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## Two federal courts decline to restrain Title IX investigations and hearings during coronavirus (COVID-19) pandemic

By Steven Richard

As we analyzed in a recent [alert](#), courts will address whether they should intercede and restrain Title IX investigations and hearings during the COVID-19 pandemic, with students away from campuses and cases presenting questions concerning whether and how a video conference investigative meeting or adjudicative hearing should occur. Two federal courts recently declined emergency requests by student respondents for restraining orders. As discussed below, the courts exercised judicial deference, after examination of the school's intended implementation plans and with assurances that the processes will be fairly and securely conducted.

### *Doe v. Oberlin College, et al.*

In the *Oberlin* case, a respondent sought an emergency order to restrain the college's continuation of a pending sexual misconduct case against him, contending that the school's policies and actions were discriminatory. The plaintiff asserted Title IX challenges under erroneous outcome and selective enforcement theories.

In response to the plaintiff's motion requesting the court to intercede, the college reported that its investigation was ongoing and no final determination had been made whether there will be a hearing. The college indicated that its investigation has been hampered by the COVID-19 pandemic since there are no students on campus. If a hearing will be held and the students will not be able to appear in person, the college will conduct the hearing via videoconferencing, directing the complainant and respondent to participate. The court "observed that while Oberlin may direct complainant and [respondent] to appear at the hearing, Oberlin cannot compel their appearances" and that "adverse inferences may be drawn from such absences."

In its short ruling issued on April 7, 2020, the court showed deference and declined to enter a restraining order, allowing the college to address the implementation and logistics of its process. Because the college's process is ongoing, the court held that the plaintiff's Title IX claims of erroneous outcome and selective enforcement are unripe for judicial review. The court also dismissed the plaintiff's constitutional claims because the college is not a state actor, despite receiving federal and state funding.

## ***Doe v. Transylvania University***

On April 13, 2020, the Eastern District of Kentucky issued a detailed memorandum and order, which provides a useful analysis of the factual and legal issues that will likely arise in other cases seeking emergency relief. Particularly, the court carefully reviewed and was satisfied with the functionality and security of the technology to be utilized by the university in its upcoming videoconference hearing.

### ***Background***

The case concerned an incident between the plaintiff, John Doe, and a female student, Jane Doe, in his dormitory room. Jane reported that John undressed himself and forcefully kissed her, hit her, and held her down on a couch. Jane indicated that she was able to push him away and leave the room. When notified of Jane's complaint, John denied the allegations, claiming that their encounter arose consensually with Jane kissing him before he told her to leave his room. The university implemented interim measures by relocating John to a campus apartment complex with imposed restrictions on his access to other residences and precluding guests in his room. The university took the interim action because there was another pending complaint against John.

As the investigation proceeded, John retained legal counsel and asserted that Jane engaged in non-consensual contact against him. John and his counsel interacted with the Title IX Coordinator and were accommodated in their requests to reschedule meetings. The Title IX Coordinator provided counsel with the unredacted investigative report concerning Jane's complaint and a link to a Google drive folder containing the investigative evidence. John received a redacted version of the report to prepare for a pre-hearing conference.

During the pre-hearing conference, John stated that he wished to proceed with a complaint against Jane, which he filed that evening. Subsequently, John's counsel made demands for more evidence, and the university rescheduled the hearing date regarding Jane's complaint to address counsel's concerns. New counsel then entered an appearance on John's behalf, who was not promptly responsive to the university's outreaches to him. Regarding John's complaint, the university's investigators, who were not part of the investigation of Jane's complaint, determined that there was insufficient evidence to support his allegations and allow the matter to proceed to a hearing.

The university scheduled a video conference hearing on Jane's complaint to occur on April 15. Under the university's procedures, the parties may call witnesses, present evidence, make opening and closing statements, and challenge the evidence. In response to John's concerns about the form of cross-examination, the university agreed to modify its practice to be more aligned with cross-examination methods stated in the Department of Education's proposed Title IX regulations. John filed a lawsuit alleging that the university acted in a discriminatory manner and failed to comply with its policies. John sought emergency relief to restrain the hearing.

### ***The court's analysis***

The court requested the university to address the technology to be utilized to conduct the video conference hearing. The university intends to use a private setting on the Google Meet platform as the secure method to hold the hearing. The university provided details regarding the functionality and privacy of the platform. The platform allows the Title IX Coordinator to record the hearing and to protect the recording appropriately as sensitive information in the university's files. The university also assured the court that its technology would allow for the secure distribution of information necessary for the hearing. Further, the students involved in the hearing should be

familiar with the platform, as many of their classes and assignments have utilized the software while they are away from campus.

The court carefully analyzed and addressed John's protestation that a video conference will not equate to a "live" hearing under the university's policy, which states that "[a]ll hearings will be live and recorded by a transcriber." The court, however, noted that nowhere in the policy is "live" defined as requiring everyone involved to be physically present in the same room. "And contrary to the plaintiff's assertion, a hearing can be 'live' even when conducted by video conference. It is puzzling and wrong to suggest that real-time videoconferencing converts an administrative proceeding into something that is not 'live.'" The parties will be able to participate on the same videoconference, question witnesses before the fact-finder, and conduct cross-examination in real time. The panel will be able to make credibility evaluations and render a decision in a "he-said, she-said" proceeding. In fact, the university agreed to modify its hearing practices to allow John's advisor (attorney) to conduct cross-examination.

The court held that John failed to demonstrate a likelihood of success regarding his gender discrimination claims, particularly because such claims are not ripe for adjudication with the school's adjudicative process ongoing. Further, the university "has a substantial interest in the fair, prompt, and accurate resolution of disciplinary matters without due interference from courts[,] as well as "a strong interest in maintaining a campus free of sexual harassment and sexual assault." Jane also has an interest in the prompt resolution of her Title IX complaint, and indefinitely postponing her hearing "would leave her to languish without such resolution."

Looking at the totality of the circumstances, the court found that John received proper notice of the charges and was afforded multiple pre-hearing conferences. He was advised of the evidence against him before the hearing. He will have the opportunity to call witnesses, present evidence, cross-examine witnesses, and make opening and closing statements. The university appropriately satisfied the court's concerns that its hearing panel will be able to judge the credibility of witnesses through a videoconferencing platform that will also provide for privacy and security of the information presented.

## **Takeaways**

Colleges and universities must make careful assessments regarding how and when they will proceed with Title IX investigations and hearings, as affected by the evolving circumstances of the pandemic. Notices to the parties must be clear and timely. Most of all, if a party seeks judicial relief to compel a rescheduling or restraining of an investigative meeting or a hearing, the school must be fully prepared to document and prove to the judge's satisfaction that fairness, privacy, and security concerns will be protected through the utilized platform. The school must demonstrate that its intended remote participation protocols not only adhere to the school's policies as fully as possible under the current challenges, but also provide appropriate assurances to enable a court to exercise judicial deference and decline to intercede.

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