

Episode 7: Part 2 — Title IX Investigations the NPRM and more with Scott Schneider

Courtney Bullard:

Welcome to the Law and Higher Ed podcast. My name is Courtney Bullard, CEO of Institutional Compliance Solutions, and your host. I'm a Tennessee attorney, and I began ICS after serving as campus counsel for eight years at a university system. In that role, I handled all legal matters affecting the campus, or as I like to say, I did everything but divorces. I bring that on the ground experience with me in working with clients today, and that experience shaped the mission behind ICS, which is to provide legally sound, but also practical advice to the institutions that we partner with. Today, I specialize in compliance with Title IX and related laws and regulations, as a result of my experience in the area on campus, since the Title IX boom in 2011. This podcast provides relevant, tangible information that you can utilize in your professional life right now, and even maybe your personal life. Through interviews with campus leaders and subject matter experts and informational episodes, you have access to information at any time, any day, that has both legal and practical implications for your career and your campus. So let's get to it.

You are listening to part two of episode five in my conversation with Scott Schneider with Husch Blackwell. We continue our discussion talking about the traits that make up a good Title IX investigator and the difficulty of the job, and we also debunk some myths that are out there about the job. If you listen to the end, you also get to learn some really fun facts about Scott, and what he would be doing if he were not a lawyer, and his day playing hooky from work. I hope you enjoy.

What do you think makes a good investigator? So when I do investigator training, I always try to do these MythBusters on what makes a good investigator, i.e. you must be an attorney, or you must have a criminal ... Not criminal law, I'm losing my words, but being law enforcement-

Scott Schneider:

Must be a criminal.

Courtney Bullard:

... or have had a background in law enforcement, or ... Yeah, must be a criminal. Must be a law enforcement is what I meant. So I do these MythBusters, but I'd be interested to hear from you what you think are some of the basic traits that would make for a good investigator, either external or internal. And I will tell you this, I tell people all the time bedside manner can make or break an investigation, whether or not someone's even ... They might be great at attention to detail, all these things, but I've had situations when I was in house where we had some folks that didn't have good bedside manner, and it was a mess. So I will just go ahead and cheat and tell you, I think that's something that is important. Somebody needs to be personable and to speak with people. But interested to hear your perspective.

Scott Schneider:

So when I do training I say, and I don't want to overstate it, but I think this is a tremendously difficult job to do. The skill set you need to bring to bear on this is pretty extensive. And so I start with really some

decent analytical skills to be able to assess right up front, what is the issue here? Where do people agree? What do I really need to be focusing my attention on? An then targeting your investigation to those issues, as opposed to, I'm just ... So I think some analytical skills are necessary. There's-

Courtney Bullard:

And that sounds so simple, but the reality is, and this is where having a JD does help, because that's what you're trained to do in law school, it sounds very simple when you say it, but sometimes it's hard to do, and it's hard not to get sucked into rabbit holes or in the weeds. People throw everything, all the spaghetti on the wall. All of it. And you've got to read through it, and figure out what really the issue is. That can be difficult.

Scott Schneider:

I'm routinely brought in to, a university says, "Wow, this investigation, we're getting a lot of criticism. One of the criticisms is, it took way too long to do. What happened?" And almost invariably, that's it. In the initial framing of what the issue is, there wasn't planning. And so I think that analysis is important right up front, a planning component is super important. And then, I don't know how to put this in words, but I think you did. When we're sitting down with the folks that we're interviewing, bringing to it some degree of emotional intelligence. And this is where I honestly think lawyers are almost bad.

Courtney Bullard:

Yes, they are.

Scott Schneider:

These, in my opinion, and this is my opinion, these are not, especially when we're dealing with 18 and 19 year old students, these are not extensive cross-examinations.

Courtney Bullard:

Exactly.

Scott Schneider:

They certainly don't start that way. It's get out of the way, allow both of these students to provide their account of what happened, and then you take it at the very beginning with this very broad telling of what happened, and then you obviously narrow it down and ask the difficult questions. But you do that in a respectful, empathetic way. And I can tell you, I've seen investigators do this in a way that was super aggressive. It just, it doesn't get the information that you need, first off.

Courtney Bullard:

No, people shut down.

Scott Schneider:

That's exactly right. It's in nobody's interest. And number two, it's very off putting, and it's just not a productive exercise. I think that the last piece of this is, you do this incredible investigation, you do the interviews, you've narrowed it, writing a good rapport. I can't tell you the number of times, and this is

where I do think the law school training is super important, where I've see people do this really phenomenal, thorough investigation, and then write a report that's just garbage. It's very conclusory, it doesn't deal with these inconvenient facts that don't support your conclusion. And they're just rife with problems that, if you ever end up in litigation, are going to be exploited, number one. But number two, I think, don't demonstrate how serious the issues are. The part of this that is okay, finally stress inducing is, you've realized for students in sex assault cases that the stakes on both sides are so, so high. And I think the quality of your work needs to reflect that in your work product, your report. That is the product here.

