No. 21-8289

IN THE

Supreme Court of the United States

OCTOBER TERM 2022

KYLER PARK,

Petitioner,

v.

QUICKSILVER STATE UNIVERSITY,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

TEAM NUMBER 46

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Public universities must uphold due process protections guaranteed by the Fourteenth Amendment and Title IX for students accused of misconduct. Quicksilver State University provided Petitioner, a student accused of sexual misconduct, with adequate notice and an opportunity to be heard in a formal proceeding, but did not allow him to directly cross-examine a witness or require the witness to remove a face covering during the proceeding. Did the University satisfy due process?
2. Federal Rule of Civil Procedure 41(d) exists to deter forum shopping and vexatious litigation. This is accomplished by awarding "costs" against plaintiffs who dismiss and refile the same claims against the same defendants. Is a judge allowed to include attorney's fees as part of "costs," when doing so would further the plain meaning and purpose of the Rule?

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The decision of the United States Court of Appeals for the Fourteenth Circuit is unreported, but it is available at No. 21-4601 and reprinted beginning on page 1a of the Record. The District of Quicksilver's decision is not reported, but it is available at D.C. No. 20-cv-7615 and discussed throughout the Fourteenth Circuit's decision.

STATEMENT OF JURISDICTION

The judgment of the Fourteenth Circuit was entered on October 18, 2021. The petition for writ of certiorari was granted on October 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner brought this action under the Fourteenth Amendment and Title IX, claiming that Quicksilver State University violated his constitutional due process rights and rights under Title IX. Section 1 of the Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Title IX provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . . 20 U.S.C. § 1681.

STATEMENT OF THE CASE

I. Factual History

This case is about balancing a university's need to prevent sexual assault with the due process rights of students accused of sexual misconduct. Here, that balance strikes in favor of the university.

Kyler Park was expelled from Quicksilver State University (the "University") for violating University policies prohibiting sexual misconduct. R. at 1a. In March of 2020, Park engaged in sexual intercourse with a fellow student, Jane Roe. R. at 2a. This took place during the University's Spring Break when most students had left campus, which resulted in there being no witnesses to the encounter other than Park and Roe. R. at 3a.

When classes resumed, Park was notified by the University's Division of Student Affairs that he had been accused of "acts of sexual abuse, unwanted sexual contact, and dating violence." R. at 3a–4a. Each of these acts violate the University Code of Student Conduct. R. at 3a. Park was further notified by the University that

a student conduct hearing would adjudicate the claims against him on May 20, 2020. R. at 4a.

Before Park's hearing occurred, the University cancelled in-person classes for the rest of the semester due to the outbreak of the COVID-19 pandemic. R. at 4a. Park's hearing, however, was still held in-person as scheduled. R. at 4a. The Hearing Board (the "Board") that would adjudicate the claims included five employees and students appointed by the University's Vice Chancellor for Student Affairs. R. at 4a. Both Park and Roe attended the hearing in-person. R. at 4a. The University permitted Park to attend the hearing with his attorney. R. at 4a. All attendees at the hearing were required to wear face coverings. R. at 5a.

The hearing followed a set procedure. Before the hearing began, both Park and Roe were allowed to submit requested questions to the Board. R. at 5a. The Board then decided which questions were relevant and questioned the witnesses itself. R. at 5a. The University prohibited either party from directly cross-examining a witness. R. at 5a. This prevented Park from questioning Roe personally or through his attorney. R. at 5a. University policies further explained that the Board did not have to "observe the rules of evidence usually followed by courts." R. at 6a. The Board could also exclude irrelevant evidence. R. at 6a.

The Board asked Roe most of Park's requested questions. R. at 6a. These questions largely tested Roe's credibility and examined her memory of the encounter. R. at 6a. Park also requested that the Board question Roe on her credit-card statements and her father's occupation as the operator of a karate dojo. R. at

7a. The Board, however refused to ask these questions because it found them to be irrelevant. R. at 6a–7a.

Following Roe's questioning, Park requested that the Board disregard her statements because she wore a face mask that obscured much of her face. R. at 8a. Park argued that this prevented the Board from assessing Roe's credibility. R. at 8a. The Board refused this request. R. at 8a.

Ultimately, the Board found Park in violation of the Code of Student Conduct and recommended that he be expelled. R. at 8a. The Vice Chancellor approved this sanction. R. at 8a. Park was then expelled and brought suit. R. at 8a.

II. Procedural History

Park sued the University in the District Court of Quicksilver. R. at 8a. He alleged that the University's disciplinary proceeding violated his civil rights under § 1983 and that the University violated Title IX by reaching an erroneous outcome because of Park's sex. R. at 8a.

After Park filed his lawsuit, the University moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). R. at 9a. Judge John Kreese, a University alumnus, conducted a hearing on the University's motion. R. at 9a. On the day of the hearing, Park filed a voluntary dismissal of his lawsuit under Federal Rule of Civil Procedure 41(a)(1). R. at 9a. Almost two months after this, Park refiled his lawsuit against the University in the same district court asserting the same claims. R. at 9a. The case was assigned to a different judge. R. at 9a.

The University again moved to dismiss. R. at 10a. The University filed a motion under Federal Rule of Civil Procedure 41(d) urging the court to find that Park acted in "bad faith and/or vexatiously" and award the University its costs, including attorney's fees. R. at 10a. The requested fee amount was $74,500. R. at 10a.

The court heard the University's motions and granted both. R. at 10a–11a. The court, however, reduced the University's fee award to $28,150. R. at 11a. In granting the motions, the court did not find that Park acted in bad faith, but found that his actions were "motivated by a desire to gain a tactical advantage" and that Park "likely nonsuited his first action to avoid an unfavorable judgment on the merits." R. at 11a. Park appealed the district court's judgment to the Fourteenth Circuit. R. at 11a.

