

This transcript was exported on Jan 15, 2021 - view latest version [here](#).

Courtney Bullard:

Welcome to the Law and Higher Ed podcast. My name is Courtney Bullard and I'm your host. A practicing attorney, who specializes in compliance with Title IX related laws and regulations. I'm the owner of Institutional Compliance Solutions and my team provides legal and consulting services to school districts and institutions of Higher Education. If you want to learn more about our services, go to [www.icslawyer.com](http://www.icslawyer.com).

Courtney Bullard:

As we come to the end of 2020, we are planning for 2021 and we have a ton of virtual training opportunities in 2021 that are quickly coming on the calendar, so be sure to check those out on our website as well as a free webinar on January 28, one for Higher Ed and one for K-12, which is my annual year-end review, where I go through all that happened in 2020 in Title IX compliance and as we all know, there's been a lot, including litigation trends, and predictions going forward. I hope you're enjoying the Law and Higher Ed podcast and we'll continue to tune in to episodes. I'm quickly recording new ones each week that will be released in early 2021 as well.

Jody Shipper:

So, first of all, nothing's happening inauguration day or the day after as Scott Jones discussed. These regulations aren't going away with a pen stroke, so we're going to have either a repeal and nothing or repeal and something new, hard to know, and all of these processes take time. There's the notice and comment process and all of the procedures under the Administrative Procedures Act.

Courtney Bullard:

This episode is the first of its kind because I have not one guest, but three of my colleagues joining me to talk about the impact of the election on Title IX compliance, and all three of them represent a unique perspective. Jody Shipper is a consultant in the Title IX space with Grand River Solutions, Scott Schneider is a litigator and lawyer at Husch Blackwell, and then Joe Storch, who is In-House Counsel at SUNY. All of them have been prior guests on my podcast and you can learn more about them. I'm linking their bios in the show notes.

Courtney Bullard:

There's no question that politics impacts education and that is something I did not fully appreciate until I was In-House Counsel. I'm not a political analyst or expert. For a deeper dive on the impact of the election on Higher Education at a broader level, I encourage you to listen to Higher Grounds' most recent episode. John Graff has some great guests, one is Scott Schneider and they talk a lot about the impact of the new election results on Higher Education at large. I'll put that episode in my show notes.

Courtney Bullard:

We now have an anticipated change in administration with the election called for Biden Harris. What does this mean for Title IX compliance in 2021 and beyond after the past months' scramble to comply with a new Title IX regulations amidst a pandemic. As the election results were coming in, I messaged my three guests today to discuss initial thoughts on the election results and their impact in an episode and I have many more colleagues scheduled to continue this dialogue in future episodes.

Courtney Bullard:

I hope you enjoy this episode as much as I did and that it helps you to think about the potential impacts of the election on compliance with Title IX going forward.

Courtney Bullard:

I'm excited to have all of you on this episode to talk through our thoughts on the impact of the election on Title IX compliance going forward knowing that much is speculation at this point and certainly 2020 has been a wild year, so we're getting to the end. We'll get to the million-dollar question regarding predictions on what will happen with the new regs, but I want to start with a quick review of what has happened in the last 30, 60, 90 days with some sub regulatory guidance by the Trump administration that impacts this area.

Courtney Bullard:

So Joe, I'm going to start with you. Can you briefly cover some of these important developments on this front?

Joe Storch:

Sure. Thanks, Courtney. Thanks for having me on again. We have seen quite a few months and that's aside from a national election. A couple of weeks before the election, the President issued an Executive Order around training in diversity and certain areas of diversity. A few weeks after that, we saw the Clery Act Handbook be rescinded and I'll just chat for a moment about each of those.

Joe Storch:

The Executive Order on diversity would bar federal contractors and the federal government itself and certain federal grantees from conducting certain trainings using certain topics that are seen as "divisive concepts" in the language of the executive order and that has a big impact on those of us in Education. Many of us work with federal agencies. We might have federal contracts or we might have federal grants and there's some real interesting little details in there. Courtney has a link to a post that we put up at SUNY explaining some of the details and I won't do that here, but suffice it to say that it is decently likely and I think that's already been telegraphed from a new administration of the President Elect that that executive order will be withdrawn. So, I think the long-term impact of that executive order will be far less than it would have been if the President was reelected.

