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RETHINKING FEDERAL REGULATION OF SEXUAL HARASSMENT

The need for deliberation, not demagoguery, in the Age of Trump

OVER THE PAST DECADE, federal regulation of education under Title IX has been sucked into the impetuous vortex of partisan polarization. Title IX of the Education Amendments of 1972 prohibits schools that receive federal funding from discriminating on the basis of sex. For decades, intercollegiate athletics was the main source of controversy. Support for and opposition to federal policy on that topic crossed party lines.

No longer. Starting in 2010, the Obama administration issued an unprecedented number of Title IX directives and launched hundreds of investigations. Democrats in Congress cheered these moves as a long-overdue response to bullying at K-12 schools and sexual assault on college campuses. The 2016 Republican Party platform, in contrast, charged that the original purpose of Title IX had been perverted “by bureaucrats—and by the current President of the United States—to impose a social and cultural revolution upon the American people.”

The Trump administration has already taken a number

of steps to modify Title IX policies. Last February, it revoked the Obama administration’s “Dear Colleague” letter (DCL) on transgender students’ access to sex-segregated facilities such as bathrooms and locker rooms. Over the summer, the Department of Education’s Office for Civil Rights (OCR) altered its procedures for investigating sexual violence complaints. Soon after, Secretary of Education Betsy DeVos announced that her department would review its guidelines on sexual harassment.

This unleashed a torrent of criticism from across the aisle. Thirty-four Democratic senators told DeVos that they were “extraordinarily disappointed and alarmed” by this apparent shift in policy. Twenty Democratic state attorneys general also wrote the secretary “to express our serious concern over reports that your office is preparing to roll back important protections for survivors of sexual assault on college campuses.” The editorial board of the *New York Times* saw this as “Another Sign of Retreat on Civil Rights.” An op-ed in the *Times* by author John Krakauer

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and activist Laura Dunn set the tone of the coming debate: if the Trump administration succeeds in revising Title IX guidelines, “The result may make colleges safer. For rapists.”

The Trump Challenge

Needless to say, on this issue the Trump administration has a serious credibility problem. Not only has the president repeatedly made demeaning comments about women, he has even bragged about committing sexual assault. His secretary of education has yet to demonstrate an adequate understanding of the legal obligations of her department. Rather than nominating an assistant secretary for civil rights, the White House avoided a confirmation battle by making Candice Jackson “acting assistant secretary.” Jackson has no previous government experience. She apparently came to Trump’s attention by parading in front of the media some of the women allegedly harassed by Bill Clinton and by making wild accusations about Hillary Clinton. While in office, she has made imprudent off-the-cuff remarks regarding sexual abuse allegations, for which she later apologized.

This is not exactly a group that inspires confidence.

Since OCR’s controversial guidelines were established through unilateral administrative action, at first glance it would seem that they can be rescinded in a similar fashion. In 2011, President Obama announced the strategy: “We can’t wait for an increasingly dysfunctional Congress to do its job. When they won’t act, I will.” For OCR, this “We Can’t Wait” campaign included not just Title IX guidelines but Title VI rules on school discipline, affirmative action, education for English language learners, and allocation of school resources (see “Civil Wrongs,” *features*, Winter, 2016). In each instance, OCR evaded standard rule-making procedures by claiming that it was merely clarifying existing policy—despite the fact that the White House described these initiatives as “ground-breaking.”

President Trump clearly has a fondness for governing through hastily written executive decrees. For a number of reasons, though, the Trump administration cannot simply rescind most previous OCR directives and walk away from the sexual harassment issue as it did transgender rights. Court decisions and agency policy stretching back to the early 1990s have established schools’ responsibility under Title IX to respond to known or systematic sexual harassment. OCR’s current guidelines are long and detailed. Schools need to know which of these requirements are still operative. Moreover, a number of schools have already signed settlement

agreements with OCR, and many more have changed their policies to comply with its demands. They will be reluctant to alter their practices unless they are sure they will not be subject to further investigation or to court suits.

This means the Department of Education must revise its guidelines in a way that federal judges and educational institutions find reasonable, which will require considerable political skill from an administration notorious for its impetuosity and ham-handedness.

It is important to remember that although discussion of sexual harassment has focused on colleges, OCR’s rules also apply to K–12 schools. Scores of public schools have been investigated, and many have signed detailed resolution agreements. There is also considerable overlap between OCR’s guidance on sexual harassment and its 2010 DCL on bullying, which was aimed primarily at elementary and secondary education.

