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TOP STORY

Legal experts say Biden's pushing ahead to the Obama past on campus rape could be a mistake

Richard Bernstein / RealClearWire

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President-elect Joe Biden, accompanied by Vice President-elect Kamala Harris, speaks at The Queen theater, Thursday, Nov. 19, 2020, in Wilmington, Del.

Andrew Harnik / AP

Earlier this year, President Donald Trump's often embattled Education Secretary, Betsy DeVos, established new rules on handling sexual assaults on campus to strengthen protections for accused students, almost all of them men.

Joe Biden, who was the Obama administration's point man for the policies DeVos upended, has made his displeasure clear.

"The Trump Administration's Education Department ... is trying to shame and silence survivors," the Biden campaign platform declared. "Instead of protecting women," it has "given colleges a green light to ignore sexual violence and strip survivors of their civil rights."

Editor's Note

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To "stand with survivors," Biden has promised not only to restore a set of Obama-era "guidelines" to combat so-called campus "rape culture" – with compliance a condition of federal dollars – but to add to them. As president, his campaign literature states, he would push for legislation creating, among other things, "online, anonymous sexual assault and harassment reporting systems."

But as he works to restore and expand a "believe women" approach to sexual assault that DeVos and others criticized as a presumption of male guilt, Biden will face much more serious headwinds than the Obama guidelines did when first introduced in 2011.

In developments barely reported in the mainstream media, hundreds of colleges and universities across the country have run into a legal thicket as they've implemented the original guidelines. There has been a flood of lawsuits, more than 600 of them, brought by accused men in both state and federal courts claiming that colleges used biased, one-sided and unfair proceedings when they found them guilty of sexual misconduct and punished them, mainly by suspensions and expulsions from their schools.

Notable is that around half of the lawsuits heard by the courts to date have met with rulings in favor of the accused men – in effect a validation of the Trump-DeVos effort to protect the due-process rights of accused men and a rebuke to the Obama-Biden approach.

Then there is the matter of the Supreme Court, reconstituted with a conservative majority by President Trump's three justice appointments – including Amy Coney Barrett. Before her elevation a few months ago, she was central in what some lawyers view as a landmark case, *Doe v. Purdue*, when a federal appeals court found that Purdue University may have discriminated against a male student on the basis of sex, believing his female accuser's version of events while barring the young man from presenting evidence on his own behalf.

"It is plausible," the court said in its unanimous decision written by Barrett, that Purdue "chose to believe Jane because she is a woman and to disbelieve John because he is a man."

"A real battle is shaping up," Andrew Miltenberg, the lawyer who brought the case against Purdue, said in a Zoom interview. "On the one hand, you have Biden, the moving force behind the 2011 Obama policies who will attempt to roll back some of the regulations put into place under Trump, so we're going to be revisiting due process and related matters, like investigations, hearings, and appeals."

"At the same time," Miltenberg, widely viewed as a pioneer in this emerging field of law, continued, "you have a clear majority on the Supreme Court who will be sympathetic to the plight of young men accused of sex assault and who haven't had an equitable opportunity to be heard. And you have Supreme Court Justice Barrett, who's written the most significant decision on the matter to date. It's setting up an interesting and potentially volatile dynamic."

Lawyers expect that as Biden strives to return to the Obama-era policies, confusion will abound as high schools, colleges, and universities try to figure out what set of policies they should follow because it would probably take years to rescind and replace the Trump/DeVos rules.

But it seems almost inevitable that the Biden administration will return to beliefs about sexual assault long advanced by feminists and the campus left. The very Biden vocabulary – the use of the term "survivor" rather than the more neutral "alleged victim" or simply "plaintiff" – is telling. It illustrates an

inclination to assume, as Barrett found the Purdue administrators to have done, that sexual assault accusations should take priority over any contrary arguments or even evidence presented by the accused student.

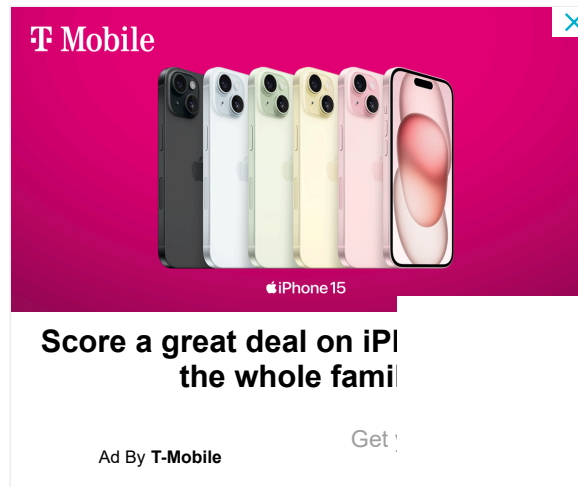
Biden's past statements indicate an acceptance of the "rape culture" ideology, the belief that, as one feminist website puts it, "sexual violence against women is normalized and excused in the media and popular culture," and that the deeply embedded misogyny of patriarchal culture requires extraordinary measures to combat – a vision of society rejected by its critics as wild exaggeration.

