

A resolution to revise the Sexual Misconduct Umbrella Policy

Whereas, the University of Michigan released its draft “Sexual Misconduct Umbrella Policy” (the “Umbrella Policy”) addressing sexual and gender-based misconduct on October 15, 2019¹;

Whereas, the Umbrella Policy holds that a hearing “to obtain information [...] to make a determination of whether a Policy violation occurred” is expected² and that a “typical hearing may include [...] questions by one party to the other”³, such as a Respondent, “an individual who is reported to have committed Prohibited Conduct”⁴, questioning a Complainant, “an individual who is reported to have experienced Prohibited Conduct”⁵, where Prohibited Conduct includes “Sexual Assault; Sexual Exploitation; Sexual Harassment; Gender-Based Harassment; Sexual and/or Gender-Based Stalking; Intimate Partner Violence; Sex and Gender-Based Discrimination; Retaliation; and Violation of Protective Measures”^{6,7};

Whereas, though the Umbrella Policy holds “a Complainant and a Respondent may have an adviser [...] an individual chosen by a party to provide support and guidance during the review of a report of Prohibited Conduct”⁸, such as “an advocate and/or an attorney”⁹, it is unclear whether an adviser or an equivalent representative may be permitted to cross-examine a witness;

Whereas, the Supreme Court has held “where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses”¹⁰ as it is often critical to resolving factual disputes, a value to both Complainants and Respondents, serving the goal of reaching legitimate and fair decisions;

Whereas, the United States Court of Appeals for the Sixth Circuit has recognized that “Universities have a legitimate interest in avoiding procedures that may subject an alleged

¹ University of Michigan, Sexual Misconduct Umbrella Policy (October 15, 2019), <https://sexualmisconduct.umich.edu/umbrella-policy/>

² University of Michigan, Ann Arbor Student Procedures (October 4, 2019), Dearborn Student Procedures (October 14, 2019), Flint Student Procedures (October 14, 2019), § VII.C (pg. 16), https://sexualmisconduct.umich.edu/wp-content/uploads/2019/10/Studentprocedures_10.4.19_FINAL.pdf, <https://sexualmisconduct.umich.edu/wp-content/uploads/2019/10/DearbornStudentprocedures.pdf>, <https://sexualmisconduct.umich.edu/wp-content/uploads/2019/10/FlintStudentProcedures.pdf>

³ *Id.* § VII.C.6 (pg. 18, emphasis added)

⁴ University of Michigan, Umbrella Policy (October 4, 2019), § II.F (pg. 3) https://sexualmisconduct.umich.edu/wp-content/uploads/2019/10/Policy_10.3.19_clean.pdf

⁵ *Id.* § II.E (pg. 2)

⁶ *Id.*, § I (pg. 1)

⁷ *Id.*, § II.A (pg. 2)

⁸ University of Michigan, Ann Arbor Student Procedures, Dearborn Student Procedures, Flint Student Procedures, § VII.A.6 (pg. 10)

⁹ *Id.*

¹⁰ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that¹¹;

Whereas, the United States Court of Appeals for the Sixth Circuit has recognized that “an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting [an] alleged attacker”¹²;

Whereas, the University has recognized “allowing an accused student to confront the claimant directly may subject an alleged victim to further harm or harassment” and that “fear of having to confront, and discuss in detail, a sexual assault with the very individual accused of having committed the assault may well lead alleged victims not to report cases in the first instance”¹³; and

Whereas, the University adopted the Umbrella Policy “with a commitment to: (1) eliminating, preventing, and addressing the effects of Prohibited Conduct; (2) fostering an environment where all individuals are well-informed and supported in reporting Prohibited Conduct; [and] (3) providing a fair and impartial process for all parties”¹⁴; now, therefore, be it

Resolved, that the Senate Assembly urges the University to

1. Revise the Umbrella Policy to comply with due process and protect victims of sexual and gender-based misconduct;
2. Prevent a Respondent from directly questioning a Complainant;
3. Adopt a policy that includes cross-examination by a representative;
4. View cross-examination of witnesses as serving the goal of reaching legitimate and fair decisions;
5. Protect the Complainant from further harm or harassment, as might be caused by cross-examination by the Respondent;
6. Create a forum where cross-examination of the Respondent and the Complainant may be conducted by a representative trained in the appropriate scope and manner of cross-examination;
7. Recognize that fear of having to confront, and discuss in detail, a sexual and/or gender-based misconduct with the very individual accused of having committed the misconduct may well lead alleged victims not to report cases in the first instance; and
8. Commit to eliminating, preventing, and addressing sexual and gender-based misconduct; foster an environment where all are informed and supported well; and provide a process with fairness for all.

¹¹ *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018) (emphasis added).

¹² *Id* (emphasis added).

¹³ Appellee’s Pet. For Reh’g and Reh’g En Banc at 6, *Doe v. Baum*, No. 17-2213 (6th Cir. Sept. 24, 2018))

¹⁴ University of Michigan, Umbrella Policy (October 4, 2019), § I (pg. 1)