

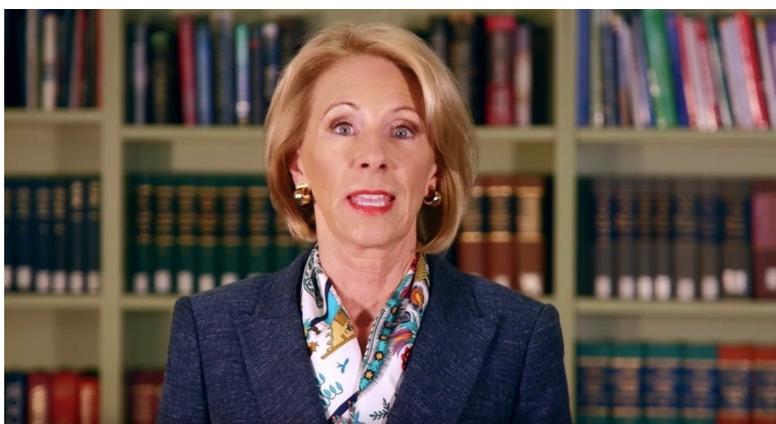


# AmericanRhetoric.com

**Betsy DeVos**

*Remarks on Title IX Regulatory Changes*

First broadcast on 6 May 2020



[AUTHENTICITY CERTIFIED: Text version below transcribed directly from audio]

Americans, and people all over the world, are grappling with changing and challenging circumstances. But our work continues. So, I want to speak with you directly about a serious issue.

Two years ago, I made a promise<sup>1</sup> to address the scourge of sexual misconduct on our nation's campuses. Today, we take historic action on Title IX because we must -- because students, their safety, and their success are at the center of everything we do. From *Brown versus the Board of Education*, to the Individuals with Disabilities Education Act, to the Every Student Succeeds Act, America has continued to expand and protect opportunities for students to learn.

That's also true for Title IX.



# AmericanRhetoric.com

It was enacted to ensure, (and I quote):

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>2</sup>*

Title IX is a just cause, and it's the law.

Title IX has brought an end to many injustices since it was enacted, and the new Rule we announce today will help end more. I take the responsibility of enforcing Title IX seriously. Our Office for Civil Rights takes that responsibility seriously.

There is no place for sexual misconduct anywhere. Such acts are disgusting and unacceptable, especially when they're perpetrated in schools. In elementary and middle schools, high schools and colleges, vocational and graduate programs, no student's learning journey should include surviving sexual misconduct. No student should be made to feel alone or abandoned by their school. No incident should ever be swept under the rug.

And no student or teacher accused should be punished before evidence proves responsibility.

Students who are subjected to sexual misconduct deserve deliberate and decisive action that carries the force of law. I promised that the Department would take historic steps to craft a Rule to do just that. Today, we release that Rule. It takes bold steps to protect all students and their rights, especially their right to learn.

Our work began well before we drafted a proposed rule by meeting with survivors, wrongly accused, administrators, and those who walk side-by-side with students every day. They were tough conversations, but ones we needed to have.



# AmericanRhetoric.com

Soon after we made a draft for public comment available, we were pleased to see an unprecedented level of engagement. Indeed, that's what we wanted. We even extended the public comment period in order to hear from everyone who had something to contribute. We carefully read and responded to comments from the American people -- more than 124,000. This is how our government should work -- informed by the people, representative of the people, and for the benefit of the people.<sup>3</sup>

Today, we announce a final Rule that recognizes we can continue to combat sexual misconduct without abandoning our core values of fairness, presumption of innocence, and due process.

Our Rule empowers survivors like never before. The pain suffered by each survivor due to sexual misconduct can be lasting and profound. These gross acts are often about control and power. Those who have no control over themselves attempt to exert it over others.

Our Rule puts survivors back in charge of their education and their lives. With our Rule, if a student is harmed, he or she has control over what happens next.

Under our Rule, schools must offer survivors help they can't get anywhere else. Although survivors may wish to file a police report or sue in court, Title IX protects their education, separate and apart from what the police or the courts may do.

Under our Rule, schools must offer free, personalized services that help survivors keep their education on track.

Under our Rule, survivors are empowered to make themselves heard and to then determine the kind of school-level response that will best support their needs. This approach protects them from suffering trauma all over again.

