



Writing an Investigation Report

Office of Legal Counsel
February 24, 2021



Pennsylvania's
STATE SYSTEM
of Higher Education



Key Principles of an Investigation

- Prompt
- Fair
- Impartial and objective
- Reasonable in scope
- Undertaken in good faith



Factual Scenario

- Willow Smith (Complainant) filed a Formal Complaint on September 23, 2020 alleging Blake Morgan (Respondent) engaged in nonconsensual oral sex and nonconsensual sexual intercourse at an off-campus apartment party on September 19
- Complainant also alleges Respondent stalked her by showing up at her class on September 21 and residence hall on September 22



Factual Scenario, cont.

- Complainant went to an off-campus party with her roommate, Mackenzie Phillips (Witness), after first consuming alcohol
- Complainant and Witness Phillips spent time playing beer pong at the party with Ethan West (Witness) and Respondent
- Complainant and Respondent continued to consume alcohol and spend time together on a rooftop deck of the off-campus apartment



Factual Scenario, cont.

- Complainant and Respondent went downstairs to a bedroom in the apartment where the party took place
- Complainant and Respondent engaged in some sexual contact and/or intercourse (disputed facts)
- Complainant went home the next day and reported red marks on her arms to Witness Phillips and Resident Assistant, Savannah Lyons (Witness)



Factual Scenario

- After receiving a text from Witness Phillips, Respondent attempted to approach Complainant outside of her class and residence hall
- Complainant made a Formal Complaint to the Title IX coordinator



Elements of a Report

- Background
- Identification of Parties and Witnesses
- Summary of Allegations
- Jurisdiction
- Policies Implicated and Relevant Definitions
- Standard of Proof
- Timeline of Investigative Steps
- Evidence
- Interviews
- Undisputed Relevant Facts
- Disputed Relevant Facts
- Analysis
- Summary



Background

- Allegations and possible Policy violations
- Introduction of Investigator and investigation process
 - Fair and impartial investigation
 - Opportunity to offer, inspect, and review evidence
 - Opportunity to respond prior to the completion of the report
 - Opportunity to review and respond to final report



Background, cont.

- Explanation that the report only includes relevant evidence
- Irrelevant evidence includes:
 - 1) Evidence about the Complainant's sexual predisposition or prior sexual behavior unless:
 - It is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - It concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove Consent.
 - 2) Evidence that constitutes information protected under a legally-recognized privilege including attorney-client privilege; or
 - 3) Any party's medical, psychological, and similar records unless the party has given voluntary, written consent.



Background (Facts Applied)

- Allegations of violations of the University's Sexual Misconduct Policy
- Bob Jones assigned as Investigator
- Formal Complaint filed
 - Must be given to Respondent within 10 days
 - Parties provide testimony and evidence through interviews
- Parties and advisors given 10 days to inspect and review draft report
- Final report provided and given an additional 10 days to comment



Identification of Witnesses

- Identify Complainant and Respondent
 - Under certain circumstances, the University may be the Complainant
- Identify Witnesses and briefly explain their relationship to the complaint, Complainant, and/or Respondent



Identification of Parties and Witness (Facts Applied)

- Willow Smith—Complainant, 21-year-old female student
- Blake Morgan—Respondent, 21-year-old male student, swim team member
- Ethan West—Witness, student, swimming teammate and roommate of Respondent, Witness Phillips' boyfriend
- Mackenzie Phillips—Witness, student, roommate of Complainant, Witness West's girlfriend
- Tyler Branson—Witness, student, swimming teammate of Respondent
- Savannah Lyons—Witness, Resident Assistant



Summary of Allegations

- Provide a brief summary of the factual allegations
 - Include dates of Formal Complaint and alleged conduct
 - Include brief timeline of events



Summary of Allegations (Facts Applied)

- Violations of the University's Sexual Misconduct Policy, naming Respondent
- Nonconsensual oral sex
- Nonconsensual sexual intercourse
- Stalking



Jurisdiction

- Policy gives the University authority (and the obligation) to promptly and equitably respond to all reports of sexual misconduct in order to eliminate the misconduct, prevent its recurrence, and redress its effects on any individual or the community.
- Policy prohibits all Sexual Misconduct Violations, which may be categorized as either Regulatory or Nonregulatory conduct based on the Title IX regulations



Jurisdiction, cont.

