

Courtney Bullard:

Hey there, Courtney Bullard, host of the Law and Higher Ed Podcast. I hope all of you out there listening are hanging in there and are safe and healthy. This podcast was really fun to be a part of. I'm sharing with you me as a guest on the podcast called Higher Ground with John Graff. Scott Schneider was also a guest on the podcast, and we discussed COVID, we discuss the NPRM and the implications of the NPRM, and so much more. Had a lot of fun with these two who are colleagues that I know and respect in the industry. Scott Schneider was a former guest in one of the earlier podcast episodes. I hope you enjoy the episode as much as I did.

David Yas:

Hi, this is David Yas at the Boston Podcast Network hoping you are staying safe and healthy during this period of precaution over the corona virus. It's difficult to connect with your clients and contacts in a period such as this. Here we continue to produce podcasts that allow you to connect with the people that you want to reach. You've got a rapt audience like never before. People are home, they're listening and they're waiting to hear from you. We can create a professional podcast with a quick turnaround and do the whole thing remotely so you don't have to leave your home. Get in touch with us at pod617.com. From pod617.com, the Boston Podcast Network, it's Higher Ground. Now here's your host, higher education attorney John Graff.

John Graff:

Love it, love the song. Welcome back, Erin and Dave. Its been a while since I've seen you guys face to face. Good to see you. Hopefully we'll get back in the studio in person soon. I miss that, definitely.

David Yas:

Some day, some day.

John Graff:

What's that?

David Yas:

Some day.

John Graff:

Some day it will happen, some day. Right. You want to make a prediction on when that day is going to be?

David Yas:

No. I've given up on predictions. Every one of my predictions has been wrong. I give up. The world makes no sense. Tom Brady's on the Buccaneers.

John Graff:

I would like to not talk about that, please, ever again.

Courtney Bullard:

Yeah, that's a sensitive subject for a lot of people.

John Graff:

Yeah, for sure. For sure.

Courtney Bullard:

We're not going to go into that. No.

John Graff:

No, no. Welcome back also everybody who's out there kind enough to tune in and listen to us for a bit today. We know your time is valuable and that you choose to spend it with us means absolutely everything to us. Last time we talked was back on March 20. We were talking about the corona virus impact on higher education. Boy, have things changed in just the course of not even 30 full days at this point. You recall that we had my good friend and law partner Pete [Louis Drawn 00:02:43] who had a lot of practical advice for employers including higher ed on how to manage the COVID situation. I wanted to take from COVID getting because we're just all inundated with it at this point. Nevertheless it's still impacting some of what we do in higher ed and how we do it.

Some of that relates to Title IX. Rumor has it that the Title IX regs are imminent. As we all know there are some radical changes, I use that term intentionally. There are some radical changes in the Title IX regs. We've been hearing that they're imminent for many, many, many months. Are we really getting close? Thus the episode today: the new Title IX regs, are they imminent and what does that mean? We're joined today by two very prominent Title IX minds and all around good people to help us figure out what's happening with these regs in higher ed in light of the pandemic and in light of the regulatory changes.

Dave, help me welcome Courtney Bullard. There you go. Courtney Bullard is a lawyer and owner of Institutional Compliance Solutions with, based on the website now, over 10 years experience representing institutions including eight years as a university system attorney. I've got about eight months as a system attorney, Courtney.

Courtney Bullard:

Really? I didn't know that.

John Graff:

Yeah, yeah. I was in house for a stop over. I was in house council. Courtney served as a trusted advisor through the chancellor, vice chancellors, athletic director, director of office. That's what it says.

Courtney Bullard:

Just a lot of people.

John Graff:

A lot of people.

Courtney Bullard:

A lot of higher ups.

John Graff:

Importantly, the Title IX coordinator. Courtney is also the host of a podcast that I like to listen to, which is the Law and Higher Ed podcast and is a nationally recognized attorney for her contributions to news media including the chronical of higher education. I've read your name there. Inside higher ed, I've read it there. Vice news on HBO, which I have not seen yet. Courtney is also the creator of Title IX University, which is an online digital platform that provides Title IX training and also has some triage expertise, remote triage expertise which we're going to talk about later. Now, before I turn to our next guest, I just want to note something that's very unique about how Courtney and I met. Courtney, do you remember where we met?

Courtney Bullard:

I feel like you told me and now I don't remember. You're putting me on the spot.

John Graff:

If I say the name Mohegan Sun, does that ring a bell?

Courtney Bullard:

Oh, that's right. Yes, yes. We both spoke at the summit.

John Graff:

At a Title IX conference that was actually held at Mohegan Sun of all places. For those of you who don't know what Mohegan Sun is, what? A casino.

David Yas:

Literally had no idea where that was going.

