

# Policy on Sexual and Gender-Based Misconduct

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# Background

The University of Michigan, comprised of the Ann Arbor campus, the University of Michigan Dearborn, the University of Michigan-Flint, and Michigan Medicine (collectively the “University”), is committed to creating and maintaining a safe and non-discriminatory campus community that is free from Sexual and Gender-Based Misconduct and that enables individuals engaged in its PROGRAMS OR ACTIVITIES to participate fully in the scholarly, research, educational, patient care, and service missions of the University. The University does not discriminate on the basis of sex or gender in any of its PROGRAMS OR ACTIVITIES.

# Background

- Title VII, Title IX, Clery/VAWA
- Student sexual misconduct policies and SPG 201.89-0
- *Doe v. Baum*
- Umbrella policy
- 2020 regulations
- 2022 NPRM

# Title IX

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

# Title IX: 2020 Regulations

- Sexual harassment definition
- University program or activity
- Formal Complaint & dismissal requirements

# Title IX: 2020 Regulations

## Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30).

# Program or Activity

## Program or Activity

A Program or Activity includes:

- (1) any location, event, or circumstance where the University exercises substantial control over both the Respondent and the context in which the conduct occurs;
- (2) any building owned or controlled by a Student Organization recognized by the University;  
and
- (3) a University campus.

Conduct that occurs off campus in locations or at events with no connection to the University is unlikely to occur in a Program or Activity of the University.

# Policy Scope

WHO: Students, employees, third parties

WHEN/WHERE:

- On campus or other property owned or controlled by the University;
- In the context of a University Program or Activity including, but not limited to, University-sponsored study abroad, research, field work, practicums, internship programs, online programs, employment, or patient care services rendered at the University of Michigan Academic Medical Center as defined in Regents' Bylaw 11.36; or
- Outside of a University Program or Activity, but potentially poses a serious threat of harm, has a continuing adverse effect on, or creates a hostile environment for Students, Employees, or Third Parties while on campus or other property owned or controlled by the University, or in any University Program or Activity. In determining whether the University has jurisdiction over off-campus or online conduct that did not occur in a University Program or Activity, the University will consider the severity of the alleged conduct, the risk of ongoing harm, whether both parties are members of the University Community, the impact on the University Program or Activity, and whether off-campus conduct is part of a series of actions that occurred both on and off campus.

# Policy Scope

## WHAT: Prohibited Conduct

- Sexual Assault
- Sexual Exploitation
- Sexual Harassment
- Gender-Based Harassment
- Sex/Gender-Based Stalking
- Intimate Partner Violence
- Sex/Gender-Based Discrimination
- Retaliation
- Violation of Supportive Measures

# Procedures

- Student Procedures (Respondent is a Student)
  - Investigative Resolution
  - Adaptable Resolution
  - Other Response
    - Educational Conversation
    - Training to identified group (e.g., residence hall, student org, etc.,)
    - Others as applicable
- Employee Procedures (Respondent is an Employee or Third Party)
  - Investigative Resolution
  - Adaptable Resolution
  - Mediation
  - Pre-investigation Review
  - Other Response
    - Educational Conversation
    - Training to identified group (e.g., residence hall, student org, etc.,)
    - Referral to grievance process
    - Others as applicable

# Investigation Process

- Student Respondent
- Employee Respondent (including where Complainant is a Patient)



# Impartiality

- All involved in the process **MUST** be impartial
- Avoid prejudgment of facts at issue
- Determinations must be based on the **evidence** as to whether **conduct occurred** in violation of the Policy
- Preponderance of the evidence standard: presumption of non-responsibility
- Focus on conduct, avoid stereotypes: The gender, gender identity and/or sexual orientation of any party to an investigation should have no bearing on how colleges and universities will investigate
- Be aware of implicit bias
- Credibility assessment must not be based on a party's status as a respondent or a complainant

# Impartiality: Practical Implications

- Do not rely on cultural “rape myths” that essentially blame complainants
- Do not rely on cultural stereotypes about how people of one gender or another purportedly behave
- Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
- Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
- Avoid any perception of bias in favor of or against complainants or respondents generally
- Employ interview and investigation approaches that demonstrate a commitment to impartiality
- Focus on facts of every individual case
- Strive to conduct all proceedings in manner that will not allow even a perception of prejudgment or bias for or against any party, or for against complainants or respondents generally

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# Hearing Process

- Hearing Officer questions
- Party questions of other party and witnesses are asked by the party's advisor
- Only relevant questions are permitted and the Hearing Officer must determine whether a question is relevant before it is answered
- Hearing Officer is responsible for maintaining an orderly, fair, and respectful Hearing and has broad authority, including to respond to disruptive or harassing behaviors, adjourn the Hearing, or exclude the offending person(s).

# Hearing Process: Questions

- The hearing is not intended to be a redo of the investigation
- Ask relevant, clarifying questions as necessary
- Use a consistent manner of questioning for all parties and witnesses
- Consider where open-ended vs narrower questions may be more appropriate
- Objective, impartial credibility assessments

# Relevance

Tendency to make the existence of a consequential fact more probable or less probable than it would be without the evidence

# Relevance: Complainant's Prior Sexual Behavior

Not relevant, unless:

- offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
- if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent, and are offered to prove consent; or
- if due process under the applicable law otherwise requires it.

