

## Why the regional Title IX proposal needs tweaking, but shows promise

**Victims, accused students, and colleges and universities could benefit from greater consistency and transparency in Title IX compliance in cases of sexual assault.**

*By Hon. Jane Cutler Greenspan (Ret.)*



Right now, campuses across the country are responding in broadly disparate manners to student allegations of sexual assault. The lack of consistency from campus to campus, and even from case to case within campus systems, deters many victims and frustrates accused individuals. Victims, accused students, and colleges and universities could benefit from greater consistency and transparency in Title IX compliance in cases of sexual assault.

Title IX, which prohibits discriminatory practices, has been regulated by the Department of Education Office for Civil Rights (OCR). Most colleges and universities established misconduct codes to forbid “discrimination” which was considered to occur where a student was victimized by sexual assault or sexual harassment.

In those “codes,” procedures were established to investigate and adjudicate where a student was accused of sexually assaulting or harassing another student. Recently the OCR has been under pressure to revise its various regulations to accommodate criticism that the regulations do not provide sufficient due process for the accused in those misconduct codes.

### **Regional Title IX Centers**

In response, Secretary of Education Betsy DeVos has proposed a system of Regional Centers where “professionally-trained experts handle Title IX investigations and adjudications” that are referred to them by participating schools. This is a promising idea. The Regional Centers would act independently of campuses, and would therefore be more insulated from social and political pressures, and the resultant biases that can shape these processes.

However, there are some issues with the plan as it stands.

For example, in order to be eligible for referral, the incident has to “rise to a criminal level.” The problem with this standard is that not only does it create a redundancy with the criminal justice system, it creates potential *conflicts* with that system.

The criminal justice system in the Regional Center’s jurisdiction may reach a different conclusion than that Regional Center in a particular case, and that could undermine confidence in the Regional Center’s

procedures, especially in the scenario where the justice system applies a “beyond a reasonable doubt” standard and convicts, but the Regional Center applies a lower evidentiary standard and does not make a finding that the accused violated the applicable code of conduct. This would mar public faith in the Regional Center adjudication system.

The other issue is putting the responsibility to schools to decide – applying state law, presumably – when behavior “rises to a criminal level” such that it should be referred. Colleges are having enough trouble interpreting Title IX. They should not be tasked with interpreting state criminal law in order to interpret Title IX and ensure that they are complying with it, and Title IX compliance should not vary from state to state. Importing state criminal law needlessly complicates an already complex system.

### **The Challenge of Adjudicating Campus Sexual Assaults**

I have worked in the criminal justice system for decades, and as a frequent external adjudicator of sexual assault cases at several colleges and universities, I have been working on the problem of appropriate systems for dealing with campus sexual violence for many years now. Incorporating the structural vulnerability of potential inconsistent verdicts may end up being fatal to the Regional Center system. The older and more established system—the criminal justice system—will always get the benefit of the doubt, at the expense of the Regional Centers.

Further, although the idea is promising, implementation may not be perfect. The Regional Centers will likely fumble a bit in their early years. That is to be expected, even if everyone is doing their best and participating in good faith. Inconsistent verdicts will be especially difficult at that time, and may cause victims to skip the colleges and Regional Centers altogether, instead relying solely on the criminal justice system. If that happens, campuses will find it very difficult to establish that they are complying with Title IX.

It is not clear under the current Regional Center proposal whether investigations will be conducted by colleges and universities prior to referral. Referral must be by a standard more compliant with Title IX than “a crime occurred” and student complainants must have some recourse should campuses elect not to refer.

### **The Need for Independence**

It is vital that the investigatory process be independent, so that campus pressure to keep sexual assault statistics low will not affect the process. The EEOC model provides a useful comparison. When an allegation of workplace bias is made, the agency conducts an independent investigation, although there may be a parallel internal investigation in a company, perhaps conducted by Human Resources or an outside law firm hired for this purpose.

At the conclusion of the investigation, the EEOC presents its results. The EEOC offers, but does not mandate, mediation. Once the EEOC has made a determination, there are several ways in which the investigation may go, but the original complainant always retains the right to take the case forward, regardless of the EEOC’s determination.

That process should be replicated here. If campuses maintain the investigation stage, students should have the right to refer a case to the Regional Centers regardless of what the investigation concludes.

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Potential victims of rape need to reestablish control, at least as much as potential victims of workplace discrimination do. Although schools may wish to retain control of this stage of the process, the right thing to do is to center students.

None of this alleviates schools' responsibilities under Title IX to investigate sexual assault and determine the appropriate response, or the duty to keep campuses safe. Accordingly, Regional Centers, which are quasi-judicial, staffed by trained and knowledgeable professionals, can accomplish what schools are trying to do – investigate and adjudicate cases fairly, and help to ensure campus safety. External adjudicators with judicial experience have years of training to bring to bear on the important evidentiary and credibility determinations that are the foundation of fair adjudications.

Here's what that means: judges are experts in weighing what evidence is relevant, and what evidence is merely inflammatory. We know when evidence is more probative than prejudicial, and vice versa. We have decades of experience in evaluating conflicting testimony and making difficult credibility determinations.

Most campus sexual assault cases rely primarily on testimonial evidence rather than physical evidence. Credibility determinations are key. The decades of experience spent on the bench, evaluating testimony in numerous settings, and examining closely when someone is telling the truth about an extraordinary or atypical situation is of incredible value when deciding these difficult cases. A panel of student and faculty "honor code" adjudicators cannot, and should not, make these calls. Title IX demands, at a minimum, more seriousness, professionalism, and neutrality than that.

The idea of Regional Centers works because colleges and universities are not equipped to handle these types of disciplinary proceedings. These are not cases about cheating, or about the line between thorough sourcing with sloppy attribution and actionable plagiarism. They are very difficult cases, involving intense emotional vulnerability and difficult credibility determinations. They resemble criminal litigation in many ways, but often do not find their way into the criminal justice system.

This is true for many reasons, not the least of which is the difficulty presented by the "beyond a reasonable doubt" standard of proof, which is extremely high. Prosecutors are free to exercise what is known as prosecutorial discretion, allowing them to decline certain cases regardless of how weak or strong the evidence, and regardless of the relative severity of the underlying offense.

It is unfortunate that Candice Jackson, acting head of the U.S. Department of Education's civil rights office, told the [New York Times in July](#) that "90 percent" of campus sexual assault cases amounted to regrets about drunken sex, an assertion that is not based on any data. She subsequently apologized, but her comments, in an environment where the majority of survivors of sexual assault do not report, can only exacerbate that problem.

### **An Opportunity for Improvement**

The Regional Center model holds great promise in encouraging reporting. It will help to convince people accused of having committed an assault to participate in restorative justice programs, which often produce more satisfactory resolutions than traditional adjudications, from the victims' perspectives. It would be best if the Regional Centers hosted such programs and offered them to all students, even for victims of rape, who have been violated in the most intimate way and should be assured of the utmost fairness and

empowered to make critical choices about how they pursue justice. Staffed by professional specialists, with training and experience, the Regional Centers can take on the heavy responsibility of evaluating these cases in light of training in fact-finding and the law of relevance and prejudice.

Regional Centers may have the added benefit of reducing colleges' liability and insulating them from charges of gaming the statistics. This system can bring needed objectivity, independence, and transparency that is currently lacking, and that may be difficult for campuses to provide. Promotion of a version of the Regional Center plan with these improvements would represent true leadership from America's colleges and universities. The Regional Center system will allow schools to get back to doing what they do best: educating students.

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