

# Tips For Schools Handling Title IX Cases During Pandemic

By **Kimberly Lau, James Figliozi and Branden Lynn**

As schools across the country trade in-person instruction for online curriculums, the fate of countless student disciplinary proceedings hangs in the balance. Schools now find themselves in the unenviable position of moving their investigations and hearings online.

Disciplinary complaints are now being adjudicated far beyond the familiar campus confines, as students are scattered across the country and the world. Few schools have the systems and procedures in place to cope with a pandemic.

Instead, schools, like many of us, have been left to figure things out on an ad hoc basis. Failure to quickly and effectively develop new procedures will expose schools to lawsuits from both complainants and respondents.

If schools press forward with the disciplinary process without ensuring a fair process, respondents who are found responsible will likely seek redress in court, arguing they were denied rights guaranteed to them under the school's policies or the due process clause or that the procedural irregularities support a Title IX erroneous outcome claim.

On the other hand, delaying the investigation process indefinitely may result in lawsuits by complainants asserting deliberate indifference under Title IX.

Everyday life may have been changed by the pandemic, but schools have not been relieved of their Title IX duties. With students' futures on the line and potential lawsuits looming, schools need to work extra hard to maintain fairness and address the following concerns that arise from using online platforms to adjudicate Title IX cases.

## **Due Process Concerns**

Public colleges and universities engaging in online disciplinary proceedings during the COVID-19 pandemic must be wary of the inherent due process concerns that are sure to arise. Private institutions should also take care to ensure that they are providing equivalent accommodations to complainants and respondents in accordance with their policies and procedures.

Moving to an online platform is far from ideal. However, in this novel environment, it is essential that schools provide complainants and respondents with equal opportunities to participate in the disciplinary process.

When initiating disciplinary actions, schools must be certain to comply with all required notice provisions. If one party was interviewed in person before the suspension of on-campus operations, institutions must strive to provide a substantially similar atmosphere for the interview of the other party.

Similarly, witness interviews should be conducted in a manner that does not advance one



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party's interests to the other party's detriment. Moreover, complainants and respondents must be afforded comparable access to investigatory materials, exhibits and witness statements when preparing for hearings and drafting appeals.

This may require a loosening of certain well-worn restrictions regarding the evidence gathered and documents prepared during the disciplinary process. For example, schools that normally prohibit the copying of case materials may wish to consider a temporary rescission of this proscription to avoid accusations of bias.

To maintain the integrity and fairness of the adjudication process, schools should ensure that participants have access to a reliable internet connection, computers, microphones and webcams before conducting any remote interviews or hearings. Upon learning that a participant in the disciplinary process lacks any essential communication equipment, institutions should be ready to loan out devices as necessary.

Throughout the disciplinary process, schools must facilitate arrangements that will guarantee complete and equal participation for both complainants and respondents (as well as their respective witnesses and advisers).

Throughout the disciplinary process, schools should also be aware of various factors that could prejudice students no longer living on or near campus. For many colleges and universities, a majority of the student body will be disbursed throughout the country and perhaps the world.

In scheduling interviews and hearings, institutions should be mindful of the time zones where the participants currently reside. When dealing with certain sensitive matters, such as those involving intimate partner violence, schools would be well-served to confirm living arrangements before initiating or continuing disciplinary processes.

In all instances, fairness and safety must be paramount concerns.

### **Abuses of Process Are Inherent In Remote Proceedings**

The Title IX process is inherently imperfect. After all, the Title IX investigatory process is not run by trained detectives, and the Title IX hearing room is far from a courtroom.

Schools attempt to safeguard the integrity of the process by employing confidentiality agreements, issuing no-contact orders, and having investigators summon students into their offices for questioning with as little notice as legally required. So, how does a school safeguard against abuses of process during a pandemic when social distancing is required and in-person meetings are no longer an option?

### ***Unanticipated Participants***

Schools generally have a policy limiting complainants and respondents to one adviser during the process. The rationale, we imagine, is to control the "playing field" between the parties and make sure one party does not acquire an uneven advantage.

But how would a school really know when a student has more than one adviser in the room if the interview is held via Zoom and the web camera is only pointed at the student? One way to decrease the likelihood of unanticipated participants is to ask students to authenticate who is present in the room at the beginning of the virtual meeting, then again at an undisclosed point in time during the meeting.

## ***Coached Responses***

In addition to the one-adviser limit, many schools prohibit advisers from substantively participating in the process. In other words, advisers cannot speak on behalf of their clients, and there is little room for advisers to help their clients as they stumble through a difficult line of questioning (even if the difficulty is the result of the investigator's poor word choices).