John Graff:

Kind of an interesting place for a Title IX conference, don't you think? An environment where vice prevails. Dave, help me welcome Scott Schneider now. Oh, jeez. Oh, man. I saw that [crosstalk 00:06:11]. Scott Schneider, where does one even begin? Scott's a partner at-

Scott Schneider:

Not at the Mohegan Sun, that's for sure.

John Graff:

Oh, I'm sure it's more sorted than that. Scott is, according to his website and I agree with all of these statements, a prominent litigator and a sought after advisor on Title IX labor and employment law issues, and risk management concerns within student affairs. He's a very seasoned investigator, a very knowledgeable Cleary mind. Most people don't know this about Scott and me. For years, I did the NACUA lawyers to new lawyers, new to NACUA thing. I did their Cleary intro training. Then one year I didn't get invited back. I was like, "Oh, what is this all about?" Of course, you know, I read that Scott Schneider has taken over for me. I thought at the time, "One of two things has happened: either NACUA was loosening its standards. Or I need to up my game." Either way, I attended his session and I thought it was great.

Scott Schneider:

They didn't do any background check that year and thank goodness for that. Yeah.

John Graff:

They would have had you out at the beard, man.

Scott Schneider:

Yeah. I think the beard was a little less unruly then.

John Graff:

Well, either way, we're grateful to you both for joining us. You bring a lot of wisdom to the discussion. Let me just tee it up, we've got Title IX regs that we have been promised will be published now since back in 2019. Who knows whether they're actually coming out right away. I've got some informal intel that indicates that they may be out towards the end of April, some time in May, and that they're being held up right now because of some internal logistics issues within department of ed. I've also heard a rumor that the compliance deadline would be some time towards the end of the summer.

Obviously, we are shut down in higher ed right now in terms of on campus learning. I imagine that the shut down might impact how swiftly we're actually expected to comply with these things. There's another wrinkle. I'm also hearing the word on the street that several state attorney's general are planning to file a lawsuit against the department of education to enjoin enforcement of the regulations. We've got a contingent of people who are lawyers on this call and then some not, who are on this conference, and then some non lawyers. Scott, as a "prominent litigator," help us understand what is an injunction, what does that mean when I tell the world that, hey, somebody's going to file an injunction motion against the department of ed?

Scott Schneider:

Yeah, in this context, I think the most basic way to explain it is to say, "Court, we want you to step in here and say you don't have to comply with these regs at this point." That's the, I think, the best, easiest way to explain it. I was thinking about, we were talking about this earlier, the last time that I remember a high profile reg state attorney general's deciding to fight it was the FLSA changes back at the end of the Obama administration. They were going to change, I think, the over time rules to basically make it more difficult for employers to claim exemptions and for more employees to be covered by the overtime rules.

There was, I think, about 20, 25 state attorney generals who got together and filed the lawsuit. It was here, I'm in Austin. It was here in the eastern district of Texas where a court basically came back and said, "No, we're enjoining enforcement of these new regs or this new rule." Again, the net impact of that was it was as if rules were published and nobody had to follow them. That's if we go down that route, that's what I would expect to see here.

I don't know which state, I can't imagine for instance on this one, like Texas would be involved in that. It would be interesting to see which states get together. I think Cuomo has been pretty outspoken on this. It would basically be a collection of states getting together, going to a court and saying, "Block enforcement of these regulations."

John Graff:

Courtney, your sense as to whether higher ed just generally would like to see these regulations in their current form blocked?

Courtney Bullard:

I think in general yes, especially with everything that's going on with COVID. They've got enough on their plates. I think the general consensus, at least for my clients, would be not to have to add something else. On the flip side, I also think there's a lot of folks, especially like myself that's like, "Let's just get on with it." If we're going to have to comply and this is going to happen, let's just do it so that we can move on with our lives instead of all these conspiracy theories every other week on when they're going to drop and if they're going to drop, whether they're going to drop in the same form and how much money is it going to cost to come into compliance, and all the other things that are going to happen.

I think that as we've already talked about, higher ed has a lot on its plate. To some degree, and I know we'll get into this in a minute, but some Title IX offices are winding down. They don't have as many reports coming in. Yeah, I mean, the summer could be a time to get into compliance if these regs are going to come. By the same token, personally, people are dealing with a lot as well. It's not all about their jobs when they're trying to work from home. I don't know. My feeling is, like, let's just get on with it. Let's just do this.

Scott Schneider:

Yeah, that's where I am too. I feel like we've been talking about this for how long, John? It's like two years now?

Courtney Bullard:

Yeah. It's like two years. It's like beating a dead horse.

John Graff:

Yeah, I think it's two years. I think if my memory serves me, last summer, Scott, we did a pog episode where we talked about the new regs and what was going to happen.

