

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DOE,

Plaintiff-Appellant,

vs.

OBERLIN COLLEGE, et al.,

Defendants-Appellees.

Civil Action No. 20-3482

**On Appeal from the United States
District Court for the Northern
District of Ohio, Case No. 1:20-cv-
00669**

DEFENDANTS-APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

Pursuant to Federal Rule of Appellate Procedure 27 and Sixth Circuit Rule 27(d), Defendants-Appellees Oberlin College, the Oberlin College Board of Trustees, and Rebecca Mosely (together, the “College” or “Oberlin”) respectfully move this Court to dismiss the above-captioned appeal as moot.

INTRODUCTION

This case arises from Oberlin College’s investigation of allegations in which Jane Roe (“Roe”), a female Oberlin student, accused Plaintiff-Appellant John Doe (“Doe”), a male Oberlin student, of sexual assault in violation of Oberlin College’s Sexual Misconduct Policy (the “Policy”). Doe filed this action in an attempt to secure an injunction and other relief to prohibit Oberlin from *even* investigating Roe’s allegations, as Title IX, 20 U.S.C. § 1681 requires Oberlin to do. The District Court properly denied Doe’s request to stop Oberlin from conducting its mandated investigation into Roe’s allegations, dismissed Doe’s Fourteenth

Amendment due process claim under 42 U.S.C. § 1983 on the merits given that, as a private college, Oberlin is not a state actor, and dismissed Doe's remaining state and federal claims without prejudice as premature. A copy of the District Court's opinion is attached hereto at Exhibit 1.

In the interim, on July 2, 2020, following an investigation into Roe's allegations and during the pendency of this appeal, a three-person hearing panel at the College concluded that Doe did not violate Oberlin's Policy. *See* Declaration of Rebecca Mosely, Oberlin's Title IX Coordinator and Director for Equity, Diversity, and Inclusion ("Mosely Decl.") ¶ 4, attached hereto at Exhibit 2. Since Roe did not appeal this finding, Doe will not face any discipline from the College based on Roe's allegations, nor will his academic transcript contain any reference to the disciplinary proceedings. *Id.*, ¶¶ 5-6. As a result, there is no possibility that the harm Doe sought to prevent can occur, thus mooted Doe's claims. *See* Am. Compl., R.5-1, ¶ 2, PageID#441.

Doe did not disclose in his Appellant Brief that the hearing panel found he did not violate Oberlin's Policy.¹ Oberlin therefore moves to dismiss this appeal on

¹ Prior to filing his Appellant Brief, Doe relied on the panel's decision in his pending defamation lawsuit against Roe. *See Doe v. Doe*, No. 1:20-cv-01002-JG (N.D. Ohio), Pl.'s Motion for Leave to File a Brief in Opposition to Def.'s Motion to Proceed Pseudonymously Based on July 3, 2020 Title IX Hearing Ruling that Absolved Plaintiff of All Alleged Misconduct, Doc. 20 (filed July 13, 2020), at p. 3 ("[T]he three-member panel found, by a preponderance of the evidence, that the Plaintiff was Not Responsible for the misconduct alleged by the Defendant[.]").

grounds that it is moot because a case or controversy no longer exists between the parties and this Court cannot grant any effectual or meaningful relief that would affect the parties' legal interests. Accordingly, this Court lacks jurisdiction over the subject matter of this appeal.

PROCEDURAL BACKGROUND

Through this litigation, Doe and his counsel sought to prohibit Oberlin from investigating Roe's allegations of sexual misconduct, as Title IX and the U.S. Department of Education require Oberlin to do. Doe initiated this litigation on March 20, 2020, by filing a Verified Complaint in the Lorain County (Ohio) Court of Common Pleas. The Complaint sought a Temporary Restraining Order and a Preliminary Injunction to stop the College from investigating allegations that Doe sexually assaulted Roe. Doe's *Ex Parte* Motion for TRO and Preliminary Injunction, R.1-2, PageID#260-293; Am. Compl., R.5-1, ¶¶ 2, 21, 343, PageID#441, 446, 513. The Complaint also alleged violations of federal due process, 42 U.S.C. § 1983, violations of Title IX, 20 U.S.C. § 1681, as well as assorted claims under Ohio law. Am. Compl., R.5-1, PageID#440-518. Oberlin removed the matter to the United States District Court for the Northern District of Ohio. Notice of Removal, R.1, PageID#1-5.

