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New cross-examination rule in campus sexual assault cases reflects past court rulings against University of Michigan

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Attorney Deborah Gordon in her Bloomfield Hills office on Feb. 18, 2019. Gordon has defended University of Michigan students in sexual assault cases, arguing that the university's policies were unconstitutional. One of those cases, *Doe vs. Baum*, was heavily cited in new Title IX rules released Wednesday, May 6.

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ANN ARBOR, MI – When colleges across the country begin holding live hearings with cross-examination in campus sexual assault cases as a result of new federal Title IX rules delivered Wednesday, they'll closely reflect court rulings that have gone against the University of Michigan in recent years.

Under the new policy announced by U.S. Education Secretary Betsy DeVos on May 6, cross-examination is allowed under a live hearing model, which is in step with a [2018 ruling from the U.S. Sixth Circuit Court of Appeals](#) that UM could not punish a student for sexual misconduct without providing an opportunity to directly question the accuser.

[The new rules that go into effect on Aug. 14](#) have been lauded by due process advocates and criticized by victim advocates, require cross-examination, but vary slightly from the Sixth Circuit ruling.

[The ruling against UM in that case, Doe v. Baum](#), required that a public university hold a live hearing with cross-examination in sexual assault cases where credibility is at issue, either by the accused student or their lawyer or advocate.

Citing Doe v. Baum, the new Title IX regulations require that cross-examination be conducted not by the accused student but only by their lawyer or advocate, said KC Johnson, a professor at Brooklyn College and co-author of "The Campus Rape Frenzy: The Attack on Due Process at America's Universities.

"The (Department of Education) argument is that the students cross-examining each other would be traumatic for a truthful complainant," said Johnson, who tracks federal campus due process lawsuits across the country. "... So, this difference from Baum is a complainant-friendly one that doesn't weaken the rights of the accused."

Following the ruling from the Sixth Circuit, [UM sought a rehearing](#) to clarify that no student has a constitutional right to a direct cross-examination, but its petition was denied.

The university eventually implemented [a new interim sexual misconduct policy](#) in January 2019 to adhere to the court ruling, but questioning by students' personal advisers or attorneys was not allowed out of concern that not all students would be able to afford counsel. UM President Mark Schlissel later advocated for cross-examination in sexual assault hearings, [but in a less intrusive setting](#).

“After that opinion came down, (UM) intentionally created a rule that students had to cross examine one another directly,” said attorney Deborah Gordon, who represented the anonymous UM student in the case.

“I think they were upset with the opinion against them in Doe vs. Baum and I think they wanted to make it difficult by saying, ‘See, we were right, we shouldn’t have these hearings.’ Now they’re going to have to back off of that.”

The interim policy was criticized by victim advocates on campus, as well as the American Civil Liberties Union, which urged the university to withdraw the “problematic” policy and argued that it risked deterring complaints, traumatizing those who make complaints and creating a hostile campus environment.

The interim policy, along with UM’s former policy on Student Sexual and Gender-Based Misconduct, were found to be unconstitutional in a separate court ruling for allowing an accused student to be suspended before a hearing could be held.

In that case, Doe vs. UM, U.S. District Judge Arthur Tarnow found that the policy allows UM to impose “serious interim sanctions” without a hearing.

UM student Emma Sandberg, who previously spoke out against the interim policy, said the new rules from DeVos weaken Title IX, but would still be a step in the right direction regarding cross-examination, given the university’s interim model.

“At UM, given how terrible our current cross-examination model is, these regulations will actually help make the hearing less-traumatic for victims at UM, since personal advisers will be required to ask the questions rather than the students themselves, which is in line with what we have been advocating for,” Sandberg said.

UM Spokesman Rick Fitzgerald said it will “take some time to more fully understand these regulations and how they may impact our policies.”

Fitzgerald said “many” of the highlighted portions of the policy “are already in place in our student policy,” but did not address when the university plans to enact a finalized sexual misconduct policy [after releasing a draft in October 2019.](#)

Overall, Gordon believes the new Title IX rules are “very workable,” by allowing those who are well-versed in the legal process to conduct questioning during sexual assault hearings.

“I don’t think re-traumatizing a victim trumps a student’s right to not be expelled without due process of law,” Gordon said. “If we’re going to have a country of laws, you can’t take that into account when you are depriving somebody of a constitutional right.”

[Some members of Congress](#) including U.S. Rep. Elissa Slotkin, D-Holly, have said the new Title IX rules would allow – and in many cases require – schools to have inequitable grievance procedures for sexual misconduct, make it harder for students who have experienced sexual violence to come forward and get the help they need and make it easier for perpetrators to get away with assault.

DeVos' changes narrow the definition of sexual harassment and require colleges to investigate claims only if they're reported to certain officials. Schools can be held accountable for mishandling complaints only if they acted with “deliberate indifference.”

Outside of cross-examination, Sandberg said the new regulations are “very concerning” for UM students, arguing that it is DeVos’ job to ensure that schools are a safe place and conducive to learning.

“As Secretary of Education, she has prioritized weakening Title IX, and her new Title IX rule strips survivors of their rights and protects universities and perpetrators instead,” Sandberg said.

“Overall, the new Title IX regulations are devastating for students and survivors across the country, and I hope that the next administration will overturn them.”

Gordon said she is confident the new Title IX rules will hold campus disciplinary panels more accountable for protecting the rights of all students.

"I'm quite sure there are going to be far fewer lawsuits brought against the University of Michigan because they are using this procedure," Gordon said. "People have a feeling there is more fairness involved."