No matter which path a survivor chooses, they always have the right to supportive measures that help them heal and continue their education.



# AmericanRhetoric.com

These measures include academic course adjustments, counseling, no-contact orders, dorm re-assignments, leaves of absence, and class schedule changes. These are things schools can do almost immediately to make an important difference for survivors.

If a survivor does choose to move forward with a formal complaint, our Rule provides a clear process to do so. For the first time ever, Title IX codifies into law sexual harassment as the discrimination it is. Before now, administrations only addressed it through "Dear Colleague" letters, which are not legally binding and do not have the force of law.

We owe students more than letters.

We owe students more than good intentions.

We owe them accountability through the law.

We owe them rules that they can count on, so they know their schools must take sexual misconduct seriously and treat everyone fairly.<sup>4</sup>

We wrote our Rule to offer actual protections. And we respect the actual text of laws like the Clery Act, the Violence Against Women Act, and Supreme Court case law. And for the first time ever, our Rule protects survivors of dating and domestic violence, as well as stalking. The previous Administration only addressed these terrifying behaviors in a footnote.<sup>5</sup>

Further, our Rule makes clear that schools must respond to incidents occurring where the school has control. Acts of sexual misconduct do not always occur in a dorm room, a locker room, a classroom, or a study hall. That's why we'll hold schools accountable for acts that happen in off-campus settings, like school-recognized fraternity or sorority houses, on field trips, athletic events, during academic conferences, on travel, or on a school's computer network.



# AmericanRhetoric.com

Importantly, we added protections for K-12 students. We know that the number of sexual misconduct complaints in elementary and secondary public schools is tragically 15 times greater than it was a decade ago. Look no further than the disturbing and heartbreaking failures in Chicago Public Schools. Too many innocent young students suffered because adults didn't do their jobs. We took decisive action in Chicago, and we've since expanded efforts nationwide to ensure the widespread, shocking failure to protect vulnerable students doesn't occur there or anywhere again.

Schools must promptly and thoroughly address incidents of sexual misconduct, including those that involve student-on-student misconduct and teacher-on-student abuse. No child should ever be preyed upon at school by those in authority, by those entrusted with responsibility for their care, or by fellow students. Adults at school must protect children and they must foster safe learning environments. We are committed to ensuring that.

Our Title IX Rule covers new circumstances in which schools must respond to incidents of which they have "actual knowledge." For K-12 schools, that includes reporting sexual misconduct by any person to any school employee. More broadly, our Rule requires all schools to investigate every formal complaint and apply basic due process protections. Schools must follow fundamental principles like fairness, equal treatment, and the presumption of innocence.

These are common sense measures that should be paramount in any effort to enforce Title IX. The truth is, however, the Title IX letter from the prior Administration failed too many students. Survivors, those denied due process rights, and campus administrators all told me that the results of the letter did a disservice to everyone involved.

Folks on the Right, on the Left, and those in between knew it wasn't working. There's the former President [John Gaskin] of the St. Louis County NAACP. He noticed that the unfair processes at many colleges "disproportionately impacts African American men." He called for "immediate [due process] reforms."<sup>6</sup>



# AmericanRhetoric.com

The ACLU insisted that:

*While conventional wisdom often pits equal rights and due process against each other, there are important ways in which these interests are shared. Both principles seek to ensure that no student -- complainant or respondent -- is unjustifiably deprived of access to an education.<sup>7</sup>*

Supreme Court Justice Ruth Bader Ginsburg observed that some schools have not given the accused person a fair opportunity to be heard. She said (and I quote): "The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that...[it's] one of the basic tenets of our system...everyone deserves a fair hearing,"<sup>8</sup> she insisted.

Justice is not a political issue. It can only come from a process everyone can trust, a process widely believed to deliver fair and reliable results. The outcome of the failed approach created by the previous Administration's letter was a lack of faith in the system, a lack of confidence in the outcomes. And that's not fair to anyone, most of all survivors. Too often, these young women and men suffered unthinkable acts, mustered the courage to report them, endured a grievance process, and thought they had achieved justice -- only to have it overturned in courts of law.

Those who insist that the previous Administration's letter worked well can't ignore 171 lawsuits which found students' rights were not respected in campus proceedings. Many of those cases are disturbing.

