

Sexual Misconduct on Campus: Betsy Devos Had It Right

by William Beaver

Sexual misconduct on campus had always been a concern, but the extent to which it occurred was difficult to assess since it was assumed that the vast majority of incidents were never reported to law enforcement or college officials. This began to change however in 2005 when the College Sexual Assault Internet Survey (CSA) was administered at two large universities in the South and Midwest to students ranging in age from 18-25. Students at these schools were not required to take the survey, but nearly 6,800 responded. It is important to note that the survey defined sexual assault more broadly to include not only rape and attempted rape but also touching of a sexual nature. The results of the survey were released in 2007. The most publicized finding was that 19 percent of the females reported being sexually assaulted while in college and 3.4 percent reported being raped.

The survey received widespread media attention. Headlines typically re-

ported that one in five females had been sexually assaulted while in college. The fact that the CSA used a broader definition of sexual assault was seldom emphasized. The various behaviors involved were lumped together despite the obvious differences between touching and forced penetration. As James Allen Fox, a professor of criminology at Northeastern put it, "This one in five statistic shouldn't be just taken with a grain of salt but the entire shaker." Nonetheless, both pundits and politicians began describing the situation as an epidemic fueled by a rape culture. One Congressman even proposed that any student accused of sexual assault should be immediately expelled. This despite the fact that the National Crime Victimization Survey reported that among the general population the number of sexual assaults (rape or attempted rape) declined by more than one-half between 1994 and 2014, and that non-college females were more likely to be raped than college females, which

suggests that whatever the actual situation is on campus, the term epidemic is not an accurate portrayal of it.

There were other problems with the CSA. It was not a national survey, only two schools were involved, and it could not account for what researchers call self-selection bias, which occurs when individuals who had been sexually assaulted were more likely to complete the survey than those who had not (four times as many women responded to the CSA than men). All of which helps to produce a non-random sample whose validity is open to question. To accurately measure the number of sexual assaults would require a school to mandate that all students must complete a survey. A few years ago, the University of Kentucky did just that and found that about 4.9 percent of its students had been sexually assaulted. However, the Kentucky survey used the more traditional definitions of sexual assault—rape or attempted rape.

Despite its shortcomings, the CSA served as a tipping point and fueled the belief that immediate action was needed. In 2011, the Department of Education (DOE) sent a “Dear Colleague Letter” to the nation’s colleges and universities. Schools were reminded that Title IX of the Civil Rights Act required them to investigate and prevent sexual violence and harassment apart from any actions taken by law enforcement. Colleges must implement a grievance procedure and appoint a Title IX coordinator to investigate all cases of sexual misconduct to determine the outcome

of a case. Schools must bar contact between the accuser and the accused and would also be responsible for any on or off-campus incidents, including in off-campus housing.

College judicial review boards usually consisting of faculty and staff would conduct a hearing if necessary. While hearing a case, the preponderance of evidence standard would be utilized (they probably did it) as opposed to the more rigorous “clear and convincing” standard used in the past. Both sides could present witnesses and other evidence and have a lawyer present. However, defendants were denied access to the evidence gathered by the Title IX coordinator and could not conduct cross-examinations, since it was assumed that it would further traumatize the alleged victim. Finally, all incidents were to be resolved within sixty days.

Under normal circumstances when changes of this magnitude are made, the public is given the opportunity to comment, which is required under the federal Administrative Procedure Act. However, the Obama administration was convinced that rapid action was needed so the APA was ignored. Instead, colleges were warned that failure to implement the new rules could mean the loss of federal funding including federal student loans, which the majority of schools needed to operate. Not surprisingly, most schools attempted to comply along with using a broader definition of sexual assault. The cost involved could be significant. At large universities, costs could be as high as

\$500,000 a year, creating what one researcher called a “sex bureaucracy.”

To provide further impetus then vice president Joe Biden was appointed to head a taskforce on campus sexual assault. The vice president emphasized the urgency of the situation when he stated, “One in five of every one of those young women who is dropped off the first day of school, before they finish school will be assaulted in her college years.” The taskforce recommended that all colleges conduct surveys to determine the number of sexual assaults and also provide training and educational programs. In 2013, Congress passed legislation that required schools to do just that. In retrospect, much of what occurred was triggered by the CSA survey, and as Mary Koss, a prominent researcher on sexual violence put it in referring to the CSA, “It’s is not the soundest data (the White House) could have used.”

The new rules imposed by the Obama administration were soon having some of the desired effects. Specifically, the number of reported sexual assaults on campus increased by 205 percent. The dramatic increase was not due to more assaults but more reporting of them. Indeed, the *National Crime Victimization Survey* found no increase in the number of sexual assaults between 1997-2013. However, an unintended consequence of the new policy soon emerged. By the time the Trump administration entered office, more than 350 male college students had filed lawsuits claiming their right to due process had been violated. (Before 2011, only two such suits had been filed over the past two decades.)

Although college judicial hearings were not courts-of-law, the idea of due process was viewed by many, including members of the Harvard Law faculty, as a fundamental right not to be violated even in quasi-judicial settings, which became the position of the DOE during the Trump administration.

