

Report on Activities of Academic Affairs Advisory Committee for 2023-2024

From: Emmanuelle Marquis, Chair, Academic Affairs Advisory Committee

Subject: Report on Activities of Academic Affairs Advisory Committee for 2023-2024

Members: Andrew Chang, Colleen Conway, Robert Deegan, Bruno Giordani, Aubree Gordon, Albert Liu, Rahul Mannan, Frank Pelosi, Jordan Siegel

SACUA Liaison: Damani Partridge

Meeting Dates: The committee met with Provost McCauley and Christine Gerdes on October 5 2023, December 6 2023, February 1 2024, March 14 2024, and April 17 2024. Additional planning meetings were held on September 21 2023, November 8 2023, and January 18 2024.

2023-2024 Committee Charge

- Develop educational guidance for students aimed toward supporting an academic environment in which faculty may be presenting and discussing content that students find uncomfortable.
- Develop best administrative practices for faculty responses to student objections to course content, with consideration made regarding University procedures and resources that tend to support or challenge faculty academic freedom.
- In collaboration with SACUA, continue pursuing such further work related to the AAAC 2022-2023 recommendations regarding 4 SPG reviews and revisions related to disability and illnesses.
- Assess current practices regarding disability support for faculty and staff, and provide recommendations regarding improvement.
- Brainstorm on a potential symposium or invited speaker event focused on research around faculty burnout, including defining “burnout,” identifying root causes, and policies and procedures to prevent burnout—with planning, logistical, and financial assistance from the Faculty Senate Office.
- Consider with the Provost any further issues or topics brought forward by the AAAC committee members or the Provost for discussion over the course of the year. While coordinating with the Faculty Senate Office to help avoid duplicating work that SACUA has now referred to itself or to another committee, the committee may also continue discussing any issues or topics raised in the committee's most recent annual committee report.

AAAC discussions with Provost McCauley

- **Classroom discussions of sensitive issues:** The Provost invited the CRLT director and AAAC raised concerns about the lack of support for faculty against external threats and student complaints.

- **SPGs and disability inclusion:** AAAC presented their analysis of 4 SPGs emphasizing the power of language and urging for transparent and inclusive rules and guidelines. The Provost's Office was interested in moving forward with next steps on revising these SPGs, including convening a meeting with all key constituencies. Regarding support for staff and faculty with disabilities, AAAC put forward recommendations. In response, Provost McCauley indicated the creation of a faculty committee advisory to her Office and her interactions with Vice Provost for Equity & Inclusion and Chief Diversity Officer Chavous to create funding avenues to support scholars in disability studies.
- **Sex-based harassment:** The AAAC presented a set of recommendations to address systemic issues at the University.
- **Additional discussions** included the systematic underpayments for faculty, continued concerns about Work Connections and the lack of transparency surrounding its operation, work of CCRT and its reporting structure, and faculty wellness with a focus on dependent care. In addition, Provost McCauley requested feedback on CSG resolutions and a student strike disrupting a few classrooms.

AAAC Actions and Recommendations

The AAAC issued five documents found in the attached appendices and shared with the Office of the Provost and/or SACUA:

- Review of the texts of four SPGs (201.12 Discipline, 201.15 Fitness for Duty, 201.15-01 Temporary Removal of Faculty for Lack of Fitness for Duty, 201.11-1 Sick Leave Plan—Academic Appointments).
- Proposed changes to SPG 201.12 and 201.15. AAAC also recommends the removal of SPG 201.15-01.
- AAAC resolution on Academic Freedom and External Harassment
- AAAC resolution on salary increase underpayments for faculty on University Year appointments
- AAAC memo in collaboration with the National Women's Law Center on recommendations to address sex-based harassment at the University of Michigan.

Moving forward, the AAAC recommends a survey of staff and faculty regarding Work Connections, continued effort to modify SPGs to protect staff and faculty with disabilities, and targeted efforts to further enable the inclusion of staff and faculty through flexible hiring practices, establishment of formal undergraduate and graduate degree programs in disability studies, etc.

More generally, the AAAC supports the establishment of a transparent, faculty-led process for the review, modification, and creation of SPGs and other campus-wide policies.

The AAAC initiated a resolution on Academic Freedom and External Harassment. The AAAC recommends continued effort to ensure the protection of academic freedom and faculty exercising their rights.

The AAAC recommends following up on the recommendations outlined in the memo on sex-based harassment.

Finally, while forming additional committees to review best practices and research or benchmarking current practices against those at peer institutions can be useful, the AAAC emphasizes the urgency needed to address the inclusion of people with disabilities, the protection of academic freedom, and the protection of students, staff, and faculty against sex-based harassment.

AAAC 2023-2024 Report Appendices

- I. Review of SPGs related to disability and illnesses (201.12 Discipline, 201.15 Fitness for Duty, 201.15-01 Temporary Removal of Faculty for Lack of Fitness for Duty, 201.11-1 Sick Leave Plan—Academic Appointments).
- II. Proposed changes to SPG 201.12 and 201.15.
- III. AAAC resolution on Academic Freedom and External Harassment
- IV. AAAC resolution on salary increase underpayments for faculty on University Year appointments
- V. AAAC memo in collaboration with the National Women's Law Center on recommendations to address sex-based harassment at the University of Michigan.

December 16, 2023

Review of SPGs related to disability and illnesses

Academic Affairs Advisory Committee

We have reviewed the texts of the relevant University of Michigan Standard Practice Guides (SPGs). These are copied in their entirety with suggestions for modifications and improvements below (in the next pages).

The main SPGs associated with medical conditions, disabilities, and leaves, are:

- <https://spg.umich.edu/policy/201.12: Discipline>
- <https://spg.umich.edu/policy/201.15: Fitness for duty>
- <https://spg.umich.edu/policy/201.15-01: Temporary Removal of Faculty for Lack of Fitness for Duty>
- <https://spg.umich.edu/policy/201.11-1: Sick Leave plan: Academic appointments>

These specific SPGs associate misconduct, at risk behaviors, perceived disability with medical and disabling conditions with limited to no safeguards or recourse possible for the concerned employees. While some of these SPGs may have been created in reaction to one or two specific cases, their wider application raises significant concerns.

We find that the lack of review and faculty input has led to the accumulation of inconsistencies, duplications, and outdated language over time leading to confusion and potential harm for university employees. In other words, through any of these four SPGs, a faculty/staff member or staff may be terminated for having a disabling condition despite reasonable accommodations.

This issue is far more than an inclusive language issue since the language used in some SPGs points to larger systemic issues. Therefore, faculty participation in the process of revising these SPGs is essential to create a safe, inclusive, and welcoming campus culture and re-affirm faculty trust in the institution. Our objective is to ensure that procedures are consistent with the renewed commitment of the university to address inequities, especially towards faculty and staff with disabilities.

<https://spg.umich.edu/policy/201.12>: Discipline

Applies To: Regular staff with the exception of those covered by the terms of a collective bargaining agreement

Owner: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

Primary Contact: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

I. POLICY

The University requires that employees maintain a standard of performance and conduct that contributes to the continuing excellence and orderly and efficient operation of the University. The University, in its sole discretion, will determine whether an employee's performance, conduct or behavior meets this standard.

II. DEFINITIONS

A. MISCONDUCT: Conduct, performance or behavior, whether by act or omission that interferes with or adversely affects in any way the orderly or efficient operation of the University.¹ This includes any violation of rules and regulations, whether written or unwritten,² or unsatisfactory work performance that is caused by other than a lack of capacity or ability,³ and off duty or off premises behavior which adversely affects the employment relationship. "Misconduct" may also be called "unsatisfactory performance" or "undesirable conduct" or any similar term and is reason for taking disciplinary action.

B. TERMINATION: Generic term for the ending of the employment relationship at the initiative of the employee or the University for any reason, including misconduct. A misconduct termination, however, is usually referred to as a discharge.

C. TYPES OF DISCIPLINARY ACTION:

1. EXTENT OF DISCIPLINE: The extent of disciplinary action taken depends on all of the facts and circumstances available at the time the decision is made. Considerations include the nature of the misconduct, the employee's past record including disciplinary action, if any, taken in the past, and years of service. There is no requirement that an oral or written warning or reprimand, or a disciplinary layoff precede a discharge or that a warning or reprimand precede a disciplinary layoff if the facts and circumstances dictate another approach (See also Section III B.)

¹ The current definition of misconduct is missing the essential aspect of harm.

² The reference to unwritten rules is problematic. Simply replace with "This includes any violation to written rules and regulations, or"

³ This is in contradiction with clauses E and F. It initiates a discrepancy in the possible association between being disabled/ill resulting in a need for disciplinary action. Medical conditions need to be explicitly added as not a cause for misconduct.

2. ORAL WARNING OR REPRIMAND: An oral statement of disapproval to the employee by the supervisor or another member of management concerning the employee's misconduct. At the supervisor's discretion, an oral warning or reprimand may be documented in the departmental file if there is concern that it may be misunderstood or denied by the employee at a subsequent date.
3. WRITTEN WARNING OR REPRIMAND: A written statement of disapproval to the employee by the supervisor or another member of management concerning the employee's misconduct.
4. SUSPENSION: The interruption of active employment with or without pay pending a decision about the extent of disciplinary action, if any, to be taken. A suspension is not disciplinary in nature but after investigation, a suspension may or may not be converted to disciplinary action.
5. DISCIPLINARY LAYOFF: Time off without pay for misconduct.
6. WRITTEN REPRIMAND in LIEU of DISCIPLINARY LAYOFF: A written warning which is considered to be the equivalent of, and having the same effect as, a disciplinary layoff without pay.
7. DISCHARGE: Termination for misconduct following a Disciplinary Review Conference.
 - D. DISCIPLINARY REVIEW CONFERENCE (DRC): A meeting to provide an opportunity for discussion with an employee whose termination at the initiative of the University is contemplated. The conference will include an oral or written statement of the alleged misconduct or performance concerns and allow an opportunity for the employee to respond. The employee will be informed of the outcome in a timely fashion.

III. REGULATIONS

- A. SUSPENSION PENDING INVESTIGATION: A suspension should not be given for a predetermined period of time, but should last only long enough in the supervisor's judgment to permit time for investigation or for formulation of a decision after the investigation is completed. Time off during a suspension may be converted to a disciplinary layoff.
- B. APPROVAL FOR DISCIPLINARY LAYOFF AND DISCHARGE OR TERMINATION: No disciplinary action involving a disciplinary layoff, a written reprimand in lieu of a disciplinary layoff, or any discharge may be taken prior to the approval of the appropriate Human Resources Office (Staff HR, Michigan Medicine HR, Dearborn HR, Flint HR).
- C. EXCLUSIONS: Temporary and probationary employees, employees where alternative employment arrangements exist, and those whose employment agreement states that they serve at the pleasure of a particular University official are not covered by this Standard Practice Guide.
- D. SUPERVISOR'S RESPONSIBILITY: When it is determined that misconduct has occurred, it is the supervisor's responsibility to take disciplinary action.

E. INABILITY:⁴ Unsatisfactory performance may be the result of an employee's lack of ability or capacity. In these cases, progressive discipline, such as warnings or disciplinary layoffs, may not be an appropriate method to correct the performance. Prior to termination, units should consider alternative corrective measures or permit the employee a period of time to locate a more suitable position. A Disciplinary Review Conference will be held prior to termination.

F. MEDICAL CONDITIONS: If performance, including attendance,⁵ is adversely affected by a medical condition for which there is acceptable medical evidence and the employee is following prescribed treatment, disciplinary action is not always appropriate. However, termination because of inability to perform the essential functions of one's position may be considered on a case by case basis.

G. DISCIPLINARY LAYOFFS: A disciplinary layoff is imposed by the supervisor for a stated period of time. The layoff may range from the balance of the day's work schedule to several days or weeks. A disciplinary layoff will be accompanied by a written reason. (See also Section III B) For exempt employees, if a Disciplinary Layoff is given, it must be for at least one full day or more.

H. WRITTEN REPRIMAND IN LIEU OF A DISCIPLINARY LAYOFF: A "Written Reprimand in Lieu of a Disciplinary Layoff" will be clearly identified as such, and may be used at the discretion of the supervisor with the approval of the appropriate Human Resources Office. This approach is particularly recommended when the misconduct is unexcused absenteeism; or when the absence caused by disciplinary layoff would have a more negative impact on the unit than on the employee.

I. DISCIPLINARY REVIEW CONFERENCE (DRC): The employee will be notified by the University as to the nature and purpose of a Disciplinary Review Conference. The employee's immediate supervisor or designee and a representative from Human Resources will also be present for the review.

The employee may be accompanied by a representative of his/her choosing, and by one other employee in possession of relevant facts. Employees will not lose time or pay for attending a

⁴ This SPG is about misconduct and therefore should not include medical conditions or disability. That disciplinary action should ever be the first procedure to address a medical condition or disability suggests that the university is not vested in the well-being of its employees or its commitment to DEI. These two points E and F need to be removed from this SPG.

Furthermore, the language is problematic as it directly ties performance to the abled body. The first sentence in E: Inability may be interpreted to suggest that the University does not consider faculty with disabilities to be able to perform satisfactorily. It is frightening that the first step should ever be a disciplinary action and not the consideration of accommodations. It also leaves out accommodations, as required by the ADA.

"Acceptable" will need to be defined under the ADA.

We also note that, in some instances, the university still uses outdated intake forms and metrics to assess functions.

⁵ Thanks to the pandemic, we now have pervasive technology to perform efficient and productive work remotely. The use of attendance as a metric of performance is both ableist and outdated.

conference held during their normal working hours.

When unlawful discrimination is alleged in the Disciplinary Review Conference, the appropriate Human Resources Office will review any facts which may have been provided to the Equity, Civil Rights and Title XI Office (ECRT).

J. GRIEVANCES: Grievances filed by employees concerning disciplinary layoff, written reprimand in lieu of layoff, termination or discharge are submitted directly at Step 3 of the grievance procedure. (See SPG 201.08 "Grievance Procedure")

K. VACATION, SICK TIME, AND PTO PAY:

1. Vacation – employees will be paid for vacation which has accrued as of the termination date. (SPG 201.64-0 (/policy/201.64-0))

2. Sickness or injury disability income (e.g., paid maternity(childbirth) leave, paid parental leave, and sick time pay) – which may have been available is cancelled upon termination. (SPG 201.11-0 (/policy/201.11-0) and SPG 201.30.6 (<http://spg.umich.edu/policy/201.30-6>))

3. Paid Time Off (PTO) – eligibility for and payment of accrued PTO at time of termination for employees covered under Michigan Medicine PTO policy will be made in accordance with that policy

L. BENEFITS: When employment has been terminated, the employee should contact the Shared Services Center for details regarding the status of their benefit programs.

M. RETIREMENT: If an employee subject to discharge is eligible to retire, in consultation with Human Resources, consideration may be given to allow voluntary retirement in lieu of discharge.

Notes

This SPG was updated in September 2018 to clarify impact of SPG 201.30-6, Paid Maternity (Childbirth) and Parental Leaves.

This SPG was updated in March 2022: reflect changes in the names of relevant offices; clarify that a suspension may be with or without pay; referral to the Michigan Medicine PTO policy for PTO payout rules at time of termination; clarifying language in the "applies to" section that this policy would continue to apply in instances where there is not yet a collective bargaining agreement in effect.