It's like, did I take this situation seriously? Did I give it the attention it was due? Did I treat it with the gravity that the situation demands? If I were accused, or if I was the person who was alleging assault, what I read this report and go, "Wow, I don't agree with the end result here, but I really feel like the university or this investigator took this matter super seriously"? And so, when I'm thinking of good investigators, it's like that whole skill set is there. It's right from the beginning, they're framing the issues appropriately. They know what they're focused on. There is this natural, by the way, curiosity about, wow, what would be really important evidence here, and going very early on to try to secure that evidence, whether it be social media, or videos, or whatever the case may be. It's doing good interviews that don't look like cross examinations that you would see on Matlock, or ... I'm dating myself there, but-

Courtney Bullard:

Exactly.

Scott Schneider:

But get all of the relevant information. And then really pouring it into a report that you put a ton of effort into, that analyzes all of that information, synthesizes it. And then when you reach a conclusion, you don't ignore those facts that don't support your conclusion. You deal with them, and say why you've decided to go another way. So I think it is super, super ... I say this all the time, but to do this work well is super, super difficult, and it requires a skillset that not everybody, in fact very few people have.

Courtney Bullard:

I agree with you. I always tell folks in my training, well, first of all, all those things you said, someone has to possess and be able to do while they're also probably, if they're on campus as a Title IX investigator, while also doing a whole other job, most likely. So it is a difficult situation that a lot of these folks are put in on campus, because they wear a lot of hats and this stuff takes time. But I do mock investigations sometimes in my trainings, and when you you tell people about this emotional intelligence, and I'm telling them, "These are members of your campus community, right? So you want to treat them with respect, integrity, that kind of thing." And then we get into these mock investigations, and you've got somebody who is super aggressive, and they're like, "Oh, I see now."

But then that person has a hard time seeing that they're being ... They're like, "But I want to know the answer to this", and they're pushing, pushing, pushing, and it's interesting. And I agree with you, not everybody has all of those things in a skillset. They may have one or another. And the report writing, for me, I don't mind doing it because I'm a lawyer and I don't mind writing, but it's still something that I'm honing, I guess. And reasonable minds can differ. I'll see a report, it's not that it wasn't well done, but there's so much information I can't even figure it out. And I like things to be more

of a roadmap, and easier to read and follow. So reasonable minds can differ, really on all of it. And that's what makes this whole Title IX world sometimes so complicated, because-

Scott Schneider:

Yeah, no, it's ... The report writing, for me, I like this part of ... It's one of the few things that I get joy out of it. I love writing these reports. I find them interesting and, yeah, but I don't approach them as data dumps. It's this opportunity to tell a story-

Courtney Bullard:

Exactly.

Scott Schneider:

... about what happened, and weaving it all together and doing a thorough analysis that signifies, I think, the significance of the stakes for everybody.

Courtney Bullard:

Yep. I liked the way you framed that. That's a good way to put it.

Scott Schneider:

Yeah. And then knowing, by the way, at the very end of this, which is what we said at the very beginning, that no matter how empathetic I am, how hardworking, how fair I've been in this process, how much I've poured into this report, that at the end of this process, somebody is going to be upset with the conclusion you reach.

Courtney Bullard:

Yep. It's a lose-lose situation.

Scott Schneider:

I'm a people, pleaser is why [crosstalk 00:12:00]. Yeah. I finally figured this out, and the emotional pain that that has created for me. We won't turn this into a therapy session, but-

Courtney Bullard:

And it's true. And for example, I have one coming up that I'm about to submit, and I know the complainant is going to be so upset, and I dread it. I don't dread it because I don't feel confident in my conclusion, but it's still hard because you know someone's ticked off at you, and-

Scott Schneider:

Well, and I just say, this is just one of these things where if you can't handle that part of this, you shouldn't be doing this work. And the other thing-

Courtney Bullard:

You've got to have thick skin.

Scott Schneider:

Absolutely. And you also have to be willing to set boundaries, because I do find that there are, well, let's just say hypothetically, situations where you can tell an institution would love for you to reach a certain conclusion.

Courtney Bullard:

Absolutely.

