

**FOULED OUT: WELLS v. XAVIER UNIVERSITY AND THE IMPACT OF TITLE IX
ON THE WRONGFULLY ACCUSED**

by

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I. INTRODUCTION

Dezmine “Dez” Wells is about to complete his senior season on the University of Maryland Men’s Basketball team.¹ However, he began as a phenomenal freshman on the Xavier University Men’s Basketball team,² and was looking forward to his sophomore season when his world came crashing down after he was accused of sexually assaulting another student.³ While Dez was not criminally indicted,⁴ he was “found . . . responsible for rape” by Xavier University’s University Conduct Board (“UCB”), and expelled.⁵ Dez sued the school, claiming his hearing was unfair.⁶

The policies and procedures Xavier followed during the hearing were mandated by the U.S. Department of Education’s Office of Civil Rights (“OCR”) to ensure compliance with Title

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¹ See #44 *Dez Wells – Bio, Men’s Basketball*, UMTerps.com, <http://www.umterps.com/ViewArticle.dbml?ATCLID=207324755> (last visited Feb. 28, 2015).

² See *Men’s Basketball Team Held Its Annual Awards Banquet on Thursday Night*, GOXAVIER.COM THE OFFICIAL SITE OF THE XAVIER MUSKATEERS (Apr. 19, 2012), <http://www.goxavier.com/sports/m-baskbl/spec-rel/041912aaa.html>.

³ Dan Wetzel, *Maryland Guard Dez Wells Suing Xavier for Expulsion*, YAHOO SPORTS (Aug. 20, 2013, 10:13 PM), <http://sports.yahoo.com/news/ncaab--maryland-guard-dez-wells-suing-xavier-for-expulsion-021302176.html>.

⁴ Pl.’s Am. Compl. ¶78, *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2013) (No. 1:13-CV-00575) [hereinafter Compl.].

⁵ *Id.* at ¶66.

⁶ *Id.* at ¶3.

IX.⁷ Failure to comply would mean a loss of federal funding,⁸ so schools strive for compliance.⁹ Unfortunately for the wrongfully accused, OCR’s requirements are slanted against them.¹⁰

This article discusses how Title IX, and thus OCR requirements, bind educational institutions to follow OCR’s policies and procedures—without any room for deviation. Consequently, schools must use the lowest available standard of proof. Additionally, Xavier did not permit legal counsel—a further hindrance. This article argues that by changing the standard of proof and allowing legal advisors, those wrongfully accused will have a better chance at receiving a fair hearing.

II. TITLE IX

Under Title IX of the Education Amendments Act of 1972, “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.”¹¹ Title IX was Congress’ effort to fill in civil rights legislation by preventing federal resources from supporting discriminatory practices in education.¹²

While Title IX’s most well-known application ensures “that no student—male or

⁷ See generally Russlyn Ali, “Dear Colleague Letter” April 4, 2011, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS (2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also Alexandra Fries, *Student-on-Student Sexual Assault Policy: How A Victim-Centered Approach Harms Men A Close-Up on Notre Dame's Changes to Its Student Handbook*, 39 J.C. & U.L. 633, 644 (2013).

⁸ Fries, *supra* note 7, at 644.

⁹ See generally *Resolution Agreement Xavier University OCR Docket Number 15-12-2048* (July 23, 2012), available at <http://www.atixa.org/documents/Xavier%20Resolution%20Agreement.pdf> [hereinafter *Agreement*]; Charles Huckabee, *Xavier U. of Ohio to Amend Policies on Sexual Assault After Title IX Investigation*, THE CHRONICLE OF HIGHER EDUCATION (August 1, 2012), <http://chronicle.com/blogs/ticker/xavier-u-of-ohio-to-amend-policies-on-sexual-assault-after-title-ix-investigation/46335>.

¹⁰ Cf. Fries, *supra* note 7, at 646.

¹¹ 20 U.S.C. § 1681 (2012).

