Courtney Bullard:

Welcome to The Law and Higher Ed podcast. My name is Courtney Bullard, and I'm 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:

Yeah, as of right now, it is absolutely mandatory, it's absolutely required for schools to be ... unless you're going to claim the religious exemption, which is actually way easier to do under the new Regs. You actually don't have to claim it. You just have to, when they say why aren't you following Title IX? You say, oh, religious institution. Unless you're planning on doing that you absolutely ... general counsel's and administrators in the Title IX offices absolutely need to be preparing your policy and your practice for August 14th for these rules to be effective. Because if August 14th comes and you're not you're automatically going to be looked at as out of compliance by the Department of Education.

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 time 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, and 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 today. 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 one of my episode with Jake. Hi, Jake. And welcome to the podcast.

Jake Sapp:

Good afternoon, Courtney.

Courtney Bullard:

So this past six weeks have been completely wild, as we were just talking about before recording, for Title IX professionals, attorneys, subject matter experts. Both of our schedules have been full. And grabbing time to record this episode has certainly been difficult. We've had to reschedule it several times. But I do think that is allowed time, obviously, for a lot more to happen in challenges to the new title IX Regs. And so the delays probably are going to work in our favor and in our listeners favor, would you agree?

Jake Sapp:

I absolutely agree. Although we haven't seen any response from the Department of Education regarding these lawsuits. We've seen there's been amended complaints and some of these filed, and we've had time to actually look through the different causes of action and to identify exactly what the legal challenges facing the regulations are. So I think it actually, despite us tried to get together for the past month, it's really worked out well that we're able to do so now.

Courtney Bullard:

Yeah, and just for a disclaimer for our listeners. We're recording this on June 19th, six weeks after or so after the regulations were issued by the Department of Education. They came out on May 6th. And things change almost hourly, if not at least daily right now in this space. So this is what we know as of today. And at the time that this is released, which will probably be in about a week. Some more challenges might come in. But this is what we know as of now. And I'm really happy to have you, Jake, to help break all of this down. And hopefully, help not only our listeners, but myself make sense of everything that's out there. So, again, like I said, on May 6th, the Department of Education issued these new Title IX regulations with an implementation date of August 14th. First things first, what litigation is out there today, the 19th challenging the Department of Education in the new regulations.

Jake Sapp:

Great. So when we started this process, we were definitely expecting that the legal challenges to the Title IX regulations would be centered around the Administrative Procedure Act. And that's actually exactly what the ... as of right now, there's four lawsuits that are going to be challenging the Regs. And all four of those focus exactly on the Title IX, on the Administrative Procedure Act. There's a case from the advocacy group, Know Your IX. There's a case from the state of New York itself. There's a case from the Victim Rights Law Center, and then the most well known legal challenge. And probably one of the strongest ones. And also the longest complaint comes from the Attorney General lawsuit challenging the Regs. There's a 18 Attorney General's filed, a lawsuit challenging the enforcement of the Title IX regulations.

Courtney Bullard:

Okay, so breaking down a little bit of what you said there. Number one, you mentioned the Administrative Procedure Act. So, and that forming the basis for this litigation or these challenges, maybe breaking down why that's important and what that means. And then second, who are they suing?

Jake Sapp:

Okay, so we're going to start with the second question first. The answer is they're suing the Department of Education specifically. And they're suing, obviously, Betsy DeVos is the Secretary of the Department. But then they're also suing Kenneth Marcus. I believe is the individuals name who had a large part in

putting together these regulations from the Office of Civil Rights perspective, under the Department of Education. And so those are the three main individuals or entities that are being ... that the legal challenges are being levied against. Regarding the Administrative Procedure Act itself. The Administrative Procedure Act is a law that prescribes how agencies promulgate regulations. They lay out the procedural rules that the agencies have to follow and then they also, it also lists the specific of when and how courts can challenge these agency actions.

And of course, at the end of the rulemaking process, the regulations put forth by the agencies have the full force of law. Just like if they were legislative rules passed by Congress. And so that's why so many entities are protected by the regulations. And they're beginning the challenges to them, because these will have the administrative enforcement will have the force of law on institutions that accept federal funds under Title IX. Specifically, the informal rulemaking which is outlined in Section 553 of the Administrative Procedure Act. Basically outlines the different expectations and the procedures that agencies have to require, and for this type of rulemaking. And at the basis of it is they have to provide the public with adequate notice of what the rule is going to do through the notice of proposed rulemaking which for Title IX purposes came out in 2017.

