From: David Brown
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (topic of the comment) (cross-examination should be allowed)

The Office for Civil Rights should permit cross-examination, both by counsel, and by accused people who lack counsel.

Some have wrongly urged restrictions on cross-examination, saying that it belongs only in criminal cases, or that it should be precluded because it harms victims. These arguments miss the mark, and disregard court decisions that justify allowing cross-examination in campus discipline.

Cross-examination is not solely an entitlement in criminal cases. It is also often required in civil or campus disciplinary cases as well, as a requirement of due process or administrative law. *See, e.g., Tyree v. Evans*, 728 A.2d 101 (D.C. 1999) (due process required opportunity to cross-examine accuser before imposition of one-year no-contact order); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (cross-examination should have been permitted in campus sexual-assault disciplinary proceeding, in light of due process); *Arishi v. Washington State University*, 385 P.3d 251 (Wash. App. 2016) (cross-examination needed prior to campus discipline for sexual offense); *Liu v. Portland State University*, 383 P.3d 294 (Or. App. 2016) (cross-examination needed prior to suspension or expulsion).

So restricting cross-examination could give rise to constitutional or statutory claims against colleges under federal or state law. The Supreme Court intended to accommodate the accused's rights under federal and state law, not override them, when it stated that under Title IX, "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 649 (1999). So such rights to cross-examine should not be restricted by the Office for Civil Rights.

The argument that cross-examination harms victims or creates a sexually hostile environment proves too much. If accepted, that argument would also preclude cross-examination in civil court cases, where it is clearly an entitlement, and routinely permitted, based on a contrary judicial understanding of cross-examination's usefulness and effects.

Courts can't discriminate based on gender or race, even a little bit, or permit it in court. For example, courts can't allow lawyers to strike prospective jurors based on their gender or race. *See, e.g., J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994). Further, state actors cannot engage in sexual harassment. *See Beardsley v. Webb,* 30 F.3d 524 (4th Cir. 1994).

But no one has ever suggested that it violates the Constitution to allow cross-examination in a racial or sexual harassment lawsuit. Lawyers and even accused people representing themselves cross-examine sexual harassment plaintiffs. No one has challenged this, even though cross-examination is often used in

sexual harassment cases, and often used to defeat liability. That illustrates that it is recognized as non-discriminatory, and thus, can't violate Title IX, which simply prohibits discrimination "on the basis of sex," 20 USC 1681.

Cross-examination of sexual and racial harassment complainants routinely occurs in civil court and civil litigation, and is used to dispose of such cases. For example, if the accuser admits on questioning that she did not really view offensive comments as being a "big deal," that shows the comments did not rise to the level of harassment, because they did not create a subjectively hostile work environment, or did not interfere with an education. The Sixth Circuit dismissed a harassment claim for just that reason in *Newman v. Federal Express Corp.*, 266 F.3d 401 (6th Cir. 2001).

The only way to establish reliably whether the accused actually did (or did not) interfere with access to an education, or create a subjectively hostile environment, may be to ask the complainant questions related to those issues, on cross-examination.

For example, if the accused said things that were sexually offensive, but did not actually harm the complainant much, there is no Title IX or Title VII violation. *See, e.g., Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) ("If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

Discussing topics that are sexually offensive but do not interfere with an education is protected by the First Amendment, under the Supreme Court's decision in *Papish v. Curators of the University of Missouri*, 410 U.S. 667 (1973) and other court rulings.

The fact that a complainant may find cross-examination discomfiting is not a basis for precluding it on hostile-environment grounds. If an environment is hostile to the complainant for reasons other than sexism, it does not implicate antidiscrimination or harassment concerns under laws like Title IX or Title VII. *See, e.g., Succar v. Dade County School Board,* 229 F.3d 1343 (11th Cir. 2000) (harassment not rooted in sexism did not violate the civil-rights laws). Either men or women can be cross-examined, so it is not a gender-based practice.

"If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." *Stahl v. Sun Microsystems*, 19 F.3d 533, 538 (10th Cir. 1994). The fact that cross-examination may address sexual matters or be unpleasant for the complainant does not make it gender-based or sexually-discriminatory. Sexual discussions devoid of sexism are not sexual harassment even when they are discomfiting or inappropriate, because the civil-rights laws prohibit discriminatory harassment, not non-discriminatory harassment or behavior. *See Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514 (7th Cir. 1997); *Duncan v. City of Denver*, 397 F.3d 1300 (10th Cir. 2005)).

Cross-examination is not sexist or discriminatory in nature, but rather is motivated by a desire to uncover information. It has been described by the Supreme Court as the "greatest legal engine ever invented for the discovery of truth." (*See Lilly v. Virginia*, 527 U.S. 116, 124 (1999)).