Applies To: All Faculty and Staff

Owner: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

Primary Contact: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

I. POLICY

The University endeavors to provide a safe work place for the benefit of all members of the University community. This policy covers only those situations in which an employee is having observable difficulty performing his/her work duties in a manner that is safe for the employee and/or for his or her co-workers, or is posing an imminent and serious safety threat to self or others.⁷ This policy proscribes⁸ the circumstances under which an employee may be referred for a fitness for duty evaluation. The purposes of this fitness for duty policy are:

- A. To help assure the safety and health of individuals in the University community or others with whom they have contact.
- B. To establish procedures by which the University can evaluate an employee's ability to safely and competently perform her/his duties when a health⁹ or safety problem arises.
- C. To comply with the 1988 Federal Drug Free Workplace Act.

II. DEFINITIONS

- A. "Employee" — employee for purposes of this policy means all faculty and staff employed by the University in any capacity, whether full or part-time or temporary or regular status.
- B. "On Call Employees" — Staff members who are required to restrict their whereabouts and activities in order to be available for consultation or return to work to meet emergencies. (see SPG 201.36).

⁶ This SPG needs a new title that reflects the actual focus of the SPG and removes the current ambiguity with ableist connotations linking disability and safety. Suggestion: "Evaluation and removal of an employee for unsafe behavior".

⁷ Note the exclusive focus of this SPG on unsafe behavior. Further confirmed in the associated procedure: [Procedures for SPG 201.15, Fitness for Duty](#).

⁸ Typo? "Prescribes".

⁹ This SPG is about treating unsafe behavior. Health issues should not be included here, or it creates confusion and possible discrimination against those with health issues or disability.

C. “Fitness For Duty” — The employee is physically and mentally capable of safely performing the essential functions¹⁰ of his/her¹¹ job.

D. “Coordinating Party”— This is the appropriate party/office (based on the specific situation) responsible for coordinating and facilitating the fitness for duty evaluation. The coordinating party should be, but is not limited to:¹² The Faculty and Staff Counseling and Consultation Office (FASCCO) for central and regional campuses, or the Office of Counseling and Workplace Resilience for Michigan Medicine faculty and staff, or Work Connections.¹³ The responsibilities of the coordinating party are to:

1. Identify who will conduct the fitness for duty evaluation
2. Receive the results of the fitness for duty evaluation
3. Share information about the results only as detailed in Section III, O: “Confidentiality/Privacy”.
4. Coordinate payment by the University for the fitness for duty evaluation.

III. REGULATIONS¹⁴

A. Employees are responsible for managing their health in such a way that they can safely perform their essential job functions,¹⁵ with or without reasonable accommodation.¹⁶

B. Employees who have the responsibility for on-call shifts must remain in a fit condition for the entire on-call period.

C. Supervisors may refer employees for a fitness for duty evaluation if they follow the adopted procedures. See link to Procedures in Section IV of this policy.

D. The determination by a supervisor to refer an employee for a fitness for duty evaluation must involve consultation with a central staff of Michigan Medicine Human Resource representative unless the nature of the situation dictates immediate attention.¹⁷

¹⁰ In addition to the outdated and discriminatory use of gender, "essential functions" need to be defined. For faculty, this ought to be done by SACUA.

We also note that the use of the word ‘safely’ is extremely important here as it is the only distinction between the application of this SPG for unsafe behavior versus defining fitness for duty for any illness or disability, as done in the next SPG, thereby creating ambiguity.

¹¹ Replace with their.

¹² “Impartiality (free of mandatory reporting obligations)” is a key attribute that needs to be specified. If this is about a disability (but let’s remember that this SPG is about harm), the coordinating party should also include a disability coordinator.

¹³ Work Connections is not an impartial entity. Moreover, its role is to manage medical leaves. It has been known to deny accommodations for staff/faculty with disabilities.

¹⁴ Important point: The SPG is missing the details about who makes the decision to refer an employee for a fitness evaluation. In the subsequent SPG 201.15-1, it is currently stated that a dean would make this decision for a faculty member.

¹⁵ Again, essential functions for faculty ought to be defined with a non-ableism mindset. Furthermore, it seems like an odd statement that presumes we all have some agency and control that perhaps we don’t.

¹⁶ Remove “or without” as it is suggesting that employees with disabilities should be able to perform without accommodations, which is in contradiction with the ADA.

¹⁷ Delete in its entirety. This point should have never been included in the official version of the SPG that was obviously written by someone at the medical school and not reviewed for wider campus use. It also raises the question that while HR may be informed, there needs to be the explicit mention that HR need to

- E. Application of this policy is not intended as a substitute for other University policies or procedures related to performance. In addition, application of this policy is not a substitute for discipline. In any situation involving misconduct, disciplinary action may occur.
- F. The University will pay the cost of fitness for duty evaluations.
- G. An impartial, independent¹⁸ health care evaluator with appropriate expertise (which will include one or more of the following: medical, psychological, alcohol, or other drug conditions) will conduct a fitness for duty evaluation.
- H. The University¹⁹ will make the final determination of an employee's fitness for duty status.
- I. An employee referred for a fitness for duty evaluation will be relieved of duties pending completion of the fitness for duty evaluation.
- J. When an employee is found to be unfit for duty, his/her employment status will be determined on a case-by-case basis, in accordance with University policy and practice.
- K. An employee's pay status while fitness for duty is being determined will be dependent on his/her employment status and the facts of the case.²⁰
- L. In all cases, the University must receive a "return to work/fitness for duty form" saying the employee is fit " from the independent evaluator before an employee may return to work.
- M. In most cases, a re-entry conference with the supervisor and a Human Resources representative (if appropriate) will occur prior to the employee's return to work.
- N. Non-compliance with a request for a fitness for duty evaluation may constitute insubordination and be cause if disciplinary action is warranted.
- O. CONFIDENTIALITY/PRIVACY
1. Records of fitness for duty evaluations will be treated as confidential medical records and be kept separate from existing department and personnel files; this information can be shared only on a strict "need to know" basis.
 2. After an evaluation, information available to the employee's work unit will be limited to:
 1. Whether a person is fit to resume his/her job duties
 2. Whether a person is a direct threat to self or others
 3. Whether a person needs specific reasonable accommodations²¹

be out of the medical decision-making process and that medical information cannot be included in personnel files.

¹⁸ What constitutes independent, how such an evaluator is selected, and what is the path for appeal? This is not currently followed by the university whose current practice is to require use of their preferred vendors. Also, why only one evaluator? This should include as many evaluators as necessary for the condition and appropriate expertise should be defined, perhaps with terminal degrees, certifications, etc. Independent implies mutually agreed upon, which is not how the process currently works.

¹⁹ Who exactly this refers to needs to be explicitly defined.

²⁰ the idea that pay could be affected BEFORE any fact is clarified is concerning

²¹ Though this SPG is not supposed to be about disability, nor disability accommodations, the line is very blurry as to the application of this SPG. Even in the case of a harmful situation, is this how UM wants to

IV. RESOURCES

Resources that are available to provide assistance about dealing with individual fitness concerns include:

- A. [Work Connections](#); ²²
- B. For central and regional campuses: Faculty and Staff Counseling and Consultation Office FASCCO
- C. For Michigan Medicine: Michigan Medicine Office of Counseling and Workplace Resilience
- D. Appropriate Human Resources Office

Procedures: [Procedures for SPG 201.15, Fitness for Duty](#)²³

determine disability accommodations? It appears to be in violation of the ADA as the ADA requires an interactive process and does not require fitness for duty evaluations.

²² Work Connections should not be a primary resource. Moreover, Work Connections do not organize independent, impartial health care evaluation contrary to point G. Work Connections pays and relies on a small set of physicians subcontracted from private firms such as <http://michiganime.com/>, some of them with documented unethical practices. This is particularly shocking given that many faculty and staff seek care at Michigan Medicine and see the professional opinions of their Michigan Medicine physicians put in questions. It is odd that the University of Michigan would tout its medical school and hospital as among the best in the country but not trust its physicians' professionalism when it comes to the care of its own employees.

²³ This procedure confirms that the SPG exclusively focuses on unsafe behaviors, rather than any medical or disabling condition.

<https://spg.umich.edu/policy/201.15-01>: Temporary Removal of Faculty for Lack of Fitness for Duty^{24,25}

Applies To: All Faculty on the tenure, research and clinical tracks

Owner: Office of the Provost and Executive Vice President for Academic Affairs

Primary Contact: Office of the Provost and Executive Vice President for Academic Affairs

I. POLICY

The essential functions of the faculty of the University of Michigan are teaching, research/scholarship, and service/leadership. Each faculty member is expected, at a minimum, to be able to contribute to these functions as defined by his or her school or college, in writing or by practice.²⁶ In most schools and colleges, there will be, for example, an expected teaching load; in some units where it is feasible, there is an option of accommodating imbalance in responsibilities by reassignment. In general, there is a presumption that faculty are fit for duty.

This policy addresses the process and criteria to be used when considering the timely, administrative removal from assigned duties of a faculty member who is unable to perform the essential functions of his or her position, despite reasonable accommodations.²⁷ This policy applies, and can be implemented, only in those situations in which observable²⁸ conduct has raised a substantial and serious question or concern whether a faculty member is physically and mentally capable of performing his/her²⁹ essential functions³⁰ and the faculty member believes

²⁴ While we can attempt to work within the framework of this SPG and suggest improvements, this SPG needs to be removed. It is ultimately about faculty performance packaged within a biased and ableist wrapper.

As an example, we all know faculty members whose research funds have dwindled and have been assigned extra teaching or service, faculty who are so bad at teaching that they are kept away from the classroom, or colleagues who routinely do not do any service regardless of their level of research and teaching activities. These colleagues are not considered unfit for duty. So, why should we allow the university to act any differently towards those with perceived disabilities? This SPG will always be a potential source of abuse towards some of our more vulnerable colleagues.

²⁵ We need a different title, for at least two reasons. 1) fitness for duty has an ableism connotation that is unwelcome, 2) it is used as an umbrella term to describe very different behaviors and situations leading to significant ambiguity. In 201.15, it is used to describe unsafe behavior, while here in 201.15-1 it is used to describe perceived disability and/or lack of performance.

²⁶ “Or by practice” This implicitly supports the continuation of ableist practices. For example, requirement for in person meetings as opposed to hybrid option, teaching modality, etc. More generally, unwritten rules can be used to maintain discriminatory practices.

²⁷ This sentence suggests that the SPG applies to the removal of any faculty with any form of illness or disability that prevents the faculty member from performing essential functions. It leaves open the ambiguity of whether this SPG should be used to decide whether a faculty member indeed has a disabling condition. It is at odds with the next sentence that clarifies that the SPG should only be used when there is a disagreement between the U and the faculty member.

²⁸ An interesting lack of subject. There is significant ambiguity of who is concerned by this statement and who would be making such observations.

²⁹ Replace with their.

³⁰ Again, essential functions ought to be defined, who defines what is essential also needs to be clarified, and the access and use of accommodations need to be part of the equation.

that such concern is unwarranted. In such situations, as under SPG 201.15, the faculty member may be referred for a fitness for duty evaluation as described below.³¹

Application of this policy is not intended as a substitute for other University policies or procedures related to performance, including those imposed because of clinical or professional requirements. In addition, application of this policy is not a substitute for discipline or action taken because of willful behavior unrelated to physical and/or mental capability.

II. DEFINITIONS

- A. “Faculty” – This policy applies to all faculty on the tenure, research, and clinical tracks.
- B. “Fitness for Duty” – The faculty member is physically and mentally capable of performing the essential functions of his/her³² position.³³
- C. “Lack of Fitness for Duty” – The faculty member is temporarily³⁴ or permanently incapable³⁵, physically and/or mentally, of performing the essential functions of his or her position, despite reasonable accommodations.

III. REGULATIONS³⁶

- A. Faculty members must be capable of performing the essential functions appropriate to their academic title, as defined in written policy or by practice in their schools and colleges, with regard to teaching, research/scholarship, and service/leadership.³⁷
- B. B.³⁸ When a substantial and serious question, based on documented evidence, arises about a faculty member’s ability to perform the essential functions of his/her³⁹ position, a dean, with the advice and counsel of Academic Human Resources, the University’s ADA Coordinator, and the Office of the General Counsel, may decide that it is appropriate to refer a faculty member for a fitness for duty evaluation.⁴⁰
- C. To minimize the detrimental impact of the observable behavior on others⁴¹, a faculty member referred for a fitness for duty evaluation may be immediately administratively relieved of

³¹ It is important to clarify when this SPG does not apply. For example, by adding, “This SPG and processes described herein do not apply to situations where a faculty member is seeking accommodations for an illness or disability.”

³² Replace with their.

³³ A change of vocabulary is needed. Fitness for duty has a different definition in 201.15, emphasizing the notion of safety. Here, it appears to refer to the general notion of disability. Again the ambiguity and blurry lines between when the different SPGs apply can be a source of abuse. It is also essential to add “despite or with accommodations”.

³⁴ What constitutes temporarily?

³⁵ What does this mean?

³⁶ Appeal and reinstatement processes are entirely lacking.

³⁷ Is this really the case that schools have their own definition of essential functions? The notion of “in practice” is also somewhat disturbing as it can be used to deny warranted accommodations under the false pretense that “this is not how we do things”. Add with needed appropriate accommodations/.

³⁸ Typo.

³⁹ Replace with their.

⁴⁰ We need some consistency with 201.15. Here, an impartial entity should be coordinating (such as FASCO with perhaps the ADA) and the situation should not be up to a Dean, e.g. lack of impartiality, lack of expertise. In addition, it raises confidentiality issues.

⁴¹ This is suggesting that disability visibility could be a detriment to able people. This raises strong concerns about how it could be used against employees.

some or all duties pending completion of the evaluation, as determined by the dean or his/her⁴² delegate, in consultation, where feasible, with Academic Human Resources and the Office of the General Counsel.

D. When a faculty member is referred for a fitness for duty evaluation and/or immediately relieved of some or all duties pending evaluation, written notice must be given to the faculty member stating the reasons for the referral (including failure to perform essential functions) and identifying the evidence upon which the decision is based. A faculty member's compensation and benefits will remain unchanged until a decision based on the evaluation is made.

E. Upon request, the University will arrange for a impartial, qualified, independent⁴³ health care professional with appropriate expertise to conduct a medical evaluation and make recommendations concerning the faculty member's fitness for duty. The University will pay the cost of this evaluation. The faculty member may request an additional evaluation, within a reasonable time, at his or her expense. If the evaluations disagree, the University may request a third evaluation or review of the medical file at the University's expense. Work Connections will communicate evaluation results to Academic Human Resources, and Academic Human Resources will, in turn, communicate essential information to the School or College.⁴⁴

F. After obtaining the results of any medical evaluation(s), the dean of the School or College or his or her delegate, in consultation with Academic Human Resources, the ADA Coordinator, and the Office of the General Counsel, shall make the determination of a faculty member's fitness to perform the essential functions of his/her⁴⁵ position. When possible, the dean of the School or College or his/her⁴⁶ delegate, in consultation with the ADA Coordinator, the Office of General Counsel, Academic Human Resources, the chair, and the faculty member, will develop a plan of reasonable accommodation(s) or modified duties based on the independent evaluation(s).⁴⁷

G. When a faculty member is determined to be unfit for duty, his/her⁴⁸ employment status will be decided on a case-by-case basis, in accordance with University policy and practice. If a medical leave is necessary, appropriate income protection and long-term disability policies apply.

