

New 2020 Regulations Coming on Campus Sexual Misconduct – The Good, the Bad, and the Ugly

New Title IX regulations are about to be issued by the U.S. Department of Education's Office for Civil Rights (OCR), the first new regulations to be issued under the federal education sex equity statute since 1975. Some provisions of the new regulations are good, many are bad, and a few are ugly. While the Obama administration was focused on the rights of those who were victims of sexual misconduct, the Trump administration is reshaping Title IX around the rights of those who are accused.

One must wonder why the politics of sexual misconduct force a focus on the victim/survivor or the accused, rather than balancing the rights of both? The bulk of the new rules are set to implement broad due process protections for students accused of sexual misconduct in school and college environments, while weakening long-standing protections for victims/survivors. OCR aims to transform historically informal school disciplinary processes into adversarial, quasi-criminal legal proceedings with live hearings, evidentiary rulings, and attorney-led cross-examination. When was the last time making any system more complex and bureaucratic made it better?

Due process proponents seem to think that Betsy DeVos's new Title IX regulations will save everyone's sons from no good, horrible college and school administrators who think all men are potential rapists. Or some such nonsense. Having worked with school resolution systems for twenty-one years, I don't think OCR's new rules will broadly accomplish fairer outcomes, unfortunately.

The resolution system schools have in place for sexual misconduct allegations could surely benefit from some changes and refinements, but why won't OCR's proposed changes solve the unfairness problem? Because OCR has confused procedural unfairness with substantive unfairness. OCR has set out to fix the procedures of school resolutions on the incorrect assumption that procedural fairness alone will result in more accurate substantive outcomes.

We all want better substantive decisions, and those will result from 1) ensuring neutral and impartial decision-makers are in place, and then 2) training them comprehensively and rigorously in the fundamentals of good decision-making. You can't overcome biased decision-making with all the due process in the world. Live hearings won't do it. Cross-examination can't do it. Put another way, if OCR mandates that colleges and schools mirror criminal prosecutions procedurally, but doesn't improve the substantive training and impartiality requirements, unfair outcomes will still result, just like they do in the criminal system.

If some additional due process protections are welcome, the draft of the proposed regulations reveals that OCR is taking it way too far. For example, the proposed regulations require immediate notice of the allegations before any school interview of the respondent. OCR insists this is a due process "right." Except it isn't. The police can interview a criminal suspect without

notice. If that doesn't violate due process rights, there is no basis to require more under Title IX in a school context than is required by law in criminal investigations.

OCR also wants to mandate live hearings, but there is no data to show that live hearings are less prone to error than results produced by non-adversarial investigations. There is no reason to believe that enhanced formality and more adversarial proceedings will produce more accurate findings than other resolution models. Human Resources has been using the investigator as decision-maker model under Title VII for nearly sixty years. You'd at least have hoped that OCR would have studied data or consulted research or commissioned an investigation of effective resolution models. Nope. They are shooting from the hip. Worse, they have not examined the effect of mandating live hearings on victims/survivors. That's one of the main reasons it's fair to characterize OCR's proposed changes as one-sided. Title IX is supposed to protect everyone.

The 2020 proposed OCR regs seem like they are headed toward a mandate for cross-examination between the parties as well. Yet there is no research to indicate that cross-examination creates more accurate results than other ways of allowing the parties in a sexual misconduct allegation a full and fair opportunity to review and contest all evidence prior to a final determination.¹ In fact, because cross-examination relies on talented questioning and sophisticated rules of evidence, it is susceptible to great variations in its effectiveness², and there is research to show that cross-examination is no more effective at discerning the truth than other methods of doing so.³ OCR is adding process for the sake of process and forgetting to balance rights. If cross-examination were a better method of discerning the truth, we'd still have to examine the effect on victims/survivors, and the burden of imposing this added protection on schools. OCR has not done so, and again, the data on effectiveness is debatable.⁴

The 2020 regs aim (backhandedly) to raise the standard of proof used in resolutions to clear and convincing evidence. This may result in fewer "convictions," but OCR is ignoring that fewer convictions goes both ways, reducing the number of people wrongly found to have committed sexual misconduct (false positives), but also (by definition) increasing the number of people who are not found in violation but should have been because they actually did it (false negatives). Why is it fairer to inaccurately find people not in violation if they actually did it?

However, I don't argue that just because more/better due process won't fix the problem, we should minimize due process protections in school resolution proceedings. I'm a proponent of rational, clear due process requirements for school resolutions of all discipline, not just for sexual misconduct. I'm also a proponent of equity and equal dignity for all participants, though the rights of victims/survivors do not appear to be top OCR priorities under the proposed new 2020 Title IX regulations. Many of the proposed changes may chill the willingness of

¹https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100090

²<https://heinonline.org/HOL/LandingPage?handle=hein.journals/uclalr25&div=33&id=&page=>

³<https://onlinelibrary.wiley.com/doi/abs/10.1002/acp.1768>

⁴<https://heinonline.org/HOL/LandingPage?handle=hein.journals/monash37&div=13&id=&page=>

victims/survivors to report sexual misconduct to school officials, which would completely undermine the purpose of Title IX, but that is a topic for another opinion article.

If OCR wanted to truly fix the problem of unfair resolutions of sexual misconduct allegations, it would:

1. Implement regs that improve procedural fairness and “due process” without going overboard as the current draft does;
2. Mandate meaningful training requirements and school accountability for regular, comprehensive training; and
3. Address and create accountability for the vetting process by which schools choose and empanel internal or external decision-makers, to ensure they are independent, neutral, objective, and impartial.

Shockingly, the proposed regulations place no meaningful emphasis on improved training or enhanced guarantees of neutral and impartial decision-making. What a huge miss. OCR has studied the problem for years but has landed on the wrong fix. OCR’s impending massive regulatory changes to Title IX will ignite years’ worth of litigation and political battles. Colleges and schools will be caught in the middle between pro-victim and pro-respondent factions. Who will win? That’s unclear. But who will lose? We all will. We’ll lose out on a set of rational changes that could have brought about balanced resolution processes within a fair framework. That could have been Betsy DeVos’s legacy, but instead, history may remember her as the Secretary of Education who turned school disciplinary proceedings into adversarial quasi-criminal courtrooms without making anything fairer for anyone.

Brett A. Sokolow, Esq., is President of the 3,500-member Association of Title IX Administrators (www.atixa.org)