

## Education Department Ceases Enforcement of Title IX Regulatory Provision Barring Reliance on Certain Statements

By Susan D. Friedfel, Monica H. Khetarpal, Joshua D. Whitlock, Carol R. Ashley, Crystal L. Tyler and Laura A. Ahrens

August 25, 2021

The U.S. Department of Education's Office for Civil Rights has announced that it will immediately cease enforcement of the Title IX regulatory provision prohibiting decision-makers' reliance on statements not subject to cross-examination at a live hearing.

The announcement was made in a [Letter to Students, Educators, and other Stakeholders re \*Victim Rights Law Center et al. v. Cardona\*](#), released on August 24, 2021.

The letter comes after a federal district court in Massachusetts issued an opinion in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104 (D. Mass. July 28, 2021), that found 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious in violation of Section 706(2)(A) of the Administrative Procedure Act. The Court vacated and remanded the case to the Department of Education for further consideration and explanation of that provision. The provision 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."

In response to the district court opinion, the Department stated that it would "immediately cease enforcement of ... the prohibition against statements not subject to cross-examination" and that higher education institutions "are no longer subject to" that provision.

The Department further clarified:

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.

The Department's letter does not expressly require institutions to revise their Title IX Sexual Harassment grievance procedures in line with this development. However, the Department's statement about the practical impact of its position suggests that institutions should remove or replace any portion of their procedures that prohibits reliance on statements not subject to cross-examination. Such statements remain subject to the relevance rules, but now decision-makers have discretion to consider all statements made by parties and witnesses during the investigation, including those found in emails, text messages, police reports, SANE documents, and medical documents.

The Department instructed that any statements in an Office for Civil Rights document, including its [Questions and Answers on the Title IX Regulations on Sexual Harassment \(July 2021\) and Appendix](#) with sample policies, which include the vacated portion of 34 C.F.R. § 106.45(b)(6)(i), should not be relied upon and will be updated in the coming weeks to reflect the guidance in the August 24 letter.

Meanwhile, the Office for Civil Rights is continuing its comprehensive review of the Department's current Title IX regulations, orders, guidance, policies, and similar agency actions as outlined in President Joe Biden's "[Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#)."

The Jackson Lewis Higher Education Team is well-versed in Title IX issues and continues to analyze

### Meet the Authors



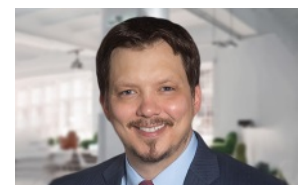
[Susan D. Friedfel](#)

Principal  
New York Metro  
White Plains 914-872-8027  
Email



[Monica H. Khetarpal](#)

Principal  
Chicago 312-803-2529  
Email



[Joshua D. Whitlock](#)

Principal  
Charlotte 980-465-7242  
Email

ongoing developments in this area. Please contact a Jackson Lewis attorney with any questions regarding the August 24 letter, Title IX policies, and any other Title IX developments. More information regarding Jackson Lewis' Title IX Video Training Series can be found [here](#).

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.



**Carol R. Ashley**

Of Counsel  
Washington, D.C. Region 703-483-8300  
Email



**Crystal L. Tyler**

Of Counsel  
Richmond 804-212-2880  
Email



**Laura A. Ahrens**

Associate  
Greenville 864-672-8045  
Email

## Practices

Collegiate and Professional  
Sports  
Litigation

## Industries

Higher Education