

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 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 are also hosting a breakdown and implementation of the new Title IX regs, both on May 27th and in June, to get a deeper dive into what all of this is going to look like for colleges and universities, and to assist you with that process.

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. 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.

Melissa Carleton:

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Courtney Bullard:

My guest this week is Melissa Carleton, a partner at Bricker and Eckler. Melissa advises higher education entities in a variety of areas, including student affairs, student conduct, disability accommodations, student confidentiality, policies, contracts, governance, and employment matters. She also has a great deal of experience in guiding the institutional response to allegation of sexual abuse. She regularly works with colleges, universities, career technical schools, and K-12 school districts to comply with Title IX and, where applicable, the Clery Act, as well as implementing guidance and regulations.

I reached out to Melissa when I decided to do a quick episode on all of the changes and challenges that the regulations present for school districts, due to her experience in that area and the work we've been doing together on the joint guidance. I hope you enjoy my conference with Melissa.

Hi Melissa, and thank you so much for joining me on this episode to talk about special considerations in K through 12, with these new regs that just dropped.

Melissa Carleton:

No problem, Courtney. I'm glad to be here.

Courtney Bullard:

It's funny, because we have a relationship based solely on social media platforms, but I've made such great connections with colleagues that way. So when I was thinking about this topic, you were the first one that came to mind. I know we're working together on the K-12 portion of the joint guidance as well, and your expertise goes beyond K-12.

So I wanted, in that vein, to start with these new regs dropped, I think everyone that listens to the podcast is aware of that. They heard the episode last week with Joe Storch, and we've all been losing sleep and burning the candle at both ends, that are in this area, trying to get our minds around what this means both for higher ed and K-12. So first, a lot of our listeners are higher ed folks, this is a law and higher ed podcast, but you and I, I think, both agree, even if you are in a higher ed space, it's important to note some of the changes that have come into play for K-12 that are different. You had expressed to me, before we talked, why that is, and I was hoping you could articulate that again for our listeners.

Melissa Carleton:

Sure. I think there's a couple different ways that these differences can be important for people in higher ed to understand.

The first way is, at least in the state that I live in, and a lot of other states, we have dual enrollment programs. So you may have programs at your college that involve students who are also getting high school credit for attending your college program. Here in Ohio, the way that operates a lot of times is a high school teacher may be simultaneously teaching a class for college credit, on the high school's campus. So the class is listed as a college class, and it's being taught for college credit, but it's also being taught for high school credit. So you have a situation where two different entities may have Title IX obligations if something were to occur in that class.

We also have situations in which colleges or universities may sponsor a K-12 program. Maybe it's a laboratory school, or something of that nature, on their campus. So we have situations like that, where the school itself may have K-12 obligations.

The third way would be that we have people on our campuses who are training teachers and administrators for K-12 work after they graduate. So we have administrators that are going into K-12 schools on a regular basis to observe student teachers, and if something happens in the environment where a student teacher is perhaps accused of a Title IX concern, it may be that the student teachers could be subject to a Title IX procedure at the hands of the K-12 institution.

Those are the three ways, most commonly, that I see that this crossover occurs.

Courtney Bullard:

Yeah, absolutely. I know with student teacher placements, when I was in-house council, we had many, many issues come up, where either a student teacher felt that they were the victim of some type of sexual misconduct, or were being accused of that. Absolutely important for our higher ed folks to understand some of these implications.

Obviously, the new regs are posing a lot of challenges for everyone. But, there are some things that are really specific and different in the K-12 context. What are some that stick out to you, that for my K-12 folks listening, maybe need to be paying special attention to?

Melissa Carleton:

Sure. I think the first is the notice requirement that goes to particularly the respondent, at the outset of the investigation.

A lot of building administrators are very proactive. When they get notice of potential misconduct, they will get information about the potential misconduct. And then, their next step is to immediately call that respondent down to the office and say, "Hey, Billy, or Bobby Joe," or whoever that student is, "why don't you tell me about what happened today?" That's not going to be an option if this implicates potential sexual harassment under the new Title IX regulations.

Under the new regulations, that respondent is going to need to have written notice of the allegations, and have the opportunity to have an advisor present for that interview. So there's going to be a lot more notice on the front end. Traditionally, one of the main differences I see in the way my K-12 clients and my higher ed clients have been able to operate in an investigative process is K-12 typically moves at a much faster rate because K-12 administrators have a lot more control over bringing witnesses down to the office, and getting through their witness list much faster than, often, the higher education clients have the ability to do. But, this is really going to put something of a pause on starting that investigation, while they wait for that written notice to happen, for the advisor to be lining up.