- Regulatory Prohibited Conduct
 - The conduct is alleged to have occurred in the United States;
 - The conduct is alleged to have occurred within the University's Education Program or Activity and when the Complainant is participating in or seeking to participate in an Education Program or Activity; and
- Nonregulatory Prohibited Conduct
 - Policy does not meet one of the elements above



Policies Implicated and Relevant Definitions

- List the alleged violations of the University's Sexual Misconduct Policy or the Student Code of Conduct
 - Include the definition of the alleged violation and the elements of that violation
- Include other relevant definitions from the University's Sexual Misconduct Policy or the Student Code of Conduct
 - Consent, incapacitation, etc.



Polices Implicated and Relevant Definitions (Facts Applied)

- Regulatory Stalking

- Elements

Element 1: a course of conduct

Element 2: toward another person

Element 3: that demonstrates or communicates an intent to place the other person in reasonable fear of bodily injury or to cause substantial emotional distress to the other person



Polices Implicated and Relevant Definitions (Facts Applied)

- Nonregulatory Sexual Penetration Without Consent

Element 1: any penetration of the mouth, sex organs, or anus of another person, however slight by an object or any part of the body

Element 2: without consent



Polices Implicated and Relevant Definitions (Facts Applied)

- Definition of Consent
 - Relevant because Nonregulatory Sexual Penetration Without Consent requires an analysis of whether consent was present



Standard of Proof

- For student Respondents the Pennsylvania Code pertaining to student due process requirements must be followed:
 - Must use the preponderance of evidence standard
 - Meaning that it must be more likely than not that the Respondent violated a University Policy
- The Title IX regulations require the University to use the same standard of proof for student and employee Respondents



Timeline of Investigative Steps

- Include a timeline of steps of the investigation, including dates of
 - Initial report and formal complaint
 - Investigator selected and assigned
 - Start of investigation
 - Notices provided
 - Interviews of Parties and witnesses
 - Conclusion of investigation
 - Dates for Parties to inspect and review report
 - Report finalized



Evidence

- List of evidence considered during the investigation
- May include
 - Text messages
 - Emails
 - Social media posts
 - Videos
- Evidence may corroborate or contradict interviews of Parties and Witnesses



Evidence (Facts Applied)

- Copies of text messages between Witness Phillips and Complainant
- Copies of text messages between Respondent and Witness Phillips
- Photograph posted on Complainant's Instagram of Complainant and Witness Phillips
- Photograph posted on Witness Branson's Twitter account
- Photograph of Complainant's arms taken by Witness Phillips on September 20, 2020



Interviews

- Provide summaries of interviews with each Party and Witnesses
- Summaries should be in narrative form
- Summaries should include all relevant information and items of evidence collected
 - Should ONLY include relevant information



Undisputed Relevant Facts

- Undisputed facts are those that either all parties and witnesses agree on or those that are so clear that they cannot be seriously disputed
- Examples may include
 - Date of an incident
 - Location of an incident
 - Who was present and/or involved



Undisputed Relevant Facts (Facts Applied)

- Complainant and Witness Phillips planned to attend a party hosted by the swim team at an off-campus apartment on September 19
- At 9:15 p.m., Complainant and Witness Phillips took a selfie which Complainant posted to social media
- At 9:30 p.m., Complainant and Witness Phillips took two shots of vodka
- Between 9:30 and 10:00 p.m., Respondent texted Witness Phillips to ask if Complainant was coming to the swim team party



Undisputed Relevant Facts (Facts Applied)

- Complainant and Witness Phillips arrived at the party around 10:00 p.m.
- Complainant and Witness Phillips joined Respondent and Witness West for a game of beer pong
- All four consumed beer during the game
- Complainant and Witness Phillips took Fireball shots



Undisputed Relevant Facts (Facts Applied)

- Complainant and Respondent went to the rooftop deck around midnight
- Respondent gave Complainant a cup of Fireball whiskey on the roof
- Respondent and Complainant began flirting and kissing
- Around 1:00 a.m., Respondent and Complainant returned to the party and went into a bedroom



Undisputed Relevant Facts (Facts Applied)

- Complainant and Respondent continued kissing in the bedroom
- Complainant began to perform oral sex on Respondent (consent is disputed)
- Respondent placed his hands on top of Complainant's head and Complainant pushed them away; Respondent removed his hands
- Complainant continued performing oral sex on Respondent

