How colleges can help sexual assault survivors — and the accused

Too many colleges are mishandling sexual assault. Here’s what might actually help.

Updated by Anna North | Oct 13, 2017, 8:30am EDT

When Rep. Jackie Speier (D-CA) was taking her daughter on a tour of college campuses a few years ago, she remembers that the first question a parent asked wasn’t about academic requirements, or sports, or social life. It was, “Is my daughter going to be safe here?”

That parent was talking about campus sexual assault, a problem that has captured even more public attention than usual since Betsy DeVos, the secretary of education, lambasted...
the Obama administration’s handling of the issue in a speech at George Mason University in September.

Since then, the Education Department has rescinded Obama-era guidelines on sexual assault, and put in place an interim guidance that some say is unfair to survivors. In response, Speier on Thursday announced the introduction of the Title IX Protection Act, which would enshrine in law some of the Obama administration’s guidelines, such as the right of a survivor to appeal a school’s ruling and a recommendation that schools use an evidentiary standard that survivors and their advocates say is the most appropriate.

The bill is needed because “Title IX is being rolled back” under DeVos, Speier said. “Her actions are taking us back in time.”

Meanwhile, in her George Mason speech, DeVos described a “failed system” that “has clearly pushed schools to overreach.”

“This unraveling of justice is shameful, it is wholly un-American, and it is anathema to the system of self-governance to which our Founders pledged their lives over 240 years ago,” DeVos added.

The controversy around campus sexual assault can make the problem seem intractable: How can universities support assault survivors and still be fair to accused students? What standards should they use to evaluate evidence? Why are schools responsible for this in the first place?
These questions get a lot of attention not because sexual assault is more common among college students than among other people — according to one study, college-age women were more likely to be assaulted if they weren’t in college. Rather, campus sexual assault is disproportionately in the public eye because federal civil rights law gives students a unique way to seek justice — they can file a complaint with the school, and school officials are legally obligated to investigate. Since the Obama administration stepped up enforcement of the law — specifically, Title IX of the Education Amendments of 1972 — in 2011, students have been increasingly vocal in calling for their schools to prevent and investigate assault.

Most people agree that some schools haven’t done a good job. Some have even argued that schools should stop handling sexual assault cases and leave the matter to the police. But schools are legally required to deal with sexual assault on campus, and there are compelling reasons some students don’t want to go to the police. What’s more, it may not be necessary to rip up what DeVos calls the “failed system” and start from scratch. In fact, advocates have some fairly simple recommendations — some of them contained in the Obama-era guidelines themselves — to help make the system fair for survivors and the accused alike.

**Title IX requires schools to address sexual harassment and assault**
Title IX, part of the Education Amendments of 1972, states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” For a long time, Title IX was best known for its role in school sports programs. The law requires schools to treat male and female athletes equally, and girls’ participation in high school sports has increased by almost 900 percent since it was passed.

But courts have also held for many years that sexual harassment and sexual assault are forms of discrimination prohibited by Title IX, as Diana Moskovitz reports at Deadspin. That means schools are responsible for addressing harassment and assault as part of creating a fair environment for all students.

The Department of Education has issued several guidance documents over the years explaining how schools should interpret Title IX. These guidance documents are not new law — rather, they explain how the Education Department understands the law and will enforce it. Several guidance documents issued by the Bush administration discussed harassment. But according to Fatima Goss Graves, the president of the National Women’s Law Center, things changed in 2011, when the Obama administration released the “Dear Colleague” letter explaining how schools should investigate harassment and assault complaints.

The letter put into writing the standards that the department used to determine whether schools’ sexual assault proceedings were fair, Graves said. For instance, it made clear that schools had to use a “preponderance of the evidence” standard when adjudicating sexual harassment or assault claims, meaning the goal should be to determine whether “it is more likely than not that sexual harassment or violence occurred.” Some schools, the letter said, used a stricter “clear and convincing” standard, meaning an accuser would need to prove that “it is highly probable or reasonably certain that the sexual harassment or violence occurred.” This was inappropriate, the letter said; the preponderance standard was used in other kinds of civil rights cases, including in discrimination cases before the Supreme Court, and was the most fitting standard to use in campus sexual assault proceedings.