"We need a fundamental change in our culture, and the quickest place to change culture is to change it on the campuses of America," Biden said in a 2015 speech at Syracuse University.

Biden was especially blunt in a 2017 speech at George Mason University when he said, "Guys, a woman who is dead drunk cannot consent – you are raping her," a statement suggesting but then dismissing the ambiguities that often cloud sexual assault claims, including the common presence of alcohol, and differing and changing recollections.

Biden ardently supported the Obama administration's 2011 "Dear Colleague" letter introducing the guidelines to college administrators, even though from the outset there were strong objections to some of its provisions. Among them, the letter encouraged schools to use a "preponderance of the evidence" standard of proof in deciding sex assault cases, rather than the more stringent "clear and convincing evidence" standard, which had been commonly in use in these cases before. A "preponderance of the evidence" is the lowest standard used in legal proceedings, requiring only that an accusation be seen as more than 50% likely to be true.

The Obama guidelines also permitted a “single adjudicator model,” whereby the person responsible for handling the case does both the investigation into the facts and makes the judgment of the accused person. This person is more often than not the Title IX coordinator on campus, Title IX being the 1972 law that banned sex discrimination in education, generally seen as an effort to advance women's rights.



The guidelines also left it up to schools whether to hold live hearings, at which accused students could present exculpatory evidence, call witnesses, or cross-examine the students accusing them. Some court decisions that have gone against colleges have found that some sort of live hearing and some sort of questioning of accusers is necessary for a fair outcome.

“We did see some bad cases in the Obama era, cases where it basically didn't matter what evidence there was,” Jackie Gharapour Wernz, a lawyer who worked in the Education Department's Office of Civil Rights in both the Obama and Trump administrations, said in a Zoom interview. “The college was going to find against the defendant, the male defendant, no matter what. I think the schools felt pressure under the Obama guidance.”

Conservatives aren't the only ones who have raised questions about the guidelines. The liberal Supreme Court Justice Ruth Bader Ginsburg, whom Coney Barrett replaced upon her death this year, expressed misgivings about them in a 2018 interview, just when DeVos was announcing the new rules: “There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system.”

Similarly, 28 Harvard Law School professors signed a letter in 2014 protesting the measures Harvard had adopted in response to the guidelines which, they said, “lack the most basic elements of fairness and due process” and “are overwhelmingly stacked against the accused.”

The law professors complained that Harvard “decided simply to defer to the demands of certain federal administration officials rather than exercise independent judgment.”

A survey conducted by YouGov in mid-November showed 68% of the 2,532 Americans polled agreeing that “students accused of crimes on college campuses should receive the same civil liberties protections from their colleges that they receive in the court system.” Only 8% disagreed.

The DeVos rules, formally adopted in May after a two-year process of “notice and comment,” addressed the main complaints expressed about the Obama-era guidelines. Among other things, the DeVos rules require live hearings and the right of the accused, or usually his lawyer or adviser, to cross-examine the accuser; give schools the option to use “clear and convincing evidence” as their standard of proof; and narrow the concept of harassment.

Of course, no reasonable person condones sexual assault, or opposes punishing those genuinely guilty of it, but experts say it is often difficult to determine whether the activity was coercive or consensual.

“Probably 40 or 50% of allegations of sexual assault are baseless,” Brett A. Sokolow, the head of TNG, a risk management and consulting law firm who has served as an expert witness in many cases, said in a phone interview. “There are a lot of cases where someone says they were incapacitated, but the evidence doesn't support that they weren't able to make a decision.

“There's also the education that schools provide,” Sokolow continued, “telling students that if you were drunk and somebody had sex with you, come to us.”

Sokolow estimates that over the years across the country some 20,000 or more students have been disciplined at their universities for sexual misconduct.

According to a database posted on the "Title IX for All" website, some 676 lawsuits have been brought against universities by men claiming discrimination or due process violations against them, and 194 of those decided by the courts have met with a favorable outcome for the student plaintiffs.