⁴² Replace with their.

⁴³ Add mutually agreed.

⁴⁴ Add "on a strict need to know basis". Employee privacy is at stake here. In some cases, this is just humiliation and intimidation. Deans and non-medical people should not have access to these evaluations in any way or to unrelated medical history. It should only be on a need to know basis as stated in 201.15. Also, the employee should have all the results, communications, and documentation that has been collected about them.

⁴⁵ Replace with their.

⁴⁶ Replace with their.

⁴⁷ Let's remember that the application of this SPG is only for when the University wants to remove a faculty member temporarily or permanently, This SPG was never intended to address the need for or process to gain accommodations. Per the ADA, independent evaluations are not standard procedures to gain accommodations. Per the ADA, UM is required to have an interactive process for defining, agreeing, and establishing accommodations. This point should be replaced by a reinstatement process and if/when accommodations and/or modified duties are needed, the process is typically to request them to the unit manager, College-level employee disability services coordinator, and/or UM ADA Coordinators in the Equity, Civil Rights, and Title IX Office.

There needs to be an appeal process.

⁴⁸ Replace with their.

Existing policies concerning leaves of absence continue to apply. Although a faculty member's effort (and, consequently, a proportionate share of his or her compensation) may be reduced because he or she is unable to perform expected duties for an extended period of time, the determination that a faculty member is unfit for duty shall not affect his or her tenured status. Active health care and retirement contributions will continue during the period of disability for a period of time consistent with the maximum benefit duration under the University's long-term disability plan. The School or College will provide the faculty member with at least three (3) months advance notice of a reduction in effort. The faculty member is entitled to have his or her case re-evaluated in view of new evidence. Non-compliance with a request for a fitness for duty evaluation may be cause for disciplinary action.

H. A faculty member may challenge actions taken under this policy under the applicable procedure, typically the School or College faculty grievance procedure. A faculty member may also seek informal resolution through discussion among the parties, use of the School or College, or University, Ombuds or mediators, or through the intervention of School or College or University officials with appropriate authority.

I. Confidentiality/Privacy. Records of fitness for duty evaluation will be treated as confidential health records and be kept separate from existing department and personnel files; this information can be shared only on a strict "need to know" basis as determined by the dean or his or her delegate in consultation with Academic Human Resources.

J. This policy is to be consistent with and should be interpreted to be in conformance with requirements of the Americans with Disabilities Act, the Persons With Disabilities Civil Rights Act, and the Family and Medical Leave Act.⁴⁹

⁴⁹ Replace this entire statement with "The Americans with Disabilities Act, the Persons With Disabilities Civil Rights Act, and the Family and Medical Leave Act, and any relevant state and federal laws supersede this policy."

<https://spg.umich.edu/policy/201.11-1>: Sick Leave plan: Academic appointments

Applies To: Instructional faculty not covered under a collective bargaining unit, research professors, and research scientists

Owner: University Human Resources and the Office of the Provost and Executive Vice President for Academic Affairs

Primary Contact: Academic Human Resources

I. POLICY

The University, consistent with its needs and requirements, wants to minimize the compensation loss of its faculty members during certain periods of absence from work that occur during their annual appointment periods (from September 1 through May 31 for University-year appointments or at any time for twelve-month appointments) due to personal illness, injury or preventive medical or dental care that is either unavoidable or in the best interest of the University and its faculty members.

II. REGULATIONS AND ELIGIBILITY

If an accident or sickness renders a member of the instructional faculty incapable of performing his or her duties during his or her University-year or 12-month appointment, the faculty member may apply for sick leave income¹. The faculty member's school or college must make alternative arrangements to cover the duties of the faculty member without additional funding.

Faculty are eligible to receive sick leave income for up to three calendar weeks per year to care for a family member whose condition meets the eligibility criteria included in this policy, including care for a family member who loses time from regular work because of incapacity caused or contributed to by pregnancy, miscarriage, abortion, or childbirth. Sick leave income is also available for faculty who are not eligible for paid parental leave, and who are unable to work because they are bonding with their newly born, newly adopted, or newly fostered child. Those faculty ineligible for parental leave (less than six months service) may use sick leave income for bonding during the year following the child's birth or arrival in the home.

A. Eligibility and Compensation

In addition, the availability of sick leave income beyond three weeks per year is described below.

1. All tenure track faculty, lecturers not covered by a collective bargaining unit, clinical instructional faculty, research professors, and research scientists (all ranks) are eligible for sick leave income at their regular rate of pay during incapacity not to exceed three calendar weeks annually. The availability of additional sick leave income, depending on years of service, is described below.
2. All adjunct clinical instructional faculty and visiting instructional faculty, regardless of years of service, are eligible for sick leave income at their regular rate of pay during incapacity not to exceed three calendar weeks annually.
3. Tenure track faculty, lecturers not covered by a collective bargaining unit, clinical instructional faculty, research professors, and research scientists (all ranks) with one year of service and less than ten years of service are eligible for sick leave income paid during incapacity at the full rate of the faculty member's academic year annual salary or twelve-month salary for a time not to exceed one-half the length of his or her annual appointment (up to 4 ½ months for

faculty who hold University-year appointments and up to 6 months for faculty who hold 12-month appointments).

The aforementioned faculty are also eligible for additional sick leave income paid, during incapacity, at one-half the rate of the faculty member's University-year annual salary or twelve-month salary for a period of time not to exceed an additional one-half the length of his or her annual appointment (up to an additional 4 ½ months for faculty who hold University-year appointments or up to an additional 6 months for faculty who hold 12-month appointments).

As an alternative to the arrangement described in the two preceding paragraphs, the faculty member may opt to receive sick leave income paid during incapacity at the full rate of the faculty member's academic year annual salary or twelve-month salary for a time not to exceed three-quarters the length of his or her annual appointment (up to a total of 6 ¾ months for faculty who hold University-year appointments or up to a total of 9 months for faculty who hold 12-month appointments).

4. Professors, associate professors, clinical professors, clinical associate professors, research professors, research associate professors, research scientists, and associate research scientists with ten or more years of service are eligible for sick leave income paid during incapacity at the full rate of the faculty member's academic year annual salary or twelve-month salary for a time not to exceed the length of his or her annual appointment (up to 9 months for faculty members who hold University-year appointments or up to 12 months for faculty members who hold 12-month appointments).

5. The aforementioned faculty are also eligible for additional sick leave income paid during incapacity at one-half the rate of the faculty member's University-year annual salary or twelve-month salary for a time not to exceed the length of his or her annual appointment (up to an additional 9 months for faculty members who hold University-year appointments or up to an additional 12 months for faculty members who hold 12-month appointments).

As an alternative to the arrangement described in the two preceding paragraphs, the faculty member may opt to receive sick leave income paid during incapacity at the full rate of the faculty member's academic year annual salary or twelve-month salary for a time not to exceed one length plus one-half the length of his or her annual appointment (up to a total of 13 ½ months for faculty who hold University-year appointments or up to a total of 18 months for faculty who hold 12-month appointments).

B. Initial Period of Illness

The first three calendar weeks of incapacity due to accident or illness will not be included in computing the maximum sick leave income allowable under (II.A.3 and II.A.4) above. In each instance of incapacity in excess of three calendar weeks, the eligible faculty member must apply for sick leave income by providing the required documentation. (See procedures below.)

C. Incapacity

Under the terms of this policy, a faculty member is considered to be in a period of incapacity when he or she is totally unable to perform his or her University responsibilities. Cases of temporary partial or permanent partial incapacity are not included but each such case will be subject to special action by the President (or his or her designate) by providing a part-time appointment or making another adjustment, depending on the circumstances.

D. Subsequent Periods of Incapacity

If a faculty member becomes incapacitated (as defined by this policy) on two or more occasions, the amount of sick leave income available to him or her for the second or subsequent incapacity is the amount of sick leave income for which the faculty member is eligible as described in this policy (including the annual three weeks per calendar year) minus any sick leave the faculty member used during the five years before the date on which the faculty member becomes incapacitated.

E. Worker's Compensation

When a faculty member receives a Worker's Compensation benefit, including any dependency allowance, for time lost from work, please see SPG 519.02, Worker's Disability Compensation, for further guidance.

F. Vacation

When a faculty member meets the sick leave eligibility requirements while on vacation, the individual has not lost time from regular work and is therefore not eligible for sick leave under this plan except for certain unusual circumstances (e.g., hospitalization). Under such circumstances the faculty member may request that he or she not be charged with vacation but that it be considered as sick leave. Such a request is subject to approval of the department chair or academic program director, the dean and the Office of the Provost and Executive Vice President for Academic Affairs.

G. Pregnancy

When a faculty member loses time from regular work because of incapacity caused or contributed to by pregnancy, miscarriage, abortion, or childbirth, (in conjunction with maternity (childbirth) ;leave under SPG 201.30-6, Paid Maternity (Childbirth) and Parental leaves) during the period of incapacity she is eligible to use sick leave under the terms of this policy.

H. Exclusions

No sick leave income is payable if incapacity results from war, insurrection, rebellion, or participation in a riot or civil commotion; or from engaging in any criminal act, intentionally self-inflicting injury or illness for fraudulent purposes, or while working for an employer other than the University. The University will not pay sick leave income to an eligible faculty member during his or her leave of absence without salary.

I. Doubtful Eligibility⁵⁰

At any time, the University⁵¹ may require evidence (which it deems acceptable) ⁵² of a condition that qualifies a faculty member for sick leave income. A statement from a

⁵⁰ This SPG is missing an appeal process.

⁵¹ Define who at the university. The ambiguity allows for breach of privacy. Work Connections suggest that the decision is made by unit administrators who would be given access to private medical information.

⁵² Delete (which it deems acceptable). The ADA requires explicit clarity in the documentation needed. The lack of clarity has been used by Work Connections against U-M employees.

faculty member's physician may be required.⁵³ Examination by a physician, designated by the University, and at the University's expense, may be required at any time.⁵⁴

J. Records

The department, academic program, dean's office, or other designated office should maintain a complete, accurate report of sick leave absence, which is essential. Accurate record keeping of sick leave income absence provides faculty members with the basis for possible income tax exemption.

K. Transfers

When a University employee who holds a non-instructional regular appointment accepts an instructional appointment that qualifies him or her for sick leave under this policy, he or she will be eligible for sick leave based on his or her length of service beginning from the time he or she accepts the instructional appointment. Instructional faculty members who are eligible for sick leave under this policy and who transfer into a regular non-instructional appointment will be eligible for the sick leave plan for which the new position qualifies him or her.

L. Terminations

Eligibility for sick leave ceases on the effective date of the faculty member's termination. A faculty member who is ill on or immediately prior to a previously determined termination date is eligible for sick leave through the previously determined termination date.

M. Return to Work

Insofar as possible while maintaining orderly and efficient operations of the unit concerned, during the period of time when the faculty member is incapacitated the unit will not fill his or her position except through temporary arrangements.

N. Use of Vacation Time

At the request of the faculty member, after his or her available sick leave income, and leaves provided under SPG 201.30-6 Paid Maternity (Childbirth) and Parental Leaves, is exhausted the University may charge an absence from work covered by this policy against the individual's available vacation time (if any).

O. Time Off Without Pay

If a faculty member is absent from work beyond sick leave and vacation benefit availability, and leaves provided under SPG 201.30-6 Paid Maternity (Childbirth) and

⁵³ Add "The University will clearly communicate what information is missing and required in case the provided documentation is not deemed acceptable."

Interestingly, UM is known to discard letters from employee's physicians who are themselves employed by Michigan Medicine, a top ranked medical institution.

⁵⁴ What does at any time mean?

We note that this clause is presumably used by Work Connections to negate medical and disability diagnoses and deny faculty the possibility of requesting and accessing accommodations.

As highlighted below, there is no appeal process. Any decision from Work Connections is final. Such a lack of due process can have a devastating impact for staff and faculty.

We also note that these rules are made under the assumptions commonly held in HR circles that every employee (staff or faculty) cheats. While it might be that a very small minority of employees would perhaps opt to malingering, these rules hurt and discriminate against the many who continue to dedicate their lives and careers to the University while navigating disabling events.

Parental Leaves, the department chair, academic program director, or dean may provide excused time off without pay for a period of time not to exceed three calendar weeks. Longer absences must be in accordance with SPG 201.30-1 Leaves of Absences Without Salary.

P. Continuation of Benefit Plans

1. For each month the faculty member receives full regular income under this plan, deductions and contribution practices will be the same as when the faculty member was actively working.
2. For each calendar month in which the faculty member receives one-half regular income under this plan, the University's and the faculty member's share of contributions to the retirement, group life insurance, and health insurance programs in which the staff member was enrolled at the time of his or her sickness or injury (in accordance with his or her salary at the time of sickness or injury) will continue based on one-half salary. Eligibility for health and life insurance will continue even when the one-half pay reflects less than a fifty percent (50%) appointment. If the faculty member has exhausted all available sick leave income and he or she is unable to return to work, where applicable he or she may use any vacation time he or she has accrued during each calendar month when he or she received one-half regular income to extend his or her absence from work at one-half regular income.

III. OTHER RELEVANT POLICIES

A. The Family and Medical Leave Act of 1993 (FMLA)

The FMLA allows eligible employees up to twelve weeks of job-protected leave per year, provides for continuance of the employee's pre-existing health, dental and vision coverage during this leave period, and restores the employee to the same or an equivalent position at the conclusion of the designated leave. The FMLA applies to all employees with at least one year of service who worked at least 1250 hours in the previous twelve months.

Additional information can be found at <https://hr.umich.edu/leaves-of-absence> and at <http://www.hr.umich.edu/hra/FMLA>.

Proposed changes to SPG 201.12 "Discipline" and 201.15. "Fitness for Duty"

[https://spg.umich.edu/policy/201.12: "Discipline"](https://spg.umich.edu/policy/201.12:)

Applies To: Regular staff with the exception of those covered by the terms of a collective bargaining agreement

Owner: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

Primary Contact: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

RECOMMENDATIONS:

1. Rename the SPG to "Progressive Corrective Action." as below

Rationale: Changing the name from "Discipline" to "Progressive Corrective Action" better communicates the range of actions possible to address concerns. "Discipline" too quickly frames this SPG as punishment, when all that might be involved in some cases is a collegial and supportive conversation.

2. Adopt the same or substantially the same policy as the University of Chicago policy on Progressive Corrective Action: <https://humanresources.uchicago.edu/fpg/policies/700/p703.shtml>

Rationale: After comparing the University of Chicago policy with the U-M policy, the Chicago policy appears to more clearly communicate the intent and process involved in addressing workplace concerns.

PROPOSED TEXT:

201.12: Progressive Corrective Action

I. POLICY

Corrective action is a process designed to identify and correct problems that affect an employee's work performance and/or the overall performance of the department. The University, in its sole discretion, will determine whether an employee's performance, conduct or behavior meets this standard.