Scott Schneider:

And I tell anybody that asks me to do an external investigation right up front, if you tell me what to do, or you try to influence my result here, I will not do this work with you, because it's my personal integrity around these issues is way too important to me, just personally. But yeah, there are probably 8 million other people that you can find, if you're looking for a preordained conclusion go to them, but that ain't going to be me. And-

Courtney Bullard:

Well I think being in house, you're used to ... I had to tell people that were my employers all the time, bad news, things they didn't want to hear, the true risks of what they were doing. And so I'm like, I'm not helping an institution at all if I'm not going to give them the facts, what they need to hear versus what they want to hear. I'm right there with you, I'm not going to do it. But I get challenged. I don't know how you handle this, or if you've dealt with it, I'm sure you have, when people lawyer up, it's like the first thing they want to do is, "Well you are hired by the campus, and you are an attorney, and you represent institutions. So you're going to give them what they want."

And I, in my best way possible try to explain to them, I'm a lawyer, but I'm not an advocate in this situation, all these things. Yes, I'm being paid by them. I'm being very transparent with you about it. But those were the options. Somebody in house or someone external, there's really no other way to go about this. But do you ever run into that?

Scott Schneider:

No, not really.

Courtney Bullard:

Well then buckle up, because it's coming. I've gotten it a lot lately.

Scott Schneider:

To me, what comes with the territory in this work, especially now, this wasn't always the case-

Courtney Bullard:

Exactly.

Scott Schneider:

It's certainly the case now, is that every little thing that, because somebody is going to be upset with the end resolve, there is a potential for litigation or other sorts of challenges to your work. And the form of those challenges evolves. And I could certainly see, hey, you're a hired gun, you have a conflict,

whatever, fine, that could be one way of challenging me. My response to that has always been at the end of the day, I'm going to tell people what I think happened here, and I'm not going to be influenced by any other consideration, other than look at the facts, let the facts take me wherever they lead, and apply the facts to whatever the policies are for the institution. And I don't know how else to ...

Courtney Bullard:

There's no other way another, all you can do is ... That's all I can do. Doesn't always appease them. And I will sometimes address it in my report when I'm getting a lot of pushback, but in a footnote or something, just saying what my role is. I don't know about you, but I'm huge on roles, and explaining people's roles in a process, because I think a lot of confusion happens when that's not explained upfront. And so when we're serving in a role as an investigator, it's very different than when we're serving as legal counsel for a campus, or consulting, or whatever. You're changing hats for sure.

Scott Schneider:

Yeah. It's always a part of every introductory conversation, for instance when I'm interviewing people, that they understand who I am and what my role in this process is. I'm not the support person, or anything like that. But also, my practice is, I do investigations, and then I do some work with schools about how to handle things. And so also being clear with the institutions about, in this capacity, I'm your investigator. I'm not your attorney. The things, for instance, that we send via email in this investigation, probably not privileged because I'm the investigator. I'm not your attorney.

Courtney Bullard:

Yep. Right. Yep.

Scott Schneider:

Clarity of roles is super, super important.

Recording:

Did you know that ICS has a membership? Are you a Title IX coordinator that feels you can never keep up with the ever-changing Title IX landscape, or do you need access to tools that can help you stay current and perform your job at the highest level for your institution? Perhaps your campus needs help with training. Put our knowledge to work for you with an ICS membership. Over 15 courses that can be used to train your campus, unlimited access to all ICS webinars, compliance aids and tools that are legally current, discounts on services, and information to assist you with Title IX and other regulations such as Clery, FERPA, and the ADA are just a few of the benefits of an ICS membership. Whether you are interested in one as an institution or as an individual, contact ICS today, or visit www.icslawyer.com to become a part of the ICS family.

Courtney Bullard:

So I guess rounding out our conversation, I wanted to touch really quick, if we can make it quick, it's difficult, but we've been centered a lot on investigations, and I think we're mostly talking about these Title IX investigations. And of course it's a hot bed of legal issues as we've already touched on. And then you have the NPRM that was released in November of 2018, and I know you and I are like minded in our

overall opinion of some of what's contained in those proposed rules. I'd like to hear from you what your biggest concern is, and then if you've heard any scuttlebutt recently about what's going on with that.

Scott Schneider:

I think if I were to frame, my biggest concern is that this is, the proposed regs are a political document, not a practical document that is really focused on how to do these and do these well. It's basically, we're in the midst of an issue where there's clearly, this is a cultural war issue and it has been for quite some time, for 20 years now, and there are competing factions in the culture war. And what you would hope to get from the department of education is to recognize two fairly obvious points, which is, wow, there's this problem with sexual misconduct that occurs within either the K through 12 setting and the higher education setting as well, and wow, to be accused of this misconduct and to be found responsible for it is pretty significant.