The Fourteenth Circuit affirmed the district court's judgment. R. at 40a. As to the dismissal of Park's lawsuit, the court found that the University's disciplinary proceeding did not violate Park's due process rights. It explained that Park did not have a due process right to directly cross-examine Roe during the hearing, and that any due process requirement for cross-examination was satisfied when the Board questioned Roe using questions submitted by Park. R. at 17a. The court further held that Park's due process rights were not violated when the Board did not require Roe to remove her face mask when she spoke at the proceeding. R. at 24a. As to the award of attorney's fees to the University, the Fourteenth Circuit held that the district court did not abuse its discretion in awarding fees because the

University was the "prevailing party" to the litigation and Park's nonsuit was done to gain a tactical advantage. R. at 37a–38a.

SUMMARY OF ARGUMENT

This Court should affirm the Fourteenth Circuit and find that the University's disciplinary proceeding satisfied due process requirements and that attorney's fees are included as "costs" under Federal Rule of Civil Procedure 41(d).

When a student at a public university is accused of misconduct, the university's disciplinary process must satisfy due process requirements under the Fourteenth Amendment and Tittle IX. To satisfy due process, a university must provide an accused student with notice, an explanation of the case against the student, and an opportunity for the student to present his side of the story.

Cross examination is not the lynchpin of due process in a university disciplinary proceeding. The majority of state jurisdictions and federal appellate jurisdictions hold that an accused student does not have a right to direct and unfettered cross examination. This is because a university disciplinary hearing is not a civil or criminal proceeding where a litigant has a constitutionally guaranteed right to examine or confront witnesses. Instead, this Court has historically limited the due process rights of accused students. If the student receives some kind of notice and some kind of hearing where he can present his version of events, the student's due process rights are not violated.

Some courts hold that cross-examination may be required where the case's outcome rests on the credibility of a witness. Most of these courts hold that this

requirement is satisfied where the university hearing panel conducting the proceeding questions the witnesses instead of the accused student. Under this procedure, an accused student can present his side of the story and assess the credibility of a witness. The university can also ensure that the proceeding protects the interests of the witness—often the victim of alleged sexual misconduct—and that only relevant questions are asked.

Regardless of the approach adopted by this Court, the University satisfied due process. The Petitioner received adequate notice, an explanation of the case against him, and an opportunity to present his version of events at a hearing. At this hearing, the Petitioner could submit questions for the Hearing Board to ask the witness. While the University did not permit him to directly cross-examine the witness or require the witness to remove her face mask, his due process rights were not violated.

Federal Rule of Civil Procedure 41(d) of the Federal Rules of Civil Procedure allows an award of "costs" when a plaintiff dismisses and refiles the same claim against the same defendant. The Rule, however, fails to define the word "costs," and so the Court is left to answer whether attorney's fees are awardable under rule 41(d). The answer is yes. Although the Rule does not explicitly allow an award of attorney's fees, it evinces a purpose to do so through the plain language, history, and purpose of the rule.

The plain language meaning or Rule 41(d) supports allowing an award of attorney's fees as part of "costs," because dictionary definitions and statutory

context support such a finding. Dictionary definitions from the year Rule 41(d) was written, to now, all establish that legal "costs" are believed to include attorney's fees. Such a conclusion is only furthered by a look at statutory context. For example, Federal Rule 54(d)(1) provides "costs—other than attorney's fees—should be allowed." The included clarifying language implies the drafters believed "costs" to be attorney-fees inclusive.

The history and purpose of Rule 41(d) further cement such a finding. Before Rule 41(d) was enacted, courts enjoyed significant leeway to award attorney's fees to punish bad faith plaintiffs. Specifically, courts were allowed to use attorney's fees as a penalty to discourage plaintiffs who would file claims to harass defendants. Rule 41(d) was then codified to discourage such forum shopping and vexatious litigation. Awarding attorney's fees as part of "costs" would increase the deterrent effect by proving for non-insignificant financial penalties for such bad faith action.

Even if the Court believes Attorney's fees should not always be awardable, the Court should at least find they are awardable under some circumstances. Such a finding would naturally follow from this Court's previous decision in *Marek v. Chesny*. In *Marek* the Court found "costs" in another Federal Rule of Civil Procedure to allow awarding attorney's fees when authorized by the underlying federal statute. Although only allowing attorney's fees in some situations would significantly weaken Rule 41(d), it weakens the Rule less than disallowing fees entirely.

ARGUMENT

I. A student accused of misconduct in a university disciplinary proceeding does not have a right to direct and unfettered cross-examination of witnesses, or to insist that witnesses testify without face coverings.

This case is about a violation of a university's conduct code, not a violation of law. Quicksilver State University's disciplinary proceeding satisfied the due process protections to which public university students accused of misconduct, like the Petitioner, are entitled. Therefore, this Court should affirm.

To state a claim for a procedural due process violation, a plaintiff must first identify "a liberty or property interest which has been interfered with by the State" and second show that the procedures which led to that interference were constitutionally insufficient. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). Courts have traditionally assumed the presence of a cognizable liberty or property interest where a university disciplinary process may result in expulsion. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82–85 (1978). Thus, the question here only concerns the second factor and "what process is due" to a student accused of misconduct in a university disciplinary proceeding. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Students accused of misconduct are not extended the same due process rights as individuals accused of civil or criminal wrongdoing. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975)) ("[The rights of students] in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.").

Instead, where the Court must determine "what process is due," the Court considers three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). These factors support a finding that Petitioner received due process throughout the university disciplinary proceedings.

This Court has cautioned against applying the factors from *Matthews* to create too formal a process for university disciplinary proceedings, recognizing that "[a] school is an academic institution, not a courtroom or administrative hearing room." *Horowitz*, 435 U.S. at 88. "[E]scalating [a proceeding's] formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Goss*, 419 U.S. at 583. Courts should, instead, balance "the student's interest in avoiding unfair or mistaken exclusion from the educational process against the school's interest in maintaining discipline." *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1248 (E.D. Mich. 1984) (citing *Goss*, 419 U.S. at 579–80). Courts

> ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing

> was fair, and accorded the individual the essential elements of due process.

Gorman v. Univ. of R.I., 837 F.2d 7, 13 (1st Cir. 1988).

