

April 5, 2021

Professor Eric Rasmusen's Appeal of Vice-President Applegate's Decision to the Faculty Board of Review

On February 26, 2021, Vice Provost Eliza Pavalko decided to accept the findings of an Investigative Report that I had committed various violations of Indiana University's policy against discrimination and its recommendations that I be required to do blind grading of my classes, to have my classes videotaped, to be kept off of recruiting committees, and other punishments. I appealed to Vice President Applegate (Provost Lauren Robel having recused herself) on substantive and procedural grounds. He rejected the substantive grounds as being relevant, and rejected my procedural appeal. He said on March 17, "You may further appeal my determination to the Faculty Board of Review, in accordance with the terms described in the VPFAA's decision." Vice Provost Eliza Pavalko's decision said, "If Vice President Applegate upholds this decision, you may then request a review by the Faculty Board of Review based on the two bases listed above." Thus, I am appealing to you. I think the substantive ground are still important and relevant, but I will only discuss Vice-President Applegate's decision here. I attach as appendices (A) My response to the Investigative Report, (B) Vice Provost Pavalko's decision, (C) my appeal to Vice-President Applegate, and (D) Vice-President Applegate's decision. Please read (C), my appeal to Vice-President Applegate, for my objections to the procedure being followed, which I stand by despite his decision. Here, I will just add responses to his decision.

A first issue is whether IU's Title IX investigation procedures of 2019, applied to me in late 2020, are fair, despite the new Title IX guidance of May 2020. VP Applegate said,

OIE's investigation, as noted in Attachment Alpha, began in late 2019, and it involved actions arising on or before that date. The actions not only pre-date the 2020 UA03 Policy, but they also pre-date the effective date of the DOE regulations that provided the basis for the 2020 Policy. It is basic fairness that (except in very unusual situations) a person's actions are evaluated according to the rule or policy in effect at the time of those actions.

No: it is basic fairness to use the requirements and penalties in place at the time, but not the procedures used, particularly if the procedures have been declared unfair by a higher authority—in this case the Department of Education's interpretation of Title IX.

To be sure, the DOE did say, in guidance that did not go through notice and comment, that for the transition it would allow the old procedures to be used. As VP Applegate says,

Moreover, and conclusively, in making the 2020 regulatory revisions, DOE stated explicitly that the revisions were not intended to apply to already-pending matters, and that the new regulations are not retroactive. See U.S. DOE Guidance dated August 5, 2020.¹

They did say that, but a still higher authority--- the US federal courts--- stated to the contrary, in the only court decision to date, that the DOE guidance would let university administrations choose whichever rules they liked best and so was invalid. See my appeal for details.

A second issue is whether IU should be using the Title IX procedures for all discrimination, not just sex discrimination. VP Applegate says:

You also argue that the use of UA-03 procedures for violations of UA-01 (Non-Discrimination/Equal Opportunity/Affirmative Action) is in error. This is not correct. UA01 is a general prohibition on numerous types of discrimination and a statement of IU's position on affirmative action. It contains no separate procedural rules. In contrast, UA-03 covers specific types of conduct, and it is designed to help implement the broad principles established in UA-01

The question is why the usual Indiana University rules for faculty misconduct shouldn't apply to discrimination. With respect to sexual discrimination, the answer might be "Title IX is special." However convincing that might happen to be, it doesn't apply to anything but sexual discrimination.

The third issue is whether an appeal in my case can be based on the substance of the allegations, or just on procedural irregularities. This depends on whether it is "Level One" or "Level Two" penalties. The policy says that "Level Two Sanctions include sanctions that directly modify job duties, salary or job status, including affecting compensation, consideration in tenure or promotion decision, suspension, and termination." In my case, the sanctions did directly modify job duties. They included a requirement of blind grading and exclusion from a variety of standard administrative duties, including, for example, exclusion from writing and grading general exams for Ph.D. students and from recruiting. Thus, I think it is Level One, and you should look at the substance mistakes I outline in my Reply to the Investigative Report, attached as an appendix.

A fourth issue is about the right to present evidence. VP Applegate says:

First, you appear to claim that you were denied a right to present evidence. This is obviously not the case. You were interviewed by OIE, you supplemented the interview answers in writing (your Attachment C), and you have presented a detailed (line-by-line, or "fisking") critique of the OIE report in Attachment Alpha. Moreover, in contravention of IU policy, you directly contacted your former students (including those who had dropped your course) from the Fall 2018, Spring 2019, and Fall 2019 semesters. You have been able to present all this material, highlighting the material you feel is most favorable to your cause...

