ATIXA POSITION STATEMENT

ATIXA POSITION STATEMENT ON CONSIDERATION OF PATTERN EVIDENCE IN CAMPUS SEXUAL MISCONDUCT ALLEGATIONS

ABOUT ATIXA

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

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ATIXA issues this position statement to provide guidance to our members on the consideration of pattern evidence in sexual misconduct investigations and resolutions. Contradictory research, recent court opinions, and common questions regarding the existence and admission of pattern evidence suggest a need for clearer guidance for the field.

First, it is important to establish what we mean when we reference a pattern. ATIXA defines an alleged pattern to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A confirmed pattern exists when a preponderance of the evidence supports that the alleged acts actually occurred. The similarity can be in the type of act, commonality of chosen victims, location, consistency of premeditation, and/or signature or *modus operandi* (method of operation) of the perpetration.

Second, it is important to recognize that under Title IX, an investigation can occur within three different frameworks: incident, pattern, or climate/culture. When one behavior by one individual is being investigated, we are investigating an incident. When more than one similar behavior by one individual is being investigated, we are investigating a possible pattern. And, when an entity, institution, department, and/or the actions of multiple individuals are being investigated, we are usually investigating the potential for a hostile climate or culture.

This taxonomy of investigation types is crucial to understand, because it is important to recognize the framework for your investigation at the outset, when possible. You may be working with more than one framework at a time, and, as an investigation unfolds, you may need to shift frameworks. What starts with an investigation of an incident can become an investigation of a pattern or climate (or vice-versa) as you learn more and more incidents become known. Or, you may start off thinking

you have a pattern, but it turns out to be only an incident. Similarly, initial information about a pattern can turn into a larger investigation of a climate, and vice-versa.

While certainly an inexact science, recognizing patterns within the evidence of good faith reports involving the same responding party requires thorough investigation. Only through careful investigative methods is one able to identify repeat elements or details, if those details are sufficiently similar to create a pattern, represent a method or *modus operandi*, and/or, when considered in the aggregate, evidence an overarching scheme. This is pattern evidence. If pattern evidence is identified, we consider this evidence in two ways: in evaluating the information obtained in the current report (to aid in our credibility assessments and/or to aid in determining whether the evidence makes the current reported misconduct more likely to have occurred) and in assessing appropriate sanctions.

OCR alluded to pattern behavior in the 2001 guidance. For example, in discussing pattern as a basis for finding a hostile environment, OCR said to consider "[t]he type, frequency, and duration of the conduct. In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial."

OCR further noted:

> *In addition, by investigating the complaint to the extent possible including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action.*

And, footnote 77 of the 2001 Guidance, excerpted in its entirety below, is quite concrete about pattern:

> *For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).*

OCR has also suggested, in correspondence with ATIXA, that pattern could be broadly construed, and prior good faith allegations and/or findings of any of the behaviors on the Title IX continuum could be evidence that helps to prove the current allegations. This is quite a different approach to the student conduct model, which typically only considers previous findings in determining sanctions. But pattern can and should impact the underlying finding as well, both on campus and in court, as discussed further below.

In our role as practitioners, one of our responsibilities – as referenced by OCR above – is to remedy hostile environments. To do this, we must look for evidence of patterns and address them if they are discernible; patterns contribute to and exacerbate a hostile environment and may indicate the possibility of future recurrence. But assessing whether individuals engage in patterned behavior and deciphering which elements create a pattern is not often a straightforward task. This can be a critical skill for Title IX administrators, not just in making a finding, but in assessing the risk of a situation where a reporting party is reluctant to proceed. Pattern can be one of the reasons that a Title IX administrator decides the school or college should proceed despite the reluctance or non-participation of the reporting party.

Research on repeat offenders provides some insight into the role of pattern evidence in assessing future risk. David Lisak, a well-known clinical psychologist, has spent his career studying interpersonal violence and has been broadly published and featured in numerous documentaries. According to Lisak, a select few individuals account for the majority of campus sexual assaults, with many of these individuals committing multiple acts.

More recent research published in JAMA Pediatrics by Kevin Swartout and a group of researchers, suggests that sexual assaults on campus are not, as Lisak proposed, perpetrated by a small percentage of individuals but instead are carried out by a larger percentage of young men who don't neatly fit into a serial rapist profile. Swartout's conclusion is difficult to digest because it bucks the commonly accepted orthodoxy established by Lisak. It posits there is not a small and easily-identified group of perpetrators on campus, and suggests instead that individuals have a multitude of motivations for their actions and may or may not engage in patterns of misconduct.

Lisak's study could serve as justification to place special emphasis on possible patterns, whereas Swartout's conclusions, while equally concerning in their own way, are less supportive of a lethal risk of repeat perpetration. Given the difference in repeat perpetration findings ranging from 25%-63% depending on which study is cited, ATIXA suggests reviewing the literature carefully, digesting the methodological critiques about each study and the recency of the data to make determinations regarding pattern evidence based on these two disparate schools of thought. No matter which study holds sway with you, the literature evidences some level of repeat perpetration risk; your job is to assess the actual risk of a particular situation, not the speculative potential of possible re-perpetration. This assessment may be a key opportunity to work with your BIT (behavioral intervention team) or TAT (threat assessment team) so that your decisions are evidence-based and not assumption-based.

