Acad. Quest. (2019) 32:197–204
DOI 10.1007/s12129-019-09788-3

ADVANCES

Due Process, DeVos, and the Courts

KC Johnson

Published online: 5 April 2019

As the U.S. Department of Education considers the public comments to its proposed Title IX regulations, it's worth considering how much the ground has shifted on questions related to Title IX and campus due process in the last two years. Six years of relentless pressure from the Obama administration's Office for Civil Rights (OCR) had the effect, if not the intent, of creating a rigged campus system, in which accused students too often were essentially presumed guilty and then denied the tools necessary to establish their innocence. The last twenty-four months, by contrast, have featured an unprecedented amount of attention on the rights of the accused, and the unfair Title IX processes that too many universities use.

Two primary bases for the change exist. The first, of course, is Education Secretary Betsy DeVos. Campus sexual assault is a peculiar issue, in that the *political* incentives for aggressive action exist solely on one side. No politician wins points for standing up for the rights of the accused in most contexts, and certainly not in this context. Meanwhile, demanding tough pro-accuser policies allows a legislator or cabinet officer to be seen both as sensitive to women's interests and tough on crime. The one-sided political environment has only intensified since the advent of the #meToo movement, which has brought some of the campus attitudes about the presumption of guilt into the broader public square.

KC Johnson is professor of history at Brooklyn College, Brooklyn, NY 11210; kcjohnson9@gmail.com. He is the author or editor of twelve books, most recently as editor of *Asia Pacific in the Age of Globalization* (Palgrave, 2014), author of *All the Way with LBJ: The 1964 Presidential Election* (Cambridge University Press, 2009), and co-author with Stuart Taylor Jr. of *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (St. Martin's, 2007; rev. and expanded ed., Thomas Dunne, 2008).

DeVos, in short, had no political incentive to tackle the issue of campus due process. The political incentives were all the more imbalanced given that she serves in the administration of President Trump, who has faced multiple allegations of sexual assault and sexual harassment.

Nonetheless, DeVos has made restoring campus due process a top priority. In 2017, at George Mason Law School, she delivered a major address on the topic. Her search for a "better way" than that offered by her predecessor, DeVos commented, led her to recognize "that due process is not an abstract legal principle only discussed in lecture halls. Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one. The notion that a school must diminish due process rights to better serve the 'victim' only creates more victims."[1] A few weeks later, the Secretary withdrew the Obama-era guidance that had fostered the one-sided campus system, replacing it with interim guidance that gave schools a number of choices to create fairer procedures. Only a tiny number of institutions, most prominently the University of Kentucky, took DeVos up on her offer.

DeVos's proposed Title IX regulations operate at two levels. The first area concerns the *definition* of sexual misconduct, under Title IX, for which a school could be found liable. The Education Secretary has proposed linking that definition to the Supreme Court's definition in *Davis v. Monroe County Board of Education* (which held that schools are liable under Title IX "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").[2] The Obama administration, by contrast, offered a far broader definition, suggesting that "sexual harassment is unwelcome conduct of a sexual nature."[3] Given that the Obama administration defined conduct as speech in two cases (involving the University of Montana and the University of New Mexico), this definition also threatened academic freedom.

DeVos's efforts to connect Title IX regulations more closely to the language of the Supreme Court generated widespread condemnation from accusers' rights organizations, Democratic legislators, and other defenders of the status quo. In perhaps the most unfair attack, a *New York Times* op-ed from Dana Bolger, co-founder of the accusers' rights organization Know Your IX, claimed that adopting DeVos's proposed regulations would leave unprotected a 12-year-old

[1]"Secretary DeVos Prepared Remarks on Title IX Enforcement," George Mason Law School, 7 Sept. 2017, https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement.

