Speaker 1: Welcome back to the podcast. My name is Courtney Bullard, your host. You can learn about myself, my company, institutional compliant solutions, and my fabulous team on our website at www.icslawyer.com. It's been a little while since I've been able to record a podcast episode. We've been busy, busy over here at ICS as usual and it's been a while since I've been able to get a podcast recorded with our guests this week, Steven Richard. I've been really excited to talk to him about litigation in Title IX, which is a rapidly evolving space and so we'll break that down in today's episode. But before I get to an introduction of Steven and our conversation, I wanted to talk a little bit about all that we have going on here at ICS. Our fall and summer training schedule, virtual training schedule is live, so be sure to go on our website and register for a course for K12.

We have all the core courses for the Title IX team members, and then for higher ed we have a bootcamp and a care and support training, and we have some others that we intend to add to the schedule, including one on Title VII and Title IX and its overlap. We've had a lot of those lately serving as external investigators and as external Title IX coordinators. We are bringing back a live training, which I'm really excited about for K12 investigators on September 15th. And it's here in Chattanooga, Tennessee, where ICS is headquartered. If you have never been to Chattanooga or to Tennessee, now is your chance. It's beautiful. And it is going to be $89 a person if you register by August 1st, after August 1st it will be $129. Because we're hosting it here in Chattanooga and also in honor of the 50th anniversary of Title IX, we are offering these much lower prices for our training for this in person.

So take advantage, I'm really excited about it, but of course, if you can't join us in person, be sure to register for one of our live virtual trainings online. Much, much more to come, we are waiting on the NPRM. Part of me wonders if it's going to be released today, the day that I'm recording this, which is Friday the 13th of May, but we'll see and of course we'll put a lot out when that occurs. We also have some new folks on board with the ICS team that you'll be introduced to over the summer that I'm really excited about as well, so tons going on as always and finding creative ways to serve you, our clients, is really always at the top of our list and the work that we're doing.

All right, moving to our guest today. And when I say that we've tried to schedule this podcast for probably over a year, that is not an exaggeration because Steven's docket has stayed really, really full, which is indicative of just how much is going on with Title IX litigation. Steven Richard is a highly experienced trial and appellate lawyer. He handles complex commercial, higher education, privacy and employment cases throughout the federal and state courts of new England. He's especially active in the Rhode Island federal district court, where he has served as the chair of its Local Rules Committee. He's also a member of the National Association of College and University Attorneys and the co-editor of Nixon Peabody's Privacy Partner blog. He is a partner at the firm, Nixon Peabody, I should have said that at the beginning.

While he handles a broad array of cases, he has extensive experience in higher education law handling a wide variety of matters for colleges and universities. He represents institutions of higher education IN matters relating to student discipline, civil

rights claims, tenure issues and copyright matters. His practice has included both the development of proper policies on campuses and litigation of cases on behalf of colleges and universities. As Title IX compliance issues remain a subject of national concern and debate, in higher education law I thought it would be fitting to have him as a guest on this podcast. I hope you enjoy our conversation.

Hi, Stephen, welcome to the podcast. Thank you for your patience as we have, I think, taken almost a year to finally get together to talk, but it's perfect timing because there's a whole lot going on with Title IX litigation so I appreciate you joining me.

Speaker 2: Thank you, Courtney me and it's well been worth the wait on my end. We've both been very busy and it's a dynamic time in higher ed, but there's a lot to discuss, particularly as we await the new Title IX regulations and the amendments of the Biden Administration. So lots to talk about and looking forward to it.

Speaker 1: Me too, me too. And as you said, a lot is going on. It's a dynamic environment and in your work you were in the middle of it from a litigation perspective, for sure. So let's start with your background. Just tell me about your practice. Tell me what made you decide to become a lawyer. You know, all the things.

Speaker 2: Well, what made me decide to be a lawyer is something I always wanted to do as far back as I can remember. So I went the traditional route of political science major, Boston University, attended Notre Dame Law School and I started my practice in Boston, but came home to Rhode Island, which is where I grew up and where I wanted to be. Very early in my career, I had the benefit of working with a mentor in litigation who was a longtime attorney representing Brown University. And as a young associate in the mid 1990s, one of my first big projects was to help him in a Title IX case. this is an interesting time because it was pre-Gebser, pre-Davis and it was somewhat uncharted waters as far as what Title IX liability meant.

It was an alleged faculty and student case and it was my first federal court jury trial and I played a leading role at my mentor. We obtained a defense verdict and the case went up on appeal to the First Circuit. I argued it, the case Wills v. Brown University is still a controlling precedent in the First Circuit as to issues of alleged faculty-student misconduct and what the standards are for liability of an institution. So that was my starting point and I really fell in love with higher ed and sort of kept in touch with things, and my practice exploded on April 4th, 2011, as all of our worlds changed with the Dear Colleague Letter.

In the past decade, I have been predominantly litigating and representing colleges and universities in various types of lawsuits brought by complainants, respondents, I do a lot of faculty work and it's just something I fell in love with from the outset of my career and really have grown as a lawyer. And it's a daily endeavor, just learning all the new cases and all the new developments and all the new regulations we have to keep track of and apply. So in many ways I'm still a student, even though I've been litigating Title IX and higher ed cases for over quarter century.

Speaker 1: That's so interesting. Your background, like super impressive and you've sort of been in the trenches since the beginning, which is fascinating and brings a whole new perspective for me to what we're going to talk about today. One thing that you said that struck me just because I talk about it all the time is that the area is changing rapidly and it is hard to keep up and you have this judicial standard, you have the regulatory standard, which is also kind of OCR standard now and it's confusing because they are different. So I do want to see if we can weave that into our conversation a little bit to note some of those differences about, A, what it's like doing this work on the ground, B, what OCR expects and then, C, what it actually means to be civilly reliable as an institution and the standards that are put in place. But as we get into that conversation, you mentioned Gebser and Davis, could you talk just a little bit about why those Supreme Court cases are so important?

