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Practice Guide for Title IX Practitioners: Ensuring effective live hearings and direct cross-examination in Title IX disciplinary proceedings in the wake of the *Cardona* decision

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Live hearings and direct cross-examination in Title IX disciplinary proceedings are the law! In this Practice Guide, we provide background on those requirements and on a recent decision vacating a single provision of the Department of Education's 2020 Title IX regulations: the provision requiring exclusion of statements when a person does not submit to cross-examination. We then provide points for practitioners to consider as they seek to ensure that schools, in the wake of that decision, do not subvert the still-binding live hearing and direct cross-examination requirements and thereby deprive respondents of their right to defend themselves.

Though we firmly believe that both parties in Title IX proceedings should be treated fairly, our focus here is on fundamental principles of American jurisprudence: people who are accused of serious wrongdoing have a right to defend themselves; this includes a right to know and test all of the evidence; and findings of wrongdoing should be based only on credible and reliable evidence.

Background

On May 7, 2020 the Department of Education announced new Title IX regulations, taking a much-needed step toward promoting fundamental fairness, reliability, and consistency in campus disciplinary proceedings. The "Final Rule" is firmly rooted in the principle that Title IX protects access to education for *all* parties – complainants and respondents, males and females – and that disciplinary proceedings should be fair to all. The procedural provisions, including the requirement that post-secondary schools provide a live hearing and allow accused parties to confront and test *all* of the evidence, implemented principles already required by existing law, as confirmed by state and federal court decisions both before and after the Final Rule was adopted.

Now, over a year later, court challenges to the Final Rule have failed and its provisions remain binding law, except for ***one sentence*** in 34 CFR § 106.45(b)(6)(i) (the "exclusion provision"):

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"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 Victim Rts. L. Ctr. v. Cardona*, No. CV 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021), *order clarified*, 2021 WL 3516475 (D. Mass. Aug. 10, 2021). Every other provision of Section 106.45(b)(6)(i) remains in effect. Post-secondary institutions ***must***, therefore, "provide for a live hearing;" ensure that all participants can simultaneously see and hear each other (either in person or virtually, with appropriate technology); and "permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice . . . ." *Id.*

As the *Cardona* Court acknowledged, the goal of the Final Rule was to ensure a "'fair grievance process leading to reliable outcomes, which is necessary in order to ensure that recipients appropriately remedy sexual harassment occurring in education programs or activities.'" *Cardona*, at *6. The Department "detailed its reason for adopting the live hearing procedures, including the cross-examination requirement," "explained its balance between cross-examination as a 'necessary part of a fair, truth-seeking grievance process' with safeguards to minimize the potential for 'traumatic effects on the complainants,'" and stressed that schools are responsible "for reaching an accurate determination regarding responsibility while maintaining impartial[ity]." *Id.* at *5-6.

As is also clear from *Cardona* and the Department's explanation of the exclusion provision, the Department adopted the provision to prevent schools or parties from sabotaging the direct cross-examination requirement, given that schools do not have the power to force witnesses or even parties to testify. *See id.* at *6. This concern was not abstract: as court opinions show, it has been all too common for school decisionmakers to allow and accept untested statements from complainants and their supporting witnesses, sometimes without hearing from them at all.[2] In the Department's words, "[i]f statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process." Title IX Regulations, May 19, 2020, Preamble, 85 F.R. 30337,

[2] And courts have allowed plaintiffs to pursue claims against schools on that ground. To cite just a few of many examples, *see Doe v. Purdue Univ.*, 928 F.3d 652, 664 (7th Cir. 2019) (finding "particularly concerning" that school officials "concluded that Jane was the more credible witness—in fact, that she was credible at all—without ever speaking to her in person"); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400-06 (6th Cir. 2017); *Nokes v. Miami Univ.*, No. 1:17-cv-482, 2017 WL 3674910, *12-13 (S.D. Ohio Aug. 25, 2017). Similarly, courts have criticized schools that allow complainants to cherry pick evidence. *See, e.g., Doe v. New York Univ.*, No. 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021).

30347. The Department's solution was a "bright-line rule" requiring exclusion of *all* statements made by a person who does not submit to cross-examination. *Id.*; *Cardona*, at *6.

