

**TO: University Faculty Council**  
**FROM: Jenny Kincaid, University Director of Institutional Equity & Title IX**  
**DATE: October 19, 2021**  
**RE: Proposed Revisions to UA-03**

**The Office of Institutional Equity requests approval of the following revisions to the Discrimination, Harassment and Sexual Misconduct policy (UA-03):**

1. A federal district court has vacated the provision in the 2020 Title IX final rule that required that if a party or witness does not submit to cross-examination, the decision-maker cannot rely on any statement of that party or witness. Following that decision, the Department of Education issued an [update on August 24, 2021](#), reading in part:
  2. In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.
  3. In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

Most of our Big Ten peers have already removed or are in the process of removing this provision from their policies.

The vacated provision in the regulations excludes all prior statements made or submitted by the party (e.g. prior statements to police or conduct investigators, all prior hearing testimony, including responses previously given on cross examination) if the party chooses not to answer even one question on cross. This exclusionary rule disadvantages both parties. Examples: A respondent who is facing a criminal charges as well as student conduct charges may wish not to answer a particular question on advice of their attorney, but then cannot submit other statements that they believe may help their conduct case. A complainant may have a no finding in their case in which a respondent refuses to appear at a conduct hearing, even when the respondent admitted the behavior in a prior statement to investigators or police.

Under the proposed revision, parties and witnesses remain subject to cross-examination. The only change would be that if a party does not participate in the hearing or declines to answer a cross-examination question, their prior statements may still be considered. In addition, the prior statements are still evaluated for relevance and credibility as they would be in any conduct proceeding. The proposed revision returns to the practice in place before the 2020 regulations, and also tracks the way that other types of civil or criminal legal procedures work.

The proposed language deletion appears in two sections. (Note that for all text changes, deletions are in red, added text in blue, moved text is in green):

## STUDENT SEXUAL MISCONDUCT-TITLE IX COMPLAINT RESOLUTION PROCEDURES

### F. Sexual Misconduct Hearing

10. ~~If any party or witness does not participate in the sexual misconduct hearing, the hearing may proceed; however, when deliberating, the panel may not consider the non-participating individual's statements during the investigation in the determination. Evidence provided that is something other than a statement by the party or witness may be considered. The panel may consult with legal counsel to determine questions of admissibility.~~ If Complainant or Respondent does not appear at the hearing, their Hearing Advisor **should** **may** still ask any relevant questions of other party(ies) and witness(es) on their behalf.

## ACADEMIC APPOINTEE AND STAFF SEXUAL MISCONDUCT – TITLE IX COMPLAINT RESOLUTION PROCEDURES

### H. Hearing

4. ~~If a party or witness does not submit to cross-examination at the live hearing, the DO must not rely on any statement of that party or witness in making a determination of responsibility and may not draw any inference based solely on the non-participation of any party or witness.~~

- When UA-03 was revised last year, we simply missed transferring the language regarding prior sexual history. That language (identical to that in former Sexual Misconduct Policy) needs to be re-inserted in four places, under the Investigation sections in the University and Title IX Sexual Misconduct procedures for academic appointees and staff, and in the University and Title IX Sexual Misconduct procedures for students:

Information related to prior sexual history of the parties will be prohibited except in very limited circumstances regarding prior sexual history between the parties where such information may be relevant to the issue of consent. However, consent will not be assumed based solely on evidence of any prior sexual history.

- We need to add an appeal deadline for the initial assessment in cases of employee discrimination and harassment:

## ACADEMIC APPOINTEE & STAFF DISCRIMINATION & HARASSMENT COMPLAINT RESOLUTION PROCEDURES

### B. Initial Assessment

- When the initial assessment results in a decision not to proceed with the complaint under any university procedures, once notice is given to the parties, either party may appeal that decision to the Decisional Official **within 10 calendar days of the decision** (see below).

- We propose revisions that remove the step of providing a Preliminary Investigation Report, which was a new step that we added to the three employee procedures in 2020. As written, the Preliminary Report does not include the full analysis and recommendation on a finding. This extra step has resulted in both complainants, and more often respondents, spending additional time and expense with attorneys to respond to that document; time and expense which may be unnecessary if they know what the analysis/recommendation is. The

proposed changes would still allow a review and response by the parties and access to the Investigation File, so no rights or opportunities are lost.

The proposed language changes appear in three procedures. The changes in the following two procedures below are the same, the Title IX procedures are slightly different (see below) since there is a required hearing under the regulations. As background, we did not have any employee Title IX investigations on any campus this past year.

