

OCR Pivots on a Controversial Provision of the 2020 Title IX Regulations

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On August 24, 2021, the Department of Education's Office for Civil Rights (OCR) issued a letter notifying postsecondary institutions that it would no longer enforce one of the more controversial provisions of the 2020 Title IX regulations—the exclusion of evidence rule. According to this rule, "[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 plain English it means that if the respondent fails to show up to the hearing or refuses to be cross-examined, none of their previous statements or evidence could be considered by the hearing panel. That includes police reports, statements to sexual assault nurse examiners, written admissions by the respondent, and other inculpatory evidence.

OCR indicated that it will stop enforcing this provision of the Title IX regulations because of a federal district court's decision in Victim Rights Law Center et al. v. Cardona. In this case, the court found that this provision of the Title IX regulations was arbitrary and capricious, and therefore in violation of the Administrative Procedure Act.

The August 24, 2021 letter from OCR further clarifies that postsecondary institutions are no longer required to use the exclusionary rule language in their Title IX grievance procedures. Institutions may now permit their decision-makers to consider statements made by parties or witnesses even if those individuals do not participate in cross examination at the live hearing. As MUSC prepares to revise the Policy on Nondiscrimination, Anti-Harassment, and Equal Opportunity, we will look to OCR's guidance on this issue to ensure that the Title IX grievance process is fair and leads to reliable outcomes.