¹² Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 625 (2003).

female—shall be excluded or denied the opportunity of participating in any athletic endeavor based on sex or gender at an institution that receives federal funds,”¹³ it applies more broadly: any school receiving federal money “must provide fair and equal treatment of the sexes in all areas.”¹⁴

OCR periodically publishes “Dear Colleague” letters intended to remind schools receiving federal funding that compliance with Title IX is required, and that failure to comply “may result in a . . . loss of federal funding.”¹⁵ On April 4, 2011, Russlyn Ali, the Assistant Secretary of OCR, issued a Dear Colleague letter¹⁶ to establish comprehensive guidelines detailing how colleges should handle sexual assault allegations, including using the preponderance of the evidence standard—a “more likely than not” standard—when considering such allegations.¹⁷ OCR intended to “remind schools of their responsibilities to take immediate . . . steps to respond to sexual violence in accordance with the requirements of Title IX,”¹⁸ where schools must act, even if the student does not file a complaint.¹⁹

¹³ *Id.* at 624.

¹⁴ *June 23, 1972: Title IX Enacted*, HISTORY, <http://www.history.com/this-day-in-history/title-ix-enacted> (last visited Feb. 28, 2015).

¹⁵ Fries, *supra* note 7, at 644.

¹⁶ Ali, *supra* note 7, at 1 n. 1.

¹⁷ Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION (April 4, 2011), <http://chronicle.com/article/Education-Dept-Issues-New/127004/>.

¹⁸ *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts April 4, 2011*, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS 1, 1 (Apr. 4, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.

¹⁹ *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, U.S. DEP’T OF EDUCATION OFFICE FOR CIVIL RIGHTS 1, 1, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> (last visited Feb. 28, 2015, 11:08 PM).

III. IMPACT AND CONCERNS

Many concerns have emerged about the Dear Colleague letter.²⁰ One such concern relates to the preponderance standard used to investigate allegations of sexual violence or sexual harassment.²¹ Schools that had been using the higher “‘clear and convincing’ standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred)”²² were forced to change their grievance and investigative procedures to meet the lower preponderance standard.²³ OCR reasoned, though, that the higher clear and convincing standard was neither consistent nor equitable with Title IX.²⁴

The preponderance standard also put school investigations at odds with law enforcement investigations. For example, the grand jury handling Dez’s case used a probable cause standard to determine whether to indict him,²⁵ considering “(1) that a crime has been committed and (2) that the defendant committed it.”²⁶ Probable cause also is fluid: it “is not reducible to precise definition or quantification, and finely tuned standards such as . . . preponderance of evidence have no place in probable-cause decision; all that is required is the kind of ‘fair probability’ on which reasonable and prudent people, not legal technicians, act.”²⁷

²⁰ Sieben, *supra* note 17.

²¹ Fries, *supra* note 7, at 645.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 645.

²⁵ “Like a preliminary hearing, the probable cause standard applies in grand jury proceedings.” Probable cause requirement. Baldwin’s Oh. Prac. Crim. L. § 39:16 (3d ed.).

²⁶ *Id.*

²⁷ 25 Ohio Jur. 3d Criminal Law: Procedure § 124. *See also*, Florida v. Harris, 133 S.Ct. 1050, 1052 (2013) (stating that “In testing whether an officer has probable cause to conduct a search, all that is required is the kind of “fair probability” on which “reasonable and prudent [people] act.” (citing Illinois v. Gates, 462 U.S. 213, 235 (1983))).

Another concern is that criminal prosecutors may decline to pursue cases due to a lack of evidence, whereas Title IX requires schools to pursue cases.²⁸ Realistically, “[t]he disciplinary hearing becomes, then, the only venue for establishing [the student’s] innocence and preserving his reputation.”²⁹ OCR would have to make practical changes not addressed—and perhaps not foreseen—by the Dear Colleague letter to remedy this discrepancy.³⁰

OCR additionally recommends that schools provide an appeals process.³¹ “But, the benefits of the appeal process are minimized by the overarching lack of procedural safeguards afforded the accused during the original hearing . . . [t]he letter barely touches on this subject . . .”³² because “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”³³ As a result, “procedural protections, in particular the evidentiary standard, need to be stronger in order [to] prevent wrongful condemnations that will negatively impact the rest of the wrongly accused student’s life.”³⁴

Ohio Attorney General Mike DeWine recognized such concerns. He announced that “his office will examine how the state’s public universities use their student disciplinary boards and

²⁸ Sieben, *supra* note 17.