Joe Storch:

On a Friday night and without any fanfare, no press release, no tweet, no fanfare of any type, the Department of Education withdrew the Clery Act Handbook and replaced it with a 13-page appendix. Now, the Clery Handbook is sub-regulatory guidance. It was meant to offer some explanation and some context around the statute and the regulations that are the Clery Act Law as it were. That handbook, I want to point out was rescinded, but not repudiated and we can talk about this a little bit in the podcast here. But when the department withdrew the Title IX guidance of the prior administration, they repudiated it, they insulted it, they said really bad things about it, and they wrote really bad things about it. Here, the handbook was not repudiated, it was withdrawn, and still is available on the department's website, so it can still be used as a reference.

Courtney Bullard:

Okay, perfect. So, two things to keep an eye on and of course, I've shared John Graff's podcast episodes on the rescission of the Clery Handbook that goes into great detail about all of this, but Jody, you were also a Clery subject matter expert, anything else to add on that or obviously the diversity Executive Order maybe that's what I'd like to say, nothing burger. For some reason, it's my favorite word these days because of the change in administration, but anything else, Jody, you might want to add to that?

Jody Shipper:

No. I couldn't be in greater agreement than with everything Joe has said. And for those of you who, by the way, haven't heard Joe do a Clery Act training, it is always worthwhile, if for no other reason than he has the very best Clery jokes. No one else knew it could be funny. You have to have taken advantage of and enjoyed several trainings from Joe to really up your repertoire of both dad jokes and Clery jokes. So, if for no other reason than that, it's worthwhile to have some guidance back and, frankly, an ability to do a better job keeping our campuses safer, which I do think to some degree that handbook provide it.

Courtney Bullard:

Absolutely. Totally agree. I'm going to turn this over to Scott.

Scott Schneider:

So, I certainly think the Diversity Executive Order will go away and quickly under the Biden administration. I don't know enough about the Clery Handbook issue. I will say, if you look at the Biden Presidential website, there was a discussion about Enhanced Clery Enforcement. And so, from a compliance standpoint, it wouldn't surprise me if there was more activity around Clery enforcement than probably any other administration. And that I always back up and say what Obama did around the Office for Civil Rights with respect to Title IX was historically unprecedented. I mean, there was no office prior to the Obama administration that really focused to that extent on doing these broad program compliance reviews and the way that they did it.

Scott Schneider:

And is it possible that under the Biden administration, you could see the same sort of activity around Clery? That wouldn't surprise me. I haven't heard. There are a number of people that I talked to that know people that will likely be in the administration. I haven't heard anyone say that explicitly, but it's on the website and it's a law that's been on the books for a while and they're finding mechanisms that you don't have under Title IX, where it's saying, "We're going to pull off your funding even though that's never happened." So, I don't know what they'll do with the handbook but it wouldn't surprise me in the least. If you saw the Biden administration saying, "We're going to do in terms of Clery compliance what the Obama administration did around Title IX," that wouldn't surprise me.

Courtney Bullard:

So the next topic is the big question. We've got the new Title IX Regulations that were released in May, went into effect in August. Campuses and school districts have been working hard to update policies and procedures, conduct trainings, tweak their processes, as a result to come into compliance. And now, we have a change in administration. Scott?

Scott Schneider:

I don't think anything will happen quickly that was for better or worse, one of the things that's significant about putting this sort of guidance in the form of regulations is it makes it a lot more difficult to unwind. It's not like a "Dear Colleague" letter or a guidance document that a new administration can come in and say, "We're rescinding." There's a process that you need to go through.

Scott Schneider:

I mean, I do know that there are people, who will play prominent roles, probably in a Biden department of Education that are not fans of certain aspects of the current regulations and it wouldn't surprise me in the least, if at some point, they initiate the process to have those regulations rescinded. And I think probably the best most recent case study would be what Betsy DeVos did with the gainful employment regulations. I mean, when she became Secretary of Education, those regs were on the books from the Obama administration and she said two things: "We're not going to make compliance with these regs an enforcement priority and we're going to go through the process of having these regulations rescinded and replaced."

Scott Schneider:

And I don't remember exactly what the timeline was on that, but it wasn't quick. It was from the announcement until they were rescinded. I think it was at least a couple of years and then even during that period of time, where she said, "Hey, we're not going to enforce this." There was tons of litigation against the Department of Education trying to compel them to enforce the regulation, so there's no path as far as I'm aware of for a quick rescission of these regulations and if the administration is inclined to rescind them, there's a process.