So that we recognize both that sex assault is a problem, and we need to provide robust processes and procedures for folks that are accused, because the stakes are so high. And so you would want the document to accept both of those premises and then say, "And here is some practical guidance on how school should be dealing with these issues." And what we get instead is a genuflection to one side on the culture war. What has been proposed in terms of, I'll just say live hearing requirements, fundamentally is not going to be workable for small campuses. Not every school ... There's so much diversity in higher education that any time we say, "Oh, there's going to be a one size fits all approach for any problem", you're going to have so many issues. And I think it'll be especially true for some of the small privates.

I don't know how, if this is going to be in the final rule, they're going to be able to do this and do it well. Which by the way, if we don't do it well, the biggest people we're serving well are the people who are in our process, both those who are bringing the complaint and those accused. I've always been a fan of, look, give us the broad guideposts about what is it that we should be doing in this space to address these twin principles, providing a fair process, a thorough process, but not going overboard.

And then, if schools are screwing it up, we'll then use the enforcement proceedings of OCR to deal with that. The proposal as crafted now is, there's a long history of the process case law as applied to student disciplinary issues. This goes back, at least in the Supreme court, for about 50 years. And one of the common themes of all of this case law is, there's no one size fits all approach, given the diversity of issues and resources and everything else, to deal with student disciplinary processes. So we have to have some degree of flexibility here.

One of the other nuggets is, these are educational institutions. These aren't courts, all right? We don't have quasi courts in our higher education institutions. And so the proposed regs, in my mind, literally turn that precedent on its head. And the thing that rankles me a little bit about it is, you have people that are quote unquote conservative, who are advocating for this, and it's literally one of the least conservative proposals that I've ever seen.

Courtney Bullard:

Approaches, yeah.

Scott Schneider:

The idea that... And I'll go to a textual argument. This might get boring. The idea that Title IX, this very straightforward law that prohibits discrimination within the context of education programs, would require private institutions to develop hearing processes that rival the hearing processes that criminal courts provide, is absurd.

Courtney Bullard:

Well, and I can tell you we have APA hearings, and if you're a state school here, and so I had to represent the school in APA hearings and sexual misconduct cases, and where you do have to cross examine students. And the non sophisticated word for it, is it just felt very yucky.

Scott Schneider:

Yeah.

Courtney Bullard:

It's painful to watch. I hated it. I was just like, this is not ... This 19 year old kid is not prepared for something like this, and shouldn't have to be prepared for something like this. This is not what education institutions are about.

Scott Schneider:

But at least there, in the public school setting, there's been a lengthy history of, we need to have some formalized-

Courtney Bullard:

Oh, sure.

Scott Schneider:

[crosstalk 00:23:48] due process, but I do work for like schools that sometimes have 1500 or 2000 students.

Courtney Bullard:

Oh, that's a lot of my clients.

Scott Schneider:

Yeah, and I go, how do you ramp up from where folks are, which is maybe a single investigator model ... That's really good by the way. That works. That gets the information. That is accommodating student's schedules. That's giving people meaningful opportunities to participate, to this very rigid system that isn't accommodating the students' schedules, that puts people in the chair of having to make on the spot evidentiary decisions and explain why they've ... So I'm very, very disappointed with the end result of where we are.

I get that they have this very complicated problem, one they took on voluntarily, to deal with, but I feel like we end up, at least in this draft, with more of a political document than anything that ... It's not going to help the practitioners. It's not going to help the students. It's not going to help institutions. I also think, if what we had is what we end up with, it's also rife for challenge, and it will be challenged.

And I can't imagine it's going to survive in its current form. As far as what I'm hearing about, where are we going? As I understand it, there's a really big rush to go through the comments, respond to the comments. I think the aim here is to have final regs in place in the summer. I say that, and God, if they can do that, that's ...

Courtney Bullard:

I'm like, that would be ... That's crazy.

Scott Schneider:

Yeah. That's how I feel about it, as well. The pushback has been ... I haven't read all the comments, I'm reading some of the synthesis of the comments, but I think the bulk of the comments are really focused on the rigidity of what they're proposing. And frankly, this just doesn't, it doesn't work. And so this is the perennial frustration, I think, in the space, is that depending on administration, the pendulum swings one way, in one direction, and then counter swings the other way, and then ... We just need to have this pragmatic conversation about, we have a problem on campus, we want to make sure that students accused have a fair process, how do we do this? And how do we do it in a way that at the end of the process, we recognize someone's going to be upset with the end result?

There's no process that we're going to employ where everybody walks away and they go, "Wow, that was awesome." If that's the goal here, we are totally spinning our wheels. So we know at the end of this process, someone is going to be upset with the end result. But how do we develop a practice in a process where we have a degree of confidence in this? And doesn't mean it's perfect. And I thought we were getting there.