Courtney Bullard:

So much in the new regs, at least in the jurisdiction I'm in, the circuit I'm in is the sixth circuit. A lot of my clients are sixth circuit clients. A lot of what's in the regs, not all of it, but some things are certainly consistent with why we're seeing litigation trends anyways. People in California, people in sixth circuit, they're already having to make some of those changes, or at least we're advising them to make some of those changes.

John Graff:

Is that because of the bomb decision?

Courtney Bullard:

Yeah. Bomb and, I mean, pretty much that was the catalyst I would say. I can't think off the top of my head the one in California right now. Yeah, we're already having bomb hearings and things like that at most estate schools, which are very similar to what OCR is going to require in the new regs.

John Graff:

Help me understand, Courtney, when you say we're already having bomb hearings, what does that mean?

Courtney Bullard:

A lot of the institutions already have live hearings, but moving to live hearings where you allow cross examination by an advisor in some way, shape, or form. Either submitting questions that the chair is able to ask on behalf of a party, that's what you mostly see. Then the chair is in the position of having to decide what's relevant and what's not and all those great things. Kind of following that same framework. You had some institutions that were state institutions that were single investigator and have moved away from that into a hearing model. At the very least, when you talk about a bomb hearing, at the very least going from losing the single investigator model going to a hearing. Then you have many who have also moved into insuring everybody has an advisor and then the ability to submit questions to a chair and ask questions of each other. I haven't seen any where they're... Well, that's not true. Never mind. I take that back.

John Graff:

Yeah, so I'll ask this question of either one of you, have you had an opportunity to actually sit in on one of these hearings?

Scott Schneider:

Yes.

John Graff:

Thoughts? How did it go?

Scott Schneider:

Main the school but it was less than ideal. It's just, you know, to ramp... I mean, look, courts have been doing live hearings for hundreds of years. There's a lot of institutional knowledge and expertise and we know how to do it, for especially privates where there's really no... Outside of California. I mean, I don't know a private institution that has had "full blown due process hearings" for much of anything outside of tenure revocation. This is very new.

When people try new things that end up being a little complicated, what you're going to find are there's going to be a whole host of mistakes that you make early on. It's just like anything else that you do in life, riding a bike, making a steak, whatever. There are going to be some errors in ramping it up. Some of that, we can train around and train people up. I'm not one of these people who thinks this has to be an absolute disaster. We can train people up. We can put the right people in these positions. These are hard. To do these things well is very, very difficult.

By the way, we're doing them in a setting that's probably as difficult emotionally as any setting humanly imaginable. I mean, I've tried cases, civil cases, discrimination cases, what have you, those are hard enough. Trying cases where the issue is whether or not someone was sexually assaulted is just rife with all sorts of emotional energy that just piles on to what is already a very difficult process.

Courtney Bullard:

It's very messy. It's messy for institutions that aren't familiar with live hearings to move into. For some of the smaller schools, they don't have a ton of hearings. They may have one a year. You're having to

re-learn every time, even when you train the people up. Whereas some of the other schools, especially the publics, are used to a hearing process and they're just tweaking.

Scott Schneider:

You know when they say when you try something new, you learn from your mistakes. It's just given the stakes for both students here, it's just hard to acknowledge that we're going to go from one way of doing things to radically different way of doing things. By doing that, I mean, we have to acknowledge that probably a whole host of mistakes are going to be made in that transition. That's just painful. That's been my biggest gripe with all of this. We finally, it took us a while to finally start doing this work really well after the 2011 dear colleague letter. Of course, I think mistakes were made at the front end, which a lot of people seize on now.

Now what we're going to do is radically change the way we do these things for a number of different schools. Then we'll probably at some point become proficient at that. Then another administration presumably will come in. I don't think Donald Trump's going to serve forever. Is that a possibility?

John Graff:

For Armageddon, I don't know.

Scott Schneider:

At some point, we'll have another administration and the pendulum will swing. It's just-

Courtney Bullard:

Yes, it's exhausting.

Scott Schneider:

... Every time you make a change like that, you don't ramp up, you don't start at perfect. You don't start at mistake free. You're going to make mistakes and learn from those mistakes. I just don't think these radical changes serve students well.

Courtney Bullard:

Agreed.

John Graff:

Yeah, it was tough. Right? It was tough back in 2011 to get your head wrapped around the guidance. What we saw in my firm were two things at the time. We were doing the investigations ourselves. Those would usually be a high profile investigation, some senior executive or a board member or somebody who was under investigation. You know, I guess when it comes sexual harassment, a little bit more hands on we were when it came to domestic violence.

That seemed to be a harder one for institutions to investigate back then. Then we started doing the co investigator models where it's not just us necessarily. We would be with an administrative person, like a Title IX coordinator or something. They would ride shotgun and those, they served to add an element of enhanced fairness to the process. Also, as a live training for the in house person.

