From: Ryan Thompson
Sent: Thu, 10 Jun 2021 14:56:07 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Comment on Hearing Procedures)

Dear ED and OCR,
This written comment on Title IX is submitted by:
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In addition to the verbal comments I submitted to the Department during the public hearing on Tuesday, June 8, at about 2:20pm (slotted for 2:30pm under Confirmation Number FVN5XS589LR), which I was not able to complete in the 3 minutes, and thus, are copied in full at the end of this email, I submit the following as my written comment:
This comment, which was written in the form of an editorial essay earlier this year and entitled *"The Last Thing Trump's OCR Said To Me..."*, is available here and focuses on the problematic cross-examination procedures enacted by the 2020 Title IX Regs:
https://www.esqthompson.com/trump-editorial
If, however, you are not permitted to click this link to my website, I have copied the essay in full below, which, again, is followed by my full prepared verbal comment from the public hearing on Tuesday:

The Last Thing Trump's OCR Said to Me ...

And Other Title IX News & Reflections

Editorial By Ryan Thompson, Esq.
THOMPSON ESQUIRE PLLC

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Click to skip to section:

i. An Answer Is an Answer, Except When It's Not

On the evening of January 19, the last full day of Donald Trump's term as president, the staffers and attorneys at the Office for Civil Rights (OCR) seemingly spent the night responding to old emails that have been sitting in their inboxes since the summer.

At 8:26 p.m. that evening, I too received an email from OCR answering a question that I had posed to them on August 14, 2020, which was the day the new and controversial 2020 Title IX Regulations had gone into effect.

I had asked my question in response to OCR's peculiar all-or-nothing stance on cross examination in school Title IX proceedings. OCR had clarified earlier in August that any refusal by any party or witness to answer any relevant cross-examination question had the inflexible effect of invalidating any and all testimony and statements that person had previously made.

So, if that party or witness made verbal declarations at the scene of the incident, then subsequently had submitted to an hour of direct questioning by the hearing panel at the school's Title IX proceeding, and then answered another hour of cross-examination questions from the parties' advisors, the refusal to answer one relevant cross-examination question invalidated all of this. Every single one of this person's statements could no longer be considered.

Logically, this caused many of us Title IX practitioners to not only question the rationale behind this odd procedural mandate but to also wonder what was now the most curious question: What constitutes an answer?

Will "I don't know" or "I forget" suffice? Will answers that don't fully answer the question be considered a refusal? Do unresponsive answers that don't even make any sense satisfy OCR's requirement that the party or witness simply must not "refuse" to answer? And if so, where is that line of satisfaction, and who determines when that line has been crossed?

Based on OCR's unwavering and prescriptive approach to Title IX, many observers concluded that the quality of the answer could not matter nor be evaluated. An answer is an answer, regardless of what the answer was. Thus, any answer at all was therefore not a refusal.

This supposition, if true, seemed problematical to me for a variety of reasons. Thus, accepting the Department of Education's much publicized invitation to seek help directly from its OPEN Center, I posed this question to OCR on August 14:

> *Dear OPEN Center,*
> *If during cross-examination, a party or witness provides the advisor with answers that do not substantially relate to the question, shall that still constitute answering the cross-examination questions, sufficient to allow that party's/witness's statement to be considered?*
>
> *For example:*
> *Q: Did you call a taxi to pick you and the other party up from the bar that night?*
> *A: I drive a Ford F-150 pick up truck.*
>
> *Is that a sufficient answer, or is that refusing to answer the cross-examination question?*

A mere 158 days later – with U.S. Education Secretary Betsy DeVos already gone and President Trump packing for Mar-a-Lago – I received my response. And OCR's answer initially appeared to be a rather reasonable, measured and realistic response to my somewhat silly, but necessary, question:

> *34 C.F.R. §106.45(b)(6)(i) of the Title IX Regulations provides: At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. (emphasis added).*
>
> *If a party's advisor of choice asks a relevant question of another party or a witness, and that party or witness declines to respond to the question, then the decision-maker is precluded from relying on any statement made by that party or witness. Answering a question with irrelevant information initially does not necessarily mean that a witness has failed to subject themselves to cross-examination. However, follow-up clarifying questions may be asked, and if the witness continues to answer with irrelevant information that is unresponsive to the question, they have effectively declined to submit to cross-examination.*
>
> *If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) 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. (Emphasis added.)*

I'm not quite sure where the "emphasis added" was, as it appears to have been lost in the email transmission, but emphasis or not, this answer initially made some sense to me – at least as far as my specific question was concerned.

