

Courtney Bullard:

Welcome to the Law and Higher Ed Podcast. My name is Courtney Bullard, and I am your host. If you want to learn more about myself and my background, please go all the way back to episode one of this podcast. In short, I'm an education attorney specializing in Title IX compliance. There's no question that these are unprecedented times for everyone, including school districts and institutions of higher education. COVID, killer bees, natural disasters, and now the new Title IX regulations issued by the Department of Education with an implementation deadline of August. My team has been hard at work with resources to address the virtual world. Now, of course, we're also working on assisting you with coming into compliance with the new regs. Here at ICS, we have a lot of different offerings. First, we have a lot of summer courses, virtual, of course, including investigator, adjudicator, and hearing officer training, all of which will be compliant with the new regulations.

We're also part of what I call a Title IX think tank. It is 50 plus lawyers from across the country who are contributing to a joint guidance on the new regulations. And that's hosted on SUNY's website, SUNY standing for the State University of New York. Finally, we're partnering with school districts and institutions of higher education on policy revision, and review and implementation to get them in compliance with the new regs by the current stated deadline. You can find out about our events, including the free webinars, on www.icslawyer.com/ics-events. If you're interested in working with us to help your institution or school district come into compliance, you can always email me at chb@icslawyer.com, or use the contact us button on our website.

Jake Sapp:

We have not only over the past year or two, but over the past week or two, we have seen federal district courts granting state injunctions against Department of Education regulations and against other Trump executive administrative agency decisions.

Courtney Bullard:

When I was thinking through episode topics in light of the new Title IX regulations, of course, litigation challenges came to mind, and immediately my guest this week also came to mind to talk through this topic. Jake Sapp is the Deputy Title IX Coordinator and Compliance Officer for Austin College. He also holds a JD from Stetson University College of Law. He has spent a lot of times speaking on the topic of Title IX and all the legal trends that we've seen in the court system over the past couple of years in studying that topic. And so he's really well-versed on everything that has both happened in the past, and of course that's happening to date. So very excited to have him join us, and I think you will learn a lot from him as you listen to today's episode on everything that's happening in the court systems with Title IX. Here's part two of my conversation with Jake.

Anything else on those challenges that we haven't discussed that you think we need to discuss? Anything else?

Jake Sapp:

If we're going to talk about the actual lawsuits, just real brief, we have the Know Your IX lawsuit filed in Maryland, which they're really challenging the definition of sexual harassment, the mandatory dismissal, formal complaints, the actual knowledge standard. And this is a really interesting argument, and this is actually something, it's so much of what is brought up in these complaints have already been at least initially addressed in the actual preamble for the Title IX. And one of the more interesting arguments I think, is that the agency, the Department of Education is only enforcing this burdensome or this

comprehensive of a regulation for sexual misconduct. However, the department is responsible for also enforcing ADA, section 504, Title VI. And the Know Your IX lawsuit in particular raises this and says, it's arbitrary and capricious for you to have this comprehensive and burdensome of a regulation for Title IX, but not for these other anti-discrimination statutes that you're responsible for enforcing.

And the real quick response basically by the department without getting into too much was, well, that's not required. We don't have to have uniform regulations under different statutes that we enforce. So that was an interesting piece for that one. The second case is the attorney general case filed in the District of D.C., Washington D.C. And this is really great. I would really encourage anybody to just go take a look at it, just Google attorney general case and Title IX, you'll find it published online.

Courtney Bullard:

It's also, there's the link under our resources on our website, just FYI, that kind of has-

Jake Sapp:

There you go. You don't need to Google.

Courtney Bullard:

... everything that keeps coming up. If you want a quick link, you don't even have to Google.

