



FORUM

The Implications of New Title IX Regulations for Institutions of Higher Education

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The establishment of Title IX, which prohibits sex-based discrimination in schools that receive federal funding, has protected students for nearly five decades by holding educational institutions accountable for cases of sexual discrimination. Notably, Title IX has played a significant role in equity in athletics, sexual harassment and violence, and protections for transgender students.

But while this law's foundation was built on sex equality, the specific nuances of Title IX policies have varied among the presidential administrations, most recently the Trump administration. On May 14, 2020, the [ACLU](#) and law firm Stroock & Stroock & Lavan LLP filed a lawsuit against Former Secretary of Education Betsy DeVos on behalf of four activist groups: Know Your IX, the Council of Parent Attorneys and Advocates, Girls for Gender Equity, and Stop Sexual Assault in Schools ([Know Your IX v. DeVos](#)). The lawsuit was in response to new revisions released on May 6th to existing Title IX policies (otherwise known as the "[Final Rule](#)") for sexual harassment on college campuses set forth by the DoE. The ACLU and Stroock & Stroock & Lavan LLP have argued that colleges and universities conduct sexual misconduct cases from a higher standard than reports of discrimination based on race, national origin, disability, etc. [Ria Tabacco Mar](#), director of the ACLU's Women's Rights Project, called the new rule a "double standard that is devastating for survivors of sexual harassment and assault, who are overwhelmingly

women and girls.” But Secretary DeVos has stated that the new regulations will secure due process rights for both the accused and the accuser, claiming that the 2020 revisions will allow Title IX officials at colleges and universities to use either a preponderance of the evidence or a “clear and convincing standard” to prove sexual harassment claims, thereby setting a higher burden of proof. This contrasts from the policy of the Obama administration (2011), which used a “preponderance of evidence” to determine guilt in sexual misconduct claims. This consequently led to many college males filing civil lawsuits based on the claim that they were being unjustly accused of sexual harassment.

There are several issues the ACLU claims violates the due process of sexual violence victims. Firstly, they claim that the Final Rule redefines “sexual harassment” into three distinct traits: to be “so severe, pervasive, and objectively offensive” that it denies the person equal access to educational opportunities. This arguably narrows the scope for sexual misconduct claims, because the complaint must meet all three conditions for sexual harassment to be even be applicable. The previous definition used “or” in place of “and.” Secondly, any allegations or reports of sexual misconduct can be tossed and not investigated if not reported to the “right” person, or the individual formally in charge of all Title IX-related issues. Thirdly, the alleged sexual misconduct “must have taken place during a school-sanctioned activity, building, or event in which the institution has ‘substantial control.’” This disregards locations such as off-campus apartments, study abroad programs, and field trips, all of which should still fall under the school’s jurisdiction. Fourthly, it installs a “quasi-judicial system” that allows the cross-examination of both parties, which can further retraumatize victims and discourage them from coming forward about the misconduct. Finally, the current COVID-19 pandemic has heavily impacted universities’ budgets and systems, making it difficult for them to adhere to the DoE’s August deadline to implement these revisions.

On October 20, 2020, U.S. District Court Judge Richard Bennett dismissed the case on the basis that Know Your IX was unable to prove that the Final Rule was directly reducing reports of sexual misconduct, and that it was creating more work for the organization. Other reasons discussed how the claim was arbitrary and “speculative.” Similar cases such as Women’s Student Union v. U.S. Department of Education, which made a congruent argument to the Know Your IX case except for high school students, are still ongoing. So far, none of the lawsuits filed against the Final Rule have been successful. So what does this entail for the future of the Final Rule in universities? The answer is still quite unclear, largely due to the fact that it is relatively new. Most colleges have yet to fully recover from the impacts of the COVID-19 pandemic, both financially and systematically, making it difficult to

assess the true consequences of the rule. But Know Your IX and the ACLU have a promising argument — by creating blockades in sexual misconduct reporting and scope, especially during a time where almost everything was conducted within a virtual space, the Final Rule could not have come at a worse time for sexual misconduct claims to go unnoticed or ignored. Universities must continue to stay vigilant on how the implementation of the Final Rule is impacting their prosecution of sexual misconduct cases. *Know Your IX v. DeVos*, while in itself may not have been successful, is the necessary, groundbreaking case for future lawsuits that will continue to challenge the due process of the Final Rule.