²⁹ Fries, *supra* note 7, at 651.

³⁰ *Id.* at 654.

³¹ Ali, *supra* note 7, at 12.

³² Fries, *supra* note 7, at 647.

³³ Ali, *supra* note 7, at 12.

³⁴ Fries, *supra* note 7, at 651.

train their members.”³⁵ The accusers and those accused of sexual assaults “have said the system is unfair and broken” because the boards are made up of individuals “with little or no legal training,” yet they have great power to impact students’ lives.³⁶ Others have noted that those without legal training often are not able to appreciate due process, or understand how to evaluate evidence or interpret standards, leaving the accused with no guarantee of a fair hearing.³⁷ Moreover, federal legislation has been proposed “to help guide victims and the accused through potential adjudication.”³⁸

IV. WELLS v. XAVIER UNIVERSITY

A. *Dez’s Hearing*

Dez’s bright future came to a screeching halt when he was accused of sexual assault, though he claimed the sexual activity was consensual.³⁹ Physical exams revealed no trauma to the accuser,⁴⁰ and she declined to press charges.⁴¹ Further, Prosecutor Joseph T. Deters became extremely concerned about how truthful the accuser had been in her allegations,⁴² and advised “Xavier not to conduct a hearing on the alleged incident until his Office had completed its

³⁵ Karen Farkas, *University disciplinary boards to be examined by Attorney General’s Office: Higher Education Roundup*, CLEVELAND.COM (Nov. 24, 2014, 8:10 AM), http://www.cleveland.com/metro/index.ssf/2014/11/college_disciplinary_boards_to.html.

³⁶ *Id.*

³⁷ Legal Skills Prof, *Ohio AG to Investigate Student Disciplinary Boards*, LEGAL SKILLS PROF BLOG (Dec. 1, 2014), http://lawprofessors.typepad.com/legal_skills/2014/12/ohio-ag-to-investigate-student-disciplinary-boards.html.

³⁸ Tyler Kingkade, *Senators Seek Huge Fines For Colleges Mishandling Sexual Assault*, HUFFINGTONPOST.COM (Feb. 26, 2015, 5:59 PM), http://www.huffingtonpost.com/2015/02/26/campus-sexual-assault-bill_n_6761170.html.

³⁹ Wetzl, *supra* note 3.

⁴⁰ Compl. ¶¶26-27.

⁴¹ *Id.* at ¶39.

⁴² *Id.* at ¶40-41.

investigation.”⁴³ However, Xavier nevertheless proceeded.⁴⁴

Xavier assigned the case to its UCB, composed of Xavier faculty members, administrators, and students, to determine if Dez violated Xavier policies.⁴⁵ Pursuant to the 2011-2012 Xavier Student Handbook, UCB members were required “to be trained and experienced in adjudicating such matters”⁴⁶ and use “a ‘preponderance of the evidence’ standard.”⁴⁷ Additionally, the length of the investigation and hearing could be limited.⁴⁸ The handbook further did not specify who had the burden of proof at this type of disciplinary hearing, nor was it specified at the start of Dez’s hearing.⁴⁹ Yet he did, in fact, bear the burden; he had to prove that the sex was consensual.⁵⁰

After Dez’s hearing, he was informed “that he had been ‘found... responsible for rape,’” and was expelled from the University just one day later.⁵¹ Moreover, Dez’s appeal was denied following a greatly abbreviated appeals process.⁵² Worse still, Xavier publicly announced Dez’s expulsion in a widely circulated written statement,⁵³ and just one week later the grand jury

⁴³ *Id.* at ¶43.

⁴⁴ *Id.* at ¶45.

⁴⁵ *Id.* at ¶29-31.

⁴⁶ Compl. ¶31.

⁴⁷ *Id.* at ¶32a-d.

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶46-48.