Jake Sapp:

Yeah. Just go directly to ICS, or [crosstalk 00:05:42] ... so you can get all the resources. The attorney general's case, some of the different things that they're arguing are that the Title IX rule is violating FERPA. So they're bringing up other federal laws. They say that the regulations are taking away the flexibility that school administrators need to enact grievance procedures and maintain the safety at school. That is an argument directly pulled from the Supreme Court. And it wasn't a Title IX case, but it was a student discipline case. Very, very popular regarding student due process for behavioral decisions, not academic decisions. Schools are given way more leniency and flexibility in academic decisions by the Supreme Court, and that's the Horowitz case that you can look up. But the regarding disciplinary standards from the Goss case, they specifically said, okay, the state law gave you basically a protected interest in continuing K through 12 education, and administrators aren't allowed to suspend you for more than 10 days without some sort of notice and an opportunity to be heard.

And the court specifically noted that, yeah, we have this requirement, but also administrators need flexibility. Davis, administrators need flexibility to do this, and courts have to be careful when going into overturn, call it, or education administrator's decisions. And the attorney general case is recognizing that, and like I said, they're all siding to D.C. cases. And so that's really strong for them. Particularly in perhaps there's stronger precedent for the injunction to be granted at the D.C. court versus the Maryland court. But again, we're going to see how that plays out. The attorney General case identifies 19 different clauses that are arbitrary and capricious, and then they also identify three parts that didn't follow the procedure required by law that we've talked about.

The third case is the Victim Rights Law Center. Again, not in accordance with law, they bring up the logical outgrowth argument. And they say that, while you're trying to, the final rule is actually contrary to the purpose of Title IX. And they say, it's also contrary to the Supreme Court precedent. I'm not so sure about what exactly the precedent they're talking about. We'll have to see what exactly they're arguing. And again, they bring up the arbitrary and capricious excess of statutory jurisdiction, they didn't follow the procedures required by law. They also brought up a really, this is something that's

unique to them ... Or this may have been the last lawsuit from the State of New York, as you and I know, I followed on Twitter Executive Order 12866, which is the procedure that the agency has to give the regulation over to the Office of Management and Budget and OIRA in the Office of Management and Budget, and they then have to have the rule approved by the attorney general under Executive Order 12250.

Unique to this lawsuit is that as of right now, we haven't seen anything that indicates the attorney general has approved these rules. And so that is something that is substantively required under the original Title IX statute. It was the president had to approve the final regulations, but then Jimmy Carter issued an executive order, which said for civil rights discrimination regulations, the attorney general has to approve them. We haven't seen that done yet. And then the attorney general brings up the only one so far, they bring up a violation of equal protection under the Fifth Amendment claim. So this is the only claim that's not brought under the Administrative Procedure Act. They're basically arguing that the department was motivated at least in part by discriminatory and baseless gender stereotypes that women and girls lacked credibility with regard to sex based harassment, and they're saying that that stereotype misunderstands the actuality of what's going on in schools around the country.

And in the State of New York case, again, it wasn't in accordance with the law. They exceeded their statutory authority. It conflicts with FERPA. It conflicts with section 504 of the Rehabilitation Act. This is where they argue to conflicts with 12866 and other regulations. So you can see, and I'm sorry, I don't mean to ramble, but you can see there's not too many different causes of action, but there's so many different pieces under each challenge.

Courtney Bullard:

Yeah. And you're not rambling at all, this is extremely helpful in trying to succinctly summarize each one and show the commonality, but also the differences is so interesting, and you're so appreciated. So we have all of these arguments, of course, some overlapping, some different. Do we anticipate more challenges, anything that you see on the horizon?

Jake Sapp:

I certainly would we have, or I would look forward to seeing other attorney generals join, particularly the attorney general of the 18 attorney general lawsuit. But I'm pretty sure we're going to see more challenges, but I don't know if we're going to see anything different than what's been raised so far. The Know your IX Lawsuit was dropped immediately, very quickly, very quickly after the initial regs were published back in May. And these other ones, the State of New York case I think was just filed the first week of June. So, we've had a progression with the four of them so far. I think it's certainly possible that we'll see more advocacy groups filing new complaints. But the main ones, in my mind, the main players, if you will, have already filed their complaints. So the State of New York, they've already filed their first amended complaint yesterday on the 18th.