What we want to make sure is that those K-12 administrators are really conscious of those notice requirements, so that they don't accidentally wander into the trap of calling that person, as the way they always do.

Courtney Bullard:

Absolutely. I agree with you, they do move very quickly in K-12. How you just explained it made a lot of sense to me. I feel like some K-12 folks are, "Oh, okay. We don't have to do a live hearing, so these new regs, these aren't going to be as bad." Then when you think about it from the standpoint that you are bringing up, it will absolutely be a big change in the way that they handle these matters.

Melissa Carleton:

I feel like it's going to be a big change in a lot of ways, particularly in the slowdown. It's not just slowing down on when you can question the respondent, but there's a part of the procedure that says they have to have 10 days, the parties are going to get 10 days to review the case file before a draft investigative report can be prepared for review by the parties. And then, the parties get 10 days before the hearing, or before ... In this case, if you don't choose to have a live hearing, they get 10 days to review and respond to that investigative report before the decision maker can render their decision.

So in school districts where they're very used to issuing decisions within a matter of a couple of days, this is going to slow the process down dramatically, and I think that's going to be a big change for a lot of institutions, also.

Courtney Bullard:

Absolutely. Yes, we are doing a training tomorrow, and going over those timelines with investigators. It's going to be a huge change.

Talk to me about the formal complaint, and how that would play into what you're describing with the written notice of investigation. So is that only necessary in that environment when there's a formal complaint? Or, when there's simply an allegation, and then that decision's being made, and the parties being given an opportunity to decide if they're going to file a formal complaint? Do you follow me?

Melissa Carleton:

Yeah. This is interesting.

We've shifted to a paradigm where school districts need to have actual knowledge to take action on an allegation of sexual harassment. The actual knowledge occurs when a formal complaint is filed with them. The formal complaint is something that needs to be filed and signed, by either a complainant, so the alleged victim of the conduct, or it can be filed by the Title IX coordinator. And the parent can do this, on behalf of the alleged victim, so obviously they're not expecting kindergartners to be able to interpret the sexual harassment policy. That's what kicks off the obligation to address the complaint.

In situations in which an employee is the respondent, there is no ability to informally resolve that complaint, it must move through a formal investigative process. We're going to see more investigations if that hasn't been previously the practice in the K-12 district. You can still, under the final regulations, informally resolve student on student cases, and I would expect to see a lot of that, particularly with young students in the educational environment, and teaching them what behavioral standards are appropriate. Particularly in cases that may not rise to the level of a hostile environment at the outset, but maybe singular instances of behavior on the basis of sex.

Courtney Bullard:

Yeah. My read is that the new definition of sexual harassment, which is a really narrow definition, a lot of what happens in the K-12 space is not going to probably rise to that level.

The example I love to give, and I don't know why, is somebody drawing a penis on a desk. That's not going to necessarily rise to that level of severe, pervasive, and objectively offensive that we're now seeing, it doesn't fall under any of the other definitions, like those Clery definitions, which is another K-12 difference that they're not going to be all used to. So you're not going to be required to go through this whole formal process, but there's going to be a much bigger requirement at the outset to do that intentional analysis, to determine if it does or doesn't fall under this definition. Would you agree with me?

Melissa Carleton:

No, I think you're absolutely right. I think it's going to be so important, at the K-12 level, just the same as at the higher ed level. But, maybe with a little different spin on it. At the K-12 level, you've got to figure out, if it doesn't fall within the definition of sexual harassment and you're not running it through your Title IX procedure, how are you going to address that behavior so that it doesn't rise to the level of sexual harassment, as the cumulative affects continue?

Because that's where we're training our students how to interact with the world around them, and we really want to have a good educational foundation so that we can make sure that the behavior doesn't continue-

Courtney Bullard:

Absolutely.

Melissa Carleton:

To when they go through to college, right? We want to stop that.

Courtney Bullard:

Absolutely. Then, we mentioned parents, we talked about parents with the formal complaint. That is something that is also different. And I know as a group, with the joint guidance, we talked about the fact that parents can be involved in this Q&A process that's now in the regulations, and how that might look. Any additional thoughts you'd like to share, on that topic?