It's a lot like what we would expect from our courts and our judges, who generally attempt to preside with some combination of strict procedural oversight and sensible flexibility. If a witness provides an unresponsive answer, the judge will address the issue, oftentimes prompted by an attorney's objection.

While OCR didn't specifically state such in its answer to me, when OCR writes that "if the witness continues to answer with irrelevant information that is unresponsive to the question, they have effectively declined to submit to cross-examination," I think that it can be assumed that the hearing officer or hearing chair (the Title IX proceeding's version of a judge) will need to be the individual to make the ruling on when this declination occurs.

And then every single one of that person's statements – made prior to the report, made during the investigation, and made during testimony at the Title IX hearing – will need to be disregarded, according to OCR.

The significance of this consequence cannot be overlooked, and upon further thought and examination, herein lies the problem with OCR's email to me:

Unlike in a civil or criminal courtroom, where a witness or party could be held in contempt and/or jailed for being unresponsive, here in a Title IX proceeding, the actual outcome of the case can be directly and substantially affected by this procedural action. The ruling by the Title IX decision-maker to declare a witness or party as non-responsive has the extreme effect of eradicating everything that witness or party has ever said.

This is especially concerning if this is a key witness, and this erasure occurs with no action or input by the parties themselves. And it's even more concerning if the question that was refused was indeed "relevant" but was not all that critical to the case.

Perhaps the witness is an athlete who was asked about their drug use on the night in question. Perhaps the witness was at the scene with someone whom they would rather not have their spouse find out about. And so the witness refuses to answer one single "relevant" but insignificant cross-examination question, and the decision-maker must therefore disregard every statement and everything that "non-responsive" witness has ever stated or testified to. To wipe this evidence from existence seems illogical and contrary to the truth-seeking functions of these adjudications.

Furthermore, establishing where exactly the line exists between "responsive" and "non-responsive" won't always be so easy. And OCR gives no guidance in its email to me as to how or where we draw this line.

Is the following witness non-responsive?

> *Q: How much alcohol did you consume on Friday night?*
> *A: I was the designated driver.*
> *Q: Did you drink any alcohol?*
> *A. That would be illegal.*
> *Q: Yes or no, did you drink alcohol on Friday night?*
> *A. Yes. But it was Saturday morning.*
> *Q: How much did you drink?*
> *A: Don't know. Like I said, I was the designated driver.*

Is this witness being non-responsive, or are these answers substantial enough to not be considered a refusal? Would a decision-maker be inclined to declare this witness non-responsive if these questions-and-answers continue, thereby eradicating every statement this witness has made, no matter how crucial this witness' prior statements were to the outcome of the case?

And do we examine each of the above questions in isolation for potential non-responsiveness? Or is there just one question and the rest of the questions are "follow-up clarifying questions," as OCR references in its email to me?

What if the advisor who is cross-examining the witness is satisfied with the answers, but the decision-maker is not? Does the decision-maker need to interject to induce the witness to become responsive? Should the decision-maker allow questioning to continue, in case their decision on non-responsiveness was in error and could later be appealed? Does the determination that the witness is non-responsive need to be made immediately, or can it later be determined by the decision-maker upon examination of the record?

You can play with these hypotheticals endlessly, and I'm not sure where exactly the line between responsive and non-responsive is, but I'm fairly certain it is a gray line that exists somewhere on a gradient where reasonable decision-makers' minds may differ.

And for the rule-writers of the overly prescriptive, procedurally narrow 2020 Title IX Regulations, this is an intriguing power and responsibility to bestow upon the decision-maker or hearing officer –

potentially allowing an entire case to swing on one decision that a party or witness is being non-responsive, potentially to just one single cross-examination question.