Undisputed Relevant Facts (Facts Applied)

- Complainant and Respondent had sexual intercourse (consent is disputed)
- Complainant woke up at 9:00 a.m. the next morning in bed with Respondent
- Complainant texted Witness Phillips to ask where Phillips was
- Complainant left the apartment and went back to her residence hall
- Complainant told Phillips about the previous night and showed Phillips red marks on Complainant's arms



Undisputed Relevant Facts (Facts Applied)

- Witness Phillips took photographs of Complainant's arms
- Witness Phillips convinced Complainant to speak with Witness Lyons, their Resident Assistant
- Respondent woke up in bed alone at 10:30 a.m.
- Witness Phillips texted Respondent at 1:00 p.m.: "I can't believe what you did to Willow [Complainant]! Don't ever come near her again, creep!"



Undisputed Facts (Facts Applied)

- On September 21, Respondent was waiting outside Complainant's class
- Complaint saw Respondent; Respondent shouted Complainant's name; Complainant walked away quickly; Respondent did not follow
- On September 22, Respondent was waiting outside Complainant's residence hall
- Complainant shouted that Respondent should "go away" and Respondent did not follow Complainant



Disputed Relevant Facts

- Disputed facts are those that Parties and Witnesses may disagree on
- Decision maker(s), NOT investigators, will make determinations about disputed relevant facts
- Examples include
 - Whether or not a Complainant consented
 - Intoxication of Parties impacting ability to consent
 - Identity of the Respondent



Disputed Relevant Facts (Facts Applied)

- Key relevant disputed facts
 - Was there consent to engage in oral sex?
 - Was there consent to engage in sexual intercourse?
 - Did Respondent have an intent to place Complainant in reasonable fear of bodily injury or to cause substantial emotional distress to Complainant?



Consent to Engage in Oral Sex

- Complainant stated she initially performed oral sex
- Complainant stated Respondent put his hands on Complainant's head and this made her uncomfortable and Complainant felt pressured to continue
- Complainant stated she pushed Respondent's hands away and he did not return them
- Respondent stated he put his hands on Complainant's head but did not hold Complainant's head or push her to continue
- Complainant stated she continued to perform oral sex on Respondent for several minutes after Respondent removed his hands



Consent to Engage in Sexual Intercourse

- Complainant stated she did not consent to sexual intercourse
- After performing oral sex, Complainant stated she went to the bathroom and put her dress on
- Complainant stated she returned to lay on the bed and had no further memory until she work up the next morning at 9:00 a.m.
- Complainant stated she had red marks on her arms, her vagina was sore, and her dress was across the room on a table

Consent to Engage in Sexual Intercourse

- Respondent stated he asked Complainant to have sex 20 to 30 minutes after Complainant performed oral sex
- Respondent stated that Complainant did not say anything but she stood up and removed her underwear
- Respondent stated that he took her actions of undressing as consent
- Respondent stated he left the room for 10-15 minutes to find a condom and returned to have sexual intercourse with Complainant



Intent to Place Complainant in Reasonable Fear of Bodily Injury or to Cause Substantial Emotional Distress to Complainant

- Respondent stated that he approached Complainant on the 21st and 22nd to see if Complainant was alright, due to confusion over Witness Phillips' text
- Respondent stated that when Complainant walked away quickly and did not respond when Respondent called her name on September 21, Respondent did not follow Complainant
- Respondent stated he sought Complainant out again outside of her residence hall on September 22; When Complainant yelled at him to go away, he did not follow her.



Intent to Place Complainant in Reasonable Fear of Bodily Injury or to Cause Substantial Emotional Distress to Complainant

- Complainant stated that she was shaken and did not wish to speak to Respondent on September 21. Complainant walked away quickly and did not respond when Respondent called her name
- When Respondent waited outside of her residence hall on September 22, Complainant yelled at him to “go away”
- Respondent’s two appearances made Complainant uneasy and she subsequently decided to make a report to the Title IX coordinator



Analysis

- DO apply relevant facts to each element of each alleged violation
- DO NOT make credibility determinations
- DO NOT make recommended findings
- DO NOT make determinations

Credibility determinations, findings and determinations are the responsibilities of the Decision Maker(s)



Analysis, cont.

