

Title IX Investigations: Viewing Best Practices From Inside and Outside

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Title IX Investigations: Viewing Best Practices From The Outside

Due Process From the Outside

Quick Bio

- Education

- B.A. University of Pennsylvania
- J.D. Harvard University Law School

- Experience

- Choate, Hall & Stewart
- Prosecutor in Massachusetts and Ohio
- State of Ohio
- Private Practice

- Married to a Professor

Current Lawsuits – Engel & Martin

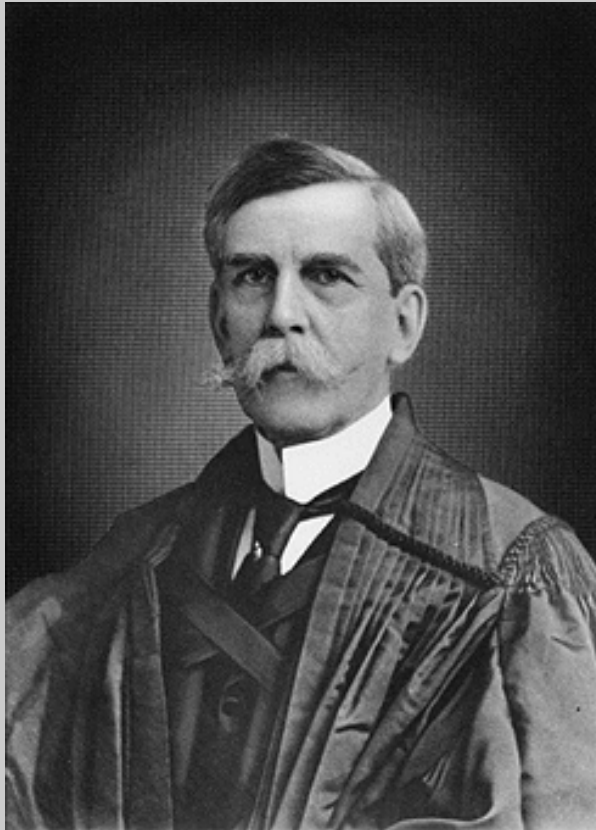
- Public Schools:
 - University of Houston
 - University of Cincinnati
 - The Ohio State University
 - Wright State University

- Private Schools:
 - William and Hobart
 - Wooster
 - Mount Saint Joseph

What To Take Back To Your Institutions

- The “Secret” to not getting sued
- Better Understanding of Student Due Process Rights
 - Saying, “This is not a criminal trial” is the beginning, not the end, of the discussion
 - Cutting edge issues:
 - Bias Against the Accused
 - Confrontation Rights
 - Disclosure of Helpful Information

The Key To Not Getting Sued



*Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted; **even a dog distinguishes between being stumbled over and being kicked***

Holmes, *The Common Law* (1909)

Respect Is Often Lacking

- Respect is distinct from “fairness” or “equality”
 - Common courtesy to students, parents, and advisors goes a long way
 - Presumption of innocence – treat accused students like they are wrongly accused
- “Lower the temperature.”
- Rules should not be used to make things more difficult
 - Rules are imperfect creations of human beings
 - Perception of unfairness drives reality
 - Students don’t know integrity of people like you do
 - Students are inclined to distrust the process

Cutting Edge Due Process Issues

1. Bias
2. Confrontation/Cross-Examination
3. Discovery

Due Process 101

Public Institutions

- Students have a liberty or property interest in continuing their education
- Constitution requires due process before student can be suspended or expelled

Private Institutions

- No constitutional protections
- Possible sources
 - Student handbook
 - Values of a liberal education



Supreme Court . . .

Problem: the Supreme Court has provided very little guidance on this issue

Goss v. Lopez

- Facts
 - High school students suspended for 10 days for destroying property
 - Generally, no hearings.
- Student must be given “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story”
- Limitation:
 - “We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days.”
 - “Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”

University of Missouri v. Horowitz

■ Facts:

- Medical Student
- Dismissed after poor performance in clinicals
- “A school is an academic institution, not a courtroom or administrative hearing room.”

