DeVos’s Changes to Title IX Enforcement

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Abuse

Someone close to me was abused by her coach.
   He was convicted.
   Later he died of stomach cancer.
   The victim said, "Good." (by Asbjorn Osland)

Introduction

The protagonist was Betsy DeVos. Her challenge was to revamp the U.S. Department of Education’s (DOE) Office of Civil Rights’ (OCR) approach to Title IX in relation to campus sexual misconduct. President Trump appointed her as the Secretary of Education. She was confirmed by the Senate after Vice President Pence cast his tie-breaking vote, the first time in history this was done in a cabinet confirmation hearing. She wanted to emphasize local control of education to give parents the choice of where to education their children.

She inherited the Title IX controversy that had resulted in a large number of lawsuits. The “Dear Colleague Letter” of 2011 (United States Department of Education, Office of Civil Rights. (2015, October 16), wherein veiled threats were made that lack of campus compliance could result in the loss of federal funding, was controversial. It was a well-intended federal effort to establish a policy that may have sidestepped constitutional due process issues and the public comment period crucial to the Administrative Procedures Act (APA).

She and her staff, in July 2017, held hearings to listen to various stakeholders. Subsequent to these hearings, DeVos intended to clarify the new DOE federal policy. She authorized temporary changes explicated in the “Q&A on Campus Sexual Misconduct” (2017). Listening to both sides of the controversy was a sound first step consistent with the APA. What should she finally recommend as policy? How could the policy be fair to the various stakeholders when the opposing sides held such differing views? One side was concerned with reducing campus sexual violence while the other wanted to also ensure that the accused enjoyed due process.
Biographical Sketch of DeVos

Betsy DeVos started her tenure as the Secretary of Education after being confirmed with Vice President Pence’s tie breaking vote, the first time in history this was done in a cabinet-confirmation hearing. Her father was an entrepreneur in the auto parts business and her brother, a former Navy SEAL and CIA employee, created Blackwater USA, which provided assorted contract security services to the government. She married into the DeVos family; her father-in-law founded Amway. She and her husband were long-term Michigan Republican Party activists as well as contributors. DeVos was a supporter of school choice, including private school vouchers. Teachers unions opposed her nomination (Toppo, 2017, February 7). She was a mother of four children and had six grandchildren. According to the Department of Education bio (2017, April 26), she wanted to:

*advocate for returning control of education to states and localities, giving parents greater power to choose the educational settings that are best for their children and ensuring that higher education puts students on the path to successful careers.*

Background to Title IX

Former U.S. Senator and Harvard Professor Daniel Patrick Moynihan thought Title IX amendments of 1972 were “one of the most important pieces of education legislation in the history of the Republic” (Winslow, 2015). It opened opportunities for women in educational institutions, not just in college sports.

Title IX also became a vehicle for addressing campus sexual misconduct. Alleged victims sometimes recalled incidents that they thought were sexual abuse or rape. Memories were sometimes foggy because the sexual encounter had occurred while the individuals were intoxicated. Weeks or months could have passed after the incident before a complaint was lodged, which complicated the gathering of evidence; police need to look for bodily fluids, evidence of violence, hairs from the perpetrator and so forth. Under Title IX, campuses were to provide resources to students who felt they had been abused but did not complain to the local police. Title IX officers could be certified by ATIXA (i.e., the Association of Title IX Administrators), a group that certified Title IX administrators and held annual meetings. They were usually not trained police investigators.

The social climate in late 2017 had become one of serial revelations of yet another celebrity sexual abuse allegation. #metoo, the Twitter forum for people to tell their own story of sexual abuse (Bennett, 2017, November 30; Codrea-Rado, 2017, October 16), exploded and it was named Time’s Person of the Year (Zacharek, Dockterman, & Sweetland Edwards, 2017, December 18). Though the Title IX changes promulgated by the federal government’s Office for Civil Rights in the Department of Education preceded #metoo by six years, the social movement against sexual misconduct reinforced concern that Title IX enforcement remain vigorous under DeVos.

Change to how allegations were processed in universities had become necessary as costly lawsuits kept growing. The “Dear Colleague Letter” of 2011 (DCL of 2011), wherein veiled
threats were made that lack of campus compliance could result in the loss of federal funding, resulted in too little attention paid to constitutional guarantees. The well-intended federal effort established a policy that sidestepped constitutional due process issues. These perceived deficiencies gave defendants, almost always men, grounds for filing lawsuits, which they did in 201 cases as of December 3, 2017 (Helpsaveoursons, 2017, December 3); the website listing of cases was probably incomplete in that interested parties had to post the case.

