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The "Live Hearing" Requirements in the Department of Education's Title IX Final Rule: Start Your Engines

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Trial lawyers around the country are familiar with John Henry Wigmore's maxim that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." The accuracy of Professor Wigmore's assertion is itself a matter of debate. Nevertheless, that "legal engine," a bedrock of courtrooms for centuries, will soon be a central feature of sexual harassment grievance hearings at American colleges and universities. Section 106.45(b)(6)(i) of the new Title IX Regulations Addressing Sexual Harassment ("Regulations"), issued by the Department of Education on May 6, 2020 , requires institutions of higher education ("IHEs" or "postsecondary institutions") to use a live hearing with cross-examination of parties and witnesses as a part of their grievance process.[1] The Regulations will be implemented and subject to oversight by the Department's Office for Civil Rights ("OCR"). The Regulations take effect on August 14, 2020, prior to the commencement of the fall semester for most IHEs.

To be sure, the live hearing requirement is only one of a series of seismic changes to the compliance landscape created by the Regulations, which are the first "legally binding rules on recipients with respect to responding to sexual harassment." The Regulations make significant changes to everything from the scope of a school's mandate to respond to sexual harassment, to the definition of sexual harassment itself, to the standard for evaluating a school's response, all of which are beyond the scope of this article.

That said, for many IHEs, the requirement of a live hearing with cross-examination by advisors will necessitate the heaviest lift in terms of policy changes, staffing, and coordination. This article summarizes the new live hearing requirements by way of contrast with the pre-Regulations status quo, and offers practical tips for IHEs seeking to implement those requirements.

I. GRIEVANCE PROCESS

Before the Regulations: ***IHEs used a variety of grievance processes to adjudicate complaints of sexual harassment, including the "single-investigator," hearing chair, and hearing panel models, among others.***

After the Regulations: ***The Regulations impose a significant amount of uniformity on the process to be used by IHEs in responding to complaints of sexual harassment, eliminating the "single investigator" model and requiring that IHEs provide for live hearings, with the option to use videoconferencing at the request of a party or at the discretion of an IHE.***

Analysis: Given that most, if not all, IHEs will conduct operations on some sort of modified basis through the rest of the calendar year in response to the exigent circumstances related to COVID-19, IHEs should make sure that they are technologically and logistically ready to conduct "virtual" hearings that comply with the Regulations.

The Regulations require that a "decision-maker" be present at the live hearing. Of course, one role of the decision-maker is to render a decision on responsibility. The decision-maker is also charged with making determinations on relevance with respect to cross-examination questions, as discussed below. The decision-maker cannot be the same person who investigated the complaint, or the Title IX Coordinator.

Other than that, the Regulations permit flexibility for IHEs in assigning the role. For example, IHEs may choose to use a panel of trained faculty or staff to act as a decision-maker. That said, because this role is so critical, trained and experienced professionals may ensure better compliance with the Regulations than community members.

II. RIGHT TO AN ADVISOR

Before the Regulations: ***If an IHE's policy permitted parties to have an advisor of their choice present for some or all of the grievance process, it had to do so in a way that applied equally to all parties. Parties were not guaranteed the right to an advisor.***

After the Regulations: ***IHEs are required (1) to permit parties to be accompanied by an advisor of their choice; and (2) to appoint an advisor for parties that do not provide an advisor for themselves at each hearing.***

Analysis: The advisor mandate in the Regulations appears to apply only to the live hearing itself. While parties must have the right to an advisor throughout the rest of the process, IHEs do not appear to be required to appoint advisors at all previous stages. For example, a party may choose to participate in the investigation without an advisor.

On the other hand, the advisor mandate applies to all parties to a live hearing, even parties that choose not to participate in the hearing. As a practical matter, this could mean appointing an advisor to fill the role for a party that has chosen not to appear at the hearing at all.

IHEs face critical staffing decisions with respect to the advisor mandate. The Regulations do not require that advisors be attorneys; however, because the concept of cross-examination is so central to the advisor's role in the live hearing, attorneys with a background in litigation are strong candidates to serve as advisors. Contracting with a pool of local attorneys to serve as "on-call" advisors to be appointed in cases where a party does not have an advisor of their choice may be the most convenient option. In the long term, regional organizations or law school clinics might also provide solutions.

III. OPPORTUNITY FOR WITNESS CROSS-EXAMINATION

Before the Regulations: ***IHEs did not need to provide parties with the opportunity to cross-examine witnesses; as a practical matter, most IHEs did not permit advisors to speak during any proceeding.***

After the Regulations: ***IHEs now must permit advisors to conduct cross-examination "directly, orally, and in real time" of any party or witness. Parties are not permitted to conduct cross-examination themselves.***

Analysis: So long as advisors are permitted to ask all relevant cross-examination questions, IHEs may still enact policies that enforce decorum or prohibit the badgering of witnesses. Additionally, the Regulations do not require IHEs to permit advisors to participate in the grievance process in any fashion beyond the cross-examination of parties and witnesses. For example, the Regulations do not contemplate argument, objections, or other courtroom concepts.