Speaker 2: Sure. There are two Supreme Court cases that go back to the late 1990s, Gebser was a 1998 decision and Davis a 1999 decision, which were Supreme court precedents that set the standard to hold an institution liable for alleged sexual misconduct. Gebser pertaining to faculty on student situations, Davis student on student, and really the important origin is the spending clause of the constitution and how you can hold an institution liable under Title IX. What the Supreme court set in those two cases is the still controlling precedent that a school has to have actual notice of the alleged misconduct through an official with the authority to take corrective measures, and then as far as your responsive actions, they cannot be deliberately indifferent to the situation and the report, so they cannot be clearly unreasonable in light of the known circumstances.

The application of those two basic principles has been vexing for judges and 25 years or so later, we're still trying to figure it out. You know, I follow these cases daily. The first thing I do every morning when I come in is I open up Lexis and just punch in Title IX to see if something has developed or changed overnight, which it can. As recently as this week, the Seventh Circuit, for example, issued an on box decision where it was very candid saying we've struggled with the application of these precedents. So one of the challenges as a litigator is to tell judges that as much as the courts have struggled applying Gebser and Davis and what it means and how you apply to different scenarios, think of what these administrators at campus levels have to face every day and in the emotional aspects in real time and that's part of the challenge as a litigator to convey that narrative to the judge, that these are very difficult decisions.

You know, I'll sum up this part of the discussion with something that really sticks with me from a case I tried in Rhode Island Federal District court. It was a bench trial and the judge wrote at the end of the trial in his decision, these are messy and unfortunate cases and that's what they are, but they're highly important, highly emotional and we're still struggling, to this day, understanding the true scope of liability under Davis and Gebser and how to apply it to really unique and dynamic situations that arise daily.

Speaker 1: Well said. It makes me think of so many things as you're talking, one being the difference between reading about a lawsuit or even maybe being a juror in a courtroom or a judge, of course, and actually doing the work on the ground every day and trying to

get that across, you and I were talking about this before, to a jury or a judge when they're looking backwards at the response or alleged lack thereof by an institution to an allegation of sexual misconduct. So how do you do that?

Speaker 2: That's the challenge every day when we litigate these cases, and you have to start with the recognition that every judge and every juror is either a parent or a grandparent or knows someone who is in college and you have to convince the judge about the community that you're representing. And not all of my clients are the same, I represent some state institutions that are very big, some small private institutions, not all have the same resources so I always want to start by explaining to the court, whether it's the judge or the jury, who my client is, what it does to address these very challenging situations and also to convince everyone that they are taking with the utmost seriousness and responsibility. Because when you're in court, whether you're facing a lawsuit by a complainant and saying you didn't do enough quickly enough, or your response was deliberately indifferent or a respondent who's challenging a disciplinary action, every possible allegation will be hurled.

You know, some of which are legitimate and we have to defend, but some of them are purely extraneous. And when you get a 75 page complaint against your client, you really need to parse through with the judge and the jury to explain who my client is, what the environment and climate is on the campus, what the resources are to address them and how we applied them properly. So it's a daily challenge in court, not only to deal with the precedents, but to explain who your client is and how your client addresses these challenging situations.

Speaker 1: What are some things... I don't know if this is going to be a fair question or not, and then we're going to kind of dig into some of these cases. But in your experience as a litigator and trying to get that message across to a jury or a judge, what are some helpful things that universities have done? I know we can't get into the weeds of like the actual facts of a case, but are there some maybe more bright line things that stick out to you with respect to a university's actions or trainings or policies and procedures? I ask because when we train investigators and coordinators and decision makers, I'm always very candid and transparent about the fact that the likelihood is that you will either be the subject of a lawsuit or involved in a lawsuit, a witness, or something like that.

It's just the reality given the uptick in litigation we've had in Title IX and that is the biggest fear, really, of a lot of these Title IX administrators, and a lot of what we're told anecdotally as to why they're leaving the profession outside of just the difficulties on the ground. So is there anything high level that you could share that might be helpful to those on the ground who are trying to do their best and do the right thing, but are very concerned about litigation?

Speaker 2: Yeah, I think you hit it spot-on, Courtney. I recall a couple years ago, an article in the Chronicle of Higher Education about Title IX coordinators just leaving the job because they viewed it as a can't win situation and too stressful. And it does start at the grassroots, as you said, with the training and understanding of not only the law, but your policies and making sure that the policies can work for you and that you can apply

them with an understanding and consistency. Then it's just some basic applications that sometimes get lost in the daily shuffle or the haste of a proceeding is that recognize everything you say in an email will be discoverable and a flip off the cuff comment can come back to be very problematic three years later when you're trying to explain that it isn't that important in a very challenging lawsuit where someone's saying you didn't follow the law. So make sure that everyone stays in their proper lane too, because it's not a simple process where we have just one person making the decision.

You know, we've moved away from single investigative model, so we have a Title IX coordinator, we have investigators, we have panels, we have appellate offices. And making sure that when each of these persons testify, he or she understands clearly what their respective roles were, how they follow them and how they apply them. It's when the signals get crossed or the jurisdictional boundaries get blurred, that it's very hard to stand up in court to articulate to a judge or a jury that we followed our policies and it's clear as day. So it does start absolutely at the ground level with the great work that you and your team and other trainers do to make sure that people understand what the law expects, what their policies require, but also what their resources allow. Right? You have to be able to make this all work based upon what you have and people, resources, and assets, and most importantly, understanding the climate of your community; that all colleges are dynamic places and you have to have synergies here that start at the grassroots.