To Scott's point, you could see the level of sophistication the in house investigators just going up and up and up and up. I would say you saw a lot better of an outcome for a lot of people. Hold on, my video is blocking. I'm back, yeah. Now to your point, Scott, that's something I've got some concern about too is just do we spend another four years as training higher ed to handle this? Probably having them spend a lot of money on outsourcing to hearing officers and people who can actually steer the relevance discussion, balance the equities in the room, only to have another C change later.

What does that do to the actual parties to these cases? You know, in five years if the regs... Say regs drop now, five years from now, there's a new administration, and now am I on one side of that V just claiming that whatever happened to me in my process three years ago or four years ago was just not fair. I don't know how you restore the fairness field.

Scott Schneider:

I think maybe, and I've said this publicly, I think part of what is... If we're being honest, I haven't seen what the final regs. I've only seen the proposed regs. I don't know what's going to be in the final but I think if we're being honest, part of the policy aim here is to make it as difficult as possible for someone to want to participate in this process. What I think part of the policy aim is to say we don't like this process all that much. We don't think schools should be in this business of adjudicating these sorts of claims. If we are, we're going to make it as cumbersome and difficult as possible. There are two things that can happen if I'm right about that in an environment like that.

The first thing is that basically people who are victims of sex misconduct say, "I'm not even going to report any of this." The reports go back to where they have been historically which is people don't come forward. They don't want to go through a process that looks more and more like a gauntlet. I mean, the idea of direct cross examination in a school by a lawyer is mind boggling when you think about the history of higher ed.

The other, and this I'm more optimistic about this, the other possibility here is we start looking for non adjudicatory ways to resolve some of these complaints. In particular with vehicles like restorative justice or some rigorous informal ways that don't put people and our students through what looks like basically a civil hearing, a criminal hearing, or whatever. I'm a little more optimistic about that and the possibilities there.

I think that would be, the net impact assuming that the final regs are what we suspect the final regs would be, I would think the net impact of that is going to be students no longer wanting to come forward and participating in the process and maybe not even coming forward at all, which would be a tragedy. Or students looking and clamoring when appropriate for some sort of alternative way to resolve what is a terribly difficult problem.

Courtney Bullard:

Yeah, I agree with Scott. I think we're going to see a huge upsurge in informal resolution type processes with the caveat that can also be dangerous in some respects. This whole restorative justice term is being thrown around and even in my own conference with our key note speaker, her definition of restorative justice was not what my understanding was. A lot of outfits out there now doing "Restorative justice training," and that can be dangerous in its own way. My big soap box these days is I love the idea of informal resolutions. I think it can work really, really well whatever that's going to... Or alternative resolutions.

Getting really clear on what that means, like mediation means something totally different to a lawyer than what they're using it as. You know? You just hear all these terms being thrown around.

Making sure schools are intentional with whatever it is that they decide to do and not trying to go become school, licensed therapists with an honorary degree to try to move these through the process if that makes sense. I agree that I think it could be great, actually, but there's going to be some errors there, too, as well. I don't know what those errors are going to look like for the parties sometimes. That could also be dangerous.

John Graff:

Yeah. I think it's tricky. It's sort of like to analogize it to something I'm seeing happen right now is the world has gone to online learning. Right? It's really impacting students. I've got school age kids. I know you do, Courtney, as well. Scott, I think you do as well, right? It's impacting their day to day existence in a big way. One thing I'm seeing sometimes is sort of some unrealistic expectations of parents as to what the teachers can reasonably accomplish during those sessions.

It's not a matter of excellence at this point. It's a matter of survival. You know, when you're not deeply in the know, you don't really have a way sometimes to discern what's a great experience versus a not great experience. I would think that that applies to people going through the Title IX process at any school, especially if there's a hearing model in place. You're not going to know whether you could have had a better outcome with a different hearing officer. You're not even going to know what the training looked like behind the scenes.

I think having worked as a sexual assault investigator, as a police officer for a while, parties need to know whether they are on the respondent side or the complainant side exactly what the process is all about. They need to have some faith in the qualifications of the people who do that job.

Scott Schneider:

Amen. I mean, I'm going to totally switch gears on you. I heard Dave earlier talking about qualifications, talk about Tom Brady.

Courtney Bullard:

Here we go.

Scott Schneider:

I do feel sad for the people of Boston. It must be really difficult to have lost the second best quarterback of all time to the Tampa Bay-

John Graff:

Here we go, here we go.

Scott Schneider:

... I just want you to know I have a lot of empathy, Dave, for you and John. Erin, I don't know what your affiliation is with the professional football team. For instance, my team the New Orleans Saints, if we had lost the greatest quarterback of all time to an inferior team in the league, I would be devastated.

John Graff:

Dave, can you shut his mic? Can you shut him down?

David Yas:

I can. I'm thinking about it.

John Graff:

No, man. I mean, yeah, if we're going to talk about quarterback qualities, at least comparing Tom Brady to Drew Brees, thank you. I think that's fair-ish.

