SEXUAL VIOLENCE CASES

Campus policies need reform in California

By James E. Moore II

ALEX BRANDON— THE ASSOCIATED PRESS

Education Secretary Betsy DeVos speaks with the media after a series of listening sessions about campus sexual violence July 13, 2017, in Washington, D.C. Next to her is Michelle Johnston, president of the University of Rio Grande in Rio Grande, Ohio.

U.S. Education Secretary Betsy DeVos' announcement that the agency will act to replace the broad social intervention launched with its "Dear Colleague" letter of 2011 is a welcome correction. The letter is technically non-binding guidance to schools and universities, but is really an administrative shortcut that created rules without the period of notice and comment otherwise required.

Under Title IX of the Education Amendments of 1972, universities receiving federal support, or whose students receive federal aid, have a responsibility to protect students from sexual harassment, including sexual violence. Unfortunately, the 2011 guidance concerning investigation and adjudication of student sexual misconduct gutted procedural fairness for accused students nationwide. But universities quickly complied, rather than risk being cut off from federal funding.

The "Dear Colleague" letter addresses a substantive problem. Traditionally, universities have been quick to expel students convicted of serious crimes, but have been reluctant to expel students on the basis of internal findings, except for cheating.

Although this avoided civil liability, it also led to many episodes of unpunished student misconduct, including criminality. Worse, many universities were passively or even actively resistant to acting on student complaints of rape.

Unfortunately, the DOE's 2011 guidance created new problems that are just as vexing.

Adjudicating guilt always involves uncertainty. Courts ascribe guilt in criminal cases only if evidence of guilt is clear and convincing. As a result, criminal courts free many of the guilty and convict very few of the innocent.

The 2011 guidance required schools to reject the criminal standard and instead adjudicate accusations of student criminal sexual misconduct on the basis of the civil law's weaker, preponderance-of-the-evidence standard. Even under the best procedural circumstances, which are out of reach for universities, some of these adjudications are factually wrong. No one knows exactly how many, but it is a mathematical certainty that the number of innocent students found responsible for sexual misconduct is increased under the DOE's guidance. The agency took the morally objectionable position that universities must punish more of their criminal students by punishing more innocent students.

DeVos has said "enough."

Unfortunately, California institutions will not enjoy the full relief provided by DeVos' changes. California's 2014 "affirmative consent" law makes the DOE's preponderance-of-the-evidence standard for sexual misconduct cases a requirement for public institutions and for private institutions receiving state support, including state financial aid to students. That's everybody.

There is still a meaningful step California's institutions can take. Universities are quick to point out their conduct hearings are not law courts, but then predicate procedures on legal practices and precedents. These include the practice of treating separate accusations of sexual misconduct leveled against the same student as cumulative evidence of wrong doing, and a path to expulsion.

Sex crimes are special. Courts permit prosecutors to introduce evidence that defendants have committed previous sex crimes, even if there have been no previous convictions or even charges. Mere arrest qualifies as evidence.

However, students being investigated by their schools for sexual misconduct are not defendants in a criminal court, and there is no compelling reason for university to buy into this practice and acknowledge any previous acts for which students have not been found responsible.

There is ample reason not to. Students are my favorite people, but their obliviousness to risk and the intense bonds that develop between them can induce them to collude in a lie. Current university practices present a great danger that two false, carefully coordinated accusations of rape from two different women can be sufficient to ensure punishment of any student they target.

The DOE's interim revisions to the current guidance are forthcoming. This will not mean turning a blind eye to campus rape. It will be an opportunity to restore conventional standards of procedural fairness at universities.

Even if California's Legislature persists in the fallacy of trying to protect victims by punishing innocents, there are important steps California universities can and should take to improve the fairness of their Title IX procedures.

James E. Moore II is a professor in the Price School Public Policy and Management and the Viterbi School of Engineering at the University of Southern California.