



Written by [William P. Hoar](#) on October 23, 2017

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Correction, Please!

DeVos Assailed for Restoring Due Process in College Sex Cases

Item: *In an article entitled “Education Dept. relaxing rules on college sex offenses,” the Washington Post reported on September 23 that on the previous day the Trump administration “withdrew Obama-era guidance on how colleges and universities should respond to sexual violence, giving schools flexibility to use a higher standard of evidence in judging cases and formally shifting the federal stance on what has become an explosive campus issue.”*

The Post said that the earlier action by President Obama was viewed by “victim advocates” as a “milestone in efforts to get schools to address the long-standing problem of campus sexual assault, punish offenders and prevent violence.”

Item: *The Times Union (Albany, N.Y.) for September 15 reported of the partisan opposition to the scrapping of the Obama rules, saying: “A total of 29 Democratic senators including Sens. Charles Schumer and Kirsten Gillibrand warned Education Secretary Betsy DeVos not to rescind Obama-era guidance on handling campus sexual-assault cases, telling her that doing so would undermine protections of vulnerable victims.”*

The Albany paper went on to say: “Under the Obama-administration guidance, often referred to as the ‘dear colleague’ letter since it was laid out in a letter to campus administrators, alleged attackers should be judged based on ‘preponderance of the evidence’ — whether it more likely than not affirmed guilt. DeVos ... has argued the standard has resulted in what critics have called ‘kangaroo courts’ weighed against alleged assailants.”

Item: *The New York Times for September 23 also found plenty of critics of rescinding the guidelines. These included Fatima Goss Graves. The “president of the National Women’s Law Center, an advocacy group for women’s rights, said Ms. DeVos’s announcement would have a ‘devastating’ impact on students and schools. ‘It will discourage students from reporting assaults, create uncertainty for schools on how to follow the law and make campuses less safe,’ she said in a statement.”*

Correction: While there was a hysteric reaction from many quarters of the “liberal” establishment alleging that the Trump administration was siding with rapists, most critics ignored that the Department of Education had not even issued new rules at that point.

When interim recommendations were issued, one would have thought that open season for rape had been declared — when what did really happen was that the universities were told, in part, that they should offer equal opportunity for the accused and the accuser to have legal advisors when taking part





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in their hearings.

This prompted critics such as California Senator Kamala Harris to rail against the action, insisting: “Survivors of sexual assault deserve to be believed, not blamed.” Even before Education Secretary Betsy DeVos gave her carefully reasoned remarks, she was blasted by 20 Democratic attorneys general, who warned against “a rushed, poorly considered effort to roll back current policies.”

DeVos has been balanced in her comments about the issue. As she put it in a speech in September, “One rape is one too many,” but also “one person denied due process is one too many.”

Former Vice President Joe Biden didn’t even wait to see what happened before he came out swinging against it, fuming that the “announcement that the Department of Education plans to rewrite key Title IX guidance which works to address and prevent sexual assault in our schools is a step in the wrong direction. The truth is, although people don’t want to talk about the brutal reality of sexual assault ... it is our reality, and it must be faced head-on.”

It should go without saying that sexual assault and rape are abominable. So is murder. But we don’t — or we shouldn’t — trash civil liberties when a person is accused of murder. Yet that standard does not hold in many colleges when it comes to sexual-abuse allegations, when the accused is essentially guilty until proven innocent.

An American who believes that an accused killer should receive a fair trial, to include facing his accuser, is not generally considered to be “pro-murder.” This is part of the common law, tracing at least to the 13th century in the Magna Carta, and codified in the Sixth Amendment of the U.S. Constitution, which states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel.”

The Obama “guidance” to universities — making them an extortionate offer that they couldn’t refuse — came up with very different standards. Of course this was all done under the guise of protecting students, and largely removed such matters from the court system. The Obama administration’s Education Department, as pointed out by the *Wall Street Journal*, “circumvent[ed] Congress and neglect[ed] normal executive-branch rule-making procedures mandated in the Administrative Procedure Act, such as soliciting public comment. Instead, it simply jammed the policy through by sending out a ‘Dear Colleague’ letter, including an explicit threat that noncomplying schools could lose federal funding.”

This also lends more evidence backing the conservative tenet that federal dollars come with strings, leading to federal control.

Photo: AP Images

As aptly summarized by *National Review*, that letter “required universities to lower the burden of proof in sexual-assault adjudication to a ‘preponderance of the evidence’ standard (50.1 percent probability) without also adequately preserving essential due-process rights such as access to counsel, access to available evidence, and full and fair cross-examination of witnesses. At the same time, the administration commenced dozens of open-ended investigations of universities — acting on claims that they were insufficiently committed to protecting women from rape.”

Though DeVos’ evenhanded action drew much fire, with the press being among the loudest decriers, the mainstream media earlier gave the Obama administration a free pass. Yet, as *National Review* noted,



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the Obama actions were

fundamentally lawless. No American administration has the ability to rewrite the law by merely issuing a letter. At the very least, the Obama administration should have conducted a notice-and-comment regulatory rulemaking process in accordance with the Administrative Procedure Act. Even then, the regulation would still have to be consistent with governing federal statutes and comply with the Constitution. But Obama's Department of Education ignored these steps and instead violated the APA, Title IX, and the Constitution in an ideologically motivated trifecta of campus tyranny.