Scott Schneider:

Drew Brees is the best quarterback of all time. Thank you.

John Graff:

All right, so Scott's a guest and we treat our guests fairly. You can have the last word on that.

David Yas:

Their scandal was more deplorable than our scandal. At least we didn't pay people to knock people's heads off. Touche.

Scott Schneider:

Technically, Drew was not embroiled in that scandal, unlike cheater Tom Brady who was.

John Graff:

Okay, all right. Erin, can you cross him off the guest list from now on?

Courtney Bullard:

Thank you, Scott. Thanks for joining.

John Graff:

In all seriousness, Scott's a good friend and this is how we do all the time. It is a constant ritual of trading barbs and shots and so and so. Courtney, talk to me a little bit about triaging of Title IX cases in the current remote pandemic model.

Courtney Bullard:

Well, there's a lot at play at the moment. I think folks are, as I already mentioned, dealing with both professional and personal issues as they transition to working at home. I work from home and have for years. I have four children who are now also working from home. That proves to be interesting as they run across every time I'm on a call or a Zoom. Luckily they're behaving right now. A lot of these Title IX professionals are at home. They also have kids at home or family members who they're taking care of. I think from a triage perspective, that's the first and foremost thing they've got to worry about is personally taking care of themselves and figuring out what's going on in certain states. People are falling ill and all those good things.

Professionally, a lot of folks are in the middle of doing investigations and moving from in person investigations to virtual investigations. I think at this point, we're what? A month in or something. I'm sure your clients are kind of figuring that out and things are going okay. There's been challenges to that by attorneys, of course. For the most part, that transition's happening okay. Then there's the, will they

still be getting new complaints? And what that's going to look like going forward, whether there's any policy changes that need to be made in order to address this new virtual world or not.

I think that when we've surveyed some folks in some of our webinars, we've had hundreds of people in there and we'll do these polls asking how everybody is doing. Pretty much on average, everyone responds fair. Some people are doing well. Some people are not, are really struggling. Most folks, I think, are figuring out a new rhythm. Overall, I think complaints are obviously going to go down as students aren't having that interaction. I do have my own predictions for when and if campuses open back up for those students that can return. I think there's going to be, like, mega COVID parties at the fraternities and a huge explosion of things at some point. It might be a year from now but at some point I think that's going to happen. Then thinking about new behaviors that might be alleged as a result of this new environment.

John Graff:

Like what?

Courtney Bullard:

Well, I've had cases of folks who are HIV positive who then go have sexual relationships with people. Then don't tell them. I could see that happening. Then, more importantly I think what we'll see more of is just in the online context, harassment and stalking maybe coming out more in the online context going forward. I don't know what these new behaviors are going to be. I think that's something I think we all have to be thinking about and that Title IX coordinators are having to think about.

Then one thing we've talked to them a lot about is sustainability planning and having back ups for their back ups. I mean, we've done it as a team here. If I get sick, where does that case go? Managing expectations, staying engaged and ensuring that there are a lot of schools that very large Title IX offices and coming up with those plans are not so difficult. Then there are plenty of schools where it's one or two people. What if your Title IX coordinator falls ill and has a leave of absence for a period of time?

Something that probably should have been thought about before but obviously it's way more imminent now with the COVID-19 situation. If you're in the middle of an investigation and you fall ill, you don't want those parties to hear crickets on the other end. They've got to start setting up at the beginning to manage those expectations and kind of overly communicating and just thinking through those hard things.

John Graff:

Is that something your company, Institutional Compliance Solutions, is that something that you guys are doing now? Are you guys providing that redundancy?

Courtney Bullard:

Yeah. We're mostly at this point working with our clients where we serve as legal council to help them in that transition. Then we've had some institutions where we've come in and looked at their open cases. That's our triage service. We take their open cases. We help them figure out how to transition. The thing that might be getting a little lost in the shuffle is support measures and just helping them not just look at open cases but look at past cases where support measures are in place and reaching out to those students to figure out are these support measures on going? Are they no contact directives that apply even when you're not on campus? Some schools they do, some schools they don't.

Really evaluating and making sure that there's that continuity and that support is still being offered if needed. From a triage perspective, it's threefold really looking at their policies, getting them moved over to the virtual with their active cases. Then also looking at their entire case log and past cases and what support measures are still ongoing.

John Graff:

Right. We have to talk later because we do have some work I think we need to do at that front together. Scott, let me flip this to the Cleary features of some of this compliance for a second. I didn't mean to cut you off right there, I see where you were about to say something. In terms of... Courtney is talking about offering support measures, we've got to disclose that we can offer those support measures in our Cleary compliance documents, our annual security report, et cetera. What does this mean for those disclosures at this point? Can we actually meet the promises in the current era that we're making in our annual security report just last year?

