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## Civil libertarians criticize Education Department for making false accusations, campus censorship easier

The U.S. Department of Education is pressing schools to reduce their due process protections for people accused of sexual harassment or misconduct, and to eliminate people's opportunity to cross-examine their accusers, under the premise that schools have been too slow to credit accusations. This will make an already bad situation on campus even worse. As Harvey Silverglate, the former head of the Massachusetts ACLU, points out at *Minding The Campus*, many schools already find students and teachers guilty even when they are clearly innocent.

As attorney Silverglate notes, many universities, such as Stanford, the University of Virginia, Brandeis and Washington University, have reduced safeguards against false accusations under pressure from the Education Department's Office for Civil Rights. But "even before the lowering of the evidentiary burden, a number of students around the country were found guilty in campus tribunals on sexual assault charges, only to be later vindicated. At George Washington University, a student found guilty of sexual assault—despite the eyewitness testimony of his three roommates that the encounter was consensual—is now suing the school for \$6 million in damages. The University of North Dakota found a student guilty of sexual assault, but refused to reopen the case even *after* state authorities charged his accuser with filing a false police report. And at Brown University, a student withdrew in 2006 after being accused of rape and now is suing the university, his accuser and her father, a wealthy donor who allegedly influenced Brown officials throughout the process."

As lawyer and former ACLU Board member Wendy Kaminer observes, "Campus investigations and hearings involving harassment or rape charges are notoriously devoid of concern for the rights of students accused; 'kangaroo courts' are common," yet, according to the Education Department's Office for Civil Rights, "students accused of harassment should not be allowed to confront (or directly question) their accusers." The Department of Education's assault on cross-examination is unjustified, since cross-examination has justly been called "the most powerful engine for the discovery of truth ever devised by man." In sexual harassment cases brought in court, the defendant invariably has the opportunity to cross-examine the accuser, because courts recognize that cross-examination is useful in exposing false allegations.

I earlier explained at length how the Education Department's claim that Title IX prevents schools

from adopting a strong presumption of innocence or providing more than minimal due process protections is legally unjustified and not supported by court rulings in Title IX cases.

As Cato Institute lawyer Ilya Shapiro notes, the lack of due process protections will result in free speech violations. There is a fine line between protected speech about sexual topics and unprotected sexual harassment, and it is crucial that accused people be able to prove that their speech did not amount to sexual harassment. Even sexually vulgar speech on political issues is protected on college campuses, as the Supreme Court's Papish decision illustrates. And perfectly civil, non-vulgar students have been subjected to disciplinary proceedings for sexual and racial harassment, in violation of the First Amendment, merely for expressing commonplace opinions about sexual and racial issues, like criticizing feminism or affirmative action, or discussing the racial implications of the death penalty. (See the examples cited in the *Amicus* brief of Students for Individual Liberty in *Davis v. Monroe County Board of Education*, available at 1998 WL 847365.)

To fully defend themselves against sexual harassment charges over speech on sexual topics that doesn't really amount to sexual harassment, people who are wrongly accused of sexual harassment will sometimes need to cross-examine their accuser to show that their speech did not really have any sexually harassing effect, and thus did not legally amount to sexual harassment, despite their accuser's attempt to make a mountain out of a molehill.

(To legally qualify as harassment under Title IX, speech must be severe and pervasive enough to create a hostile learning environment for the listener, and interfere with the listener's education, both in subjective and objective terms. Transitory offense is not enough. If the accuser admits on questioning that she did not really view the offensive speech as being a "big deal," or was not shocked or surprised by it, that probably rules out the existence of a subjectively hostile environment. But a wrongly-accused person can't establish that without questioning the accuser, and may not be able to show that the accuser wasn't greatly impacted by the speech without cross-examining the accuser about its alleged effect on her and her studies, such as whether she continued to enjoy her college experience after overhearing the allegedly "harassing" remarks).

There is no uniform rule that people are constitutionally entitled to cross-examine their accusers in campus disciplinary proceedings in general (unlike in criminal prosecutions), but there are certain types of disciplinary proceedings where cross-examination can end up being constitutionally required. In cases like *Donohue v. Baker* (1997), judges have ruled that cross-examination *was* constitutionally required on due-process grounds when it was essential to test the credibility of the accuser.

Sexual harassment cases commonly turn not only on such credibility disputes, but also on the complainant's alleged subjective emotional state, which makes cross-examination far more essential than in the ordinary campus discipline case. (By contrast, other kinds of disciplinary cases often turn solely on objective events that can be verified without any cross-examination of the accusing witness.) So the Education Department's attack on cross-examination in sexual harassment cases may well result in many violations of the Constitution's Due Process Clause, in addition to exceeding its legal authority under Title IX.

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