⁵⁰ *Id.*

⁵¹ *Id.* at ¶66.

⁵² Compl. ¶71-72.

⁵³ *Id.* at ¶74-75. See generally, Wetzel, *supra* note 3; Eamonn Brennan, *The Strange Case of Dezmine Wells*, ESPN.COM *Men’s College Basketball Nation Blog* (Aug. 29, 2012, 3:56 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/63416/the-strange-case-of-dezmine-wells.

declined to charge Dez with any crimes.⁵⁴ Deters proclaimed “the allegation ‘didn’t reach anything close to a standard of proof’ and ‘should never have gotten to the point where someone’s reputation is ruined.’”⁵⁵ He also “called Xavier’s investigation ‘fundamentally unfair’ and emphasized that ‘there is something flawed with a procedure where a young man and his accuser appear before a group of people, which . . . probably isn’t well trained in assessing these types of cases.’”⁵⁶

Dez then transferred to Maryland, and the NCAA granted a waiver so he could play basketball immediately, instead of having to sit out a year as is customary for transfers.⁵⁷ Furthermore, Dez sued Xavier for wrongful expulsion.⁵⁸ He alleged that the manner in which Xavier handled the case was influenced by earlier OCR concerns that the university mishandled prior sexual assault allegations,⁵⁹ and that Xavier was more interested in satisfying the Department of Education than its own duty of fairness to students.⁶⁰

B. *Xavier and OCR*

In light of OCR having released its Dear Colleague letter in April 2011,⁶¹ Xavier was one of several educational institutions that did not move quickly enough in adapting to the new

⁵⁴ Compl. ¶78.

⁵⁵ Wetzel, *supra* note 3.

⁵⁶ Compl. ¶80. *See, e.g.*, Brennan, *supra* note 53.

⁵⁷ Wetzel, *supra* note 3.

⁵⁸ Compl. ¶1-4, 86-147.

⁵⁹ Wetzel, *supra* note 3. *See, e.g.*, Jennifer Grove, *Xavier Coming Under Fire for Handling of Sexual Assault Case*, FOX19.COM (Jan. 17, 2012, 8:42 PM), <http://www.fox19.com/story/16541690/xavier-coming-under-fire-for-handling> (explaining the agreement between Xavier and the Office for Civil Rights to protect sexual assault victims).

⁶⁰ Wetzel, *supra* note 3.

⁶¹ Ali, *supra* note 7, at 12.

guidelines and complying with Title IX.⁶² As a result, Xavier mishandled several sexual assault incidents, and the school reached an agreement with OCR in July 2012 to comply with Title IX.⁶³

Due to the timing of Xavier's agreement with OCR and Dez's hearing,⁶⁴ Xavier was cornered.⁶⁵ Dez claimed Xavier was more concerned with placating OCR than with providing fair procedures during the investigation and hearing.⁶⁶ Also, the Dear Colleague letter's conflict with legal criminal standards meant the grand jury's refusal to indict Dez⁶⁷ contrasted with UCB's finding that he was responsible for rape.⁶⁸ This is yet another example of the "procedural safeguards . . . granted at the expense of the male student accused of sexual assault [tilting] the balance of the disciplinary hearing in favor of the complainant."⁶⁹ The Dear Colleague letter failed to address a situation like this,⁷⁰ creating a victim-focused approach in sexual assault claims. Arguably, this type of approach is deliberately indifferent to the rights normally afforded to the accused.

V. RECOMMENDATIONS

Xavier was forced into its position because of Title IX's requirements via OCR mandates.

⁶² See Ebus, *OCR Investigates Xavier University's Handling of Sexual Assault*, TITLE IX BLOG (Jan. 15, 2012), <http://title-ix.blogspot.com/2012/01/ocr-investigates-xavier-university.html>.

⁶³ See generally *Agreement*.

⁶⁴ Compl. ¶71.

⁶⁵ Compare *Id.* at ¶66, 71, with *Agreement*.

⁶⁶ Wetzell, *supra* note 3. See generally Compl.

⁶⁷ Compl. ¶78.

⁶⁸ *Id.* at ¶66.