■ Limitations:

- Notes “the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.”
- Goss requirements did not apply to academic violations (such as charges of plagiarism)

Due Process Framework

- *Goldberg v. Kelly*
 - “The fundamental requisite of due process of law is the opportunity to be heard.”
 - The hearing provided must be “at a meaningful time and in a meaningful manner.”
- *Mathews v. Eldridge*
 - “Due process is flexible and calls for such procedural protections as the particular situation demands.”
 - Balancing Test
- Balance:
 - Students’ interest in their education
 - Risk of an erroneous deprivation
 - Probable value, if any, of additional or substitute procedural safeguards
 - Burdens that the additional safeguards would entail on the school

Due Process Includes . . .

- Notice
- Full and Fair Investigation
- Presumption of Innocence
- Opportunity to Present Evidence and Witnesses
- Ability to compel witnesses to attend
- Confront Adverse Witnesses
- Representative
- Unbiased Hearing Panel
- Checklist approach is wrong
- Holistic Approach
 - Protections interact and reinforce each other
 - Cannot look at each protection in isolation
- Not a criminal trial, BUT . . .
Due Process guarantees enhance accuracy and reliability

1. Bias in Training

- Purpose of Hearing Panel is to decide disputed facts
- How?
 - Decide facts based on evidence presented
 - Assess credibility based on individuals and acts
- Bias = Any deviation from purpose
- Sources of bias:
 - Internal: “pre-loaded perceptions”
 - External: “community expectations”
- Ask: why is this information being shared in training?

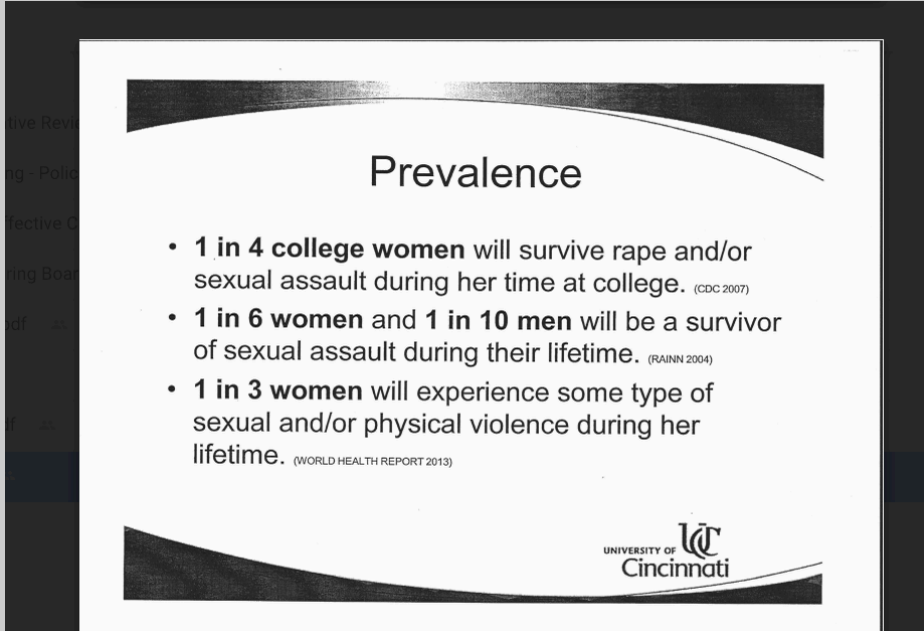
Aristotle: Logos, Ethos, Pathos

- First principle of persuasion: “Well dispose your audience to you and ill dispose them to your enemy.”
- “Aristotelian Bias”
 - Logos: Create logical fallacies
 - Ethos: enhance the credibility of one side
 - Pathos: reduce the audience’s ability to judge by appealing to emotions
- Perception drives reality
 - Training by “advocates” creates perception of bias
 - Not gender based; “Merely biased against those accused of sexual assault”

UC Training

- Aristotelian Bias:
 - Ethos: Makes a claim of sexual assault seem more credible
 - Pathos: Encourage panel members to find an alleged sex offender responsible before he can commit another sexual assault.