Courtney Bullard:

Yeah. Well, and we don't have responses. There's so much to watch in this area.

Jake Sapp:

Yeah. So this is also the key thing. I think that the department is going to wait to respond for as long as possible so that they don't show their hand regarding, so that if you're going to file a complaint, you

don't have the luxury of or the privilege of already having the Department of Education's direct responses. So I think they're going to wait for as long as possible before they respond substantively, if you will.

Courtney Bullard:

I think you're right. I think you're right.

Jake Sapp:

But I think we may see some more. Maybe, possibly, obviously so we have challenges from state attorney generals, and then we have challenges from advocacy groups. One thing I'm really interested to see is if there's going to be a group of private colleges challenging the regulation's implementation of public school constitutional due process protections to a private business. We haven't seen that, and those have been raised in these lawsuits, but I'm interested to see in whether there will be a conglomerate or something of private schools, because essentially these are private businesses. Yes they accept the federal funding, which qualifies them as having to follow Title IX, but they are distinctly different in their business operations, they're not arms of the state law. They're not arms of the state. So I think we could see a challenge from that, and I would look forward to seeing what the courts do with that.

Courtney Bullard:

So one last thought, unless you have others on the legal challenges. I mean, I know we could talk about it forever. But the million dollar question is the likelihood of success. Are we going to have to comply with all this? And I know the quick answer is we don't know, but just any other closing thoughts on that?

Jake Sapp:

Not only over the past year or two, but over the past week or two, we have seen federal district courts granting state injunctions against Department of Education regulations and against other Trump executive administrative agency decisions. I can't give you a dispositive answer yes or no. I think that there's enough substantive argument in these cases that at least one of them is going to get the initial injunction granted. So I think there's a strong possibility that we're going to see the enforcement date on August the 14th not actually be the date of enforcement, and this is the same thing that I told you, I tell it to everyone who asks me Title IX questions, you really have to ask your federal court judge. They are the ones that decide these things, not only with agency regulation challenges, but with actual, are we going to follow the Coleridge understanding of actionable sexual harassment from the Sixth Circuit, or are we going to turn to the Tenth Circuit Farmer case?

Is further actionable sexual harassment required to make out a deliberate indifference case? And this is actually I guess, a really important thing for individuals involved in this work to understand, depending on what jurisdiction you're in, you could have drastic different compliance obligations just because of the courts, whether your judge has been active, and in what way they've been active in regulating Title IX obligations. So just because we have a ruling over here means it's not applied over in another jurisdiction. I think it will be interesting, to say the least, to see what federal court judges do with this. But I would not be surprised if we see the, at least one of the injunctions granted. It'll be appealed obviously to the circuit court.

Courtney Bullard:

I know it's so hard to say. Well, and let me say this. Am I not correct, that even if they're successful in an injunction, it could still go forward and not have success in the lawsuit [crosstalk 00:16:57]-

Jake Sapp:

Oh, of course.

Courtney Bullard:

... and then the implementation deadline will revert back to the 14th? It's not like the courts are going to say, we enjoin this, but now you have another six months to get in compliance, that's not their role.

Jake Sapp:

Right. That would not be something I would expect to see. So yeah, that's exactly correct. Even if the initial injunction is granted in one of these cases, that is in no way, shape or form a guarantee that at the outcome of the court of the legal case, the court is going to rule that the Title IX rule is wrong or violates the law. And they could say that the regulations do indeedly are valid and they do meet all of the requirements under the Administrative Procedure Act. And this is the same process, this is essentially the same substantive process followed by the Congressional Review Act, which is going on right now. And when the regulations were published, because it was determined by OIRA to be a major rule, there's the requirement that Congress has 60 days to review any agency action if they want to, and if they have the numbers, they can file and go through a joint resolution of disapproval regarding the regulations.

And if that is passed, then that specific rule is prohibited from going forward, and the agency is prohibited from putting forth any rule that has substantively the same material or requirements as the old one. Now that's very unlikely to happen. But in that instance, if that challenge went forward but then failed, then the regulation would go into effect on the original listed effective date.

