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Students Accused of Sexual Assault Have the Government's Ear. What Are Their Goals?



Evelyn Hockstein, The Washington Post, Getty Images
Education Secretary Betsy DeVos held meetings last week about whether to reject or soften Obama-era guidance on sexual-misconduct policies on campuses under Title IX.

By Sarah Brown | JULY 19, 2017 ✓ PREMIUM

When Will entered his campus disciplinary hearing after being accused of sexual assault at a university in the South, he immediately felt that the odds were stacked against him: "You walk in there, and they see a guilty person."

The members of the hearing panel deciding the case weren't well trained or objective, said Will, who asked to use only his first name, and

"they treated me with no respect at all." He requested that his surname and the name of his former institution not be used because of the sensitive nature of the allegations; he was not charged with a crime.

After several months, Will was found not responsible for violating campus policy. But he doesn't want other accused students to be treated the way he was by administrators. He said he has been struggling with depression and anxiety ever since and had to drop out of college for a while.

"I literally walked into a kangaroo court and, by the grace of God, got out unscathed," he said.

Will was one of roughly a dozen students who met with Education Secretary Betsy DeVos last week to tell their stories of being falsely accused of sexual assault. The meeting was one of the "listening sessions" the secretary held with victims, accused students, and college officials as the department's Office for Civil Rights considers changes in the Obama administration's guidance on Title IX, the federal gender-equity law.

The gathering drew widespread attention, thanks in part to controversial remarks by Candice E. Jackson, the department's acting assistant secretary for civil rights, who suggested beforehand that the overwhelming majority of campus sexual-assault accusations involve cases of drunken regret. (She apologized after many people condemned her remarks.)

The most hotly contested aspect of the debate over Title IX enforcement involves the 2011

"Dear Colleague" letter, which spelled out colleges' obligations to respond quickly and equitably to reports of sexual violence, and to eliminate hostile environments on their campuses. Critics say the guidance went too far and effectively directed colleges to tilt their processes in favor of victims, trampling on the rights of accused students.

Ms. DeVos said after the meeting that some aspects of colleges' approach to adjudicating sexual-assault cases aren't working, though she didn't specify what she'd like to change or what she might do with the "Dear Colleague" letter. On Wednesday, a group of Democratic state attorneys general urged her to uphold the Obama administration's approach to Title IX enforcement.

Will and other accused students who spoke with *The Chronicle* said their meeting with Ms. DeVos was the first time they felt as though a top federal official had cared about what they had to say. Many lawyers and other allies of accused students say they feel the Trump administration is more willing to listen to their perspective.

"There has been a massive fear on campuses of OCR," said Eric Rosenberg, a lawyer at Ohio-based Rosenberg & Ball Co. LPA, referring to the civil-rights office and its aggressive enforcement of Title IX and victims' rights during the Obama years. Now, he said, "the voice of the falsely accused is beginning to be heard in ways that were not previously available to them."

Standard of Proof

Accused students and their supporters stress that they agree with victims' advocates on at least one thing: For far too long, colleges didn't take sexual-assault reports and victims seriously.

Cynthia P. Garrett is co-president of Families Advocating for Campus Equality, or FACE, a nonprofit group that supports accused students. Ms. Garrett told *The Chronicle* she wanted to debunk some of the myths she often hears about due-process advocates. "Our goals are not to get rid of Title IX," she said. "Our goals are not to deny anybody civil rights." Nor do they want the civil-rights office to stop enforcing Title IX with respect to campus sexual violence.

Their focus, she said, is simply on making sure the campus disciplinary process is fair to all students involved.

A few other goals unify these advocates.

They want to do away with the "Dear Colleague" letter, for one. And they want to change the standard of proof that the letter told colleges to use in sexual-assault cases: a "preponderance of evidence," or concluding that it is more likely than not that a sexual assault occurred. These advocates say colleges should use a higher

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standard, like "clear and convincing," which falls between "preponderance" and the standard used in criminal cases, "beyond a reasonable doubt."

Fairness doesn't mean the same thing to everyone, though. Some say they believe sexual-assault cases should be handled by law enforcement; others say colleges run a distinct, equally important process. Some would like lawyers to be able to participate in campus hearings and advocate on behalf of students; others say that would be disruptive.

For some lawyers who represent accused students, fairness isn't just about making sure students who face allegations have more rights. It's about changing a culture on many campuses that, in their view, has become too victim-centric.

"I don't believe a school should call someone a survivor just because they say they are," said Justin Dillon, a partner at KaiserDillon PLLC, in Washington. "A fair process should determine that." Mr. Dillon is representing a recent University of Virginia graduate in a lawsuit challenging the Obama administration's Title IX guidance.

Mr. Dillon's suit argues that the Education Department's civil-rights office placed new mandates on colleges without drafting regulations and going through a notice-and-comment period, where the public can weigh in. (Federal officials have said that the "Dear Colleague" letter was a guidance document and didn't amount to new requirements.)

Those who work with sexual-assault victims believe Mr. Dillon's mind-set is victim-blaming. Among many due-process advocates, "there is a dominant narrative of claiming false reports to suggest survivors — and women in particular — are lying about sexual violence," said Laura L. Dunn, executive director of SurvJustice, which supports victims.

Researchers have found that just a fraction of reports are false, Ms. Dunn said in an email, and that most sexual assaults go unreported.

Regulations, Not Guidance

One of the most vocal critics of the Obama-era guidance has been the Foundation for Individual Rights in Education, or FIRE, which advocates for free-speech and due-process rights on campuses.