- Deviation from fact finding role: protect the campus



The slide is titled "Prevalence" and features three bullet points with statistics on sexual violence. The University of Cincinnati logo is in the bottom right corner.

Prevalence

- **1 in 4 college women** will survive rape and/or sexual assault during her time at college. (CDC 2007)
- **1 in 6 women** and **1 in 10 men** will be a survivor of sexual assault during their lifetime. (RAINN 2004)
- **1 in 3 women** will experience some type of sexual and/or physical violence during her lifetime. (WORLD HEALTH REPORT 2013)

UNIVERSITY OF
Cincinnati

Creation of Community Pressure

- Creates risk of “letting a guilty person go”

Profile of a Sex Offender

- Seeking power (NOT about sex)
- Predators target vulnerable persons
- Known to the victim (84% of rape victims know their attacker and 57% of rapes happen on “dates”)
- Most rapists are repeat date rapists; the average rapist rapes 14 people before he ever spends a night in jail.
- Uses alcohol as weapon: “*Undetected Rapist*”

Undermining Credibility of Accused

- Encourages decisions based on statistics and stereotypes
 - College men are likely to commit offenses
 - If not punished, will be more crime
 - Encourages discounting of persuasive testimony
- Does not matter if statistics are true or not



THE OHIO STATE UNIVERSITY
OFFICE OF STUDENT LIFE

Counseling and Consultation Service

Facts

- 22-57% of college men report perpetrating a form of sexually aggressive behavior (Abbey & McAuslan, 2004)
- 1 out of 3 males reported engaging in sexually coercive behavior are somewhat greater than the rates reported in some other studies of college males (e.g., Koss et al., 1985)
- Men are more likely to commit sexual violence in communities where sexual violence goes unpunished. (National Sexual Violence Resource Center, 2004).
-
- Repeat perpetrators are aware of myths and how to present as empathic

2. Confrontation of Witnesses

- Most schools rely on written questions
 - Suggestion in Dear Colleague Letter
 - Constitution does not require “cross-examination”
- Problems:
 - Is this effective?
 - Gatekeeping
- Problem Scenario:
 - Complaint made to Title IX Office
 - Investigation Completed with statements from Complainant
 - Complainant does not appear at hearing
 - Hearing relies solely on statements in investigation

Confrontation of Witnesses

- Why have cross-examination?
Answer: Accuracy
 - *Blackstone*, Commentaries on the Laws of England (1768): "This open examination of witnesses . . . is much more conducive to the clearing up of truth"
 - *Pointer v. Texas* (1965): "Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth . . ."
- Need to acknowledge costs
 - Victims can be traumatized
 - School administrators don't have the training or experience to control
- Schools create some of the problems through process
 - Inexperience or untrained chairs
 - No attorney participation

Confrontation Law

- Broad Claim by Schools:

In college and university disciplinary hearings, there is no “general” right to confront adverse witnesses

- Narrow Claim by Students:

In college and university disciplinary hearings, the Due Process guarantees of the Constitution includes a right to confront adverse witnesses when: (1) the information supplied by those witnesses is the reason for the adverse actions and (2) there is a question of credibility to be resolved by the finder of facts.

Flaim-Winnick Rule

- *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970): “in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”
- *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972), the Second Circuit said, “if [a school disciplinary] case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing.” *Id.* at 550.
- *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005): relying on *Winnick*, when there is “a choice between believing an accuser and an accused, . . . cross-examination is not only beneficial, but essential to due process.”

Doe v. University of Cincinnati

- Allegation of sexual assault during a Tinder hookup
- Complainant provides statement to investigator
- UC conducted a hearing to determine if student had violated the Student Code of Conduct.
 - Complainant did not appear at the ARC Hearing.
 - The “Investigative File” was read to the hearing panel.
 - The investigator and the Title IX coordinators were not present.
 - Included statements of the four people Complaint told her story to
 - No Physical evidence presented
- Result: Responsible

Doe v. UC: Hearing

[ARC CHAIR:] Okay, so the complainant is not here. At this time I would have given them [sic] time to ask questions of the Title IX report. But again, they [sic] are not here. So we'll move on. So now, do you, as the respondent, [REDACTED], have any questions of the Title IX report?

