The Department of Education, Office for Civil Rights Will No Longer Enforce a Portion of the 2020 Amendments to Title IX Regulations

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Following a recent decision by a federal district court in Massachusetts, the United States Department of Education (DOE) published a bulletin stating that its Office for Civil Rights (OCR) will no longer enforce the "Suppression Clause" of the 2020 Amendments to the Title IX Regulations (2020 Amendments). The impact of this decision is that educational institutions who receive federal funds (Recipients), can individually decide whether they want to remove the Suppression Clause from their policies and procedures.

Background

In *Victim Rights Law Center et al. v. Cardona* (D.Mass. July 28, 2021, No. 20-11104-WGY) [2021 WL 3185743], four organizations and three individual complainants brought a lawsuit in a Massachusetts federal district court challenging thirteen provisions of the 2020 Amendments. The district court upheld twelve of the thirteen provisions. Only the Suppression Clause was struck down.

The Suppression Clause states: "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 34 C.F.R. § 106.45(b)(6)(i).) This means that under the Suppression Clause, a party or witness *must* submit to cross-examination at a Title IX hearing and answer *all* relevant questions, before the decision-maker(s) are permitted to rely on *any* statement of that party or witness in reaching a final determination. If the party or witness refuses to testify on cross-examination, or refuses to answer even a single question on cross-examination, none of their previous statements to investigators or to third-parties, or any other statements they made at the hearing can be relied upon by the decision-maker(s). For example, if a party made incriminating statements to a police officer or investigator, and then decided not to answer a question during cross-examination or participate in cross-examination at all, every statement that party made would be thrown out under the Suppression Clause. Similarly, if a complaining party or key witness failed to appear at the hearing, even if due to threats by the responding party, *none* of the statements made by that person could be considered during the hearing. In striking down the Suppression Clause, the district court called it "arbitrary and

capricious," explaining that the DOE failed to consider the consequences of the provision and failed to mitigate potential repercussions from the provision.

On August 24, 2021, following the holding in the *Cardona* case, the DOE published a bulletin (DOE Bulletin) acknowledging the *Cardona* holding and stating that it will no longer enforce the Suppression Clause. Specifically, the DOE said it will "immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision."

Takeaways

What does this mean for California Recipients?

The *Cardona* holding and the DOE Bulletin do not impact K-12 Recipients, as the Suppression Clause only applies to live hearings, and live hearings are only required for use by postsecondary Recipients.

For postsecondary Recipients in California, the effect of the DOE Bulletin is that they can now choose whether they want to implement the Suppression Clause. Specifically, as stated in the DOE Bulletin:

A decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

However, in California, and in any state except Massachusetts, although OCR will not enforce it, the Suppression Clause remains a part of the 2020 Amendments. Therefore, in a private civil action, a party could still argue that the 2020 Amendments were not properly adhered to, in the event the Suppression Clause was not implemented by a California postsecondary Recipient. Any court hearing such a case could decide to follow the *Cardona* decision and vacate the Suppression Clause. As of now, however, that has not been done. Accordingly, California postsecondary Recipients should consider the potential risk of litigation in the event they choose not to enforce the Suppression Clause.

If you have any questions about the Cardona decision or the DOE Bulletin, would like assistance in updating the relevant policies, or have questions about Title IX in general, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also subscribe to our podcasts, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

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