HIGHER EDUCATION
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Assessing the Evolving Impact of Victim Rights Law Center et al v. Cardona on College and University Title IX Procedures

It has been over two months since the federal District Court's July 28, 2021 decision in *Victim Rights Law Center et al v. Cardona* vacating the section of the United States Department of Education's 2020 Title IX Final Rule that precluded postsecondary institutions from considering any statement made by a party or witness who does not submit to cross examination at a live adjudicatory hearing. Since the decision, institutions have sought to assess its impact on their processes for adjudicating allegations of sexual harassment, including the possibility of changes to eliminate this preclusion requirement from their procedures.

In the Court's decision, District Judge William Young (of the U.S. District Court for the District of Massachusetts) declined to invalidate a majority of the challenged provisions in the Final Rule, but held that the preclusion requirement was invalid because the Department of Education had acted arbitrarily and capriciously in adopting it (thereby violating the federal Administrative Procedure Act). Although the import of Judge Young's decision for institutions situated within Massachusetts was clear, it initially raised questions for institutions in other jurisdictions as to whether they would still be required to follow the preclusion rule in their adjudication processes. However, on August 10, 2021, in response to a joint motion for clarification, the court issued a supplemental decision confirming that the preclusion rule was "vacated" (rather than simply enjoined as to particular parties), and on August 24, 2021, the Department issued guidance confirming that it would immediately cease enforcement of the preclusion rule.

In the ensuing weeks, many institutions have considered the impact of these events, including the possibility of amending or removing provisions in their adjudicatory processes that were implemented to comply with the preclusion requirement. Institutions considering such actions should consult with their legal counsel, as there are a number of variables warranting consideration. Given the Court's decision and the Department's guidance (and, by extension, the Department's apparent decision not to appeal the ruling), institutions are not faced with the prospect of regulatory enforcement action should they choose to eliminate their preclusion rule provisions. It is possible, however, that private litigants could seek to argue that although the preclusion rule is no longer required as a regulatory matter, it is somehow necessary to afford a fair process, and/or that its repeal by an institution is reflective of gender bias (*see*, by way of analogy, *John Doe v. Rensselaer Polytechnic Institute*), and institutions will want to consider the extent to which they are concerned about the viability of such arguments. Finally, some institutions may be unable to immediately cease enforcing preclusion provisions in their procedures, may need to follow internal policies and governance procedures to effectuate the necessary changes, and may need to consider the impact of such changes (if any) on pending cases.

Given the unusual current posture of this provision of the Final Rule, if you have questions or concerns about whether or how your institution should consider changing its procedures, we encourage you to contact any Bond attorney in our higher education practice, or your institution's counsel.

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