II. DEFINITIONS

A. MISCONDUCT: includes, but is not limited to, performance deficiencies, violation of University policy, failure to adhere to conditions of employment.

B. SERIOUS MISCONDUCT: Serious workplace misconduct includes, but is not limited to:

- theft (to include unauthorized removal and/or use of University property);

- fighting;
- falsification, alteration or improper handling of University-related records;
- unsatisfactory customer service (mishandling of or unsatisfactory service to the public, students, patients, staff or faculty) as defined by the department;
- disclosure or misuse of confidential information, including government-mandated regulations that outline the [treatment of confidential information](#) (i.e., HIPAA, Medicare compliance, etc.);
- unauthorized possession or concealment of weapons;
- insubordination (e.g., refusal to carry out a direct assignment); and
- misuse of the University's electronic information systems, including:
 - deleting or altering electronic information without authorization;
 - generating false, misleading or defamatory information;
 - disregarding copyright and other intellectual property rights;
 - unreasonable use of available information technology which is not relevant to the employee's assigned task or to core University purposes;

C. **TERMINATION:** Generic term for the ending of the employment relationship at the initiative of the employee or the University for any reason, including misconduct. A misconduct termination, however, is usually referred to as a discharge.

D. **CORRECTIVE ACTIONS:**

1. The corrective actions are:

1. **ORAL WARNING OR REPRIMAND:** An oral statement of disapproval to the employee by the supervisor or another member of management concerning the employee's misconduct. At the supervisor's discretion, an oral warning or reprimand may be documented in the departmental file if there is concern that it may be misunderstood or denied by the employee at a subsequent date.
2. **WRITTEN WARNING OR REPRIMAND:** A written statement of disapproval to the employee by the supervisor or another member of management concerning the employee's misconduct.
3. **SUSPENSION:** The interruption of active employment with or without pay pending a decision about the extent of disciplinary action, if any, to be taken. A suspension is not disciplinary in nature but after investigation, a suspension may or may not be converted to disciplinary action.
4. **DISCIPLINARY LAYOFF:** Time off without pay for misconduct.
5. **WRITTEN REPRIMAND in LIEU of DISCIPLINARY LAYOFF:** A written warning which is considered to be the equivalent of, and having the same effect as, a disciplinary layoff without pay.

6. DISCHARGE: Termination for misconduct following a Disciplinary Review Conference.

2. The specific corrective action(s) and order of the corrective action(s) taken depend on all of the facts and circumstances available at the time the decision is made. Steps may be repeated. Considerations include the nature of the misconduct, the employee's past record including disciplinary action, if any, taken in the past, and years of service. There is no requirement that an oral or written warning or reprimand, or a disciplinary layoff precede a discharge or that a warning or reprimand precede a disciplinary layoff if the facts and circumstances dictate another approach (See also Section III B.)

- E. DISCIPLINARY REVIEW CONFERENCE (DRC): A meeting to provide an opportunity for discussion with an employee whose termination at the initiative of the University is contemplated. The conference will include an oral or written statement of the alleged misconduct or performance concerns and allow an opportunity for the employee to respond. The employee will be informed of the outcome in a timely fashion.

III. REGULATIONS

A. SUPERVISOR'S RESPONSIBILITY:

1. When it is determined that misconduct has occurred, it is the supervisor's responsibility to initiate the appropriate corrective action.
2. Supervisors initiating corrective action should consult with their own immediate supervisor and/or their divisional Human Resources representative prior to issuing discipline. HR Employee and Labor Relations Office personnel should be contacted in order to give measured feedback, suggest alternative action(s) or approve the impending corrective measure.
3. APPROVAL FOR DISCIPLINARY LAYOFF AND DISCHARGE OR TERMINATION: No disciplinary action involving a disciplinary layoff, a written reprimand in lieu of a disciplinary layoff, or any discharge may be taken prior to the approval of the appropriate Human Resources Office (Staff HR, Michigan Medicine HR, Dearborn HR, Flint HR).

- B. Typically, a preliminary meeting is held with the employee to allow the employee an opportunity to understand the nature of the concern and to explain his/her position on the matter. If necessary, the corrective action documentation would then be put together which would summarize the issue, taking into account any additional information the employee may have provided during the preliminary meeting.
- C. When issuing corrective action, there should be clear and direct communication between the employee and his/her immediate supervisor (or other University official with responsibility for the unit in which the employee works). This communication should include a meeting between the employee and the supervisor (usually after an investigative

meeting described in (3) above is held between the employee and the supervisor). The supervisor should discuss the nature of the problem and how it affects the employee's overall performance and/or the overall performance of the department. During the meeting, the supervisor should make it clear to the employee that there are specific performances/behavioral expectations of the position, that he/she has failed to meet the outlined expectations, and a corrective action is being issued. It should also be clearly established that the employee must work on correcting the problem within a defined time period to avoid more serious progressive discipline.

- D. Disciplinary action should be taken within a time frame that will allow for a positive change in the employee's behavior or work performance. All disciplinary actions should be documented in writing, preferably on the Notice of Corrective Action form, which includes instructions for the approval and routing process.
- E. Except for serious offenses, the progressive corrective action ordinarily should not be advanced if six (6) months or more have elapsed since the previous corrective action. The employee's prior disciplinary record is never expunged from his or her personnel file. However, when the progressive correction action occurs six (6) months or more after the previous discipline, the last disciplinary step taken should be repeated.
- F. In the case of serious misconduct, an employee may be suspended and/or discharged on the first offense.
- G. **SUSPENSION PENDING INVESTIGATION:** A suspension should not be given for a predetermined period of time, but should last only long enough in the supervisor's judgment to permit time for investigation or for formulation of a decision after the investigation is completed. Time off during a suspension may be converted to a disciplinary layoff.
- H. **APPROVAL FOR DISCIPLINARY LAYOFF AND DISCHARGE OR TERMINATION:** No disciplinary action involving a disciplinary layoff, a written reprimand in lieu of a disciplinary layoff, or any discharge may be taken prior to the approval of the appropriate Human Resources Office (Staff HR, Michigan Medicine HR, Dearborn HR, Flint HR).
- I. **DISCIPLINARY LAYOFFS:** A disciplinary layoff is imposed by the supervisor for a stated period of time. The layoff may range from the balance of the day's work schedule to several days or weeks. A disciplinary layoff will be accompanied by a written reason. (See also Section III B) For exempt employees, if a Disciplinary Layoff is given, it must be for at least one full day or more.
- J. **WRITTEN REPRIMAND IN LIEU OF A DISCIPLINARY LAYOFF:** A "Written Reprimand in Lieu of a Disciplinary Layoff" will be clearly identified as such, and may be used at the discretion of the supervisor with the approval of the appropriate Human Resources Office. This approach is particularly recommended when the misconduct is unexcused absenteeism; or when the absence caused by disciplinary layoff would have a more negative impact on the unit than on the employee.

K. DISCIPLINARY REVIEW CONFERENCE (DRC): The employee will be notified by the University as to the nature and purpose of a Disciplinary Review Conference. The employee's immediate supervisor or designee and a representative from Human Resources will also be present for the review.

The employee may be accompanied by a representative of his/her choosing, and by one other employee in possession of relevant facts. Employees will not lose time or pay for attending a conference held during their normal working hours.

When unlawful discrimination is alleged in the Disciplinary Review Conference, the appropriate Human Resources Office will review any facts which may have been provided to the Equity, Civil Rights and Title XI Office (ECRT).

L. RETIREMENT: If an employee subject to discharge is eligible to retire, in consultation with Human Resources, consideration may be given to allow voluntary retirement in lieu of discharge.

M. EXCLUSIONS:

1. Temporary and probationary employees, employees where alternative employment arrangements exist, and those whose employment agreement states that they serve at the pleasure of a particular University official are not covered by this Standard Practice Guide.
2. LACK OF QUALIFICATION: Unsatisfactory performance may be the result of an employee's lack of requisite skill, experience, education and other job-related requirements. In these cases, progressive discipline, such as warnings or disciplinary layoffs, is not an appropriate method to correct the performance. Prior to termination, units should consider alternative corrective measures or permit the employee a period of time to locate a more suitable position. A Disciplinary Review Conference will be held prior to termination.

N. GRIEVANCES: Grievances filed by employees concerning disciplinary layoff, written reprimand in lieu of layoff, termination or discharge are submitted directly at Step 3 of the grievance procedure. (See SPG 201.08 "Grievance Procedure")

O. VACATION, SICK TIME, AND PTO PAY:

1. Vacation – employees will be paid for vacation which has accrued as of the termination date. (SPG 201.64-0 (/policy/201.64-0))
2. Sickness or injury disability income (e.g., paid maternity(childbirth) leave, paid parental leave, and sick time pay) – which may have been available is cancelled upon termination. (SPG 201.11-0 (/policy/201.11-0) and SPG 201.30.6 (<http://spg.umich.edu/policy/201.30-6>))
3. Paid Time Off (PTO) – eligibility for and payment of accrued PTO at time of termination for employees covered under Michigan Medicine PTO policy will be made in accordance with that policy

P. BENEFITS: When employment has been terminated, the employee should contact the Shared Services Center for details regarding the status of their benefit programs.

Applies To: All Faculty and Staff

Owner: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

Primary Contact: Office of the Provost and Executive Vice President for Academic Affairs and University Human Resources

RECOMMENDATIONS:

Rename the SPG as above, replace the current SPG language with the language below or something substantially similar, and remove the procedure since the relevant information was merged into the language below.

Rationale: the change of name and language changes remove possible confusion about the application of the SPG and clarify its exclusive focus on safety concerns.

PROPOSED TEXT:

201.15: Addressing a Safety Concern in the Workplace

I. POLICY

The University endeavors to provide a safe workplace for the benefit of all members of the University community. This policy covers only those situations in which an employee is having observable changes of behaviors leading to difficulty performing their work duties in a manner that is safe for the employee and/or for their co-workers, or is posing a serious safety threat to self or others. This policy prescribes the circumstances under which an employee may be referred for an evaluation due to a safety concern. The purposes of this policy are:

- A. To help assure the safety of individuals in the University community or others with whom they have contact.
- B. To establish procedures by which the University can evaluate an employee's ability to safely perform their duties when a safety concern arises.
- C. To comply with the 1988 Federal Drug Free Workplace Act.

II. DEFINITIONS

- A. "Employee" — employee for purposes of this policy means all faculty and staff employed by the University in any capacity, whether full or part-time or temporary or regular status.
- B. "On Call Employees" — Staff members who are required to restrict their whereabouts and activities in order to be available for consultation or return to work to meet emergencies. (see SPG 201.36).

C. “Evaluation Referral Group” — This is the group who decides whether a referral for an evaluation should happen. The individuals will be a group composed of U-M psychologists, social workers, accessibility specialists, or other relevant clinicians.

D. “Coordinating Party”— This is the impartial and confidential party/office (based on the specific situation) responsible for coordinating and facilitating the evaluation. The coordinating party may include: The Faculty and Staff Counseling and Consultation Office (FASCCO) for central and regional campuses, or the Office of Counseling and Workplace Resilience for Michigan Medicine faculty and staff, or a U-M ADA / Disability Coordinator. The responsibilities of the coordinating party are to:

1. Identify who will conduct the evaluation and be sure all parties agree to the evaluation and the evaluator/s.
2. Receive the results of the evaluation
3. Share information about the results only as detailed in Section III, O: “Confidentiality/Privacy”.
4. Coordinate payment by the University for the evaluation.

III. REGULATIONS

A. Safety Concerns. Should a concern regarding workplace safety arise, the following procedures shall be followed, depending on (1) imminency and (2) whether the concern is related to impairment or to a threat of serious harm to self or others.

1. Imminent/Current Severe Impairment

When an employee is now or will imminently be severely impaired (e.g., unconscious, staggering, incoherent, or exhibiting extreme physical symptoms)

1. Call 911
2. Stay with the individual and provide reasonable assistance to support the wellbeing of the individual until they are in the custody of emergency personnel
3. Contact the Evaluation Referral Group for that group to follow up regarding whether further action may be necessary, following the resolution of the immediate crisis.

2. Severe Impairment (without raising to the level of item A. 1.

When an employee exhibits a pattern of severe impairment creating a concern about their health and safety or the health and safety of those around them.

1. Contact the Evaluation Referral Group for that group to follow up regarding whether further action may be necessary.

3. Imminent/Current Threat of Harm to Self or Others

When an employee is posing an imminent direct threat to harm themselves (e.g. suicidal statements) or intent to harm/plan to harm self or others

1. Call 911
2. Take steps to ensure your own safety and that of others.

3. Depending on the situation, make reasonable efforts to protect the employee, but do NOT attempt to physically restrain or interfere with their free movement.
4. Contact the Evaluation Referral Group for that group to follow up regarding whether further action may be necessary, following the resolution of the immediate crisis.

4. Threat of Harm to Self or Others

When an employee a concern arises that an employee may pose in the future a threat of harm to themselves or others

1. Contact the Evaluation Referral Group for that group to follow up regarding whether further action may be necessary.

B. Evaluation Referral Group.

1. Upon being notified of a safety concern, the Evaluation Referral Group will determine whether the circumstances warrant referring an employee for an evaluation to address the safety concern.
2. When considering whether a referral for an evaluation is warranted, the Evaluation Referral Group shall keep in mind that this policy is not intended as a substitute for other University policies or procedures related to performance or the provision of reasonable accommodations.
3. If possible given the circumstances, the Evaluation Referral Group shall meet with the employee as soon as the employee is available to meet. The employee may bring another person for support.
4. After considering the totality of the circumstances, based on a received report of a safety concern, the Evaluation Referral Group shall determine whether an evaluation should occur.
5. If an evaluation should occur, the Evaluation Referral Group shall contact the appropriate Coordinating Party, given the circumstances.

C. Evaluation

1. An employee referred for an evaluation due to a safety concern will be relieved of duties pending completion of the evaluation.
2. The Coordinating Party will arrange for an impartial, independent health care evaluator with appropriate expertise and mutually agreed upon by the employee and the coordinating party (which will include one or more of the following: medical, psychological, alcohol, or other drug conditions) to conduct an evaluation for safety concerns.
3. The University will pay the cost of evaluations due to safety concerns.
4. Non-compliance with a request for an evaluation due to a safety concern may constitute insubordination and may warrant disciplinary action.
5. If an evaluator determines that the employee presents a serious safety concern to themselves or others that cannot reasonably be mitigated, their employment

status will be determined on a case-by-case basis, in accordance with University policy and practice.

6. If an evaluator determines that the employee DOES NOT present a serious safety concern to themselves or others or that such concerns CAN be reasonably be mitigated, the employee may return to work, provided that any safety concerns have been reasonably mitigated.

D. Second Evaluation

1. Either the University or the employee may request a second evaluation.
2. If after a review of the evaluation, the Evaluation Referral Group finds that there was a flawed or otherwise invalid evaluation by the agreed-upon examiner, the request for a second evaluation will be granted.
3. All the same II.C evaluation provisions apply for a second evaluation.
4. The result of the second evaluation will be considered final.