An entire Title IX industry had developed since 2011 with specialized lawyers, and ATIXA. ATIXA estimated that around 25,000 employees and professionals worked in jobs related to Title IX. Some states continued to process Title IX complaints as they had before the DOE issued the 2017 Q&A on campus sexual misconduct. For example, the California State University (CSU) system continued with pre-DeVos regulations. The California Education Code Section 67386 (California Legislative Information, 2016, January 1) stipulated the following:

(a) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1092(f)) involving a student, both on and off campus. The policy shall include all of the following: * * *(3) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.

California used the preponderance of the evidence standard, the lowest of the three standards. The DOE stated that universities could choose either that one or the clear-and-convincing standard, with a higher probability of guilt required than the preceding (HG.org, 1996-2017). Criminal cases used the highest standard of beyond a reasonable doubt; in this context these were usually sexual assault or rape cases where the victim pressed charges.

**Administrative Procedure Act**

DeVos’s approach to listening to the various stakeholders in public hearings was consistent with what Senator Lankford, of Oklahoma, had advocated. On March 4, 2016, Senator Lankford wrote the following to OCR:

Congressional oversight of agency action is a cornerstone to the checks and balances ensured by our Constitution. I will continue to push back against agencies’ improper use of guidance documents that, while purporting to merely interpret existing law, fundamentally alters the regulatory landscape. Congress enacted the Administrative Procedure Act to safeguard against precisely these threats of administrative fiat, and agencies that spurn such procedures do so contrary to congressional design and at the expense of the American people. Accordingly, I again call on you personally to clarify that these policies are not required by Title IX, but reflect only one of various ways schools may choose to develop and implement policies for the prevention and remedy of sexual
harassment and sexual violence that best meet the needs of their students and are compliant with federal law. I further ask that you immediately rein in the regulatory abuses within the Department of Education and take measures to ensure that all existing and future guidance documents issued by your agency are clearly and firmly rooted in statutory authority.

The APA was available to the Obama administration and Obama’s DOE used it the Title IX protections developed over the years would be actual federal regulations instead of "guidance" that can be revoked with no process.

The issue was politically charged in that victims rightfully believed campuses had to pay attention to their plight and alleged perpetrators believed they were due the legal protections afforded under the U.S. Constitution Bill of Rights.

DeVos attempted to follow the APA but she still had to distill the results of the hearings and create a policy for stakeholders that had differing ideas of fairness regarding campus sexual misconduct.

The Foundation for Individual Rights in Education (FIRE) evaluated the 50 top universities in the country and found them sorely wanting in terms of constitutional safeguards. On the other hand, many OCR employees and women’s groups thought the processes resulting from the DCL of 2011 were appropriate. FIRE’s criteria were as follows (Bauer-Wolf, 2017, September 5):

1. A clearly stated presumption of innocence, including a statement that a person’s silence shall not be held against them.
2. Adequate written notice of the allegations. Adequate notice should include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.
3. Adequate time to prepare for all phases of the disciplinary process, including notice of the hearing date at least seven business days in advance, and access to all evidence to be considered at the hearing five business days in advance. If the accused student is required to respond to the allegations before the hearing, he or she must receive notice at least five business days in advance.
4. A prohibition on conflicts of interest that could compromise the integrity of the process (i.e., advocates cannot serve as investigators or fact-finders, and fact-finders must not hear the appeal).
5. The right to impartial fact-finders, including the right to challenge fact-finders’ impartiality.
6. Access to and the right to present all relevant inculpatory and exculpatory evidence at hearing.
7. The ability to pose relevant questions to witnesses, including the complainant, in real time, and respond to another party’s version of events. If questions are relayed through a panel or chairperson, there must be clear guidelines setting forth when questions will be rejected, and the reason for refusing to pose any rejected question should be documented.
8. The active participation of an adviser of choice, including an attorney (at the student’s sole discretion), during the investigation and at all proceedings, formal or informal.