Speaker 3:

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Courtney Bullard:

Okay. I didn't want to complete our podcasts without kind of talking about things that just happened this week with the Supreme Court, and seeing if you could share with us a little bit a quick summary of what's happened. I saw with one of our colleagues on Twitter, who was like, if you're into brackets, you're a betting person in athletics and you bet on brackets, I don't want to steal and act like this was my concept because it wasn't, but I just thought it was so true, it was like, you would have probably lost

in your predictions of what the Supreme Court would do with these two cases we're about to talk about, some pretty landmark cases. So, let's talk first about [crosstalk 00:20:35] the one that LGBTQ funds. Yep, let's talk about that one.

Jake Sapp:

Yeah. So the Title VII Bostock case, and this is the case that I have more familiarity with because it relates directly to Title IX. [crosstalk 00:20:45].

Courtney Bullard:

Yeah. And we can really honestly just talk that one and its implications on Title IX. We don't even have to get into the other one.

Jake Sapp:

Sure. So just a real quick, it's really necessary, to understand the history of Title IX is to understand the history of Title VII and Title VI. Obviously Title VI and Title VII come from the Civil Rights Act of 1964. Title IX is not part of the Civil Rights Act of 1964. Title IX is Title IX of the Education Amendments of 1972. So different laws. But here's the deal, by the time that Title IX was being litigated in the federal courts, Title VI had already had a good amount of precedent. And so for the first 30, 40 years of application in the courts or of adjudication of the courts of Title IX, they were looking very heavily at Title VI. More recently, Title VI cases have gone down and Title VII has exploded, and courts have looked at Title VII to help them understand obligations under Title IX. But Title IX and Title VII are different in the sense, that Title IX is a spending clause in legislation law, which means it's basically a deal that Congress made with the states. If you follow this law, we'll give you money.

Versus Title VII, which is not spending clause legislation and is an outright prohibition on certain activities. So they have different origins and different purposes. Title IX is supposed to stop the schools from intentionally or allowing non-intentional discrimination on the basis of sex, versus Title VII, which is to give employees the opportunity to be paid for the damage they received at the workplace. And so with having that understanding that they play off of each other, not always the same all the time, and knowing that Title IX's obligations have been understood by looking at Title VII precedent, the new case that the Supreme Court ruled on this week, Bostock, is extraordinarily important. It encompasses three different cases, Bostock who was a county employee in Georgia, the Zarda case, and then the funeral home case.

And the one that I focused on the most is the funeral home case that is basically dealing with, because out of the Sixth Circuit, they use the Price Waterhouse plural opinion from the Supreme Court to identify that, under Title VII it's discrimination to A, either intentionally say you're transgender, I don't like that, I'm intentionally discriminating against you because of how you identify, or in the alternative, it's also discrimination to make employment decisions based on sex stereotypes. So it's not, you're transgender, I'm discriminating against you. It would be, you're a man, I see you as a man, but I don't see you as doing or acting like a man should, therefore I'm going to fire you. So that's what the Sixth Circuit says was the discrimination. The Supreme Court came this week, and they put all of these three cases together and they ruled that under the current Title VII law, it is employment discrimination if employment decisions are made on the basis of sex, including sexual orientation and gender identity.

So it's now illegal in the employment context for any adverse action to be made against you, and it doesn't even have to be the whole decision, if any part of the decision was justified or enacted because of your sexual orientation or your gender identity. That qualifies as discrimination under Title

VII, and you should contact the EOC immediately. So that's the big holding in this case under Title VII. Now, what it has to do with Title IX is extraordinarily important. Remember that so much of Title IX comes from Title VII, and it wasn't necessarily addressed in the opinion, but it was very heavily addressed in Justice Alito's dissent. Justice Alito specifically talked about, basically made a slippery slope argument in saying that, okay, because we've held this way in Title VII, what are all of the other federal laws that deal with sex and use the definition of sex, and how is this going to play into it? Specifically he raised the discussion of athletics and housing.

