

U.S. Department of Ed Wont Enforce Title IX Cross Examination Regulation

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The U.S. Department of Education has decided to agree with the ruling of a federal court in Massachusetts, and it will no longer enforce one of its own regulations in Title IX proceedings at colleges and universities.

Early last week the department said that it will not enforce its cross-examination requirement in a Title IX hearing at post-secondary institutions. The U.S. District Court of Massachusetts in late July ruled that the requirement - which obligated anyone accused in a Title IX case to be cross-examined - contained loophole issues that went against the regulation's spirit.

Instead of continuing to enforce the regulation, the department decided to ignore it going forward. The department will establish new cross-examination rules as part of a broader revamp of the Title IX regulations, which are expected to be issued at some point in the coming year.

In the case in question, *Victim Rights Law Center et al v. Cardona*, the court upheld most of the Title IX provisions but took aim at the newly-adopted rule prohibiting a Title IX decision-maker from relying on statements that are not subject to cross-examination during the live hearing when deciding whether an accused student or employee has violated the institution's prohibition against sexual misconduct. The cross-examination rule states, "[i]f 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"

This provision seems logical, but upon taking a step back and analyzing it in conjunction with other portions of the regulations, it creates a giant loophole for a respondent and a sure defeat for a complainant, regardless of the allegation's merits.

Respondents could elect not to appear at the hearing to avoid self-incrimination and may try to persuade third-party witnesses with damaging information from attending the hearing. Institutions cannot subpoena third party witnesses to testify at an internal Title IX hearing. And the requirement for cross-examination also precluded the use of statements made by third parties during an investigation - such as emails or text exchanges - unless the person authoring the statement would be cross-examined at the hearing.

In a perfect storm when a respondent plays the cards right, the hearing would consist of a complainant's testimony and the cross-examination of the complainant with no other evidence and no chance to cross-examine the respondent. This is substantially different from normal court proceedings. Rules of civil or criminal procedure usually prohibit such gamesmanship.

Because of that, the federal court in Massachusetts invalidated the cross-examination rules and directed the U.S.

Department of Education to consider the "necessary and likely consequence" of the cross-examination provision and provide a justification regarding why the rule should remain in place. Earlier this week, though, the department told stakeholders that it will not defend the cross-examination rule any further and would not seek to enforce that rule against institutions. Instead, the department intends to update the cross-examination rules.

In the meantime, postsecondary institutions should review and potentially revise their existing Title IX rules regarding consideration of statements, documents and reports containing a respondent's prior statements, even if a respondent refuses to testify at an institution's Title IX live hearing.

If you have any questions on this move from the U.S. Department of Education, please contact [Katelyn Rohrbaugh](#), [David Freedman](#) or anyone in the [Barley Snyder Education Practice Group](#).

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