Scott Schneider:

I think it depends what we put in our annual security report, yes, and at what promises we've made. If we need to make adjustments, I don't think anybody anticipated anything like this happening. If we need to make adjustments, make the adjustments. I was more interested, I'll be honest with you, John, less interested in Cleary. I was intrigued by something Courtney said which was mega COVID parties. I immediately thought, John, we should start a band. We should start a band.

John Graff:

I'm in, I'm in.

Scott Schneider:

It's called mega COVID.

Courtney Bullard:

You're welcome. You're welcome, guys. I'll expect royalties on the name.

Scott Schneider:

We will go-

John Graff:

Oh no.

Scott Schneider:

... We'll go to campuses throughout America and we will rage, John.

Courtney Bullard:

You'll generate business for me while you are all out there raging.

John Graff:

My question is... Another little mega Duff clip there. I'm more of a king maker guy myself.

Scott Schneider:

I will say this one, a couple of really, something to piggy back off of what Courtney was saying, I mean, the good news is at least in my experience, yeah we're getting some interesting new cases. I've seen a lot more cyber stalking type things now than we did before. Case load is coming down. The guidance I'm trying to give clients is take the time. First off, do your investigations. Make sure they're really, really good. One of the interesting things is it's been easier to schedule interviews now. People are home, they're not bouncing around to classes and parties and extra curriculars. We can get them. Let's do what we can to quickly and with the high degree of quality, process our investigations.

Use this time, that's why I'm almost hoping the regs drop sooner rather than later. Give people as much time as humanly possible to start transitioning to whatever the final regs are going to say. We have some time. I mean, to focus on what does good policy look like in this space? What does a top notch training program look like in this space? The sort of things that you typically don't have time to do because you're just so overwhelmed with the case loads that you're facing. Use this time productively.

Courtney Bullard:

Yeah, that's a lot of things. I mean, we've taken with our clients to sit down with our teams that aren't having active cases right now to say, "How can you be proactive going forward?" I mean, this is unprecedented time for them where we're always, I'm sure all of us are doing webinars or trainings and telling them all of the things they need to be doing to be proactive and to have robust policies and procedures. There's not the time to do it because all of the Title IX coordinators are drinking from a fire hose on a daily basis just trying to get through the day.

Now there's that opportunity that they haven't had before to get some training if they've got the funding. Also, to sit down as a team and work together on future stuff. Even without the NPRM, it's a great time for that. If the NPRM is going to come out, then now would be helpful. At least they've got the time to do it.

Scott Schneider:

I know we're talking about Title IX and Cleary but outside of that, the conversation I've been having this week more than any other conversation is schools saying, "We need to figure out a way to be open in the fall. What does that look like? How do we manage risk?" I find it to be the most fascinating, complicated question that schools are wrestling with. We're also working, I keep hearing this word fluid. I'm so sick of it. There needs to be a new one. Yeah, we're in an environment where the facts are changing on a daily basis.

If tomorrow, and I saw something on Twitter yesterday about, wow, we're making developments in terms of an anti viral response to this virus that you get it. If you're symptomatic, you can take this medicine. It's from some company. I don't even remember the name. The chances of you dying go down considerably. I mean, if we're making progress in that regard, the risk management calculations become super, super different in terms of bringing students back in the fall semester. I have a daughter, she goes to LSU. By the way, go Tigers. Greatest college football team of all time. I think even Dave Yas would agree.

Courtney Bullard:

Do you see this, Scott? This would be Alabama. Roll Tide.

Scott Schneider:

Roll Tide?

Courtney Bullard:

That's our house. Oh, we got Auburn. Oh, man.

Scott Schneider:

We did beat Alabama and Auburn last year.

Courtney Bullard:

No, I know. I know. I know.

Scott Schneider:

God bless her, she's a junior in college. She wants to go back next fall. The alternative is staying here with me. I could understand why someone would want to exit that situation as promptly as possible. She wants to get on with some sense of normalcy with her life and all that so long as it's safe. That was brutal, Dave Yas. I was at that game and needed a therapist immediately after that.

David Yas:

I thought it was a pretty good non call.

John Graff:

For those of you who are watching us on our YouTube channel, you can see that Dave Yas is taunting Scott Schneider. If you're just listening, you're missing the fun.

David Yas:

It's sAints heartbreak moment.

Scott Schneider:

Yeah, it's sad. There's been a lot of those. What does, talk about Cleary, what does that look like from a safety perspective?

Courtney Bullard:

My clients feel very bipolar. They're like, "We're preparing to not go back and we're preparing to go back. We're preparing for furloughs and not going back and we're preparing to go back and what safety measures have to be put in place." Nobody knows. It's crazy. From a safety perspective and Cleary, it's going to be really interesting.

John Graff:

Yeah, it's funny. Joe [Storch 00:39:07] and I did an accrual web briefing last Tuesday.

