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CONDUCTING A LIVE HEARING WITH CROSS-EXAMINATION UNDER THE NEW TITLE IX RULES

Few things in the U.S. Department of Education's proposed Title IX rules on sexual harassment concerned colleges and universities more than the requirement to hold a live hearing with cross-examination. The critique that educational institutions are ill-equipped to hold judicial-style hearings and oversee cross-examination fell on deaf ears, as the hearing provisions in the final rules remain largely unchanged. Implementing those requirements by the time the Title IX rules become effective (August 14, 2020) will be difficult. Below is a summary of the key provisions and the challenges they present.

THE "LIVE HEARING"

Key requirements. Every institution must provide live hearings for Title IX grievance proceedings. A trained hearing officer must oversee the hearing and exclude any question or evidence deemed to be irrelevant. The parties' advisors—not the parties themselves—must be allowed to cross-examine witnesses and the other party, with certain restrictions described below. At either party's request, the institution must provide for the entire hearing to be conducted with the parties in separate rooms, with the parties able to see and hear each other in real time. Any party or witness may be allowed to participate in the hearing remotely. The institution must record all hearings, even if the hearing is in person.

Challenges for institutions. Institutions will have to acquire and set up technology to conduct and record live hearings, with the parties in separate rooms and some or all of the parties or witnesses participating remotely. They should take steps to ensure that any software (such as Zoom) has adequate security protocols to protect the privacy of sensitive proceedings about sexual harassment. On top of technological hurdles, schools must recruit and train advisors and hearing officers on the Title IX hearing requirements and the school's own rules and procedures, including the scope of permissible cross-examination.

CROSS-EXAMINATION ON RELEVANT ISSUES

Key requirements. Each party's advisor must be allowed to cross-examine the other party and any witnesses "directly, orally, and in real time." Cross-examination is limited to "relevant" questions, including questions related to credibility. The hearing officer must decide whether a question is "relevant" before it is answered and must explain any decision to bar a question as irrelevant. It is up to the school to ensure that all hearing officers receive adequate training on "issues of relevance." The rules, however, don't define what's "relevant," other than to exclude certain evidence—a person's treatment records,

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privileged information, and (with limited exceptions) certain questions or evidence about a complainant's "sexual predisposition or prior sexual behavior" (often called rape-shield protection). It will fall to the hearing officer to determine whether a question falls into one of these prohibited categories and to decide whether other questions are relevant.

Challenges for institutions. Perhaps the biggest challenge will be recruiting and training hearing officers. They will need extensive training on the Title IX hearing rules, the school's conduct code and hearing procedures, the standard of proof, and the technology to be used for cross-examination and remote participation. To make informed decisions on what questions and evidence should be excluded, hearing officers will have to understand attorney-client privilege, work-product doctrine, treatment records protections, and rape-shield protections. More broadly, they will need to understand how to decide whether a question or evidence is "relevant."

These requirements may narrow the pool of employees willing to serve as hearing officers. On top of the training required to serve in this role, hearing officers will have to devote much time to preparing for and running live hearings. In choosing hearing officers, institutions should consult faculty handbooks, employee handbooks, and any collective bargaining agreements to ensure there are no restrictions on giving such

additional responsibilities to faculty or staff. They should also screen for any possible biases that a faculty or staff member may have displayed either in the classroom or in public statements. Hiring external hearing officers will conserve internal resources and may reduce claims of bias or conflict of interest, but schools must still ensure that the hearing officers are trained on Title IX, the institution's conduct code and procedures, and its culture and core values.

Institutions will no doubt want to try to avoid protracted, trial-like hearings, but it's unclear how much leeway they will have. For example, it's unclear under the rules if, at the parties' request, a hearing officer can rule in advance on whether certain categories of evidence will be excluded or permitted, in order to reduce question-by-question rulings on relevance. And while the rules permit cross-examination on credibility issues, it isn't clear how much hearing officers can limit the examination to protect witnesses from being harassed or intimidated. Institutions will also have to develop mechanisms, with no real guidance in the rules, to deal with party advisors who try to circumvent a hearing officer's relevance rulings or who become unruly or uncivil during a hearing.

PROVIDING AN ADVISOR TO STUDENTS WHO DON'T HAVE ONE

Key requirements. Under the final rules, a party must have an advisor to conduct cross-examination. Students can select

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their own advisor, and they're free to choose a lawyer. If a student does not have an advisor, the institution must provide one. In selecting an advisor, the institution does not have to find someone who is "aligned" with the interests of the student (as the proposed rules recommended). But the advisor cannot be biased and must be trained and provided at no cost to the student.