And then the public has to be given a meaningful opportunity to adequately comment on the rule. Now, some of the conditions that go into this are the length of time, and whether the public had enough time to take into consideration what's actually going on in the rule. There was a case out of the Fourth Circuit in 2012. That said, that the department didn't use, didn't provide enough time for the public to comment. And therefore it was ruled to have violated the Administrative Procedure Act. That's not something that we're going to be looking at as far as the legal challenges to this Title IX rule. Because as many of you know, the notice of proposed rulemaking, through the NPRM. The department gave, actually almost more time than it's ever given for any rule for the public comment period. As it was closed in December and then it was reopened in January or February of 2019.

Courtney Bullard:

Right. And there were a ton of comments, obviously that came in. Probably, I don't know this-

Jake Sapp:

Yeah, there were 100. There were over-

Courtney Bullard:

It's probably more than ever.

Jake Sapp:

Yes. So there were 124,000 comments around that number that came in to the department, specifically over the Title IX regulation. And that is a, for context, that is a massive amount of comments to an administrative rule. And it hearkens back to the first Title IX regulations issued in 1974. Back when the department was the Department of Health, Education, and Welfare. On, those were issued on June 4th, 1975. And there were over 10,000, or there were almost 10,000 formal responses to that regulation. And that was the most that the Department of Health, Education, and Welfare had ever received. So, from now all the way back to the mid 1970s. This is an extraordinarily salient issue, which obviously is leading to the number of lawsuits and all of the press surrounding the new regulations, your hotly contested area back then and now?

Courtney Bullard:

Goodness, yes. Okay, so I know that in your head ... you've broken down and have things really well organized to walk through all that's going on. So if I get out of order please stop me. And if we need to go back for whatever makes sense for those listeners, we are trying our best. These lawsuits are hundreds of pages long at times. And we're not trying to give you a legal Crash Course. But at the same time we want to get you this information in a way that's somewhat digestible as possible. But I think for me, the first question I have that I think you and I talked about too, is we're getting a lot of questions like this compliance implementation date of August 14th. Is that really going to happen? Will this litigation impact that at all or the likelihood that it might impact that? So maybe if we start there, would that be okay?

Jake Sapp:

Yeah, I think that'd be great.

Courtney Bullard:

Okay.

Jake Sapp:

So, okay. Regarding the compliance date of August 14th, the four lawsuits all are requesting, in some way shape or form to either invalidate select provisions of the rule and for the court to provide injunctive relief. And essentially, what asking for an injunction is, it would be granted if the plaintiff can show that there's a likelihood of success on the merits. Regarding are they going to be able to ... if going, if we go through the whole court process, what's the chance that the court is going to strike it down? So, and there's a number of things that the court that plaintiffs have to show to meet that standard. But right now the only answer that we can, I can really give is, we don't know. Just like with Title IX compliance issues outside of the effective date of the regulations. These questions can really only be answered by the federal court judge that's deciding the issue.

That's looking at the case has access to the record using their specific jurisdictions precedent on allowing nationwide injunctions or just the specific state injunctions that we've seen granted. Specifically by the Washington federal court judge in the CARES Act, regarding the distribution of funds to undocumented students that was stricken down. But it was only stricken down in the state of Washington. And so there's a difference between asking for an injunction for just one small state versus the nation. And the Supreme Court has actually talked about this. Going back to last year Supreme Court case, Homeland Security, the New York, talking about these nationwide injunctions, they bring up serious questions about the scope of courts, equitable powers under Article III.

The court in that case cited back to the Trump v. Hawaii regarding immigration restrictions. Talking about for most of the country's history, judicial power was looked at, the fundamental power to render judgments in individual cases. And Justice Thomas pointed out in this case that the courts traditionally didn't believe that they could make federal policy. And they didn't view judicial review in terms of as, in terms of striking down laws or regulations. However, there was one of the first cases that ever really use the nationwide injunction comes from 1963, a case called Wirtz v. Baldor Electrical Company. Where the court was addressing a lawsuit challenging the secretary of Labor's determination regarding the minimum wage for a particular industry. In that case, the District Court ruled that the Secretary's determination was unsupported. But they remanded it back to the ... they sent it back to the District Court to assess whether the plaintiffS actually had stand in to challenge it.