I was given ten days to respond to the Investigative Report, which is the first time I was told the specific allegations. When I contacted former students to see if they thought I was guilty of discrimination, the Administration said I'd violated the rules by contacting them. They've brought a separate complaint on that to the Faculty Misconduct Committee. Thus, it seems the Administration does not think I should have tried to present evidence.

A fifth issue is perhaps not really an issue, not a disagreement, just a misunderstanding. VP Applegate says:

You also seem to contend that the KSB's call for concerned students to come forward constitutes a procedural failure. Such a request, however, is hardly "irregular" or even particularly remarkable. When student concerns about potential misconduct come to light, it is the standard and responsible practice to ask those who may have been affected to come forward. Indeed, it is a vital practice when the wrongdoing at issue or the power differential between the perpetrator and victim is a type that tends to silence those most impacted.

That's actually is not a procedural failure. It is retaliation for my 2019 Twitter posts. No misconduct had come to light, just posts protected by academic freedom, yet the Administration asked students to complain about me.

Similarly, a sixth issue is probably a misunderstanding. VP Applegate says:

You also appear to invoke the United States Supreme Court's Brady v. Maryland decision to argue that OIE should have provided you with "exculpatory" evidence. To state the obvious, Brady is a criminal case and completely inapposite to an internal administrative proceeding like the present one. There are not even Level Two sanctions at stake that would deprive you in any way of your position or livelihood. Even if some version of an exculpatory evidence rule were to apply, the fact is that OIE's report did include evidence favorable to you, and you highlighted those aspects in the Main Appeal and Attachment Alpha.

Yes, the OIE Report did include some material favorable to me. Did it include all of it? Nobody knows. *Brady v. Maryland* doesn't apply directly; it is only about federal criminal cases. But it shows what courts think about fairness generally.

I am not sure if I should call the other objections "issues". VP Applegate says:

While your interspersed comments in Attachment Alpha contain several intimations of sinister happenings behind the scenes, they lack both specificity and any evidence to support them. Simply to suggest that something might be so does not make it so or even make it likely.

Yes, who knows what is happening behind the scenes. We can only speculate. But speculation is valid, though to be viewed critically and with intelligence.

He also says:

You further contend that there is a procedural irregularity because you were not advised of the names of witnesses or complainants. In this particular case, which was a university-level investigation, the university itself is deemed to be the complainant.

I would have liked to have been told that the University was the complainant.

And he says:

Witness names are not typically provided in OIE investigations, in accordance with the need to protect the privacy interests established in UA-03 (privacy interests are deemed important to protect in both versions of this policy), and to help prevent retaliation.

How can I retaliate? With the faculty, sure--- I can vote on their tenure, etc. But the students are no longer in my class, and most of them probably have graduated.

He misunderstands something about my Fall 2019 teaching:

You have already demonstrated by your actions that you will take steps to trace individual students in an attempt to sway them by engaging them in a mandatory class assignment and by reaching out to contact present and former students in previous semesters.

That mandatory class assignment was to learn how to use anonymous email, an important thing in this age of political persecution. Students were required to send *some* comment, however

empty the content. The main reason for the assignment, though, was to give students a chance to anonymously ask questions about the attacks on me by the Administration. I felt I owed them a chance to comment and question, but that I couldn't ask them to do that openly, because they might fear retaliation by me or the Administration, whether by grade and graduation or by frowns. I didn't answer questions from people generally, but students in my class were special, and I felt they had a right to ask about the disruption the Administration was causing them.

To return to the question of retaliation, he says:

Worse, you have threatened to intimidate students and faculty colleagues by your "warning" to VPF AA Pavalko (reported in her decision) that you would single them out for their views on your case.

My "warning" was misinterpreted. I said that I would ask IU faculty to choose whether they supported me or the Administration. I am not intending to ask my own colleagues that, and certainly not students, but rather senior faculty in the University at large. It would be unfair to put untenured faculty on the spot as to whether they thought the Administration was wrong, but fair to put tenured faculty on the spot.

And, finally, he says:

Further, it is disingenuous to claim that you had neither time or permission to contact former students, because you did precisely that and reported the two positive responses you received.

Is ten days ample? The Administration spent over a year investigating me.

I would like the Committee to consider all these things and decide whether I have been treated fairly or not.