This all continues to speak (or shout, rather) to the fact that OCR's all-or-nothing stance on cross-examination is not functional in practicality. And I'm not convinced anyone (including the new administration's OCR) should be accepting this interpretational stance to be too persuasive.

ii. <u>OCR's All-Or-Nothing Cross-Examination Curiosity</u>

Under the new Biden administration, the future feasibility of OCR's all-or-nothing stance on cross examination will be examined – if not by OCR itself, then likely by the federal courts. And it's important for practitioners to understand the difference between what the Title IX Regulations say, and what the Department of Education and OCR say they say.

As mentioned above, OCR clarified its all-or-nothing stance on cross examination to many of us on August 13, the day before the 2020 Title IX Regs went into effect. It had perplexed many of us to read OCR's position that a party's or witness' refusal to answer a single relevant cross-examination question is met with the eradication of all of their previous statements and testimony.

The Regulations do not speak to this specific issue with detailed clarity; they simply state that, "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…" See §106.45(b)(6)(i).

It was an OPEN Center email answer sent to the Association of Title IX Administrators (ATIXA) that provided clarity on OCR's position on this matter. It read, in relevant part:

> *A party or witness must answer all relevant cross-examination questions in order for the party's or witness's statements to be relied upon by the decision-maker; thus, refusal by a party or witness to answer one relevant cross-examination will trigger the Rule's prohibition against the decision-maker relying on that party's or witness's statements in reaching a determination regarding responsibility. See Preamble to the Rule at p. 1183 ("For similar reasons, the Department declines to allow a party or witness to 'waive' a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications.)* See ATIXA's OCR OPEN Center Response Repository.

As an Affiliated Consultant with ATIXA, I spent much of that day discussing with my colleagues our questions and concerns regarding OCR's strict interpretation of its own Department of Education's regulations. While the Title IX Regulations themselves have the force and effect of law, their own interpretation of their often unclear Regulations do not. And while OCR cites the aforementioned waiver language in the Preamble, disallowing a party or witness to "waive a question" is not synonymous with rejecting every single statement that party or witness has ever said.

I'm not so sure the courts, or judges, or even the new Biden administration's OCR will continue to interpret this cross-examination requirement in the Regs to require this strict interpretation of what constitutes a refusal to submit to such.

As I have often said, courts and judges will continue to evaluate the fairness of these Title IX proceedings using the same evaluators as they do in presiding over their own courtrooms and legal processes. It's one of the main reasons why I believe that, irrespective of the Title IX Regs, cross examination will continue to be considered by courts across the country as being fundamental for due process.

But this all-or-nothing cross-examination mandate? I'm not so sure how well such an oddity will be respected in the courts.

Imagine a criminal defendant uttering the motive for their alleged crime to witnesses at the scene, then providing statements to police officers who arrested them, and then making additional statements to detectives during their investigation. Then, at trial, the defendant testifies and answers questions during direct examination, and then answers another few dozen questions under cross examination. However, at the end of all of this, the defendant ultimately refuses to answer one relevant cross-examination question. Can you imagine a procedural rule that would then force the judge to have every single aforementioned statement made by this defendant now disregarded?

The same would be true for exonerating or exculpatory statements made by a defendant or respondent, as well as impeaching statements that could show ulterior motives of a complainant or witness. With OCR's approach, we would need to reject this crucial evidence, perhaps allowing a party (or their advisor) to game the system by intentionally having their prior statements disregarded.

A judge would likely find such a procedural rule in the criminal or civil court system unreasonable. And one cannot help but wonder whether a judge will find this similar OCR rule (or "interpretation" of their rule) just the same.

We saw in October what one New York federal judge thought about OCR's directive issued through a blog post on the issue of retroactivity of the Regs. (See *"Judge Halts RPI Sexual Misconduct Hearing"*)

Granted that there were other issues at play in that case, but that judge didn't seem to care what OCR had blogged about. The Regs, as they are written (and often blurry), are the only law that judges must follow. When there is a lack of clarity in the Regs, our judges and courts are likely going to apply their own interpretations of what they believe constitutes due process and fundamental fairness.

And this strict all-or-nothing stance of the previous administration's OCR is a good candidate to become the first victim of common sense.