Courtney Bullard:

I listened, it was very good.

John Graff:

Oh, thank you. The turnout was great. There was like 640 people on there. I think people are interested. They wanted to know two things, really. One what do we do about emergency notifications in light of the corona pandemic? Specifically, I think the question was across the industry, what happens when we get a positive case? Do we have to send out an emergency notification? My thought on that was always, look, it's sort of like diving into a shallow swimming pool at this point. Going outside of your house is an open and obvious risk. By the time the department of ed actually decided to issue its guidance on when, anybody? April three, after all of higher ed had been shut down for two and a half or three weeks. It starts to water down the importance of sending out some kind of emergency notice.

The other issue is what does that mean for your crime on campus? You're not going to have any crime on campus. Your statistics are going to go way down. To your point, Courtney, your online harassment type statistics, the information is there. The incidence may increase but it doesn't necessarily translate to Cleary because most people can't be on campus anyway. What we're starting to see in our practice is a lot of thinking about emergency management planning around the return, as Scott was saying, to campus. What do we do if we bring everybody back and there's a second wave and we've got to now shut down again after 30 days or 15 days? Or when this semester is in full swing, or people are in finals. That just brings a host of risk mitigation concerns to bear safety considerations, et cetera.

I mean, one thing that I'm hearing is that there will be a sort of phased in return. We'll let either certain years or certain programs come back. I think to the point that Courtney was making earlier, that lull, that period of time where we can actually get our affairs in order, that window will shrink as more and more people are on campus. Then there's more in person contact, et cetera. Use the time wisely, right?

Scott Schneider:

I just wanted to point out that NACUA only asked you to do that because I refused.

John Graff:

Oh, good. Good. There are A-list celebrities who have made fortunes because they were the second person in. Thank you.

Courtney Bullard:

Hilarious.

John Graff:

Thank you for being too high on the horse there, buddy. The cringe laugh. In terms of... Besides just the hearing, I love the shade, Scott. Besides the hearing dynamics, the in person cross exam, the cross exam by a lawyer, what are a couple of other concerns we're hearing from our clients about impact of these new regs?

Scott Schneider:

I mean, that it's clearly going to increase cost. You know, you're literally putting someone who may be a student affairs professional in the position of having to make evidentiary decisions. Even for a season judges, are exceptionally complicated. I think most schools are realizing we're probably going to have to outsource this. I think that was bad enough prior to corona. The hit on institutional budgets associated

with this, and no one comes out of this by the way unscathed. There's not a college or university in the country that is not going to take a significant hit. This is an unfunded mandate in a time where we have serious concerns about our operational budget. That's the biggest one is how in the heck are we going to put someone in that position? How are we going to pay for that, especially given the challenges? Not sort of the challenges, the incredible challenges that we will be facing because of this unprecedented disaster.

John Graff:

Right, people are losing their jobs. They're being furloughed. They're being laid off or terminated, et cetera. Now the government is coming in and saying, "Hey, you're basically going to have to higher up this resource."

Scott Schneider:

Yeah, especially for private schools, we're going to give you under the guise of a civil rights statute which prohibits discrimination on the basis of sex, we're going to force you and your student conduct department to, in essence, enact the most rigorous form of due process imaginable. It's like, "All right, how do we staff that?" I don't know.

Courtney Bullard:

The thing is, what actually falls under the definition of sexual harassment under the new regs is going to be not as much conduct is going to fall under that that would require the rigorous process. Regardless, if things come out the way that they were proposed, which we don't know. Regardless, there's things that schools have to give each party an advisor that aligns with their own interests. I mean, that's not something right now that's required of schools. I mean, there's this depth you're going to need and folks are going to need to volunteer maybe, because you can't pay them to do things. I don't know who's going to want to be put in that position to start with. There's also some record keeping as far as being able to share evidence during the hearings. That has to be kept online.

Well, before COVID, that seemed really daunting. Now post COVID, schools are having to do it anyway that already run a hearing process, have a way to share information in a secure manner. Those kinds of things. To some degree, that will help prepare for that. There's just going to be, like Scott said, there's going to be money that needs to be spent in my opinion, on changing policies and procedures and processes.

Going and copying and pasting are taking a boxed policy isn't going to work in my opinion. You really got to think about how it impacts your campus and what works best for your campus. Then have people help you with implementation of the policy and actual training to do all of the things that are going to be required. All that costs money. Trying to do it without spending the money is just going to land schools where they've been, which is in litigation. Money, that's it.

John Graff:

Those schools are certainly well served if they align with Courtney Bullard, Institutional Compliance Solutions. Scott Schneider, at law dude, self proclaimed Dave Roll of higher ed at Hush Blackwell, Austin office. The location doesn't matter for any of us anymore, right? We work remotely. We're certainly hear to help at Hirsch Roberts Weinstein. We got a little bit of experience in this neck of the woods. I love that picture. Before we wrap, closing thoughts. Scott?

