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Commentary

Time to End Obama-Era Fed Micromanagement of Colleges Under Title IX

By Hans Bader | February 22, 2017 | 11:22 AM EST

Vice President Pence says he and President Trump "believe that education is a state and local function that should be controlled by" states, not the federal government. A great way to restore local control would be rescind the Obama administration's federal micromanagement of college discipline. Under Obama, the Education Department sometimes pressured colleges to do things that could lead to lawsuits being filed against them by their students.

For example, the Education Department's April 4, 2011 "Dear Colleague" letter urged colleges to restrict cross-examination in sexual harassment and assault cases. As its Office for Civil Rights (OCR) put it in that letter, "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing." When schools take that advice, it can violate a student's rights under a state's Administrative Procedure Act (APA). Under many state APAs, students have a right to cross-examine their accuser, as courts have made clear in cases such as *Arishi v. Washington State University*, 385 P.3d 251 (Wash. App. 2016) and *Liu v. Portland State University*, 383 P.3d 294 (Or. App. 2016).

(It is conceivable that the advice in the "Dear Colleague" letter could also lead to violations of *federal* law at colleges that follow it. In a few campus disciplinary cases, such as *Donohue v. Baker*, 976 F.Supp. 136 (N.D.N.Y. 1997), and *Doe v. Univ. of Cincinnati*, 2016 WL 6996194 (S.D. Oh. 2016), judges have ruled that some cross-examination *was* constitutionally required on due-process grounds to test the credibility of the accuser. But the Supreme Court has not ruled on whether cross-examination is ever required by the federal constitution in the college setting, even though it lauded cross-examination as the "greatest legal engine ever invented for the discovery of truth" in its decision in *Lilly v. Virginia*, 527 U.S. 116, 124 (1999).)

The Education Department's "Dear Colleague" Letter purported to apply the federal sex discrimination law Title IX. But it misconstrued Title IX, as I explain in detail at this link. Moreover, in advising colleges to restrict the rights of their students, it ignored language in a 1999 Supreme Court ruling that emphasized that schools don't need to risk violating the rights of their students to comply with Title IX. In setting forth a standard for when schools need to take action against sexual harassment or assault by students, the Supreme Court said that "the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action. … [I]t would be entirely reasonable for a school to refrain from a form of disciplinary

action that would expose it to constitutional or statutory claims." (*See Davis v. Monroe County Board of Education*, 526 U.S. 629, 649 (1999)).

The Supreme Court plainly meant to allow colleges to avoid acting in ways giving rise to statutory claims against them under both federal and state law, since it was in response to a dissenting opinion that cited both federal and state laws limiting the ability of schools to discipline students (such as state constitutional provisions. *See Davis*, at pg. 649, citing the dissenting opinion in *Davis*, at pp. 666-668).

In addition to ignoring the Supreme Court, this Obama-era "Dear Colleague" letter also wrongly imposed new obligations on schools without notice and comment, in violation of the Administrative Procedure Act (as I explained earlier). For example, it "ignored past Office for Civil Rights rulings authored by its own career lawyers and civil servants in forcing colleges to investigate off-campus conduct. Such 'unexplained departures from 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."

In its April 4, 2011 letter, the Office for Civil Rights told colleges they "have an obligation" to investigate even when an incident "occurred off school grounds." This contradicted what OCR's career staff told colleges in Title IX rulings during the Bush administration, when I worked there. For example, OCR's Dallas office noted that "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).

The Obama OCR's contrary position, which it later used to find colleges such as Harvard Law School in violation of Title IX, 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 sexual assault in *Roe v. St. Louis University*, 746 F.3d 874, 884 (8th Cir. 2014). Quoting the Supreme Court's Davis decision, it noted that "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" (quoting *Davis v. Monroe County Board of Education*, 526 U.S. 629, 645 (1999)).

Since free-speech protections are stronger outside of school than within K-12 schools (*see, e.g.*, *Klein v. Smith* (1986)), the Obama-era OCR's pressure on schools to investigate what it labeled as verbal sexual "harassment" (such as vulgar speech) outside of school could give rise to constitutional lawsuits against a school. That pressure was thus at odds with the intent of the Supreme Court's *Davis* decision to avoid subjecting schools to the risk of "constitutional or statutory claims."

The "Dear Colleague" letter issued by the Obama-era Office for Civil Rights in 2011 also wrongly ignored past agency rulings in demanding that colleges not allow accused students to

appeal findings of guilt unless they also allowed complainants to appeal not-guilty findings — a position that some critics viewed as akin to double jeopardy.

Before the Obama administration, OCR had stated that "there is no requirement under Title IX that a recipient provide a victim's right of appeal." (University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006)).

Under the Clinton administration, OCR had approved a school's limiting appeal rights to the accused because "he/she is the one who stands to be tried twice for the same allegation." (Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996)).

Similarly, under the Bush administration, OCR had concluded that "appeal rights are not necessarily required by Title IX, whereas an accused student's appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University." (Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008)).

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