Scott Schneider:

Now, one thing I've talked about this and I don't think this is a viable path, but there's also a lot of litigation out there challenging these regulations. Some of which is pending, some of which could now be filed. Is it possible that in a lawsuit, the administration basically takes the position that, yes, we don't think that these regs were changes sides in the litigation. It doesn't defend the litigation and you get something like an injunction barring enforcement. Yeah, I mean, maybe if something like that were to happen. I don't know what the chances are, but it wouldn't be completely unusual or even in the context, by the way of Title IX. I mean, there's some history of administration's flip-flopping positions.

Scott Schneider:

I mean, the whole cannon case was initially, the administration, the presidential administration, I think it was, I know I get them all confused, but I think it was the Ford administration was basically saying, "Hey, there's no private right of action." And then the Carter administration comes in and says, "Hey, Supreme Court, we think there's a private right of action," and that helped kind of. So, there's some precedent for that at some level, but I certainly don't think anything is going to happen quickly. There's no path for that.

Courtney Bullard:

All right, so my next question for Jody, if the regulations do go away, in whole or in part, was all this compliance worked by our clients and then we work in a similar space, working hand-in-hand with a lot of folks on the ground across the country and all the work that they did over the summer and then continued to do was it all for nothing?

Jody Shipper:

I actually don't think it was all for nothing. I think a lot of really difficult conversations took place on K-12 campuses and college and university campuses about process, about overlapping processes. Some of the work that had to take place with these regulations really highlighted both conflicts and gaps and I think that's so important to address, so if this is what it took to become more aware of that, I think it's really important. I think in the K through 12 space, there were some really critical conversations that took place, some critical work that took place, there were so many who didn't realize that they were obligated to follow Title IX regulations and to be more mindful of requirements.

Jody Shipper:

And even over the summer and I'm sure, Courtney, you had the same experience, finding people who for the first time realized they should have been paying attention for the last many years and they hadn't been. So, in many ways, this has prompted some difficult conversations, some necessary conversations, people have improved their skills. I think that's also really important. And I think, Courtney, you and I very much agree on this, reviewing your policies shouldn't be something that happens only when there's a change in the presidential administration or new regulatory framework. It needs to happen more often. And clearly, it will be happening again once we have some clarity on what the new guidance might look like.

Courtney Bullard:

I totally agree. And I can't say it enough in the K-12 space, how many... I mean, we're talking to sometimes hundreds of coordinators, who are reaching out to us as part of our community with questions and so many school districts were behind just being very candid, weren't doing the work in the compliance space with Title IX. They were doing a lot of other difficult work dealing with cyber bullying and bullying and hazing. But Title IX compliance absolutely was not at the forefront or Title IX coordinators were there in name, but without any idea what that really meant.

Courtney Bullard:

And so, I completely agree with you that this brought about some of those conversations, brought it to the forefront for boards and leadership, and administrators. And that's something that really didn't need to happen. And it's not just in K-12, but certainly, I've seen the biggest impact in K-12, as far as realizing this is something that needs to be done, which will have the longer term effect of creating safe environments for their communities, and then also, at the Higher Ed level, some similar trends.

Courtney Bullard:

So I agree, I really do not believe that the work of this summer was for nothing at all. I think for some schools, it gave them the resources that they were already needing and should have had. I gave some buy in there because of this new law and as we were talking, as we were preparing to go into this recording, we don't know what's going to happen, but there are things that will likely remain. And so, I agree with you is the short answer. I don't think it's all for nothing at all and that's what I've been telling my clients and my community partners as well.

Courtney Bullard:

And, Joe, I know you've been doing a ton of training as well. Anything else you'd want to add on that?

Joe Storch:

Yeah. I think that my big regret is the emphasis and concentration on this in an extremely short timeframe, in a time of both a pandemic, incredible stress over health concerns and incredible stress over finances. And so, whether it was worth it or not, I don't know. Certainly listening to the two of you, I think you make some really great points. At the same time, I will always be regretful of what was lost during the time that colleges and universities, and you all work much closer in the K-12 space than I do, just the time that was spent on the compliance aspects of this that was not spent on student mental health, that was not spent on student financial needs, the money that could have gone to that, the resources.

