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**VIA ELECTRONIC MAIL**



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Cc: Regents of the University of Michigan (by email)

**Re: Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence**

Dear President Schlissel, Dr. Harper, and Mr. Lynch:

The American Civil Liberties Union of Michigan and the American Civil Liberties Union Women's Rights Project (together, the "ACLU") write to express our serious concerns regarding the University of Michigan's Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (the "Interim Policy"). The ACLU supports the requirement of a live hearing and an opportunity for cross-examination in higher education to assess credibility where serious sanctions such as expulsion, suspension, or notation on a student's permanent school record are possible.<sup>1</sup> But the Interim Policy requires students who file sexual misconduct complaints to undergo cross-examination conducted personally by their alleged abusers. While cross-examination is essential, this form is not. It is

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<sup>1</sup> See ACLU, Comments in Response to Proposed Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," RIN 1870-AA14 (Jan. 30, 2019), at 24-26, <https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule>.

especially susceptible to abuse, will deter some students who have experienced sexual assault or harassment from filing complaints in the first instance, will undermine the equitable resolution of sexual harassment complaints, and risks contributing to a hostile environment on campus. It is also inconsistent with Title IX.

We therefore urge the University of Michigan to rescind the Interim Policy and replace it with a policy that complies with due process and Title IX by providing for cross-examination conducted by the parties' representatives instead of the parties themselves. We also urge the University of Michigan to provide a lawyer to either party on request to ensure that all students have access to competent representation without regard to financial circumstance.

### **I. Cross-Examination Is Important to Test Credibility and Assess Truth Where Serious Consequences Are at Stake.**

The ACLU supports the requirement of a live hearing and an opportunity for cross-examination in higher education to assess credibility where serious sanctions such as expulsion, suspension, or notation on a student's permanent school record are possible. Cross-examination is an essential pillar of fair process. Although the Supreme Court has not required cross-examination in the school discipline context, in other contexts the Court has held, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."<sup>2</sup> In cases that turn exclusively or largely on witness testimony, as is often the case in peer-on-peer grievances, cross-examination is especially critical to resolve factual disputes between the parties, and to give each side the opportunity to test the credibility of adverse witnesses.<sup>3</sup> The right is valuable for complainants and respondents, and serves the goal of reaching legitimate and fair results.

### **II. Neither Due Process Nor *Doe v. Baum* Requires the University to Allow Respondents Themselves to Cross-Examine Complainants.**

While the University should provide for cross-examination in sexual misconduct proceedings with serious consequences, it need not, and should not, allow the accused to conduct cross-examination themselves. Before the University adopted the Interim Policy, it used a "single investigator" model for formal resolution of sexual misconduct allegations. Under that model, there was no opportunity for a live hearing or cross-examination of adverse witnesses, and advisors were prohibited from testifying at meetings.

In 2018, the United States Court of Appeals for the Sixth Circuit held in *Doe v. Baum* that the University of Michigan's sexual misconduct policy violated the due

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<sup>2</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

<sup>3</sup> See AM. BAR ASS'N, ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 9 n.63 (2017) (citing *Doe v. Brandeis Univ.*, No. 15-11557-FDS, 2016 WL 1274533, at \*35 (D. Mass. Mar. 31, 2016)).

process rights of students accused of sexual assault.<sup>4</sup> Specifically, the court held, “if a university is faced with competing narratives about potential misconduct, the administration must facilitate *some form* of cross-examination in order to satisfy due process.”<sup>5</sup> The court stated that the purpose of cross-examination was twofold: (1) to “allow the accused to identify inconsistencies in the other side’s story,” and (2) to “give the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted.”<sup>6</sup> The court held that, to comply with due process, cross-examination must involve “*live questioning in front of the fact-finder.*”<sup>7</sup>

The Sixth Circuit made clear, however, that the requirement of cross-examination did not mean that the respondent had a right *personally* to cross-examine the complainant:

That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses. Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student’s agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.<sup>8</sup>

Despite this guidance from the Sixth Circuit, the Interim Policy—adopted by the University in direct response to *Doe v. Baum*—does *not* provide for cross-examination by the accused student’s agent or representative.<sup>9</sup> Under the Interim Policy, after the hearing officer poses questions to one or both parties, both parties can directly ask questions of one another and of any witnesses.<sup>10</sup> Although both parties can appoint an advisor to assist with preparation for the hearing, the advisor “may not present evidence on a party’s

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<sup>4</sup> *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

<sup>5</sup> *Id.* at 581 (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 583 (emphasis in original).