Importantly, the Regulations still permit the decision-maker to ask questions of all parties and witnesses. If a decision-maker asks a series of questions on a topic, it may reduce the need for an advisor to revisit those topics on cross-examination. That said, the Regulations' exclusionary principle, discussed more fully below, only applies when a party declines to answer a question posed in cross-examination, and not to questions asked by the decision-maker.

IV. CROSS-EXAMINATION QUESTIONS

Before the Regulations: ***OCR's previous guidance suggested that IHEs should permit parties to submit written questions for other parties and witnesses to the hearing panel or hearing chair, who would review the questions and ask those deemed relevant and appropriate.***

After the Regulations: ***The Regulations require the decision-maker to determine whether each cross-examination question posed by an advisor is relevant, and permit the advisor to ask all relevant questions.***

Analysis: The Regulations specifically prohibit cross-examination questions pertaining to a complainant's sexual predisposition or prior sexual behavior, except for questions intending to show that someone other than the respondent committed the conduct alleged, or whether the questions concern specific incidents between the parties and are offered to prove consent. Other than this "rape shield" exclusion, the Regulations do not provide a definition of "relevant." The Regulations indicate that the Department did not intend for IHEs to import the rules of evidence used in courts of law. Still, the typical definition of relevance employed in those rules of evidence – that is, whether the question or answer has any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence – is probably a good place to start.

The rejection of any question as irrelevant may be closely scrutinized, either as a part of the internal appeals process, in response to a complaint to OCR, or in subsequent civil rights litigation. Therefore, if a decision-maker rejects a question, the decision-maker should make a detailed and contemporaneous record as to the basis of their decision for rejecting it.

V. CONSEQUENCE OF REFUSING CROSS-EXAMINATION

Before the Regulations: ***Because cross-examination was not a common feature of IHEs grievance processes, most policies did not articulate any standard for what conclusions the decision-maker should draw if a party or witness refused to answer a question. For the most part, IHEs instituted policies affirming that no negative inferences were to be drawn from a party's decision not to participate.***

After the Regulations: ***The decision-maker is prohibited from considering any statement made by any party or witness that does not submit to cross-examination.***

Analysis: The Regulations do not create a negative inference for non-participation. In fact, the Regulations explicitly state that the decision-maker "cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."

That said, the "bright-line" nature of the exclusionary principle will have significant consequences on the decision-maker's determination of responsibility. For one thing, it appears that, if a party declines to answer a single relevant question on cross-examination, the decision-maker must exclude *all* previous statements of that party or witness. This includes not only any statements made during the hearing, but also any statements made during the investigation, whether to the investigator or reported through a third party. As a result, decision-makers will almost certainly have reviewed or heard statements from parties or witnesses that are subsequently excluded when that party or witness declines to submit to cross-examination. Similarly, other parties or witnesses, not knowing that a witness' statements have been excluded, may report

or testify hearsay that must also be excluded. Decision-makers must be exceedingly careful in crafting the rationale for their determinations of responsibility, and make it apparent that they did not rely on any excluded statement for that determination.

Additionally, the definition of "statement" is extremely broad and not subject to any of the exceptions surrounding hearsay exclusions in courts. In particular, there is no exception to the exclusionary principle for statements made against a party's own interest. Moreover, the preamble notes that the exclusionary principle "does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on." In many campus sexual harassment cases adjudicated prior to the new Regulations, this type of evidence was commonly used as corroboration in word-on-word cases. Parties may now have additional incentives not to participate in order to exclude prior statements that might be construed either as admissions of responsibility or contradictions of other statements.

OCR recently clarified in a blog post that the exclusionary rule does not apply to "verbal conduct" that itself constitutes the sexual harassment at issue. Accordingly, a decision-maker may rely on words attributed to the respondent where the alleged sexual harassment comprises those words, even if the respondent refuses to submit to cross-examination.

As a practical matter, IHEs should ensure that hearings are scheduled in a manner that permits all necessary witnesses to attend and be subject to cross-examination. This includes not only parties, but also witnesses, some of whom may be both critical to the determination of responsibility and outside the realm of the postsecondary institution itself (e.g., Sexual Assault Nurse Examiners, police officers, etc.).

Endnotes

1. The live hearing requirement does not apply to K-12 schools, so long as those schools afford each party the opportunity to submit written questions to be asked of other parties or witnesses.

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Chris also maintains an active higher education law practice. His experience as a former Deputy Title IX Coordinator gives him a unique perspective on institutional governance and crisis response. Chris applies this perspective to advise colleges and universities on compliance with Title IX, VAWA, the Clery Act, and other state and federal regulations. He regularly serves as a hearing chair for review panels adjudicating Title IX violations, and as an independent appeal officer for the post-hearing review of Title IX investigations.