E. CONFIDENTIALITY/PRIVACY

1. Records of evaluations for safety concerns will be treated as confidential medical records and be kept separate from existing department and personnel files; this information can be shared only on a strict “need to know” basis.
2. After an evaluation, information available to the employee’s work unit will be limited to:
 1. Whether a person is safe to resume his/her job duties
 2. Whether a person is a direct threat to self or others

IV. RESOURCES

Resources that are available to provide assistance about dealing with safety/health concerns include:

- A. For central and regional campuses: Faculty and Staff Counseling and Consultation Office FASCCO
- B. For Michigan Medicine: Michigan Medicine Office of Counseling and Workplace Resilience
- C. U-M ADA Coordination team at the Equity, Civil Rights, and Title IX Office.
- D. Appropriate Human Resources Office

AAAC resolution on academic freedom and external harassment

Whereas, Academic Freedom is a bedrock principle of U.S. institutions of higher education as codified in the 1940 Statement of Principles on Academic Freedom and Tenure ([1940 Statement of Principles on Academic Freedom and Tenure | AAUP](#)).

Whereas, Faculty members at U-M who adhere to the 1940 Statement on Principles on Academic Freedom and Tenure in their classroom teaching have increasingly become victims of external harassment simply for doing their job.

Whereas, Faculty members at U-M who have become victims of external harassment for exercising their academic freedom in the classroom have lacked adequate support from the U-M administration in terms of fundamental solidarity, full-throated support of their academic freedom, and support in repairing injury to their public reputations.

Whereas, attacks on academic freedom and the external harassment issue problem have been the focus of considerable attention at U-M for almost a year but with no action yet being taken:

- April 25, 2023: UM-AAUP & SACUA jointly requested that a Task Force be appointed to address this problem
- August 2023: Work Group on Faculty Threats & Harassment submits Recommendations
- Nov 2, 2023: NCID webinar “Envisioning Institutional Responses to Supporting Scholar Safety”

Be it resolved, that the University take immediate action to put in place a prominent U-M website, publicized across all departments, that provides information and resources for faculty who have been harassed or threatened. There currently exist numerous resources that many faculty remain unaware of. As additional resources are developed, the website can be expanded.

Be it resolved, that the Provost’s office this semester establish a unit that coordinates support for targeted faculty. Crucially, this unit must incorporate input from faculty, including faculty who have themselves been targeted. The guiding principle must be that faculty feel the support of the University behind them, including support to restore a faculty member’s reputation when it has been damaged.

Be it resolved, that the University expand external threat assessment, particularly where it involves faculty.

Be it resolved, that the University central administration publicly voice full-throated support (and repeatedly over time) for U-M faculty members, individually and as a whole, in regard to their academic freedom as codified in the 1940 Statement of Principles on Academic Freedom and Tenure ([1940 Statement of Principles on Academic Freedom and Tenure | AAUP](#)).

See also the revised [Senate Assembly Resolution #2192024 Resolution on Academic Freedom and External Harassment, approved by the Senate Assembly on February 19, 2024.](#)

Resolution on Salary Increase Underpayments for Faculty on University Year Appointments

Whereas, Faculty members from the Ann Arbor, Dearborn, and Flint campuses who are appointed on a University Year basis are appointed starting September 1 and ending April 30 or May 31 and have their University Year salary paid out over twelve months from July 1 through June 30.

Whereas, salary raises for faculty members who are appointed on a University Year basis are initiated on September 1 after the beginning of the University academic year defined as the start of the Fall term, currently the last week of August, but raises are not reflected in the pay in the previous months of July and August representing the start of the fiscal budget year.

Whereas, Faculty members who are appointed on a University Year basis have been systematically underpaid by the amount equal to their yearly salary raise multiplied by two-twelfths; the amount corresponds to the salary increase not reflected in the prepaid months of July and August.

Whereas the University of Michigan recently announced that salary raises for University Year appointments will start July 1 beginning July 1 2025, however, without compensation for past years underpayment.

Be it resolved, that the University of Michigan apply retroactive pay for all University of Michigan Faculty on University Year appointments for all affected years in accordance with applicable federal and state laws.

Approved by the Academic Affairs Advisory Committee (AAAC) on Apr 4, 2024

Approved, with revisions, by SACUA on April 8, 2024, for discussion by the Senate Assembly

See also [Senate Assembly Resolution #04152024-2 Resolution on Salary Increase Underpayments for Faculty on University Year Appointments](#), approved on April 15, 2024



April 15, 2024

Dear Dr. Laurie McCauley and Faculty Senate Members:

The Academic Affairs Advisory Committee (AAAC), as a standing committee of the Faculty Senate at the University of Michigan, chose as part of its activities for the current academic year to help propose ways in which the University of Michigan can proactively become more effective at preventing and responding to all forms of sex-based harassment. In October 2023, AAAC hosted a campus-wide event sponsored by the Faculty Senate featuring Dr. Jennifer Freyd, a renowned psychologist and researcher on educational institutions’ responses to sex-based harassment. Dr. Freyd is known for coining the term *DARVO* (Deny, Attack, Reverse Victim Offender) to describe when harassers deny wrongdoing, discredit their victims, and position themselves as the true victim. Dr. Freyd is also known for coining the term *institutional betrayal* to describe the failure to prevent or respond supportively to wrongdoings within the institution when there is a reasonable expectation of protection. The AAAC chair approved the Committee service task for committee member Professor Jordan Siegel to research a set of recommendations inspired by the sponsored talk by Dr. Freyd, and to present a set of recommendations based on dialogue with the National Women’s Law Center (NWLC), which has specialized expertise in making university campuses safer learning and work environments for women, LGBTQI+ people, and people of color.

In accordance with this goal, we are pleased to offer the following recommendations on how the University of Michigan (the University) can better address harassment and discrimination, with a focus on sex-based harassment (including sexual assault, dating violence, domestic violence, and stalking).

NWLC is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, NWLC has participated in all major Title IX cases before the Supreme Court as counsel¹ or amicus. NWLC is committed to eradicating all forms of sex discrimination in school, including sex-based harassment, discrimination against LGBTQI+ students, discrimination against pregnant and parenting students, and sex discrimination against students who are vulnerable to experiencing multiple forms of discrimination, such as women of color and disabled women. We equip students with the tools to advocate for their own Title IX rights at school and assist policymakers in enforcing Title IX and strengthening protections against sex discrimination.

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¹ E.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

I. Sex-Based Harassment Harms Students' Access to Education.

A. Sex-based harassment is widely prevalent in higher education.

Sex-based harassment is exceedingly common in higher education. A 2019 survey of more than 180,000 students at 33 major U.S. universities found that:

- **Sexual assault** ²
 - In college, 32% of women, 32% of transgender and nonbinary students, and 9% of men have been sexually assaulted since enrolling.
 - In graduate school, 13% of women, 21% of transgender and nonbinary students, and 4% of men have been sexually assaulted since enrolling.
- **Dating and domestic violence** ³
 - In college, 14% of women, 22% of transgender and nonbinary students, and 10% of men have experienced dating or domestic violence since enrolling.
 - In graduate school, 7% of women, 12% of transgender and nonbinary students, and 6% of men have experienced intimate partner violence since enrolling.
- **Stalking** ⁴
 - In college, 25% of women, 28% of transgender and nonbinary students, and 13% of men have experienced stalking since enrolling.
 - In graduate school, 13% of women, 18% of transgender and nonbinary students, and 6% of men have experienced stalking since enrolling.
- **Sexual harassment** ⁵
 - In college, 59% of women, 65% of transgender and nonbinary students, and 36% of men have been sexually harassed since enrolling.
 - In graduate school, 37% of women, 53% of transgender and nonbinary students, and 23% of men have been sexually harassed since enrolling.
 - The harasser was a faculty member, advisor, residential staff, coach/trainer, or supervisor for 27% of graduate women, 42% of transgender and nonbinary graduate students, and 21% of graduate men.

B. Most students don't report sex-based harassment.

Unfortunately, few students report sex-based harassment. Many victims do not report because they believe the incident is “not serious enough” to report, including because it began consensually or alcohol and drugs were present.⁶ Other common reasons for not reporting include shame and embarrassment, fear of not being believed, and fear that no one will do anything to help.⁷ In addition, many survivors fear retaliation from the harasser, discipline by their school, or other negative academic, social, or professional consequences.⁸ Finally, many survivors simply do not want their harasser to get into trouble, particularly if their harasser is an intimate partner, romantic interest, friend, or someone who is well-liked in the school community.⁹

As a result, few victims of sex-based harassment report it to their institutions of higher education:¹⁰

- **Sexual assault:** Among victims of sexual assault, only 12% of women, 21% of transgender and nonbinary students, and 10% of men reported the incident to their institutions of higher education.

² David Cantor *et al.*, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* at A7-55–A7-58 (Oct. 15, 2019), <https://bit.ly/3P2SR14> [hereinafter AAU Report] (reflecting the percentage of students who were subjected to nonconsensual sexual contact through force, incapacitation, coercion, or without voluntary agreement; for example, 25.9% of college women were sexually assaulted by force or incapacitation; 26.1% by force, incapacitation, or coercion; and 31.6% by force, incapacitation, coercion, or without voluntary agreement).

³ *Id.* at A7-68, A7-69.

⁴ *Id.* at A7-73, A7-76.

⁵ *Id.* at A7-59, A7-61–A7-63.

⁶ *Id.* at 30-31.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at A7-27, A7-30, A7-92.

- **Dating and domestic violence:** Among victims of dating and domestic violence, only 21% of women, 30% of transgender and nonbinary students, and 15% of men reported the incident to their institutions of higher education.
- **Stalking:** Among victims of stalking, only 28% of women, 33% of transgender and nonbinary students, and 29% of men reported the incident to their institutions of higher education.
- **Sexual harassment:** Among victims of sexual harassment, only 14% of women, 21% of transgender and nonbinary students, and 8% of men reported the incident to their institutions of higher education.

C. Many institutions are mishandling reports of sex-based harassment.

Student survivors who do come forward are often ignored or punished by their schools instead of being supported. For example, a 2020-21 survey of survivors conducted by Know Your IX, a survivor- and youth-led organization, revealed a pattern of outrageous conduct by schools:¹¹

- **Discipline:** Students were punished for “misconduct” like physically defending themselves from their assailants or telling their friends about their assaults and even dismissed from graduate programs for “unprofessional conduct” (*i.e.*, leaving the room when traumatized by hearing their assailant’s voice).
- **Frivolous cross-complaints:** Students were subjected to retaliatory, frivolous cross-complaints of “harassment” from their abusers. In one example, after a student was found responsible for rape and strangulation and lost his appeal, he filed a cross-complaint against his victim, accusing her of raping him during the same encounter that he had previously claimed was consensual.
- **“Wellness checks”:** In a number of other disturbing cases, survivors were falsely reported by their abusers as actively suicidal and in need of a “wellness check” from police, causing them to be involuntarily committed to an inpatient facility and subsequently perceived as “unstable” and not credible.

When schools fail to address sex-based harassment, survivors are forced to miss class, receive lower grades, withdraw from extracurricular activities, change majors, drop to part-time enrollment, drop to a two-year degree, pay extra tuition to retake courses, graduate late, or leave school altogether. In some cases, they lose campus jobs or scholarships that render them homeless. Ultimately, 34% of college survivors are forced to drop out.¹²

As of April 2024, the Department of Education is currently investigating 321 complaints against institutions of higher education, including the University, for allegedly mishandling reported sexual harassment or assault.¹³

D. False accusations are rare.

Despite the popular misconception, false accusations of sex-based harassment are quite rare. For instance, researchers have repeatedly found that police frequently misclassify reports of sexual assault as “false” when they were merely unsubstantiated or because the victim was intoxicated, was mentally ill, delayed reporting, or was assaulted by an acquaintance or intimate partner.¹⁴ In one of the largest and most methodologically rigorous studies on false reports, researchers found that police relied on these types of biases to classify 8% of 2,643 reports of sexual assault as “false,” whereas researchers concluded the actual rate was only 2.5%.¹⁵ In contrast, false reports of car theft are estimated at 10%.¹⁶

In other words, **false accusations of car theft are 4 times higher than false accusations of sexual assault**, and nearly 70% of sexual assault reports that are classified as “false” are actually credible.

However, the myth of false accusations being common persists in part because many people take the testimony of non-victims as evidence of innocence. As a recent *Washington Post* article noted:

¹¹ Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting* 12, 18-20 (2021), <https://bit.ly/4bXZGLy>.

¹² Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. Coll. Student Retention: Res., Theory & Prac. 234, 244 (2015), <https://bit.ly/3TIIZna>.

¹³ Department of Education, Office for Civil Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools* (last updated Apr. 2, 2024), <https://bit.ly/4aEIUR7>.

¹⁴ David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) Violence Against Women 1318-1334 (2010), <https://bit.ly/42Xk1fl>.

¹⁵ Kimberly A. Lonsway, Joanne Archambault, & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* 3 (2009), <https://bit.ly/3SWWly0>.

¹⁶ Todd Keister, *Thefts of and from Cars on Residential Streets and Driveways*, Arizona State Univ. (2007), <https://bit.ly/3xnocWo>.

Sexual harassment seems to be one of the few misdeeds for which we accept testimonies from non-victims as evidence of innocence. Serial killers manage to not murder everyone they meet. Burglars don't rob every house they pass. We don't call the owners of un-robbed houses to the witness stand and ask them to add their statements to the public record: He couldn't be a thief, your honor — he once visited my home, and yet I still have my flat-screen.¹⁷

In addition, many harassers genuinely do not understand what sexual assault is. A 2014 survey of college men found that 18% of survey respondents would not “rape a woman” even if “nobody would ever know and there wouldn't be any consequences” but *would* “force a woman to sexual intercourse” (*i.e.*, rape) under the same circumstances.¹⁸ In other words, there are people who would absolutely rape someone while genuinely believing themselves incapable of rape.

II. Harassment and Failure to Address It Is a Systemic Problem at the University

Harassment is alarmingly common across the University's community. There is the high-profile case of Dr. Robert Anderson, whose sexual abuse of more than 1,050 people, mostly men of color—potentially the case with the most sexual abuse allegations against a single person in U.S. history¹⁹—during his nearly 40-year tenure resulted in a \$490 million settlement by the University in 2022.²⁰ In another recent high-profile case, six former University students filed a sexual harassment lawsuit against former professor Bruce Conforth.²¹ And of course, there is the case of Martin Philbert, former provost and chief academic officer, who serially harassed at least 8 women throughout his career and was promoted by the University time and time again, resulting in a \$9 million settlement by the University in 2020.²²

But there are also everyday incidents that do not get media attention. The University's 2021 climate survey revealed that many college students and graduate students had felt discriminated against in the past 12 months, including:²³

- **Sex discrimination:** 18% of students experienced sex discrimination, including anti-LGBTQI+ discrimination, in the past 12 months. 52% of students are women.²⁴
- **Race and national origin discrimination:** 18% of students experienced race discrimination, and 11% of all students experienced national origin discrimination in the past 12 months. 51% of students are Black, Latinx, Asian, or Indigenous, and 9% are international).²⁵
- **Disability discrimination:** 6% of students experienced disability discrimination in the past 12 months. 9% of students are disabled.²⁶

Few incidents of harassment are reported to the University, and fewer still are investigated or addressed by the Equity, Civil Rights & Title IX (ECRT) Office. Students and staff have also raised concern about the Title IX Office's mishandling of investigations, including by former Title IX coordinator Pam Heatlie, who was previously embroiled in a mishandled investigation at another university.²⁷

¹⁷ Monica Hesse, *'He never harassed me' isn't evidence. It's misdirection.*, Wash. Post. (Aug. 2, 2018), <https://wapo.st/3P4KrXb>.