Speaker 1: You have said so many things that speak my language, which is... I mean, all of us that do Title IX work, I think we're all in accord on a lot of that. But I'll just say this before we move into talking more specific about cases for those who are listening and we say this all the time at ICS, but that on-the-ground training more than just telling you this is what you have to do, but how to do it, that synergy of your Title IX team. I talk all the time about knowing your role, staying in your lane, being clear about what your role is at the outset of the case, it just leads to so many issues that we see with OCR complaints or of course lawsuits. All that is important and it sounds simple, but it's really not and we serve in a lot of external roles.

We serve as Title IX coordinators and investigators and decision makers, so we kind of feel on the ground exactly what we're trying to train, which is, what does this feel like in real time? And you and I were talking before this, that hindsight's 2020, but in real time when everything's coming at you quickly, taking that breath to remember where you fit, what your role is. For example, one of my team members, she's an investigator in a case right now and I have to keep reminding her, "You don't have to make the decision, we are just handing this off. We're done." You know, we don't have to explain to them all these other things, the client. You know?

Speaker 2: That's absolutely right.

Speaker 1: But it's hard, you know? Or if we're a decision maker, I'm like, "We're just a decision maker, we don't need to make all those decisions." Yeah.

Speaker 2: One of the other challenges in presenting witnesses in the courtroom, or even during depositions pretrial, is that there are always inherent attacks that litigants try to cast as far as bias. Now, everyone brings a unique skill set or set of experiences to the table. You know, I've had cases where decision makers who are totally neutral down the line, doing the right thing are criticized and challenged because of their past work experience as well. 10 years ago you wrote a piece in a journal about fraternity, so you have a bias against males, or you have a bias against this culture. One of the things that the law recognizes is that there is a presumption that the folks who make these difficult decisions and serve in these challenging roles bring neutrality to the table, but you do get frequent attacks on bias and when people stray out of their lanes, it makes that bias argument more plausible or more recognizable to a judge or a jury.

So you have the challenge of not only staying in your lane, but also being able to defend your past work experiences to show that there's no blurring of any type of policy or procedure and there's no bias in what I bring to the table that, yes, like everyone else, like the people sitting in the jury box, we all have diverse backgrounds and experiences, but that doesn't make me biased. That doesn't mean that I can't do my job. And that's part of the biggest challenge in the courtroom, particularly before a jury is to say that this witness didn't bring a bias to the table when he or she was a decision maker and follow the rules, follow the policies and should not be criticized in hindsight the way that often occurs in litigation.

Speaker 1: It's a really great point and a good reminder, especially with the regulations requirement that training include information on avoiding conflicts of interest and bias. There's certainly a heightened attention on that issue, but you're exactly right. I think it would be very hard to explain why you don't have a bias. The thing that we get the most is you were hired by XYZ school, so you're biased. You've been hired to make a decision that is favorable to that school. And we haven't gotten as much lately, but certainly I've gotten that in different scenarios and trying to explain, well, this is what universities have to do, there's no other option. Either I have to have someone on the ground or hire someone external. This is how it's designed.

Speaker 2: No, it's a catch 22, right?

Speaker 1: Yeah.

Speaker 2: I mean, some schools do keep it internally and do a good job of it. Others, I think, have the resources and ability to say, "Let's get someone externally." And then that person does a good job so you use him or her again, and then they're challenged, "Well, this university's hired you four times. You're catering to the school that's paying your bill frequently. No, we're keeping in place a skilled investigator who does a good job." So it's a constant articulation of why we make every decision, every strategic choice in a case and to explain that there's a justifiable neutral and plausible reason for the action.

But that's the reality of Title IX litigation, as well as other discrimination claims that are often affixed in these lawsuits is to show that you really don't take a scalpel to every single decision and try to dissect it in hindsight to say, "This could have been done

better." Perfection is not the standard here, the question is, was there discrimination and was there bias? And those types of questions need to be clearly answered through, as we said, policies, procedures, and staying in your lane and doing what you've been trained to do, and that's my job as a litigator to tell that story.

Speaker 1: Yeah. Well said again. I'm just eating up some of the words that I love some of your imagery and the way that you're explaining things. It's not to take a scalpel to every decision, I love that I'm going to have to steal it. Talking about liability, you mentioned at the beginning with Gebser and Davis, you articulated really well what the standard is. I'm curious to know your thoughts on how the regulations will impact that actual knowledge requirement in litigation. In other words, the regulations define actual knowledge and that's not something we had before, I feel like for me, it was heavily litigated and of course we don't know what the litigation's going to look like in cases that are coming under the 2020 Title IX regulations, because they're probably just starting to come in, but I was wondering if you've seen any of that in your practice or have any thoughts on that.

Speaker 2: You certainly do see it in the 2020 amendments, in the long preamble that we all spent days reading through mentioned repeatedly that the department at that time was trying to essentially incorporate Davis to the fullest extent. So it incorporated the concept of actual knowledge and deliberate indifference. So in some ways I've seen perhaps more synergy than in the past, because under the Dear Colleague Letter, there was more of a constructive notice standard, which created a bit of a schism or bifurcation in trying to articulate to a judge these are two different standards, one for liability for your honor to consider in the context of Title IX civil lawsuits, and the other for the Department of Education to look at administratively. And that's part of the challenge is to draw that line in court as to what's in the judicial realm and what's in the administrative realm.

