.

III. SCOPE OF THE INVESTIGATION

On November 9, 2017, the Complainant submitted a complaint online. She was sent resources on the same day. Also on November 9, 2017, Director of the Chess Team, Dr. John Adams, came to CDE to report that he had been made aware of the situation between the Complainant and the Respondent. He was seeking advice as a responsible employee. (In her review of the draft report on April 17, 2018, the Complainant indicated that Dr. Adams came seeking the advice of CDE after the chess team student captain’s told Dr. Adams that attempting to mediate the issue between the Complainant and the Respondent was, in essence, “sweeping it under the rug,” since he was suggesting that they “apologize to one another” for a “mutual wrongdoing.”) The Complainant responded on November 16, 2017, that she would like to meet with Johnson. A meeting was tentatively scheduled for November 20 or 21, but it was not confirmed. The Complainant reached back out after Thanksgiving Break, and an appointment was confirmed for December 4, 2017.

Before this meeting, the Complainant expressed some concerns about traveling with the Respondent on the Chess Team. She also expressed some concerns about her classes. Johnson sent her faculty an academic assistance email on December 1, 2017. A No Contact Order was also requested by the Complainant. It was sent out to her and the Respondent on December 4, 2017. At the December 4, 2017 meeting, the Complainant indicated her desire to have a formal investigation into the allegation of Sexual Assault against the Respondent. The Notice of Investigation letter was sent out on December 5, 2017, as well.

Specifically, the Complainant stated, once she arrived at the Respondent's apartment:

- The Respondent asked the Complainant to come inside and sit down.
- The Complainant noticed the Respondent put his arm around her. She thought this was a friendly gesture, as they were friends and teammates.
- The Complainant recalls the Respondent leaned over and kissed her.
- The Complainant told the Respondent that wasn't a good idea. She said he agreed.
- The Complainant recalls that moments later, the Respondent was kissing her again.
- The Respondent allegedly asked the Complainant if she would like to go upstairs and hang out with the other people at the apartment. The Complainant said yes.
- The Complainant and the Respondent went up to one of the upstairs bedrooms.
- Almost immediately, the other people left the room.
- The Complainant stated that the Respondent texted her to please stay.
- After the others left, the Respondent closed the door, and kissed the Complainant again, and placed his hands on her breasts, and her buttocks and placed her hand on his penis.
- The Complainant said she made a "big fuss" and left the room, and subsequently, the apartment.

Consistent with the University's responsibility to ensure an environment free from harassment or discrimination, CDE conducted a formal investigation. The investigation covered the foregoing allegations and other matters that were revealed during the course of the investigation. This investigative report relies upon the following primary components and documents to determine what, if any, University policy violations have occurred:

1. An internal investigation with interviews of the parties:
 - a. Complainant – Sally Smith
 - b. Respondent – Mark Jones
 - c. Witness 1 – Samantha Kelly
 - d. Witness 2 – David Sing
2. Documentation and investigative files obtained by the Title IX Investigator;
3. Documentation provided by the parties and witnesses; and
4. University policies.

IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT) AND RETALIATION):

The Office for Civil Rights (OCR) in the United States Department of Education is responsible for enforcing Title IX, which states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

OCR's 2001 guidance states that sexual harassment is the unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.

OCR's 2001 guidance also states that sexual harassment can occur that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct, and explains that this type of harassment is generally referred to as hostile environment harassment. The 2001 guidance lists factors to determine if a hostile environment has been created, including:

- The degree to which the conduct affected one or more students' education.
- The type, frequency, and duration of the conduct.
- The identity of and the relationship between the alleged harasser and the subject or subjects of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, the location of the incidents, and the context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual harassment.

In assessing these factors, OCR states:

It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgment in determining whether a sexually hostile environment has been created.

The University's *Policy 1111, Sexual and Gender-Based Harassment and Other Interpersonal Violence* applies to all faculty, staff, students, contractors and visitors, states in pertinent part:

A. SEXUAL ASSAULT

Sexual Assault consists of (1) Sexual Contact and/or (2) Sexual Intercourse that occurs without (3) Affirmative Consent.

1. **Sexual Contact** is:

- Any intentional sexual touching
- However slight
- With any object or body part (as described below)
- Performed by a person upon another person

Sexual Contact includes (a) intentional touching of the breasts, buttocks, groin or genitals, whether clothed or unclothed or intentionally touching another with any of these body parts; and (b) making another touch you or themselves with or on any of these body parts.