Joe Storch:

And we all know, there are only 24 hours in a day and so, time spent on one thing is time not spent on another and we've all talked about how sad we've become that this issue that we all care about and have devoted our careers to has become part of the political atmosphere, Red Title IX and Blue Title IX. And I think we all yearn for a day where it returns to doing the right thing under civil rights law and under the law and regulations, that's my regret that the time it took during such an unbelievably difficult, historically difficult time.

Courtney Bullard:

I could not agree more. And this, I could get on my soapbox about this because of all of the trainings we did over the summer virtually and working hand-in-hand with folks on the ground. It cannot go unsaid, I guess is the word I'm looking for, enough that the enormous strain it has put on folks on the ground. You talk about needing those resources for student mental health and I completely agree, but also just the strain it's taken on these administrators who have had to rapidly get into compliance in the midst of everything else we're talking about both personally and professionally.

Courtney Bullard:

I've been grateful to run this business and be able to work hand-in-hand with those administrators to try to help shoulder the load. I know that Jody does that, too in her work and Scott, and you, all have as well, Joe, but it's really sad. I mean, honestly. I think it was all necessary. I wish it didn't happen, obviously, when it happened, so I completely agree with your sentiment there.

Courtney Bullard:

So, along the same lines, if the regulations go away, don't go away, part of it goes away, we still have a lot happening in the courts and litigation trends, I do a year-end review, in January of every year where I cover litigation trends as well as other things that have happened from the year before, I feel like the one that I do this coming January needs to be about 20 hours long given how 2020 has gone in this space, but the litigation trends alone are something we look to we're looking at best practices and advising our clients on compliance in this area.

Courtney Bullard:

What are some that stand out to you, Joe, to consider in this space when even outside of the regulations? And we already know the preamble to the regulations, of course, relied on some pretty significant court decisions in what the Department of Education utilized to support the determinations

and the decisions they made in these regulations. But anything specifically that stands out to you, and then of course, Jody or Scott, that informed compliance, even if the regs weren't in place?

Joe Storch:

I think there are parts of the regs that I honestly think are good and I think you and I share this opinion. There's some good, there's some meh, and then there's some stuff that just doesn't make a lot of sense. I continue to think that people, students, the university community is probably best served with as many options as feasible under the circumstances. And so, I think one of the good things about the regs is the exploration of non-investigatory, non-adjudicatory options. And to the extent, the regs have sort of facilitated a more robust conversation about that. I think that's fantastic.

Joe Storch:

I mean, I meet with victims of assault and I know you do, too. I meet with students accused of sex assault. No one seems to be particularly enamored with this kind of investigatory, adjudicatory model and folks just seem to be clamoring for something that better serves their needs. And so, like I think the conversation around restorative justice has been super useful. And some of the other informal resolution topics. So, for that alone, I don't think it's been a waste. And look, I am a big believer, especially when the stakes are this high and the importance of having sufficient process that we have faith in the results of that process.

Joe Storch:

And there are parts of the regs that I think are absurd, but to the extent it's for schools and particularly K through 12 schools, to have something that is a little more robust in this space, so that we can all have confidence or some degree of confidence. You never have complete confidence in any human system, especially one where we can't do subpoenas, we can't do discovery and I think that's good.

Scott Schneider:

Yeah. So, I think the biggest trend for me, we certainly saw what kind of became a blockbuster, 2:1 decision out of the Sixth Circuit, the Doe v. Baum case, followed by some other cases. And it seems that the Sixth Circuit has been a very, very active circuit in this area and at the same time, what we're seeing is other circuits around the country that have not adopted or have not gone as far as the Sixth Circuit has gone. We also saw a couple of cases that sought to apply and in my view, misapply constitutional due process to private institutions, which I never understood, but one of the biggest trends, I think and I kind of want to pass it to Jody, who's been tracking this, as well, is just that there is not a uniform movement. There were a lot of folks, experts on social media as it were, who saw the Sixth Circuit opinion and said, "The world is going this way and every court will follow Doe v. Baum, and this will be the law of the land."

Scott Schneider:

And indeed, as you pointed out the Department of Education, remember there was that leaked document and then when we saw the proposed rule, it had now included the Doe v. Baum stuff. Okay, so the Department of Education looked to it, but there are other circuits around the country that could have adopted it, some of them passed over it and some of them firmly did not adopt it on its face. And I think that's one of the most interesting things.