On March 30, 2020, during a telephonic conference with the parties, the District Court denied Doe's request for injunctive relief and dismissed Doe's

Complaint without prejudice because Oberlin had not completed its investigation into whether Doe may have violated the Policy. On April 1, 2020, Doe filed a motion asking the District Court to reconsider its rulings. Doe's Motion for Reconsideration, R-4, PageID#393-408. The same day, with leave of the District Court, Doe filed an Amended Complaint that confirmed the Court had diversity jurisdiction over his state law claims. Am. Compl., R.5-1, PageID#440-518.

In response to Doe's motion for reconsideration, the District Court held another telephonic conference on April 2, 2020. After hearing from counsel for both sides, The Hon. Judge Dan Aaron Polster affirmed the denial of Doe's motion for a temporary restraining order, and dismissed Doe's due process claim on the merits with prejudice because Oberlin, as a private college, is not a state actor. Apr. 2, 2020 Tr., R.12, PageID#704-716; Apr. 7, 2020 Opinion and Order, R.6, PageID#690-693. Judge Polster also dismissed Doe's remaining state and federal claims without prejudice as premature, stating:

I find all of these premature. I'm going to let this play out. Whatever happens, happens. It may all be moot. Title IX directs the university to conduct this investigation, so I'm just denying all those state claims, and the specific case is premature. I'll let it play out how it plays out.

Apr. 2, 2020 Tr., R.12, PageID#715-716. On May 5, 2020, twenty-eight days after the District Court issued its Opinion and Order, Doe filed a Notice of Appeal. Notice of Appeal, R.8, PageID#695-696. Doe did not seek to expedite his appeal, which had the effect of abandoning his claim for

injunctive relief as Oberlin's investigation proceeded. Doe also secured approval from the Court-appointed mediator to delay filing his Appellant Brief until after the investigation and disciplinary process were completed. *See* June 16, 2020 Briefing Letter, Doc. 33 (resetting the due date for Doe's Appellant Brief until August 3, 2020).

The investigation then "play[ed] out" on July 2, 2020, with Doe being found to have *not* violated Oberlin's Policy. Mosely Decl., ¶ 4. Doe will not face any discipline from the College based on Roe's allegations, nor will his academic transcript contain any reference to the disciplinary proceedings. *Id.*, ¶¶ 5-6.

Doe and his counsel were aware that the hearing panel found that Doe did not violate Oberlin's Policy. Yet rather than disclose this finding to the Court consistent with their professional duty of candor, they filed an Appellant Brief on August 3, 2020 that did not mention the outcome of the disciplinary proceeding that Doe's lawsuit was designed to stop.

LEGAL STANDARD

This Circuit permits parties to file a motion to dismiss for lack of jurisdiction. 6 Cir. R. 27(d). "Because the exercise of judicial power under Article III of the Constitution depends on the exercise of a live case or controversy, mootness is a jurisdictional question." *Demis v. Sniezek*, 558 F.3d 508, 512 (6th

Cir. 2009) (citation omitted). “The mootness inquiry must be made at every stage of a case[.]” *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 691 (6th Cir. 2002) (quotation and citation omitted).

“[I]t is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment [this Court is] reviewing.” *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Established precedent concludes that if “events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed.” *Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 596 (6th Cir. 2004) (quotation omitted); *see also Adams v. Baker*, 951 F.3d 428, 429 (6th Cir. 2020) (per curiam) (“A case may become moot on appeal if an intervening event makes it impossible for a court of appeals to grant any effectual relief . . . in favor of the appellant.”)

“The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.” *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (quotation and citation omitted). A case becomes moot “when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017) (quotation and citations omitted).

FACTUAL BACKGROUND

On or about December 12, 2019, Roe reported to Erica Rau, Oberlin's volleyball coach and a Deputy Title IX Coordinator, a "serious allegation of sexual misconduct" against Doe based on two sexual encounters between Doe and Roe since approximately October 31, 2019. Am. Compl., R.5-1, ¶¶ 156-163, PageID#477-478. The College notified Doe of Roe's allegations against him and the commencement of the Title IX process through an email from Coach Rau to him on February 4, 2020. Am. Compl., R.5-1, ¶ 7, PageID#442. Coach Rau asked Plaintiff for his availability to meet with her and discuss the allegations. *Id.*, ¶ 169, PageID#479. Doe did not respond to Coach Rau, but instead retained legal counsel. *Id.*, ¶ 172, PageID#480.