For a university disciplinary proceeding to be fair and accord an individual student the essential elements of due process, the university's procedures must "provide a meaningful hedge against erroneous action." *Goss*, 419 U.S. at 583. To satisfy this requirement, the basic due process protections a university must provide to a student accused of misconduct are: (1) notice; (2) an explanation of the case against the student; and (3) "an opportunity to present his side of the story." *Id.* at 581. If a university provides students with "*some* kind of notice" and "*some* kind of hearing," the university has satisfied these basic due process requirements. *Id.* at 579. Even where a university following these procedures permanently expels a student, this Court has held that due process is satisfied. *Horowitz*, 435 U.S. at 90.

The touchstone of due process is fundamental fairness. *Bearden v. Georgia*, 461 U.S. 660, 666 n.7 (1983) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973)); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 299 (1992) ("Due process concerns the fundamental fairness of government activity . . . ."). When considering whether a university disciplinary proceeding satisfies fundamental fairness, there is a well-established "presumption that government officials can and will decide particular controversies conscientiously and fairly." *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986). University disciplinary boards are presumed to be honest and impartial absent a showing of actual bias. *Doe v. Univ. of Cincinnati*, 173 F. Supp.

3d 586, 601 (S.D. Ohio 2016) (citations omitted); *see also Winthrow v. Larkin*, 421 U.S. 35, 47 (1975) ("[A party challenging an administrative proceeding] must overcome a presumption of honesty and integrity in those serving as adjudicators . . . .").

A. Students accused of misconduct in a university disciplinary proceeding have no absolute constitutional or statutory right to cross-examination.

Due process in the university misconduct setting does not establish a right to the cross-examination of witnesses. Decades of settled case law hold that cross-examination is not required in university disciplinary hearings. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) ("[A hearing requirement] is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."). Due process is necessarily flexible, *see Morrissey*, 408 U.S. 471, and "the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases." *Gorman*, 837 F.2d at 16.

While due process requires universities to provide students accused of misconduct with an opportunity to be heard, as long as this opportunity permits the accused student to give his version of the events, due process is satisfied. *Horowitz*, 435 U.S. at 89–90. This Court has never required cross-examination in a university disciplinary proceeding. Here, although the Petitioner was not permitted to conduct cross-examination, he was still provided an opportunity to dispute the accusations against him, present his story, and submit questions for the Board to ask his

accuser. Thus, the University's proceeding did not violate the Petitioner's due process rights.

As the Fourteenth Circuit recognized, there is a clear majority approach to decide whether due process requires cross-examination in a university disciplinary proceeding. R. at 17a. The majority of federal circuits hold that "the Constitution does not confer on [an accused student] the right to cross-examine his accuser in a school disciplinary proceeding." *Jaksa*, 597 F. Supp. at 1252; *see also Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."). Many of these jurisdictions hold that if a university provides notice and an opportunity to be heard in an informal setting where the accused student may offer his side of the story, but cannot cross-examine witnesses, the university satisfies due process. *See infra* Appendix A; Appendix B.

Guidance promulgated by the U.S. Department of Education Office of Civil Rights (OCR) further supports the argument that cross-examination is not required in disciplinary proceedings following an allegation of sexual misconduct under Title IX. At the time of Petitioner's hearing, the relevant compliance guidance from OCR suggested that cross-examination was not required in Title IX proceedings. *See Q&A on Campus Sexual Misconduct*, U.S. Dept. of Educ. (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [hereinafter 2017 Guidance]. The guidance specifically provides that cross-examination "made available to one party in the adjudication procedure should be made equally

available to the other party." *Id.* at 5. That a university may "ma[k]e available" cross-examination clearly indicates that the university has a choice of whether to provide cross-examination at all. *See id.*

B. If this Court finds that cross-examination is required in a university disciplinary proceeding, the questioning of witnesses solely by a university hearing board satisfies due process.

Although there is no absolute right to cross-examination in university disciplinary proceedings, some jurisdictions may require cross-examination under the facts of this case. However, even under such a standard, the Petitioner still received due process in his disciplinary proceeding. In the narrow circumstances where a student does have the right to cross-examination in a university misconduct proceeding, that right is not unlimited. Nineteen state jurisdictions; the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits; and district courts in the Seventh Circuit hold that due process does not create a right for an accused student to direct unlimited cross-examination in a disciplinary proceeding. *See infra* Appendix A, Appendix B.

Cross-examination may be required when assessing a witness's credibility is determinative to the outcome of the proceeding. Where the issue is the credibility of the accuser, cross-examination is the best procedural device to "delve into the witness' story to test the witness' perceptions and memory." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *see also Maryland v. Craig*, 497 U.S. 836, 846 (1990). In these situations, due process only requires that the accused student has *some* opportunity for real-time cross-examination during the proceeding, even if only through a

hearing panel. *Haidak v. Univ. of Mass. Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (citation omitted). Even the circuits that would require cross-examination where credibility is at issue "stop short of requiring that the questioning of a complaining witness be done by the accused party." *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020) (citing *Haidak*, 933 F.3d at 69).

The jurisdictions that follow this rule distinguish between an adversarial system of questioning and an inquisitorial system. *Haidak*, 933 F.3d at 69. Generally, in the United States, all litigation occurs within an adversarial system. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); *see also Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."). By contrast, an inquisitorial system is a "system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry." *Inquisitorial System*, *Black's Law Dictionary* (11th ed. 2019). This Court has upheld the use of the inquisitorial model in administrative proceedings, such as a Social Security hearing. *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000). Lower courts have also upheld this system in university disciplinary hearings. *Haidak*, 933 F.3d at 69.

Permitting cross-examination by a hearing panel, but not by an accused student, under the inquisitorial model where credibility is an issue strikes the

proper balance between the accused's due process protections and a university's interests. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406–407 (6th Cir. 2017). The accused student is provided an opportunity to be heard without requiring a university to "transform its classrooms into courtrooms." *Jaksa*, 597 F. Supp. at 1250. Further, allowing the hearing panel to question alleged victims of sexual assault prevents the trauma or intimidation that could otherwise result from allowing an accused student to directly question the victim himself. *Doe*, 872 F.3d at 403 (citations omitted).

Moreover, "the fact that a particular procedure is possible or available does not mean that it is required under the Due Process Clause." *Horowitz*, 435 U.S. at 96 n.6. "Courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method" and, further, university disciplinary proceedings need not mirror a criminal trial. *Gorman*, 837 F.2d at 14. While direct cross-examination is a valuable tool in our criminal justice system, "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Haidak*, 933 F.3d at 69. As such, the Board acted reasonably in refusing to allow Petitioner or his attorney to conduct the cross-examination of Roe.