So in large part, at least in the cases I've seen so far and you're right, they're starting to come through the dockets at this point in time because there's always a delay post-amendments and we're starting to get new cases under the 2020 amendments. I haven't seen much tension because in large part, they do sort of reconcile one another more than perhaps the former guidance documents did, but that's a whole nother challenge as we sit here in May of 2022, checking our email every morning, have the amendments come out? Right? So it's really a challenge with this evolving regulatory environment as to which regulations apply when? What is applicable, because there's no retroactivity? And how that translates into the judicial realm and how you, if necessary, have to convince a judge to separate the two.

Speaker 1: Exactly. I think this is a good time to transition to a recent article. You always are great... Well, I think I'm on your alerts as well. At sending me higher education alerts that your firm puts out and that you author, which are great because they really distill down some complex issues. You know, litigations complex when you read opinions, especially for non-lawyers, it's a lot to absorb. So you sent one about whether the Supreme Court would revisit the Davis causation requirement to me the other day and it's something we've certainly seen covered by our colleagues as well,. Can you talk a little bit about that and what's important about it and kind of what's going on?

Speaker 2: As we sit here recording on May 13th, the Supreme Court conferred yesterday on May 12th and of course privately, and we're all waiting to see whether it'll accept this case that's before it on a petition. But the case is Fairfax's County School Board v. Doe; it comes out of the fourth circuit. But it's a case that presents evolving issues under Davis, both actual knowledge and deliberate indifference. It's in a high school context, but it is applicable by analogy to colleges and universities. The question is, number one, actual knowledge, is that a subjective standard or is an objective one? For example, in that particular case, the school heard a report of an incident between two students that occurred on a school trip, a bus trip that they were taken and subjectively didn't think that it constituted sexual misconduct implicating a Title IX response.

But the litigants have argued that the standard of actual knowledge is objective. What would a reasonable person think and not what subjectively a school official may have thought? So that's important on the actual knowledge component of it. And where I think it's really interesting and what I wrote about my alert is the deliberate indifference prompt that the response prompt, because there's this really open-ended language in Davis talking about causation. Your response has to cause a deprivation of educational opportunities in order to be held deliberately indifferent. What Davis says is that a school can be held liable if it's response causes a student to undergo harassment, which is understandable if further harassment occurs and you didn't responsibly address or mitigate against it, that's a liability risk. But there's this open-ended alternative language that says you can be held liable if your response makes the student's liable or vulnerable to harassment.

And what that vulnerability language means has really led to different interpretations judicially and that's the issue that I see of particular importance to the court is that can a school be held responsible for its actions if there's no further sexual misconduct? Essentially, did the perpetrator act again, or was the students objected to a second incident? Some courts have held that if there's no second incident, if there's no further harassment, there can be no deliberate indifference in the response, but others focus on this vulnerability language and say vulnerability can mean a lot of things. A student can be walking in fear on the campus. A student can be missing classes. A student could be emotionally traumatized by the idea that the alleged perpetrator is still in the campus community or still in the city. So that's going to be the issue that I think may peak the Supreme Court's attention. It actually came up before the court two years ago for potential review out of the Sixth Circuit.

To the surprise of many, including myself, the Sixth Circuit's decision was not reviewed, but now we have the Fourth Circuit weighing in too with a very fractioned and split decision on its end. So it's possible and I think it would be welcomed if the Supreme Court takes its time to revisit Davis both as to perhaps the actual knowledge criteria and standards, and most importantly, how do you apply deliberate indifference? And what is this language about making a student vulnerable to sexual harassment truly mean?

Speaker 1: Yes, I've seen this as an expert witness on both sides. I think it'll be great to get some clarity from the Supreme Court for sure. One thing that when you were talking I thought of is it is a K-12 case, but what I do know from our clients, because we have as many

school districts as we do colleges and universities is the regulations have upended their world when it comes to trying to get in compliance and really significantly changed how they have to do things when Title IX sexual harassment is at issue. And certainly there's plenty of litigation and that actual knowledge requirement under the regs for K-12 is very different than for higher ed. So just wanted to put that caveat out there, I think I've explained it in other podcasts, is treated differently under the regulations.

Speaker 2: And one of the other challenges is who is the authorized official, which can vary in different contexts and that's part of the challenge as a litigant, an advocate in court to explain that, is it a faculty member? Is it a dean? You know, certainly the Title IX coordinator obviously is an authorized official, but different communities have different people playing different roles in different reporting chains. So that's another challenge on a daily basis and we see a lot of divergence in cases on this actual knowledge standard as to who is the authorized official that receives the report and did that person move it forward properly or fail to do something that creates a liability risk. So in many ways, we've litigated Davis and Gebser for a quarter of century and you'd think you'd have established ground rules and principles and in basic structural form, we do.

But the devils certainly in the details in this work as you know very well that you really have to, in each case, explain the facts, specific realities and community standards that apply and explain to the judge or jury, this is why there was an actual notice or this is why we were not deliberately indifferent, but instinctively the people sitting on the other side, the judge or a jury may say, "Well, that doesn't make sense to me. She told a faculty member, why isn't that an authorized official?" In litigation, application of Davis and Gebser seems very clear cut to lawyers like myself who read and apply it daily, but explaining it and applying it to decision makers on a daily basis is really challenging in court.

Speaker 1: It's also hard to understand if where you're getting your information is media attention to some of these cases, because of course how I say the facts get in the way of the truth a lot of times. Sometimes it's great coverage, but we just see so much in the media now about coverage of these cases and you're right, the devil is in the details.