Scott Schneider:

Are we going to rap with an R?

John Graff:

Actually, Courtney's going to rap.

Courtney Bullard:

No, I'm not going to rap.

John Graff:

She's the rapper. Even Larson is involved. Yeah, I see.

Scott Schneider:

I mean, yeah. I said this to earlier, setting aside Title IX and Cleary, what a remarkable position we find higher ed in at this point. I think, I was in house at Tulane. We had Katrina which basically impacted the entire campus. We were blessed to have a president in Scott Cowen who was just this amazing leader. One thing he said was, "We're reopening in January." Everybody thought he was crazy for saying that. He also took the opportunity to basically make a lot of the changes, hard changes, that the university knew it needed to make for a long, long time.

Finally, the crises allowed it the opportunity to make those hard changes and frankly put it on a trajectory for the next decade to 15 years where it's a lot healthier place. I think, again, setting aside IX and Cleary and all that sort of stuff, that's where we are. I mean, we have a moment right now in this time of crises to do really good, deep thinking about where do we want to be in a decade from now and then making hopefully the courageous decisions to get to that place.

John Graff:

Excellent, excellent. Guys, I can't thank you enough for joining us. I could listen to you guys all day. I have the utmost respect for you. One of the things I love about this circle of Title IX lawyers, and there are others out there too, is that we come together to share internally and then externally information. I love that we're all at different organizations. We all want to promote our businesses and whatnot. We do it together. We're able to benefit from each other's guidance and all. Thank you very much. Scott, if people want to get ahold of you, how do they do that? Instead it's just blasting on an electric guitar out the window.

Scott Schneider:

You know, I'm going to do something weird. Hey, why don't y'all text me? Want to do that? Let me give you this number. You ready for this? Just text me. I'm going to get random texts. I didn't plan for this. It's 504-214-4962. Text me.

John Graff:

Erin, could you please promote that everywhere? Everywhere, all over the planet.

Courtney Bullard:

Is a face tattoo okay, too?

Scott Schneider:

I'm totally fine. Yeah, if you put the face tattoo on this cheek right here. 504-214-4962. Please text me.

John Graff:

All right. Then we'll get the Scott Schneider help for you. Courtney, how do people get ahold of you?

Courtney Bullard:

I mean, you're welcome to text me as well. Maybe we should have a texting war. I know Scott would win because of the beard and his overall coolness so I'm afraid to even enter in to that competition. I will say doing this has been really fun. It's always a fun distraction. To have it on live like this, Scott is definitely... Every time I turn around, he has a different background. It's cracking me up. Anyways, to find me, really my website, www.icslawyer.com. You can email me, CHV@icslawyer.com. You can call me, 423-710-4027. Text me there if you want to. We're here. Just to dove tail on what you said, John, I really love the colleagues that I've made in this area across the country that I respect and I know do really great work. It's really fun to collaborate and I appreciate the opportunity.

John Graff:

Well, we appreciate you guys. Can't thank you enough for sharing the time and your inside with us today. Respect both of you and I know no matter who gets the call from a client, they're in good hands with you, either one of you guys. If you like what you heard today, please share us with your friends, colleagues, family. Get the word out because our goal here is to offer some practical take aways to the industry. I think we've done that today. We would very much appreciate it if you subscribe to us on what, Erin?

Erin:

Spotify or Apple Podcast. Right, Dave?

David Yas:

That's right.

John Graff:

It used to be iTunes. Wasn't it?

David Yas:

It used to be iTunes. Now it's Apple Podcast.

Erin:

Yeah, it used to be iTunes.

John Graff:

Yeah. If you want to get ahold of me, hit me at Jtgraphics at [@JTGraph](https://twitter.com/JTGraph) on Twitter. Thank you, Dave. Thank you, Erin. Thank you, Scott. Thank you, Courtney. All right, that's a wrap.

Courtney Bullard:

Thanks guys, stay safe. Stay well.

Erin:

Bye guys.

Scott Schneider:

See you.

John Graff:

All right.

Courtney Bullard:

Here at ICS, we know things are challenging and our thoughts are with all of you on the ground who are working to adjust these significant transitions on campus. Stay connected with us on LinkedIn, Twitter, Instagram, and Facebook. We have a Title IX Facebook group as well. Please ask to join that group where we talk about all kinds of things but specifically we'll be providing some real time updates as we navigate the COVID challenge. Be safe and be well. As always, if you need anything, you can reach out to us through our website or email me directly at CHV@icslawyer.com. This podcast does not establish an attorney/client relationship which is only formed when you've signed an engagement agreement with ICS. It is also not intended to replace any legal advice provided by your legal counsel. It is for your informational purposes only.