

## A resolution to rescind the Interim Policy

Whereas, the University of Michigan adopted an Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (the “Interim Policy”) on January 9, 2019<sup>1</sup>;

Whereas, the Interim Policy holds that a hearing “to obtain information [...] is necessary to make a determination of whether a Policy violation occurred” and that a “typical hearing may include [...] questions by one party to the other”<sup>2</sup>, such as an “individual who is reported to have committed Prohibited Conduct”<sup>3</sup> questioning “an individual who is reported to have experienced Prohibited Conduct”<sup>4</sup>, where Prohibited Conduct includes “sexual assault, sexual and gender-based harassment, intimate partner violence, stalking, retaliation, and violation of interim measures”<sup>5</sup>;

Whereas, the Interim Policy holds “a Claimant, a Respondent or witness may have an adviser of their choice”, though “the adviser may not present evidence on a party’s behalf, present argument, examine witnesses, testify, disrupt, or otherwise obstruct the meeting or proceedings”<sup>6</sup>;

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”<sup>7</sup> as it is often critical to resolving factual disputes, a value to both claimants and respondents, and serves 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 victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that”<sup>8</sup>;

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”<sup>9</sup>;

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<sup>1</sup> University of Michigan, Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (January 9, 2019),

<https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-Policy-PDF-Version011519.pdf>

<sup>2</sup> *Id.*, § XIII.B.7 <https://studentsexualmisconductpolicy.umich.edu/content/b-hearing> (emphasis added)

<sup>3</sup> *Id.*, § II <https://studentsexualmisconductpolicy.umich.edu/content/ii-whom-policy-and-procedures-apply> (emphasis added)

<sup>4</sup> *Id.*, § II <https://studentsexualmisconductpolicy.umich.edu/content/ii-whom-policy-and-procedures-apply>

<sup>5</sup> *Id.*, § I <https://studentsexualmisconductpolicy.umich.edu/content/policy-statement>

<sup>6</sup> *Id.*, § XIII.6 <https://studentsexualmisconductpolicy.umich.edu/content/xiii-investigative-resolution> (emphasis added)

<sup>7</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

<sup>8</sup> *Doe v. Baum*, 903 F.3d 575 (6<sup>th</sup> Cir. 2018)

<sup>9</sup> *Id.*

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”<sup>10</sup>; and

Whereas, the University adopted the Interim 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”<sup>11</sup>; now, therefore, be it

***Resolved, that the Senate Assembly urges the University to***

- 1. rescind the Interim Policy and replace it with a policy complying with due process and strengthening the fact-finding mission of the University;**
2. prevent an individual reported to have committed Prohibited Conduct from directly questioning an individual reported to have experienced Prohibited Conduct;
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 alleged victims from further harm or harassment, as might be caused by cross-examination by the accused;
6. create a forum where cross-examination of accused and accuser 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 assault with the very individual accused of having committed the assault may well lead alleged victims not to report cases in the first instance; and
8. commit to eliminating, preventing, and addressing the effects of sexual and gender-based misconduct; to fostering an environment where all individuals are supported and well-informed; and to providing a fair and impartial process for all parties.

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<sup>10</sup> Appellee’s Pet. For Reh’g and Reh’g En Banc at 6, *Doe v. Baum*, No. 17-2213 (6<sup>th</sup> Cir. Sept. 24, 2018))

<sup>11</sup> Interim Policy §I <https://studentsexualmisconductpolicy.umich.edu/content/policy-statement>