Speaker 2: That's an important consideration too, that I think is vitally significant for every litigator representing higher ed to understand and also for administrators who work with their external counsel and litigation to expect and understand from the advocate, is that we really have to keep in mind and never lose sight of the reputational issues that pervade in all these cases. Every one of my cases that are high profile, I can go on social media and read about it, student newspapers cover it, there's a lot of chatter about it. And how does that play into the narrative because the courts are, and they do a good job of it, impartial and try to zone out all of those external influences. But I can tell you from experience, I tried a case down here in Rhode Island Federal District Court four or five years ago, it was a bench trial, and it received a lot of publicity.

During the course of the trial, which was staggered as a bench trial, the judge received over 300 emails from external student groups and advocates on both sides of the argument, trying to influence the decision and the judge actually, in his bench ruling,

articulated that these external forces come into play in these cases and as a judge, my challenge is zoning them out. So you're absolutely right that the narrative can be influenced by all of these new and dynamic external voices that come into play on Title IX issues that occur daily on college campuses.

Speaker 1: Wow. 300 emails, which I was talking to a reporter yesterday, trying to explain... It's a situation with a school where there were some walkouts and some decisions made on the ground. Trying to just explain, in general, the pressures that administrators on the ground have from all sides when there's a case that is "high profile." It might just be high profile for the community, it may never reach national news, but that's enough. That story that you just told about the judge, I mean, that's it, you have Title IX coordinators who are receiving emails and phone calls from all sides, coverage from the news, you got leadership at the university or the school district receiving the same thing and they have to stay neutral through all of that and make a decision about that particular process that's so challenging.

Speaker 2: Right. Absolutely. And that's why, as I said, a few moments ago, the one overriding concern that I keep in the back of my mind to represent my clients is, look, my job is to understand the law, to be a zealot advocate in court and to do my very best and be prepared as possible. But even the best result could have the worst reputational impact so I always make sure that to the best of my ability, I understand what my client is facing, who is facing the most external pressure or internal pressure to do a certain thing or go a certain way and what does this ruling mean reputationally for my client? Because a victory in court may have lingering effects on a college or university campus.

Speaker 1: Yes. Okay. So let's turn to the most recent Supreme Court opinion incomings and talk about that a little bit. I was speaking with another attorney earlier this week to get an update on a case and she said it best, she said, "I think this is a game changer in Title IX litigation." So can you talk a little bit about what's going on?

Speaker 2: Sure. And I would agree that it's a game changer and it's one that flew a little bit under the radar on my end to be candid with you.

Speaker 1: Me too.

Speaker 2: I wasn't following it or expecting it and then last week I saw this decision and started reading it and said, "Wow." Cummins is a case that does not involve Title IX itself, it's a case that involves a plaintiff who was a physical therapy patient who was receiving care at a facility. The patient is deaf and impartially blind and communicates through American Sign Language. So she requested as part of her physical therapy to be able to have sign language services to assist her in her care, and the facility said, "No, we don't offer that. We can try other alternatives, but that's not something we're going to do to accommodate you." She wound up going elsewhere for her care, but brought a lawsuit under Section 504, the Rehabilitation Act and the Affordable Care Act challenging the alleged disability discrimination.

And so the question we all ask is, well, what does this have to do with Title IX? What it has to do with Title IX is that this was a decision analyzing those two statutes under the scope of liability permissible in lawsuits challenging laws under the Spending Clause. And as we talked about at the outset, Title IX is a piece of legislation, all 37 words that we deal with daily trying to understand and decipher that was enacted under the Spending Clause of the United States constitution. What the court analyzes in Cummings is, well, how do you hold the recipient of federal funding legally responsible for discrimination? What's the standard we should apply here? And what the court articulated is a contract-based theory to say that when a college and university or school district receives federal funding, it's essentially a contract with the funding agency that we will give you federal funds and in return, you agree not to discriminate and you agree to assume these liability risks.

So the court struggled in split in a six to three decision: the six conservative judges on one side, the three liberal judges dissenting, interpreting, how do you apply that contract theory to emotional distress damages in this type of lawsuit under the Spending Clause? Whether it's the Affordable Care Act in Section 504 as at stake in Cummings or Title IX, or Title VI, which deals with racial discrimination and other settings, what the court did is it said essentially as part of this contract in accepting the funding from the government and you as a funding recipient agreeing not to discriminate, you essentially say that I as the recipient, expect to be held responsible to the same extent that I would on the contract law. So what types of remedies are available under basic contract theories was the issue before the court, and what the conservative majority ruled is that in the usual setting contracts do not allow for emotional distress damages.

Traditionally, a contract is an economically based lawsuit and therefore the funding recipient such as a college, university, or school district, when accepting the funding, did not envision that as part of the usual scope of liability in a contract relationship, that the college, university or school district could be held responsible for emotional distress, pain and suffering as a result of alleged discrimination. The dissent very strongly said, "Well, wait a minute, contracts sometimes allow for that type of recovery where it's foreseeable that the breach could cause emotional distress, and does this ruling essentially gut and limit the ability of plaintiffs to ever raise emotional injuries in a lawsuit where they claim to have been a victim of discrimination?"

So in its black letter ruling, albeit a split ruling with the liberal justices in the minority, very strongly opposing what the majority did, is the impact of this as a Title IX lawyer myself, is that I will now stand up in court and they've already filed supplemental memoranda saying this in some of my cases that those emotional damages that are pled in the Title IX count in this lawsuit are no longer recoverable. So that is a big, big change because presumptively a lot of courts and a lot of lawyers have always thought that the basic core remedy that litigants seek in Title IX litigation entails emotional injury damages.