<sup>8</sup> *Id.* (citations omitted).

<sup>9</sup> University of Michigan, Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (Jan. 9, 2019), <https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-Policy-PDF-Version011519.pdf>.

<sup>10</sup> *Id.*, § XIII.B.7 (“A typical hearing may include brief opening remarks by the hearing officer; questions posed by the hearing officer to one or both of the parties; follow-up questions by one party to the other (typically with the Respondent questioning the Claimant first); questions by the hearing officer to any witness; and follow-up questions by either party to any witness (typically with the Respondent questioning the witness first).”).

behalf, present argument, *examine witnesses*, testify, disrupt, or otherwise obstruct the meeting or proceedings.”<sup>11</sup> In other words, under the Interim Policy, the claimant is cross-examined directly by her alleged abuser rather than by her alleged abuser’s advisor.

The Interim Policy’s student-on-student cross-examination is in no way required by *Doe v. Baum*. In fact, it contravenes *Doe v. Baum*’s directive that schools have an interest in “avoiding procedures that may subject an alleged victim to further harm or harassment” including by “subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.”<sup>12</sup>

### **III. The Interim Policy Violates Title IX by Subjecting Those Who Complain of Sexual Assault or Harassment to Further Trauma and Harassment, and by Deterring Them from Filing Complaints.**

Under Title IX, educational institutions must adopt policies and procedures to prevent and remedy sexual assault and harassment that denies or limits education on the basis of sex.<sup>13</sup> The Interim Policy runs afoul of these demands, as it will deter some students who have experienced sexual assault or harassment from filing complaints in the first instance, will impede the equitable resolution of sexual harassment complaints, and risks contributing to a hostile environment on campus.

The University of Michigan itself has recognized that personal cross-examination is deeply traumatic and would deter reporting. The University made the following argument in its own petition seeking rehearing of the Sixth Circuit’s decision in *Doe v. Baum*:

Students are not trained in cross-examination, and allowing an accused student to confront the claimant directly may subject an alleged victim to further harm or harassment. Indeed, fear of having to confront, and discuss in detail, a sexual assault with the very individual accused of having committed the assault may well lead alleged victims not to report cases in the first instance.<sup>14</sup>

The Sixth Circuit also recognized as much, cautioning that allowing an accused student to personally conduct cross-examination, rather than through a representative, could be harmful and a form of harassment: “Universities have a legitimate interest in

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<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Doe*, 903 F.3d at 583.

<sup>13</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett*, 503 U.S. 60 (1992); U.S. Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (stating that schools on notice about possible sexual harassment must “take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again”).

<sup>14</sup> Appellee’s Pet. for Reh’g and Reh’g En Banc at 6, *Doe v. Baum*, No. 17-2213 (6th Cir. Sept. 24, 2018).

avoiding procedures that may subject an alleged victim to further harm or harassment,” the court wrote. “And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that.”<sup>15</sup>

The federal government also recognizes the harm of a policy such as the University’s. The U.S. Department of Education’s proposed rule for Title IX compliance, released for public comment in November 2018, requires advisors aligned with the parties to conduct cross-examination due to concerns regarding “potential harm from *personal* confrontation between the complainant and the respondent.”<sup>16</sup>

To investigate how the Interim Policy affects students at the University of Michigan, the ACLU spoke with representatives of multiple groups that are active on issues of sexual misconduct, gender violence, or the law, including Jane Roe, the Title IX Project, the Panhellenic Peer Educators Program, the Sexual Assault Prevention and Awareness Center, End Rape on Campus, the University of Michigan ACLU Undergraduate Chapter, U-M Dearborn’s Empowered Arab American Women Association, the Student Sexual Assault and Harassment Legal Advocacy Service, the Disability Students Association, the Gender Violence Project, the Latino Law Students Association, Res Sista Loquitur, the Reproductive Rights and Justice Organization, and the Asian Pacific American Law Student Association. Many of the students were themselves survivors of campus sexual violence, and some of them had filed complaints while at Michigan.