This limitation is easier to monitor when a student is expected to appear for his/her interview with the Title IX investigator in person along with his/her adviser in tow. Such a restriction will inevitably become more challenging for a school to enforce when conducting interviews via videoconferencing. Asking students to certify that their answers are their own may potentially disincentivize students from over-utilizing their advisers in these circumstances.

## ***Witness Collusion***

Although Title IX cases usually involve "he said, she said" allegations, schools regularly rely on witnesses to corroborate each party's perspective. Naturally, many of the witnesses who were present before and after the incident are friends with either the complainant or the respondent.

Without the proper sequestering, it's easy to see how witnesses may be motivated to corroborate their statements with the complainant or respondent in advance of their interviews. This risk is only heightened when interviews are conducted online.

There is nothing stopping students from text messaging, emailing or web chatting with each other during a live video interview, as schools cannot possibly see what the student is doing outside the view of the web camera. To address this potential abuse of process, schools may want to consider asking students to show proof that their phones are off or not in use for the entirety of the interview.

## ***Unauthorized Audio Recordings***

Most school policies disallow students from recording his/her interview or hearing. Enforcing this restriction is relatively easy when the student is expected to appear for their interview or hearing in person. But, it's nearly impossible to prevent a student from making an unauthorized audio or video recording if the interview or hearing takes place over the internet. One way to stop students from creating a recording is to ask that students hold their phones up to the screen to show that the recording function is not engaged.

## ***Security and Privacy Concerns Amid a Pandemic***

The Family Education Rights and Privacy Act, or FERPA, protects the privacy of student educational records. Individual institutions must make sure the software they use during the disciplinary process complies with FERPA.

With the sudden onset of COVID-19, schools have been forced to make drastic changes to how they operate, with little time for due diligence. Zoom, in particular, has seen its popularity soar as schools flocked to the platform to meet remote-learning needs.

Zoom's guidance on FERPA compliance, last updated in February 2018, indicates that Zoom

does not share customer data with third parties, and highlights the security measures in place to protect user data. However, Zoom has since admitted that certain customer data was improperly shared with [Facebook](#).

Additionally, researchers have warned against transmitting sensitive information using Zoom because of vulnerabilities in Zoom's encryption methods. While Zoom has been quick to respond to the issue of Zoombombing — uninvited attendees breaking into and disrupting a meeting — and has promised to address other security and privacy issues, the New York City Board of Education, citing privacy concerns, has instructed all schools to stop using Zoom.

For students who are involved in a Title IX disciplinary process, there may be nothing more intimate and sensitive than what is discussed during the disciplinary process. Many students choose to file complaints with their school because it allows them to avoid the stress and public pressure associated with filing a criminal complaint.

Students accused of misconduct want nothing more than to prove their innocence and put the allegations to bed with as little publicity as possible. Many students who subsequently file Title IX lawsuits in state and federal court do so pseudonymously.

In light of student privacy concerns, schools need to make sure the software they are using is secure and the privacy of the students involved is protected. Failure to do so may mean schools are failing to comply with FERPA.

Additionally, school administrative staff conducting investigations, interviews and hearings need to ensure they understand the programs they are using. Staff should take advantage of the information available on the software providers' websites.

This can go a long way in protecting the investigation and hearing process from unwelcome intruders. For example, if a hearing is conducted by videoconference, schools should make sure witnesses do not join the conference before their presence is required. Restricting premature access to the hearing will help maintain the integrity of the process, and prevent individuals from inadvertently hearing or seeing things that are meant to remain private.

## **Conclusion**

Respondents have already started to challenge schools' efforts to continue Title IX disciplinary proceedings remotely, with at least one student filing a motion for a temporary restraining order seeking to enjoin Transylvania University from proceeding with a scheduled disciplinary hearing. The case is *Doe v. Transylvania University*.<sup>[1]</sup>

In Transylvania, the student alleged violations of Title IX and breach of contract, which placed the university in a precarious position; if it delayed the adjudication of the Title IX complaint amidst the current health crisis, the university risked suit by the complainant under a deliberate indifference theory for failing to timely respond to her complaint.

However, proceeding with an online hearing would undoubtedly cause the respondent to continue his claims against the university in federal court. Transylvania, and future cases like it, will be closely watched as an example of how schools are expected to handle Title IX cases in the current climate.

Based on the concerns highlighted in this article, schools will need to act quickly to develop policies to adapt to the use of online platforms when investigating and adjudicating Title IX

cases. Establishing clear policies will help to maintain the integrity of the process while students struggle to reach some sense of closure to this chapter of their lives amid the current catastrophic health crisis.

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[1] Doe v. Transylvania University, No. 5:20-cv-00145-DCR (E.D. Ky. Apr. 7, 2020).