Scott Schneider:

And as I pass it over to Jodi, what I'll say is Title IX and these rules and protections from sexual and interpersonal violence and protections from harassment are ideal when they're applied uniformly and the challenge with some of the pullback on Clery and it not being apples to apples, the challenge with the different circuits application here is that students are going to be treated differently, protected differently, impacted differently.

Scott Schneider:

Most American students go to school, pretty close to home. They go to school in their home state. They often go to school somewhere where they can commute. The idea of a student who goes away to college, certainly, there's plenty of them, that's what the media covers, that's what's in the movie, but that's not our typical student. So, most students are going to school closer to home. They are stuck in whatever law and application their circuit, their state, and the like. And I think we lose something when we lose some of that uniformity and protection.

Courtney Bullard:

Agreed. Jody, any thoughts on that?

Jody Shipper:

One of the really interesting thing to me both leaving in the comments we've just heard with which I really do agree, but also in talking about the regulations and which parts might be kept and which parts might not, many of the court decisions that have not gone as far as Doe v. Baum have emphasized the need to know the evidence and meaningfully respond and test the evidence. And there have been many court decisions that have said, "When you have a robust process for testing the evidence, it does not necessarily have to be this adversarial hearing with the live cross examination because the point is testing of the evidence."

Jody Shipper:

And parts of the new regulations that are currently in effect, do emphasize the need to do more of that, for example, with the evidence review process and their chance to respond to the evidence. Many of those steps, I mean, Courtney, I think you and I are on the same page on this are steps that should have been taking place for everyone anyway, for a very long.

Courtney Bullard:

Absolutely.

Jody Shipper:

And many institutions have been painted with a very broad brush as not allowing students to see the evidence or respond to it, because of a few who held things a little too close to the vest. So, I think that's one place where some of the litigation plays in, but we can also be looking at some of the practices that courts have noted what's really underlying so many of these cases where, as Joe said, they didn't go as far as Doe v. Baum. It's because they've recognized what was really at stake.

Jody Shipper:

And the other thing that I just got to say it, I find so interesting is that this idea of needing to apply constitutional due process to private schools comes up in the context of sexual assault, but not

plagiarism or theft and there is just a lot of assumptions underlying why one and not the other. There's a lot of sort of politics in there. There's a lot of bias that underlies those distinctions. And I just got to put out there, I just find that interesting.

Courtney Bullard:

Yeah, I totally agree.

Joe Storch:

And Jody, I could not agree with you more. And we've seen cases that are homicide type cases. There might be an off campus organization where actions are taken by students that lead to the hazing death of another student. And I am not familiar with a case that applies constitutional due process concept to private colleges. And this is cases that involve student's severe injury. And so, what you point out is absolutely right on the money. It's something we've all talked about privately for a while and it's very, very frustrating.

Courtney Bullard:

Yeah.

Speaker 5:

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 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, appellate decision makers, advisors and informal resolution facilitators.

Speaker 5:

You can learn more about all of these offerings at [www.icslawyer.com](http://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.

Courtney Bullard:

It just came to me as you were talking, Jody, so I have to ask and I'll see if you guys are willing to step out there and say anything on this, but we're talking about the Baum case and I think for my clients in schools, the Higher Ed institutions that have struggled the most in making this transition under the regs are those who were previously under a single investigatory model and have never done a hearing panel in any way, shape or form, at least in the sexual harassment, sexual misconduct contexts.

Courtney Bullard:

And of course, we've got litigation trends that are all over the place. I'm in the Sixth Circuit, practiced in the Sixth Circuit, Baum hearings have been going on for quite some time. Betsy has overseen thousands of them in her work on the ground before she joined ICS, but lots of institutions. We're not doing that or anything close to that. So, what do you think about the single investigatory model? Is it gone forever if

the regs go away or do you think that institutions are best served by having a different investigator than decision maker? I was just curious, your thoughts?

Jody Shipper:

I'll take a stab at it. Joe may have a very different take on it from where he sits, but again, I go back to, "Did you really allow for meaningful testing of the evidence?" And a really honest and robust ability to question it to say, "I need you to go back and ask so and so this question." Making sure that people really have those opportunities, not just sort of pro forma, but that they actually are able to see it, to test it, to question it, to push back on it.