One involves a ROTC student who was accused of groping his ex-girlfriend while she was sleeping. The school found him responsible and suspended him without hearing from the ex-girlfriend herself, without citing evidence, and without allowing him to present evidence of his own. So, the young man, training to serve his country, sued his way to the U.S. Seventh Circuit Court of Appeals. The Court's panel of judges (all women, by the way) ruled that the school's process, which determined guilt "based on the accusation rather than the evidence," was "fundamentally unfair."<sup>9</sup>



# AmericanRhetoric.com

Another case involves a familiar scenario. One person's story contradicted the other person's story. The school's investigator interviewed many witnesses but could not determine credibility. Yet a school appeals panel found one student responsible. That student sued, and the U.S. Sixth Circuit Court of Appeals ruled that:

*if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.*

And then there's the young woman in Kentucky who sued because the school's process was broken. The survivor was forced to relive her trauma through not one, not two, but appallingly four separate school hearings and four separate appeals. Process error after process error clearly did not serve the survivor well. And her case is still making its way through the courts six years later.

Too often, students have been forced to sue to secure centuries-old rights to due process, which are enshrined in our Constitution. To be fair, schools were pulled in an errant direction by the previous Administration's letter. Our Rule puts an end to school processes that ignore survivors or ones that bypass fairness.

Now, there are some who suggest these acts are so personally devastating that they supersede any kind of right, procedural or otherwise; that any complaint must be believed without even considering the facts. But survivors need more than belief. They need justice. And justice without fairness is no justice at all.

So, the way to a better Title IX justice process is not to undermine rights, but to uphold them. The way to a better process is not to reform it, but to replace it. The way to put an end to the crisis of confidence on too many campuses is to rediscover the fundamentals of our Founding on which our Framers staked their futures for the sake of ours.<sup>10</sup>



# AmericanRhetoric.com

These are enduring, universal principles. They first found their voice in the Magna Carta in 1215, when a king, for the first time, acknowledged that his power was not absolute. Inspired by that truth, the Father of our Constitution, James Madison, said that "Government is instituted and ought to be exercised for the benefit of the people."<sup>11</sup>

Indeed, it ought to be.

But Madison knew that wouldn't always be the case, so he introduced several amendments to the Constitution -- the Bill of Rights, including one that, like the Magna Carta, redefined how people relate to their government. No person, Madison insisted, shall "be deprived of life, liberty, or property, without due process of law."<sup>12</sup> This well-established right is the people's safeguard, a bulwark against what John Adams called "the uncertain wishes, imaginations, and wanton tempers of men."<sup>13</sup>

Due process is for everyone because it is a principle that generations of people have abided by in order to uncover the truth.

Our Rule restores due process protections for students on both sides of a Title IX incident -- because due process is not just for the accused. California's Second District Court of Appeal ruled that "When the accused does not receive a fair hearing, neither does the accuser."<sup>14</sup>

Our Rule requires that a fair grievance process must include the right to written notice of allegations, the right to an advocate (who may be, but does not need to be, an attorney), and the right to submit, examine, and challenge evidence.

When a survivor and alleged perpetrator disagree about what happened, an unbiased decision-maker needs to reach a factually correct conclusion. The fair and effective way to do this is for each person to tell their side of the story, and answer probing questions. So, institutions of higher education must hold a live hearing where advisors conduct cross-examination.



# AmericanRhetoric.com

Now, this isn't without reasonable limits. Survivors are shielded from having to come face to face with the accused. The Rule forbids the parties from ever personally cross-examining each other. It also expands "rape shield" protections and excludes questioning that is irrelevant or privileged.

A fair finding must equally apply a standard of evidence so that schools do not apply one standard for faculty and another for students, whether it be the "preponderance of evidence" standard or the "clear and convincing" standard. And a fair finding must never assume one party is credible and the other not. The final finding must explain how and why the decision-maker reached conclusions; and it must offer both parties an opportunity to appeal.

Our Rule protects survivors against any kind of retaliation, whether they report sexual misconduct, file a formal complaint, participate in a grievance process, or choose not to.