¹⁸ Victoria Bekiempis, *When Campus Rapists Don't Think They're Rapists*, Newsweek (Jan. 9, 2015; last updated Mar. 12, 2016), <https://bit.ly/3UZbCGv>.

¹⁹ Reva Lalwani et al., *'No amount of money is going to ever make anybody whole': Anderson survivors search for closure in settlement process*, Michigan Daily (Apr. 5, 2024), <https://www.michigandaily.com/news/focal-point/anderson-survivors-look-for-closure-in-settlement-process>.

²⁰ Hayley Harding, *UM finalizes \$490M settlement with victims of Dr. Robert Anderson*, Detroit News (last updated Sept. 17, 2022), <https://bit.ly/3xp9Vsk>.

²¹ Julia Jacobs & Zachary Small, *Past Students Say Professor of Rock 'n' Roll Sexually Harassed Them*, N.Y. Times (updated Apr. 26, 2021), <https://bit.ly/3VHRoSh>.

²² David Jesse, *University of Michigan reaches \$9 million settlement with 8 women who were sexually harassed by ex-provost*, USA TODAY (Nov. 18, 2020), <https://bit.ly/3U8vdUc>.

²³ University of Michigan, *2021 University of Michigan Student Campus Climate Report* 44 (2021), <https://bit.ly/4aBXmbo> [hereinafter *UM Campus Climate Report*].

²⁴ *Id.* at 50; University of Michigan, *Michigan Almanac – Diversity* 87 (last updated 2019), <https://bit.ly/3TOtPnY> [hereinafter *UM Diversity Report*].

²⁵ *UM Campus Climate Report*, *supra* note 23, at 48; Data USA, *University of Michigan-Ann Arbor* (last visited Apr. 4, 2024), <https://bit.ly/4achH5df>; *UM Diversity Report*, *supra* note 24, at 88.

²⁶ *UM Campus Climate Report*, *supra* note 23, at 46.

²⁷ Nisa Khan, *The Runaround: What it's like to file a bias report at the University*, Michigan Daily (Apr. 17, 2018), <https://bit.ly/3vGw4Ss>.

Although the University has ~50,000 students, meaning ~9,000 of them (18%) experienced sex discrimination in the past 12 months,²⁸ the ECRT's 2023 report on sex-based misconduct revealed that:

- **Reports (929):** The ECRT received only 929 reports of sex-based misconduct, including sexual assault (347), dating or domestic violence (66), stalking (110), and sexual harassment (327).²⁹
- **Investigations (29):** These 929 reports resulted in 29 investigations and 2 restorative processes.³⁰
- **Findings of responsibility (4):** Of the 17 students investigated for sex-based misconduct, 1 was found responsible, 1 was found not responsible, 14 had investigations pending at the time of the ECRT's report, and 1 complaint was dismissed upon the complainant's request.³¹ Of the 12 staff investigated, 3 were found responsible, 3 were found not responsible, 5 had investigations pending at the time of the ECRT's report, and 1 complaint was closed because the respondent left the University.³²
- **Corrective measures (3):** Of the 4 respondents who were found responsible for sex-based misconduct, 3 received corrective measures: 1 student received a no-contact order, 1 staff was suspended for 5 days, and 1 staff was designated as ineligible for rehire after they left the University.³³
- **Supportive measures (33):** Despite receiving 517 reports of sex-based misconduct, the ECRT approved only 33 supportive measures: academic (10), employment (3), housing (3), and mutual no-contact restrictions (17).³⁴

In summary, the ECRT's data shows that there is a systemic pattern of harassment being underreported, under-investigated, and under-substantiated at the University:

- Only 10% of students who experience sex-based misconduct reported it to the ECRT.
- Only 6% of reports of sex-based misconduct against an identified University respondent resulted in an investigation or restorative process.
- Only 14% of investigations resulted in a finding of responsibility at the time of the ECRT's report.
- Only 4% of reports of sex-based misconduct resulted in an ECRT-approved supportive measure.

III. The University Should Strengthen Policies Against Harassment.

The statistics in **Part II** clearly indicate that prior attempts by the University to improve the ECRT's policies and practices have not been successful in properly addressing and preventing harassment and discrimination at the University. In addition, we are concerned that the University's 5-year DEI 2.0 Plan's 61-page report mentions the word "harassment" only twice—in a generic and cursory way—and does not mention "sexual assault" or "gender-based violence" at all.³⁵ Similarly, we are concerned that the DEI 2.0 Plan's list of "Campuswide Action Items" does not mention addressing any of these issues.³⁶

In light of the prevalence of harassment at the University and its insufficient responses to it, **We strongly recommend that the University add an explicit and specific plan to address sex-based harassment to its DEI 2.0 Plan.** We recommend that the amended DEI 2.0 plan include (but not be limited to) the following recommendations:

A. Strengthen Investigation of Current ECRT Complaints.

1. Consider past and concurrent allegations against the same respondent.
2. Under the Biden Title IX rule, do not default to live hearings with cross-examination.
3. Continue investigating even after a complainant leaves the University.
4. Weigh witness statements fairly.
5. Use a trauma-informed approach to questioning.

²⁸ *UM Campus Climate Report*, *supra* note 23, at 50; *UM Diversity Report*, *supra* note 24, at 86.

²⁹ University of Michigan, *Annual Report Regarding Institutional Response to Reports of Sexual and Gender-Based Misconduct* 4, 6 (June 30, 2023), <https://bit.ly/3TFBc18> [hereinafter ECRT Report 2023].

³⁰ *Id.* at 6, 27, 39. The ECRT's report did not disclose how many formal complaints were filed but did not proceed to an investigation or restorative process because the University determined they did not allege conduct that would constitute a policy violation.

³¹ *Id.* at 33.

³² *Id.* at 45, 48.

³³ *Id.* at 34, 49. The report does not indicate any corrective measures for the employee who was found responsible under the University's Sexual & Gender-Based Misconduct Process. *Id.* at 44-46, 49.

³⁴ *Id.* at 56. While the report notes that other offices can grant supportive measures without ECRT approval, this is still a remarkably low number compared to the number of reported incidents and the prevalence of harassment (both reported and unreported) at the University.

³⁵ University of Michigan, Office of Diversity, Equity & Inclusion, *DEI 2.0 Plan* 22, 40 (2023), <https://bit.ly/43RGyej>.

³⁶ University of Michigan, Office of Diversity, Equity & Inclusion, *Campuswide Action Items* (last visited Apr. 5, 2024), <https://bit.ly/3PNI7oY>.

6. Ensure investigators do not have a conflict of interest.

B. Train All Senior Administrators and ECRT Staff.

1. Train senior and ECRT staff on trauma-informed responses.
2. Train senior and ECRT staff on culturally responsive approaches.
3. Certify all ECRT staff as rape crisis counselors.

C. Support and Restore Complainants Instead of Punishing Them.

1. Offer a wide range of effective supportive measures.
2. Don't punish complainants.
3. Offer a restorative process as an option.
4. Strengthen the climate survey.

D. Hold Bad Actors Accountable.

1. Hold faculty and staff harassers and enablers accountable.
2. Hold ECRT staff who violate protocol accountable.
3. Conduct background checks on all ECRT staff.

E. Take Other University-Wide Systemic Actions.

1. Review previously mishandled ECRT complaints.
2. Restructure the ECRT.

* * * * *

A. Strengthen Investigation of Current ECRT Complaints.

1. Consider past and concurrent allegations against the same respondent.

The University should require ECRT to consider past reports or complaints of harassment or discrimination against a respondent in an ongoing investigation of that respondent. Specifically, for every new complaint against a respondent, the ECRT should be required to look for past reports or complaints against the same respondent, including complaints that were never investigated, and to consider them as evidence in the current investigation.

The University should also require ECRT to consider concurrent complaints of harassment or discrimination against a respondent in an ongoing investigation of that respondent. Specifically:

- If all complainants agree to consolidate, then ECRT must consolidate all open complaints against the same respondent into a single investigation.
- If not all complainants agree to consolidate, then ECRT must honor each complainant's request to have their complaint be used in another concurrent investigation against the same respondent.

This would be consistent with the Rule 415 of the Federal Rules of Evidence (FRE), which allows civil cases to consider evidence that the defendant committed any other sexual assault.³⁷

2. Under the Biden Title IX rule, do not default to live hearings with cross-examination.

The Biden administration's forthcoming Title IX regulations will not require institutions of higher education to conduct live hearings with cross-examination. At the same time, the Sixth Circuit has held in *Doe v. Baum* that Michigan's public universities must provide a live hearing with cross-examination only when certain factors are present. Specifically, the *Baum* court held that Michigan's public universities must provide a live hearing only when a serious sanction is a possibility and must allow for cross-examination only when the credibility of a party or witness is at issue.³⁸

³⁷ Fed. R. Evid. 415.

³⁸ *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

Therefore, when the new Title IX rule is in effect, the University will not need to use a live hearing with cross-examination in the following situations:

- **Hearings.** If no serious sanction, such as expulsion or suspension, is a possibility, the University will not need to provide a live hearing. In such cases, the University will be able to interview the parties and witnesses in individual meetings instead.
- **Cross-examination.** If the University's determination does not turn on the credibility of any party or witness, the University will not need to allow an opportunity for cross-examination. In such cases, the University should allow the parties to submit written questions that are posed by a neutral hearing officer or panel to the other party and witnesses.

For example, the University may find that the investigation does not turn on the complainant's credibility in the following scenarios (not exhaustive, intended to be illustrative):

- A student emails a professor an application for the professor's research program, and the professor replies saying that the student is more likely to be chosen for the program if they agree to go on a date with the professor.
- A student texts their classmate to confront them about a nonconsensual sexual encounter, and the classmate replies by apologizing for the sexual assault, admitting they knew the student did not consent, and asking for another chance.
- A complainant's sexual assault by a group of respondents is recorded by one of the respondents, and the complainant is visibly unconscious in the video recording.

3. Continue investigating even after a complainant leaves the University.

The University should require ECRT to continue investigating a complaint after a complainant is no longer affiliated with the University (unless a meaningful investigation would no longer be possible). This includes (but is not limited to) situations where a complainant has graduated, withdrawn, transferred to another school, or passed away.

The ECRT's 2023 report erroneously states: "It often is not legally permissible or possible for the University to proceed with an investigative resolution to reach a finding of a violation without the Complainant's participation in a live hearing when the Respondent is a student."³⁹ This is incorrect for several reasons.

First, an investigation can very well proceed without a complainant's participation under the Title IX rule:

- Both the 2020 Title IX rule and the Biden administration's upcoming Title IX rule allow a Title IX coordinator to submit a complaint initiating an investigation against a respondent without requiring the participation of the complainant.⁴⁰
- Both the 2020 Title IX rule and the Biden administration's upcoming Title IX rule require schools to investigate a complaint by a complainant who is no longer affiliated with the school as long as they were participating or attempting to participate in the school's program or activity either: (i) when they filed the complaint (under the 2020 rule) or (ii) when the incident occurred (under the Biden rule).⁴¹
- While the 2020 Title IX rule originally required individuals in higher education to submit to cross-examination at a live hearing in order for their statements to be considered as evidence, a federal court struck down that requirement in 2021.⁴² The Biden administration's upcoming Title IX rule will not require the University to conduct live hearings with cross-examination at all. This means complainants will not have to cross-examine and universities will be able to rely solely on other people's statements and other evidence to reach a decision.

Second, while the Sixth Circuit held in *Baum* that complainants at Michigan's public universities must participate in a live hearing with cross-examination, it did not contemplate what would be required when a complainant is dead or otherwise unavailable as those facts were not present in the *Baum* case. However, we can look to the Third Circuit for guidance. Like the Sixth Circuit in *Baum*, the Third Circuit has held that private universities must

³⁹ ECRT Report 2023, *supra* note 29, at 27.

⁴⁰ 34 C.F.R. § 106.30(a) ("formal complaint"); 85 Fed. Reg. 30026, 30432 ("nothing in the final regulations requires a complainant to participate in a grievance process against the complainant's wishes, even where the Title IX Coordinator signed a formal complaint initiating a grievance process against the respondent"). See also Proposed 34 C.F.R. § 106.45(a)(2)(iii).

⁴¹ 34 C.F.R. § 106.30(a) ("formal complaint"); Proposed 34 C.F.R. § 106.2 ("complainant").

⁴² National Women's Law Center, *Federal Judge Vacates Part of Trump Administration's Title IX Sexual Harassment Rule* (Aug. 11, 2021), <https://nwl.org/resource/federal-judge-vacates-part-of-trump-administrations-title-ix-sexual-harassment>.

conduct live hearings and, when credibility is at issue, allow an opportunity for cross-examination.⁴³ Nonetheless, the Third Circuit has recognized that, even if a complainant is unavailable, the school still has a Title IX duty to address gender-based violence and other sex-based harassment.⁴⁴ Any other rule would be absurd, as it would reward respondents who kill their complainants by not requiring their school to investigate them.

Third, even the federal courts allow testimony from unavailable witnesses to be used in certain situations. For example, the federal courts allow the following statements from unavailable witnesses to be used in both civil and criminal proceedings:

- A statement on the witness's then-existing state of mind or emotional, sensory, or physical condition.⁴⁵
- A statement made for medical diagnosis or treatment.⁴⁶
- A statement made in an oral or written recorded recollection.⁴⁷
- A statement made against the person who caused the witness's unavailability (e.g., by homicide).⁴⁸
- A statement that is supported by sufficient guarantees of trustworthiness and is more probative than any other evidence that can be reasonably obtained.⁴⁹

The University should not require an unavailable complainant to be cross-examined in order to proceed with a school investigation when neither the civil nor criminal courts apply such a categorical rule.

4. Weigh witness statements fairly.

The University has been known in at least one case to accept a sworn affidavit from an eyewitness without informing the eyewitness that their affidavit would categorically be treated as worth less than if they had submitted to an unsworn interview where the Title IX investigator could ask follow-up questions. In that particular case, the witness submitted a sworn affidavit instead of submitting to an interview because they had had a prior traumatizing experience being interviewed by a Title IX investigator.

The university should not categorically treat sworn affidavits as less credible than unsworn interviews. Such a policy would violate both the 2020 Title IX rule and the Biden administration's upcoming Title IX rule, which require "an objective evaluation of *all relevant evidence*."⁵⁰ Accordingly, the University should allow the decision-maker to decide how much weight to give each piece of evidence. For example:

- A decision-maker could decide to give more weight to a sworn affidavit than an unsworn interview statement because the former is sworn testimony.
- A decision-maker could decide to give less weight to a sworn affidavit than an unsworn interview statement because the latter included the opportunity to ask follow-up questions.
- A decision-maker could decide to weigh these two types of evidence equally.
- A decision-maker could decide to give less weight to a particular witness's statement (whether sworn or unsworn) because it is contradicted by the testimony of all other witnesses in that case.