Jody Shipper:

So, if all of that gets folded into a single investigator model and your circuit is one that has been friendly to that model, I can see some schools returning to that, but I do think the concept of another set of eyes, another person does reduce the risk. I don't know that it's going to necessarily end everyone's questioning of the process, that it's necessarily going to make a more correct answer, but certainly, at the very least, to have another set of eyes, who was able to take a good look and make sure that things add up and that things add up properly that bias didn't somehow creep into the process. Maybe they'll notice that this person kept saying, "There were four witnesses. Why does someone only reach out to three?"

Jody Shipper:

So, I think there's a lot of in between pure single investigator, one decision-maker, and the current sort of DeVos hearing model, where schools might safely land again depending on circuit expectations. And then, one last piece on that some of the courts have really brought some nuance to this when they talk about the need for cross-examination by distinguishing reliability cases versus credibility cases. Credibility being if that's the issue, then you have to have this cross examination and we've seen some lower courts, unfortunately not many, published decisions yet, where they've said, "No, you didn't need a cross examination."

Jody Shipper:

And this is even in areas where it's sort of the law of the circuit, because this was the reliability of the evidence case, so you're fine without that cross examination. I do wonder if we're going to need to take a look at how to bring more nuance when we're separating credibility and reliability decisions because I think that's a distinction that we're going to have to pay more attention to.

Courtney Bullard:

I completely agree. And on the ground and training folks, as you already know run into, credibility is always challenging for decision makers and investigators making those credibility determinations, but I'm right there with you on what you just said regarding single investigatory model. Joe, do you have any other thoughts?

Joe Storch:

I think the only thing I would add to what Jody said is, there's this sense among some that the single investigator model was something that was invented in Higher Ed and only used in Higher Ed and it's so terrible and so much more unfair than anything that's used anywhere, but I have a hard time imagining

outside of a highly unionized workplace, most companies, certainly all small companies and probably most decently sized and large companies who don't use something that looks like a single investigator model.

Joe Storch:

I don't know that at the local big box store that they hold a hearing when somebody makes an accusation of sexual harassment or sexual assault. I don't know that they provide them with all their evidence in a digital fashion. I don't know that.

Courtney Bullard:

They do not. They do not.

Joe Storch:

They do not.

Jody Shipper:

They do not and I believe they don't. I mean, I was an employment law litigator for a long time before.

Courtney Bullard:

Me, too, yeah.

Joe Storch:

Yeah, when I say I do not [crosstalk 00:35:26] that's my like New York style, I should say. [crosstalk 00:35:29].

Courtney Bullard:

Jody and I are like, "No. They don't."

Jody Shipper:

No, they don't.

Courtney Bullard:

We were employment lawyers and we still do sexual harassment investigations in the private sector and for churches and other organizations, absolutely not. You do not get any of this in that setting and it is a single investigatory model. Somebody from HR doing an investigation, making a determination.

Joe Storch:

Here's a question that I've never gotten an answer to in the United States Department of Education if somebody makes an accusation of sexual harassment, sexual and interpersonal violence, what is the process? Does it look more like the Title IX final rule? I doubt it or does it look more like a single investigator model that would be verboten under the department's rules, but is fairly standard in the employment. Again, outside of a highly unionized regulated environment where you would have maybe arbitrations and the like.

Joe Storch:

And so maybe it will go away permanently for K-12 in education, but that actually makes education the outlier whereas the sort of the media around it was like, "Well, we're trying to make it as fair as everything else." As fair as everything else? Everything else uses something that looks like the single investigator model does just fine with it and when a staffer to a United States Senator or a member of Congress, or a high level staffer in a federal agency is removed from their job, that's a big deal, right?

Joe Storch:

So, that is something that could have reputational aspects, that's something that certainly has pecuniary aspects. They're going to make less money and the like. And that's okay for a single investigator model, but saying to somebody, "You're going to be suspended for X amount of time during your sophomore year, all of a sudden requires a higher level of due process?" It doesn't make sense under the Constitution. It doesn't make sense under case law, sort of pre-2017, 2016, 2015. So I think the single investigator model is here to stay for sure whether it will come back and be used in especially private Higher Education, I think remains to be seen for the reasons Jody and you have raised.

Courtney Bullard:

And I know for some of my clients now that this has been put in place, it's hard for them to find enough folks to serve in every role, especially these smaller institutions, they just don't have enough folks to have a separate investigator than decision maker. On the flip side, some of my clients really are liking it. It takes some of the pressure off the investigator, it gives that second set of eyes that Jody was talking about. So, it will be interesting to see where folks land. Hopefully, though, some discretion will come back depending at informed by your circuit, of course, we'll see. But all has yet to remain.