In fact, even before the courts and judges get a chance to lend us their interpretation of OCR's interpretation on this issue, we actually could see the new OCR regime publish guidance that effectively retracts or clarifies the previous OCR's interpretations of its Department of Education's own Regs.

In less than a month, the signs are already there that this Biden administration does consider the Title IX situation to be a priority that needs to be addressed.

And with critics on both sides of the Complainant/Respondent aisle claiming the pendulum has swung too far in favor of the other side (to the Complainant side under Obama, and to the Respondent side under Trump), we may just see a more neutral foundation established by this Biden administration. While walking along this middle ground has traditionally been a politically unpopular path, it certainly does allow one a less obstructed view of the intended destination.

iii. Title IX Is Complicated, Truth Is the Solution

As an attorney who has spent the last four years dedicated solely to this one specific legal practice area of Title IX, civil rights investigations and sexual misconduct, I know well the elevated level of complexity involved in this work. It is an area of law unlike any other, in which practitioners must balance rigid and complicated federal and state law mandates in combination with real-world applications and common-sense styles that are workable at our schools and campuses.

But the underlying solution to properly adjudicating these matters is profoundly simple: Find out the truth.

Nothing simplifies the excessively complicated Title IX or civil rights adjudication process more than the ability to reference the factual truth. Everything else, from advisor assignments to cross examination to the application of the standard of evidence, is protective fodder that satisfies procedures that are ultimately and allegedly designed to help us find the factual truth.

Simply put, if we magically could know the factual truth of what happened during the alleged incident or incidents, then none of this complex quasi-court system would be necessary – except perhaps for a short hearing to determine whether the actual facts constitute a policy violation.

But seeking and finding the factual truth is usually not as farfetched of an aspiration as some critics would have you believe, as they paint you a picture with "he said, she said" rhetoric, colored over with defeated acceptance that no investigation can adequately sort the truth from the lies. Or, even worse, proclaim that only the cops are capable of figuring out these otherwise unsolvable mysteries.

While I do not discount the fact that there exists a concerning history of inadequate and even biased investigations at some of our country's schools, there is no denying that the field has progressed exponentially in the last half decade. Title IX offices are wisely becoming a primary focus for U.S. higher education institutions, which are prioritizing the proper handling of these matters, considering both overall community health and ultimate legal liability and financial risk.

As someone who gets hired to conduct both these investigations and hearings, there is no denying that many colleges and universities are repurposing their monies and priorities to ensure that the discovery of the truth in these matters is their ultimate goal – and are doing this despite an ongoing worldwide pandemic and devastating financial crisis.

To put it quite clearly, a skilled, thorough and unbiased investigation, conducted through the objective lens of a neutral investigator, is the most critical piece to these Title IX, sexual misconduct and civil rights adjudications.

Too often some schools can get overburdened with the complexities, legal liabilities and procedural convolutions that it causes them to view the investigation as just another step in the long and precarious process. They end up going through the Title IX procedural fog as if it's a mathematical equation where one calculation is as important as the next.

But it's not. Nothing is more important than investigating the facts and gathering the accurate information surrounding the incident/s that have caused the Title IX or civil rights case to be reported in the first place. As a former newspaper reporter and investigative journalist, I see the comparisons with that field of profession far more parallel than I do with legal practice.

The investigation is the uncovering of the truth; the investigation report is the unbiased account that details those facts. It is a nonfiction narrative of what happened during a particular moment in time, told through evidence and interview testimony.

And this particular fact has never been more apparent to me than now – as I conduct investigations for schools across the country, as well as advise and consult institutions and conduct these hearings. Rarely do properly orchestrated hearings suddenly provide fairness to adjudications that are marred with incomplete or incompetent investigations. And no degree of lawyerly advice or expert consultation can correct or rectify an inaccurate investigation report.

We owe it to our communities, our employees and our students, and most particularly, the parties involved in each one of these life-changing cases, to do everything we can to judge these matters based on their factual truths. And that begins with an investigation conducted through the clear eyes of an objective lens.

As I have often said, there is no more powerful tool in combating sexual assault, harassment, discrimination and interpersonal violence in our schools and in our society that having a reliable truth-seeking system that inspires trust in everyone involved, as well as everyone watching.

And right now, everyone is indeed watching.