Speaker 1: Right. And those damages are often, tell me if I'm wrong, sometimes the bigger number financially that could be awarded by a jury or a judge.

Speaker 2: Absolutely the bigger number and the most unpredictable number. For example, if you have a case where a litigant says that, "I, because of alleged discrimination, lost the year in college. I had to take a leave or I was suspended for a year before I was reinstated." That's a delay damage in economic analysis that experts in economists can figure out, but numerically, it could calculate based upon tables and earning capacity expectations, et cetera.

It's at least quantifiable with a somewhat established framework, but when you get to pain and suffering, when you get to emotional trauma, which is often the situation in these highly emotional settings in the Title IX world, how do you quantify that? How do you quantify the extent of the pain and suffering? How do you predict into the future its longevity and impact upon the person going forward as a person working and trying to establish a career? So a lot of that uncertainty and a lot of the anxiety that I would feel as a litigant defending Title IX cases has dissipated because now I know at least for Title IX claims, not others, that emotional injury claims are precluded under Cummings and that's a significant game changer.

Speaker 1: Yes. And when I put my other hat on and I look at the other side of things, when you have an individual who, let's take a complainant, who allegedly experienced sexual harassment or sexual assault and believes that a university or school district didn't do enough to protect them, you just naturally think to yourself of that emotional trauma. And so to take that off the table, it's just really fascinating. And like you said, there are other causes of action [inaudible]-

Speaker 2: Negligence.

Speaker 1: ... negligence, thank you. Where that will come in, but under Title IX theories, if it will not, that's really interesting and I don't think I've even thought about it as deeply until you started explaining all.

Speaker 2: Where it really gets challenging in lawsuits is that as we just said, that we'll see alternative causes of action now trying to recover those damages and negligence obviously for a complainant is the one that jumps out most prominently. And then you get into questions of, well, what's the duty analysis that applies there. You know, typically courts do not hold colleges and universities liable for the acts of third parties, including students, unless there was a special relationship duty that existed under the facts and circumstances and that's another whole evolving area of the law.

So what we're going to get as a result of this decision is that in the Title IX part of the case, we've got some clarity that this is the scope of damages that are recoverable, but these alternative causes of action allowed for potential recovery of emotional injuries, but potentially in likely have different standards and maybe even different factual scenarios that are most relevant to them. So how do we parse through all of that presenting the case in court? And that, to me, thinking through my challenges going forward, really that comes front and center to me because I expect to see a pivoting by plaintiffs to perhaps rely more on state law causes of action or other theories that they

think can recover these types of damages and less so on Title IX, which typically has always been the most prominent front and center claim.

Speaker 1: Yes. So interesting. Okay. I want to talk about other trends in litigation that you're seeing and/or experiencing in your practice. You touched on a few as we were preparing to start recording, but what are you seeing? What else is happening in this ever-changing landscape?

Speaker 2: Ever-changing every day, what we're seeing on the complainant side by individuals suing because they claim to have been victimized by sexual harassment, we're starting to see more multi-plaintiff lawsuits where there some very high profile cases have been in the news in the past year or two, where a group of 6, 10, 12 plaintiffs sue in a collective fashion, even though each must stand on their own claim. They're essentially trying to create a narrative that focuses more on the pre-incident actions and responsibilities of the institution than opposed to the post-incident responses, which has been the traditional framework and application of Davis and Gebser. So the theory of liability is one that's commonly called heightened risk. The articulation of the theory is, well, there's essentially an official policy of custom that is developed on college campuses, whereby they've been indifferent to the risk of sexual misconduct and sexual assault generally and therefore I was subjected to that risk in a victim of it.

And it really brings in a lot of challenging and interesting questions is, well, number one, is that recoverable? And courts have split on that analysis, but to the extent it is a plausible cause of action, is it focusing on an individual program? For example, was someone part of an athletic team that was a hostile environment? Or can you expand this campus-wide? Or can you even expand it to off campus parties and situations that ensue? So this whole concept of pre-incident risk, heightened risk is really coming to the forefront. In the past couple of years, we've seen more decisions in this area and I think we'll continue to see them. That's been something that has been front and center in my practice in a couple of lawsuits and really challenging application of Title IX and one that's I think going to get more traction in development in the next couple of years.

On the respondent side, we're actually seeing at least from my point of view, a little bit more uniformity that traditionally we've had different standards. Folks have probably heard of erroneous outcome, selective enforcement, where someone is challenging a disciplinary action. And this all goes back a couple years ago to a Seventh Circuit decision that justice Barrett been sitting on the Seventh Circuit and now on the Supreme Court obviously said, "Look, let's simplify this and really just apply for respondent lawsuits." A basic test of has someone plausibly pled discrimination on the basis of sex?

And what factors go into that, courts are looking at not only the processes and procedures of the case, but a lot of the external factors and constituencies as to how they may have impacted the disciplinary decision, as well as just the patterns of decision making in general, to what extent are respondents held responsible versus not responsible? So on the respondent side, which a few years ago was more prominent in my practice, as far as being a little bit less clear, I think has become more uniform in application. On the complainant side, we're starting to see a lot more questions that we

discussed at the outset and just a few moments ago about what Davis and Gebser truly mean as far as actual knowledge deliberate indifference, and can you apply it to pre-incident analysis.

Speaker 1: As you explain all of these trends and these cases, I have to ask and again, I don't know if it's a fair question. But there are a lot of lawyers obviously who have started focusing on Title IX, both on the plaintiff's side and on the defense side, and then there's a lot of lawyers who are kind of picking it up here and there. And we keep talking about how complex this is as I hear you articulate all that's going on so well, and I know you're always dogged and staying up to date, how important do you think it is as a litigator to have that unique understanding of Title IX and the landscape and what it's like to be on a university or college setting and to do this work in order to litigate these cases?

