

Courtney Bullard

Welcome to The Law and Higher Ed podcast. My name is Courtney Bullard and I'm your host. I've been practicing law for almost two decades in a specialized and Title IX compliance for school districts and institutions of higher education.

If you want to learn more about me, go all the way back to episode one, to get more information not only on myself, but on institutional compliance solutions.

I wanted to record this quick informational episode because schools are starting to, live the regs, as we call it. We are continuing forward with our series Putting Policy Into Practice, and we are truly living the regs with our clients and community partners.

I wanted to share with you some of the initial pain points of the new regulations in practice as school districts and institutions begin to have reports of sexual harassment.

The first I call still reeling. Many, if not, all of you are still reeling from COVID and trying to return to school and the new regulations. Plenty of districts and institutions have their policies completed but are still working through the governance processes.

Some are experiencing pushback from their boards because board members do not understand the intricacies of these new requirements. If this is you, take a deep breath, do what you can and document any delays in meeting the Department of Education's August 14th, deadline.

Number two is finding people to serve in the roles. Most have their Title IX policies in place but are still working through identifying folks for each of the Title IX roles. The most difficult seem to be advisors. Remember that a pool of folks may be beneficial. Perhaps your investigators serve as an investigator in a case, but in another case, they serve as an advisor. Those individuals are well-equipped to serve in the role of advisor because they understand the process which can be enormously helpful.

Some of you are small and therefore do not have enough individuals for these roles and/or there's great potential for a conflict of interest. Consideration of external individuals may be necessary, as discussed in the last episode with Elizabeth Canning.

Number three is the evaluation. Any report of sexual harassment must be evaluated to determine whether it meets the definition of Title IX sexual harassment and falls within the recipient's program or activity. This analysis may seem simple on its face, but in practice it is very complex. The prong that is the most difficult for Title IX coordinators is the prong, which we would say is the second prong and defines sexual harassment is unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive, that

it effectively denies a person equal access to the recipient's education program or activity.

We know from court cases that the bar for conduct, meeting the sufficiently severe pervasive and objectively offensive prong, is very high. As Title IX coordinators evaluate formal complaints and/or reports of sexual harassment, to determine whether a formal complaint signed by a Title IX coordinator is appropriate, where the complainant does not want to file a formal complaint, it will be important to document any determination made.

If the conduct is determined that it does not meet this definition, is the report referred to another campus area and if so, how will that transition occur? Does the report remain in the Title IX office but under a different process? Again, if so, how is that communicated to the parties and documented?

Just because the Title IX coordinator determines that the conduct does not meet this definition or another definition under sexual harassment, this does not mean that the school district or institution does not take the alleged conduct seriously and that it will not be addressed. It simply means we'll not go through the formal Title IX grievance process required under the new Title IX regulations.

Number four is the reluctant complainant. Our clients are already experiencing complainants who do not want to proceed with a formal Title IX complaint, once they understand the formal Title IX grievance process.

When should a Title IX coordinator file a formal complaint? A few things to consider. First, the district or institution can not discipline that respondent for the alleged conduct outside of the formal Title IX grievance process. If the conduct rises to the level of Title IX sexual harassment and occurred within your program or activity, that means no informal resolution of any kind as well.

If it is an employee on student allegation, the inability to discipline is particularly concerning. That is one scenario that stands out to me where a Title IX coordinator will want to consider signing a formal complaint. Other considerations are similar to prior evaluations made by Title IX coordinators, including whether the allegation or matter includes the use of a weapon, whether there was more than one respondent, whether there have been other reports of sexual harassment or other relevant misconduct concerning the same respondent, whether the respondent threatened further sexual harassment or other misconduct against the complainant, whether the alleged sexual harassment was committed by multiple perpetrators, the nature and scope of the alleged sexual harassment, including whether the sexual harassment was perpetrated with a weapon, the ages and roles of the complainant and respondent, whether the district or institution can pursue the investigation without the participation of the complainant and whether the report reveals a pattern of perpetration at a given location or by a particular group.

Finally, number five, the process itself and smooth transitions. The Title IX process itself is prescriptive. Many of you are still determining your internal process and who is going to serve in those key Title IX roles. Smooth transitions will be important within the process from one step to the other. It's already mentioned the transition between the dismissal of a formal complaint and a referral to another process will be confusing for the parties. Ensure this is thought through on the front end to help make the transition as clean as possible, but more importantly, to alleviate as much as the confusion as possible for the parties and avoiding appearing as though the alleged conduct will not be taken seriously or addressed.

In the formal grievance process, considering how the investigation is handed off to an investigator, then to the decision maker, then to the appellate decision maker, if necessary. If offering informal resolution, same analysis. How has this facilitated, especially if the matter jumps from an investigation to informal resolution and then back to the investigation, for example.

So these are the five areas that we've identified currently in working with clients as they live the regs. Of course, there are many more and I will be recording another informational podcast through this series before the end of 2020, as we continue to gather more information and questions from our clients, especially on that severe pervasive and objectively offensive analysis because we have fielded many, many calls regarding that specific prong.

As always here at ICS, we hope that you're doing well as you navigate this semester in the midst of COVID and working through the new regulations.

Speaker 2:

Feeling overwhelmed in this current virtual environment and pressure to comply with the new federal mandates? Check out all that ICS has to offer to assist you through these challenging times. ICS community access provides your institution with trainings, compliance aides, 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, appellate decision makers, advisers and informal resolution facilitators. You can learn more about all of these offerings at www.ICSlawyer.com.

Finally, we partner with institutions in 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.

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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, should look for that.

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