The National School Boards Association’s general counsel criticized that DCL for “creating an expectation that school officials are to respond to each and every offensive incident as if it were a civil rights violation,” thus “needlessly drain[ing] school resources and attention from the more crucial task of fostering an appropriate climate while minimizing the professional discretion of local educators to craft workable, individualized solutions.” For the past seven years, OCR has paid scant attention to these legitimate concerns. As the department reviews its guidelines, public school officials have an opportunity to explain the practical implications of these federal mandates.

Sadly, it is likely that the debate over Title IX regulation will fall into the usual political rut: Democrats will decry any change as part of Republicans’ “war on women,” and the Department of Education will cover its tail by relaxing enforcement rather than rewriting its guidance. But there are several compelling reasons for Democrats to tone down their hyperbolic attacks and for the Department of Education to undertake a thorough reexamination of federal rules.

Civil Liberties

First and most important, this is one of the rare contemporary issues that does not fit easily into the usual left/right divide. OCR’s regulations have received sustained criticism from a wide array of scholars, professional groups, and civil libertarians usually aligned with the Left.

Nowhere is this more clear than in an open letter recently released by four distinguished women professors at Harvard Law School. They urge OCR



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to revise its guidelines in order to ensure “fairness for all students under Title IX.” They point out that the current definition of sexual harassment is so broad that it “often involves mere speech about sexual matters.” The procedures schools have adopted under pressure from OCR “are frequently so unfair as to be truly shocking.” This sends “a dreadful message, that fairness is somehow incompatible with treating sexual misconduct seriously.”

A task force of the American College of Trial Lawyers issued a similar warning: “OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students accused of sexual misconduct.” A federal district court judge in Massachusetts described the process used by Brandeis University as “closer to Salem, 1692, than Boston, 2015.” Another judge charged that “due process has been completely obliterated” by the actions of the University of California, Davis.

In 2016, the American Association of University Professors issued a highly critical report on OCR’s Title IX policies, pointing out that “faculty in disciplines related to gender and sexuality” are particularly “vulnerable to the chilling effect of potential hostile environment charges and are disproportionately affected in their teaching and research due to universities’ adoption of overly broad definitions.” Nadine Strossen, former president of the ACLU, devoted her 2015 Salant Lecture at Harvard to warning of the dangers to freedom of speech posed by OCR’s policies.

Anyone who has read *The Campus Rape Frenzy* by KC Johnson and Stuart Taylor Jr. or *Unwanted Advances* by Laura Kipnis will have a hard time denying that OCR’s rules and the agreements they have forced schools to sign threaten both due process of law and free speech on campus. It is hard to believe that the federal government is incapable of striking a better balance.

Rule of Law

Second, OCR’s reading of its authority under Title IX goes far beyond the interpretation adopted by the Supreme Court in two decisions that squarely addressed the sexual harassment issue. On most Title IX matters, OCR has stayed close to the courts’ interpretation of federal law. It has a strong reason for doing so. Since termination of federal funds (the main enforcement tool created by Title IX) is administratively awkward and politically suicidal, OCR relies on “private rights of action” filed in federal court to provide its directives with enforcement teeth. When schools know they can be sued for damages and injunctive relief, they become far more willing to negotiate with OCR.

In *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999), the Supreme Court adopted a narrow reading of schools’ responsibility for sexual harassment by employees and other students.

A school will be held liable for damages only if an official who “has authority to institute corrective measures” has “actual knowledge of, and is deliberately indifferent to” the misconduct.

Moreover, schools will be held liable “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.” To be covered by Title IX, such misconduct must be “serious enough to have the systematic effect of denying the victim equal access to an educational activity or program.” “Although, in theory, a single instance of sufficiently severe one-on-one peer harassment” could have the effect of denying

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students equal access to educational programs, the court found it “unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.” The court also stressed that judges “should refrain from second-guessing the disciplinary decisions made by school administrators.”

On the last day of the Clinton administration, OCR issued revised guidance that explicitly rejected this view of schools’ responsibility. For example, OCR announced that “a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.” When the University of Montana incorporated the language of the Supreme Court into its official policy, OCR demanded that it be removed. Schools bear responsibility for investigating “any unwelcome conduct of a sexual nature.” Most importantly, OCR’s 2011 and 2014 guidelines contained page after page devoted to “second-guessing the disciplinary decisions made by school administrators.”