Challenges for institutions. Selecting and training advisors for unrepresented students will be a significant burden. As with hearing officers, if an institution uses faculty or employees as advisors, it should consult the appropriate handbooks and collective bargaining agreements. And it will have to identify advisors who are willing and able to cross-examine any party or witness, including faculty members and university administrators who may be the subject of or a witness concerning sexual harassment claims. Advisors will have to dedicate significant time to training, advising students, and actively participating in the grievance process and hearings.

Hiring third parties as advisors might mitigate some of these concerns, but it would also be expensive and the institution would remain responsible for ensuring that the advisors are trained on the Title IX rules and on the institution's rules, procedures, and culture.

Finally, institutions should consider what they can do to make sure a hearing is fair when one student has an experienced

trial lawyer to conduct cross-examination and the other student is provided with an advisor by the institution who is not a lawyer, let alone a lawyer with years of trial experience. The rules don't address these concerns and provide little guidance to institutions.

EXCLUDING STATEMENTS FROM A PARTY OR WITNESS NOT SUBJECT TO CROSS-EXAMINATION

Key requirements. A hearing officer cannot rely on any statement by a party or witness who does not submit to cross-examination at the hearing. The rules do not define what a "statement" is, but anything a party or witness said to investigators or that is included in any reports or records can't be considered without cross-examination. The rules attempt to mitigate the harshness of this requirement by prohibiting a hearing officer from drawing an adverse inference from the fact that a party or witness does not submit to cross-examination. The Department recognized that there may be sound reasons not to appear for cross-examination (e.g., if a person subject to possible criminal prosecution has been advised by counsel not to appear). The Department has indicated that the refusal by a party or witness to answer questions asked by the hearing officer does not require exclusion of the person's statements.

Challenges for institutions. This provision is deeply problematic. It may discourage

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complainants from coming forward and filing a formal complaint if they know the decision-maker can't consider what they have to say unless they submit to cross-examination. Witnesses may be reluctant to come forward for the same reason, making it harder for institutions to conduct effective investigations. Investigators may be able to gather evidence leading to a firm conclusion about the allegations of sexual harassment, but they may not be able to provide sufficient evidence to support that conclusion at a hearing if key witnesses won't agree to be cross-examined. That may make it harder for schools to hold perpetrators accountable or to exonerate those who have been wrongly accused.

These problems may increase the use of informal resolution of complaints. Under the rules, an institution can offer an informal resolution process (such as mediation) at any time during the grievance process before a determination of responsibility, provided that a formal complaint has been filed and both parties are fully informed and consent to participating. However, informal resolution cannot be used to resolve sexual harassment claims against an employee.

Complainants may also look to avoid the Title IX process. The rules permit complaints that fall outside the scope of Title IX to be pursued independently

as violations of the institution's conduct code. Some complainants may therefore try to frame their complaints as violations of other conduct code provisions, rather than as sexual harassment claims that trigger the full panoply of Title IX procedural requirements. Institutions may want to review their conduct codes to see if they provide such alternative avenues for addressing misconduct. They should be prepared, however, for possible claims by respondents that the institution facilitated the framing of a sexual harassment complaint as something else to circumvent the procedural fairness requirements of the Title IX rules.

APPEAL ISSUES

In a change from the proposed rules, institutions are now required to offer an appeal to both parties on three permissible grounds—procedural irregularities, newly discovered evidence, and alleged bias or conflicted interest of any personnel involved in the Title IX process, provided the errors affected the outcome. The complexity of the live hearing process is likely to give rise to appeals from the aggrieved party claiming procedural irregularities, adding to the pressure on institutions to follow carefully all of the procedural requirements in the Title IX rules and their own process rules.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

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WHAT INSTITUTIONS SHOULD DO TO PREPARE NOW

Since the final rules become effective August 14, 2020, institutions should immediately begin planning for implementation.

Here are key steps to take now with respect to the hearing requirements:

- Review all codes of conduct and procedural rules for handling sexual harassment complaints to ensure that they provide for a hearing compliant with the requirements of the final Title IX rules.
- Identify an appropriate campus location for conducting live hearings, with separate rooms for each party.
- Determine whether existing technology is adequate to allow parties to participate in the hearing from separate rooms and for any party or witness to participate remotely.
- Decide whether to use staff and faculty as party advisors and hearing officers or to hire outside professionals.
- If using staff or faculty, start identifying possible advisors and hearing officers. Review relevant handbooks, employment agreements, or collective bargaining agreements for possible restrictions.
- Decide who will conduct the required training of party advisors and hearing officers and develop plans for conducting that training. If possible, have counsel involved in this training.
- Begin to develop general relevance standards and guidelines for student advisors and hearing officers to use in conducting and overseeing cross-examination.