[DOE]: Well, since she's not here, I can't really ask anything . . .

Doe v. UC: Result = Injunction

- *“In this case, the ARC Hearing Committee was given the choice of believing either Jane Roe or Plaintiff, and therefore, cross-examination was essential to due process.”*
 - Adopts Winnick-Flaim approach
 - Distinguish cases with high school students
 - Decision suggests that written question process could have been acceptable
- Take away:
 - Complainant must appear before and be questioned in front of the finder of facts
 - Why? Leads to a more accurate process

3. Disclosure of Helpful Evidence

- What is “helpful evidence”
 - Lawyers refer to this as “exculpatory evidence”
 - Two types:
 - Actually undermines the claims of a party
 - Affects the credibility of a party
- Why? Accuracy
 - Prevent surprises
 - Give parties adequate time to prepare their presentations
 - Allow finder of facts to assess credibility

Disclosure of Helpful Evidence

- Example: Accused Student often asked: why would she make up this allegation?
- Possible answers in possession of school:
 - Academic records
 - Victim advocacy
- Accommodations could affect credibility
 - Creates incentive for students to fabricate to obtain accommodation
 - Locks in a story
- Mistakes:
 - Not trusting finder of fact to evaluate this evidence
 - Inclusion of “hearsay” reports of assault to bolster credibility of victim

Doe v. The Ohio State University

- Students at The Ohio State University College of Medicine
 - Accused student going into final year
 - Complainant started in 2013.
- **December 2013:** Complainant requested permission to take a leave of absence and to restart the first year of medical school
- **July 2014:** Complainant and Accused Student have sex after meeting at a bar. NO COMPLAINT.
- **March 23, 2015:** Academic Program Director informs Complainant he was referring her to the ABRC with the recommendation that the Committee "consider dismissal from the College of Medicine."

Doe v. OSU Timeline

- **March 25, 2015:** Complainant contacted the OSU Counseling and Consultation Service
- **April 2, 2015:** Complainant met with victim advocate and (later) Title IX Coordinator
- **April 15, 2015:** Med School Hearing
 - Advocate accompanied and helped prepare a statement
 - OSU Title IX director sent letter of support; affirmatively stated that Ms. Roe was "a victim of a crime sexual in nature,"
 - Complainant told ABRC that she had been sexually assaulted in July, 2014
- **April 21, 2015:** Allowed to restart Med School

False Statements at Hearing

"I had to present this case to the [Med School Committee] and tell them about this assault and how it affected me throughout this year. . . . their decision to keep me in school and allow me continue next year in the fall **was already decided before my decision to report this assault.**"

Reported assault to Advocate and Title IX Coordinator prior to Med School decision

"this [reporting the assault] **doesn't give me any benefit** other than holding him responsible and meeting an ethical obligation — or responsibility, rather."

Letter: Allowed to stay in school in "acknowledgment of the apparent impact of the personal incident [i.e. the sexual assault] which you described as affecting your performance"

Court Decision: Need to Disclose

... without discovery or mandatory disclosures, Doe is left to rely on the beneficence of the university administrators. Doe only has what he can unearth and what OSU provides to form the basis of any cross-examination. In this case, Doe alleges that he had no way to know about critical evidence that would impeach his accuser's credibility, and this was a case where the panel's decision hinged on a credibility decision

If the Administrators knew that Jane Roe lied about the timing of her accommodation at the hearing and permitted her testimony to stand unrebutted, that plausibly violated John Doe's right to a fundamentally fair hearing. . .

Note on FERPA

- Nothing in FERPA prohibits the disclosure of the records as part of the disciplinary process
 - 99 CFR §99.31 and 28 U.S.C. §1232(g)(b)(1)(a): disclosure of student records is permitted to other school officials who have a legitimate interest in access to the records.
 - 99 CFR 99.31 (a)(14)(i): disclosure of education records, without the consent of the student, is permissible “in connection with a disciplinary proceeding at an institution of postsecondary education.”

- FERPA does not prohibit disclosure of redacted records. *U.S. v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (“Nothing in the FERPA would prevent the Universities from releasing properly redacted records”)

Contact Information

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