OCR justified its break with the court by claiming that its interpretation applies only to court suits for damages, not to demands made by federal administrators. Recognizing that the Supreme Court might not take kindly to being ignored in

this way, OCR has done all it can to avoid judicial review, even to the extent of telling senators and judges that its guidelines are just advisory, not legally binding. That, of course, is not the message it has been sending to school officials.

Not only has OCR thumbed its nose at the Supreme Court's interpretation of Title IX, but schools that have instituted new disciplinary procedures under pressure from OCR have been repeatedly castigated by lower-court judges for disregarding procedural fairness.

Cultural Imperialism

Third, although disciplinary procedures have received the most publicity, OCR's sexual harassment rules go far beyond this, constituting a dangerous and unauthorized intrusion into students' lives and beliefs.

In 2010, then Assistant Secretary of Education for Civil Rights Russlynn Ali told reporters that the Obama administration's DCLs and enforcement practices represented a "new paradigm" for dealing with sexual harassment. No longer would the focus be on identifying and disciplining perpetrators. Now the goal was to "change the culture on the college campuses, and that is hugely important if we are to cure the epidemic of sexual

"Changing the culture" is an unusually ambitious educational undertaking. That is why no word is repeated more frequently in OCR's policy directives than "training." Schools must provide regular training, not just for investigators and adjudicators but also for all students, faculty, and staff, usually at least once a year. OCR requires prior approval of schools' training programs, and offers lots of advice on what should be included. The agreement with Tufts University, for example, mandates training on "victim behavior, dynamics of power, [and] implicit bias." Dynamics of power? Should federal administrators have a big say on what schools teach their students on this politically loaded topic?

In their important 2016 *California Law Review* article on "The Sex Bureaucracy," Harvard Law professors Jacob Gersen and Jeannie Suk note that the "college sex bureaucrats" who run these federally mandated programs "are not simply training students on the rules of rape, sexual assault, and sexual harassment." Rather,

they are instructing on, advising on, counseling on, defining, monitoring, investigating, and adjudicating questions of sexual desire. . . . Sexual violence education and prevention programming is rapidly morphing into sex instruction reminiscent of guidance provided by sex therapists like Dr. Ruth. This jibes well with the public health framework that has so strongly influenced the federal regulatory orientation to sexual violence. Since the sex bureaucracy's role is regulating health and safety, explanations of consent easily lead to instruction about what is "healthy" or "positive" in sex and relationships.

The ambition to "change the culture"—not just on college campuses but throughout the nation—lies behind many other elements of OCR's guidelines. For example, colleges must provide remedies to victims "regardless of where the conduct occurred," because "students often experience the continuing effects of off-campus sexual harassment in the educational setting." This includes harassment by non-students over whom the school

has no control.

Most importantly, OCR requires schools to regulate not just the behavior of their staff and students but what the agency calls "verbal conduct"—and the rest of us call speech. Its definition of "sexual harassment" includes "unwelcome" sexual advances "whether or not they involved physical touching." This includes "making sexual comments, jokes, or gestures"; "distributing sexually explicit drawings, pictures, or written material"; "calling students sexually charged names"; and "showing or creating e-mails or Web sites of a sexual nature."

If that is not sweeping enough, the guidelines also prohibit "sexual-stereotyping," which includes "persistent

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violence on our college campuses across the country." This theme was emphasized by a 2014 White House report: "Sexual assault is pervasive because our culture still allows it to persist. According to the experts, violence prevention can't just focus on the perpetrators and the survivors. It has to involve everyone."

Repeated references to an "epidemic" of sexual assault by OCR and advocacy groups are not just overheated rhetoric. Behind the talk of "rape culture" lies a certain worldview: violence against women is so deeply engrained in our culture that we hardly see it; existing institutions will do nothing about it until they are reconstituted; and addressing the problem requires us to change the way all of us think about sex, gender, and sexuality.



Students at Dickinson College march in support of harsher consequences for students who commit sexual offenses.

disparagement of a person based on a perceived lack of stereotypical masculinity or femininity.” To violate Title IX, harassment “does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”

Under pressure from OCR and student activists, many schools have extended their definition of “sexual harassment” to prohibit even more forms of speech. Harvard prohibits “sexually suggestive innuendoes” and even “commenting about . . . an individual’s body.” Marshall University defines harassment as any expression that causes “mental harm, injury, fear, stigma, disgrace, degradation, or embarrassment,” while Colorado State University at Pueblo explains it as the “infliction of psychological and/or emotional . . . through any means.” Some schools have expelled students for messages sent on social media, including tasteless jokes aimed at no one in particular.