2. **Sexual Intercourse** is:

- Any penetration
- However slight
- With any object or body part (as described below)
- Performed by a person upon another person

Sexual Intercourse includes (a) vaginal penetration by a penis, object, tongue, or finger; (b) anal penetration by a penis, object, tongue, or finger; and (c) any contact, no matter how slight, between the mouth of one person and the genitalia of another person.

3. **Affirmative Consent** is:

- Informed (knowing)
- Voluntary (freely given)
- Active (not passive), meaning that, through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed-upon sexual activity

Affirmative Consent cannot be obtained by Force. Force includes (a) the use of physical violence, (b) threats, (c) intimidation, and/or (d) coercion.

V. INVESTIGATION

A. Statements of Parties and Witnesses

- a. **Complainant**- Title IX Coordinator, Jane Johnson, met with the Complainant, on December 19, 2017, at 2:36 pm.

Written Complaint submitted online Thursday, November 9, 2017, at 3:40 pm.

Brief Account of Incident(s): I was at a party a couple of weeks ago with my friends. I heard a bunch of people were going to Mark's house, around the corner, to hang out. I texted him asking if I could come and he said yes. I was going to leave with friends but said I wanted to go over, so a friend walked me there since I was too drunk to know where it was, even though I've been there a few times.

I knocked on the door and Mark let me in. It was just him and I was confused where everyone else was. He told me to come to sit with him on the couch so I did and he put his arm around me. I thought it was a friendly gesture since we were friends and teammates. He started kissing me but I stopped him saying we were both really drunk. I felt weird about it and he said 'okay' and then started kissing me again five seconds later. I was in shock and didn't really know what to do except keep telling him I didn't feel comfortable because we were both drunk.

He wasn't listening. Finally, he suggested we go upstairs to hang out with two of our friends. I said yes because I wanted to be around other people, and I didn't realize they were in his bedroom. We went upstairs and were talking, but the two of them said they were leaving (Samantha Kelly, David Sing). I said I wanted to get an Uber but Mark texted me that I should stay. I opened up my Lyft app and texted him "maybe" to be polite, but they left before I could call it. Mark started kissing me again and I told him we should stop but instead he just said: "you want me to shut the door" and got up to shut it. I didn't know what to do so I didn't say anything.

He started telling me I had been baiting him and that I shouldn't have worn that dress or danced like that at the party. He undid his belt and pants and picked up my hand and put it on his penis. After a few seconds, I took it off because I didn't want to do that and told him. He told me to give him a blowjob. I said no and rolled onto my back to create distance and get away from him but he rolled on top of me and pinned me. I asked him to stop but he started kissing my neck and chest and putting his hands all over me and trying to take off my dress. I was fading in and out of consciousness and falling asleep because I was on my back. I felt like if I didn't do something it was going to escalate because he wasn't stopping even though I told him to.

I made a big fuss and told him I had to go and left the room. I started crying when I got downstairs and two of my friends helped me get home (Candice Thompson). He texted me later asking if I made it home okay and I said I was uncomfortable. He tried calling me and said he was freaking out and that all we had done was kiss, even though it had gone further than that despite me making it repeatedly clear I did not want any sexual engagement with him.

We share a chess team and I have to see him at team meetings, tournaments and in the team room. My coach found out recently and filed a separate Title IX report. Mark has told other students on my team and on other teams in the country that I am faking charges against him even though I have filed nothing up to this point.

[Upon review of the report, the Respondent said when the Complainant told him to stop, he stopped. He said prior to her saying "stop," the Complainant said she was "giving him cues" to stop, but that he was unable to pick up on the cues because of his state of mind at the time.]

b. RESPONDENT - Title IX Coordinator, Jane Johnson, met with the Respondent on December 19, 2017, at 8:55 am.

The Respondent said that the Complainant texted him and asked if she could come over (from the party). He said of course. He said they were both super drunk. He said they sat down on the couch, and almost immediately started kissing. He recalls they both leaned in. After the first kiss, the Respondent said he

looked at the Complainant and said, "Sally" (he explained to the investigator that it was his way of saying, "Are you sure?") The investigator explained that was not the use of 'clear words or actions.'). He asked her if she wanted to go upstairs where their other teammates were, and she said yes. When they got upstairs, other teammates (Samantha Kelly, David Sing and perhaps Tom) were in his room. He said the others indicated they were going to leave, and he texted the Complainant to stay. He said she replied, "Maybe." He said he had no idea she was uncomfortable until she verbalized it later to him. The Complainant indicated Tom was not in the room at the time.