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For more information on investigation, hearing, legal, consulting and other services offered by THOMPSON ESQUIRE PLLC, please visit the firm's Services page. Or to request a Rate Sheet, please contact Ryan Thompson directly at ryan@esqthompson.com, or call 716-961-3432 (Buffalo office) or 646-819-1994 (Manhattan office). THOMPSON ESQUIRE PLLC serves schools, private businesses and government entities across the United States. This editorial under no circumstances constitutes legal advice, and absent a written contract, no attorney-client relationship exists between readers and THOMPSON ESQUIRE PLLC.

FULL PREPARED VERBAL COMMENT FOR TUESDAY, JUNE 8, TITLE IX PUBLIC HEARING:

"My name is Ryan Thompson, and I submit these comments on behalf of myself and my law firm Thompson Esquire PLLC.
For the last year I have compared the 2020 Title IX Regs to an experimental airplane that not only was never test flown, but was never even put through the flight simulator. The current Regs were written with a clear incomprehension as to the realities that schools are confronted with and how these Regs would translate into real life.

Though likely never intended to do so, the Regs-writers created an odd bifurcated conduct system at most higher ed institutions where sexual violence or harassment between students on campus must be handled differently from sexual violence or harassment between students across the street at a house party, for example.

The Regs, while rightfully mandating equal treatment and instilling due process protections for both parties – something that many of us practitioners had been engaged in for years as best practices – the

overly prescriptive and often arbitrary rules have created quasi courtrooms where gamesmanship and attorney tactics can overcome actual evidence.

As a former Title IX Coordinator, and now an attorney engaged almost exclusively in Title IX and Civil Rights work with schools, I have seen this gamesmanship up close. As a Hearing Officer, I have actually had attorneys tell me that their plan is to ask a party or witness a question that they will refuse to answer so that, as a result of the Regs, all of their previous statements and evidence will then be eradicated from the record.

These procedural oddities, like OCR's all-or-nothing cross examination mandate and the treatment of nonresponsive witness testimony, do not exist in any modern legal system that I am aware of, created as if an experiment is some law school clinic. They take us further away from assessing these cases on the actual facts and evidence, and they make these lengthy Title IX adjudications into legal contests where money and attorney strategy can trump the truth.

Already we have seen the time it takes these cases to be resolved become lengthier, and this time continues to grow, as delay tactics can make smart strategy under the current Regs, because of their prohibitions against many interim actions and temporary degree or transcript holds.

While I believe some level of cross-examination, or some procedural equivalent, is wise to ensure fundamental fairness, I wonder if this mechanism can be built into robust investigation interviews rather than live hearings.

If, however, we do want to continue to operate this live hearing model, I implore you to remove the procedural oddities mentioned previously, as well as consider the following:

• As a Hearing Officer, I don't need to approve every single relevant question. Just put the onus on us to step in and stop a non-relevant question.

• And the strict rules as to what constitutes non-relevant will need to be reexamined as well, including whether a party may waive certain exclusions related to their own privacy.

• Depending on how the cross-examination exclusionary rules are redesigned, we will also need to revisit the consequence of when a witness fails to appear for the hearing, and whether who called that witness is material.

• We just want to get as much relevant evidence and as many helpful witnesses to participate in the process as possible, not play potentially life-altering strategic mind-games with our students.

• We also don't need to force hearings upon parties when neither party wants to engage in one, but instead prefer some other form of administrative adjudication. Nor do we need hearings for minor violations when sanctions will be less serious.

• I also see no reason why we must treat employees the same as students, prohibiting institutions from compelling their own employees to participate or testify as witnesses. We want to encourage the gathering and consideration of evidence, not find ways to exclude it.

• And finally, I think I speak for many in this field, especially those seasoned student conduct hearing officers out there, when I say that we must ensure that the remote hearing options and integration of Zoom for these adjudications remain available to use post-pandemic. Simply put, we are finding these remote hearings are working significantly better from an administration perspective, and, most importantly, are less traumatic and difficult to endure for both parties and the witnesses."

Thank you very much for your time, dedication and attention to these critical matters.
Please let me know if I can be of any future assistance.
Sincerely,

Ryan Thompson, Esq.

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