There was an overwhelming consensus among the students and advocates with whom we spoke: Respondents in sexual misconduct hearings should *not* be permitted to personally cross-examine claimants, and a policy that provides otherwise will significantly impede reporting of sexual harassment and assault. These students understood that *Doe v. Baum* required the University of Michigan to implement “some form” of cross-examination. But of all possible forms of cross-examination, students stated that allowing alleged abusers to personally conduct the cross-examination is the worst imaginable option. Students informed us that being cross-examined personally by their abuser would be highly traumatic and would deter them from filing a complaint. Students also raised concerns that the prospect of personal cross-examination would have a particularly strong chilling effect on reporting by students of color, who already are more likely to feel that they do not have enough support from the University.<sup>17</sup>

This overwhelming response mirrors the general public reaction to the Interim Policy. Following the University’s announcement of its Interim Policy, the new student group Jane Roe launched an online petition calling on the University to change the cross-examination provision of the Interim Policy so that cross-examination would be

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<sup>15</sup> *Doe*, 903 F.3d at 583.

<sup>16</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61476 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106), <https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf>.

<sup>17</sup> See *Results of the 2016 University of Michigan Student Campus Climate Survey on Diversity, Equity and Inclusion*, <https://diversity.umich.edu/wp-content/uploads/2017/11/DEI-STUDENT-REPORT-FINAL.pdf>.

conducted by an advisor instead of the alleged assaulter. “The implications of this policy are almost unimaginable,” the petition states. “I was raped, and being forced to see my rapist is my biggest fear. Having him question me. Having him use his words to stab me. . . . This is too much to ask of any victim of sexual assault.”<sup>18</sup> As of the date of this letter, the petition has garnered nearly 65,000 signatures.<sup>19</sup>

The deterrent effect of the Interim Policy is especially troubling given that most survivors of sexual assault are already reluctant to report the misconduct through official channels. According to a 2015 climate survey, only 3.6 percent of Michigan students who had a nonconsensual sexual experience in the past year told an official source at the University.<sup>20</sup>

By needlessly subjecting students to further trauma and deterring students from reporting sexual assault and harassment, the Interim Policy contravenes Title IX’s requirement that schools “take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”<sup>21</sup> Instead of preventing and remedying sexual harassment, the Interim Policy will exacerbate its occurrence and heighten its effects.

#### **IV. Allowing Cross-Examination Through a Representative Is a Feasible and Preferable Alternative.**

The University of Michigan should withdraw the Interim Policy and issue a new policy that comports with both Title IX and the due process requirements outlined in *Doe v. Baum*. As the Sixth Circuit’s ruling made clear, “the university could allow the accused student’s agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.”<sup>22</sup> Indeed, as stated above, the U.S. Department of Education’s proposed rule on Title IX provides for that very alternative.<sup>23</sup>

Cross-examination through a representative is a preferable alternative for a number of reasons. First, it better furthers the purpose of Title IX. As noted above, when

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<sup>18</sup> Jane Roe, *University of Michigan: Don’t Further Traumatize Survivors of Sexual Assault*, <https://www.change.org/p/university-of-michigan-don-t-further-traumatize-survivors-of-sexual-assault>.

<sup>19</sup> *Id.*

<sup>20</sup> University of Michigan, U-M Releases Results of Campus Climate Survey Regarding Sexual Misconduct (June 24, 2015), <https://news.umich.edu/u-m-releases-results-of-campus-climate-survey-regarding-sexual-misconduct/>.

<sup>21</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 15 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

<sup>22</sup> *Doe*, 903 F.3d at 586.