Courtney Bullard:

So, I want to throw a question to Scott. We know what the enforcement posture was under Obama. It's clearly changed some or a lot under Trump. What do you think will happen? And is there anything else, just because it piqued my interest that you would want to add to that?

Scott Schneider:

Yeah, I don't know. For sure, I will say this, I mean, at least in my experience, it's sort of have been weird, because the Trump administration, at least from my experience, has been much more modest in enforcing Title IX. I mean, they've piled on to a couple of cases. But you certainly don't see that list of shame or whatever the Obama administration that we used to have. I've done this the full four years. I haven't had one, "Hey, we're doing a full scale program compliance review." It's always been, "Hey, we received this complaint. We want to investigate this particular instance."

Scott Schneider:

And then there's been a kind of sweeping up and cleaning out the backlog of cases that was created under the Obama administration, but even with that, I have schools that they've had pending OCR investigations that have been pending for five or six years at this point, so one of the interesting things is on the compliance side, this OCR has been much more modest in its ambitions, we just haven't seen as vigorous of enforcement. I don't know and I'm skeptical that they will do what the Obama administration did, because I felt as if they bit off more than they could chew.

Scott Schneider:

And the proof of that is that when they left the office, there were all these hundreds of pending investigations that to this day, a lot of them still haven't been resolved and I'm not sure that that has served any of the students or community members who have come forward well. And so, I would think they're going to be more aggressive than the Trump administration, but I don't know that they will go as far as the Obama administration, unless they are prepared to add a whole lot of staff to the Office for Civil Rights. And there's just never really been, as far as I can tell, an appetite to do that or fund that.

Courtney Bullard:

All right. So, here we are, end of 2020, new president elect most likely, changing of the guard in January, waiting to see what happens with the new regulations. So, what should schools do now? What should our Title IX coordinators be doing now, if anything? Jody, what do you think?

Jody Shipper:

Well, so first of all, nothing's happening inauguration day or the day after as Scott and Joe have discussed. These regulations aren't going away with a pen stroke, so we're going to have either a repeal and nothing or repeal and something new, hard to know and all of these processes take time. There's the notice and comment process and all of the procedures under the Administrative Procedures Act. So, everyone should be doing in January, what they were doing in October, November and December. In other words, right now, and the same thing for February, March and April unless and until there is something new, that comes out that changes the approach.

Jody Shipper:

It is true that the administrative procedures access that process doesn't have to be used, it doesn't apply to interpretive rules. Where exactly that line is, is source of some dispute and debate. We may get some guidance by, I hope, the era of guidance by tweet will be ending, so there may be some information that is shared about interpreting the current guidance. I think mostly it will apply, it will be interesting to see how people enforce it if complaints are filed with OCR out there enforcing guidance with which they disagree, but that's also a separate issue. So, very long-winded way of saying nothing should change unless and until we have very specific clear instruction or guidance, or something that is more than smoke signals that can help us understand which direction to go.

Courtney Bullard:

I love your tweetable that I just made regulations are not going away with a pen stroke. I think that is great.

Scott Schneider:

And I think we stayed the course. I will also say and I've said this a few times lately, I think sometimes we lose the forest for the trees and there's been a lot of emphasis on sort of the nitpicks of compliance and there are tons in the new regs or tons of little things we need to do. And my hope is that in focusing on those nitpicks, we're not losing sight of sort of big picture issues. And I think, for instance, and I've talked about this case a few times, and have a lot of thoughts about it, the McCluskey case at the University of Utah.

Scott Schneider:

And again, we could spend a lot of resources on, "We need to make sure this notice goes out and all this sort of stuff, but we need to be careful about enormous balls not being dropped along the way." It's like, "Hey, we received a report and are these parts of the university community? Are we talking to one another?" I mean, the silos within institutions of Higher Education are a legend because yeah, I always, when I think of Title IX compliance, yeah, we want to make sure we do all the little things right, but we want to make sure that we kind of avoid certainly, "My God. I mean, we have a young woman who is dead."

Scott Schneider:

And so, I don't think anything from my standpoint, it's going to change around the regulations. I'm little worried that sometimes our Title IX coordinators are focusing way too much attention on some small details and maybe missing bigger narratives. And I just try to make that point when I talk to my clients.