[2]Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

[3]Russlyn Ali, "Dear Colleague," April 4 2011, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

student who was raped on a playground away from school.[4] Yet mandatory reporting laws in all 50 states already require schoolteachers and principals (and a host of other figures) to report such allegations to the authorities. Moreover, DeVos's regulations make clear that sexual assault constitutes sexual harassment as per Title IX and the hypothetical described by Bolger would almost certainly involve Title IX liability as well.

That DeVos's critics have needed to misrepresent her proposals unintentionally reveals the weakness of their case. That said, it seems unlikely that definitional changes in sexual harassment will have much actual effect on the ground. Of those who have spoken on the issue, university leaders have uniformly maintained a desire to retain the Obama-era definitions. (Any college president who declined to do so would doubtless risk campus protests.) Harvard University even went to court to be allowed to adjudicate a case against a student—who was accused by a non-student for an incident that allegedly occurred out of state and without any connection to Harvard's educational activities.[5]

Universities would have much more difficulty, however, evading the second section of DeVos's proposed regulations. Recognizing that under Title IX, schools can potentially discriminate on the basis of gender if they treat either party unfairly, the regulations propose a variety of procedural protections for students facing Title IX tribunals. The most important, borrowing from a decision issued by the Sixth Circuit Court of Appeals in a case from the University of Michigan, requires schools to abandon the increasingly popular single-investigator model, in which a single person, usually hired by the Title IX office, interviews the parties, perhaps speaks to other witnesses and inspects other evidence, and then returns a finding, without any hearing at all. The proposed regulations, by contrast, would require a hearing, in which an advocate or lawyer for the accused student would be able to question his accuser and other witnesses. As the Supreme Court has observed, cross-examination is "the 'greatest legal engine ever invented for the discovery of truth.'"[6] This change would dramatically enhance the rights of accused students overall.

The proposed regulations contain other provisions that would ensure enhanced fairness in Title IX proceedings. Critically, they would require schools to provide to accused students (upon request) a copy of the training material given to their adjudication panel members. The Obama administration required such training, and numerous lawsuits (ranging from cases against Penn to the University of

[4]Dana Bolger, "Betsy DeVos' New Harassment Rules Protect Schools, Not Students," *New York Times,* November 27, 2018.

[5]Doe v. Harvard Coll., No. 1:18-cv-12462 (D. Mass. Dec. 18, 2018).

[6]California v. Green, 399 U.S. 149, 158 (1970).

Mississippi) have shown that universities have tended to use guilt-presuming training in which virtually any permutation of the accuser's behavior is consistent with the accused student's guilt. The proposed regulations also would ensure that all accused students have a presumption of innocence, with the burden of proving guilt on the school, rather than the current system—in which the accused student is effectively presumed guilty and required to prove his innocence. Finally, the proposed regulations would require schools to consider exculpatory as well as inculpatory evidence, and to explain their decisions when imposing guilt. Because the regulations would carry the force of law, schools (however grudgingly) would have no choice but to comply with them. And institutions that chose outright defiance would have a much harder time in court, since they could no longer rely on the argument that they were merely doing the bidding of the Department of Education.

These proposals all seem to reflect baseline requirements for due process and basic fairness. Yet they have been met with vitriolic opposition from Democratic legislators. Senator Dianne Feinstein (D-California) claimed that the proposed regulations would "silence victims," and "drown out the voices of victims in favor of" the student they had accused. (Feinstein did not explain how this would happen.) Multiple Democratic senators asserted—again, without explaining how—that fairer procedures would lead to decreased reporting of sexual assault. House Speaker Nancy Pelosi (D-California) curiously asserted that the new rule "denies survivors due process." Her California colleague, Jackie Speier, denounced DeVos as "a shill for Trump Admin[istration]'s slash and burn agenda to gut protections for sexual violence survivors." In light of the willingness of U.S. Senate Democrats to derail the Supreme Court nomination of Brett Kavanaugh based on a single uncorroborated accusation, such comments are now *de rigueur* from the party that once prided itself on its support for civil liberties and its concerns with the rights of the accused.[7]