OCR’s regulations are hardly the only threat to freedom of speech on college campuses, but they are a significant one, and for reasons spelled out below, a source of institutional support

for students and college bureaucrats eager to ban any speech they find offensive.

Bureaucratizing Our Schools

Fourth, OCR’s post-2010 enforcement strategy—which can best be described as “harass and colonize”—sought to change colleges’ structure and priorities in a way that will be especially difficult to undo.

OCR’s break with the courts presented a serious enforcement problem: how could it induce schools to comply with its requirements now that court-based enforcement was unavailable? In 2013 and 2014, the Obama-appointed head of OCR Catherine Lhamon threatened to cut off federal funding to schools. But everyone knew this was a bluff. In Title IX’s 45-year history, OCR has never terminated funding. “Going nuclear” is not only politically dangerous but exposes OCR’s guidelines to judicial review—something it is desperate to avoid.

OCR's decision to publicize its investigations was one part of a clever two-pronged enforcement strategy. It would pressure schools to negotiate legally binding agreements by subjecting them to investigations that would be expensive in both monetary and reputational terms. These lengthy investigations were not primarily information-gathering exercises. Rather, they were designed to bludgeon schools into submission. The process, as they say, became the punishment. Colleges face stiff competition for attracting students. Who wants to be accused of tolerating an "epidemic of sexual assault"? Most of the resulting agreements go well beyond what OCR's official guidance explicitly requires. For example, many schools have adopted the "single-investigator" model that OCR "recommends" but does not openly demand.

In addition, OCR required schools to create large Title IX offices with close ties to OCR and student activists. These offices will remain long after OCR's policy shifts.

Before 2014, OCR had refused to publicize an investigation until it had found a violation of the law and reached an agreement with the school in question. Over the next three years, it publicly announced every sexual assault investigation against a college from the outset in order to increase pressure on schools to settle.



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criticism not just from the schools that remained under a cloud for months and even years, but also from students who often graduate before seeing any resolution of their complaints. As a lawyer for the Boston-based Victim Rights Law Center put it, although OCR's determination to "look at everything from soup to nuts" was "a great thing" overall, it "utterly fails to provide remedies to individual victims." She described OCR's response to individual complainants as, "Thanks for the complaint, we'll see you in four years while we do a compliance review."

In June, OCR ended this novel practice, returning discretion to regional officials to determine the scope of their investigations and emphasizing the importance of expeditious resolution of complaints. But hundreds of investigations remain ongoing, and schools not yet on the hook look around and think (in the words of one Title IX officer with whom I spoke), "there but for the grace of God go I."

The internal Title IX compliance offices produced by this process are ambitious as well as expensive. Since 2013, Swarthmore, a college with only 1,500 students, has appointed four new Title IX deputy coordinators and a Title IX Fellow, plus a "violence prevention educator and advocate" and sexual misconduct investigator in the college police

department. By 2016, Harvard had 50 full-time and part-time Title IX coordinators, and Yale had 30. The University of North Carolina now has seven full-time Title IX compliance officers. This is a good example of how expansion of government regulation increases the number and influence of academic administrators—an institutional shift of great significance for higher education.

These offices do not limit themselves to responding to

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Just as important, OCR turned every individual sexual-assault complaint into a full-blown compliance review of the entire institution. This was expensive and time-consuming for both the targeted institution and for OCR. Of the nearly 350 investigations OCR has initiated against colleges since 2011, only 72 had been concluded by the end of August 2017 (see Figure 1). The average length of these investigations is about two years, with some dragging on for five or six.

According to a *Chronicle of Higher Education* report, "Longtime leaders can't recall another issue that so consumed colleges. . . . Some presidents say they've spent half their time on the issue—and serious money, limiting their ability to add another mental-health counselor, for example, or hold down a tuition increase." Peter Lake of Stetson University, a leading expert on Title IX compliance, describes the process in this way: "They come into your closet and say, 'Everything is in order, but we just went into your dresser and your socks aren't matching.'" He estimates that from 2011 to 2015 colleges have spent more than \$100 million to comply with Title IX sexual-harassment guidelines.