Walsh v. Hodge provides a useful illustration of this approach. In *Walsh*, a university professor was terminated following a sexual misconduct hearing in which no cross-examination took place. *Walsh*, 975 F.3d 475. While the court found the professor's private interest significant (the loss of employment and reputation), the

other two *Mathews* factors (risk of erroneous deprivation and government interests) outweighed the professor's interest in conducting direct cross-examination. *Id.* at 485. The court found the second factor to be most important in the analysis, noting that the risk of erroneous deprivation "is a particularly important interest in this case when the entire hearing boiled down to an issue of credibility." *Id.* at 484. The court held that the hearing committee should hear testimony from the accuser and the accused should be provided an opportunity to test their accuser's credibility. *Id.* In assessing the third *Mathews* factor, the court found that "the University has three public interests: (1) preserving the University's resources to serve its primary function of education, (2) protecting vulnerable witnesses, and (3) providing a safe environment for other members of the faculty and student body" and noted that it "ha[s] recognized the importance of all three." *Id.* In balancing these factors, the *Walsh* court found that the hearing committee should have engaged in questioning of the accuser, that the professor should have been permitted to submit questions to the committee for questioning, and that "cross examination . . . by Walsh personally would [not] have significantly increased the probative value of the hearing." *Id.* at 485. The University provided these exact procedures in the present case. In fact, a later case, noting *Walsh*'s requirements, asserted that "a university could have *avoided* a due process violation by doing precisely what [the university] did here," when it followed these procedures. *Van Overdam v. Tex. A&M Univ.*, 43 F.4th 522, 529 (5th Cir. 2022). Here, the Board's refusal to allow direct cross-examination by

petitioner or his attorney perfectly aligns with the standard that petitioner advocates adopting in the present case.

The inquisitorial model is also consistent with Title IX. At the time of the Petitioner's disciplinary proceeding on May 20, 2020, the Department of Education assessed Title IX questions using the Department's 2001 Revised Sexual Harassment Guidance and a 2017 interim guidance document on sexual misconduct. 2017 Guidance; *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Dep't of Educ. Off. for Civil Rights (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Guidance]. Under the policies applicable at the time of the hearing, accused students did not have a right to unfettered cross-examination. *Id.* Instead, the accused could submit questions to the hearing board to be asked at the proceeding. 2017 Guidance at 5. The Department of Education's current policy states: "Courtroom rules of evidence and procedure will not apply." *Questions and Answers on the Title IX Regulations on Sexual Harrassment*, U.S. Dep't of Educ. Off. for Civil Rights, at 46 (July 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf [hereinafter 2021 Guidance]. Accused students still do not have an unlimited right to cross examination. *See* 34 C.F.R. § 106.45. If cross-examination is permitted, the accused must submit his questions to the decision-maker for approval. 34 C.F.R. § 106.45(b)(6)(i). The decision-maker has ultimate discretion as to whether a question may be asked during the proceeding. *Id.*

C. Due process does not hand accused students a blank check to dictate the circumstances of cross-examination in a university disciplinary proceeding.

The University's disciplinary proceeding followed the inquisitorial system. The Petitioner was not allowed to directly cross examine the complainant, but was allowed to submit questions to the Hearing Board. R. at 6a. The Board, as the decision-maker, could then decide what questions it would ask the complainant. *Id.* The Board denied Petitioner's request to require the witness to remove a face mask due to the outbreak of the COVID-19 pandemic at the time of the hearing. R. at 8a. These actions satisfied due process and complied with Title IX.

1. The Board's selection and refinement of Petitioner's questions for cross-examination satisfy due process.

The Board properly selected and refined questions for cross-examination that had been provided by Petitioner in compliance with its duty to reasonably question Roe. While the board did not ask every question submitted by the Petitioner, this does not violate due process. *Doe v. Cummins*, 662 Fed. App'x 437, 439 (6th Cir. 2016). Title IX policy at the time of the hearing only allowed a hearing board to consider evidence that was relevant to resolving the dispute. 2017 Guidance at 4; 2001 Guidance at 9. Current federal regulations hold: "Only relevant cross-examination and other questions may be asked of a party or witness." 34 C.F.R. 106.45(b)(6)(i); *see also* 2021 Guidance at 49 ("Only relevant questions may be asked of a party or witness."). The Petitioner's questions which were rejected by the hearing board asked about the complainant's father's occupation and the complainant's credit card statements. R. at 7a. These questions were irrelevant and

their exclusion did not deny the Petitioner his due process rights. "There was nothing unfair—much less constitutionally unfair—about the Board's decision to keep its focus on the events at issue." *Haidak*, 933 F.3d at 68.

To provide an illustration, Petitioner argues that the Board should have asked Petitioner's questions about the complainant's father's occupation. However, asking these questions was likely to derail the hearing and create an environment where the cross-examination was exploited by Petitioner as an opportunity to harass Roe. Neither of these probable outcomes were acceptable. Although student disciplinary proceedings need not abide by judicial rules of evidence, *Nash*, 812 F.2d at 665, a board's choice to limit questioning to only subjects deemed relevant is well within the bounds of reasonableness, particularly considering the burden that a potentially endless—and likely fruitless—cross-examination would impose on university officials. *See Cummins*, 662 F. App'x at 448. Further, while there may have been a small likelihood that Petitioner's questions of Roe related to her father's karate dojo would have discredited her testimony, this is outweighed by the University's interest in "protecting vulnerable witnesses." *Walsh*, 975 F.3d at 484. "Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment." *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018). To the extent that the Board determined this line of questioning would be unnecessarily harassing, it was reasonable for the Board to refuse to ask questions provided by Petitioner.

In conducting cross-examination of witnesses in university sexual misconduct proceedings, a Board may be selective about which respondent-promulgated questions to ask, so long as they "conduct a hearing reasonably calculated to get to the truth by allowing [the respondent] to be heard after [the complainant] testified and by examining [the complainant] in a manner reasonably calculated to expose any relevant flaws in her claims." *Haidak*, 933 F.3d at 71. The Board satisfied this standard through its inquisitorial method of questioning.