⁶⁹ Fries, *supra* note 7, at 635.

⁷⁰ *Id.* at 654. See generally Ali, *supra* note 7.

One of the biggest problems with the mandates is that the lowest possible standard of proof is used.⁷¹ A criminal trial requires a higher standard of proof; requiring universities use a lower standard automatically stacks the deck against those wrongfully accused. Increasing the required standard of proof would begin to level the playing field.

However, raising the standard of proof alone is not enough. OCR requires UCBs, whose members have minimal training, to apply legal standards. Since legal standards are often misapplied in courts of law where attorneys have had years of training, it is conceivable that these lay individuals with minimal training would misapply legal standards with even more frequency.

That outside legal counsel is not available further exacerbates this problem. One solution would be to provide a legal advisor to UCBs. A university staff attorney or outside lawyer could aid the board in its interpretation and application of the required legal standard. Additionally, both parties should be allowed the assistance of counsel. It need not be formal, as with a criminal trial, but a legal advisor could guide them throughout the hearing even if not directly speaking on their behalf. At a minimum, the advisor could be behind the scenes, letting the parties know what to expect in the process, things to look for, and questions to ask, while the parties would represent themselves in front of UCB. Again, these advisors could be provided by the schools, selected by the parties, or volunteers from the legal community. This way, OCR could continue to require the use of legal standards, terms, and actions, and all parties involved would have legal guidance throughout, resulting in a fundamentally fairer process.

None of these recommendations are intended to suggest that the accuser's rights should be reduced. On the contrary, providing a legal advisor would give the accuser additional

⁷¹ Fries, *supra* note 7, at 646.

assistance, while the accused's rights would also be protected in ways not currently addressed by the Dear Colleague letter. This article's suggestions go toward providing an equitable process and ensuring the accused is more likely to receive a fair hearing not in conflict with the legal system.

VI. CONCLUSION

Dez's situation is unique for two reasons. First, he was a high-profile basketball player for Xavier, thus attracting more attention than a general student would, as demonstrated by Xavier releasing a statement on the matter. Next, the prosecutor spoke publicly on Dez's behalf, saying that Dez did not commit the crime for which he was accused. Consequently, this case received even more attention than would normally be generated by a general student accused of sexual assault. Though Dez has been able to maintain his composure and add to his basketball accolades while at Maryland,⁷² his character is still questioned and fans continue to heckle him about the rape allegation.⁷³

Ultimately, the case settled.⁷⁴ However, but for Xavier's reaction to OCR's findings and the Dear Colleague letter, Dez would never have faced these challenges. The policies and procedures Xavier offered were a means of protecting itself, especially in a high-profile case such as this one, and were a direct result of the agreement it came to with OCR.⁷⁵ Xavier

⁷² See #44 Dez Wells – Bio, Men's Basketball, UMTERPS.COM, <http://www.umterps.com/ViewArticle.dbml?ATCLID=207324755> (last visited Feb. 28, 2015).

⁷³ Amanda Lee Meyers, *Dez Wells, Xavier Settle Lawsuit*, CINCINNATI.COM (Apr. 24, 2014, 5:29 PM), <http://www.cincinnati.com/story/sports/college/xavier/2014/04/24/dez-wells-xavier-settle-lawsuit/8111709/>. See also Greg Howard, *Penn State Students Chant "No Means No" At Maryland's Dez Wells*, DEADSPIN.COM (Feb. 15, 2015, 3:15 PM), <http://www.cincinnati.com/story/sports/college/xavier/2014/04/24/dez-wells-xavier-settle-lawsuit/8111709/>.

⁷⁴ Meyers, *supra* note 73.

⁷⁵ See generally *Agreement*.

essentially had no choice but to set up these policies and procedures to comply with Title IX.⁷⁶ Thus, Xavier was protected by following the agreement, but there was no protection for Dez because the rights of the accused are not considered in the Dear Colleague letter.⁷⁷

⁷⁶ *Agreement.*

⁷⁷ *See Fries, supra* note 7, at 654 (stating that “This predicament is not addressed in the Dear Colleague letter.”).