- Do a jurisdictional analysis to determine if a alleged violation is Regulatory or Nonregulatory (in U.S. Educational Program or Activity)
- Break down each element of each alleged violation
- The goal of this section is to list the undisputed and disputed facts that apply to each element of each alleged violation



Analysis, cont.

- Must first make a jurisdictional determination as to whether the alleged conduct is Regulatory or Nonregulatory
 - The conduct is alleged to have occurred in the United States;
 - The conduct is alleged to have occurred in the University's Education Program or Activity and when the Complainant is participating in or seeking to participate in an Education Program or Activity; and
 - The alleged conduct, if true, would constitute covered Regulatory Prohibited Conduct, as defined in the University's Sexual Misconduct Policy.



Regulatory Stalking

- **Jurisdiction:** Regulatory because the conduct occurred on campus
- **Element 1:** a course of conduct
 - Respondent waited outside Complainant's class on September 21 and residence hall on September 22
- **Element 2:** directed toward another person
 - Respondent was waiting to talk to Complainant on both days
 - Respondent called Complainant's name



Regulatory Stalking

- **Element 3:** that demonstrates or communicates an intent to place the other person in reasonable fear of bodily injury or to cause substantial emotional distress to the other person.
 - The disputed matter for the Decision Maker(s) is whether or not Respondent had an intent to place the Complainant in reasonable fear of bodily injury or to cause substantial emotional distress to the Complainant by appearing outside her class and residence hall
 - Importantly, the Decision Maker(s) must determine whether it is more likely than not that Respondent's conduct could cause a reasonable person to fear for their safety or to suffer substantial emotional distress and Complainant did, in fact, fear for her safety or suffer substantial emotional distress



Regulatory Stalking

- What facts lend themselves to a finding that a course of conduct demonstrates or communicates an intent to place the other person in reasonable fear of bodily injury or to cause substantial emotional distress to the other person?
- Against?



Nonregulatory Sexual Penetration Without Consent: Oral Sex

- **Jurisdiction:** Nonregulatory because it occurred off campus
- **Element 1:** any penetration of the mouth, sex organs, or anus of another person, however slight by an object or any part of the body
 - Penetration of the Complainant's mouth is an undisputed fact



Nonregulatory Sexual Penetration Without Consent: Oral Sex

- **Element 2: without Consent**
 - The Decision Maker(s) must determine whether consent was active, present, and ongoing throughout the act of oral sex
 - Decision Maker(s) must determine whether it is more likely than not that Complainant withdrew consent to performing oral sex by removing Respondent's hands



Nonregulatory Sexual Penetration Without Consent: Oral Sex

- What facts lend themselves to a finding of consent?
- Against?



Nonregulatory Sexual Penetration Without Consent: Sexual Intercourse

- **Jurisdiction:** Nonregulatory because it occurred off campus
- **Element 1:** any penetration of the mouth, sex organs, or anus of another person, however slight by an object or any part of the body
 - The occurrence of vaginal sexual intercourse is not a disputed fact



Nonregulatory Sexual Penetration Without Consent: Sexual Intercourse

- **Element 2: without Consent**
 - The Decision Maker(s) must determine whether it is more likely than not that consent was active, present, and ongoing throughout the act of sexual intercourse
 - The Decision Maker(s) must also determine whether it is more likely than not that Complainant's level of intoxication reached the level of incapacitation at the time of sexual intercourse



Nonregulatory Sexual Penetration Without Consent: Sexual Intercourse

- What facts that lend to a finding of consent?
- Against?



Summary

- Should point out the Decision Maker(s) clear instruction to view the case in its entirety and weigh the presented evidence and any evidence presented at a future hearing to determine if a policy violation or violations occurred by a preponderance of the evidence



How would the following
factual changes change your
analysis?



Change in Location

- Instead of occurring at an off-campus apartment, the party occurred at an on-campus residence hall.



Intoxication

- Respondent says that all Respondent saw Complainant drink was a beer during the beer pong game. Respondent did not give Complainant a cup of Fireball on the roof, and Witness Phillips also stated that Phillips did not see Complainant drinking on the roof. Respondent said that Complainant was walking straight, not stumbling, and not slurring her words.



Text Messages

- After Complainant walked away from Respondent outside of Complainant's residence hall on September 22, Respondent texted Complainant. Respondent said "I don't know why you keep walking away or what Mackenzie [Phillips] meant by her ridiculous text. I need to see you and nothing you say or do is going to stop me."