Betsy DeVos' Support for Due Process on Campuses Draws Attack

Betsy DeVos, who was nominated to be the Education Secretary, was recently attacked because she and her husband made donations to a civil-liberties group, the Foundation for Individual Rights in Education. FIRE is "a nonpartisan organization that defends free speech, religious liberty, and due process on college campuses." FIRE is also responsible for many free-speech rulings by the federal courts, such as *Bair v. Shippensburg University* (2003), which struck down a campus speech code, and *Smith v. Tarrant County College District* (2010), which struck down limiting speech to narrow "free speech zones."

The DeVos family donations drew criticism from Senator Bob Casey (D-Pa.). He objects to FIRE's criticism of mandates that the Obama administration imposed on America's colleges and schools, micromanaging how they handle allegations of sexual harassment and assault. FIRE argues that the administration's mandates undermine due process on campus.

Many law professors from across the political spectrum have argued that these Obama administration mandates were illegal, since they imposed new obligations on schools without going through the notice and comment process mandated by the Administrative Procedure Act. A May 16, 2016 letter from 21 prominent law professors says that "free speech and due process on campus are now imperiled" by the Obama administration's mandates, which ignore "judicial precedent and Administrative Procedure Act requirements." The 21 signatories to that letter include former federal appellate judge Michael McConnell, and Harvard law professors such as

Elizabeth Bartholet (who taught sex discrimination law for many years), Richard Parker, and Charles Donahue.

Ignoring such legal commentary, Senator Casey, joined by Patty Murray, have claimed that "the Obama administration's guidance to colleges and universities in 2011 'clarified longstanding policy at the Office of Civil Rights, dating back to at least 1995 and explicitly supported by the George W. Bush administration.'" That claim of continuity is quite wrong: the 2011 guidance imposed new rules on colleges, and abolished longstanding protections for accused faculty and students on many campuses, as I previously discussed at this link. The Obama administration's 2014 sexual harassment guidance also imposed new rules that conflicted with Supreme Court precedent, as I discuss at this link.

Perhaps the most glaring way the Obama administration departed from past agency practice was in forcing colleges to investigate even off-campus conduct alleged to constitute sexual harassment or assault. That overreaching resulted in absurdities such as a Title IX investigation of Professor Laura Kipnis for an essay published off campus in the Chronicle of Higher Education, "Sexual Paranoia Strikes Academe", which students nevertheless claimed constituted "sexual harassment." (The students then accused Kipnis of "retaliation" when she took issue with their charges on twitter. After an outcry from free speech advocates, charges were dismissed months later.).

The Obama administration ignored past OCR rulings authored by career lawyers and civil servants at OCR in forcing colleges to investigate off-campus conduct. Such "unexplained departures from" past administrative precedent are arbitrary and capricious, as the D.C. Circuit Court of Appeals noted in *Ramaprakash v. FAA* (2003). The Obama administration also ignored two federal appeals court rulings, and language in a

Supreme Court decision, by demanding that colleges do so.

As the Office for Civil Rights noted during the Bush Administration when I worked there, "A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." See Oklahoma State University ruling, OCR Complaint No. 06-03-2054, at pg. 2 (June 10, 2004). This ruling was issued by career OCR staff in OCR's Dallas office.

The Obama OCR's contrary position is clearly at odds with court interpretations of Title IX as **not** applying off campus, as I have noted in the past. For example, a federal appeals court rejected a lawsuit by a student over an off-campus rape in *Roe v. St. Louis University,* 746 F.3d 874, 884 (8th Cir. 2014), rejecting arguments that the rape had on-campus effects and created a sexually hostile environment. As the court noted in that case, "The Supreme Court has made it clear, however, that to be liable" under "Title IX, a University must have had control over the situation in which the harassment or rape occurs," which is not the case for an "off campus party." It quoted language from the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 645 (1999).

This court decision rejecting liability for off-campus conduct paved no new ground: another federal appeals court ruling long predating the Obama administration's guidance made the same point, rejecting a Title IX lawsuit against a university by a student assaulted by her instructor at his off-campus dental office. (*See Lam v. Curators of University of Missouri* (1997)). Under the Bush administration, unlike under Obama, the Office for Civil Rights properly followed such court rulings.

The Obama administration should not have committed these unexplained departures from past administrative precedent, much less ignored federal court rulings. Yet, one of the ways it deemed Harvard University to be in violation of Title IX was because Harvard Law School's sexual harassment policy failed to parrot at length OCR's guidance about investigating off-campus misconduct, even though no court has ever expected a harassment policy to be so detailed as to address such hypothetical situations, much less parrot bureaucrats' guidance about how to deal with them. In its December 30, 2014 finding, it faulted Harvard's failure to include such language about off-campus conduct in its sexual harassment policy, even though Harvard Law School had in fact investigated off-campus conduct.

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