Expelling the Innocent: The New Campus Black List
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In 2011 the US Department of Education published a “Dear Colleague” letter pertaining to Title IX of the Education Amendments of 1972 and its implementing regulations. The letter emphasized that sexual harassment of students, including sexual violence, is a form of sex discrimination prohibited in education programs operated by recipients of Federal funds.

The 2011 letter threatened termination of any federal funding, including research funding, for universities failing to conform to this guidance. In 2014 DOE issued a “Question and Answer” document providing further direction, and U.S. colleges and universities largely upended their procedures for responding to allegations of student sexual misconduct. The remedy institutions usually found for protecting students from peers found responsible for sexual violence consisted of expelling men from school, too often on weak grounds.

The 2011 and 2014 documents both provide sub-regulatory guidance, so they technically did not have the force of law. However, they were simple for the DOE to implement and delivered a frightening threat to institutional leaders. Such guidance
could be created entirely at the discretion of the DOE Office of Civil Rights without collecting and responding to public comments. Because guidance is not technically a regulatory rule, it is notoriously difficult to challenge.

The DOE’s guidance addressed a genuine problem. Absent an external criminal finding, schools had little incentive to respond in a substantive way to sexual misconduct complaints from students. Doing so would draw negative attention that placed schools at a disadvantage in the competition for students.

Unfortunately, the DOE’s guidance created new problems at least as troubling as those remedied, because it required colleges and universities to abandon procedural fairness for students accused of sexual misconduct. Institutions that declined this guidance might find themselves the subject of DOE Title IX investigations, and had a compelling incentive to curry federal favor by accepting any amount of bad advice the agency offered. Expulsions of both guilty and innocent students accelerated.

The harm done by expelling innocent students is substantial, because it is nearly impossible to matriculate at a new school unless a student is in good standing at his or her previous institution. Hundreds of aggrieved students sued their schools over the due process withheld from them, and were more often than not successful in court. Civil judgements mounted against institutions doing the DOE’s bidding.

Faculty efforts to hold institutions to due process drew retaliation from terrified school administrators. I spent 26 years living in a student residence hall guiding undergraduates, whom I tried to insist my institution continue to treat fairly. I am confident my efforts led to a 2015 termination of my resident faculty role by a former vice president for student affairs. I was less prepared for the 2018 student protest demonstration against my employment instigated by a former dean.

The Trump administration moved methodically to revoke and replace the guidance in the DOE “Dear Colleague” and “Question and Answer” documents, but forewent the expediency offered by sub-regulatory guidance. Instead, Secretary of
Education Betsy Devos followed formal procedures to promulgate regulatory rules, including seeking and responding to public comments. This was a thorough and unrushed effort that, unlike the Obama administration’s guidance, took none of the stakeholders by surprise. After a closed-door summit in July of 2017 that included participation by due process advocates, Devos in September rescinded the guidance in the Dear Colleague letter, replaced it with interim guidance, and opened a notice-and-comment process for permanent regulations.

DeVos’ draft rule was published in November of 2018 and was finalized in May of 2020 after a review of more than 124,000 public comments. It went into effect less than a year ago in August of 2020, the first Title IX regulations generated this formally since 1997. DeVos’ rule has the unequivocal force of law.

The rule restores due process for accused students, protecting their rights and their institutions’ interests. It requires universities to respond to allegations of student sexual misconduct in a quasi-judicial framework predicated on a presumption of innocence. Complaining and responding parties are represented by an advisor, possibly a lawyer, and must be allowed to cross-examine each other through their advisors. Adjudication is no longer restricted to the preponderance of evidence standard called out in 2011, but may instead be based on the higher standard of clear and convincing evidence.

President Biden has pledged to undo DeVos’ reforms. One path is another multi-year process to promulgate yet another new rule. The administration could ask Congress to expedite repeal of DeVos’ rules via the Congressional Review Act, but Congress will be reluctant to escalate the matter to themselves in the run up to the midterm elections.

In May, President Biden nominated Catherine Lhamon to return to her Obama administration role as the DOE’s Assistant Secretary for Civil Rights. Lhamon is probably the individual most responsible for the due process crisis DeVos sought to
repair. Lhamon’s capacity for overreach and disregard for constitutional guarantees may preclude her confirmation by the Senate. Her opponents have ample evidence that the courts disagree with what she and the DOE Office of Civil Rights previously required of universities.

It is important the attack on DeVos’s Title IX reforms be blocked. Under the guidance that DeVos revoked, the Department of Education took the immoral position that universities should punish more of their guilty students by more frequently punishing innocents. This betrays bedrock principles of procedural fairness and is unacceptable on its face. This approach reduced Obama’s DOE Office of Civil Rights into an executive branch exercise in McCarthyism. Red-baiting was replaced by unsubstantiated rape accusations, and expulsion from college became the new blacklist. We should not step back toward such moral bankruptcy. DeVos undertook to dismantle an injustice factory, and the new rule that delivers her reforms should be retained.

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