Many cases that have gone against the universities have been settled out of court, 98 of them, according to KC Johnson, a history professor at Brooklyn College and the CUNY Graduate Center in New York, who keeps track of the cases filed. This usually occurs after the school has lost its preliminary effort to have charges against it dismissed. But there have been two cases that have actually gone to trial, one involving a student suspended for alleged sexual misbehavior at Brown University, another at Boston College, one before a judge, the other a jury, and the students prevailed in both of them.

Johnson argues that courts are generally deferential to universities and reluctant to interfere in academic questions, which makes the substantial number of decisions in favor of the accused itself "quite remarkable."

What's also remarkable, as Johnson put it in a phone interview, is that "Biden has never acknowledged even a single one of these cases."

Whether he recognizes them or not, any effort by Biden to formally rescind and replace the DeVos rules will take time, given that the DeVos rules were adopted after a lengthy, formal administrative process. By contrast, the Obama guidelines were a set of informal recommendations, taken seriously by schools because of the threat of financial penalties, but never having the status of formally adopted regulations.

A more difficult problem could well be that many of the court decisions issued so far presage difficulties for schools that adopt the very policies that a Biden administration is likely to favor.

Doe v. Purdue, for example, showed that schools could be found to be discriminating against accused men if they adopt a “start by believing” approach. As Barrett put it in her decision in which the parties were anonymized: “The majority of the [disciplinary] panel members appeared to credit Jane based on her accusation alone, given that they took no other evidence into account. They made up their minds without reading the investigative report and before even talking to John.”

The court in Doe v. Purdue didn't address the question of cross-examination, required by the DeVos rules but likely to be made optional in a Biden program. But in several cases already decided, courts have affirmed that cross-examination, or, at least, some direct questioning of an accuser by the accused or his representative is fundamental to a fair procedure.

In a 2018 case, Doe v. Baum, for example, the University of Michigan expelled a male student after he was accused by a female student of having sex with her when she was too drunk to give consent.

The university expelled John after a three-person panel found that Jane's account was “more credible” than his. John, who said the sex was consensual, sued, and a federal appeals court ruled in his favor, on the grounds that he had “never received an opportunity to cross-examine [Jane] or her witnesses.”

“When the university's determination turns on the credibility of the accuser, the accused or witnesses, that hearing must include an opportunity for cross examination,” the court found.

In another recent case, Doe v. Rensselaer Polytechnic Institute, a male student accused of sexual assault (the female complainant saying that she had been too intoxicated to give her consent) argued that the school's use of the Obama guidelines rather than the stricter DeVos rules amounted to sex discrimination against him, and the court agreed. In other words, the court seemed to be saying that the DeVos rules could be applied retroactively to ongoing cases, even if they had been initially filed before the DeVos rules came into effect.

“There is no question that the decision increases the risk of legal challenges by respondents against their schools for using old procedures in ongoing or new cases,” Wernz wrote in a blog post.

The difference in these cases led one expert, Peter Lake, a professor of law at Stetson University and director of the Center for Excellence in Higher Education Law and Policy to say, “Due process in higher education is becoming a ball of confusion – a mix of conflicting cases and regulations in flux.”

That is why some experts believe the matter is likely to end up at the U.S. Supreme Court. “Accused students have had appellate decisions in their favor in much of the country, but no general standard has been established, and there have been contrary decisions as well,” KC Johnson said.

"So my sense is that the Biden administration will construct a narrative around the decisions that have gone in favor of sexual misconduct accusers. It will be eager to confront the courts on this."

If the issue does go to the Supreme Court, the case will be heard by two among the nine justices, Clarence Thomas and Brett Kavanaugh, whose confirmation hearings were dominated by accusations of sexual misconduct against them, which both angrily denied. The newest justice, Barrett, has already given a strong indication in her *Doe v. Purdue* opinion of how she might rule.

And then there's the irony that Biden himself, though a "believe women" champion, has himself been accused of assault. Tara Reade, a former staffer, claims that some 30 years ago, when Biden was a senator, he pushed her against a wall in the Senate Office Building and digitally penetrated her, an incident that she recounted to friends at the time.

Biden has adamantly denied the accusation, saying that the alleged incident "never, never happened."

Some experts certainly believe that if Biden were to undergo the sort of campus procedure that he advocated during the campaign, with a presumption in favor of the accuser, no live hearing, and no opportunity to present witnesses or to cross-examine Reade, he would most likely be found guilty.