



The Devil is in the Details: A Closer Look at How the New Title IX Rule Harms Victims of Sexual Assault

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The Department of Education will have us believe that its Final Title IX Rule, released on May 6, is leveling the proverbial playing field between victims and accused students in campus sexual harassment cases. Do not be fooled by their words; the devil is in the details.

The new Rule presents barriers for victims of sexual harassment at every step of the reporting and adjudication process. These barriers coalesce into an inaccessible system that undermines the very fabric of the protections for victims of sexual harassment. It seems this was the ultimate design.

While the Department boasts that the Rule will produce “reliable outcomes” and rectify the “kangaroo courts” of campus adjudications, these claims are deceptive. In recent years, federal guidance has helped ensure that processes are conducted by trained investigators with legal training or a law enforcement background. Such experts were well-versed in and best suited for assessing credibility and the nuanced concept of legal relevance. Under this new framework, by contrast, virtually anyone can conduct cross-examinations, including faculty, fraternity brothers, or family members, without the safeguards of evidentiary rules or the expertise of a judge. Nowhere in our legal system (civil or criminal) can an untrained person conduct a cross-examination on a party’s behalf in court, yet the Department of Education claims that allowing such unprecedented involvement in cross-examination somehow safeguards due process.

Live cross-examination. Advertised as a way to “restore fairness” into campus proceedings, compulsory live cross-examination at first blush sounds reasonable as a means of ensuring a fair process. After all, live cross-examinations are part and parcel of our criminal justice system.

Setting aside the critical point that campus adjudications are not, nor should they be conflated with, criminal processes, a closer look at the Rule’s provisions around cross-examination reveals how problematic this scheme is. A victim of sexual assault must bring a formal complaint to the school, and by the time the victim gets a hearing, they have undergone at least two (likely more) interviews, each lasting multiple hours, by a trained, neutral investigator. The victim’s statements are vetted, evaluated, questioned and probed at length. In every interview, the victim will agonize over whether to submit private medical information; they will be questioned about their mental health, asked the same question multiple times to evaluate the truth of their words, words that they themselves brought to the school. They will also be asked why they didn’t leave, why they didn’t scream, why they waited a day too long to tell the school, and maybe even why they had contact with the accused student after the rape. Ultimately, they will be asked to explain in painstaking detail who took their clothes off, in what sequence,



where and how they were touched and by whom and when and where exactly they were positioned on the bed. All of these questions will be asked and answered *before* the live cross-examination at the hearing.

Under the new Rule, if a victim refuses to be cross-examined at the hearing then the decision-maker cannot consider any and all statements made by the victim during the case. This would include all of the following relevant information: the victim's initial report that prompted the investigation, information provided by the victim in their multiple interviews with the investigator, police reports containing statements to law enforcement, text messages containing the victim's immediate disclosure of the assault to family or friends, and medical reports containing the victim's statements to the hospital nurse. None of this highly relevant evidence would be considered when deciding whether the accused student was responsible for rape.

While this provision applies to both parties on paper, in practice it has the opposite impact for, and advantages, accused students. If the accused student declines to be cross-examined, their statements, including any admissions of culpability, will not be considered by the decision-maker. Let's say the accused student admits to a sexual assault in a text message yet refuses to be cross-examined. This admission is deliberately overlooked. Even statements made by witnesses regarding the accused student admitting to the allegations will be excluded from consideration.

With the deck thus stacked against them, should the victim submit to cross-examination? Let's investigate this further.

The Department of Education requires victims to answer any and all "relevant" questions during cross-examination. However, the Department intentionally declined to define relevance, instructing decision-makers to use "logic and common sense" to guide their decisions.

Remember, the devil is in the details.

In a campus adjudication, any and all information submitted during the investigation will be shared with both parties, even information that has no bearing on the allegations. Therefore, if an accused student submits information about the victim's suicide attempt years before the sexual assault ever happened, nothing in the Rule prevents the accused student's advisor from cross-examining the victim about this suicide attempt. This directly contradicts how the rules of evidence operate in court proceedings, where there are procedural safeguards and judges to ensure that irrelevant information does not unfairly taint the proceedings or influence the decision-makers. Importantly, nothing in the Rule itself safeguards the victim from having to answer questions like these, since relevance without parameters is a broad, slippery slope. While the Department of Education touts the Rule as protecting procedural and even constitutional rights, in truth the Rule undermines the traditional safeguards against irrelevant evidence and bias.



Consider another aspect of the Rule's scheme: if the accused student does not attend the hearing, the accused student's advisor is allowed to appear for them. The victim is still required to be cross-examined for any of their "statements" to be considered, even though the accused student did not show up, and even though the victim has participated thoroughly and completely in the investigation. It is difficult to cite any other "legal" proceeding where a party can fail to appear and still be permitted to present evidence and cross-examine the opposing party. Such one-sided protections put the lie to the Department of Education's claims about creating a "fair" process.

The hearing concludes. The decision-maker considers the "evidence," which likely includes irrelevant information (for example, about the victim's mental health) and may be missing key facts (e.g., the accused's admissions). Cross-examination was required, but did it make the process fair for both students or lead to the truth? In a word, no.

Under the new Rule, the victim will bear risk after risk, while the accused student can game the system to avoid prior admissions (or even appearing) and inflict further trauma on the victim. Inevitably, the victim will wonder whether it was worth reporting in the first place. They will likely face the choice of either seeing their perpetrator in their classes, dining halls, and gym, or leaving school.

The only thing reliable about this scheme is that victims will have little to gain by coming forward. They will face cross-examination unchecked by rules of evidence or judges and a lack of procedural safeguards. Without victims' reports, campus sexual assault rates will continue to rise as the deafening silence of victims prevents campus safety and accountability mechanisms from working.

One cannot help but surmise that this was the intent all along.

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