Tip of the Week
January 14, 2019

Nightmare at Old Main

Betsy DeVos and her supporters have a problem they are trying to solve. They look at higher education and see unfair tribunals and biased processes used to address sexual misconduct. Regardless of whether the problems they perceive are real or overblown (they're both), their perception will remain steadfast because it is rooted in their political orientation. But we have an obligation as a field to make sure that the Department of Education (ED) knows that the new regulations they have proposed to Title IX will not fix the problem they think they have and will likely create many new problems.

To put it succinctly, the current administration is presenting cross-examination as the panacea for a problem that is actually rooted in bias and lack of training. ED believes – incorrectly – that producing more and better evidence in hearings will overcome the biased and deficient analysis that is plaguing those proceedings. Phooey. The solution isn't about evidence. More evidence will not overcome bias, because bias inherently causes decision-makers to ignore and overlook evidence. Believing otherwise is wishful thinking. Producing more and better evidence (the purported goal and purpose of cross-examination) simply provides those who are biased more to ignore and overlook.

Making individuals aware of their bias, which cross-examination could also potentially achieve, only makes sense when people are conscious of their bias. But, most of the bias affecting the field is implicit bias. You can't fix something when you're not even aware of it. Similarly, if a decision-maker possesses deficient analytical skills – a common problem -- cross-examination does nothing to help them better analyze the evidence. Proficient analysis requires more and better training, and ED isn't really addressing that topic. Notably, there is also an important intersection of bias and deficient analysis that multiplies the problem into confirmation bias, which is much more difficult to unravel.

There is also a fundamental fallacy underlying DeVos' proposal. She and her supporters believe that cross-examination is, incontrovertibly, the greatest engine for discovering the truth. Perhaps they see every hearing as a Perry Mason episode, replete with an opportunity to break the witness and make them confess the truth? This kind of superstition results from watching too many TV courtroom dramas and not enough real time in actual courtrooms or educational administrative hearings.

The conceit of humans believing they are lie detectors undergirds the belief that cross-examination is the optimal way to discern truth or credibility. There is no data to support the validity of that belief. It is critical to submit comments on the NPRM to this effect. Many groups will use the OCR responses in subsequent litigation to try to overturn these provisions, should they become law. Here is a little background reading that will inform this debate. https://www.psychologytoday.com/us/blog/spycatcher/201203/the-truth-about-lie-detection

This past week, Columbia Law Professor Suzanne Goldberg wrote an Op-Ed to the Chronicle about her opposition to the cross-examination model included in the current proposed Title IX regs: https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448?cid=wcontentlist_hp_5. The piece articulated key points about why cross-examination is worth opposing. I write this column to amplify and expand on the dangers that Goldberg so aptly identified, from my vantage point.

Critique of ED's proposed approach to cross-examination should include:

Introducing Potentially Traumatic and Unnecessarily Adversarial Elements into the Process

- There is a high risk of traumatizing the parties by having judgment and recollection challenged and scrutinized by an adversarial questioner. Somehow ED believes that bringing two additional biased individuals into the process will result in more neutrality. Huh?
- While a genteel professor of history with sufficient training may be able to engage in cross-examination as an advisor without doing much harm, what about a party's Mom? I have seen Mom in this process. Many times. Mom is not genteel. Mom is not trained. Mom is a momma bear doing anything she needs to protect her cub. Maybe a student needs such a zealous advocate, but when the claws come out, civility is forgotten. The same can be true for Dad; he has claws, too.
- Maybe it's not Mom or Dad. Maybe it's a roommate, Director of the Women's Center, or a right-wing professor with a-never-believe-the-victim mindset. All of them can be in the room and now they'll have a substantive role in the process. Suppose they really attack someone they are cross-examining? How will that reflect on their advisee? Will the decision-maker(s) respect the painful process that produced the truth, or punish the party for the indiscretions of their advisor?
- ED explicitly stated in the proposed regs that it expects no additional financial burden by requiring schools to provide an advisor "aligned with the party" if a party does not have an advisor, because the Department expects all parties to retain their own counsel. Shifting the burden to the parties does not eliminate the underlying cost, of course, and now parents will need to anticipate the cost of hiring lawyers as part of their college-savings plans.
- Attorneys are highly trained in adversarial cross-examination methods. School-provided advisors will not, in most cases, equal the level of expertise and experience possessed by outside counsel. Inequity in representation is a certainty. This new procedural

"protection" will fuel inequity claims by the parties, whose advisors are never going to be equals with each other.