This enforcement strategy generated

accusations of assault and providing support to survivors. They, too, are dedicated to “changing the culture.” For example, Harvard’s new sexual-assault office proclaims on its web site that “Rape culture is ubiquitous.” That is why colleges need to reform the way we “talk about sex.” Moreover, sexual violence is inseparable from gender inequality: “The less equity that exists between genders in a culture (men having more power than women and trans people), the more likely rape, sexual assault, and harassment are likely to occur.” Consequently, “addressing gender inequality requires reflection, action, and vision that is rooted in an anti-oppression, social justice framework.”

The extent to which laudable efforts to provide professional help to victims of sexual assault have been combined with ideological attacks on “masculinity” in the name of “social justice” is evident in Princeton’s 2017 description of a new position for an “Interpersonal Violence Clinician and Men’s Engagement Manager.” Only a third of this person’s time will be devoted to traditional counseling. The rest will involve “men’s programming initiatives geared toward enhancing awareness and challenging gender stereotypes.” In addition to the advanced degrees and clinical experience, applicants must have “expertise in” and commitment to “social justice issues.” In other words, addressing the problem of sexual assault requires us to go beyond dealing with individual cases to challenge “belief systems” about “gender stereotypes,” to expose the “privileges of male identity formation and the relationship with violence,” and to work toward “social justice.”

More Deliberation, Less Demagoguery

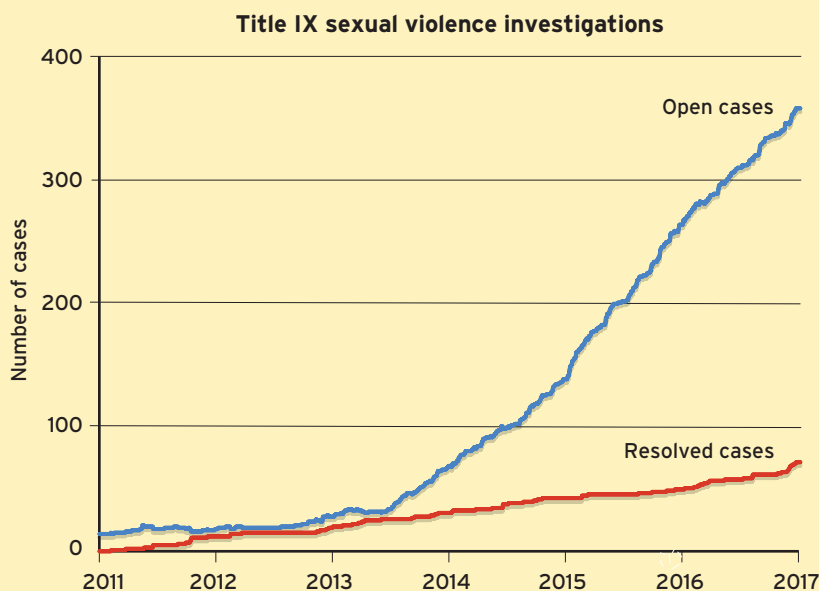
OCR has built this impressive edifice on the basis of a law that simply prohibits sex discrimination in educational institutions funded by the federal government. It has evaded standard rule-making procedures designed to collect evidence and encourage public participation; ignored the Supreme Court’s interpretation of Title IX; pressured schools to adopt disciplinary proceedings that deny due process to the accused; insisted upon a definition of sexual harassment so broad that it threatens free speech on campus; and created within colleges units dedicated to reeducating students on all matters sexual and on the dictates of “social justice.” To claim that any criticism of this heavy-handed regulation is designed to make colleges “safe for

rapists” is to engage in a most reckless form of demagoguery.

All too often the leader of the current administration, too, has engaged in reckless demagoguery. He has shown contempt for judges and for the rule of law. He has acted precipitously

Rising Sexual Violence Investigations (Figure 1)

As of August 31, 2017, the Office for Civil Rights has conducted 430 investigations of colleges for possibly mishandling reports of sexual violence, of which 358 remain open.



SOURCE: The Chronicle of Higher Education’s Title IX investigation tracker, <https://projects.chronicle.com/titleix/>

and unilaterally, with little understanding of public policy or the likely consequences of his action.

Here is an opportunity for the secretary of education and OCR to do just the opposite. By using standard notice-and-comment rule making, by bringing the agency’s policy in line with the Supreme Court’s interpretation of Title IX, by getting a better handle on the extent of sexual assault in educational institutions and effective prevention measures, and above all, by focusing regulations on improving the educational opportunities that we provide students rather than upending the sexual mores of society at large, they can demonstrate that not everyone appointed by President Trump need sink to his level.

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