The “Dear Colleague” letter also included guidance on due process for both the accuser and the accused student. “Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence,” it read. “The complainant and the alleged perpetrator must be afforded
similar and timely access to any information that will be used at the hearing.” The letter advised against allowing accused students to directly cross-examine their accusers, recommended a 60-day time frame for investigations, and warned schools against using informal mediation in cases of sexual assault.

The letter itself was only part of the story. Starting in 2011, the Education Department started “taking a more meaningful approach to enforcement” of Title IX, Graves said. At the same time, student activists were beginning to speak out about sexual assault and demand action from their schools. Sexual assault is disturbingly common — among undergraduates, about 23 percent of women and about 5 percent of men experience assault by force, violence, or incapacitation, according to a 2015 survey by the Association of American Universities. The problem was far from new in 2011, but students were becoming newly vocal about it.

“You started seeing a shift on college campuses,” Graves said. “Colleges — and college presidents in particular — recognized that they couldn’t ignore it.”

Student protests began capturing headlines. In 2014, a Columbia University student named Emma Sulkowicz began an art project called “Mattress Performance (Carry That Weight),” in which she pledged to carry a mattress on campus every day until her alleged rapist was expelled. Her parents said the school’s adjudication process had failed her in a number of ways — for example, by not allowing her to respond to statements by the accused student that she said were untrue.

The student she accused later sued Columbia, according to the New York Times, accusing the school of endorsing an “outrageous display of harassment and defamation” by giving Sulkowicz academic credit for “Carry That Weight.” Columbia settled with him in July. Protests like “Carry That Weight,” along with lawsuits against a number of schools, have helped keep the issue of campus sexual assault at the forefront of public consciousness in recent years.

Because of Title IX, schools can’t just leave sexual assault for police to handle
Sexual assault is a crime, and many wonder why schools don’t just leave the issue to the police — this question is common enough that the group Know Your IX addresses it on its website in a section titled, “Why do schools even handle sexual assault?” The answer goes back to Title IX.

“Title IX’s goal is to promise an education free of sex discrimination,” which also means an education free of harassment and violence, Graves said. The law requires schools to provide a fair educational environment for their students, and if a student is assaulted at school, that’s not just a crime — it’s also a civil rights issue. While police may get involved if the student chooses to make a report to them, that doesn’t absolve the school of its responsibility to make sure its students have equal access to education and to address any inequalities that come to its attention.

It’s also worth noting that the criminal justice system has a dismal record when it comes to handling sexual assault cases. Moskovitz offers a litany of evidence that law enforcement ignores or actively works against the concerns of survivors: “The thousands of untested rape kits across the country. The scandals in Baltimore, New Orleans, New York City, Philadelphia, and St. Louis that all showed officers intentionally downgrading sexual assault charges or just making them go away completely. The roughly 1,000 officers who have lost their badges for sexual misconduct in the past six years.” Meanwhile, patterns of police violence may make students of color understandably wary of interacting with law enforcement.

Only 20 percent of female student survivors ages 18 to 24 report sexual violence to law enforcement, according to Department of Justice statistics. Thirty-two percent of non-student women in the same age range decide to report. Other estimates of reporting rates for sexual assault vary widely, from about 5 percent to about 20 percent, according to the Washington Post.

Given the failings Moskovitz cites, it’s not a surprise that some students prefer not to report their assaults to police, or that they might choose another avenue in addition to the criminal justice process. Reporting to school officials offers them another option — and because of Title IX, school officials are required to respond.

That doesn’t mean they always respond in the right way. Recent Title IX lawsuits offer evidence that some schools — both at the college level and in K-12 education — are not responding to assault complaints appropriately, Graves wrote in a letter to DeVos in July. In
one case, she wrote, “a University of Southern California student complained that she reported a rape to her university and played authorities a tape of her rapist admitting to the assault, but the school dismissed her case for lack of evidence.” In another, “an Amherst College student published an article about her sexual assault and the school’s sexual assault counselor, who advised her to ‘forgive and forget’ instead of filing a report.”