Speaker 2: I think it's vitally important and it's a basic mindset that I keep is that I know what I don't know. I think I've experienced a lot. I have significant trial experience in this area, but every day when I come into work and the phone call rings, it's something new and I have to think about, okay, what does this mean? And what does the law say? But what does it also mean for my campus community? And I think too often folks do try to dabble in this area for lack of a better term and very good lawyers can adapt and be flexible very easily. But this is increasingly becoming a highly specialized area of the law, where all of us are students and that's how I look at myself as a practitioner in this area. I listen to your podcast, I come in every morning and check Lexis. I listen to colleagues who have experienced things on both sides of defense as plaintiff's lawyers and as defense lawyers like myself.

And this is a constantly evolving area and I tell folks this in my firm, I'm the recently appointed head of our higher education practice within the firm and a lot of young lawyers say to me, "This is such a dynamic area to law, Steven, how can I get involved?" The first thing I tell them is, "I'll get you involved when you start to learn it." Because there's a certain baseline that I think we all need to understand to do this because listen, these are very serious cases. We're dealing with typically young adults on college campuses whose immediate educational impacts are evident. They're going through difficult times, whether complainant or respondent, there are life altering consequences to this.

I mean, this is vitally important stuff that we do, and to do it without a firm understanding of it is to do the law and our clients a disservice in my view, and any one of us who believe that we truly understand it all are kidding ourselves because in a couple of days we're going to get, in all likelihood, the amended Title IX regulations and we're all going to be scrambling back to ground zero again. So every day I convince myself that I know what I don't know and I try to just fill in that gap to learn a little bit more than I knew the day before

Speaker 1: A hundred percent agree. I mean, it was probably not a fair question because I already think I knew your response, but I do feel strongly the more I do this work, I have a lot of litigators that we serve as subject matter experts kind of in the background. Just to explain to them this space, they're great litigators, but if you are not trying to keep up

with this every day, it is so nuanced and so complex. I have a law partner, a firm I was with before I started the company on my own and he would always say, "Well, good, litigator's a good litigator. You can litigate anything." And I'm like, "Well!"

Speaker 2: The other reality, too, is that judges need to be educated on this.

Speaker 1: Yes.

Speaker 2: I remember distinctly, and this goes back 10 years ago where I had a very, very high profile case that I appeared before the judge on a motion to dismiss. He was looking at me. He said, "Mr. Richard, I have one question for you. Why didn't the university call the cops?" I understood that he was putting this in the context of half of his docket, which is a criminal docket, but not respectfully, fully understanding that we have Title IX responsibilities. We have policies and procedures, and these are albeit parallel tracks that go on within our campus communities as well as within law enforcement, but they have to go on sometimes concurrently and separately and just articulating that to the judge.

So I have tremendous respect for all the judges I appeared before, and they're always well prepared and the judges in my jurisdiction keep me on my toes because they see a lot of these cases. But I also recognize that I need to educate all of them on how this law changes on a daily basis, because they have a very busy docket, they deal with a lot of different things daily, civil and criminally. To explain to them what you and I are learning daily is part of my challenge to really cut to the chase with the judge saying, "Here's where the law stands, here's why we did what we did, and here's why it was a proper response to a very challenging situation."

Speaker 1: I'm over here just nodding my head in agreement. I think one of my team members, our Director of Title IX Services, Betsy, who had the last podcast was with about parallel criminal processes. She's a former prosecutor and I think that can be really helpful, but we talk a lot about how even former prosecutors that get into this work don't understand it. And current prosecutors and creating that relationship to explain it such that when you have a case on campus where law enforcement is involved, you can have that synergy. It's just complicated. I try to explain to people a lot what I do, you know? Or my husband tries to explain, "She has this company," and they're like, "What?" So it's really unique, I love it. I'm so passionate about it, I know you are too, I can just tell by talking to you, but it's really unique. It is hard to understand if you're not in the trenches.

Speaker 2: Yeah, no, and one of the realities that I encounter is that, for example, it's very often that particularly respondents, their advisors may be individuals who formally had a law enforcement background. I've seen a lot of prosecutors go into private practice and make a good living and do a really good job representing respondents as advisors and then representing them in court. But you're right, that we have to separate the two: law enforcement and college responses, but they sometimes get blurred by the participants within the process itself that I think, instinctively, if student accused of sexual misconduct thinks to go get someone who can help me, not only on the college campus,

but with potential criminal liability and often I'm dealing with advisors or then subsequent plaintiffs lawyers trying to mix and match those two concepts. So what Betsy said is absolutely right: the challenge of recognizing these dual and parallel tracks is something that has to remain in place and I have to explain on a daily basis why they remain on place to judges that sometimes understand why law enforcement isn't more involved and you're putting this into the college community realm.

Speaker 1: Right. And to your point about advisors, we also get hired sometimes by advisors who are attorneys, a lot of times criminal defense attorneys or former prosecutors who are hired to serve as an advisor in a live hearing. I like to think we are really helpful in that situation and educating them on... I really wouldn't take that approach. You're before campus administrators and a campus proceeding, it's not a court of law. You need to do your job, but sometimes if you approach it the same way you do in a court of law, it is not going to go very well, not to mention retraumatizing folks and everything else. So it is interesting and we do a lot of training of advisors, external attorneys as advisors and our biggest takeaway is to be kind, and that this environment is not like what you see in lawsuits; if you're an employment lawyer, for example, a lot of employment lawyers serving as advisors.

