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Judge Says DeVos' Sex Assault Rule May Bar Too Much Proof

By **Chris Villani**

Law360 (November 12, 2020, 6:49 PM EST) -- A Massachusetts federal judge suggested Thursday that new rules implemented by the U.S. Department of Education and its secretary, Betsy DeVos, that limit schools' responsibilities to investigate sexual harassment claims under Title IX may go too far in limiting what evidence can be presented in a hearing.

During a bench trial over the new rules, which have been challenged in multiple federal courts, U.S. District Judge William G. Young pointed out that requiring cross-examination in investigating a sexual assault claim would eliminate a wide swath of proof that would be admissible in a court of law.

"I'm not talking about the statements of the complainant," Judge Young said. "Normally, evidence of the rape kit comes in. If I read this rule correctly, such evidence would not be admissible unless there was someone from the hospital to testify and be cross-examined as to her observations and the like. That's rather extraordinary."

Arguing for the federal government, Jennifer Mascott of the U.S. Department of Justice replied that these hearings are administrative, not criminal.

"There could be significant differences that still come within the range of reasonable policy alternatives," Mascott said, arguing the Education Department has broad discretion to create its own rules.

"My concern is this is a blanket bar on any hearsay," Judge Young said. "We are not just saying, 'We are not going to have hearsay from the complainant or the accused,' for example. This is any hearsay in the proceeding at all. That just sweeps rather broadly."

Even a photo, the judge said, would not necessarily be presented to someone adjudicating a sexual assault allegation since it would need to be authenticated.

"The department made the judgment that it was more important to have the reliability of cross-examination," Mascott said, calling it "a tried and tested way to make sure statements are reliable."

In addition to requiring cross-examination, the changes in the Education Department's final rule include removing some conduct from Title IX protections and forcing schools to toss complaints that fall outside definitions contained in the new rules.

Several victims' rights groups filed suit in June, attempting to halt the rules before they went into effect in August. Federal judges in D.C. and New York have already declined to issue injunctions blocking the rules.

Arguing for the groups bringing the suit, David Newman of Morrison & Foerster LLP said it is unfair that students who leave a school due to assault or harassment are unable to have their claims heard. It creates a scenario in which, he said, "a perpetrator of sexual assault can effectively remove those complaints simply by successfully making them traumatized to the point that they wouldn't return."

He cited high-profile sexual assault cases, like those against Larry Nassar at Michigan State University or Jerry Sandusky at Penn State University, as examples of cases that include victims who have graduated and may have no desire to return to the school but may still have evidence to offer.

The rules also disproportionately harm people like the unnamed victim in the complaint because they set a higher bar for sexual assault than other types of assault, Newman argued.

"Mary Doe is worse off for being raped than if she had been physically assaulted," Newman said.

Mascott argued the rules were the result of a three-year, well-thought-out process that studied the proper way to address sexual assault and harassment, and they are entitled to deference.

"The question here is not whether the Education Department picked the right alternative or even the best alternative or if another decision-maker could have done something better or different," she said, arguing the rules can only be struck down if "there is no set of circumstances under which the regulation would be valid."

Judge Young praised both sides for their advocacy during the videoconference hearing and took the issue under advisement. The case sped to trial after the judge, as he is wont to do, moved the matter directly to a bench trial rather than a preliminary injunction hearing.

The new rule was issued in May and instructs schools on how to implement Title IX, the 1972 law barring discrimination based on sex in education programs and activities that receive federal financial assistance.

The Trump administration in September 2017 withdrew Obama-era guidance, saying that while "well-intentioned," schools are confused about their obligations, which in turn deprived accused students of a "fair process" and denied victims "an adequate resolution of their complaints," according to court documents.

When a D.C. federal judge declined to block implementation of the new rules in August, DeVos called the ruling "yet another victory for students" as it "reaffirms that students' rights under Title IX go hand in hand with basic American principles of fairness and due process."

The victims' rights groups are represented by Julie O' Neill, Natalie A. Fleming Nolen, David A. Newman, Vanshika Vij, Caitlin A. Crujido and Robin A. Smith of Morrison & Foerster LLP, Emily Martin, Neena Chaudhry, Sunu Chandy, Shiwali G. Patel and Elizabeth Tang of the National Women's Law Center and Diane L. Rosenfeld.

The Department of Education and DeVos are represented by Jennifer L. Mascott, Rebecca M. Kopplin and Jennifer B. Dickey of the U.S. Department of Justice.

The case is Victim Rights Law Center et al. v. DeVos et al., case number 1:20-cv-11104, in the U.S. District Court for the District of Massachusetts.

--Editing by Janice Carter Brown.