While the research is inconsistent, and there is no definitive OCR policy statement on how to incorporate or assess pattern evidence, two recent judges' opinions offer valuable insight into what "sufficiently similar" means so as to establish a pattern, and how pattern evidence is utilized. Both opinions occurred in the criminal legal context, where due process requirements exceed those of colleges and schools. Courts follow articulated, established rules of evidence and years of precedential case law, a very different arena from campus proceedings. Despite these distinctions, the below summaries provide some framework for considering and utilizing pattern evidence as existing within the construct of due process, rather than a violation of it. If this evidence is admissible in criminal courts, it certainly can be considered in the less formal environment of a college or school proceeding.

In a sexual assault case currently being litigated against an ex-Michigan State University football player, prosecutors sought to admit as evidence information relating to several earlier incidents involving the player.[1] The judge allowed details related to two prior incidents, one in 2013 and the other in 2014, to be admitted as evidence. In each of these interactions, the reporting party had informed police that the football player had pulled down their pants and used force during their respective sexual assaults. Because these reports had similar details to the report in the present case, the judge allowed these prior reports into evidence. The judge ruled that two additional incidents were *not* sufficiently similar to the allegations at issue to be admitted: in one of the incidents, the football player allegedly grabbed a woman and asked her about sex, but she pushed him away and left; in the other, the player allegedly told a woman he was going to rape her but didn't take further action. This opinion establishes helpful parameters for determining what conduct is considered by the courts to be sufficiently similar.

The judge's decision to allow testimony from five additional women in the retrial of Bill Cosby is also informative. This testimony was admitted under two interrelated exceptions to the prior bad acts doctrine. The first exception is the theory that the additional testimony could, in conjunction with the charged crime, evidence a larger plan. The second exception is the theory that the additional testimony demonstrated Cosby's *modus operandi* which evidenced not simply a propensity to commit sexual assault, but Cosby's actual intent – given the remarkably similar reports of Cosby's approach to drugged sexual interactions – to penetrate the victim in the present case without her consent.

Of course, our school and campus proceedings are not bound by the same evidentiary constraints as the courts, though we must observe basic due process or essential fairness. To put a fine point on this – though it may conflict with what you may hear from the responding party – consideration of pattern evidence can be required by (rather than violative of) the principles of due process and basic fairness. How we review pattern evidence is more flexible and dependent on both circumstances and policy provisions. Where there are two or more individuals who report separate

[1] Mencarini, Matt. "Past rape reports against ex-MSU football player Robertson can be used in trial." *Lansing State Journal* 2 May 2018. 6 Jul. 2018

incidents involving the same responding party, and, after investigation, there is a potential pattern of behavior, there are three primary avenues by which to proceed:

- Combine the resolutions into hearing panels or resolution proceedings with two (or more) distinct phases, provided that the school's procedures allow for this. In this process, each phase consists of a hearing involving a separate reporting party; the testimony provided may both support the determination of the existence of a pattern and may also contribute to the preponderance of the evidence and responsibility finding for the other reporting party, assuming the pattern is present with substantially similar incidents, targets, premeditation, approaches, etc.
- Hold two (or more) hearing panels or resolution proceedings, with the same decision-maker(s) for each allegation, but then conjoin the allegations when it is time to make the finding and impose any sanction.
- Hold two (or more) hearing panels or resolution proceedings with differing decision-makers. Allow each reporting party to be a witness at the panel of the other. Make separate findings, and bring together for sanctioning, if appropriate. Keep in mind that this approach requires the reporting parties to testify multiple times, which is not ideal and may contribute to re-traumatization, and may not enable comprehensive pattern consideration, making it the least viable model.

Whether conduct constitutes a pattern is for the institution to determine by a preponderance of the evidence. ATIXA recommends that information on pattern, previous violations, and other relevant history be included in an appendix to the investigation report that is not shared with the reporting party, unless relevant. Because it is the responsibility of the school or college to identify, consider, and remedy patterns, the reporting party does not generally need this information and there may be a bar to sharing it under FERPA. An exception would be in situations where prior pattern directly corroborates the present report or has aided in the credibility assessment of the current reporting party. In such a situation, that evidence would directly relate to the present proceeding and the inclusion of the prior incidents, or some portion thereof, in that the report provides relevant evidentiary support for the findings of the investigation.

In applying pattern rules, a final caution is not to confuse validated patterns with the aggregation of unsubstantiated allegations. This is also known as the "if there is smoke there must be fire" approach to investigation. However, if a student engaged in offensive conduct in a residence hall that did not rise to the level of an objectively hostile environment and then later engaged in offensive conduct in another residence hall that also did not rise to the level of an objectively hostile environment, you can't combine the two separate instances to conclude by a preponderance of the evidence that the responding party's conduct created a hostile environment. Put another way, 49% + 49% ÷ 2 = 49%, not a preponderance proving a substantiated pattern of misconduct.

This position statement has been ratified by the ATIXA Board of Advisors, as of July 13, 2018.