#### **ACADEMIC APPOINTEE & STAFF DISCRIMINATION & HARASSMENT COMPLAINT RESOLUTION PROCEDURES**

#### **ACADEMIC APPOINTEE AND STAFF SEXUAL MISCONDUCT – UNIVERSITY COMPLAINT RESOLUTION PROCEDURES**

##### **Report of Investigation**

- a. Following the investigation, the Investigator will provide a **Preliminary** Investigation Report to the parties. ~~At that time, the parties will be provided access to the Investigation File.~~ The parties will be provided 10 calendar days to review the **Preliminary** Investigation Report **and any attachments**. Parties may **and** provide any additional and/or clarifying information to the Investigator **and request access to the Investigation File**. This period of 10 days will be the final opportunity for parties to submit any additional information to the Investigator.
- b. The **Preliminary** Investigation Report will include:
  - i. The specific allegation(s);
  - ii. The Respondent's response to the allegation(s);
  - iii. A summary of the relevant information gathered from the parties, witnesses and other sources; as well as explanation for any information submitted or received that was determined not relevant for inclusion; **any relevant attachments submitted by parties and used in analysis; and**
  - iv. An analysis of the information **and a recommendation as to whether the Respondent is responsible or not responsible for the alleged violation(s) of this policy, using a preponderance of the evidence standard (more likely than not); and a recommendation as to appropriate sanctions, if any, as set forth below.**
- ~~c. At the conclusion of the 10-day period, the Investigator will review the information submitted by either any party and determine whether and to what extent to incorporate such information into the Final Investigation Report. The Investigator will then finalize the Final Investigation Report and include a recommendation as to whether the Respondent is responsible or not responsible for the alleged violation(s) of this policy, using a preponderance of the evidence standard (more likely than not); and a recommendation as to appropriate sanctions, if any, as set forth below.~~
- d. The Investigator will **then** provide the **Final** Investigation Report to the DO, as well as to each party.

#### **ACADEMIC APPOINTEE AND STAFF SEXUAL MISCONDUCT – TITLE IX COMPLAINT RESOLUTION PROCEDURES**

## Report of Investigation

- a. Following the investigation, the Investigator will provide a ~~Preliminary~~ Investigation Report to the parties. ~~At that time, the parties will be provided access to the Investigation File.~~ The parties will be provided 10 calendar days to review the ~~Preliminary~~ Investigation Report ~~and any attachments.~~ Parties may ~~and~~ provide any additional and/or clarifying information to the Investigator ~~and request access to the Investigation File.~~ This period of 10 days will be the final opportunity for parties to submit any additional information to the Investigator.
- b. The ~~Preliminary~~ Investigation Report will include:
  - i. The specific allegation(s);
  - ii. The Respondent's response to the allegation(s);
  - iii. A summary of the relevant information gathered from the parties, witnesses and other sources; as well as explanation for any information submitted or received that was determined not relevant for inclusion; ~~any relevant attachments submitted by parties and used in analysis; and~~
  - iv. An analysis of the information.
- c. At the conclusion of the 10-day period, the Investigator will review any additional information submitted that is directly related and make it available to ~~both any~~ parties. The Investigator may incorporate such information into ~~a Final~~ the Investigation Report.
- d. The ~~Final~~ Investigation Report will be submitted to the DO, and the parties will be provided the ~~Final~~ Investigation Report and notified of next steps in regard to the hearing.
- e. The investigation will be conducted in a reasonable timeframe given the circumstances of the specific case

5. The UA-03 policy addresses harassment on the basis of protected categories, however, we frequently encounter behaviors that may constitute harassment and/or hostile work environment, but not on the basis of any protected class. Currently, no other employee policies explicitly reference this type of harassment, but we believe it is important to indicate that these behaviors are also prohibited and will be addressed by the appropriate human resources, academic, or student policies. We propose the following addition:

**Harassment:** Harassment prohibited under this policy is verbal or physical conduct, or conduct using technology, directed toward someone because of their membership in a protected class (or a perception that someone is a member of a protected class) that has the purpose or effect of substantially interfering with the individual's access to education or work, or creating an intimidating, hostile or offensive working environment or academic experience.

1. An individual's subjective belief that behavior is intimidating, hostile, or offensive does not make that behavior harassment. The behavior must create a hostile environment from both a subjective and objective perspective such that it unreasonably interferes with, limits, or deprives a member of the university community of the ability to participate in or to receive benefits, services, or opportunities from the university's education or employment programs and/or activities.
2. In determining whether a hostile environment exists, the university will examine the context, nature, scope, frequency, duration, and location of incidents, as well as the relationships of the individuals involved, and apply the appropriate standard according to the applicable complaint resolution procedures.

3. Examples of harassment can include offensive jokes, slurs, name-calling, intimidation, ridicule or mockery, or displaying or circulating offensive objects and pictures that are based on a protected class, including sex and gender-based harassment.
  4. Harassment not based on membership in a protected class, that has the purpose or effect of substantially interfering with the individual's access to education or work, or creating an intimidating, hostile or offensive working environment or academic experience, is also prohibited and will be addressed by the appropriate human resources, academic affairs, or student conduct processes.
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6. In January, 2021, as feedback on the interim UA-03 policy, IUB Graduate and Professional Student Government Assembly passed a resolution with a list of suggested policy and practice revisions focused on “concerns related to transparency, preventative mechanisms, and informational awareness in relation to our Discrimination, Harassment, and Sexual Misconduct procedures” especially regarding faculty misconduct and calling on the University to “provide a safer academic experience for all students.” One recommendation was to include in the higher level two sanctions more possibilities related to restrictions on working with students. As such, we propose the following revision:

#### **Sanctions**

1. Sanctions for violations of this policy include the following:
  - a. Level One Sanctions include sanctions that do not directly modify job duties or actual salary, such as informal discussions, additional training, periodic review, letter to personnel file (other than to promotion and tenure dossier which is included in Level Two Sanctions below). Level One Sanctions shall not be appropriate in the event the Respondent was found responsible for sexual assault or other sexual violence.
  - b. Level Two Sanctions include sanctions that directly modify job duties, salary or job status, including affecting compensation, consideration in tenure or promotion decisions, suspension, and termination.
  - c. When Level Two Sanctions do not result in termination, consideration should be given to the role(s) in which a faculty or staff member serves related to students, including advising, mentoring, committee-work, and other roles both within and in addition to, the primary employment position.
2. When determining the appropriate sanctions, consideration shall be given to the nature and severity of the behavior and the existence of any prior incidents or violations.