

Why the cross-examination requirement in campus sexual assault cases is irresponsible

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May 7, 2020 at 2:04 p.m. EDT

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One in four undergraduate women report experiencing a sexual assault while in college. For the past three years, we have studied how universities respond to complaints of sexual misconduct, examining in particular how administrators balance the Title IX rights of victims against the due-process rights of the accused. Our study of 381 colleges and universities documents wide variation in how schools navigate this challenge and identifies the kinds of procedures that potentially strike an appropriate balance. Unfortunately, the regulations that Education Secretary Betsy DeVos announced Wednesday tip the balance of rights in favor of the accused.

Universities that receive federal funding are required, under the 1972 civil rights law known as Title IX, to promptly and equitably respond to reports of sexual violence. Courts have long held that public universities must provide students accused of misconduct with basic elements of due process. Sexual misconduct matters often place in conflict the civil rights of those who report sexual harm and the due process

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The issue of cross-examination highlights this conflict. In 2011, the Education Department's Office for Civil Rights advised schools against allowing students to personally cross-examine each other during a hearing, citing concerns about potential trauma to survivors. Many schools responded to the informal guidance by adopting procedures in which students did not directly question each other, or by eliminating cross-examination entirely. The rules scheduled to take effect in August would eliminate many of these alternatives.

In traditional adversarial hearings, lawyers directly question an accuser to challenge credibility, memory and motive. Experts in sexual violence have amassed considerable evidence that cross-examination in a live hearing can re-traumatize survivors and further deter survivors from reporting sexual misconduct. Research has also shown that aggressive, adversarial questioning is a poor tool for assessing the truth in cases of sexual violence. Universities seeking to respond equitably to reports of sexual violence have strong reasons under Title IX to avoid cross-examination in a live hearing.

Due process requires that universities provide accused students with an opportunity to challenge evidence and witness testimony. As we studied how schools navigate the tension between these competing sets of rights, we found that almost 11 percent of the schools in our sample failed to protect the rights of either party and lacked clear procedures for what happens when a complaint is made. Only 20 percent of schools have created “single investigator” procedures, where one person or office investigates the claim and makes the determination of responsibility — an approach that some argue can compromise the due process rights of the accused. (Even in those cases, all but two schools allow accused students to appeal and have the case reexamined by another university official.)

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In between those extremes we found innovations that balance the rights and interests of both parties. Sixty percent of schools have moved toward models of fact-finding and resolution that avoid cross-examination but still afford opportunities for the accused to review and contest evidence. The best of these procedures rely on the expertise and specialized training of investigators who understand the trauma of sexual violence. Questions are funneled through an impartial intermediary who has the capacity to omit impermissible questions or revise a question’s format. Students have the opportunity to contest findings, and both parties have the right to appeal. Transparency of process is critical.

Our research found that it is possible to devise procedures that promote the goals of Title IX while simultaneously affording accused students the opportunity to be heard. Rather than promote these models, however, the new regulations compel schools to allow cross-examination — putting a sizable thumb on the scale in favor of the due-process rights of the accused. If lawyers are brought in to conduct cross-examination, professional ethics require zealous advocacy in defense of the accused. Wealthy students are more likely to be able to hire skilled attorneys, well-versed in strategies to destroy witness credibility and distort the campus process.

Some argue that cross-examination is necessary because schools have gone too far in seeking to protect survivors and are expelling accused students on the flimsiest of grounds. But evidence shows that even schools using the most victim-centric procedures rarely find those accused of sexual misconduct responsible. Expulsions are extremely rare. Most women still do not report the sexual harm they experience on campus, and only a fraction of reported cases are investigated by campus officials.

Courts have long required fundamental fairness in how campuses treat students facing suspension or expulsion, and they have balanced due process against other interests. If there are ways to investigate and resolve complaints that are better at establishing fact and that prevent the re-traumatization likely with cross-examination, schools have the responsibility under Title IX to create such procedures. The Education Department regulations deprive schools of the capacity to innovate those solutions. Congress ought to eliminate this cross-examination requirement and restore a balance between concern for due process and a commitment to promoting gender equality in higher education.

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