Melissa Carleton:

Parents can be difficult, and I say that as a parent. I say that as a parent who is a lawyer. I fully recognize that I am exactly the difficult type of person that I am acknowledging exists.

One of the things that I found troubling in the commentary was the notion that, after the investigative report is distributed to the parties, they get these 10 days to respond to the report. During those 10 days, if there's no live hearing held, they are allowed to submit written questions for the parties and other witnesses, and get responses to those written questions, and to ask follow-up questions in writing to get responses to those. There's a part of the commentary that talks about how they're not going to prohibit parents from answering those questions on behalf of their students. I understand that, to an extent.

So putting on the hat of I'm the mom of a seven year old, and my seven year old does not have the strongest writing skills right now. So I would understand how I would have to ... Let's face it, pandemic, folks. There's been a lot of assistance with writing in my household over the past several months, as I play the role of mom, lawyer, consultant, investigator, hearing officer, and first grade and third grade teacher.

Courtney Bullard:

Yes.

Melissa Carleton:

It's been wonderful. But, she would need some help in putting together a coherent statement, in writing, so I get that. But, I would be concerned, as an investigator, if I was getting back responses that I'm not sure the first grader would comprehend. As an investigator, you're seeking that original voice to be able to assess credibility. And as a decision maker, that's what you want, too, so I'd be really concerned about that.

Last night, I was reading these commentary and really struggling with this. What I'm not sure if you can do or not is to have the investigator go back and deliver the written questions in-person, and record the answers in-person. I'm not sure that's entirely foreclosed by the regulations. I think I'd want to think a little bit more about that.

Courtney Bullard:

Yeah. It's like all the things that aren't prohibited, you could technically maybe do. But in doing it, you want to think about ... Listen, I'm such a Title IX nerd because last night, my team and I were texting at 10:15, debating over whether employees are covered as complainants.

Melissa Carleton:

Yeah.

Courtney Bullard:

I'm quoting parts of the rule, and then they're quoting part of the preamble. And then, I'm quoting back. Reasonable minds can differ, and there is a lot of confusion that's been created, that just is the case. You can read things in the preamble, listen to Candace Jackson, and then read the regs, and they're all just a little bit different. There's certainly a lot we're still figuring out.

We're recording this on May 20th, and by the time it is released next week, we might have a slightly different opinion on some things. Yeah, we're all trying to digest, and think through how some of those are going to work. That's a really good point I hadn't thought about either, and now we're going to have me thinking about, probably. In the wee hours of the night as well.

We have talked about some of these items that we've noticed in K-12. Anything else we haven't touched on? I think one thing you and I talked about was just the visibility of Title IX coordinators, something that every K-12 school district is supposed to have. Some are doing a better job than others, but certainly these new regulations have a renewed emphasis on visibility and the role of Title IX coordinators.

Melissa Carleton:

Yeah. It's been the rule for a long time that school districts are supposed to declare a Title IX coordinator, put it in a policy, and publicize the identity of that Title IX coordinator. I know that there are policy services that school districts use, and a lot of the policy services had combined the Title IX coordinator roles with other coordinator roles, into maybe a compliance coordinator, or an anti-harassment coordinator. The Title IX regulations are very clear that this person must be referred to as a Title IX coordinator.

So this person is going to be elevated in their role. They also can't be doing the decision making. The way that the regs are written, I think, the Title IX coordinator probably should not be doing the investigations either. Because the way the role as described, at least in my opinion, the Title IX coordinator is meant to make sure that supportive measures are in place, that the process is working appropriately, that the parties are being treated equally, and that they understand what their rights are, and their responsibilities are. I think that maybe difficult for a Title IX coordinator to do, if they are also the investigator and they are posing the difficult questions that get to the heart of the credibility dispute in a matter.

When you have to be a Title IX coordinator and coordinate the supportive measures that help all of the parties continue to access their education, but at the same time, you are questioning them to determine why their story does not line up with the evidence that you have discovered on the security camera footage, it may not feel very supportive to that person. I'm not sure that those roles are going to be particularly compatible.

I think in putting together a perfect system, I would put together a system where I've got a Title IX coordinator who works closely with an investigator, a decision maker, and an appeals officer. That would be a four person Title IX team, with each of those roles having, essentially, multiple investigators, multiple decision makers, multiple appeals officers available, depending on the size of the school district, because I don't think one person can be reasonably expected to do it all.