If a witness does not want to be interviewed for a specific reason (e.g., they had a prior traumatizing experience being interviewed by a Title IX investigator), the University should offer alternatives to encourage maximum witness participation and ensure the decision-maker can make the most informed decision possible. For example, the University could:

- If the witness had a previously traumatizing experience with an investigator, offer to provide the witness with an alternative investigator.
- Ask the witness to answer follow-up questions in writing instead of in an interview.

In any case, the University should inform all parties and witnesses of their right to be interviewed and of the different ways that their evidence could be weighed if they do not submit to an interview, do not answer follow-

⁴³ *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020).

⁴⁴ *Hall v. Millersville Univ.*, 22 F.4th 397 (3d Cir. 2022).

⁴⁵ Fed. R. Evid. 803(3).

⁴⁶ Fed. R. Evid. 803(4).

⁴⁷ Fed. R. Evid. 803(5).

⁴⁸ Fed. R. Evid. 805(b)(6).

⁴⁹ Fed. R. Evid. 807.

⁵⁰ 34 C.F.R. § 106.45(b)(1)(ii); Proposed 34 C.F.R. § 106.45(b)(6).

up questions, do not submit to a live hearing with cross-examination, etc. This allows witnesses to make an informed decision about how they want to share their statements.

5. Use a trauma-informed approach to questioning.

The University should require ECRT staff to use trauma-informed approaches when interviewing a party or witness (see **Recommendation B1** for more on trauma-informed approaches):

- **Ask open-ended questions.** Research shows that even in the case of non-traumatic memories, witnesses make less accurate statements when responding to leading questions, compound or complex questions, rapid-fire questions, closed (yes-no) questions, double-negative questions, and questions that jump around from topic to topic.⁵¹ Traumatic memories are even more vulnerable to misleading, suggesting, and confrontational questioning.⁵²
- **Focus on what a witness can recall** about their experience, including their thought processes and sensor perceptions. Do not demand that they “start at the beginning” and recount all details in a seamless, chronological manner.⁵³
- **Don’t rush the witness.** Allow them to think and speak at their own pace. Don’t interrupt or try to fill pauses.⁵⁴
- **Ask for clarification.** For example, if a complainant has engaged in a counterintuitive behavior or described the incident differently on different occasions, ask them in a respectful and nonjudgmental way to “help the investigator understand” their thought process or their different observations.⁵⁵

6. Ensure investigators do not have a conflict of interest.

If the University uses a third-party vendor to conduct an investigation of an ECRT complaint or of the University’s response to ECRT complaint(s), it should not use that vendor for consulting, legal, or other non-investigatory services for 7 years, and vice-versa. This would help ensure that investigators do not have a conflict of interest when performing their duties.

B. Train All Senior Administrators and ECRT Staff.

In addition to the training that the University already requires of all new staff, the University should provide additional annual training to all senior administrators and ECRT staff on all forms of harassment and discrimination. These recommendations align with the Coordinated Community Response Team’s (CCRT’s) 2023 recommendations to the University to invest in Sexual Misconduct Prevention:⁵⁶

Senior administrators and ECRT staff should be trained on the following regarding sex-based harassment including sexual assault, dating violence, domestic violence, and stalking):

- **Skills:** Trainings should include how to recognize sex-based harassment and respond in the moment someone learns about it or observes it, how to notify the Title IX coordinator, where to find the school’s policies, the difference between Title IX and Michigan’s mandatory reporting obligations, and how to provide effective supportive measures to student complainants.
- **Content:** Trainings should include content on the prevalence, dynamics, and underreporting of sex-based harassment (see **Part I**); the impact of trauma on victims; and how to respond in a trauma-informed and culturally responsive way (see **Recommendations B1 and B2**).
- **Format:** Trainings should be conducted annually and in person rather than online whenever possible and should include best practices, open discussions, and specific examples in the school setting.

⁵¹ Emily Henderson, *Bigger fish to fry: Should the reform of cross-examination be expanded beyond vulnerable witnesses?*, 19(2) Int’l J. Evid. & Proof 83-99 (2015), <https://doi.org/10.1177/1365712714568072>.

⁵² Daisy A. Segovia et al., *Trauma memories on trial: is cross-examination a safeguard against distorted analogue traumatic memories?*, 25 Memory 95-106 (2017), <https://doi.org/10.1080/09658211.2015.1126608>.

⁵³ Jeffrey J. Nolan, Holland & Knight, *Fair, Equitable Trauma-Informed Investigation Training* 5 (July 2019), <https://bit.ly/3TAvu0E>.

⁵⁴ Harter Secrest & Emery LLP, *Conducting Trauma-Informed and Legally-Compliant Investigations, Hearings, and Appeals* 38-40 (2016), <https://bit.ly/4asDw2V>.

⁵⁵ Nolan, *supra* note 53, at 10.

⁵⁶ University of Michigan, *Coordinated Community Response Team (CCRT) 2023 Recommendations* 21-28 (2023), <https://bit.ly/43SVMzF> [hereinafter CCRT Report].

1. Train senior and ECRT staff on trauma-informed responses.

The University should train all senior administrators and ECRT staff on the following regarding trauma:

- **Memory:** People who have experienced a traumatic event may not be able to recall some details of an event, may not recall some details in chronological order, or may recall some details better over time. This is because experiencing a traumatic event causes increased activity of the amygdala (responsible for fear and anxiety) and decreased activity in the hippocampus and prefrontal cortex (responsible for memory, attention, and executive control).⁵⁷ As a result, traumatic memories are stored and retrieved differently from non-traumatic memories, and trauma can cause partial or full amnesia.⁵⁸ Unfortunately, victims who recall memories in this way are often perceived as evasive or lying.⁵⁹
- **During victimization:** Trauma can trigger a flight, fight, freeze, or fawn response.⁶⁰ Many victims display counterintuitive behaviors during their assaults. For example, many victims often don't fight back due to tonic immobility (paralysis), dissociation (a feeling of leaving one's body), or a strategic decision to avoid physical injury or death. Survivors of any gender and with any genitalia can experience involuntary physiological stimulation despite a lack of consent or sexual desire. In addition, many survivors—70% of incapacitated survivors and 48% of violent rape survivors—have no injuries.⁶¹
- **After victimization:** Many survivors exhibit counterintuitive post-assault behaviors. For instance, survivors often delay reporting for many reasons, including because they do not always immediately recognize an assault as assault—particularly when the assailant is a romantic partner. Many victims contact their assailant after the assault in an attempt to normalize the encounter; sometimes, they try to reassert control by seeking a subsequent *consensual* encounter with their assailant. Furthermore, victims often appear emotionless or even smile or laugh when recounting their assault to avoid being labeled “hysterical,” to avoid letting their assailant see how much they are suffering, or as a form of self-preservation when repeatedly recounting a traumatic event.⁶²

Therefore, the University should train ECRT staff on how trauma could impact a complainant's actions during and after harassment, as well as the complainant's responses in an investigation. ECRT staff should be trained on not disbelieving complainants based on misconceptions about “real victims”, such as assumptions based on a complainant's clothing or appearance, alcohol or drug use, prior sexual history; or because they did not fight back, did not report immediately, continued dating or being friends with the respondent, or continued to do well in school

Training should emphasize that the presence or lack of certain behaviors *commonly* associated with trauma should not be seen as dispositive of whether a Title IX violation occurred in a *particular* case. Not all counterintuitive behaviors are necessarily driven by trauma, and ECRT staff need not accept everything a party or witness recounts as true simply because evidence consistent with trauma is present. Nevertheless, it is critical for ECRT staff to understand the **potential effects of trauma** so they can interview all parties and witnesses in an effective way. This benefits everyone:

- **Complainants:** Understanding the potential effects of trauma can help ECRT staff ask questions that elicit more evidence without causing a complainant to withdraw or shut down. It can also help an interviewer avoid assuming that a complainant is necessarily lying simply because their behavior deviates from the stereotype of a “perfect victim.”
- **Respondents and witnesses:** A trauma-informed interview approach can benefit respondents and witnesses too, as they are likely to be anxious during an interview, even if not traumatized.⁶³

Finally, ECRT staff should be trained on how to interview parties and witnesses, as detailed in **Recommendation A3** above.

⁵⁷ E.g., Christopher T. H. Liang *et al.*, *Trauma-Informed Care Training for Educators: Some Preliminary Evidence*, 1 J. of Prevention and Health Promotion 240, 242 (2020); Linda Grabbe & Elaine Miller-Karas, *The Trauma Resiliency Model: A “Bottom-Up” Intervention for Trauma Psychotherapy*, 24 J. of the Am. Psychiatric Nurses Ass'n 76, 77 (2018).

⁵⁸ Legal Momentum, National Judicial Education Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case* 9 (Oct. 30, 2017), <https://bit.ly/48DmhdP> [hereinafter Judicial Manual].

⁵⁹ Nolan, *supra* note 53, at 4.

⁶⁰ *Id.*

⁶¹ Judicial Manual, *supra* note 58, at 5, 7, 9-10; Nolan, *supra* note 53, at 5.

⁶² Judicial Manual, *supra* note 58, at 7-9; Nolan, *supra* note 53, at 4-5.

⁶³ Nolan, *supra* note 53, at 8-10.

2. Train senior and ECRT staff on culturally responsive approaches.

The University should train all senior administrators and ECRT staff on using culturally responsive approaches to address sex-based harassment. This ensures that all students receive the support they need when they disclose or report harassment and that certain groups of students are not disbelieved, ignored, or punished when they seek help. For example, all employees should receive training on the following information:

- **Pregnant and parenting students** are often labeled as “promiscuous” because their pregnancy or child is evidence that they have previously engaged in sexual intercourse—regardless of whether it was consensual. As a result, they are more vulnerable to harassment and more likely to be blamed for it.⁶⁴
- **LGBTQI+ students** are often perceived as “promiscuous,” “hypersexual,” “deviant,” or “attention-seeking” and therefore blamed for their own harassment.⁶⁵ Transgender and nonbinary students are three times more likely than their peers to fear they will not be believed when reporting sexual assault, and many also fear their sexual assault will be minimized due to their harasser’s gender.⁶⁶
- **Disabled students** are often seen as less credible when reporting harassment and may also have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.⁶⁷ Disabled people are about 3 times more likely than nondisabled peers to be sexually abused.⁶⁸
- **Women of color** are labeled as “promiscuous,” less deserving of protection and care than white women, or simply unable to be sexually harassed.⁶⁹ Latina women are stereotyped as “hot-blooded,” Indigenous girls and women as “sexually violable” conquests, Black women as “angry” or “aggressive,” and Asian American and Pacific Islander women as “submissive.”⁷⁰ In addition, Black women report their assaults at far lower rates compared to white women; even at HBCUs, Black women are frequently ignored or punished after reporting their assaults by Black men or told to “give [their harassers] a pass” because their respective schools are “brother-and-sister institutions.”⁷¹
- **Men**, especially male athletes, often find it harder to recognize or report when they have been sexually harassed due to traditional stereotypes about masculinity.⁷² Even when they do recognize that they have been abused, many do not report it because they fear the abuse will be minimized due to their harasser’s gender, because their body showed involuntary arousal, or because they fear their harasser will counter-accuse them.⁷³
- **Students with multiple marginalized identities** are harmed by compounded stereotypes. For example, if a disabled Black woman reports being sexually harassed, she will also likely experience all of the pernicious stereotypes that come with experiencing sex-based harassment while being Black, disabled, and a woman.

Finally, the University’s training materials should reflect the diverse identities of victims and harassers (or complainants and respondents):

- Use gender-neutral pronouns or alternate gender-specific pronouns for victims and harassers (or complainants and respondents) in examples and case studies.

⁶⁴ Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens’ Attitudes Toward Their Pregnant Peers*, 16 Psi Chi J. Undergraduate Rsch. 33 (2011), <https://bit.ly/4aB1I2H>.

⁶⁵ See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018); Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://bit.ly/3xcV1Fw>.

⁶⁶ AAU Report, *supra* note 2, at A7-27, A7-30–31.

⁶⁷ Angela Browne et al., *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14–15, (2016), <https://bit.ly/3IXjvoP>; Leigh Ann Davis, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://bit.ly/3vw0bfe>.

⁶⁸ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls With Disabilities* 7 (2017), <https://bit.ly/3TTOzw6>.

⁶⁹ Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 16, 17, 24–29 (2019); Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 3, 2018), <https://bit.ly/3VwxLwm>.

⁷⁰ Cantalupo, *supra* note 69, at 17, 24–25.

⁷¹ Clarissa Brooks, *How HBCUs Can Make It Hard for Sexual Assault Survivors to Speak Up*, Teen Vogue (Dec. 21, 2017), <https://bit.ly/3TVVv7E>; Samhita Mukhopadhyay, *At Historically Black Colleges, The National Discussion of Sexual Abuse Takes on Fraught Layer of Racial Politics*, The Intercept (Dec. 4, 2017), <https://bit.ly/4ajKNly>; Caitlin Dickerson & Stephanie Saul, *Two Colleges Bound by History Are Roiled by the #MeToo Moment*, N.Y. Times (Dec. 2, 2017), <https://bit.ly/4avcgQl>; Lauren Rosenblatt, *Why it’s harder for African American women to report campus sexual assaults, even at mostly black schools*, L.A. Times (Aug. 28, 2017), <https://bit.ly/3TVhQGw>; Elahe Izadi, Spelman, *Morehouse investigate gang-rape allegations posted by anonymous Twitter account*, Wash. Post (May 5, 2016), <https://bit.ly/49fgtqE>; Anita Badejo, *Our Hands Are Tied Because Of This Damn Brother-Sisterhood Thing*, Buzzfeed (Jan. 21, 2016), <https://bit.ly/4ayMk6Y>.

⁷² E.g., Brief of Nat’l Women’s L. Ctr., Women’s Sports Foundation, and 49 Additional Organizations as *Amici Curiae* in Support of Plaintiffs-Appellants at 22–23, *Moxley v. Ohio State Univ.*, No. 21-3991 (6th Cir. Feb. 9, 2022), ECF No. 55, <https://bit.ly/4aQWqjN>.

⁷³ AAU Report, *supra* note 2, at A7-28–29.

- Use names and descriptions that reflect the diversity of victims and harassers (or complainants and respondents) across race, ethnicity, sexual orientation, transgender status, disability, and other protected classes.

3. *Certify all ECRT staff as rape crisis counselors.*

The University should require all ECRT staff to be certified as rape crisis counselors. This would help ensure that students who report sexual assault and other sex-based harassment to ECRT are treated with dignity and respect when seeking help in a time of crisis.

Avalon Healing Center in Detroit, MI (<https://avalonhealing.org>) is a well-respected nonprofit provider that already offers certification training for rape crisis counselors.

