



ATIXA POSITION STATEMENT

ATIXA POSITION STATEMENT ON THE FREE SPEECH RIGHTS OF INDIVIDUALS INVOLVED IN SEXUAL MISCONDUCT PROCEEDINGS

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,500 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 3,000 Title IX Coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.

June 4, 2018

ATIXA issues this position statement to express its significant concerns regarding the inappropriate practice by colleges and universities of either explicitly or implicitly silencing parties – and their advisors – involved in campus sexual misconduct proceedings. Through our leadership in the field, we have witnessed a continued use of gag orders and related policy provisions that seek to silence these individuals. This practice is troubling because it fails to respect the free speech rights of the parties and their advisors and runs contrary to regulations and guidance put forth by both the U.S. Department of Education (ED) and the National Labor Relations Board (NLRB).

Despite the current prevalence of such confidentiality pledges or gag orders, Federal Student Aid (FSA), an office of the U.S. Department of Education, has made clear that such methods of silencing parties are not acceptable. On July 16, 2004, FSA instructed Georgetown University to discontinue use of a policy which required students reporting sexual assault to sign non-disclosure agreements in order to learn the outcome of their hearings.¹ Georgetown's policy prohibited those who refused to sign the agreements from receiving conduct outcomes and sanction information related to their reports. FSA clarified that this policy is impermissible: colleges and universities "cannot require an alleged sexual assault victim to execute a non-disclosure agreement as a pre-condition to accessing judicial proceeding outcomes and sanction information under the Clery Act."²

The National Labor Relations Board has issued similar denunciations of this type of policy. In a June 26, 2015 decision, the NLRB found that an employer's practice of instructing sexual

¹ Federal Student Aid, U.S. Dep't of Educ. (16 July 2004), FSA LETTER TO GEORGETOWN UNIVERSITY (acknowledging "open issues of genuine confusion in the higher education community" with regard to dissemination of campus judicial proceeding outcomes), available at: <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/georgetownuniversity/GUFPRD07162004.PDF>.

² *Id.* at 2.

harassment investigation interviewees to refrain from discussing matters pertaining to the investigation was unlawful.³ The NLRB determined that employees have the right to “discuss discipline or ongoing disciplinary investigations involving themselves or coworkers.” Although employers may be able to present specific, exceptional circumstances which necessitate privacy, the NLRB decision establishes the presumption that such confidentiality provisions are unlawful.

While couched in a different context, in a September 22, 2016 Advice Memorandum, the NLRB held that previously-existing Northwestern University’s rules controlling football players’ speech were unlawful and mandated that the University provide the players with significantly more freedom of expression.⁴ The NLRB noted that the players must be allowed to post on social media, discuss matters of their personal health and safety, and speak with members of the media.

The ability to discuss and critique the resolution process as it unfolds is an essential right of the parties to Title IX and related resolution proceedings. ATIXA firmly believes in robust free speech protections, especially in the context of higher education, and is deeply concerned with the prevalence of policies and/or practices aimed at limiting these protections and rights of the parties – or their advisors – involved in civil rights resolution proceedings. It is ironic to lose one’s civil rights by engaging in a process designed to protect and defend them.

While trepidation regarding sensitive communications is understandable, and schools must maintain the privacy of resolution proceedings, schools goes too far when they gag the parties from sharing their experiences, their truths, or even their critique of the resolution process. ATIXA is aware of cases in which the overzealous use of confidentiality provisions has prevented students from accessing advisors and hiring attorneys. Privacy, as envisioned by OCR,⁵ is something that must be maintained by the institution, not imposed upon the parties. As ATIXA’s mission is to continue to improve upon the manner in which sexual misconduct is addressed in higher education, ATIXA exhorts our members to maintain the highest standards of practice and we encourage our members to desist from utilizing any such speech-constraining policies or practices in their sexual misconduct proceedings.

³ National Labor Relations Board (June 26, 2015), Banner Health System d/b/a Banner Estrella Medical Center, 28-CA-023438; 362 NLRB No. 137, available at: <https://www.nlr.gov/cases-decisions/weekly-summaries-decisions/summary-nlr-decisions-fo-week-june-22-26-2015>.

⁴ National Labor Relations Board (September 22, 2016), Advice Memorandum re: Northwestern University, 13-CA-157467, available at: <https://www.scribd.com/document/327182409/NLRB-Advice-Memorandum-Northwestern-University-Football>.

⁵ OCR refers to Title IX “confidentiality”, but there is no independent or statutory source for this protection in Title IX. As such, when OCR talks about “confidentiality,” it seems to be referencing or even bootstrapping external sources of privacy protections, rather than asserting something inherent in Title IX. “Confidentiality” then in the OCR sense is not a legal status, and no privilege attaches. While confidentiality is a highly protected status under law subject only to court-made and statutory exceptions, privacy is a lower level of protection allowing internal sharing on a need-to-know basis and under whatever exceptions are created by applicable privacy protections. Thus, OCR seems to have incorporated the privacy imposed by statutes like FERPA and state employee record privacy laws, which are the only sources for such protections in law.

ATIXA is also mindful of the larger society in which schools and colleges operate, and the impact that #MeToo is having both within schools and without. More and more often, confidentiality agreements seeking to bind parties are becoming disfavored, controversial, and subject to litigation, especially when wielded by the powerful to silence the powerless.

This position statement has been ratified by the ATIXA Board of Advisors, June 1, 2018.