- In addition to the issue of disparate advisors, an ineffective advisor litigation nightmare will also result from this proposed "protection." Whether the advisor is simply outclassed by the lawyer on the other side, or offers well-intentioned but ill-advised recommendations to their advisee, the party on the receiving end is going to add a new count to their lawsuit – the school provided me with an advisor, and that advisor advised me negligently. As OCR transforms schools into mini-courtrooms, we'll have to contend with our own version of an ineffective assistance of counsel claim.

Process Chaos

- In addition to the aforementioned lack of skilled advisor questioning, the hearing administrator(s) is now going to somehow be expected to make determinations regarding irrelevant or inappropriate questions in the middle of live cross-examination. It is not clear who is expected to raise objections (the party, the party's advisor, or the hearing administrator(s)), how long a ruling on objections may take, or what form the rationale for excluded questions must take.
- In addition to the procedural cacophony, there are concerning substantive considerations. Even overruled questions will have a traumatic effect on the party – indeed, a skilled attorney can wield this as a valuable tool to rattle the party and damage the appearance of credibility.
- Now, we'll have the hearing officer or chair doing battle with skilled attorneys on how a question should be phrased, whether it should be posed, and whether it was sufficiently answered. I can just see people lining up on campuses to take on the highly paid, very prestigious, and very rewarding roles of hearing officer and chair. Or not.
- In 2011, OCR required civil rights investigations with a naïve assumption that colleges had trained, experienced investigators just sitting around waiting to be deployed. Instead, it took the field years to build that capacity, and we're still struggling to bring the needed level of talent to the table. Now, OCR is doing it again, with the assumption that the hearing officers and chairs needed to manage the mini-courtrooms OCR is creating are somehow just waiting in the wings. We are going to need to build this capacity, yet again. Start now. It's going to take years.
- Training for both advisors and hearing administrators will necessarily include training on how to identify and object to impermissible questions. Attorneys and judges spend *years* mastering these skills, after completing graduate degrees. Mandating schools to bear the burden of adequately equipping staff to do the job well is unreasonable.

Training & Competence

- The proposed regs encumber schools with the task of training hearing administrators to understand and enforce the limits on advisor participation, recognize and instantly rule on inappropriate or irrelevant questions, deliver a sufficient rationale for all decisions to limit advisors or disallow questions, assess credibility of a witness based on answers given, refusal to answer, and demeanor, while also managing the hearing and advisors

who often cannot themselves respect the line between questioning and offering testimony. Again, cue the line of those who can't wait to volunteer for these roles, especially after they are deposed for the first time in a federal lawsuit over why they permitted certain questions but not others.

- Schools will likely face the added challenge of hearing officers and chairs who feel obligated to attempt to compensate for inadequate advisors who are doing their advisees no favors.
- Consider also that OCR expects advisors to align with the interests of the parties. How will schools even assess for that aspect? This requirement represents an additional burden: training advisors to advocate for a particular side during a hearing, and to recognize, object to, and provide rationale for objecting to questions, as well as training on questioning adverse witnesses, attacking credibility, exploiting weaknesses in testimony, articulating changes in demeanor, addressing trauma, and/or managing an advisee who resents the fact that the school and OCR are paternally preventing them from advocating for themselves. What happens when an advisee gets pissed at their advisor mid-hearing and wants them out?
- Another abiding concern is that an institution-offered advisor is likely going to be a process advisor, not a substantive advisor who can counsel on the best interest of the party. Let's use the example of the responding party. The advisor will be trained (hopefully) in the process and on questioning skills, but that isn't the same as an advisor on the wider scope of issues a responding party is facing, or someone with the skill of an experienced attorney trained in these types of matters. Attorneys will have the ability to help the responding party navigate interim action and interim suspension issues and will be able to challenge administrators in a manner that an institutional employee may likely not. What happens when the institution deviates from policy or procedure? An attorney will point that out. Will the school-provided advisor? What if the advisor reports to someone involved in the Title IX process? Will that create a conflict-of-interest, real or perceived? A skilled attorney will be able to advise their client on external issues, such as whether it makes sense to withdraw and the options for admission elsewhere. What will a school-supplied advisor know about that? Managing parents is a big part of the advisor role. How is a school-trained process advisor going to hold up to parental wrath?
- OCR has clearly not contemplated the time suck, the number of hours that it takes to serve as a process advisor, if it simply thinks that an institution can designate and train an employee to serve in this role. As someone who has served as an advisor on all sides, I have put 100 hours into some of these matters. What university or school employee is going to have a spare 100 hours to devote to a student who needs the strongest possible advocacy?
- Finally, let's consider the practical reality that there are three types of advisors potentially in play here. At the most skilled, we have the external attorney, if a party can afford or access one. Next, the internal advisor, selected and trained by the institution. They hopefully know the process and are able to deploy some cross-examination skill, but are limited in the broader advocacy context, and by time constraints in how much they can do. Finally, we have the advisor chosen by a party, who is likely to have no