Courtney Bullard:

I completely agree with you.

Melissa Carleton:

Yeah.

Courtney Bullard:

Yeah, I agree with you. And I know there's some schools out there that are saying to us, "We literally are so small, I don't know how we do that and avoid conflicts of interest and bias, in general." That's going to be something that's going to be specific to each school. But I agree with you, having them separated out, I think, would be ideal, in a perfect world.

Okay. So many other things we could talk about for another, probably, 30 minutes, but I really wanted to give people just a quick and dirty of some things to pay special attention to as they digest the regulations for their school district. And for higher ed, we have higher ed clients that actually have K-12 on their campuses as well. A lot of those coming forward and they're like, "Oh shoot, we didn't really think about this before, and now we need to do a whole revision."

I didn't even talk to you about this when we were prepping beforehand, so I'm going to throw this on you now. And then, if you don't like it we'll take it out. But, I always like to ask fun facts. I know you from Twitter mostly, I know you have a fun personality. If you're comfortable, I wanted to find out from you, what would you be doing if you weren't a lawyer mom? If you had all the money in the world and could be in any profession, what would you be doing?

Melissa Carleton:

Oh, well that's an interesting one.

Before I was in the law world, I was a high school marching band director.

Courtney Bullard:

Okay.

Melissa Carleton:

I still-

Courtney Bullard:

Totally different.

Melissa Carleton:

Yes. I still do miss that every August. When it comes to be band camp season, I can feel the call of the field. I have to tamp it down, and remind myself that I don't need to spend 70 hours a week doing football field drill.

Courtney Bullard:

I love that.

Melissa Carleton:

But I do still miss those days a lot. But if I had unlimited money and could do whatever I want, I'd probably write fiction and be traveling about the world, and taking my kids to all the fabulous places that we can't go anymore.

Courtney Bullard:

I know. When you talk about the football field, for some reason, it's been on my mind lately. You know how things hit you at different times. Thinking about fall, and how different it's probably going to feel. Football, and marching bands, and sports, and just all the things that come with fall, the last couple days I've been a little bit in mourning over that because there's no way it's going to look the same as what we're used to, whatever they come up with.

Melissa Carleton:

We start baseball for my nine year old son's travel baseball team, it starts next week. They have social distancing rules for baseball, and he's going to have to sit six feet apart from ... The kids go off the field and wear masks, and everybody has to sit in the outfield to watch the game.

Courtney Bullard:

Yeah.

Melissa Carleton:

I don't know, we'll see what it looks like.

Courtney Bullard:

I know. We've got soccer players. Well, I have a track person, and we've got it all. When you have four kids, it's hard not to hit every sport. But, I have one child that pretty much plays all the sports really, honestly, and the others that play one or whatever. But, same thing, we lost the season, of course, for the spring. But then, I don't know, all the rules, it's just going to be interesting. It's different, and it is what it is, and we want everybody to be safe and healthy, but it's hard not to feel a little bit of pain about it all.

And then, my other question for you is what instrument did you play?

Melissa Carleton:

Oh. I played marimba, which looks like a big xylophone, and is about the size of tuba.

Courtney Bullard:

Okay. I was like, "I've never heard of that instrument in my life." But when you say it that way, I'm like, "I know exactly what that is."

Melissa Carleton:

Yeah. I used to own one, and it took up almost an entire room in my house. So when my daughter was born, we sold the marimba and used the money to buy her nursery furniture. I tell her that she is sleeping on my marimba.

Courtney Bullard:

I love it.

Well, hopefully here's to going back to some type of normal like we want it. Maybe 2021 fall, but we'll see. But I really appreciate you, I know we are both beyond busy, and we have children at home doing distance learning. Mine are done on Friday, and could not be done soon enough. I know we're all

juggling a lot, and I appreciate you taking a few minutes just to share some thoughts on K-12. I have a feeling, with everybody, I'm going to start having folks back on to dig into some more areas, even more. Really appreciate your time, I know y'all have a ton of events you're preparing for, and webinars, and trainings. If you're listening, be sure to check them out as well.

Melissa Carleton:

Happy to be here. Thanks for having me, Courtney.

Courtney Bullard:

Thanks, Melissa.

I hope you enjoyed today's episode, and found it informative, and were able to either take away some items that will help you as we navigate these uncertain times, and maybe even give you a little bit of a calming effect. Or, maybe not. I know for us, it changes hourly.

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