Many stakeholders, whether they opposed or supported other provisions of the Final Rule, expressed concern with the breadth and inflexibility of the exclusion provision, which applied whether the person was a party, an interested witness, or an independent witness such as a medical or law enforcement observer; regardless of when and in what context the statements were made (*i.e.*, whether in connection with a disciplinary proceeding, during the encounter at issue, or as part of a history of communications between the parties); and whether the statements were self-serving or against the person's interest (including admissions or confessions). The *Cardona* Court expressed concern that the blanket exclusion could "render the most vital and ultimate hallmark of the investigation -- the hearing -- a remarkably hollow gesture," and held that the Department had not adequately justified the provision. "To so carefully balance and craft the respondent's safeguards, the definitions, the burdens, and the policies in the run-up to the hearing, just to have the prohibition and definition of absentee statements render the hearing a hollow exercise further demonstrates that the Department failed, even implicitly, to consider the consequences from the prohibition and definition of statements." *Cardona*, at *15-16.[3]

After the decision, the Department's Office of Civil Rights announced it would "immediately cease enforcement" of the exclusion provision. Though it acknowledged the other provisions of § 106.45(b)(6)(i) remain in effect, OCR exceeded its mandate under *Cardona*, the still-binding provisions of the Final Rule, and other legal authority by suggesting that the decision affirmatively allows decisionmakers to consider statements by persons who do not submit to cross-examination, including, for example, "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." https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf. And

[3] The *Cardona* Court expressed concern with potential conduct by a respondent, but under the exclusion provision, either party could avoid the consequences of a direct admission or other statement against interest by simply refusing to answer questions about it. *See* our June 11, 2021, comment in response to OCR's announced intent to review the Title IX regulations, https://conradobrien.com/uploads/attachments/ckpwvn112146ihuiw8453euj3-2021-06-11-hamill-dakessian-ocr-comment.pdf.comment; ACLU comments, https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule ("No party should be able to avoid introduction of their own prior statements against interest by declining to testify at the hearing"); June 4, 2021, comment by K.C. Johnson, Kimberly Lau, Eric Rosenberg, and many other attorneys and educators, https://kcjohnson.files.wordpress.com/2021/06/20210604-comment-on-proposed-title-ix-rulemaking-1.pdf.

stakeholders who oppose the cross-examination requirement went even farther, suggesting the *Cardona* decision would allow complainants to sabotage the live hearing and cross-examination requirement by simply refusing to answer cross-examination questions by respondent's advisor.[4]

This tactic is indefensible: *Cardona* ***upheld*** the provisions requiring a live hearing with cross-examination by advisors, and vacated the exclusion provision as written to make sure the hearing would not be a hollow exercise. *Cardona*, *15-16. If schools allow *Cardona* to be used to subvert cross-examination and a respondent's right to defend against accusations of sexual misconduct, they violate the Final Rule, violate pre-existing law as established by court decisions, and use *Cardona* to achieve the exact opposite of the intended result. Because the Department's "bright-line rule" has been vacated, schools ***must*** come up with their own ways to ensure decisions are based only on evidence that has been effectively tested in accordance with the still-legally-binding provisions of the Final Rule.

Court rulings affirming the need for live hearings with cross-examination to ensure fair and reliable proceedings, the requirements of the Final Rule, and the Department's explanations for those requirements are the starting point for the thoughts we share here. We and others have published discussions of the growing consensus of courts requiring basic procedural protections for those accused of Title IX offenses, including rulings requiring live hearings and cross-examination to effectively test a party or witness's allegations. We are not going to reproduce that discussion here, but point practitioners to the following resources:

- The seminal decision in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), one of over 30 opinions confirming the crucial role of cross-examination in Title IX proceedings, allowing a Title IX claim in part because the university did not allow the accused student or his agent to cross-examine the accuser and witnesses before a neutral fact-finder.
- Answers of Patricia M. Hamill to Sen. Alexander, HELP Committee, submitted Apr. 18, 2019, https://conradobrien.com/uploads/attachments/cktsxkuhp07kuqqiwsx13h7p9-patricia-hamill-answers-to-sen-alexander-of-help-committee-2019-04-18.pdf.
- K.C. Johnson/Samantha Harris, *Campus Courts in Court* (Dec. 2019), https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf.
- *Analysis of Judicial Decisions Affirming the 2020 Title IX Regulations*, https://www.saveservices.org/title-ix-regulation/analysis-of-judicial-decisions/.