Courtney Bullard:

Yeah, same and that case is when that Betsy, she's a former DB prosecutor. And so, when we're doing our trainings, we again another soapbox, there's just not enough education out there on domestic violence, dating violence for the folks on the ground doing the work. That's something I know I would like to do and I agree with you. We don't want to lose the forest for the trees for sure. I like that analogy a lot. Joe, anything else to add?

Joe Storch:

Yeah. Everything Jody said, I would cosign and so, I think I'll go in a different direction, which is there are some things that we know are not going to change. There are VAWA amendment to Clery responsibilities that we have that are not going to be impacted by Title IX. So, we've talked before about resources that we give out for free at SUNY or visa and immigration resource completely free. And that is something that's a requirement under the VAWA Clery that is something that serves our immigrant and international students. Go customize that, pay us nothing, put that up on your website. That's something to do during the time in between.

Joe Storch:

We've got our Spark, online training, also free. We've got our track online training also free. In fact, we're working on a new version of Spark, I don't have an exact date for that, that's going to require even less customization and we know that prevention is not going to change. If anything, it's going to be more emphasized by a Biden administration than it might have been by a Trump administration. So, take advantage of some of those things that are out there. Some of the trainings that folks are doing all over on things that are not going to change.

Joe Storch:

But especially I want to always point, and Courtney, you're in my discussions always end up going in this direction is our long-term shared goal over the next five decades of using prevention to reduce the amount of incidents that occur that we have to respond to, because our best response will never be as good as a prevented violation. So, work with programs that are already out there, work to develop programs, work to partner with other folks in your region, in your state, in your city, and the like to work together on prevention, because I think that's something that's not going to change, that's something that you can use this time to really invest and double down on, and that's something that is going to be

This transcript was exported on Jan 15, 2021 - view latest version [here](#).

positive in service of your students, regardless of what if anything or nothing or everything changes in a Biden administration in terms of Title IX and a new rule.

Courtney Bullard:

Best response is never as good as a prevented violation. I love right.

Joe Storch:

Right. Yeah.

Courtney Bullard:

All these tweetables. All right. So, I think we've covered everything we can think about the moment. There's so much to be seen. It's early days, but of course, immediately as the election results were being called, I thought of you all and thought it'd be cool to have several of you on at one time instead of a one-on-one to kind of get all the think-tank minds together. There are many more think-tank minds that I'm going to be talking to in the coming weeks as well, but you all were the first ones I thought of as colleagues. So, I appreciate you being willing to talk to me and in the listeners of the podcast so quickly. I know everybody's really busy and I wish you the best and to 2020.

Jody Shipper:

Courtney, thank you so much. It is always a great pleasure to spend time with you, and of course, with Joe and with Scott, two of my other really most favorite pros out in the world. I hang on their every word because of the exceptional wisdom they bring to the work and also I have to be honest, the extraordinary humanity that you all bring to the work as well.

Joe Storch:

And thanks, Courtney and great to be among friends and best wishes to everybody for good health in the rest of 2020.

Scott Schneider:

Courtney, always a pleasure hanging with you. At some point, I need to get out to Chattanooga when there's not a virus spreading all over the place. It's one of my favorite places in America and you need to come to Austin, Texas.

Courtney Bullard:

I would love to come to Austin, Texas.

Scott Schneider:

And also, I miss seeing my friend, Jody shipper and I look forward to seeing her soon when everybody gets their vaccines. And I don't miss with Joe as much, but I look forward to seeing him eventually and hearing some really God awful dad jokes.

Courtney Bullard:

Please stay in contact with us through all of our social media sites. We're on LinkedIn. We have an ICS page, but we also have my page as well as one for Betsy Smith, Instagram, Twitter, and Facebook. We

This transcript was exported on Jan 15, 2021 - view latest version [here](#).

have a Facebook page for Title IX coordinators. We'd love to have you join one also specifically for K-12 Title IX coordinators, so look for that. If you're enjoying this podcast in these episodes, please subscribe, rate and review that would be super helpful. And finally, as always, we're here to serve you if there's anything that you need from us, please do not hesitate to reach out. Stay safe and stay well and we'll see you next episode.

Courtney Bullard:

This podcast does not establish an attorney client relationship, which is only formed when you've signed an engagement agreement with ICS. It is also not intended to replace any legal advice provided by your Legal Counsel. It is for informational purposes only.