Ultimately, our action today brings us closer to fulfilling Title IX's promise: equal access to education for all students. And as I said, while issuing this Rule fulfills a promise I made, the truth is our work is never done. We must each consciously choose to be responsible every day. No law will make man moral. No one can regulate good behavior into being. President Calvin Coolidge rightly said that we can't substitute the authority of law for the authority of virtue.<sup>15</sup>

So let's do better. Let's begin with ourselves, with introspection. Let's approach each other with respect; conduct ourselves with grace. Our Rule to combat sexual misconduct will be most effective if we abide by another rule: if we treat each other as we would like to be treated ourselves. I hope that will underscore any effort to ensure all students are safe to learn and achieve.

Thank you for joining me in this important pursuit.



# AmericanRhetoric.com

<sup>1</sup> The exact reference is pending. At least one source attributes the "promise" to a 7 September 2017 speech (as prepared for delivery) by Secretary DeVos at George Mason University, though that address was delivered closer to three years ago

<sup>2</sup> Source: <https://www.justice.gov/crt/title-ix-education-amendments-1972#Sec.%201681.%20Sex>

<sup>3</sup> epistrophe with a passing stylistic allusion to Lincoln's Gettysburg Address

<sup>4</sup> anaphora with varying element patterns held together by a plural pronoun

<sup>5</sup> See footnote 46 of the 4 April 2011 "Dear Colleague" letter.pdf issued by the USDE Office of Civil Rights

<sup>6</sup> Source: <https://www.dailywire.com/news/st-louis-naacp-backs-state-bill-providing-due-ashe-schow>

<sup>7</sup> Source: <https://www.aclu.org/press-releases/aclu-files-public-comment-secretary-devos-proposed-rule-title-ix>

<sup>8</sup> Fuller quotation on "due process for the accused": "Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. Recognizing that these are complaints that should be heard. 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, as you know, everyone deserves a fair hearing." [Source: <https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millennials/553409/>]

<sup>9</sup> Relevant portion of the ruling: "John [Doe] received notice of Jane's allegations and denied them, but ***Purdue did not disclose its evidence to John. And withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair.*** To satisfy the Due Process Clause, "a hearing must be a real one, not a sham or pretense." Dietchweiler by Dietchweiler v. Lucas, 827 F.3d 622, 629 (7th Cir. 2016) (citation omitted). ***At John's meeting with the Advisory Committee, two of the three panel members candidly admitted that they had not read the investigative report, which suggests that they decided that John was guilty based on the accusation rather than the evidence.***...And in a case that boiled down to a "he said/she said," it is particularly concerning that Sermersheim and the committee concluded that Jane was the more credible witness -- in fact, that she was credible at all -- without ever speaking to her in person. Indeed, they did not even receive a statement written by Jane herself, much less a sworn statement.4 It is unclear, to say the least, how Sermersheim and the committee could have evaluated Jane's credibility." [emphasis added; source: <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D06-28/C:17-3565:J:Barrett:aut:T:fnOp:N:2362429:S:0> (pps. 17-18)]

<sup>10</sup> Single passage, double alliteration with yet another passing stylistic allusion, this time to President Carter's Malaise Address: "The way to put an end to the crisis of confidence on too many campuses is to rediscover the fundamentals of our Founding on which our Framers staked their futures for the sake of ours."

<sup>11</sup> "On June 8, 1789, Madison told Congress the Preamble needed a 'pre-Preamble.' 'First. That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people. That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and inalienable right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.'" [Source: <https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights>]

<sup>12</sup> Fifth Amendment to the U.S. Constitution and applied to all States by the 14th Amendment to the U.S. Constitution

<sup>13</sup> Wider quotation from Adams' Argument in Defense of the British Soldiers in the Boston Massacre Trials, December 4, 1770: "The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men." [Source: <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>]

<sup>14</sup> Opinion of The Court Of Appeal Of the State Of California Second Appellate District Division Six, John Doe, Plaintiff and Appellant, v. The Regents of the University of California et al.



# AmericanRhetoric.com

<sup>15</sup> Reasonably consistent in meaning with the spirit of this statement by Coolidge: "***There is no way by which we can substitute the authority of law for the virtue of man.*** Of course we endeavor to restrain the vicious, and furnish a fair degree of security and protection by legislation and police control, but the real reform which society in these days is seeking will come as a result of our religious convictions, or they will not come at all. Peace, justice, humanity, charity -- these cannot be legislated into being. They are the result of divine grace." [emphasis added; source: <https://www.goodreads.com/quotes/64844-our-government-rests-upon-religion-it-is-from-that-source>]