2. Neither the Sixth nor the Fourteenth Amendment permit students accused of misconduct to require a witness to remove a face covering.

Petitioner claims that he was denied due process because the Board did not require Roe to testify without a face mask, either in person or remotely. The Board's decision to allow Roe to testify in person with a face mask was reasonable, and did not deny Petitioner due process, as Roe's credibility was still adequately ascertained.

Criminal defendants have a right under the Sixth Amendment to have an unimpeded opportunity to cross-examine a witness face-to-face, compelling the witness to answer questions before "the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). In the early days of the COVID-19 pandemic, there were many concerns about the right of the accused to adequately confront their accuser in the criminal context. *See, e.g.*, *United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D.

Cal. 2020). Some courts required witnesses in criminal trials to either remove their masks when testifying or replace their masks with a clear face shield. *United States v. Thompson*, 543 F. Supp. 3d 1156, 1164 (D. N.M. 2021); *Rodriguez v. State*, No CR-21-0141, 2022 Ala. Crim. App. LEXIS 35, at *28 (July 8, 2022). Other courts have permitted witnesses to wear facemasks during criminal trials throughout the pandemic. *People v. Alvarez*, 75 Cal. App. 5th 28, 38 (2022); *United States v. Crittenden*, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at *20 (M.D. Ga. Aug. 21, 2020) ("The Confrontation Clause does not guarantee the right to see the witness's lips move or nose sniff, any more than it requires the jurors to subject the back of a witness's neck to a magnifying glass to see if the hair raised during particularly probative questioning."). Although the Confrontation Clause seeks to ensure face-to-face confrontation, that right "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849.

Nonetheless, the constitutional right established by the Confrontation Clause does not exist for accused students in a university disciplinary proceeding. *See Jaksa*, 597 F. Supp. at 1252. Disciplinary proceedings against students are not criminal trials and are not required to provide an accused with the same protections as a criminal defendant. *Doe v. Univ. of Ky.*, 860 F.3d 365, 370 (6th Cir. 2017); *see also Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) ("A university is not a court of law, and it is neither practical nor desirable it be one.") (quoting *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005)). Because the Sixth

Amendment does not apply in this context, Petitioner's argument that the wearing of a facemask by his accuser infringed on his right to confront her must fail.

Relatedly, Petitioner argues that Roe's face mask deprived him of due process by making it impossible for the Board to assess her credibility, which was an important factor in Petitioner's hearing. This is not so. While the face mask did partially obscure Roe's face, demeanor is more than just facial expression:

> The fact that covering the nose and the mouth with a protective mask does not allow for observing these facial features does not mean that witness demeanor cannot be examined. Witness demeanor can otherwise be verified through the observation of their body language, the gestures that they make with their eyes and their eyebrows, hesitancy, contradictions, mannerisms, doubts, and vacillations. In other words, the evaluation of witness demeanor is not circumscribed to their nose and mouth, but rather it encompasses a great many other characteristics.

People v. Cruz Rosario, 2020 TSPR 90, 204 P.R. Dec. 1040 (2020). Further, courts who have examined the issue of demeanor when a witness's face is partially obscured, even prior to the pandemic, have found that an unobstructed view of the witness's eyes are the most important factor in assessing credibility. *Commonwealth v. Smarr*, 220 A.3d 633, 633 (Pa. Super. Ct. 2019) ("No precedent has established that a witness's clothing or accessories renders a physical, in-court confrontation other than face-to-face, particularly where the clothing does not obstruct the witness's eyes.").

This Court has acknowledged that, even in the criminal context, unobstructed, face-to-face confrontation is not absolute, particularly "where denial of such confrontation is necessary to further an important public policy" and the

reliability of testimony is otherwise assured. *Craig*, 497 U.S. at 850. "[P]rotecting vulnerable witnesses" and "providing a safe environment for . . . the faculty and student body" have been recognized as important interests protected by public universities. *Walsh*, 975 F.3d 475. In light of the evolving and uncertain nature of the COVID-19 pandemic at the time of Petitioner's hearing, it was appropriate for the Board to allow in-person witnesses to testify while wearing a face mask to protect their personal safety and the safety of the entire University community.

Because the Board had adequate opportunity to assess the complainant's demeanor, despite her nose and mouth being covered by a face mask, Petitioner was not deprived of due process.

II. The plain language, history, and purpose of Federal Rule of Civil Procedure 41(d) demonstrate that attorney's fees are included in "costs."

Federal Rule of Civil Procedure 41(d) states, in relevant part: "the court . . . may order the plaintiff to pay all or part of the *costs* of [a] previous action." Fed. R. Civ. P. 41(d) (emphasis added). The rules, however, provide no meaningful guidance as to the definition of costs beyond that. This has led the Court to the question of whether "costs" as described in Federal Rule 41(d) include attorney's fees. They do. Providing for attorney's fees under Federal Rule 41 would provide the most effective deterrent to forum shopping and vexatious litigation, while also holding true to the text, history, and purpose of the Rule.

The Court today faces a difficult question and one that has led to a significant circuit split. Although there seems to be disagreement on the approach, all but one

circuit have reached the same conclusion: attorney's fees should be allowed in at least *some* cases. *See Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24 (2d Cir. 2018) (explaining that only the Sixth Circuit has found "such fees are never available under the rule"). This Court in *Key Tronic Corp. v. U.S.* provided a two-step approach to questions of statutory interpretation involving "costs." 511 U.S. 809, 815 (1994). First, the Court looks to whether the statute explicitly mentions recovery of attorney's fees. *Id.* If not, the Court looks to whether the statute "otherwise evinces an intent to provide for such fees." *Id.* Ultimately, this approach pays credence to the long-standing "American rule" of not allowing attorney's fees unless authorized, while also respecting the Court's ability to penalize "bad faith" or "vexatious" action. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) ("a court may assess attorney's fees when a party has '"acted in bad faith, vexatiously, wantonly, or for oppressive reasons."').