At this stage, the only thing that can be said with certainty is that any final rule from the Education Department will face a near-immediate lawsuit from accusers' rights groups and perhaps some Democratic legislators. It seems less likely, however, that Congress will intervene. While few Republicans have publicly defended DeVos, even fewer (New Hampshire governor Chris Sununu is an exception here) have publicly criticized her proposals, either.[8] A bill seeking to

[7]KC Johnson, "Democrats and DeVos (Part III)," *Academic Wonderland,* November 22. 2018, https://academicwonderland.com/2018/11/22/democrats-devos-part-iii/. The contrast here was former California governor Jerry Brown, a Democrat, who vetoed a measure to codify the one-sided Obama-era guidance into California state law. Emily Yoffe, "An Unexpected Ally for Betsy DeVos on Campus Sexual Assault," *The Atlantic*, October 19, 2017.

[8]Chris Sununu to Betsy DeVos, 19 Nov. 2018, https://www.governor.nh.gov/news-media/press-2018/documents/20181119-title-ix.pdf.

restore Obama-era guidance, therefore, would seem to have only a remote chance of clearing the Senate.

The DeVos regulations, however, would not have been possible without another major development in campus Title IX policy—a wave of lawsuits, at both the state and federal level, by accused students against their institutions. These lawsuits all have somewhat differing facts, but a common pattern emerges: a deeply unfair adjudication process in which the investigator or panelist tilted the affair in the accuser's favor, either due to ideological bias or one-sided training; and a system in which even innocent students weren't given the tools to meaningfully defend themselves.

In the calendar year 2018 alone, 74 accused students filed federal lawsuits, with at least a couple dozen more in state courts. At the federal level, universities were on the losing side of 45 of those decisions; they prevailed in 31. At the state level, the most significant action came in California, where 2018 began a process in which five consecutive appeals courts ruled in favor of an accused student, in increasingly strong terms.

Several of these decisions in particular stood out, none more so than the Sixth Circuit's ruling in *Doe v. Baum.* The University of Michigan, like many public institutions, had adopted a single-investigator model, in which the accused student had no hearing at all. The investigator nonetheless found the student not guilty—only to see Michigan overturn the finding, when the accuser appealed. (The Obama-era OCR had mandated such double-jeopardy appeals; unfortunately, the proposed regulations continue the practice.) The university's appeals board rendered its judgment from the written record of the case; it did not convene a hearing and allow the accused student to testify or cross-examine witnesses. Despite this record, U.S. District Judge David Lawson, a Bill Clinton nominee, sided with the university and dismissed the case.

The Sixth Circuit, however, disagreed. Writing for the majority, Judge Amul Thapar, a Donald Trump nominee, held that under the due process clause, "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[9] Critically, Thapar's ruling also extended this principle to *private* universities, on the grounds that policies that denied cross-examination might violate Title IX. The accused student would still need to show some evidence of gender discrimination. But here, too, the bar proposed by Thapar was a manageable one—using the facts of the Michigan

[9] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

case, a process that credited the testimony of female witnesses and doubted that of male students.

District courts in the Sixth Circuit likewise expressed concerns with the rights of accused students. In *Doe v. Ohio State* (2018), the university had informed a female medical student that academic difficulties would cause her to forfeit her place in the program. Two days later, she informed the Title IX office that Doe had sexually assaulted her, months before, after they met at a bar, and demanded an accommodation that would block her academic expulsion. But Ohio State officials never told Doe about the suspicious timing between these two events (or, indeed, that his accuser had received any form of academic accommodation), even after the accuser offered misleading testimony on the issue before the disciplinary panel. The university also refused to hear from an expert witness (an OSU professor) who was prepared to cast doubts on the accuser's claims of incapacitation through alcohol use.