On February 26, 2020, in accordance with the Policy, Ms. Mosely informed Doe and his counsel via email that based on a review of Roe's report "by the Title IX team, which determined that this report falls within the purview of the Sexual Misconduct Policy and that the College should pursue further investigation," that the College was investigating Roe's allegations. Feb. 26, 2020 Email from Rebecca Mosely, R.5-10, PageID#620; Policy, R.5-2, PageID#562. The College then retained Erin Butcher, an attorney with the Columbus, Ohio-based law firm Bricker & Eckler LLP, to conduct an investigation. Am. Compl., R.5-1, ¶ 113, PageID#466; March 9, 2020 Email from Erin Butcher, R.5-16, PageID#675.

Ms. Butcher proceeded to investigate Roe's sexual misconduct allegations against Doe despite Doe's initial refusal to let her interview him. March 12, 2020 Email from Erin Butcher, R.5-18, PageID#688. Doe then filed this lawsuit on March 20, 2020.

On June 30, 2020, a hearing was held to determine if Doe violated the Policy. Mosely Decl., ¶ 3. The three-person panel determined that Doe did *not* violate the Policy based on Roe's allegations. *Id.*, ¶ 4. Roe did not appeal this finding, so Doe will not face any discipline from the College based on Roe's allegations, nor will his academic transcript contain any reference to the disciplinary proceedings. *Id.*, ¶¶ 5-6.

ARGUMENT

Doe's appeal is now moot given that a hearing panel determined on July 2, 2020, that Doe did not violate the Policy. Mosely Decl., ¶ 4. As a result, there is *no possibility* that the harm Doe sought to prevent through this lawsuit—discipline from the College or any reference to the proceedings appearing on his academic transcript—can occur. *See Kiser v. Kamdar*, 752 Fed.Appx. 272, 274 (6th Cir. 2018) (“An actual dispute does not exist when a party requests relief that would have no effect in the real world.”). Accordingly, given that there is no longer any disciplinary proceeding pending against Doe, there is also no longer any live case or controversy between the parties. Further, Doe has no legally cognizable interest

in the outcome, and there is no effective relief that this Court can grant. *E.g.*, *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017); *Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 596 (6th Cir. 2004). Doe's claims have become moot, thus necessitating dismissal of his appeal.

To be sure, this Court cannot award Doe any effective relief based on him undergoing an investigation and disciplinary process that Title IX mandates, and that concluded he did not violate Oberlin's Policy. The Department of Education has made known that, in order to comply with Title IX, colleges and universities must investigate reports of sexual misconduct. *See e.g.*, Department of Education Office of Civil Rights September 2017 Q&A on Campus Sexual Misconduct (“[W]here the school knows or reasonably should know of an incident of sexual misconduct, the school *must* take steps to understand what occurred and to respond appropriately.”) (emphasis added), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited August 18, 2020). The U.S. Supreme Court and this Circuit have likewise advised colleges and universities that if they do not properly address allegations of sexual misconduct, they face potential liability from student-victims. *See e.g.*, *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 654 (1999) (plaintiff stated a Title IX claim against a school board for its alleged failure to investigate student on student harassment); *Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613, 618

(6th Cir. 2019) (student-victim plaintiff can plead a Title IX claim by showing that that the school had actual knowledge of sexual harassment and that the school's deliberate indifference to it resulted in further harassment against the student).

The District Court recognized Oberlin's legal obligation to address and investigate Roe's allegations of sexual misconduct, stating, "Title IX directs [Oberlin] to conduct this investigation I'm not going to jump into the middle of a mandated Title IX investigation to deal with the state claims." Apr. 2, 2020 Tr., R.12, PageID#716. Similarly, this Court cannot grant Doe any effective relief based on Oberlin's compliance with Title IX in investigating and adjudicating allegations of sexual misconduct on its campus.

Doe's claims also do not fall within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." This limited exception, which Doe has the burden of establishing, only applies where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the *same action* again." *Demis v. Sniezek*, 558 F.3d 508, 516 (6th Cir. 2009) (emphasis added) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Doe cannot show that his appeal satisfies this exception, as required to avoid dismissal.