Here, it is undisputed that Rule 41(d) does not explicitly mention recovery of attorney's fees. The Court is thus left to decide whether Rule 41(d) "otherwise evinces an intent to provide" attorney's fees. To answer questions of intent, the Court first looks to the rule's plain meaning and if the plain meaning is ambiguous, the Court then proceeds to the purpose and history of the rule to establish a definition. *See Rubin v. United States*, 449 U.S. 424, 424 (1981) ("When the terms of a [rule] are unambiguous, judicial inquiry is complete"); *see also Freeman v. Quicken Loans*, Inc., 566 U.S. 624, 632 (2012) (establishing that a statute should not be read in a manner which would "destroy the tandem character of activities that the text

envisions"). Ultimately, the language of Rule 41(d) establishes that attorney's fees are allowed under the Rule, and a reading in light of its history and purpose only emphasizes this concept.

A. Definitions and statutory context support a reading of "costs" in Rule 41(d) that includes attorney's fees.

A plain meaning interpretation of "costs" under Rule 41(d) includes attorney's fees. Although the Rule fails to explicitly mention recovery of attorney's fees, such a failure is not controlling. *See Key Tronic*, 511 U.S. at 815 ("absence of specific reference to attorney's fees is not dispositive"). Rather, in the absence of explicit language, the Court looks to dictionary definitions and reads the language in context of surrounding provisions to ascertain plain meaning. *See Muscarello v. United States*, 524 U.S. 125, 128 (1998) (explaining a word's "primary meaning" comes from the dictionary); *see also Babcock v. Kijakazi*, 142 S. Ct. 641, 645 (2022) ("This statute's plain meaning 'becomes even more apparent when viewed in' the broader statutory context." (quoting *FCC v. AT&T 646 Inc.*, 562 U.S. 397, 407 (2011))). Both approaches lead to a reading of Rule 41(d) that includes attorney's fees.

First, "costs," in both legal and non-legal dictionaries, has been explicitly defined to include attorney's fees. Webster's Second New International Dictionary from 1937 provides insight as to the definition of "costs" at the time Rule 41(d) was written. It provides that costs in law are "expenses incurred in litigation" including "those payable to the attorney or counsel by his client." Webster's Second New Int'l

Dictionary 600 (Unabridged ed. 1937). Similarly, Black's Law Dictionary defines "costs" as "expenses of litigation, prosecution or other legal transaction." *Costs, Black's Law Dictionary* (11th ed. 2019). Even if the Court were to consider the narrowest possible reading of both definitions, they could hardly be seen to preclude including attorney's fees. Additionally, Black's Law Dictionary has previously explained that "'costs' is frequently understood as including attorney fees." *Costs*, *Black's Law Dictionary* 416 (4th ed. 1968). The definition of "costs" has remained consistent for 82 years. Whether this Court embraces the definition from 1938, when the Rule was enacted, or now, the result remains the same. Costs include attorney's fees.

When looking to the broader statutory context, this conclusion is strengthened. Rule 54(d)(1) provides an example of "costs" within the Federal Rules of Civil Procedure. Fed. R. Civ. P. 54(d). Rule 54(d)(1) provides: "costs—other than attorney's fees—should be allowed to the prevailing party." *Id.* This shows that the drafters, when writing the Federal Rules, thought "costs" to be *inclusive* of attorney's fees and, therefore, felt the need to clarify that costs "other than attorney's fees" are awardable to the prevailing party under Rule 54. Without such a belief, the clarifying language would be unnecessary.

This still holds in light of arguments that other provisions provide specifically for "attorney's fees" and, therefore, Rule 41(d) does not include attorney's fees. Other provisions of the Federal Rules that provide specifically for "attorney's fees" do not include the word "costs." Rather, the oft-cited Rules 30, 37, and 56 all provide

"reasonable *expenses*, including attorney's fees." *See* Fed. R. Civ. P. 30, 37, 56. This highlights the difference in the drafters' intentions when using the word "expenses" and the word "costs." As explained above, the drafters believed the word "costs" to include attorney's fees, but not the word "expenses." As a result, the Federal Rules provide explicit provisions for attorney's fees when a rule includes "expenses," but not when a rule includes "costs." This idea is only furthered by the history and purpose of Rule 41(d).

B. Allowing judges to award attorney's fees under Rule 41(d) furthers the Rule's purpose by combatting forum shopping and vexatious litigation.

The history and purpose of Rule 41(d) both buttress the idea that attorney's fees are included in "costs." Although the history of Rule 41(d) is scarce, turning to the circumstances that led to its creation and reading such circumstances in light of the rule's purpose more conclusively establishes that "costs" include attorney's fees. *See Marek v. Chesny*, 473 U.S. 1, 16 n.5 (1985) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose." (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948))). At bottom, Rule 41(d)'s purpose is to discourage forum shopping and vexatious litigation and allowing recovery of attorney's fees would help further that purpose.

Before the enactment of Rule 41, courts maintained discretion to award costs (including attorney's fees) in the presence of bad-faith action on behalf of a plaintiff. *See, e.g., Reaume v. Wayne Circuit Judge*, 89 N.W. 953, 954 (Mich. 1902) ("on condition that the plaintiff pay the taxable disbursements incurred by defendants

for the purpose of trying this case, and an attorney fee of $50"). For example, in *Henderson v. Griffin*, the Court found no error in a lower court providing for costs (including attorney's fees) when an individual brought the same claim against the same defendant, where such a claim was already addressed once before. 30 U.S. 151, 159 (1831). The Court explained specifically that "[r]ules of this kind are granted by courts to meet the justice and exigences of cases." *Id.* Put differently, in 1831, this Court found that federal courts were allowed to award a defendant attorney's fees in the presence of vexatious litigation. *See id.* Rule 41 was put in place not to change this common law practice, but to codify it. In fact, the dearth of advisory committee notes alludes to as much. *See* Fed. R. Civ. P. 41 advisory committee notes; *see also Anders v. FPA Corp.*, 164 F.R.D. 383, 389 (D.N.J. 1995) (explaining that "there is a paucity of caselaw on the interpretation of the language of Rule 41(d)."). If the drafters wanted to abridge a long-standing practice of federal courts, they surely would have provided for it in the notes of the Federal Rule. They did not.