But what they said was that if the District Court decides that the plaintiffs do have standing, they do have the right to bring an actual lawsuit, then the district court should issue the injunction and stop the enforcement of that rule with regards to the entire industry. So that was really the first time that the court had issued a nationwide injunction. And they've gone up in popularity following the 1960s. But every time they're brought up courts are very hesitant to issue them, because of the nationwide effect of these rules. And the fact that you're giving relief to parties that haven't asked for it. So regarding an individual injunction in a state, that's not going to be as difficult versus the nationwide injunction which is a very high bar.

But there is a possibility all of these cases are alleging pretty serious errors by the department in establishing the regulations as far as how they're ... the procedures that they follow. And whether they gave enough opportunity, a notice for certain provisions. Or whether the provisions differentiate from established policies so much that the change is not necessary or appropriate.

Courtney Bullard:

What I hear you saying is theoretically, you could have federal courts granting injunctions. And so that would enjoin the regulations from going forward only in certain states. And in the other states, it would not impact it. Or of course, you could have this national ... it impact it nationally, which is less likely. Am I summarizing that correctly?

Jake Sapp:

So basically, yeah. For example, the Know Your IX case was filed in the District Court of Maryland. Looking over cases from that jurisdiction that court has over the past few years granted statewide injunctions against certain rules. But they haven't, they've been reluctant to issue national. At the circuit court level they've been hesitant to issue the universal or the nationwide injunction.

Courtney Bullard:

Okay.

Jake Sapp:

And so we could-

Courtney Bullard:

But that would have the impact of, you could have ... let me just throw in states out there randomly. Florida, where there is an injunction granted, but Tennessee where there's not. Correct?

Jake Sapp:

Exactly, exactly. And that's one of the complications that the court has highlighted. When you issue or when you issue these injunctions, you can have inconsistent rulings across different states or across different circuit courts of appeals.

Courtney Bullard:

Absolutely. And then going back even a little bit more. I know this might be a simple question for attorneys who are listening but for our live person, what does an injunction even mean? What are they asking for? And what is the impact of that?

Jake Sapp:

Sure. So an injunction is basically a legal tool that a party can seek to ask the court to make somebody do something or to stop them from doing something. So in effect, if the court in Maryland was to grant the injunction, asking prohibit ... and the party is asking for, to enjoin. That's a word that's used a lot regarding an injunction. If they're asked to enjoin the enforcement of the rule. Basically, what that means is that the court finds that there's a chance that the party has a likelihood of success in challenging the Regs. And for right now, we're going to stop the enforce, we're going to stop the enforcement of that rule. And each of these lawsuits are asking for the courts to prohibit the department from starting enforcement on August 14th.

Because these lawsuits are very likely going to be living for a long time, they're going to be going forward for a long-time. And so they're asking the courts to stop the enforcement to ... if you're not going to immediately rule that the rule is completely invalid or illegal. We're going to ask you to stop the department from having the authority to enforce the rule up until a certain date. Or until the time where the court decides that this case, the outcome of the case, basically.

Courtney Bullard:

So whether institutions have to be compliant by the 14th? Right now, we're saying yes. We have no rulings from any of these courts on the injunctive relief. And until that comes in, that's the way it is at the moment. Which right, you would agree with that?

Jake Sapp:

Yeah. As of right now, it is absolutely mandatory. It's absolutely required for schools to be ... unless you're going to claim the religious exemption. Which is actually way easier to do under the new Regs. You actually don't have to claim it. You just have to when they say, why aren't you following Title IX? You say, oh, religious institution. Unless you're planning on doing that, you absolutely ... general counsel's and administrators and the title IX offices absolutely need to be preparing your policy and your practice for August 14th for these rules to be effective. Because if August 14th comes and you're not, you're automatically going to be looked at as out of compliance by the Department of Education.

And one of the biggest differences between the NPRM and the final rule, in the NPRM they were ... the department was playing with the idea of cutting out the termination of federal funding for not being in compliance with the regulations. They remove that from the final regulation, which means they're keeping as an administrative enforcement mechanism the termination of federal funding. So obviously the enforcement of Title IX by the Department of Education, you have have an opportunity to come into compliance before they use that tool. But still, it's available. And so you definitely need to be preparing for these.

Courtney Bullard:

Yeah, that's what we've been telling clients. But we understand that certainly there's hope out there that there will be injunctive relief granted and for an extension and in some cases, leadership is holding on to that and in that can get challenging. So we are on the same page there. So moving forward after the injunctive relief. So again, just making clear that even if injunctive relief was granted, the litigation has to keep going.