<sup>23</sup> *See supra* note 16.

the ACLU sought input from students and advocacy groups most likely to be affected by the policy, the overwhelming response favored cross-examination by a representative, *not* personal confrontation by an alleged abuser. Students felt that cross-examination by a representative would not render the proceedings as hostile or abusive as cross-examination by the respondent, and therefore would not have as pronounced a deterrent effect on students who wished to file complaints.

Second, requiring that cross-examination be conducted by representatives instead of the parties will help facilitate the truth-seeking function that cross-examination is designed to promote. The complainant and respondent are not likely to be well poised to perform effective cross-examination of one another given their age, their personal stake in the outcome, and the emotionally-charged nature of sexual harassment proceedings. Questioning by a trained representative is more likely to elicit accurate testimony and reliable credibility determinations.

Third, to ensure fair proceedings and guard against abuse, the University should train representatives and hearing officers on the appropriate scope and manner of cross-examination, including the prohibition on abusive questioning. The University should also select hearing officers with relevant expertise and experience who are impartial, unbiased, and independent of the University community. Ideally, hearing examiners should be trained lawyers, as they are most likely to be well versed in the appropriate limits of cross-examination.

Fourth, we note that Michigan State University—the largest university in the state—has already implemented a policy that provides for cross-examination by representatives, not by the accused student.<sup>24</sup> Michigan State also makes advisors available to assist any student who requests one.<sup>25</sup> Given that there is already a system in place at Michigan State that is less traumatic and harmful than the Interim Policy, there is no justification for maintaining the Interim Policy’s system of allowing a student who alleges that she suffered sexual misconduct to be personally cross-examined by their alleged assailant.

Finally, to mitigate the risk of unfairness that the University has raised if only one student can afford to hire an attorney,<sup>26</sup> the University should offer to appoint counsel to any student who requests it. The expense of doing so would be relatively modest, given that University launched only 20 investigative resolutions into sexual harassment or assaults last year.<sup>27</sup> The costs associated with providing attorneys for the roughly 40

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<sup>24</sup> Michigan State University, Policy on Relationship Violence and Sexual Misconduct (Feb. 8, 2019), <https://www.hr.msu.edu/policies-procedures/university-wide/documents/RVSMPolicy.pdf>.

<sup>25</sup> Edwin Jaramillo, *MSU Revises Relationship Violence and Sexual Misconduct Policy*, State News, Feb. 12, 2019, <https://statenews.com/article/2019/02/msu-revises-relationship-violence-and-sexual-misconduct-policy>.

<sup>26</sup> See Appellee’s Pet. for Reh’g and Reh’g En Banc, *Doe v. Baum*, No. 17-2213 (6th Cir. Sept. 24, 2018).

<sup>27</sup> University of Michigan Office for Institutional Equity, *Annual Report Regarding Student Sexual & Gender-Based Misconduct & Other Forms of Interpersonal Violence: June 2017-June 2018* (Sept. 5, 2018), <https://hr.umich.edu/sites/default/files/student-sex-misconduct-report-fy-18.pdf>.

students implicated in these cases would be well worth avoiding the emotional and psychological costs of subjecting students to further trauma and harassment.

Accordingly, we urge the University to rescind the Interim Policy and replace it with a policy that guarantees cross-examination, but does not permit it to be conducted personally by the accused student. In particular, we recommend that the policy include the following key attributes:

- Cross-examination conducted by the parties' representatives.
- Appointed counsel for any student who requests it.
- Training for representatives on the appropriate scope and manner of cross-examination, including the prohibition on abusive questioning.
- The selection of hearing officers (ideally, attorneys) with relevant expertise and experience who are impartial, unbiased, independent of the University community, and trained in the appropriate scope of cross-examination as well as the University's policy.

## V. Conclusion

For the reasons set forth above, we urge the University to rescind the Interim Policy and replace it with a policy that complies with Title IX and due process. The right to cross-examination should be exercised through questioning by trained representatives rather than by the parties themselves. We hope you will take seriously our concerns, as they reflect not only the ACLU's position but also feedback from students and advocates most directly affected by the Interim Policy. Please do not hesitate to contact us to discuss this matter further.

Sincerely,



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