C. Support and Restore Complainants Instead of Punishing Them.

1. *Offer a wide range of effective supportive measures.*

The University should adopt the following best practices to ensure that supportive measures are as effective as possible for all complainants who report any type of harassment or discrimination. These recommendations align with the CCRT's 2023 recommendations to the University to invest in a Center for Survivor Support:⁷⁴

The University should inform all staff who are involved in providing or enforcing a supportive measure to be informed of such measures in writing, so they can proactively implement the measure. For example:

- If a complainant can have extra time on assignments or exams, their professors and TAs should receive a written copy of this supportive measure.
- If a complainant has a one-way no-contact order against the respondent, the University should give a written copy of it to both parties' instructors, academic advisors, student life staff, athletics coaches, and deans, so they can all help enforce it.

The University should offer a wide range of supportive measures to all complainants and continue offering supportive measures even if there is insufficient evidence to conclude that harassment occurred. For example:

- **Safety measures.** If a complainant does not feel safe at school due to harassment, the University can offer the following:
 - Issue a *one-way (or unilateral)* no-contact order that prohibits the respondent from directly communicating with the complainant, both in person and online.
 - Move the complainant to a different class, dorm, dining hall, campus workplace, and/or transportation route to and from these places, if requested by the complainant.
 - Give the complainant a campus escort between classes and other school activities.
 - If the respondent is a *student*, move the respondent to a different class, dorm, dining hall, campus workplace, and/or transportation route. The school can and should do this without forcing the complainant to move too.
 - If the respondent is a *student-employee*, supervise the respondent in their workplace interactions with other students; or if there is an investigation, put them on paid administrative leave during the investigation.
 - If the respondent is a *non-student employee*, and there is an investigation, put them on paid or unpaid administrative leave during the investigation.
 - If the respondent is *not a student or employee*, ban them from coming onto school property.
- **Academic measures.** If the harassment has made it harder for a complainant to learn or attend school, the University can offer the following:
 - Excuse any late arrivals, absences, or leaves of absence as needed, if requested.
 - Allow the complainant more time to submit an assignment or take an exam, or an opportunity to resubmit an assignment or retake an exam.
 - Allow the complainant to take a leave of absence, withdraw from a class (without putting a "W" on their transcript), or retake a class (without charging them for tuition again).

⁷⁴ CCRT Report, *supra* note 56, at 15-17.

- Allow the complainant to attend classes online by joining the physical classroom via a Zoom screen, enrolling in a separate online class, or recording lectures and providing additional office hours to ensure they still have the opportunity to ask questions.
 - Provide a free tutor for the complainant.
 - Adjust the complainant's transcript so that their grades are not negatively impacted because of the harassment: e.g., remove a bad grade, remove an affected assignment or test from the final grade, change a C or D to a Pass, or assign another instructor to regrade any assignments or exams that were unfairly graded (if the instructor was the harasser).
 - Allow the complainant to remain in any school activities, leadership positions, honors programs, campus jobs, or scholarships that have a GPA, credit, or attendance requirement, even if they no longer meet those requirements.
 - If the complainant has a scholarship based on participation in an extracurricular activity that is shared with the respondent, offer to convert the scholarship to one not based on participation in that activity.
 - Reimburse the complainant for tuition or provide a tuition credit on any classes not taken or finished, and apply any retroactive reimbursements as necessary.
- **Health measures.** If the harassment has affected a complainant's physical or mental health, the school can offer the following supportive measures:
 - Arrange for the complainant to be able to take a break or leave the classroom whenever they feel anxious or afraid, without having to get permission each time from their instructor.
 - Help schedule visits for the complainant with a medical or mental health specialist who is not their academic advisor. This is important so that the academic advisor can write the complainant a fair recommendation letter for internships, jobs, or graduate school without being biased from other interactions with the student outside of their academic advising responsibilities. If the school does not have an available therapist or psychologist, it can give the complainant information about therapists and psychologists nearby and should help pay for these appointments and any related transportation costs.
 - Help the complainant find other local services, such as a local hospital, rape crisis center, victim advocate, disability advocate, addiction counselor, housing advocate, or lawyer.

2. *Don't punish complainants.*

The University should adopt the following best practices to ensure that complainants are not punished for reporting harassment or discrimination.

Collateral conduct. The University should have an amnesty policy that prohibits the discipline of students who report any type of harassment or discrimination, including sex-based harassment, for related conduct (often referred to as "collateral conduct"):

- Conduct disclosed as a result of the harassment or discrimination being reported and investigated (e.g., consensual sexual activity, drug or alcohol use, trespassing, reasonable self-defense).
- Conduct that occurs because of the harassment or discrimination (e.g., expressing trauma symptoms, missing class after the harassment).
- Telling other people about the harassment or discrimination.
- Making a so-called "false" statement solely because the school determines after an investigation that the harassment or discrimination did not occur.

Other retaliation. The University should adopt a policy that prohibits other forms of retaliation against complainants, such as:

- Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a respondent who has been found responsible and disciplined for sexual assault then files a counter-complaint against their victim alleging the victim was the actual assailant).
- Pressuring or requiring a complainant to take time off.
- Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other rights under federal, state, or local civil rights laws; or disciplining a complainant for violating such a confidentiality agreement; unless otherwise permitted by law. (For example, the University can take reasonable steps to protect the privacy of parties, witnesses, and others while an investigation is pending.)

Review disciplinary records. The University should review disciplinary actions taken against students who have reported harassment, including sex-based harassment, to determine whether there is a causal connection between the harassment and the alleged misconduct.

3. Offer a restorative process as an option.

The University should adopt the following best practices in its current restorative process.⁷⁵ These recommendations align with the CCRT's 2023 recommendations to the University to invest in a Center for Restorative Justice:⁷⁶

The University should allow (but not require or pressure) parties to address harassment using a restorative process: a process to acknowledge the harm that occurred, center the victim's needs, and repair the harm caused. A restorative process first requires the wrongdoer to admit that they caused harm. The process must be driven by the victim's needs and desired outcomes—including what constitutes an adequate apology, changed behavior, restitution, and accountability. The victim is not required to forgive the wrongdoer. Studies have found that victims of sexual harm who undergo a well-implemented restorative process feel safe and respected and would recommend the process to others, and that students who cause sex-based harm achieve better learning outcomes through a well-implemented restorative process than through a traditional disciplinary process.⁷⁷

A restorative process allows the harmer to choose accountability over denial and allows shame to be constructive instead of destructive. By creating a space for the harmer to repair the harm caused and reenter the community, they are able to understand:

- *My world will not end if I admit I was wrong.*
- *I will not be shunned forever.*
- *I am not defined by the worst thing I've ever done.*

The University should require the following conditions be met before conducting a restorative process:

- All parties must give voluntary, informed, and written consent. See [Sample Agreement to Participate in Informal Resolution](#) on pages 31-33 as an example of what the parties and school can sign.
- The respondent must admit they harmed the complainant.
- The parties must agree not to disclose any information they learn about each other during the restorative process without the other party's consent, although they may discuss the allegations with others when seeking legal advice, counseling, or other emotional support, or with the participants in their restorative process. See [Sample Agreement to Participate in Informal Resolution](#) on pages 31-33 as an example of what the parties and University can sign. And see [Sample Memorandum of Understanding: Restorative Justice Informal Resolution Agreement](#) on pages 34-37 as an example of what the University and local prosecutor can sign to ensure that the local prosecutor's office understands that information learned in the informal resolution is confidential will not be used in a criminal proceeding.
- The facilitator must be well-trained on restorative justice, harassment, and trauma-informed and culturally responsive practices (see **Recommendations B1** and **B2**).
- The parties must be allowed to withdraw from a restorative process to begin a traditional disciplinary process or vice-versa at any time before the end of the process.

4. Strengthen the climate survey.

The University should conduct its campus climate survey every 1-2 years (instead of every 4 years as is currently done). This would particularly benefit college students by allowing them to complete more than 1

⁷⁵ Note: A restorative process is different from mediation or conflict resolution. Restorative justice is a non-punitive framework with roots in different Indigenous cultures around the world that brings together the victim and wrongdoer to acknowledge the harm that occurred, center the victim's needs, and create a plan for the wrongdoer to repair the harm they caused. In contrast, conflict resolution is inappropriate for resolving harassment because it assumes both the victim and harasser share responsibility for the harassment, can allow harassers to pressure victims into inappropriate resolutions, and often requires direct interaction between the parties, which can be retraumatizing.

⁷⁶ CCRT Report, *supra* note 56, at 6-14.

⁷⁷ David Karp & Kaaren Williamsen, *Five Things Student Affairs Administrators Should Know About Restorative Justice and Campus Sexual Harm* 12 (2020), <https://www.naspa.org/report/five-things-student-affairs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm1>.

survey during their time at the University. It would also allow the University to determine whether campus climate has improved for the same cohort of students, rather than surveying a completely new group of college students every 4 years.

In addition, the University should add questions to the campus climate survey regarding complainants' experiences. The current survey only asks whether individuals have been a victim of discrimination but does not ask whether they experienced harassment, reported the incident, or received a response from the University. The climate survey should be expanded to include questions on:

- Whether the individual experienced harassment based on sex (including sexual assault, domestic violence, dating violence, and stalking), race, national origin, color, disability, and other protected classes;
- Whether the individual reported the harassment to the University, and why or why not;
- How the University responded or did not respond; and
- What the impact of the University's response was on the student.

D. Hold Bad Actors Accountable.

1. Hold faculty and staff harassers and enablers accountable.

The University should take meaningful and proportionate action to hold faculty and staff members accountable when they create a hostile educational environment.

Category A: In the following situations, the University should, **at a minimum**, prohibit the faculty or staff member from being eligible for a promotion, teaching award, advising position, or other leadership (including executive committee positions):

- **Violence and coercion:** A faculty or staff member is found responsible for quid pro quo sexual harassment, sexual assault, dating violence, domestic violence, stalking, or other physical violence.
- **Cover-up of harassment:** A faculty or staff member is found responsible for covering up an incident of alleged harassment or discrimination when they were obligated to do report or address it under University policy or federal, state, or local law. (Whereas failure to report is limited to an omission of a required act, a cover-up involves an affirmative act, including but not limited to affirmatively taking steps to stop a complainant or witness from reporting an incident to the ECRT or to stop ECRT staff from investigating a reported incident.)
- **Hiring a serial harasser:** A faculty or staff member oversees the hiring of a new employee, and the new employee: (i) has been found responsible for harassment at another school and the hiring manager knew about it, (ii) has not taken accountability for the previous incident, and (iii) is found responsible for harassment again at the University.

Category B: In the following situations, the University should, **at a minimum**, prohibit the faculty or staff member from being eligible for a promotion, teaching award, advising position, or other leadership (including executive committee positions) until: (1) a meaningful period of time has passed; and (2) the faculty or staff member takes accountability for their actions. If the victim consents to a restorative process, the faculty or staff member must engage in a restorative process with the victim that results in taking specific, meaningful steps to admit the harm, repair the harm to the *victim and the community*, and prevent future harm. If the victim does not consent to a restorative process, the University may allow the faculty or staff member to meet this requirement by taking specific, meaningful steps to admit the harm, repair the harm to the *community*, and prevent future harm. These restorative requirements would align with the CCRT's 2023 recommendations to the University to invest in a Center for Restorative Justice:⁷⁸

- **Other harassment:** A faculty or staff member is found responsible for harassment or discrimination that is not quid pro quo sexual harassment, sexual assault, dating violence, domestic violence, stalking, or other physical violence.
- **Failure to report harassment:** A faculty or staff member is found responsible for intentionally not reporting an incident of alleged harassment or discrimination to the ECRT when they were obligated to do so under University policy or federal, state, or local law, and the complainant did not object to their reporting.

⁷⁸ CCRT Report, *supra* note 56, at 6-14.

2. Hold ECRT staff who violate protocol accountable.

If an ECRT staff is reported for: (1) engaging in intentional bias, intentionally covering up a conflict of interest, or intentionally causing a procedural irregularity; and (2) this affected the outcome of an ECRT investigation, the University's chief ethics officer or an independent reviewer should investigate the complaint.

If a University, administrative, or judicial proceeding finds that an ECRT staff has: (1) engaged in intentional bias, intentionally covered up a conflict of interest, or intentionally caused a procedural irregularity; and (2) this affected the outcome of an ECRT investigation, the University should, **at a minimum**, prohibit the ECRT staff from being eligible for a promotion, award, or other leadership. In addition, the University may impose discipline, which may include termination.

If a University, administrative, or judicial proceeding finds that an ECRT staff has: (1) engaged in bias, whether intentional or unintentional, and (2) this affected the outcome of an ECRT investigation, the University should, **at a minimum**, require the staff to: (1) undergo additional training on bias, including unconscious bias; and (2) take accountability for their actions. If the victim of the bias consents to a restorative process, the respondent must engage in a restorative process with the victim that results in taking specific, meaningful steps to admit the bias, repair the harm to the *victim and the community*, and prevent future bias. If the victim does not consent to a restorative process, the University may allow the respondent to meet this requirement by taking specific, meaningful steps to admit the bias, repair the harm to the *community*, and prevent future bias. These restorative requirements would align with the CCRT's 2023 recommendations to the University to invest in a Center for Restorative Justice.⁷⁹

3. Conduct background checks on all ECRT staff.

Before hiring or promoting an ECRT staff, the University should look for and consider whether a school, administrative, or judicial proceeding has previously investigated the candidate or found the candidate responsible for: (1) engaging in bias (whether intentional or unintentional), intentionally covering up a conflict of interest, or intentionally causing a procedural irregularity; and (2) this affected the outcome of an investigation of harassment or other discrimination. The University should consider this information when making a decision to hire or promote an ECRT staff.

E. Take Other University-Wide Systemic Actions.

1. Review previously mishandled ECRT complaints.

The University should require its chief ethics officer or another independent reviewer to identify and review all ECRT complaints filed in the last 5 years that meet any of the following criteria:

- ECRT staff did not meaningfully attempt to contact complainant or respondent even though they were enrolled, employed, or otherwise not unavailable.
- ECRT staff made initial contact with the complainant and/or respondent but did not attempt to investigate the complaint by interviewing witnesses or collecting and examining other evidence.
- ECRT staff began investigating but did not make a finding regarding responsibility or did not properly dismiss the complaint in accordance with University policy or federal civil rights laws.
- ECRT staff who investigated the complaint were found afterwards to have: (1) engaged in intentional bias, intentionally covered up a conflict of interest, or intentionally caused a procedural irregularity, and (2) this affected the outcome of an investigation.

2. Restructure the CCRT.

The University should restructure the CCRT so that it is not chaired or co-chaired by the head of ECRT. Quite simply, the CCRT cannot carry out its mission of improving the University's efforts to prevent and respond to sexual misconduct when it is chaired by the very entity it is tasked with overseeing and, in some cases, required to critique. While the CCRT can and should remain collaborative, it requires greater independence in order to

⁷⁹ *Id.* at 6-14.

effectively carry out its mission. The University could instead have the CCRT's chair or co-chairs be independently selected by an established Faculty Senate process.

In addition, the University should ensure that the CCRT has adequate representation from students, faculty, and staff members who have experienced sex-based harassment and other forms of harassment and discrimination. The University should not make changes to its policies and practices regarding sex-based harassment without soliciting and incorporating input from survivors.

* * * * *

Thank you for your consideration of these recommendations. If you have any questions, please contact sijordan@umich.edu and etang@nwlc.org.

Thank you,

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