



ATIXA POSITION STATEMENT

ATIXA POSITION STATEMENT ON CROSS-EXAMINING THE URGE TO TRANSFORM COLLEGE CONDUCT PROCEEDINGS INTO COURTROOMS

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance and supports our over 3,000 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.

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Since the early 1960s, American courts have wisely and successfully resisted the urge to transform college and school conduct proceedings into mini criminal courtrooms. While mandating basic due process elements, courts have not considered formal due process protections such as cross-examination a necessity. Until now.

Starting in 2017, some courts have become more interventionist with respect to cases involving campus conduct proceedings, especially sexual misconduct resolutions conducted pursuant to Title IX. Since then, the Sixth Circuit, state courts in California, and federal courts in Pennsylvania have continued to expand the due process required by public universities and have started to mandate some form of cross-examination as part of campus conduct proceedings.

ATIXA issues this position statement to encourage these courts to reassess their due process demands, and to similarly encourage other courts to avoid sliding down a slippery slope that will turn college hearings into quasi-criminal courts. Requiring direct, live cross-examination is antithetical to the administrative and educational nature of college disciplinary proceedings. It is also unnecessary and of unknown efficacy. While the Sixth Circuit has referenced the Wigmore quote that "cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth," Wigmore made this pronouncement in reference to the 6th Amendment right to confrontation in criminal proceedings, not in the context of campus disciplinary proceedings.

The assertion cited by the Sixth Circuit erroneously presupposes that the complex rules of evidence in existence in the legal court system are similarly applied in the campus setting. Similarly, highly-trained attorneys, advocating for their clients in courtrooms, are not the norm in campus

disciplinary proceedings. There is no data to prove – or even support – that college Title IX proceedings will reach more accurate results if amateur and largely unregulated direct cross-examination becomes the norm.

Lest anyone misperceive our position, ATIXA believes that correctives are needed, and that the error rate in Title IX findings on college campuses is far too high. But, the Sixth Circuit and the other courts following suit have settled on the wrong solution, in our view. Robust questioning, by and of the parties throughout the investigation and any hearing process is what is needed. Investigators and/or the hearing panelists/chairs can facilitate this questioning, which will serve the same end as cross-examination, without the potentially deleterious consequences of direct confrontation between the parties. This manner of comprehensive questioning effectively, fully, and fairly brings to light the facts and evidence before those who are responsible for deciding whether a policy violation has occurred.

Where a robust exchange of questioning has taken place, the added value of direct cross-examination is actually quite limited. ATIXA has long recommended three practices that serve to efficiently discover available evidence in an equitable and fair manner. First, all investigators should solicit questions from the parties, and pose those questions the investigators deem appropriate in the investigation interviews. Second, the parties should have the right to review the full investigation report (and all materials to be used by a decision-maker) prior to a final determination, and should be able to respond to this report, in writing, on the record. Through this process, any unanswered questions will be addressed, and any challenges to the evidence or statements of a party may be countered by the other party in this fashion. Finally, the final decision-maker should render an independent decision, a decision rooted in, but not bound by, the investigation. If the process allows for the decision-maker to ask questions of and by the parties, that individual should do so with vigor, tact, and sensitivity. Automatic deference to the investigation or undue deference to any party without critical review is just a rubber stamp. Allowing sexual assumptions or implicit bias compromises the impartiality of the questions that a searching, diligent inquiry requires.

In this deliberate approach, there is little added value in direct cross-examination. Further, there are significant reasons why the right to cross-examination could backfire and detract from the quality of the proceedings. In practice, direct cross-examination could produce the opposite result from what some courts are trying to effect. Three problems arise, specifically.

First, ATIXA understands college disciplinary panels and how decision-makers process evidence and reach determinations. When observing a responding party vigorously cross-examine a reporting party with questions prepared, or asked by an attorney, decision-makers' sympathies may veer toward reporting parties. Practitioners often and understandably grapple with the decisions of this difficult process and might, upon witnessing aggressive questioning or revictimizing behavior, wish to protect reporting parties from such raw exchanges. While this type of questioning is constrained via established procedural rules in a court room, campus proceedings typically do not have such articulated or enforced parameters.

Relatedly, our judicial system has honed the art and science of cross-examination over centuries, with carefully designed checks and balances in place. Cross-examination is governed in courts by dozens if not hundreds of customs, rules, and refereed controls. Seasoned hands deftly attempt to maximize the proceeding's potential to bear fruitful evidence, while minimizing prejudicial information and character assassination.

The campus disciplinary framework, which has been deliberately crafted by higher education administrators to suit an educational setting, has not been designed to incorporate the finely balanced protections required in a criminal proceeding. As a result, direct cross-examination on campuses could either become a free-for-all, or could become overly circumscribed. While maturity levels certainly vary, the emotional toll and stresses of direct cross-examination on students at any age are in no way insignificant and cannot be ignored. Even with knowledgeable, well-trained advisors, emotional or verbal meltdown is considerably more likely than effective probing for truth.

Third, and finally, some courts are using the wrong litmus test. In their recent decisions expanding due process, these courts have referenced weighing the added value of cross-examination against the added burden to colleges in affording such a protection, a balancing test required by the Supreme Court's due process precedent established in *Matthews v. Eldridge*, 424 U.S. 319 (1976). But, none of these courts has delved into an *actual* analysis of this burden on colleges. Instead, they have just assumed the added protection is worth the cost. Courts have not considered the legitimate probability that cross-examination mandates – especially direct cross-examination mandates, requiring live, in-person exchanges – likely will result in a significant chilling effect on the willingness of individuals to report sexual misconduct. In turn, fewer individuals may seek resolution from their colleges and the redress mechanisms for sex-based discrimination designed into Title IX could be weakened as a result.

Robust and probing questioning is the process that should be due in a campus resolution proceeding. That approach honors over 50 years of due process precedent within American jurisprudence. Anything beyond that recasts college resolution proceedings and hearings into quasi-criminal courtrooms, an alteration that risks inhibiting the remedial and equitable aims of Title IX without providing more accurate outcomes for those accused.

For these reasons, ATIXA does not support a mandate for direct, live cross-examination in college and school disciplinary proceedings.

This position statement has been ratified by the ATIXA Board of Advisors, October 4th, 2018.