



District Court's preliminary injunction order suggests use of single-investigator model in sexual-misconduct cases violates students' due process

By Eliza T. Davis and Kacey Houston Walker

Introduction

A federal district court recently enjoined the University of Michigan from continuing its disciplinary proceedings against a student-respondent using a single-investigator model and ordered that the University must provide him with the opportunity for a live hearing in accordance with its policies governing non-sexual misconduct. The court's ruling highlights the limitations of using a single investigator to investigate and adjudicate claims of sexual misconduct and underscores the significance of the respondent's right to a hearing and to cross-examine key witnesses, including the complainant. We discuss some of the key aspects and implications of the ruling below.

Background

The plaintiff in *John Doe v. University of Michigan, et al.*, Case No. 18-11776 (E.D. Mich. July 6, 2018), was accused of sexual misconduct by a fellow undergraduate student, thus prompting the University to commence an investigation into Doe's conduct under its Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence ("Policy"). The Policy required a single investigator to interview both parties and other witnesses and gather and evaluate relevant evidence. It afforded the parties the opportunity to comment on the investigator's summaries of their statements, identify witnesses and submit suggested questions, and later to review and comment on the investigator's Preliminary Investigation Report summarizing all witness interviews. Under the Policy, the investigator would conclude the investigation by determining, by a preponderance of the evidence, whether the accused student violated the Policy. The investigator would then submit a final report summarizing her findings to the University's Title IX Coordinator and the Office of General Counsel before the report was given to the parties. The Policy did not provide an opportunity for a live hearing.

The single investigator in Doe's case had issued a Preliminary Investigation Report but had not yet made findings with respect to whether Doe had violated the Policy when Doe brought suit, alleging that the Policy violated the Fourteenth Amendment, Title IX and Michigan's Elliott-Larsen Civil

Rights Act. Doe sought a temporary restraining order and preliminary injunction enjoining the University of Michigan defendants from continuing their investigation, sanctions and appeals process related to the sexual-misconduct claims against him, and requiring the defendants to provide a hearing under existing University policies governing non-sexual misconduct claims.

In support of his request for preliminary relief, the plaintiff argued that the Policy violated his right to due process because due process requires a live hearing and cross-examination in cases where the credibility of the parties is at stake. The court found that the plaintiff would likely succeed on the merits of his claim and granted, in part, plaintiff's request for a preliminary injunction—requiring the University to provide him with a live hearing as soon as practicable.

Key Takeaways

First, the Eastern District of Michigan reaffirmed the Sixth Circuit's previous decision requiring public institutions to permit respondents to cross-examine complainants. In *Doe v. University of Cincinnati*, the Sixth Circuit held that where institutions must make a credibility determination, a respondent must have the ability to pose questions to the accuser. 872 F.3d 393 (6th Cir. 2017). The Sixth Circuit explained that “[c]ross-examination is not only beneficial, but essential to due process in a case that turns on credibility because it guarantees that the trier of fact makes this evaluation on both sides.” *Id.* at 402 (citations omitted). In the *University of Michigan* case, the Policy at issue did not afford the plaintiff the opportunity to ask questions or even know what questions were posed to his accuser or her answers to those questions. Notably, the court did not go as far as requiring institutions to permit a respondent to directly cross-examine the claimant. Rather, the court held that the University must allow the plaintiff to engage in a circumscribed cross-examination by submitting questions to the Resolution Officer, Resolution Coordinator or Student Resolution Panel to be asked of the claimant.

Second, Judge Tarnow's decision requires the University to provide a live hearing and the opportunity to face the accuser. The University's single-investigator model did not provide for a live hearing, but rather solely relied on the investigator's final report, which summarized her findings and rationale in support. The court noted that most policies that have been subject to judicial review in the Sixth Circuit provide the accused with the opportunity to appear at a live hearing. Judge Tarnow reasoned that “[w]ithout a live proceeding, the risk of an erroneous deprivation of [p]laintiff's interest in his reputation, education[] and employment is significant [and a]dditional procedural safeguards would both assist the truth-seeking process and help to ensure the protection of [p]laintiff's constitutional rights.” Therefore, the court found that the University's Policy, which did not afford a live hearing, violated plaintiff's due process rights. This decision suggests respondents have a constitutional right to a hearing where a public institution must make a credibility determination.

Third, Judge Tarnow's decision seems to imply that public institutions may not be able to rely on the single-investigator model going forward. The court reasoned that “[b]ecause of the University's method of private questioning through the investigator, [p]laintiff has no way of knowing which questions are actually being asked of [c]laimant or her response to those questions,” and therefore violates plaintiff's right to due process. By requiring the University to allow some form of cross-examination and a live hearing, the court suggests that a single-investigator model that does not afford those safeguards is insufficient to protect respondent's due process rights.

Fourth, this case indicates that courts may require sexual misconduct cases to be heard in the same way as other disciplinary cases in order to provide the requisite procedural protections. Here, the

court noted that the University used a bifurcated system to address student misconduct and adjudicated claims of nonsexual misconduct under its Statement of Student Rights & Responsibilities that does provide the accused with a live hearing. This may show that courts will require sexual misconduct cases to be heard in the same manner as other student misconduct cases.

Looking Ahead

As this case and other Sixth Circuit appellate and trial court rulings show, litigants are turning to constitutional claims against public institutions, arguing that they have not had adequate opportunity to be heard and cross-examine their accusers. Although such constitutional claims cannot be advanced against private institutions, the issues raised by the *University of Michigan* case may nonetheless have implications for private colleges and universities, which are required to conduct disciplinary proceedings with basic fairness. Indeed, at least one other federal court has held that aspects of a university's single-investigator model, in combination with other factors, might deny a respondent the "basic fairness" to which he is entitled. See *Doe v. Brandeis University*, 177 F. Supp. 3d 561,607 (D. Mass. 2016). Thus, while courts in the Sixth Circuit are requiring public institutions to provide live hearings and the opportunity to cross-examine, it is unclear whether courts will require similar safeguards for private institutions. We will continue to review and report on important developments in these cases and the evolving judicial playing field and new OCR guidance.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Michael J. Cooney at mcooney@nixonpeabody.com or 202-585-8188
 - Steven M. Richard at srichard@nixonpeabody.com or 401-454-1020
 - Tina Sciocchetti at tsciocchetti@nixonpeabody.com or 518-427-2677
 - Eliza T. Davis at etdavis@nixonpeabody.com or 312-977-4150
 - Kacey Houston Walker at kwalker@nixonpeabody.com or 617-345-1302
-