

DeVos Sex Assault Rule Largely Upheld By Mass. Judge

By Chris Villani

Law360 (July 29, 2021, 4:29 PM EDT) -- A Massachusetts federal judge on Wednesday largely upheld a Trump-era sexual assault rule for college students that advocates fear would have a chilling effect on reporting, but the judge did say that the U.S. Department of Education went too far in barring any statements that were not subject to cross-examination.

U.S. District Judge William G. Young, who presided over a bench trial challenging the rules, found that the final version of the rule issued under former Education Secretary Betsy DeVos did not violate the equal protection clause of the Fifth Amendment because it treats men and women the same and does not discriminate on its face.

But Judge Young said the final rule isn't perfect, adding that a blanket ban on any evidence at hearings where cross-examination is not possible could let alleged assailants off the hook entirely if they simply skipped the hearing.

"This is not some extreme outlier or fanciful scenario," Judge Young wrote. "No attorney worth her salt, recognizing that — were her client simply not to show up for the hearing — an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise."

Judge Young flagged his concern about that part of the final rule during the bench trial in November 2020. In his findings of fact and conclusions of law, the judge pointed out that the accused could speak freely to friends about the investigation to collect evidence — and even convince witnesses not to testify — and "then rest easy knowing that the school could not subpoena other witnesses to appear."

Under the final rule, there would be "no police reports, no medical history, no admissions by the respondent, no statements by anyone who witnessed the incident and either could not attend or was dissuaded from attending by the respondent," Judge Young wrote. "While the complainant must attend the hearing for his or her evidence to be admitted, he or she can be cross-examined and discredited by the absent respondent's attorney, with little to no hope of evidentiary rehabilitation."

Judge Young remanded that portion of the rule to the Education Department for reworking, but he upheld the rest of the final rule as written under the prior administration, finding that deference has to be granted to the agency in charge.

"Most of the advocates' arguments boil down to policy debates regarding the best way to protect

victims, the balance between vindicating victim rights and protecting respondent rights, and what the scope of Title IX ought [to] be," Judge Young wrote. "Regardless of the vigor with which they are argued, substantive policy arguments are insufficient to overcome the presumption of validity."

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.

The Biden administration has signaled its intent to overhaul the Title IX sexual assault rules, and in April, the DOE announced that its Office for Civil Rights would conduct a comprehensive review of the agency's regulations implementing Title IX. Education Secretary Miguel Cardona called the action "the first step in making sure that the Title IX regulations are effective and are fostering safe learning environments for our students while implementing fair processes."

Several victims' rights groups, represented by the National Women's Law Center, filed suit in June 2020 while the Trump administration was still in charge, attempting to halt the rules before they went into effect last August. It was one of a number of legal challenges around the country.

After the suit was filed, Judge Young collapsed a motion for summary judgment into a trial on the merits last September.

During the trial, Morrison & Foerster LLP's David Newman, who has since left the firm for a leadership post at the U.S. Department of Justice, argued for the plaintiffs and said it is unfair that students who leave a school due to assault or harassment are unable to have their claims heard.

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 included victims who had graduated and might have had 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.

But a DOJ attorney argued that 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.

"We are reviewing the decision, but the Department has already taken several steps to examine the prior administration's Title IX regulations, responding to an Executive Order from President Biden," a DOE spokesperson told Law360 on Thursday. "Some of those steps include holding a virtual public hearing in June and issuing a Q&A to provide clarity about the obligations under the 2020 regulations."

NWLC's President & CEO Fatima Goss Graves called Judge Young's decision a "partial victory."

"This decision brings us a step closer to justice for the students and advocates who have repeatedly named the harm done by Betsy DeVos," Graves said in a statement. "This rule was designed to discriminate against student survivors, plain and simple. We are proud to have fought back against DeVos and the Trump administration, side by side with brave students and allies."

Graves added that NWLC is "encouraged that President Biden has promised to eliminate this rule, and we hope today's partial victory will help spur forward efforts to ensure that survivors and all students can learn with safety and dignity."

"From the beginning, our goal has been to show that the DeVos Department of Education's rulemaking harms our clients and puts at risk students across the country, particularly students of color, LGBTQ students and students with disabilities," said Natalie Fleming Nolen, partner at Morrison & Foerster. "We are proud to work with the National Women's Law Center, and the ruling is a step in the right direction that the provision that would have resulted in sweeping exclusions of highly relevant evidence in Title IX hearings cannot and will not be enforced. We are optimistic that the Department of Education will revise the rule to afford survivors greater procedural protections under Title IX."

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

The Department of Education is represented by Jennifer L. Mascott, Rebecca M. Kopplin and Steven A. Myers 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 Steven Edelstone.