Naomi Shatz, an attorney at Zalkind, Duncan & Bernstein LLP who has represented both survivors and accused students, argues that Title IX proceedings at many schools are not transparent for the survivor or the accused student. In some cases, she said, accused students do not receive clear notice of the accusations against them before they are questioned. In others, both parties are denied access to the evidence in the case. “Neither student has the ability to make a case for themselves if they don’t know what the evidence is,” she said.

Few dispute that some schools are failing their students when it comes to sexual assault. Where opinions differ is in how to address those failures.

**The Department of Education recently announced a change in how it interprets Title IX**

In September, the Department of Education announced that it would repeal the 2011 guidance and open a notice and comment period with the goal of creating a new rule outlining schools’ Title IX responsibilities. In the meantime, it put in place an interim guidance that differs from the 2011 letter in many ways.

The new guidance, for instance, removes the 60-day time frame for investigations, instead advising schools that the department “will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner.” It includes no prohibition against direct cross-examination or against using mediation in sexual assault cases. It allows schools to offer the opportunity to appeal only to the accused student (the 2011 letter required that appeals, if available, be allowed for both students). And it allows schools to use either the “clear and convincing” standard or the preponderance standard in investigations. Like the
2011 letter, the interim guidance is not law itself; rather, it explains how the Department of Education will enforce Title IX.

Of all the changes, allowing schools to use the “clear and convincing” standard has probably inspired the most debate. Critics of the 2011 guidance have argued that the preponderance standard — which is used in most civil cases, but is looser than the “beyond a reasonable doubt” standard used in criminal cases — is unfair to accused students.

But it makes sense to use a lower standard of proof in Title IX investigations than in criminal trials, said Alyssa Peterson, the policy and advocacy coordinator of Know Your IX, because the penalties are lower. The maximum punishment a school can impose on a student is expulsion — it can’t throw anyone in jail.

Moreover, criminal cases are supposed to balance the interests of the state against the interests of the defendant. It’s appropriate to give the defendant’s interests greater weight and place the burden of proof on the state. But Title IX investigations are meant to balance the right of each student to a fair education. “Preponderance of the evidence is the only standard that values both parties’ access to education equally,” Peterson said.

Chris Loschiavo and Jennifer L. Waller at the Association for Student Conduct Administration make the case for the preponderance standard this way: “To use any other standard says to the victim/survivor, ‘Your word is not worth as much to the institution as the word of accused’ or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant. Such messages do not contribute to a culture that encourages victims to report sexual assault.”

Many survivors and advocates are concerned about DeVos’s announcement. Both the change to the evidentiary standard and the provision allowing schools to deny survivors the opportunity to appeal are concerning, Peterson said. So is allowing mediation in cases of sexual assault. The interim guidance offers no advice on appropriate mediation,
Peterson said, and could allow schools to return to past unfair practices like forcing survivors to “work it out” with their rapists.

According to Graves, the interim guide may confuse schools or encourage sloppy practices by removing some specifics of the 2011 letter without including anything to replace them. Many schools found the 60-day time limit for investigations set by the 2011 guidance unrealistic, Graves said. But simply removing it rather than imposing a new, longer time frame “gives permission for schools to drag things out.”

Some, however, have found things to like in the announcement. Shatz said the Education Department was right to specify in the new guidance that schools should use the same evidentiary standard in sexual misconduct cases that they use in other misconduct cases. “I think that students should know going into a school how their school enforces its rules, and that should be consistent,” she said. She also praised the new guidance for requiring schools to notify accused students in writing of the exact accusations against them before any interview can take place.

On the issue of mediation, Shatz is mixed. “Informal resolution is often something both parties may want,” she said. But the department needs to provide more guidance to schools “to ensure that people are not being strong-armed into resolving things in a way they don’t want to.”