Jake Sapp:

Exactly.

Courtney Bullard:

What are the legal claims and arguments that are generally being made?

Jake Sapp:

So the arguments that are generally being made are again, all focused around the Administrative Procedure Act. And these words may sound familiar, arbitrary and capricious challenges, abusive discretions, or contrary to a constitutional right or in excess of statutory jurisdiction, those are all the grounds listed under Section 706 of the Administrative Procedure Act. That the courts can review agency actions for, or by. And so those are really ... we can get into the actual specific causes of action for each of the cases. But generally, they're all Administrative Procedure Act challenges, and they're all saying that the Department of Education didn't follow the proper procedures in promulgating the rule. And that some of the rules, some of the pieces of the rules itself are in excess of their authority. They didn't have the ... they don't have the right to do what they did. Or they didn't follow the procedure required by law. So it's, there's substantive arguments but there's also procedural arguments against why this rule should not go into effect.

Courtney Bullard:

Feeling overwhelmed in this current virtual environment, and pressure to comply with the new federal mandates by the end of summer, check out all that ICS has to offer to assist you through these challenging times. ICS Community Access provides your institution with trainings, compliance aids, Zoom meetings, newsletters, and more, including significant discounts on ICS services. All of these items are designed to help your institution with its compliance efforts, which is more important now than ever. ICS also offers complimentary webinars and resources, as well as live interactive certified virtual trainings for Title IX investigators, decision makers, advisors and informal resolution facilitators. You can learn more about all of these offerings at www.icslawyer.com.

Finally, we partner with institutions and school districts to formulate an implementation strategy for compliance with the new regulations. And as always, this service is provided to our community partners at a deeply discounted rate. Contact us today for more information on how we can serve you through this transition. And drilling down into that what highlight for us, where you think are the ... I know you've got this organized, I'm not saying this ... But basically, talk to me about those allegations and drilling down a little bit more, what do you think is the most important portions to focus on?

Jake Sapp:

What are the most important pieces to focus on.

Courtney Bullard:

Or just give me how you had it ... how you were going to outline it to begin with?

Jake Sapp:

Sure.

Courtney Bullard:

From there, obviously, going into every single one might get cumbersome. But go for it.

Jake Sapp:

Sure. Sure. So basically all of the lawsuits, either each have individual things. But the, I think something that's uniform or unilateral between all of them are that they're challenging one, the new definition of sexual harassment. Many of you will recognize and remember that the new definition of sexual harassment under the Title IX regulations attempts to line the definition, the regulation definition up with the Supreme Court's definition from the Davis and Gebser cases regarding just one fact of sexual harass. Because they're defining sexual harassment as one quid pro quo, two severe pervasive and objectively offensive. And yeah, the three definitions of stalking, dating violence, domestic violence, and sexual assault. And the interesting thing is this is just a little a tidbit. They cite to the Clery definitions, and Clery definition sites to the FBI's Uniform Crime definitions, and those cite to other places.

And so we have different standards, different places, different Sources pulling together to put forward these standards. And so those encompass the three definitions of sexual harassment. And all of the lawsuits are challenging that definition of severe, pervasive and objectively offensive. And then something that they're all, they're pretty much all also challenging is the there's a new clause that the Title IX coordinator must dismiss formal complaints under certain circumstances. Specifically if they fall outside of the institution's educational program or activity. And then there's the P ... that is defined as, obviously the educational program or activity. But then on campus and then off campus the scope is contained to buildings that the college owns, or buildings controlled or owned by student groups of the college that are officially recognized.

So if it falls outside of the educational program or activity, or basically property that's not owned or operated by students, then it has to be dismissed. And also it must be dismissed if it falls outside of, if the complained of situation incident was outside of the United States, or a formal complaint was filed by somebody that was not a student attempting to participate in the educational program or activities or an employee. Those are pretty much the ... and then also one of the ... I guess the third. I guess we can do three, is they argue that the department didn't follow and follow the correct procedures as far as some of the new clauses or some of the new requirements under the regulations weren't announced in the notice of proposed rulemaking. So the public didn't have the proper opportunity under the Administrative Procedure Act to consider and comment on those pieces. And so again, we have substantive arguments and procedural arguments.