9. The meaningful right of the accused to appeal a finding or sanction. Grounds for appeal must include (1) new information, (2) procedural errors, and (3) findings not supported by the record. Appeals must not be decided by the investigator or original fact-finding panel.

10. Unanimity of panel must be required for expulsion.

Following the above points shielded university tribunals from being described as kangaroo courts and also helped avoid lawsuits filed by students that believed their rights had been violated. However, university tribunals were not criminal courts so they did not use comprehensive constitutional safeguards when processing non-criminal disciplinary offenses.

Cost of Lawsuits

United Educators, an insurance and risk management firm, reviewed dozens of cases filed over a six-year period, primarily from students who believed they had been falsely accused of sexual assault. United Educators and the colleges paid an average of $187,000 per case. One legal fight cost $1 million. Only one case went to trial and the institution prevailed at a cost of $500,000. In another study done by United Educators, it found that claims from victims of sexual assault cost an average of $350,000. In both types of cases, typical defense costs were about $130,000.

Accused students filed over 200 legal complaints since the DCL of 2011 pressured campuses to respond to reports of sexual assault. Some critics believed this federal pressure could have biased investigations in favor of the victims, thereby denying due process to the accused students. The most common complaint made by accused students was breach of contract; the campuses had not followed their own policies. Accused students often accused campuses of unfair treatment because they were male. Complaints were also made alleging that the sexual-assault investigations were done improperly or the investigators had not been trained properly.

United Educators recommended:

1. Clarity was essential regarding what people in the investigation process were supposed to do and when.
2. Training regarding consent was vital, especially when alcohol was consumed.
3. The investigation and adjudication functions had to be separate regarding individuals participating in one but not the other.
4. Campus administrators had to appear impartial, without a bias toward the victim (Brown, 2017).

Legal and Administrative Issues to Consider Regarding Title IX

There were many legal and administrative issues DeVos needed to consider regarding Title IX. The Obama administration wanted to quickly and effectively insist that universities take sexual
assault seriously. Obama administration’s OCR chose not to follow the APA. It relaxed procedures relating to due process and changed the evidentiary standard to that used in civil court (i.e., preponderance of evidence), rather than clear and convincing. It also threatened universities with restricting access to federal funds if they failed to comply with OCR requirements.

The OCR was a federal administrative agency within the DOE. Congress authorized agencies to carry out the mandates of specific statutes, making regulations within the scope of the statute, enforcing them, and holding hearings with regard to possible violations. Congress derived the authority to legislate from Article One of the U.S. Constitution. Administrative agencies have no authority, independent of Congress, to make rules. Should an agency see the need to create regulations within an existing Congressional authorization, under the APA, it can hold hearings to give the public a notice-and-comment period. As mentioned above, Secretary DeVos held hearings in mid-July 2017 to inform her regarding what might be the appropriate action to take.

Procedural due process required that the government provide anyone whose “property” (in this instance, education) might be withheld (e.g., expulsion, graduation not honored etc.) with a notice affording them the opportunity to offer a defense and a hearing where the action of the university can be challenged.

The process for resolving claims of sexual harassment might appear in a student handbook or a policy accessible on a school web site. The policy might explain the prohibited conduct, the consequences and procedure. School hearings might be formal, with the trappings of a trial, or informal, involving meetings with the complainants and the accused, the report might be written by a faculty member, students serving on a board, or administrative heads. The OCR required that all complainants had the right to an investigation. Such a categorical rule led to time wasted on frivolous complaints.

Shortcomings of the OCR DCL of 2011 included the following:

1. Alleged perpetrators needed adequate time to prepare a defense. This can be months in a judicial proceeding, not as quickly as some university proceedings.
2. Clear definitions of sexual harassment and assault were required but were not present in the letter.
3. A university committee finding that sexual assault or harassment had occurred was not tantamount to finding that a criminal or even actionable civil offense had occurred. Yet expulsion or denial of graduation were serious remedies imposed on alleged perpetrators by university committees.
4. Alleged victims enjoyed confidentiality in some complaints. In court, alleged perpetrators had the right to confront their accusers. But official guidelines did not so stipulate.
5. For a student to be found guilty of rape by a university committee of rape when a judicial body did not so conclude could have grave consequences for the student.