The group wasn't part of last week's meetings with Ms. DeVos, but Joe Cohn, FIRE's legislative and policy director, said he's pleased that she and Ms. Jackson seem to be listening to a wider range of voices than their predecessors.

Mr. Cohn rattled off a laundry list of key due-process elements he'd like to see in every campus policy: Accused students should be told right away exactly what the allegations are; both sides should have access to all of the evidence a college has; students should be able to file complaints when they believe someone who's investigating or adjudicating the incident has a conflict of interest.

Ms. DeVos and Ms. Jackson should issue regulations, not guidance documents like the "Dear Colleague" letter, that try to make the campus disciplinary system better for all students, Mr. Cohn said. "You don't hear victims' rights advocates say, We've reached

Nirvana and we want things to stay the same," he said.

FIRE is sponsoring Mr. Dillon's lawsuit against the civil-rights office over the "Dear Colleague" letter.

A former FIRE staff member, Adam Kissel, now serves as deputy assistant secretary for higher-education programs in the Education Department, though the unit he leads doesn't handle Title IX policy.

Will, the accused student, said he wants to see campuses use independent boards during hearings, made up of people who are trained in adjudicating such cases and have no ties to the institution.

Andrew T. Miltenberg, managing partner of litigation at Nesenoff & Miltenberg LLP, in New York, said many administrators and investigators not only lack proper training, but they also come from what he describes as "victim centric" backgrounds, having been gender-studies scholars or advocates for domestic-violence victims.

While they might be well-meaning, they shouldn't be considered objective fact-finders or adjudicators, he said. He'd like to see such roles filled by former law-enforcement officials.

Sometimes victims don't want to go through hearings or see their alleged perpetrator expelled, Mr. Rosenberg, the Ohio lawyer, said. So colleges should be able to offer a separate, informal resolution process, he said. (The "Dear Colleague" letter discouraged such an alternative.)

But many of the changes due-process advocates want would turn the campus-misconduct process into a criminal court, which is not appropriate, said Colby Bruno, senior legal counsel at the Victim Rights Law Center.

During the Obama administration, what changed was that campus sexual-assault victims were finally believed and received the rights they deserved, Ms. Bruno said. There is a misperception, she said, is that "all of a sudden we have all of these people being expelled and all of these false accusations and all of these victims lying."

There's nothing wrong with Ms. DeVos's listening to accused students, Ms. Bruno said, but the secretary shouldn't be disproportionately weighing their concerns when considering Title IX policy changes. "For every one accused student who claims that he or she has been wrongly accused, there are 10 victims who claim that they've been assaulted," she said. "That is the reality."

'Unsupportive Cultural Beliefs'

Ms. Dunn said SurvJustice is open to working with lawyers and others who advocate for accused students about how to make the campus process better for all students. "We cannot agree, though, that there is a large problem with false reports," she said.

"It is abhorrent when it occurs," she continued, "but so are the plethora of sexual assaults that go ignored, dismissed, or even unreported because of our unsupportive cultural beliefs and norms."

Ms. Dunn is also concerned that many due-process advocates want to narrow the definition of sexual assault on campuses. They want to limit the scope of assault to offenses involving penetration, she said, "rather than acknowledging that sexual harassment and violence are on a continuum, and all of it should be dealt with by campuses even if law enforcement may not recognize it as a crime."

Saying that only rape qualifies as serious sexual misconduct on campuses, she said, "is out of touch with the purpose of Title IX."

But an overly broad definition of sexual assault can be unfair to accused students, Mr. Dillon said. While inappropriate sexual conduct should be punished, he said, the sanction must be appropriate for the level of misconduct.

Mr. Miltenberg said he has represented a student expelled from one institution for what he describes as "an unwanted kiss," while a student at another college was found responsible for rape and was only suspended for a semester. "It's hard for me to reconcile that," he said.

Mr. Dillon believes there must be a cultural shift on campuses, "so that schools and students themselves can distinguish between what constitutes sexual assault and what constitutes simply something that you wish had not happened or may regret."

How consent is defined can also undermine due process, added Mr. Cohn, of FIRE.

Some colleges say that consent to sex must be clear and unambiguous, he said. He interprets that to mean that if an incident is ambiguous — which campus cases, especially those that involve alcohol, often are — the complainant in the case will generally prevail. To Mr. Cohn, that's shifting too much of a burden onto the accused student.

It probably isn't the Education Department's role to provide a single, binding definition of sexual assault, he said, but federal officials could make recommendations about how a campus policy should frame sexual misconduct and consent.

In Mr. Miltenberg's view, the definition of sexual assault isn't what really matters in the end, because a fair process will iron out what constitutes sexual misconduct and what doesn't.

"There can be a campus culture where young people who feel they've been the victims of sexual misconduct, sexual assault, or unwanted sexual advances that have crossed their personal boundaries — we can have an environment in which they feel comfortable coming forward," he said.

At the same time, he said, "you can have a clear, transparent system by which young men know exactly what they're being charged with" and "have a chance to be heard."

The Education Department can't bring clarity to every aspect of the debate over campus sexual assault, Mr. Rosenberg said, adding that some issues may need to be solved by legislation. But if the department issues new regulations, he hopes that, during the required public-comment period, advocates for both victims and accused students can sit down and have productive discussions about improving how colleges handle such cases.

Often, he said, "we stoop to name-calling instead of looking at the facts."

Sarah Brown writes about a range of higher-education topics, including sexual assault, race on campus, and Greek life. Follow her on Twitter @Brown_e_Points, or email her at sarah.brown@chronicle.com.

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