training or experience at all. They could be a friend, colleague, family member, or even another student. If the institution is lucky, it won't be one of their employees, from a liability perspective. No-one believes this person is going to know how to handle cross-examination well; up against the prowess of a trained attorney, this proceeding is going to be a nightmare.

Forced Choice

- The whole advisor construct framed by VAWA Section 304 is not well-considered, and OCR is emphasizing that model. OCR's approach creates a potential forced choice between advisors that is going to be very difficult for reporting parties to make. If a reporting party, in the aftermath of an assault, chooses a victim's advocate to support them, they often want the continuity of having that person serve as their advisor throughout the resolution process. It's natural, once a bond of trust is established, to want to work with a trusted individual. But, what if that advisor is great at empathic advocacy, and completely unskilled in cross-examination? That forces a choice that a reporting party should not have to make. Either they have to accept that their advisor will not serve them well in the hearing, or they have to make a choice to change advisors mid-stream, to select someone who is better able to deploy cross-examination skills during the hearing. This entails building trust all over again, bringing a new advisor up to speed, and losing the emotional comfort of having the advocate by their side during the hearing, which they may need. OCR is forcing a choice between good victim services and good hearing support.

Credibility Is Far More Complex than OCR Seems to Understand

- Credibility is typically based on a number of factors, including: sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence/testimony, and evidentiary consistency.
- Evaluation of demeanor is an element of credibility determination, but it is often the most unreliable element and is easily misconstrued.[1]
- Many empirical, reliable studies demonstrate a person's inability to judge the truthfulness of statements at better than 50% accuracy.
- Polygraph machines, which measure otherwise imperceptible physiological responses to questions, are only slightly more accurate and subject to significant human error.

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[1] See, for example, Bandes, Susan A., *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul* (March 18, 2014). Journal of Law, Religion and State, 3 (2014) 170-199. DOI:10.1163/22124810-00302004. Available at SSRN: https://ssrn.com/abstract=2937136. The author notes, *inter alia*, that "[m]uch of what is being "read" in facial expression and body language is highly ambiguous and cannot be interpreted without reference to pre-existing schemas and assumptions."

- According to leading researchers in the field, what are often mistaken for signs of deception are really indicators of stress-coping mechanisms.
- People (and polygraphs) can detect changes in emotion or stress level, but how these changes reflect an individual's truthfulness is not consistent, predictable, or reliable.
- OCR is placing stock in a relatively brief hearing process in front of often under-trained volunteers to provide an accurate assessment of credibility, and somehow believes that the changes it is mandating for the process will improve the accuracy of outcomes over the current, existing approaches. Be careful what you wish for, OCR.

Let's not forget that perhaps the most important point is Suzanne Goldberg's argument that this entire cross-examination blueprint could significantly chill victims from ever deciding to report sex discrimination and seek formal redress. Indeed, that seems to be OCR's intention. These changes have the very real potential to do exactly that. If survivors become reticent to report discrimination to school and college officials, DeVos wins. If they unite from the grassroots to overcome the impediments that OCR is erecting, they can become a galvanizing force that refuses to let OCR use the regulatory process to destroy the essential protections Title IX is supposed to afford.

If these arguments resonate for you, use them to help frame your comments to OCR. They are due by January 28th - every comment matters. For a useful resource guide on submitting comments, click here.