Example: Complainant alleges that sexual contact on the occasion at issue occurred without their consent. Respondent alleges consent was present and was communicated by a combination of "code words" the parties use and non-verbal actions. Respondent says that in the past, the parties have consistently used the phrase "have playtime" to refer to engaging in sexual activity, and that on the occasion in question, Respondent asked Complainant "do you want to have playtime?" and Complainant said "yes." Questions about the parties' past sexual interactions is relevant to determine whether the question "do you want to have playtime" would reasonably be understood by the parties to refer to engaging in sexual activity would be relevant.

# Relevance: Respondent's Prior or Subsequent Conduct

- Never be used to prove character (character evidence is NOT relevant)
- May be considered for other purposes, such as: determining pattern, knowledge, or intent.
- A finding in a previous investigation that the Respondent violated the Policy by engaging in similar conduct may be relevant evidence of a pattern of behavior
- Evidence in a previous investigation that the Respondent engaged in similar behavior, but the behavior was not at that time determined to be at a sufficient level to constitute a Policy violation, may be relevant to assessing severity, persistence and/or pervasiveness, as applicable, or relevant evidence of a pattern, in a subsequent investigation.
- The relevance of pattern evidence will be determined based on an assessment of whether the previous or subsequent conduct was similar to the conduct under investigation or indicates a pattern of similar Prohibited Conduct.
- The Hearing Officer will determine the relevance of this information.

# New Evidence

- The Complainant, the Respondent, the Witnesses and others sharing information in the process are expected to provide all relevant information at the time of their interview, or as soon as otherwise possible, and to be truthful and complete in their statements throughout the process.
- Any and all information for consideration by the Hearing Officer must be provided to the Investigator during the investigation phase of the process and otherwise will not be allowed during the Hearing, unless the party asking that additional information be considered has clearly demonstrated that such information was not reasonably available to the parties at the time of the investigation or that the evidence has significant relevance to a material fact at issue in the investigation. If, after the final investigation report is issued, a party provides or identifies evidence that they did not previously provide or identify despite that evidence being reasonably available to them during the investigation process, the Hearing Officer may, at their discretion, draw a negative inference from the party's delay in providing or identifying the evidence

# If a party or witness does not appear

- Complainant, Student Procedures:
  - Generally, violation may not be found without Respondent's ability to cross-examine Complainant (*Doe v. Baum*)
  - Do not need to conduct a full hearing in these instances
  - Hearing outcome may be very brief
- Anyone but Complainant (Student Procedures) or anyone including Complainant (Employee Procedures)
  - Proceed with full hearing
  - May consider the non-appearing person's prior statements, but weight may be impacted by inability to cross

# Written Hearing Outcome

- As clear and concise as possible
- Objective, impassive, direct conclusions
  - Avoid opinion, speculation
- Factual findings and analysis of policy to those findings should be separated in the outcome
- Clear one sentence conclusion for each factual finding, or a list of supported/not supported events

# Appeals Process (Student Procedures)

- 14 days to file an appeal
- 14 days to respond to appeal filed
- External Reviewer reviews appeal(s) and response(s), and may also consider:
  - the investigation report;
  - the hearing transcript;
  - the Hearing Outcome, including the sanctioning determination;
  - any sanctioning input statements
  - any other materials the University (or the EXTERNAL REVIEWER) deems relevant and that have been shared with the parties.

The External Reviewer may, at any time, freely consult with or request additional information from the Title IX Coordinator and other University administrators as necessary.

VPSL reviews and may accept or modify the External Reviewer's determination.

# Appeals (Student Procedures)

Either party can appeal sanction(s) on the following ground:

- The sanction was clearly inappropriate and/or disproportionate to the conduct for which the Respondent was found responsible.

# Appeals Outcomes (Student Procedures)

## Possible Outcomes of Appeal of Finding

- Procedural Irregularity: Remand to Title IX Coordinator or Hearing Officer with corrective instructions
- New information: Remand to Hearing Officer to determine if new hearing is necessary and/or modifications made to outcome
- Bias: Remand to ECRT Executive Director to find replacement
- Unreasonable/disproportion sanctions: Alter/modify sanctions accordingly

# Appeals (Employee Procedures)

Either party can appeal finding on the following grounds:

- Procedural irregularity that materially affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility was made, that could materially affect the outcome of the matter; and/or
- The Title IX Coordinator, Investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that materially affected the outcome of the matter.

\*Corrective action cannot be appealed to External Reviewer but can be reviewed through applicable staff/faculty/union grievance process

# Appeals Process (Employee Procedures)

- 14 days to file an appeal
- 14 days to respond to appeal filed
- External Reviewer reviews appeal(s) and response(s), and may also consider:
  - the investigation report;
  - the hearing transcript;
  - the Hearing Outcome, including the sanctioning determination;
  - any sanctioning input statements
  - any other materials the University (or the EXTERNAL REVIEWER) deems relevant and that have been shared with the parties.

The External Reviewer may, at any time, freely consult with or request additional information from the Title IX Coordinator and other University administrators as necessary.

If not remanded, this concludes appeals process.

# Appeals Outcomes (Student Procedures)

## Possible Outcomes of Appeal of Finding

- Procedural Irregularity: Remand to Title IX Coordinator or Hearing Officer with corrective instructions
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# Identifying Potential Policy Violations

- Consistent section in ECRT final report and hearing outcome
- Separately identifies each allegation and the potential policy violation(s) the allegation represents
- If a single allegation may constitute more than one potential policy violation, provides some explanation as to whether one is inclusive of the other, etc.,

Questions?