This Court also provided context on the history of Rule 41 in *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 397 (1990). The Court first explained that Rule 41 was promulgated to "to eliminate 'the annoying of a defendant by being summoned into court in successive actions.'" *Id.* at 397. The Court went on to explain that Rule 41 was in place to "curb[] abuses of the judicial system" and added that baseless filing "burden(s) courts and individuals alike with needless expense and delay." *Id.* In light of the history above, this purpose follows from the common law practice that

provided judicial discretion to award costs to curb such "bad faith" action. Courts have since agreed that the purpose of Rule 41(d), to "deter forum shopping" and "vexatious litigation," is uncontested. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000).

Allowing judges the discretion to award attorney's fees substantially furthers this purpose, while disallowing attorney's fees undermines it. The "costs" of an action when attorney's fees are not included are often minimal and would not deter frivolous refiling. For example, in *Horowitz*, the Second Circuit discussed the difference in costs between awarding attorney's fees and not. 888 F.3d at 26. The court found that costs, exclusive of attorney's fees, would be only a $15.00 charge for delivery of documents and a $60.48 charge for a transcript fee. *Id.* Although the court did not explain exactly how much larger the "costs" would be with attorney's fees, it did explain it was "wholly unconvinced such small payments would effectively deter litigants." *Id.* When a plaintiff has already demonstrated their willingness to spend the necessary amount of money to dismiss and re-file a claim, a payment as small as $75.48 would hardly deter them from such an action. Attorney's fees, however, likely would.

Beyond this, the instant case is the perfect example of conduct Rule 41(d) is intended to deter. Plaintiff filed a case in Quicksilver District Court. R. at 9a. After a hearing on a motion for summary judgment that the plaintiff presumed would be unfavorable to him, plaintiff voluntarily dismissed the lawsuit, and then refiled, asserting the same claims as before. *Id.* As explained by this Court, Rule 41 is in

place to "eliminate" defendants being "summoned into court in successive actions." *Cooter & Gell,* 496 U.S. at 397. Providing that such a plaintiff need only pay "costs" excluding attorney's fees would hardly deter this conduct and would leave the rule toothless. Adoption of a definition must not produce an outcome so absurd or contrary to the legislative intent. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of [the statute] 'would produce an absurd and unjust result which Congress could not have intended.'" (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982))); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012) (describing the absurdity doctrine).

C. Allowing attorney's fees in at least some cases is consistent with this Court's precedent.

Although a reading of the rule in light of the plain meaning, history, and text supports a definition that *always* allows judges discretion to award attorney's fees, judges must at least be allowed to award attorney's fees in *some* cases. This Court has not addressed Rule 41(d) before, but has addressed the definition of "costs" in the context of another Federal Rule. This Court's prior decision should serve, at least, as a floor for the interpretation of "costs" awarded under Federal Rule 41(d). Such a decision inherently precludes any reading of the rule that *never* allows recovery of attorney's fees, because it provides that "costs," even when it does not explicitly say so, allows for recovery of attorney's fees.

In *Marek*, this Court addressed whether "costs" under Federal Rule 68 included attorney's fees. 473 U.S. at 5. The *Marek* Court, looking to strike a balance between the need for explicit congressional intent and the Rule's underlying purpose, found that Rule 68 allowed an award of attorney's fees only when the underlying statute authorized it. *Id.* at 11. In doing so, the Court emphasized that such a reading was in light of the Rule's "neutral" purpose of encouraging settlements. *Id.* at 10. Ultimately, this Court found that even such a neutral rule, when interpreted to exclude attorney's fees, would be left toothless. *Id.* at 11. As a result, the Court allowed for attorney's fees under some circumstances. *Id.*

Such a reading of Rule 41(d) would likely be unwise for a few reasons. First, such a construction would draw arbitrary distinctions between statutes and punish some plaintiffs more than others. As the *Horowitz* court explained, there are often sister statutes between state and federal law that have differing provisions on attorney's fees. *Horowitz*, 888 F.3d at 26 n.6 ("For example, attorneys' fees are allowed to prevailing parties under federal anti-discrimination statutes but not under certain New York anti-discrimination statutes, which are 'essentially the same' as their federal counterparts."). This would allow plaintiffs to continue engaging in gamesmanship when bringing cases, and arbitrarily punish some and not others. Second, Rule 68 does not offer judges the same level of discretion that Rule 41(d) does. The cost provision of Rule 68 is mandatory, whereas Rule 41(d) provides that the court "may" award costs. Fed. R. Civ. P. 68, 41(d). Third, Rule 41(d) is a negative rule, not a neutral rule. This means Rule 41(d) is in place to

deter specific conduct; such a purpose would be better served by allowing judges the discretion to allow attorney's fees under *all* circumstances, not just some. *See Andrews v. Am.'s Living Centers, LLC,* 827 F.3d 306, 311 (4th Cir. 2016) (explaining the "goal of Rule 41(d) [is] to deter forum shopping and vexatious litigation").

At bottom, a reading of Rule 41 that allows for attorney's fees in only some cases is not ideal. It does, however, leave the Court with the ability to offer sanctions deterring specific conduct in at least some cases. Although such a reading would handicap Rule 41(d), a reading completely disallowing judges to award attorney's fees would destroy it altogether. A reading disallowing fees entirely would go against not only the plain meaning, history, and purpose of Rule 41(d), but would also go against this Court's precedent and lead to an "absurd" result that undermines the presence of the Rule as a whole.

CONCLUSION

Neither the Fourteenth Amendment nor Title IX requires a university to transform its classrooms into courtrooms when conducting disciplinary proceedings. The University provided the Petitioner with the due process protections to which he was entitled, but rejected the Petitioner's efforts to transform his hearing into a trial-like proceeding. This hearing, while dissatisfactory to the Petitioner, satisfied due process. The Fourteenth Circuit properly affirmed the dismissal of the Petitioner's suit against the University. The circuit court also properly affirmed the award of attorney's fees. Rule 41(d) exists to deter plaintiffs from doing exactly what the Petitioner did: dismissing and refiling a suit to gain a tactical advantage.

The Court can fulfill this purpose by including attorney's fees as "costs" under the Rule. This Court should affirm the decision of the Fourteenth Circuit.