[4] *See, e.g.*, National Women's Law Center, https://nwlc.org/resources/federal-judge-vacates-part-of-trump-administrations-title-ix-sexual-harassment/, claiming "survivors should no longer have to be cross-examined by the respondent's advisor under the Title IX rule."

Points to consider

To help Title IX practitioners ensure that schools fulfill their binding legal obligations, we offer the following points for consideration. While we understand the Department's resistance to imposing comprehensive evidentiary rules on campus proceedings, our recommendations are based on straightforward, common sense principles that undergird the well-established rules of evidence. We are not offering specific legal advice here: how you address each situation will depend on the facts of that situation.

1. Schools must be reminded of their fundamental obligation to provide a fair proceeding and base decisions only on reliable credible evidence.
2. Schools must be reminded that the Final Rule still requires live hearings with direct cross-examination. This is fundamental to a respondent's right to an effective defense, and if schools allow anything to subvert that, they violate both the Final Rule and the law as established by the emerging consensus of federal and state court opinions. Know the underlying law – particularly the law of your jurisdiction. Review the school's policy and training, to a) identify any points subject to legal challenge and b) ensure the school follows its own legitimate procedures.
3. Schools must comply with the requirement to give the parties access to all relevant evidence, so parties can respond to it and make concrete arguments for or against admission.
4. Schools can and should consider dismissing the complaint if a complainant refuses to testify, respond to questions, or provide complete evidence. *See* § 106.45(b)(3)(ii) (allowing recipients to dismiss a complaint or allegations where "specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.")
5. A respondent's right not to self-incriminate must be protected. The regulatory provisions requiring schools to presume respondents not responsible (§106.45(b)(1)(iv)) and not to "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" (§ 106.45(b)(6)(i)) are still in effect.
6. Subject to point 5, schools can and should take other steps to ensure that the right to direct cross-examination, and the underlying right to have decisions based only on tested, credible evidence, are protected. At the very least, schools should not decide against and punish an accused party based on self-serving statements that have not been tested through direct cross-examination. Or, to put it another way, an untested accusation is not "evidence" sufficient to satisfy a preponderance of the evidence standard.
7. We don't support the "all or nothing" approach of the Department's original exclusion provision. Exclusion provisions can be tailored to what a party or witness does and does not answer questions about. In addition, it is generally not appropriate for parties to be

allowed to place relevant evidence (for example, their own admissions or other statements against their own interest) off limits by refusing to testify about it.

8. Communications that are an integral part of the encounter at issue, such as a complainant's request or expression of consent for an activity, should not be excluded.
9. Communications that are relevant for context, to establish the parties' patterns, etc., should be considered carefully. In a text exchange between the parties, for example, a testifying party may want to rely on the full exchange even if the other party refuses to testify. Or a respondent who decides not to testify due to concerns about potential criminal proceedings may still appropriately ask the school to consider the full documented history of the parties' relationship and encounters. We don't suggest a bright line rule here, because your position may be different depending on the specific facts. If schools honor their disclosure obligations, you should have the information you need to advocate for either admission or exclusion.
10. Depending on the circumstances, it may be appropriate to ask the school to draw a negative inference from refusal to answer questions or selective production of evidence.
11. If a party or witness does refuse to answer your questions, and the school does not take the steps you propose to ensure the hearing is not a hollow exercise, consider as a last resort – "without waiver of the right to a live hearing and direct cross-examination" – submitting your specific questions to the decisionmakers with a request that they ask the questions themselves, give you an opportunity to submit follow up questions, and give your client a chance to respond afterward.[5]

Here's the bottom line: now that the Department's bright-line rule has been vacated, schools have even more responsibility to ensure that live hearings with direct cross-examination do not become a "hollow exercise," and you as a practitioner will need to advocate for solutions that fit the facts of your case.

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[5] Note *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019), where the Court held (pre-Final Rule) that if the school did not permit cross-examination by the accused student or his agent, it must itself "reasonably probe the testimony tendered against that student," *e.g.*, through questioning the accuser, probing for detail, requiring clarification of ambiguities, and allowing respondent to be heard after complainant testified.