Many advocates say certain basic guidelines would help ensure due process for all students — survivors and the accused

The current debate over campus sexual assault is often portrayed as an insoluble conflict between the interests of survivors and those of accused students. But in fact, many advocates say that certain basic principles of due process, if applied consistently at all schools, would make investigations fairer for both survivors and the accused. Know Your IX has a list of recommendations to ensure due process for both survivors and accused students, including the right to review the available evidence and the right to view the opposing party’s testimony (though not to cross-examine the opposing party directly). In a recent HuffPost article, Shatz offered a similar list, though hers also includes access to informal modes of resolution.

Some advocates note that the 2011 letter actually includes a variety of due-process recommendations that apply to both parties, including equal opportunity to present witnesses and access to evidence. The way to ensure fairness for everyone, they say, is to enforce the letter, rather than getting rid of it. The 2011 letter actually includes protections...
that would address almost all the issues DeVos cited in her George Mason speech, Peterson said, if only schools would follow its guidelines.

The Title IX Protection Act, introduced by Speier and other members of the Democratic Women’s Working Group, codifies some of those guidelines. It requires schools to offer accusers and accused equal access to evidence, opportunity to present witnesses, and ability to appeal a decision. It also requires schools to use the preponderance of evidence standard, bans direct cross-examination, and states that investigations should take about 60 days, except in certain special cases.

Given the Republican majority in the House, the bill’s “ability to move may be somewhat limited,” Speier said. “But that doesn’t mean we’re not going to put our stake in the ground and make it clear where we stand.”

Others note that schools can help students who report assault even if they can’t find enough evidence to punish a perpetrator. In Title IX investigations, she explained, schools need to find out not just whether the accused student committed misconduct, but whether the school itself has become a hostile environment for the survivor. Schools today typically focus on the former, and if they can’t find enough evidence to suspend or expel an accused student, they consider the matter closed and don’t do anything more to help the accuser. Instead, Shatz argued, schools need to take a broad view of how they can create safe environments for survivors even if an accused student stays on campus.

Restorative justice practices, which focus on remedying the harm done rather than on punishing someone, may be one way of creating those safe environments, Shatz said. One survivor who spoke to Tovia Smith at NPR thought a school disciplinary hearing would retraumatize her. Instead, what she wanted “was for [the perpetrator] to step up to the plate and take responsibility, and to be active in teaching others about this experience.” She worked with an adviser to develop a restorative process, and she and her rapist ended up creating a video in which he apologized, saying, “I have raped. I hurt her in a way that I can never take back.”
A restorative process isn’t appropriate for all Title IX complaints, and experts caution that school officials need to be properly trained in order to administer it. But David Karp, a sociology professor at Skidmore College and the founder of PRISM: Promoting Restorative Initiatives for Sexual Misconduct, told NPR there is interest in restorative justice at colleges and universities around the country.

In all the debate about how to investigate sexual assault complaints, the importance of preventing assault sometimes gets lost. Jamil Smith, a journalist who was a rape crisis counselor in college, writes in the New York Times that many of the young men he worked with didn’t know that “a woman’s clothing or her sexual past is irrelevant to whether she agrees to have sex” or that “a woman isn’t required to physically fight them off to communicate that she’s not interested.” Many young people are similarly ill-informed today, he argues. “My experience taught me that we need to be proactive in preventing sexual assault, and much of that involves something that should be a natural fit for college campuses: education.”

It’s not at all clear whether the rulemaking process DeVos plans to set in motion will bring about any of the positive changes experts want to see. Some survivors and their advocates are concerned their voices won’t be heard during the notice and comment period. “The way the comment process works is very technical and advantages people who are attorneys,” Know Your IX’s Peterson said.

In the meantime, student activists are pressing schools to remain vigilant on sexual assault, said Peterson. Some schools, including those in the University of California system, have decided not to make changes based on the new guidance. “What has been super encouraging to me is how aware students are of their rights and how aware schools are of their obligations,” said Graves. “I think it’s going to be difficult to undo that.”

Was this article helpful? 👍👎