Courtney Bullard:

Yeah. And I think so going back to the first one, which would be the challenge to the definition of sexual harassment. Certainly causing all head scratching among us as colleagues and our other colleagues with respect to how that implicates Title VII. And how that's going to work in real time on a campus. It's a really narrow definition, and bringing in like legal terms or criminal law terms that we've never really seen in the college and school district environment like rape, that's under that definition of assault. And then [crosstalk 00:28:48] Yes, all those are like terms that we all were calling non consensual sexual contact. Because these are not criminal cases, and these are not civil cases. These are simply ... not simply but hearings or adjudications of determining whether a student or faculty or staff member has violated a policy on campus.

And so it's bringing in those terms. And then the second one you said was the dismissal of formal complaints and how the new regulations require that dismissal. I think in practice that too is really going to be challenging, because institutions are still trying to determine how they want to handle that off campus conduct that they previously were bringing under and looking into. And so that's going to be interesting. And then, like you said, the third being they didn't follow their correct procedures. And

we were saying the term NPRM. That's a notice of proposed rulemaking that came out when the Department of Education released what they were going to put in the regulations.

And then there are, there's a chart that's in the joint guidance that with SUNY that outlines the differences. And also OCR has one between the NPRM and the new Regs. And there's certainly areas where there are changes. And so, again, that argument that the public didn't have a chance to comment on those portions and didn't have, they didn't follow the correct procedure. So do I summarize that okay?

Jake Sapp:

Yeah, that's great. Yeah. And particularly they're saying that there's two main pieces of the final Title IX regulations, which are being viewed as the public not having the opportunity to comment on. The first is the retaliation prohibited standard, which is has been added. And then also, there's a brief sentence. Because so many states have started to do ... at least consider or have ... look at California and they're rid of administrative. Mandamus the same thing with New York. And then you have Texas with their state specific Title IX laws regarding mandatory reporting and definitions. There's a preemption part in the final Title IX regulations that say, if you have a state law that conflicts with our regulations, your state law is out, you have to follow our federal regulations. So those were the two main pieces identified as not being in the NPRM. The public not having the opportunity to consider and comment. But were included in the final regulations, so they violated what's known as the logical outgrowth.

Courtney Bullard:

Got you.

Jake Sapp:

Requirement for administrative regulations.

Courtney Bullard:

And as to that second prong with the preemption of provision which I know, let's take Texas for example, in the mandatory reporting. Under the new Regs, the only administrator deemed to have, "Actual knowledge", is the Title IX coordinator or officials with authority. And in the past, just for those listening. We had this term, responsible employee, that came from guidance from the Department of Education and most faculty staff. And where any administrators were designated as responsible authorities. Meaning if they became aware of potential sexual misconduct, they needed to report it to the Title IX coordinator. And this change is added. So you have in Texas where you are mandated to reporters, but the federal Regs saying you're not one thing that in my mind I've just been like, is when I listened to the Office for Civil Rights explain some of this in a Q&A.

What I heard was that Regs are the floor, the state law could be the ceiling. In other words, Texas is not prohibited from making that a mandate, even though we're not making that a mandate. But then there's other laws where it, they're like none of this really conflicts. But when you really dig into some of the laws I don't know how you can argue, they don't conflict. But anyways, was that the way that you understood it, that their explanation has-

Jake Sapp:

Exactly. So just going back, I'm an administrator, I'm a Title IX administrator in Texas. There were three or four, depending on which way you look at it. Laws passed by the previous legislature, passed last

summer. About higher education and Title IX. One of those pieces, as you talked about was the mandatory requirement, all employees are mandatory reporters. And if you don't, if an employee learns of ... within his course and scope of work. Learns about sexual assault or harassment that took place with a student or an employee, they have to report that. And Texas went so far as to include, if you don't report that it's a Class B misdemeanor. And then at trial if it's proven you did so intentionally, not to report, it's a Class A misdemeanor. And you could be looking at up to almost a year in jail. And actually, the first ... Texas just had their first execution of that law as far as the Chief of Police from Texas A&M Central, was just arrested two or three weeks ago.