How to proceed was not simple. For example, ten University of Minnesota football players were accused of having serial sex with one intoxicated woman. The police viewed the video tapes
several of the alleged perpetrators had made and could not find evidence that she resisted. Hence, no criminal charges were filed. The university initially suspended all ten but later concluded that five players should be reinstated to the team (Moskovitz, 2017). Where universities took Title IX action contrary to what the local police supported, in terms of criminal prosecution, they opened themselves to potentially costly lawsuits. However, where the Title IX office within the university failed to take action after the police and local prosecutors had declined to prosecute, victims of sexual assault may have felt let down.

The September 2017 Q&A on Campus Sexual Misconduct

The Department of Education, Office of Civil Rights, September 2017 was to conduct a stakeholder analysis and modify the Q&A accordingly. What follows were summarized partial comments:

- Schools were to address complaints.
- The Clery Act required the compilation and publication of annual statistics on allegations of sexual misconduct.
- Interim measures (e.g., counseling, increased security, time off, accommodations to schedules etc.) “are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct….”
- Grievance procedures for dealing with allegations of campus sexual misconduct must be published to provide prompt and equitable resolution of complaints.
- The school was to gather evidence to arrive at a fair determination if allegations of sexual misconduct occurred. A trained investigator had to conduct the investigation. There was to be mutual disclosure and sharing of relevant information.
- An informal resolution of a complaint was possible if all parties voluntarily participated.
- The standard of evidence should be consistent from case to case. Universities can choose either the preponderance-of-evidence or clear-and-convincing standard.
- The disciplinary actions taken need to be a proportionate response to the violation and all must be reported each year.

DeVos’s Stakeholder Analysis and Modification of September 2017 Q&A

The various stakeholders had differing views:

- Many Democrats and women’s groups concerned about allegations of campus sexual misconduct wanted Obama-era guidelines to continue.
- FIRE and libertarian constitutional lawyers wanted constitutional safeguards to be respected.
- University and college administrators wanted to be fair but also limit their liability by avoiding lawsuits.
- Students wanted to feel protected from campus sexual misconduct as well as false accusations.
HRM, student life administrators, and Title IX officers wanted the university and college community educated and trained so that knowledge was generalized within the community to avoid errors and lawsuits.

The social context of harassment and sexual violence had changed with Title IX and #metoo. Some older faculty might have found that comments on appearance or terms that might have been okay years ago were no longer tolerated. For immigrants, touching that was normal in some contexts abroad, such as Latin America, might not have been tolerated in the American context. Drinking alcohol or ingesting marijuana and engaging in sexual contact was a delicate balance in that both parties had to give consent whereas before expressed verbal consent might not have been expected when the sexual encounter was dynamic and non-verbal. Hence, there was a need for training. Training had become mandatory in some universities such as CSU.

In a speech (U.S. Department of Education, 2017, September 7), DeVos offered a long list of failures of Title IX in terms of campus sexual misconduct cases:

The current failed system left one student to fend for herself at a university disciplinary hearing. She told her university that another student sexually assaulted her in her dorm room. In turn, her university told her she would have to prosecute the case herself. Without any legal training whatsoever, she had to prepare an opening statement, fix exhibits and find witnesses. "I don't think it's the rape that makes the person a victim," the student told a reporter. She said it is the failure of the system that turns a survivor into a victim. ...

You may have recently read about a disturbing case in California. It's the story of an athlete, his girlfriend and the failed system. The couple was described as "playfully roughhousing," but a witness thought otherwise and the incident was reported to the university's Title IX coordinator. The young woman repeatedly assured campus officials she had not been abused nor had any misconduct occurred. But because of the failed system, university administrators told her they knew better. They dismissed the young man, her boyfriend, from the football team and expelled him from school. "When I told the truth," the young woman said, "I was stereotyped and was told I must be a 'battered' woman, and that made me feel demeaned and absurdly profiled." ...

Another student at a different school saw her rapist go free. He was found responsible by the school, but in doing so, the failed system denied him due process. He sued the school, and after several appeals in civil court, he walked free. ...

A student on another campus is under a Title IX investigation for a wrong answer on a quiz. The question asked the name of the class Lab instructor. The student didn't know the instructor's name, so he made one up—Sarah Jackson—which unbeknownst to him turned out to be the name of a model. He was given a zero and told that his answer was "inappropriate" because it allegedly objectified the female instructor. He was informed that his answer "meets the Title IX definition
of sexual harassment.” His university opened an investigation without any complainants. ...