The housing one, I'm not too sure to what extent it's going to take off, but I think that there is the Title IX and athletics is ripe for review regarding the transgender status or gender identity issue. Mainly because we already have lawsuits from the lower federal courts that were waiting for this decision, but we also have a couple of state laws that are contradicted by this ruling. Specifically, we have the Idaho state law, which signed into law, I think last month, or maybe two months ago, sometime when COVID was going on, it's all been a blur, that basically said K through 12, higher education, JUCOs, everything, all schools in the Idaho system are no longer allowed to allow transgender females from competing on female teams. They cited to the sex as defined biologically at birth. They said, that's the definition of sex. And then they said that gender identity in athletics leads to an unfair competitive scenario or experience for what they identify as females by birth, having to compete against what they identify as males at birth, who have what they identify as more athletic ability or a stronger athletic ability.

So that's the Idaho law. And there's already been a complaint challenging that law filed, and that's very likely going to incorporate the Title VII Bostock case. And then there's a big issue right now going on in Connecticut. The Connecticut school board put together a regulation that basically follows what Idaho did, and that challenge is going on right now. And again, I would very likely imagined that there's going to be an updated argument citing to the court's ruling under this that says it's discrimination to make any adverse action based on gender identity or sexual orientation, and they're going to bring that into Connecticut. So I think that those are two extraordinarily salient and specific instances of the Title VII ruling making its way into Title IX's implementation at the federal court level. That's only the first side of it, that's only one side of it.

And many schools have traditionally prohibited discrimination or covered discrimination on the basis of gender identity, especially over the past decade. Now they're going to have more substance to do that. And I do think that we're going to see an increase in legal challenges against schools, K through 12 and higher education, about not sufficiently responding to harassment based on transgender status or sexual orientation. And then of course the piece of this that everyone knows about are all of the states bathroom laws, bathroom bills, I think as they have been noted. I do think that there is going to be a major play in challenging those laws, wherever they exist still, or district regulations regarding that challenged using this Supreme Court precedent.

Courtney Bullard:

Yeah. No, I know. Literally I've had you talking for over an hour about all this, and I know there's even more we could discuss.

Jake Sapp:

Oh, there's so much.

Courtney Bullard:

Yeah. Thank you so much for synthesizing all of this. So I want to just point out that there's lots to watch and learn. You are very active on Twitter @jakehigheredlaw, and we'll have that the show notes. But you're constantly posting new developments, new cases. We could talk for another hour easily on just Title IX. When we met we were talking about this, the evolution of Title IX litigation over the past six to seven years, that is just, I mean, there's so much. Right now, of course the focus is on what's going to happen with these new regulations and challenges, but there's plenty of areas where district courts have made rulings that will implicate ... I don't know, it's just crazy. Yeah, so many things.

Jake Sapp:

Absolutely. I'm doing a webinar series right now with my alma mater law school, Stetson. And we've spent a lot of time talking about from the Supreme Court perspective and then from the lower federal courts, and then we're also going to be doing from the state law level how these courts have evolved Title IX. And then once we have that first evolution, we have the other courts expanding those recognized causes of action. And so, yeah, you're exactly right. It's been pretty wild.

Courtney Bullard:

I call it the wild wild west.

Jake Sapp:

I mean, it really is. It is constantly expanding. The traditional understanding of Title IX was athletics, and then over the past couple of decades, it's been about, ever since '98, '99, responding to complaints of sexual assault by teachers and students with Gebser and Davis. And now we're transitioning to Title IX as being ... Look at the Groover case out of the Fifth Circuit, and then you look at, oh God, the Mikulski case out of Utah, those are both extraordinarily tragic cases where schools failed to respond and it led to a student death, or that's what they're arguing is it led to a student death. But they're outlining the school's obligations using Title IX, and saying that you were deliberately indifferent to my reports, and the reason you were is because I was a woman complaining about this, or I was a fraternity member and you don't enforce rules against fraternity members like you do against sorority members. And that's why [crosstalk 00:31:55]-

Courtney Bullard:

Yeah. And for those of you listening, I had the attorney for the Groover family on one of my episodes, so definitely go back if you want to hear about that. [crosstalk 00:32:03].