The exception requires a "reasonable expectation" or a "demonstrated

probability’ that ‘the same controversy will recur involving the same complaining party.’” *Demis*, 558 F.3d at 516 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam)). Irrespective of any complaints that Doe has regarding Oberlin’s investigation and adjudication of sexual misconduct complaints, there is no reasonable expectation, and certainly no demonstrated probability, that Oberlin will subject Doe to another sexual misconduct investigation arising out of Roe’s allegations. As this Circuit has recognized, “‘The [Supreme] Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable.’” *Tigrett v. Cooper*, 595 Fed.Appx. 554, 558 (6th Cir. 2014) (quoting *Murphy*, 455 U.S. at 482); *Resnick v. Patton*, 258 Fed.Appx. 789, 793 (6th Cir. 2007) (same). As a result, the “capable of repetition, yet evading review” exception does not save Doe’s appeal.

In short, Doe’s claims no longer involve a live case or controversy, he has no legally cognizable interest in the outcome, nor can this Court grant him any effective relief. Doe’s appeal is thus moot.

CONCLUSION

For these reasons, Defendants-Appellees Oberlin College, the Oberlin College Board of Trustees, and Rebecca Mosely respectfully request that the Court dismiss Doe’s appeal.

Dated: August 21, 2020

/s/ David H. Wallace

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because the word-processing system used to prepare the motion, Microsoft Word, indicates that this brief contains 2,442 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

August 21, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion to Dismiss Plaintiff-Appellant's Appeal as Moot was filed this 21st day of August, 2020, via the CM/ECF system, which will serve all counsel of record.

/s/ David H. Wallace

David H. Wallace

EXHIBIT 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE,)	CASE NO. 1:20 CV 669
)	
Plaintiff,)	JUDGE DAN AARON POLSTER
)	
vs.)	<u>APRIL 2, 2020 HEARING MINUTES</u>
)	and
OBERLIN COLLEGE, et al.,)	<u>OPINION AND ORDER</u>
)	
Defendants.)	

This case is before the Court upon Plaintiff John Doe’s Ex Parte Motion for Temporary Restraining Order (“TRO”), **Doc #: 1-2**, and Motion for Reconsideration of the Court’s Expressed Intention to Dismiss Plaintiff’s Claims and to Deny Plaintiff’s Motion for a Temporary Restraining, **Doc #: 4**. For reasons articulated below and on the record, the Court **DENIES** both Motions, dismisses the federal due process claim **ON THE MERITS**, and dismisses without prejudice the remaining state and federal claims as **PREMATURE**.

I.

On March 20, 2020, Plaintiff John Doe filed in state court a Verified Complaint and Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction against Defendants Oberlin College and Rebecca Moseley, Oberlin’s Title IX Coordinator. Respectively, Doc #: 1-1, 1-2. Doe, who is the subject of a coed’s sexual misconduct report, challenges Oberlin College’s Sexual Misconduct Policy, contending that the Policy’s procedures, and the school’s implementation of those procedures, are notoriously unconstitutional and discriminatory toward males. Consequently, he alleges claims for selective enforcement and erroneous outcome

under Title IX of the Education Amendments of 1972, a procedural due process claim in violation of 42 U.S.C. § 1983, and state law claims for breach of contract, breach of the covenant of good faith and fair dealing, negligence and promissory estoppel.

On March 31, 2020, Defendants removed the case to federal court based on the Court's federal question jurisdiction over the federal claims and supplemental jurisdiction over the state law claims. Doc #: 1. After reviewing the Verified Complaint and the Motion for Temporary Restraining Order, the Court held a teleconference on Wednesday, March 31, 2020 with Plaintiff's Counsel Larry Zukerman and Michael Lear and Defendants' Counsel David Wallace and Cary Snyder. After discussions, the Court announced that it was going to deny the Motion for TRO and dismiss the case without prejudice.

However, on April 1, 2020, before the Court issued a formal ruling, Plaintiff filed a Motion for Reconsideration of the Court's Expressed Intention to Dismiss Plaintiff's Claims and to Deny Plaintiff's Motion for a Temporary Restraining. Doc #: 4. Plaintiff also filed a Motion for Leave to file a First Amended Complaint Instantly, which request the Court summarily granted. Respectively, Doc #: 5 and 4/2/20 non-document order.

