How Court Ruling, DOE Guidance Change DeVos' Title IX Rule

By Brian Bosworth, Lauren Bachtel and Christopher Cunio
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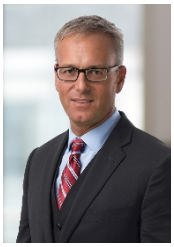

Last month, the U.S. District Court for the District of Massachusetts, in Victim Rights Law Center v. Miguel Cardona, joined courts in other jurisdictions by largely upholding the 2020 amendments to the regulations implementing Title IX of the Education Amendments of 1972, promulgated by the Trump administration's U.S. Department of Education.

The court stood apart, however, by finding one controversial provision — which prohibited decision makers at postsecondary institutions from considering any statement whose declarant did not appear live at a Title IX hearing and subject himself or herself to cross-examination — to be arbitrary and capricious under the Administrative Procedure Act, or APA.

The court vacated this provision nationwide, and remanded it to the Department of Education for further consideration and explanation. The department responded to the ruling in Victim Rights Law Center on Aug. 24, by way of a guidance letter issued by the department's Office of Civil Rights.

The letter explains that the department will immediately cease enforcement of the prohibition against statements not subject to cross-examination. This guidance will have a significant and immediate impact on Title IX investigations and proceedings at postsecondary institutions of higher education throughout the country.

The 2020 Amendments to Title IX

In May 2020, under Trump administration Secretary of Education Betsy DeVos, the department promulgated a final rule implementing Title IX, which departed significantly from prior department guidance. Among other changes, the final rule adopts a more restrictive definition of sexual harassment and prescribes a specific grievance process to handle sexual harassment complaints and Title IX investigations.

Under the final rule, schools must provide written notice of the allegations against the respondent, and inform the parties that they are entitled to an adviser, who may be an attorney. Postsecondary institutions must also provide for a live hearing, at which each party's adviser may conduct a cross-examination of any party and witness.

The final rule prohibited decision makers from considering any statement whose declarant did not appear live at the hearing and subject himself or herself to cross-examination:

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For postsecondary institutions, the recipient's grievance process must provide for a live hearing. 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. ... 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.

In practice, this provision prevented decision makers from considering not just oral statements but also evidence with indicia of reliability, such as medical records, police reports, text messages or social media posts, unless the individual who made these statements appeared live at the hearing for cross-examination.

This rule also omitted all exceptions and exclusions to the prohibition against hearsay evidence that are available under state and federal law, despite the fact that parties cannot subpoena witnesses in Title IX proceedings.

Unsuccessful Prior Challenges

Victim Rights Law Center is one of five cases brought since the summer of 2020 seeking judicial review of the final rule under the APA.[1] In no prior case had the plaintiffs achieved success in vacating any provision of the final rule.

The two cases brought by advocacy organizations — Know Your IX v. Elisabeth D. DeVos, in the U.S. District Court for the District of Maryland, and Women's Student Union v. U.S. Department of Education, in the U.S. District Court for the Northern District of California — were dismissed for lack of Article III standing.

The courts in two other cases — Commonwealth of Pennsylvania v. Elisabeth D. DeVos, in the U.S. District Court for the District of Columbia, and State of New York v. U.S. Department of Education, in the U.S. District Court for the Southern District of New York — denied the plaintiffs' motions for preliminary injunctions, finding that they were unlikely to show that the department acted arbitrary and capriciously.

In response, the complaint in State of New York was voluntarily dismissed. In Commonwealth of Pennsylvania, brought by 18 states and the District of Columbia, the court ordered that the case be held in abeyance, given the Biden administration's indication that it will seek to undo many of the 2020 amendments.

Victim Rights Law Center v. Cardona

The plaintiffs in Victim Rights Law Center — three individuals and four advocacy organizations — filed suit to challenge 13 provisions of the final rule as violations of the APA and the equal protection clause of the Fifth Amendment. U.S. District Judge William Young collapsed the plaintiffs' motion for a preliminary injunction with a bench trial on the merits, which took place in November 2020.

In the court's findings of facts, rulings of law and order for judgment, Judge Young first avoided an obstacle fatal to prior challenges by finding that one individual plaintiff and one advocacy organization demonstrated Article III standing. The individual plaintiff is a party to an ongoing Title IX investigation, and

her school is applying the final rule.

Judge Young found that the Victim Rights Law Center, an organization focused on assisting victims through the Title IX process, has suffered a "frustration of purpose," in that the cross-examination provisions have deterred student victims from requesting the organization's services.