Judge James Graham rejected the university's motion for summary judgment, arguing that a reasonable jury could conclude that OSU's withholding information about the accuser's academic problems deprived Doe of a right to "effectively cross-examine" the complaining student. Judge Graham answered yes, explaining that the accuser had "a motive to claim she was too drunk to remember the encounter: she was threatened with expulsion from medical school and might be able to remain in school if she claimed to be the victim of a sexual assault." Worried that "universities have perhaps, in their zeal to end the scourge of campus sexual assaults, turned a blind eye to the rights of accused students," Graham also reconsidered an earlier ruling and denied OSU's motion to dismiss the claim that the university not allowing his expert witness to testify might have violated Doe's due process rights.[10]

In some respects, the Ohio State decision was unsurprising, because the Sixth Circuit has been unusually solicitous of the rights of accused students. But district courts in other parts of the country grew increasingly unwilling to defer to universities in Title IX cases as well. Nowhere was that clearer than in Mississippi, where universities were on the losing side of two strong district court opinions (and a third issued in early 2019) despite a previous track record of consistent university victories in the courts of the Fifth Circuit states.

Doe v. University of Southern Mississippi successfully challenged the university's "single-investigator" model, with Judge Keith Starrett issuing a preliminary injunction requiring the university to hold a hearing and offer some form of cross-examination in the case. (The accused student was on a scholarship,

[10]Doe v. Ohio State Univ., 2018 U.S. Dist. LEXIS 68364 (S.D. Ohio April 24, 2018).

and said he wouldn't be able to stay in school pending any appeal if his funds were cut off by an unfair decision.) "The value of the additional safeguards is immense in a he said/she said situation," Judge Starrett noted. "When credibility is at issue, it is crucial to be able to attempt to draw out the truth and should be required in circumstances like these because it is 'the greatest legal engine ever invented' for uncovering the truth."[11]

A few months earlier, another federal judge in Mississippi, W. Daniel Jordan, denied the University of Mississippi's effort to dismiss a lawsuit filed by an accused student. The case involved two intoxicated students; the accused student contended the university, through the actions of its Title IX coordinator, prejudged the case. The student's lawyer obtained the training material that the university supplied to adjudicators; in two instances, the training documents suggested that panelists could interpret the *accuser's* lying as a sign of the *accused* student's guilt. Judge Jordan concluded that "this is a he-said/she-said case, yet there seems to have been an assumption under the Title IX coordinator's training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered. It is therefore plausible that the scales were tipped against Doe to such a degree that further procedural safeguards may have lessened the risk of an erroneous deprivation."[12] Jordan sided with an accused student early in 2019 in another lawsuit against Ole Miss, with a similar set of facts.

State courts, as well, grew increasingly concerned with university unfairness in 2018. Accused students prevailed in five separate appellate decisions in California state courts. A case at UC-Santa Barbara ended with a guilty finding after a perverse process in which the university claimed it was not bound by formal rules of evidence when doing so helped the accuser, but cited the same rules of evidence to prevent the accused student from presenting (highly relevant) evidence about the possible side effects of the accuser's prescription medication. The court found it "ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy . . . The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility.[13] In this respect, neither [party] received a fair hearing." Three months later, another panel of the same state appeals court deemed USC's Title IX procedures "incompatible" with an effort

[11]Doe v. Univ. of So. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018).

[12]Doe v. Univ. of Miss., 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 14, 2018).

[13]Doe v. Regents of University of California, 28 Cal. App. 5th 44, 61 (Cal. App. 2d Dist. October 9, 2018).

"to uncover the truth"; for the court, it was "virtually unavoidable" that the university's single-investigator model, which denied to the accused student both a hearing and cross-examinations, would produce a finding beset by "deficiencies."[14]

In the end, the combined efforts of DeVos and the nation's courts have shifted the discussion about due process and campus sexual assault. The question moving forward is whether this newfound appreciation for the rights of the accused will continue.

[14]Doe v. Allee, 2019 Cal. App. LEXIS 8, *55, 56, 60 (Cal. App. 2d Dist. January 4, 2019).