After reviewing the Motion for Reconsideration, the Court scheduled a tele-hearing¹ at 9:15 a.m. the next morning, April 2, 2020. Attending the April 2, 2020 hearing were Plaintiff John Doe and his counsel Larry Zukerman, Michael Lear, Brian Murray and Adam Brown, along with Defendants Rebecca Mosely and Oberlin's representative Donica Varner and their counsel David Wallace and Cary Snyder.²

¹Due to the COVID-19 pandemic and the Court's General Order 2020-5-1, all civil hearings that can be held telephonically must be so held.

²The hearing was recorded by Court Reporter Lance Boardman.

In response to the Court's questions, Counsel for Oberlin stated that the investigation is ongoing and has in fact been hampered by the COVID 19 pandemic since there are no students on campus at this time. Furthermore, the university has not yet determined whether there will be a hearing when the investigation is concluded. Oberlin's counsel stated that if the university decides to hold a hearing, the hearing can be held via videoconferencing if not in person, and the university will direct both the complainant and John Doe to appear. The Court observed that while Oberlin may direct both complainant and John Doe to appear at the hearing, Oberlin cannot compel their appearances; the Court noted, however, that adverse inferences may be drawn from such absences.

With respect to the procedural due process claim, the Court rejected John Doe's argument that Oberlin is a state actor based on its receipt of state and federal funding, and ruled that the due process claim does not apply because Oberlin College is a private university and not a state actor. Thus, the procedural due process claim is dismissed on the merits.

With regard to the Title IX claims, the Court ruled that they are premature because no hearing has been scheduled. Consequently, the Title IX claims are dismissed without prejudice.

With respect to the breach of contract claim, John Doe contended that all parties had previously agreed to handle this situation via informal resolution and that changing the agreed resolution from an informal to a formal format by the university constituted a breach of that agreement. The Court ruled that the breach of contract claim was premature. The Court also determined that John Doe's argument that the College's handling of this matter was negligent was also premature. In sum, the Court dismissed all state law claims without prejudice as premature.

II.

Based on the foregoing, the Court **DENIES** the Motions for TRO and Reconsideration for the reasons discussed above. **Doc ##: 1-2, 4.** The Court dismisses the federal procedural due process claim on the merits. All other state and federal claims are dismissed without prejudice as premature.

IT IS SO ORDERED.

/s/ Dan A. Polster April 7, 2020
Dan Aaron Polster
United States District Judge.

EXHIBIT 2

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DOE
Plaintiff-Appellant,

vs.

OBERLIN COLLEGE, et al.,
Defendants-Appellees

Civil Action No. 20-3482

**On Appeal from the United States District
Court for the Northern District of Ohio,**

District Court Case No. 1:20-cv-00669

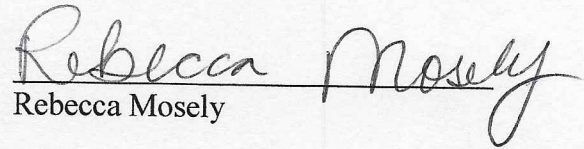
DECLARATION OF REBECCA MOSELY

I, Rebecca Mosely, declare that the following is true and correct based on my personal knowledge and if called as a witness I would testify as follows:

1. I am the Title IX Coordinator and Director for Equity, Diversity, and Inclusion at Oberlin College, a position that I have held since July 1, 2016.
2. In this role, I am responsible for, among other things, helping to develop and administer Oberlin's Sexual Misconduct Policy (the "Policy").
3. On June 30, 2020, a hearing was held to determine if John Doe, a male Oberlin student and the plaintiff in this matter, violated the Policy based on allegations of sexual misconduct that Jane Roe, a female Oberlin student, made against Mr. Doe. I attended this hearing, which was held via the Zoom video communications application.
4. On July 2, 2020, the three-person hearing panel determined that Mr. Doe did not violate the Policy with respect to Ms. Roe's allegations.
5. Ms. Roe did not appeal the hearing panel's determination.
6. As a result, Mr. Doe will not face any discipline from Oberlin College due to Roe's allegations, nor will his academic transcript contain any reference to the disciplinary proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 2020.


Rebecca Mosely