The result was entirely predictable. Campuses, fearing the loss of federal funds and pushed by their own internal constituencies who pushed ludicrous and discredited claims that up to one in five female students would be sexually assaulted during college, created a vast, morally outrageous, and oppressive system of kangaroo courts.

According to a study released this week by the Foundation for Individual Rights in Education, 73.6 percent of America's top universities don't guarantee students a presumption of innocence, fewer than half require that fact-finders be impartial, and a full 58.5 percent of institutions don't "provide students with a meaningful opportunity to cross-examine witnesses" in cases of sexual misconduct. And this is a partial list of university legal failures. All told, 45 of the 53 rated colleges received a "D" or "F" for their commitment to due process.

For those who consider the practice of sexual politics to be more important than justice, this is irrelevant. You might think that due process would be something championed alike by "liberals" and conservatives — and even by media mavens who claim to be objective. That, however, would be in a sane world.

These days, if you are in favor of long-held notions of justice and fair-mindedness, you are seen as rolling back the rights of certain accusers. Indeed, one disparaging Texas professor and lawyer even tweeted, "I'm not wishing for it... but I'd be ok if #BetsyDeVos was sexually assaulted."

Then there is the above-cited Fatima Goss Graves of the National Women's Law Center, who opined: "What seems merely procedural is a blunt attack on survivors of sexual assault." And Obama's education secretary, Arne Duncan, growled that the current administration "wants to take us back to the days when colleges swept sexual assault under the rug."

Never mind that Secretary DeVos emphasized that her department's "interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly." Schools, she insisted, "must continue to confront these horrific crimes and behaviors head-on. There will be no sweeping them under the rug. But the process must be fair and impartial, giving everyone more confidence in the outcomes." What an extremist, eh?!

As it happens, the courts have already been finding against these Obama "guidelines," with multiple judgments from jurists of all political stripes. A lengthy article in *Commentary* in September by K.C. Johnson took note of a decision the month before by a U.S. District Court. The court blocked Miami University's suspension of a student that the school had found guilty of sexual assault despite what appears to be a clear violation of the accused's due-process rights. Johnson, a professor at Brooklyn College, wrote that the District Court judge's decision



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marked the 59th judicial setback for a college or university since 2013 in a due-process lawsuit brought by a student accused of sexual assault. (In four additional cases, the school settled a lawsuit before any judicial decision occurred.) This body of law serves as a towering rebuke to the Obama administration's reinterpretation of Title IX, the 1972 law barring sex discrimination in schools that receive federal funding.

Even judges appointed by Barack Obama have been able to see that the "guidelines" are not legally sustainable. As summarized by Johnson: "The process began in May 2013, in a ruling against St. Joseph's University, and has lately accelerated (15 rulings in 2016 and 21 thus far in 2017). Of the 40 setbacks for colleges in federal court, 14 came from judges nominated by Barack Obama, 11 from Clinton nominees, and nine from selections of George W. Bush. Brown University has been on the losing side of three decisions; Duke, Cornell, and Penn State, two each."

Remarkably, four self-described "feminist" law professors from Harvard sent a letter to the Education Department in August urging a revision of the Obama rules. They described how many "terrified" college administrators had "over-complied" with the directive. "Definitions of sexual wrongdoing on college campuses are now seriously over-broad," they wrote. These definitions

go way beyond accepted legal definitions of rape, sexual assault, and sexual harassment. They often include sexual conduct that is merely unwelcome, even if it does not create a hostile environment, even if the person accused had no way of knowing it was unwanted, and even if the accuser's sense that it was unwelcome arose after the encounter. The definitions often include mere speech about sexual matters.

The Harvard law professors — Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie Suk Gersen — went on to note that the procedures for enforcing these definitions "are frequently so unfair as to be truly shocking. Some colleges and universities fail even to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses."

The Obama overreaction, to use a charitable word for what ensued, was based in part on a "sexual assault crisis" on campuses. Clearly, there is no acceptable number of rapes and other crimes, but the totals that helped drive the response were not what many people were led to believe.

David French, an attorney and author, is among those who have tried to set the record straight about the widespread claim that one in every five women, an unbelievable 20 percent, is sexually assaulted during her college years. Those figures have been repeated almost ad infinitum. Why? Well, it does help to have a "crisis" if you are going to make a power play. He noted:

In 2014, the Department of Justice's Bureau of Justice Statistics released its own, more rigorous survey, and its results were far, far different. It found that the rate of rape and sexual assault was "higher for nonstudents than for students." The annual rate of sexual assault for young women enrolled in college was 6.1 per 1,000, or less than 1 percent.

Considering the chaotic mess that Secretary DeVos found on her desk, it has hardly been a radical move on her part to seek due process and better safeguards for both accusers and accused. Victims certainly deserve justice, but so do those who might be wrongfully accused.

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