Shortly after they arrived in the room, the other teammates left. The Respondent said they kissed again. He recalls the Complainant said, "Maybe we should stop." The Respondent said, "Yeah, you're right." The Respondent said both parties got up (off of the bed) and then he said they both leaned back in and were kissing again. After that kiss, the Complainant again said, "Hey, we should really stop." And the Respondent again said, "You're right."

The Respondent does not remember saying that the Complainant was baiting him at the party. He does not remember putting her hand on his penis, and he said he did not ask for oral sex. He also said when they kissed, they were both sitting up. He said they did not lay down or roll around on the bed at all. The Respondent remembered the Complainant saying, "We should go downstairs," and he said, "Of course." The Respondent said he did grab the Complainant's butt while they were making out, but nothing else. He completely admits to this, and he stated he did not ask if he could grab her butt. He would like to take full responsibility for that and said he knows it wasn't right. Despite being drunk, he said he would like to take responsibility for his actions.

The Respondent said they all hung out for a bit downstairs and then the Complainant left with a friend (Candice Thompson). He later heard from others that the Complainant was crying when she left, but he was unaware of this at the time.

After the Complainant left his apartment, the Respondent hung out downstairs with his friends (Tom, Samantha, and David) for a while. After the Complainant left, he texted her, "Hope you made it home safe." The Complainant responded that she was really uncomfortable. He said he was sorry and he didn't mean to make her uncomfortable. He said he was happy things stopped before it escalated. He said it was just a kiss and he was happy they respected each other's decisions. The Respondent said the Complainant said, "Yeah."

The Respondent didn't hear back from the Complainant until it became a much larger situation. He thinks there is confusion about what happened because they were both drunk and he thinks they were both perceiving things really differently. He said he understands she may have felt a different way that he definitely did not pick up on. And for that, he apologizes.

The Respondent said he reacted “super poorly” when he heard the Complainant said she did not consent. He said he was really angry and really upset. He said he didn’t understand why she went to Dr. John Adams. The Respondent said he was super defensive about it and admits his response was immature. The Respondent said he went to see Dr. Adams. He was advised by Adams to get his anger under control by visiting with the Counseling and Psychological Services Office. One of his takeaways was to better understand affirmative consent when both parties have been drinking. The Complainant indicated that she did not tell Dr. Adams about the incident. She said her roommates (Edward Black and Jacob Cullen) were very worried about her when she came home and they notified Dr. Adams.

The Respondent said the Complainant was a really good friend of his. And that the last month he has just wanted to reach out to her and say how sorry he was this ever happened. He knew he couldn't, but that is what has bothered him the most. He said, the team dynamics, he can deal with.

When asked how much the Respondent had to drink that night – the Respondent said he had a lot to drink. He said he was drinking UV Blue (Handle) mixed with Sprite. He said he was at the party for an hour and a half - in an out periodically (the party was at his neighbor's). The Respondent said he was also smoking marijuana that evening as well. On a scale of 1-10, he said he was at about an 8 out of 10, with 10 being “blackout drunk.” He said he had been super stressed and had lots of stuff going on with classes. The Respondent said it was only his third time to drink this year. He recalled he had just taken his econ mid-term.

Respondent Witness list:

Witness 1: Samantha Kelly (interviewed)

Witness 2: David Sing (interviewed)

c. WITNESS 1 - Title IX Coordinator, Jane Johnson, received a **written** recollection of the evening in question from WITNESS 1 on January 31, 2018, at 4:02 pm.

On the night of the incident, which occurred sometime last November, I was in Marks’s house after a team member’s birthday party. The people in his bedroom at the time were me, Mark, David, and Sally. David and I went downstairs because I was getting ready to go back to campus and a few minutes later, Sally came down the stairs and looked visibly upset and asked to speak to me outside. Mark also came downstairs but he seemed normal. We went outside on the doorstep and she was crying. After asked her multiple times what was wrong, she finally explained to myself and Candice (another teammate who noticed what was going on and came to the porch) what had happened. She said that she and Mark had started kissing on his bed after Dave and I left, and then that he forcibly took her hand and placed it in his crotch area despite her not wanting to do that. She said that she wanted to stop kissing him, but he kept going. The entire episode lasted about 2-3 minutes max, in my opinion. About ten minutes later, Sally and I

rode back to campus with one of my friends and we dropped her off near her dorm.

d. WITNESS 2 - Title IX Coordinator, Jane Johnson, met with the WITNESS 2, on February 13, 2018, at 2:37 pm.

