

Federal Courts Weigh In: Title IX Proceedings During COVID-19

The ongoing COVID-19 pandemic has presented new challenges for college administrators as they evaluate whether to continue Title IX investigations through telephone and video conferences or postpone interviews and hearings until “stay at home” orders are withdrawn by state and local governments.

If Title IX investigations are postponed, victims of alleged sexual misconduct on campuses may sustain prolonged trauma. On the other hand, students accused of wrongdoing may be at a disadvantage if cases proceed through telephone or videoconferences. The mounting uncertainty created by the coronavirus pandemic poses unique scenarios for institutions committed to prompt and equitable resolution of complaints.

College administrators must evaluate each Title IX claim and consider continuing investigations using available technology. Federal courts have recently addressed some of the issues posed by remote Title IX investigations and hearings impacted by social distancing measures in place throughout the country.

Doe v. Transylvania University

On April 13, 2020, a court in the Eastern District of Kentucky issued an opinion and order that analyzed many factual and legal issues surrounding a Title IX remote hearing. Significantly, the court approved of the technology and virtual hearing protocols to be utilized by the university.

This matter involved an incident between two students, the plaintiff, John Doe, and a female student, Jane Doe. Jane Doe filed a complaint alleging sexual misconduct by John Doe while in his dorm room. John Doe denied the allegations and claimed that Jane started kissing him without his consent, and he told her to leave. John Doe then retained counsel and filed a complaint with the school against Jane Doe. Transylvania University investigators determined that there was insufficient evidence to support John Doe’s allegations and his complaint did not proceed to a hearing.

Continuing its investigation of Jane Doe’s complaint, Transylvania University scheduled a video conference hearing for April 15, 2020. However, John Doe filed a verified complaint, asserting that the university discriminated against him and failed to comply with university policies under Title IX. John Doe objected to the university’s procedures and conduct during the investigation of his complaint against Jane Doe – alleging he was deprived of his right to pursue a Title IX claim because the university dismissed his formal complaint after only two weeks, lacking a substantive investigation.

John Doe sought emergency injunctive relief to postpone the April 15, 2020 video conference hearing given the current COVID-19 pandemic. John Doe further objected on the basis that a video conference hearing does not qualify as a “live” hearing that is referenced in the university’s policy manual. He also claimed that his right to cross-examination will be violated.

In response, the university explained that it had modified its policy regarding cross-examination in light of the proposed changes to the Department of Education’s Title IX guidance. Accordingly, John Doe would be afforded three separate opportunities to cross-examine during the hearing by: (1) submitting questions in advance to the hearing panel; (2) asking questions during the hearing; and (3) questioning by his representation, if the individual is authorized and licensed to practice law. The court agreed that these procedures are acceptable.

The court questioned the university’s platform for video conferencing and cited to a recent article that addressed Zoom’s security and privacy issues. The university explained its remote policy, which included a private setting on the Google Meet platform.

The platform proposed by the university allows their Title IX Coordinator to record the hearing and to protect its sensitive material within the school's records. Notably, the students involved in the investigation are familiar with the web-based technology platforms as their curriculum has been transitioned to an online format. The court concluded that the use of Google Meet and the virtual hearing protocol provided by the university satisfied the security and privacy concerns of the parties and witnesses.

Case cite: *Doe v. Transylvania Univ.*, No. CV 5:20-145-DCR, 2020 WL 1860696 (E.D. Ky. Apr. 13, 2020).

Doe v. Oberlin College

On April 7, 2020, a court in the Northern District of Ohio held that plaintiff's Title IX claims were unripe for judicial review. Plaintiff, who was the subject of a sexual misconduct report, challenged the college's sexual misconduct policy. Plaintiff alleged that the college's policies and procedures are notoriously unconstitutional and discriminatory toward males – and his claims included selective enforcement and erroneous outcome under Title IX.

Oberlin College explained that an investigation was ongoing and had been hampered by the COVID-19 pandemic and the unavailability of students on campus. The college stated that hearings would be conducted via videoconferencing, which the school would provide notice of to both complainant and respondent. Significantly, the court observed that “[W]hile Oberlin may direct complainant and John Doe [respondent] to appear at the hearing, Oberlin cannot compel their appearances...however, that adverse inferences may be drawn from such absences.” As such, the court approved of the college's plan to conduct hearings remotely, via web-based videoconferences.

Case cite: *Doe v. Oberlin Coll.*, No. 1:20 CV 669, 2020 WL 1696979 (N.D. Ohio Apr. 7, 2020).

Key Takeaways

Web-based videoconferences have become a part of everyday life - technology has enabled schools to continue Title IX proceedings while maintaining compliance with their policies and procedures. For purposes of conducting “live” hearings, videoconferences provide parties with the opportunity to call witnesses, present evidence, cross-examine witnesses, and make opening and closing statements.

It is important to note that the federal court cases discussed above involve private institutions – and while essential fairness was considered, public institutions will be held to a higher due process standard. Colleges and universities must strongly consider implementation of plans regarding how and when to continue with Title IX investigations and hearings as well as creating virtual hearing protocols. College administrators must adapt to technology and privacy related concerns as the conditions of the pandemic continue to evolve. It is essential for schools to be prepared to validate the essential fairness, confidentiality and proficiency utilized through remote investigations and hearings.

See also, Bond's information memo [Campus Closed, Case Closed? Not So Fast](#) about proceeding with investigations during COVID-19.

If you have any questions about Title IX proceedings and any COVID-19 related practices, please contact [Sarah Luke](#), [Jane Sovern](#), [Samuel Dobre](#), any [attorney](#) in the [Higher Education Practice Group](#) or the attorney in the firm with whom you are regularly in contact.



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