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Victims Groups Latest To Sue DeVos Over Sex Assault Rules

By Brian Dowling

Law360 (June 11, 2020, 3:26 PM EDT) -- Victims' rights groups on Wednesday joined a host of states and other organizations that have sued the U.S. Department of Education and its secretary Betsy DeVos seeking to block new rules that limit schools' responsibilities to investigate sexual harassment claims under Title IX in certain cases.

The Victim Rights Law Center in Boston, Equal Rights Advocates in San Francisco, Legal Voice in Seattle and the Chicago Alliance Against Sexual Exploitation filed a complaint in Massachusetts federal court naming DeVos, the Education Department and its Assistant Secretary for Civil Rights Kenneth L. Marcus.

Like three other lawsuits previously filed against DeVos and the Education Department since mid-May, the new complaint asks the court to ax the regulations ahead of their planned implementation in August.

Changes in the Education Department's final rule include removing some conduct from Title IX protections, forcing schools to toss complaints that fall outside definitions contained in the new rules and requiring people filing complaints to submit to cross-examination.

Wednesday's complaint says the cross-examination rules do not "provide basic procedural protections to ensure that ... questions are clear, have a proper foundation, and are not harassing."

The groups said the final rule "will worsen the devastating effects of sex-based harassment in schools, and will further prevent and discourage victims from reporting sex-based harassment because, among other things, it narrows the definition of sexual harassment to which schools may respond."

The regulation, titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," also limits what qualifies as the type of sex discrimination that schools need to respond to, narrows what officials are responsible for responding, and "unfairly tilts the grievance processes against students who report sex-based harassment," the groups said.

The new rules would adopt a higher legal standard for the Education Department if it wanted to enforce a school's violation of Title IX, raising the bar for the department to have to show "deliberate indifference," according to the lawsuit.

One week after the Education Department released the new regulations, other advocacy groups backed by the ACLU's Women's Rights Project sued DeVos and Marcus in Maryland federal court.

That suit said the department based its rules on stereotypes and illusory concerns about rampant false accusations. According to the suit, the rules "echo the historical justifications and stereotypes that once animated the second-class legal treatment of women's and girls' accounts of sexual harassment or assault and enabled these accounts to be dismissed, belittled, and ignored."

More than 100 members of the U.S. House of Representatives, led by U.S. Rep. Jackie Speier of California, also wrote to DeVos and Marcus in late May saying the regulations "turn Title IX on its head" and urging the secretary to "reverse course and protect rather than undermine students' civil rights."

Attorneys general from 18 states and the District of Columbia filed their suit June 4, claiming the policies rushed out amid schools' response to COVID-19 "will cause confusion and mistrust and will lack the buy-in necessary for effective implementation."

Saying the new rules will "reverse decades of efforts" to combat sex-based harassment, the victims groups' lawsuit filed Wednesday offered an example of how the new rules would change schools' reactions to sexual harassment.

If a teacher saw a boy inappropriately touch a girl, the educator cannot take disciplinary action — like detention or taking recess inside the classroom — until after a 20-day investigation that involves questioning and responses from both students, the groups said.

"The boy will be presumed not responsible," the groups said. "And the girl, no matter her age, could be subject to live, direct cross-examination and will face procedural rules and standards that are more stringent, biased, and traumatizing than those her teacher would face if she were the one bringing a sex-based harassment complaint against another teacher."

Stacy Malone of the Victim Rights Law Center said that DeVos and the Education Department are "using a global pandemic to camouflage the release of the final Title IX regulations to ensure every step of the reporting and adjudication process presents barriers for victims of sexual assault. What we know for sure is that Secretary DeVos' new rules will lead to a decrease in campus sexual assault reports."

In a statement, Education Department press secretary Angela Morabito called the lawsuit a "last-ditch attempt to stall" the implementation of the new rules, which she said would "protect all students by requiring schools to follow a reliable, transparent and fair process in handling complaints of sexual misconduct."

The victim rights groups are represented by Julie O'Neill, Natalie A. Fleming Nolen, David A. Newman, Vanshika Vij, Caitlin A. Crujido and Robin A. Smith of Morrison & Foerster LLP; Emily Martin, Neena Chaudhry, Sunu Chandy, Shiwali G. Patel and Elizabeth Tang of the National Women's Law Center; and Diane L. Rosenfeld.

Counsel information for the Department of Education, DeVos and Marcus were not immediately available Thursday.

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 Alyssa Miller.

Update: This article has been updated with comments from the U.S. Department of Education.

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