On the merits, however, Judge Young rejected the plaintiffs' constitutional claims, and upheld 12 of the 13 challenged provisions of the final rule pursuant to the APA, finding that the department had adequately considered those provisions, and that the plaintiffs' arguments to the contrary were essentially policy debates.

Judge Young found fault, however, in Section 106.45(b)(6)(i)'s provision prohibiting a decision maker from considering any statement made by a party or witness who does not appear at the live hearing and subject himself or herself to cross-examination. Notably, in no prior case had the plaintiffs focused their arguments on this particular provision.

The department, Judge Young found, "failed to consider the consequences of section 106.45(6)(i)'s prohibition on statements not subject to cross-examination in conjunction with the other challenged provisions." Neither the defendants' briefing nor the administrative record indicated to Judge Young that the department "considered or adequately explained why it intended for section 106.45(6)(i) to compound with a respondent's procedural safeguards quickly to render the most vital and ultimate hallmark of the investigation — the hearing — a remarkably hollow gesture."

Under a plain reading of the final rule, Judge Young explained, a respondent could disrupt the process by scheduling the live hearing at an inopportune time for third-party witnesses, persuade witnesses not to attend the hearing, or elect not to attend the hearing themselves in order to avoid the possibility of self-incrimination, and "rest easy knowing that the school could not subpoena other witnesses to appear."

> In such a case, "the hearing officer is prohibited from hearing any evidence other than the testimony of the complainant," with "no police reports, no medical history, no admissions by the respondent, no statements by anyone who witnessed the incident and either could not attend or was dissuaded from attending by the respondent." The court cautioned:

This is not some extreme outlier or fanciful scenario. No attorney worth her salt, recognizing that — were her client simply not to show up for the hearing — an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise.

Under the APA, it is a reviewing court's responsibility "to ensure that the Department considered this necessary and likely consequence of section 106.45(b)(6)([i]) and require the agency to provide a reasoned explanation why it nevertheless intended this result." Nothing in the administrative record, Judge Young found, "demonstrates that the Department was aware of this result, considered its possibility, or intended this effect."

Given a lack of evidence that the department gave due consideration to Section 106.45(b)(6)(i)'s ban on statements that are not subject to cross-examination, the court ruled that this prohibition is arbitrary and capricious under the APA. Accordingly, the court vacated this provision, and remanded it to the department for further consideration and explanation.

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The court's ruling caused some initial confusion in this regard, as the court did not explicitly state that the provision was being vacated as well as remanded. Upon the parties' subsequent joint motion to clarify, the court confirmed that the provision was both remanded to the department and vacated nationwide, as of July 28.

The Department of Education's Response to Victim Rights Law Center

In a letter issued to students, educators and other stakeholders on Aug. 24, Suzanne Goldberg, acting assistant secretary for civil rights at the department's Office of Civil Rights, announced that:

> In accordance with the court's order, the Department 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.

The letter further explained:

> In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

Postsecondary institutions may now choose to amend their Title IX policies to allow for decision makers to consider statements made by parties and witnesses during Title IX investigations, emails and text messages exchanged between the parties, and other statements concerning the alleged sexual harassment, regardless of whether the declarants submit to cross-examination at the live hearing.

Moreover, Title IX policies may now allow decision makers to consider police reports, sexual assault nurse examiner documents, medical reports and other documents, even if they contain statements of a person who is not cross-examined. However, schools should take care to not change their practices before amending their published Title IX policies.

The department's decision to no longer enforce the cross-examination provision in Section 106.45(b)(6)(i) is likely to be the first of many steps taken to undo the Trump administration's changes to the Title IX regulations. In March, President Joe Biden issued Executive Order 14,021, which directed the secretary of education to review the 2020 amendments and consider whether they should be suspended, revised or rescinded.

In April, the department's Office of Civil Rights announced a comprehensive review of the department's existing Title IX regulations, orders, guidance, policies and other similar agency actions in furtherance of this executive order. The review is ongoing, and the Office of Civil Rights stated that it anticipates publication of a notice of proposed rulemaking that will amend the department's Title IX regulations.

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Notes

1. The other four cases: Know Your IX et al. v. Elisabeth D. DeVos et al., No. 1:20-cv-01224 (D. Md. 2020); Commonwealth of Pennsylvania et al. v. Elisabeth D. DeVos et al., No. 1:20-cv-1468 (D.D.C. 2020); State of New York et al. v. U.S. Department of Education et al., No. 1:20-cv-4260 (S.D.N.Y. 2020); The Women's Student Union v. U.S. Department of Education et al., 3:21-cv-01626 (N.D. Cal. 2021).

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