Soon after the inauguration of Donald Trump in 2017, DOE Secretary Betsy DeVos wasted little time in rescinding “The Dear Colleague Letter.” She called college judicial hearings “kangaroo courts” that were unfair, and, in some cases, had a predetermined outcome. In September 2017, interim rule changes were announced. In speaking of the changes DeVos stated, “Our proposed rule changes recognize that we can continue to combat sexual misconduct without abandoning due process.” Under the new rules, hearings would be emphasized, and schools could choose which standard of proof to be utilized. Each side could review all the evidence gathered and request information from each other and cross-examination would be permitted.

Unlike the Obama administration, DeVos announced there would be a period for public comments. After reviewing more than 124,000 of them, the new rules were finally announced in May 2020. Besides the changes already mentioned, the Obama administration’s definition of sexual harassment (unwelcome conduct of a sexual nature) was replaced with the Supreme Court’s more stringent definition, “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and

objectively offensive that it denies a person access to a school's educational programs or activities."

Another important change added dating violence to the types of misconduct to be investigated, and only formal complaints made by the alleged victim would be investigated. However, for students unwilling to file a complaint support services were to be made available. Throughout the process, a presumption of innocence was to be assumed and no single college official could determine the outcome of a case. Incidents involving students could be resolved through mediation or a hearing. However, incidents involving students and staff members would require a hearing conducted by an outside adjudicator. Cross-examinations could take place "virtually" so the accuser and accused didn't have to face each other and suffer humiliation from an adverse decision. Finally, schools would be responsible for on-campus incidents, but also for off-campus incidents taking place under their auspice, such as in fraternity and sorority houses.

Almost as soon as the new rules were announced, candidate Joe Biden pledged to undo them. Once in office, the president declared the Trump administration's policies would "return us to the days when schools swept rape and assault under the rug and survivors were shamed into silence." Interestingly, some legal experts felt that the Biden administration could not simply reinstate the Obama policies since they were unlikely to survive judicial scrutiny.

After nearly two years of reviewing 240,000 public comments along with various delays, DOE Secretary Miguel Cardona announced on April 18, 2024 the overhauling of Title IX, which bars discrimination based on sex. Not surprisingly, there was a renewed emphasis protecting alleged victims. Hence, schools must investigate all complaints on and off campus and resolve them within sixty days. Once again, investigations would be conducted by a single Title IX coordinator who would determine the outcome of a case using the preponderance of evidence standard. Hearings were no longer required, but if they were held, cross-examination would not be allowed to ensure the accuser would not be confronted by the accused. The definition of sexual harassment was simplified to unwelcome sex-based conduct that is sufficiently severe and pervasive. Finally, the new guidelines were expanded to include protections for L.G.B.T.Q+ and pregnant students. However, the crucial issue of whether transgender students could play on sport's teams based on their gender identity was not addressed. A DOE official indicated it would be after the presidential election. The new rules took effect on August 1, 2004.

Soon after the new rules were announced several states, individuals, and organizations filed lawsuits challenging them. Of major concern was the Biden administration's inclusion of "gender identity" as part of the definition of sexual discrimination and what it entails. For instance, the new rules required that transgendered students could use

restrooms and other facilities based on their gender identity and not biological sex. A number of federal judges agreed to block implementation of this part of the Biden policy affecting twenty-six states,

On January 9, 2024 a Kentucky federal judge overturned the Biden policy ruling that it violated Title IX. Soon thereafter, at the start of the second Trump presidential term, DOE head Linda McMahon announced that colleges should return to the 2020 rules established by Betsy Devos. In a “Dear Colleague Letter” and an accompanying Executive Order (14168—“Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”) the new administration preserved Title IX protections for the two sexual categories of male and female and excluding other sexual identities. In addition, he fulfilled a campaign promise ordering that biological men should be kept out of women’s sports. Failure to comply would result in a violation of Title IX, which could lead to the loss of federal funds.

What to make of all of this? Clearly, the rules imposed by the Obama administration were a rush to judgment based on questionable data. Alleged victims had to be protected, and the guilty quickly punished. In the process, important American traditions and values regarding the rights of the accused were ignored, while the Biden administration largely followed suit.

When compared to Obama and Biden, the policies established under Betsy Devos seemed both fair and prudent attempting to balance the rights of the accuser and the accused. The fact that support services are offered to those filing charges and to those who choose not to, indicates an understanding of the dilemma faced by many students, especially those accusers who know the accused and who had engaged in drug or alcohol use together.

Devos also realized the most important outcome must be to discern the truth, which is best achieved in judicial-like settings with power dispersed rather than centralized in the hands of a single administrator who is an obvious stakeholder in the Title IX regime. Both sides have access to all the evidence gathered, cross-examination is permitted, although the alleged victim does not have to have direct contact with the accused, thus lessening possible trauma. Unfortunately, the Biden policy had once again put discerning the truth on the back burner to satisfy powerful interests, thus weakening due process. The ruling of a federal judge and the election of Donald Trump has ensured, at least for the next four years, that the common-sense rules established by Betsy Devos will prevail. They strike a balance between the rights of alleged victims and the accused, and hopefully ensuring that justice is served.

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