Because it was shown, they did a brief investigation. And it was shown that a student came to that individual, and was alleging that there was sexual misconduct and that the Chief of Police didn't report that report to the Title IX coordinator for their institution. And so he was arrested. And now he's facing these charges of failing to report. So you can see the state evolution. Yeah, the state evolution is pretty wild. But to bring it back to the question of preemption, the Texas, the federal regulations say, as far as mandatory reporters we're not requiring that you do that. That's your own determination. And so in my eyes, I'm seeing the Texas Mandatory Reporter law as going to stand, because it doesn't necessarily conflict with the regulations. But when you look at Texas's law, that required, mandated a certain definition of sexual harassment based on whether you're a student or employee. In my mind that is wiped out now. Because we have to follow the federal regulations definition of sexual harassment, sexual assault.

Courtney Bullard:

Right. And I think Tennessee and Alabama, Alabama has a new free speech law that I think talks about this too. Although I believe they're in line. Those definitions end up being in line. But it's so important to look at your state laws as you're trying to come into compliance with these Regs and talk to your general counsel. And in some cases for state institutions needing opinions from the AG's office, on which ... how they're going to do that is going to be really important as we wait to see what happens. So we've identified procedural and substantive challenges that we're seeing across the board in all of these lawsuits. What about, what are they asking for? What are the prayers for relief? What do they want?

Jake Sapp:

Sure. So essentially, what they're all asking for is to stop the enforcement. At least on August 14th, and to allow these lawsuits to go forward without institutions being responsible for implementation on August 14th. They are all asking for at least in some way, shape or form for the rule, or at least parts of the rule to be invalidated as being outside of ... for the substantive challenges that we talked about, for being outside of the department's authority. Some of the challenges to the specific, like the Select provisions we talked about the definition. Or there's other instance, there's other provisions that the law suits are saying, one of the requirements for an agency is they have to do what's called ... they have to show their work.

And this is what comes from, the it's called the State Farm case. And this is the main Supreme Court case that deals with challenging agency action under the arbitrary and capricious standard from the Administrative Procedure Act. Is the case from 1983. And the court ruled that a court should only invalidate agency determinations that fail to, and here's the quote, "Examine the relevant data and articulate a satisfactory explanation for the action, including a rational connection between the facts found, and the choice made".

And my law professor, my administrative law professor always said that agencies have to show their work. They have to give the information that they used to reach a decision and have to show why?

Some people have termed this as a hard look review. And you have to look at is the agency decision a product of illogical or inconsistent reasoning? Did it fail to consider important factors relevant to the actions or, did it actually consider less restrictive yet easily administered regulatory decisions? So, that's the baseline. And a lot of the challenges are saying that a lot of these provisions they are either illogical, or they're inconsistent with the evidence that the department looked at. Or they're challenging it on there's a higher echelon, if you will, of challenging that when the courts are changed.

So instead of just issuing a new rule that's never been looked at before, there's a ... it's the same standard, the arbitrary and capricious standard. There's just extra steps added to it. If an agency is changing a rule, for example, the agency doesn't have, the changes don't have to be justified by reasons more substantial than what was listed in the original rulemaking. But they still have to show their work. They have to acknowledge that they're changing their position. And they don't, it's important here, they don't have to show why the new rule is better than the old rule. But they again, they have to show that they have to show their work and they have to look at if are there facts given that contradict the facts given for the old policy? Or has the old policy been ... by switching the policy, is there, are there serious reliance interests that have to be taken into account?

And all of these things, all of these points that we just considered are what the new regulations are being challenged on. They weren't adequately reasoned or given an explanation for the change. They didn't actually use the facts that were available to them at the time. And this not only plays out in the substantive decisions of the definitions or when a school has to comply or respond. But it also plays into ... one of the requirements for regulatory actions is that there has to be a financial consideration. They have to do an investigation of ... the agency has to do a cost benefit analysis basically.

And several of the lawsuits are challenging the financial analysis of the Department of Education by saying that they were completely wrong. This data, one they didn't give us enough data to show how they made their decisions. And two, it was just facetious, basically, is what they're saying. They're saying that the agency did not do enough work properly under the financial side of this to suffice the administrative procedure acts review. If you're the courts review using the Administrative Procedure Act. Sorry, I know that was a lot. But there's so much important precedent to consider under agency regulations being challenged.

Courtney Bullard:

Yes.

Jake Sapp:

Because it's started back in the day and it's continued to progress. Sorry, Courtney.

Courtney Bullard:

Absolutely. No, you're fine. I was going to say it's not a lot. It's just the reality. And so I have several thoughts that maybe we can dig into just a little bit. Number one is what my recollection from my administrative law classes, I teach business law. I mean, we touched on this, but it's been a minute. Was that this is a pretty high bar. In other words, it's you have to show a lot in order to show an agency acted arbitrarily and capriciously, or that they're ... the new Regs or am I right?

