



DeVos to Restore Due Process to Accused Students

“The truth is that the system established by the prior administration has failed too many students. Survivors, victims of a lack of due process and campus administrators have all told me that the current approach does a disservice to everyone involved,” said Secretary of Education Betsy DeVos, in announcing the review of a policy used during the Obama administration, criticized as disallowing proper due process for students accused of sexual assault.



In 2011, the Obama Department of Education sent what has been dubbed the “Dear Colleague” letter to colleges and universities, threatening them with a loss of federal funds if they did not crack down on alleged sexual assaults on the nation’s college campuses. The Obama administration argued that they had authority to do this because of Title IX of the Civil Rights Act.

Title IX was a federal law prohibiting discrimination based on sex for schools receiving federal funds. As is usual, the interpretations have expanded on the original law to include things such as making colleges and universities expel students accused of sexual assault.

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In Obama’s “Dear Colleague” letter, the Department of Education’s Office of Civil Rights told college administrators that they must address sexual violence on their campus. The letter provided “guidance” as to how to investigate accusations of sexual assault, which essentially ordered schools to lower their standard of proof before a student is expelled. Instead of proof beyond reasonable doubt, or even by clear and convincing evidence, the standard would be preponderance of the evidence. In reality, many students have been kicked out of school without any evidence.

Other due process procedures generally afforded to a person accused of a crime (such as the right to have a lawyer cross-examine witnesses) were to be waived. If a college was found to be not zealous enough in protecting victims of sexual assault, then it could lose any federal funding, such as grants to its students.

Faced with this threat, colleges and universities have erred on the side of the accuser, rather than the accused. Over the past few years, it has become apparent that many students have been falsely accused of rape and other sexual assaults. Even in cases in which the local police and prosecutors have seen insufficient evidence to proceed, students have seen their college careers ended by mere accusation.

DeVos, in speaking at George Mason University in Virginia, said, “One rape is one too many, one assault is one too many, one aggressive act of harassment is one too many, one person denied due process is one too many.”

Defenders of the Obama policy did not agree with DeVos’ concerns about one person being denied due process as being “one too many.” Obama’s former vice president, Joe Biden, was highly critical of DeVos, although he did not address the rights of the accused.

“Today’s announcement,” Biden said in a Facebook post, “that the Department of Education plans to



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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, especially when it occurs in our most cherished institutions, it is our reality, and it must be faced head-on. And any change that weakens Title IX protections will be devastating."

Annie Clark, executive director of End Rape on Campus, was particularly indignant. "We will not accept this blatant favoritism for the rights of rapists under the guise of fairness."

Clark evidently has never heard of the concept that due process rights are the rights of the *accused*. Simply because someone is *accused* of a crime does not mean that person is guilty. At least that has been the standard in America since even before the beginnings of the Republic.

The Foundation for Individual Rights in Education (FIRE) agreed with the review planned by DeVos. "Addressing widespread concerns about the fairness of current college sexual misconduct codes, the secretary noted that respect for due process is 'the foundation of any system of justice that seeks a fair outcome,' and that codes must ensure 'fair procedures that inspire trust and confidence.' With regard to the unilateral and opaque way that current federal mandates in this area were imposed, she further assured listeners that the era of rule by letter is over."

It is clear that any process in which a threat of removal of funds hangs over the heads of college investigators is going to be biased. In these cases, colleges do not have to worry about the removal of those funds if they expel an accused student, but only if they fail to do so and the federal Department of Education arbitrarily determines they were not aggressive enough in ousting an accused student.

There are fundamental problems that exist because of this policy. First, institutions of higher education may be well-suited to investigating accusations of plagiarism and similar charges, but criminal accusations such as rape and sexual assault should be handled by local law enforcement. Second, the Constitution does not provide for any federal role in education, either higher education or public schools. The best solution is to abolish the federal Department of Education altogether and return such matters to the states, as the Constitution clearly intended.

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