Witness 2 said he had attended a surprise party for an alum earlier that evening and then he went to his apartment. Remembers he was in the Respondent's room with the Complainant, Witness 1 and one other person (he couldn't recall who). He said the Respondent texted him to leave. Witness 2 said he understood "the signal" and needed to be a good friend to the Respondent to give him some alone time with the Complainant. He then said they went downstairs. He said he wasn't sure how long it was, but the next thing he knew, the Respondent was back downstairs with them. He didn't hear the Complainant come downstairs. Witness 1 was with him downstairs the entire time. Witness 2 said he and Witness 1 made food and then she left.

Since the party, he has heard the Respondent admit differing levels of acceptance to various people. "All I did was grab her butt." Witness 2 said it was weird as if it were some kind of plausible deniability. Witness 2 said he used to be good friends with the Respondent until this happened. Witness 2 said that other people at the party knew that the Complainant was "really drunk" that night. Witness 2 said he heard from someone else that at one point - someone had even texted the Respondent to "not mess with" the Complainant because she was "super drunk" and the next day, the Respondent sought out their help with the situation.

Witness 2 said he was not very drunk. He recalls that the Complainant was pretty drunk. Witness 2 said the Respondent seemed less drunk than the Complainant to him.

Witness 2 didn't hear about the allegations until the following weekend after a tournament. Witness 2 recalls the Respondent was super pissed off and then in denial but he gradually began to admit the part about kissing and grabbing her butt later.

B. Documentary Evidence

Below is the list of the documentary evidence reviewed for this report:

1. Documentation and investigative files obtained by the Title IX Investigator;
2. Documentation provided by the parties and witnesses; and
3. University policies.

VI. ANALYSIS

The Standard of Evidence: Preponderance of the Evidence

Findings in this investigative report are based on a “preponderance of the evidence” standard. In other words, after reviewing all of the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. (Please note: the report’s findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University’s policies were violated).

The Complainant and the Respondent “hung out” in the Respondent’s apartment on October 19, 2017, after attending a party. The Complainant had to be walked to the Respondent’s apartment because she was “too drunk to walk there herself.” The Complainant and the Respondent agree they kissed on the couch, and stopped, and decided to stop and go upstairs where their teammates were. The Complainant indicated she went upstairs to where the teammates were because she didn’t want to be alone with the Respondent. Witness 2 indicated that the Respondent texted him to clear out because he wanted to be alone with the Complainant. The Respondent indicated both he and the Complainant were drunk. Witness 2 believes the Respondent was less drunk than the Complainant. The Respondent admitted to kissing the Complainant and grabbing her butt while they were kissing. The Complainant indicated she did not want to kiss him or engage in sexual contact with the Respondent. The Complainant said the Respondent rolled on top of her on the bed, placed the Complainant’s hand on his penis, and asked the Complainant for oral sex. The Respondent does not recall them laying down or rolling around. He does not recall placing the Complainant’s hand on his penis. The Respondent said he did not ask for oral sex.

The Respondent admitted to not obtaining affirmative consent before he grabbed the buttocks of the Complainant or before he kissed her, repeatedly. This admission establishes that it is more likely than not that the Sexual Contact (intentional touching of the buttocks) occurred without Affirmative Consent (such as through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed-upon sexual activity).

In evaluating Affirmative Consent in cases of alleged incapacitation, the University asks two questions: (1) Did the person initiating sexual activity know that the other party was incapacitated? And, if not, (2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated? If the answers to the first question is “YES,” Affirmative Consent was absent and the conduct is likely a violation of this policy. In the instant case, the Respondent said repeatedly, that both he and the Complainant were “super drunk.” Based on that admission, and in knowing that incapacitation is “a state beyond drunkenness or intoxication,” the answer to the question is yes since “super drunk” is indeed a stated beyond drunkenness.

VII. CONCLUSION

The investigator finds that a preponderance of the evidence supports a possible violation(s) of the University’s *Policy 1111, Sexual and Gender-Based Harassment and Other Interpersonal Violence*.

This report will be forwarded to the Office of Student Conduct for adjudication.