Courtney Bullard:

I did too, honestly. I felt like things were getting in that direction, it settled down, and some pretty good processes were in place on campuses.

Scott Schneider:

And I think now this just throws a bit of a monkey wrench in it, and we'll just, I guess, see what happens.

Courtney Bullard:

We'll see. We'll see what happens. Okay. So to finish out I just, I like to do a fun fact, or ask a question that's not related to all this legal, heavy stuff. And that is, if you were not an attorney, what do you think you would be doing?

Scott Schneider:

Two things. I would be a truck driver is number one.

Courtney Bullard:

Oh, that sounds horrible to me.

Scott Schneider:

Oh, God.

Courtney Bullard:

I hate driving. I had to get on the road today for six hours, and I'm just like, "No."

Scott Schneider:

I would just love it. And there's a point at which I'm going to retire, and it may be sooner rather than later. And that's probably what I will do for six months of the year. The other six months, I want to be a roadie in a band, and travel. Either a roadie in a band, it has to be a rock band, or to be involved in working with music festivals of some sort. So ...

Courtney Bullard:

Now that does sound a little more fun. Not the truck driver. Basically, you don't want to sit still, you want to be out and about, seeing the world.

Scott Schneider:

I love being out and about. I love working and meeting with different people. I so love meeting and working with people who aren't lawyers. Yeah. I think that's probably the direction I will, whenever my legal career is done, I will promptly go in.

Courtney Bullard:

Well I was not expecting that answer, so I love it. My husband and I play this game all the time. If you weren't doing this, what would you do? And I always like to hear, especially lawyers, because I don't know about you, but I think most lawyers are disgruntled, most hate being lawyers and complain about it constantly. At least, especially in private practice. I felt that way for a while, until I found higher ed. And I just love it now, but ...

Scott Schneider:

Well, it was so weird ... So I'll give you one quick anecdote, because I know we're coming to the end. Yesterday-

Courtney Bullard:

Yeah, sure.

Scott Schneider:

I shouldn't say this, but I played hooky yesterday, because it was 75 degrees and South by Southwest is in town. And so around 11:00 in the morning, I went with a partner of mine to go see a band. And I'm new to Austin, so I don't know a ton of people here, but he introduced me to this motley crew of people. And they were just so much fun. We're all drinking beer, and all this stuff. Please don't tell anybody this. I didn't do any work, but [crosstalk 00:29:42]-

Courtney Bullard:

This will be released so much further out, that no one will even know what you're talking about.

Scott Schneider:

Yeah. We were having such a good time. I was like, "Well, what do you all do to make money?" And then every one of them was a lawyer. I was like, "Oh, wow, man, maybe there's hope for this profession."

Courtney Bullard:

That's hilarious. Everyone's escaping their day job.

Scott Schneider:

We had, from 11:00 AM til like 9:00 at night, probably yesterday was one of the best days of my life. It was fantastic.

Courtney Bullard:

That's awesome. I love that. And I love spontaneous times like that, they always seem to be really fun.

Scott Schneider:

And it was spent with 10 lawyers. I mean, what the heck is going on here? So ...

Courtney Bullard:

Yeah. That is odd. That is one thing about higher ed that I liked, is I wasn't working with a bunch of lawyers the time.

Scott Schneider:

There you go.

Courtney Bullard:

But that's cool. So now you found nine friends, maybe, in the legal profession, that are tolerable to hang out with, and more than tolerable it sounds like.

Scott Schneider:

Amen.

Courtney Bullard:

All right, well, I appreciate so much you talking with me. And you and I could probably talk for hours, but I've very much enjoyed our conversation. And I just thank you so much.

Scott Schneider:

Me too, Courtney. Good talking to you. Be good.

Courtney Bullard:

I hope my discussion with Scott has restored your faith in attorneys, and made you realize that we're not all curmudgeons. Some of us do have a personality, and like to have fun. But in all seriousness, I definitely took away some tidbits to add when I'm working with my clients, from talking with Scott. And I hope that some of the information that he talked about with what makes a good investigator, that there

was some practical information in there that you could take away in your day to day work as well. Thank you again for listening, and until next episode.

I really hope you found today's episode useful, and you got some information that you can use in your professional or personal life, or both. If you enjoyed this podcast, please do me a favor and subscribe to it, provide a review, and also share it with your colleagues and friends. You can find ICS on social media, through Facebook, LinkedIn, or Twitter, so we'd love for you to connect with us there. Thanks again for tuning in to the Law and Higher Ed podcast. We'll see you next episode.