Respectfully submitted,
Team No. 46
Counsel for Respondent
November 21, 2022

APPENDIX A

An Accused Student's Right to Cross Examination in State Jurisdictions

State	Due Process Right to Cross-Examination Recognized	Due Process Right to Cross-Examination Not Recognized	Case
Arkansas		✓	*Smith v. Denton*, 895 S.W.2d 550, 559 (Ark. 1995).
California	✓		*Doe v. Allee*, 30 Cal. App. 5th 1036, 1069 (Cal. Ct. App. 2019).
Colorado	✓		*Nichols ex rel. Nichols v. DeStefano*, 70 P.3d 505, 508 (Colo. App. 2002).
Connecticut		✓	*Danso v. Univ. of Conn.*, 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007).
Delaware	✓		*Bd. of Educ. of New Castle Cty. Vocational Tech. Sch. Dist. v. Clark*, 1988 WL 47096, at 1 (Del. Super. Ct. May 3, 1988).
Florida	✓		*Fla. Int'l Univ. v. Ramos*, 335 So. 3d 1221, 1225 (Fla. Dist. Ct. App. 2021).
Georgia		✓	*Life Chiropractic Coll., Inc. v. Fuchs*, 337 S.E.2d 45, 48 (Ga. Ct. App. 1985).
Illinois	✓		*Colquitt v. Rich Tp. High Sch. Dist. No. 227*, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998)
Indiana		✓	*Reilly v. Daly*, 666 N.E.2d 439, 444–45 (Ind. Ct. App. 1996)
Iowa		✓	Lunde v. Iowa Bd. of Regents, 487 N.W.2d 357,359–60 (Iowa Ct. App. 1992).
Kansas	✓		*Smith v. Miller*, 514 P.2d 377, 387 (Kan. 1973).

Kentucky		✓	*Stathis v. Univ. of Kentucky*, No. 2004-CA-000556-MR, 2005 WL 1125240, at 3 (Ky. Ct. App. May 13, 2005).
Maryland		✓	*Miller v. Bd. of Educ. of Caroline Cnty.*, 690 A.2d 557, 560-61 (Md. Ct. Spec. App. 1997).
Massachusetts		✓	*Ding ex rel. Ding v. Payzant*, No. 03-5847, 2004 WL 1147450, at 12 (Super. Ct. Mass. May 20, 2004).
Michigan		✓	*Lee v. Univ. of Michigan-Dearborn*, No. 284541, 2009 WL 1362617, at 4 (Mich. Ct. App. May 12, 2009).
Mississippi		✓	*Hinds Cnty. Sch. Dist. Bd. of Tr. v. R.B.*, 10 So.3d 387, 400–01 (Miss. 2008).
Missouri		✓	*Knapp v. Junior C. Dist. of St. Louis Cnty., Mo.*, 879 S.W.2d 588, 592–93 (Mo. Ct. App. 1994).
Montana		✓	*State v. Clapp*, 263 P. 433, 437 (Mont. 1928).
New Jersey		✓	*Rockwell v. William Paterson U.*, No. 1679-13T4, 2015 WL 9902440 (Super. Ct. N.J. App. Div. Jan. 25, 2016).
New Mexico		✓	*Scanlon v. Las Cruces Public Sch.*, 172 P.3d 185, 191–92 (N.M. Ct. App. 2007).
New York		✓	Matter of Jacobson v. Blaise, 157 A.D.3d 1072, 1076 (N.Y. App. Div. 2018).
North Carolina	✓		*Alexander v. Cumberland Cty. Bd. of Educ.*, 615 S.E.2d 408, 415 (N.C. Ct. App. 2005).
Pennsylvania	✓		*Ruane v. Shippensburg Univ.*, 871 A.2d 859, 862 (Pa. Commw. Ct. 2005).

Rhode Island		✓	*Felkner v. R.I. Coll.*, 203 A.3d 433, 457–58 (R.I. 2019).
South Carolina	✓		*Stinney v. Sumter Sch. Dist. 17*, 707 S.E.2d 397, 399 (S.C. 2011).
Tennessee		✓	*Anderson v. Stanton*, No. E2009-01081-COA-R3-CV, 2010 WL 2106218, at 8 (Tenn. Ct. App. May 26, 2010).
Texas	✓		*Texarkana Indep. Sch. Dist. v. Lewis*, 470 S.W.2d 727, 736 (Tex. Civ. App. 1971).
Vermont		✓	*Nzuve v. Castleton State C.*, 335 A.2d 321, 324 (Vt. 1975).
Virginia		✓	*Woods v. Winchester Sch. Bd.*, No. 98-213, 1999 WL 33732641, at 7 (Va. Cir. Ct. July 15, 1999).
Washington	✓		*Stone v. Prosser Consol. Sch. Dist. No. 116*, 971 P.2d 125, 128 (Wash. Ct. App. 1999).
West Virginia	✓		*North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 417 (W. Va. 1977).
Total	**12**	**19**	

APPENDIX B

An Accused Student's Right to Cross Examination in Federal Circuits

Circuit	Due Process Right to Cross-Examination Recognized	Due Process Right to Cross-Examination Not Recognized	Case
First		✓	*Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).
Second		✓	Winnick v. Manning, 460 F.2d 545, 549–50 (2nd Cir. 1972).
Third	✓		*Doe v. Univ. of the Scis.*, 961 F.3d 203, 215 (3d Cir. 2020).
Fourth		✓	*Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73–74 (4th Cir. 1983).
Fifth		✓	*Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961).
Sixth		✓	*Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005).
Seventh		✓	*B.S. ex rel. Schneider v. Bd. of Sch. Tr., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 899-900 (N.D. Ind. 2003); *Witvoet v. Herscher Cmty. Unit Sch. Dist. No. 2*, No 97-2243, 1998 WL 1562916, at 5 (C.D. Ill. May 27, 1998).
Eighth		✓	*Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867–68 (8th Cir. 2020).
Ninth	✓		*Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973).
Tenth		✓	*Brown v. Univ. of Kansas*, 599 Fed. App'x. 833, 837–38 (10th Cir. 2015).
Eleventh		✓	*Nash v. Auburn Univ.*, 812 F. 2d 655, 664 (11th Cir. 1987).
Total	**2**	**9**	