Here is what it looks like: a student says he or she was sexually assaulted by another student on campus. If he or she isn’t urged to keep quiet or discouraged from reporting it to local law enforcement, the case goes to a school administrator who will act as the judge and jury. The accused may or may not be told of the allegations before a decision is rendered. If there is a hearing, both the survivor and the accused may or may not be allowed legal representation. Whatever evidence is presented may or may not be shown to all parties. Whatever witnesses—if allowed to be called—may or may not be cross-examined. And Washington dictated that schools must use the lowest standard of proof. And now this campus official—who may or may not have any legal training in adjudicating sexual misconduct—is expected to render a judgement. A judgement that changes the direction of both students' lives. The right to appeal may or may not be available to either party. And no one is permitted to talk about what went on behind closed doors. It's no wonder so many call these proceedings "kangaroo courts." Washington's push to require schools to establish these quasi-legal structures to address sexual misconduct comes up short for far too many students. The current system hasn't won widespread support, nor has it inspired confidence in its so-called judgments. The results of the current approach? Everyone loses.

From the preceding, DeVos made it clear that she was dissatisfied with the status quo. But her staff had to consider assorted issues in making changes, such as the following (not all inclusive):

1. Federal agencies had to respect constitutional safeguards such as due process. The Administrative Procedures Act required notification of the public of significant changes to a law such as Title IX so stakeholders had a chance to comment. DeVos held hearings to hear from both sides, which was an effort to be fair and comply with the Administrative Procedures Act. Public universities and colleges had to respect due process but private institutions were not restricted in the same manner. For example, a private Christian university can require that job applicants be Christian. Religious institutions can impose a moral code too. Schools could ask for exemption from some Title IX requirements regarding when the federal rules contradicted their religious beliefs (United States Department of Education, Office of Civil Rights, 2017, October 23):

   Title IX generally prohibits a recipient institution from excluding, separating, denying benefits to, or otherwise treating students differently on the basis of sex in its educational programs or activities unless expressly authorized to do so under Title IX. Title IX and its implementing regulations contain several exemptions and exceptions from its coverage, including for the membership practices of certain organizations and admissions to private undergraduate colleges.

2. Some due process protections present in criminal cases were not guaranteed by colleges and universities under Title IX where the offenses were not seen as
criminal cases. Criminal cases should involve the police. Problems occur when the accused perceive the process as unfair and then seek legal counsel, which might result in a lawsuit. Many of the 201 lawsuits listed in the aforementioned database reflect perceived due process shortcomings. Accused students or employees need to have adequate time to review the complaint. The guidelines must be clear as to what constitutes campus sexual misconduct. For example, offense could be taken by the use of a word or term on a one-time basis. This would not constitute a hostile environment under the EEOC standards (U.S. Equal Opportunity Commission, n.d.) that stipulate there must be an on-going pattern:

*Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.*

However, a university Title IX officer might decide to investigate a one-time use of a term that the general public might find innocuous but which can be perceived as offensive in the highly sensitized university environment.

3. Even when the police refused to prosecute alleged rape or sexual assault, or when a court found the alleged rapist innocent, the Title IX office of a university can still pursue disciplinary action given its lower standard of evidence.

4. The result of hundreds of lawsuits could be that the courts would clarify what constitutes due process in the academic context.

5. Colleges and universities usually want to maintain the confidentiality of the complainant, which could make it more difficult for the accused to enjoy due process. Cross examination is expected in judicial proceedings but this fundamental aspect of due process is not always available to the accused in university proceedings.

6. The preponderance of the evidence standard customarily used under Title IX may favor the complainant. When the complaint is serious, such as sexual assault or rape, the accused could suffer expulsion and ensuing stigmatization. In such cases, due process could be threatened by the lower preponderance of evidence standard as opposed to the clear and convincing standard. DeVos recommended that universities choose either. The beyond-a-reasonable doubt level that was used in criminal trials was not an option in DeVos’s Q&A.

**Quandary**

Fears that Title IX would be relaxed so that sexual offenses would go unpunished resulted in vocal opposition to DeVos’s changes. She had held hearings and listened to both sides (Kreighbaum, 2017, July 14). She had to satisfy the various stakeholders by ensuring that
allegations of campus sexual misconduct were investigated and guilt determined. What should she do?

References