Jake Sapp:

Oh, yes.

Courtney Bullard:

It's a high bar?

Jake Sapp:

Yes, it is a high bar.

Courtney Bullard:

Okay. So it's a high bar. The second thing I think of is when you keep saying show your work, I just keep thinking 2033 pages. Which most of it is preamble in these Regs. And so, while I don't ... I can say I don't agree with the new regulations. And there's a lot of it that is so cumbersome and nonsensical, and everything else we could get into in a whole nother conversation. My thought is, I mean, that's what they were trying to do, is show their work so that they could defend legal challenges that they expected would happen. And that is why you have a preamble that is so long that goes into the rationale behind why they came up with what they came up with. And then the funny math, that's what I call it. The funny math at the end, and everything else. So what do you think about that?

Jake Sapp:

That's absolutely correct. And that's what we've been saying for, since they dropped. The reason that there's so much going into the preamble is so that there is an administrative record already made and established for the court to review. And that so much of what they are changing has citations back to Supreme Court precedent. Regarding the definition or schools response, the actual knowledge standard, doing away with the constructive knowledge standard which you find under Title VII more often than not. So that's exactly right. That's exactly right. That's exactly why there [crosstalk 00:42:48].

Courtney Bullard:

Because our practitioners out there were like, why did they have to talk about Supreme Court precedent for six pages? This is why in my opinion, they did it right.

Jake Sapp:

This is exactly why. So, when the courts review the agency action they established, what they're looking at is actually the scope of review is confined to the administrative record. And that's what the preamble is going to be. However, there is a scenario when you can go outside of the record. And it's where an allegation that the regulation or the agency action was taken in bad, was made in bad faith, or that there was pretext for it. In those instances, courts have very, very cautiously because, and we can get to this, at what point does judicial review of executive agency action violate separation of powers?

That is a major concern for agencies or for courts when doing agency reviews. But there are instances where the record can be expanded. And I believe this was done at least a little bit in the rule during the challenge to the census rule, from last year, or from two years ago. I can't remember exactly where, or from earlier this year. But the record has been expanded. But the record is generally held to what the agency puts forward. And that is why we have so much stuff in the preamble.

Courtney Bullard:

So to that end, well, let me get into these other ones. And then I'll come back and ask. But that explanation, I think is so helpful. And especially for the practitioners when they're just like, why do they have to make this so complicated? Why is this so long? The actual Regs are only this many pages. That

explanation was really, really helpful. And then, we talked about the funny math at the end. And so, thinking through all this, because I think it's like the most ridiculous math. If the courts come in and grant any part of this relief, what happens to the Regs? Do they go away entirely, or? I mean, I know the answer to this. But there's a severability provision, can you explain that a little bit?

Jake Sapp:

Yeah. So this is a really interesting piece. And there's actually, one of the lawsuits actually raises this as a basis for challenging. Ordinarily the, so after each if you're looking at not the first 2000 pages, but the last 30 pages where the actual Regs are. Under each section at the end of it, you're going to see a severability clause. And what that is stated is that if ... the reason that's there is so that during judicial review, if the court says, okay ... specifically looking at, for instance, the new definition of sexual harassment. If the court finds that that was not, that that was arbitrary and capricious. The department's hope is that by striking out that provision, because there's a severability clause, the whole rule will be invalidated.

I don't know, we'll have to see how that plays out. But as far as challenging the actual rules, some of the lawsuits are asking for invalidations of specific provisions. Versus some of the other, versus the other lawsuits which are actually asking for an invalidation or the court to set aside the entire regulation. And then each of them, though, have a catch all relief, which says any other equitable or declaratory relief that the court finds appropriate. So they're really leaving it up to the discretion, they've all identified what exactly they want. But they are leaving the possibility for more to the courts if they find it.

Courtney Bullard:

I hope you enjoy this episode. As you can see litigation for Title IX, and challenges to the Title IX regulations are complex. That's why we've divided this episode into two parts, so be sure to listen to part two when it's released next week. Please stay in contact with us through all of our social media sites. We're on LinkedIn, we both have, we have an ICS page but we also have my page as well as one for Betsy Smith, Instagram, Twitter, and Facebook. We have a Facebook page for Title IX coordinators, we'd love to have you join. One also specifically for K-12 Title IX coordinators, you should look for that.

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