Jake Sapp:

Oh, that's amazing. Yeah, that would be an amazing opportunity to hear that.

Courtney Bullard:

It's really interesting. So go listen. But no, I agree with you completely. And you mentioned this and I just want to make sure it's clear. Obviously you're working on a lot of things and I know you've been speaking a lot, but Stetson's doing a webinar, is it series? And if somebody was interested in that series, how would they find it? We'll make sure it's in this show notes too.

Jake Sapp:

Sure. So we're doing a three part webinar series, about an hour and a half each piece. The first one was on the Supreme Court and Title IX, the second one was on the federal appellate courts and Title IX. Those have already been done and recorded. And the third one is upcoming on June 24th, which is going to be intersections of Title IX with state law. And all of these, you can just go to Google and then Stetson Law Webinars. You'll see the link for the Stetson Center for Excellence in Higher Education Law and Policy. Just click there, then webinars, that'll all be listed there. And then a really exciting opportunity, I'm also going to be working on a Title IX training, a pretty comprehensive training for coordinators, investigators, and whatnot with NASPA, and that's going to be coming out later over the summer. I think there's still details that they're working out on their side. But yeah, there's a lot. I mean, anyone in the Title IX world, there's no lack of work, there's no shortage of work to be done.

Courtney Bullard:

No, there's not. And I was actually talking to someone today and they're like, we signed up for all your trainings and we love them. And I love that. Obviously we have tons of trainings that we're working on and that are coming out. But I'm always a fan of, there's plenty of work for everybody. Collaboration is key. Listening to other webinars, hearing and participating in other trainings if you can never hurts. I love hearing different perspectives. We just talked about litigation alone is the wild wild west and is an ever changing area. So definitely check those out. We'll make sure that they are in our show notes as well, and make sure to follow him. Our team's always like, this is maybe going to crack you up, I don't know, but my paralegal, Susan, who is a lawyer, she's actually brilliant, but she's like, Higher Ed Jake just put out blah, blah, blah. That's how we refer to you on everything.

So make sure to follow him. And if you're somebody who loves to get in the weeds about all this stuff and super interested, of course lawyers are, but some administrators, they go one way or the other. They're like, I don't even want to know what regulation you're citing to when you're training me, I just want to know practically what I'm supposed to do. And then you have the complete opposite that are like, I want to get in there and I want to know it all. And right now everyone's so busy. All of you folks boots on the ground are so busy. So hopefully this podcast gives an opportunity to listen and kind of get caught up, but also following on Twitter, a great way to kind of stay on the forefront of what's going on because Jake is on it. So I so appreciate you. I really appreciate your time. And thank you, thank you, thank you for synthesizing all of this, and I know much to come. And like most of my guests, I have a feeling I'll have you back as we see more developments happen in this area.

Jake Sapp:

Oh, I appreciate that, Courtney. Thank you so much for having me today. After planning for six, seven weeks, I'm really happy that we were finally able to sit down and just go through at least a brief overview of what the heck is going on with Title IX right now. [crosstalk 00:35:27] So thank you very much.

Courtney Bullard:

Yeah, no, I appreciate it. I learned so much. Yeah. Thank you.

Thanks for listening to this episode with Jake Sapp. As you can see, there's so much to discuss that we had to break it up into two parts. Jake mentioned at the end of the episode some upcoming webinars that he has going on, so be sure to check those out. And all of that will be in our show notes. Be sure to continue to follow ICS for any more upcoming information as we continue to watch this litigation. Please stay in contact with us through all of our social media sites. We're on LinkedIn. We have an ICS page, but we also have my page, as well as one for Betsy Smith. Instagram, Twitter, and

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