And it's not the same as a Title VII litigated case; you're dealing with undergrads and you're dealing with scenarios on the ground that we're so far removed from depending on our age, that unless you're working in a college setting, may shock you a little bit because you're just not expecting it and you've been out of that world for a while. There's so much that's needed to know. There's a lot of them doing fantastic jobs as advisors, but if you're an attorney out there who is getting hired as advisors, I'd really encourage you to continue to either listening on our podcast or reading and learning about what this looks like on the ground, because it's just different, very different.

Okay, you've alluded to the regulations and how we are waiting on the Notice of Proposed Rule Making to be released any day. So before we end, I wanted to see if you would be willing to play the game of what do you predict is about to happen and win with me. I was actually talking to one of my team members today and she was saying that she thought it's possible that Monday or Tuesday could be the release of the NPRM because the meetings are ending and all that good stuff. But of course, none of us really know, but are you inclined to wager a prediction?

Speaker 2: What I can predict is I'm not sure, but I like you check every day and say, "Are they out?" But I do think we're going to perhaps see some significant changes with more explicit protection of transgender individuals that certainly has evolved since the Bostock Decision from the Supreme Court, which was in the Title VII context. But we've seen the Biden administration through published guidance documents, or articulations of position, make clear that this is an area of significant concern that the administration beliefs needs to be clarified and made more explicit going forward. I'm interested to see what, if anything happens with the issue of cross examination at the grievance process hearing stage, because obviously that's been a big point of contention and was a big issue in the last set of amendments and certainly constitutionally may be required in some jurisdictions with public schools, regardless of the regulations.

So like you, I'm sitting on the edge of my seat. The other issue too, is just with this constantly changing regulatory environment, every two or three years we seem to go through this, whether through guidance documents, or Notice of Proposed Rule Making and ultimately the new rules, there are questions about, well, which sets of standards apply and when? Because we had some lawsuits at the outset of the 2020 amendment about whether or not they applied retroactively, what does it mean for conduct before August 14th, 2020? So as we constantly change, it's an evolving playing field and lawsuits are filed in the interim and how these changes applied to the facts of a lawsuit and whether they should at all, is really going to be a vexing issue for schools to figure out and for folks like myself to understand and articulate in the courtroom.

Speaker 1: Absolutely. I was explaining this when I was talking to that reporter. I mentioned earlier that things keep changing on the ground for our practitioners, those doing the work, the Title IX coordinators and decision makers and investigators. In these last couple of years, schools and institutions have put a lot of resources and time and energy to come into compliance with the regulations and figure out what this looks like. They're still learning, we're still learning how to live the regs and deal with some of the nuanced issues that are coming up. So for it to change again, I think back to when the regs came out and how hard our team alone worked that summer to help our clients get in compliance by August in the middle of a pandemic and how wild that summer was, and I know from talking to some of our clients, they just have a lot of anxiety over what's about to happen because they're finally sort of, I say, getting it loosely, but getting the things organized and feeling comfortable in this new regime under the regs.

And now they're looking at it all changing again, it's just a constant moving target. And I'm with you, I agree. I think there's no question that discrimination based on sex is going to be fully fleshed out to include sexual orientation, gender identity, and probably pregnancy discrimination when we've put in there as well and that's going to lead to a whole host of its own litigation, and I'm also interested to see. I think we all agree what we've seen as being the most controversial about the regulations for higher education is the live hearings and the ability to cross. I personally think even if the requirement for advisors goes away, that kind of this practice has been established of providing an advisor or ensuring parties have an advisor. So I'm interested to see what that looks like on the ground, if that does go away. And then for K-12, we just know a hundred percent, and I'm sorry I'm going off on a mini tangent, that the regulations have been very hard to implement on the ground.

So whether there are any distinctions made between higher ed or school districts and what they're required to do in responding to and addressing sexual misconduct, I'm interested to see. But like you, none of us know. Everybody wants me to give predictions and I'm like, "I don't know. Nobody knows." There's no way to really know; except for on the issue of SOGI, I feel pretty confident there, but everything else is truly a wait and see. And when the NPRM comes out, there's really nothing to do. We know from... I mean, I shouldn't say nothing to do, but we know from the prior NPRM in 2018, it looked vastly different in many ways than the final regulation and so that came down in 2020, so lots to see.

Speaker 2: Lots that see lots to wait for, and you're absolutely right, that it won't be immediate. Then there's just the reality of the political clock as well that by the time we settle in and figure this out, we may be up against another presidential election and what that means going forward and how things may change then is just part of the evolution and the challenge we face every day.

Speaker 1: Yes, it makes our work really fun for those of us who love it and I feel like we're in the middle of history in a lot of ways. You know, we're going to look back and hopefully will be some things that are well settled eventually and we'll have been on the inside of all of this, but it's also nerve wracking anxiety producing for our folks on the ground and that includes parties who go through it, the complainants and the respondents. If the administrators don't understand it and can't explain it well, that does not lead to a as good of a process as it can be for those that have to go through the process, and then if it changes, that causes even more confusion and uncertainty. So I'm anxious to see what happens. As I keep telling clients, we're just going to wait and see and then when the MPRM comes out, we're going to digest it and we're going to figure out what we need to know from that, and then we're going to wait and see again until it becomes a final rule. So lots is happening, a lot more to come.

Speaker 2: Agreed.

Speaker 1: Thank you so much as I've listened to you, I'm like, "Okay, Steven needs to help me with my annual year end review." Maybe you can work with me on that in January, I just love the way that you've explained things. It's all very understandable in a complex space so we'll have to talk about partnering on that. I'll be sure to put some of your materials in our show notes, as well as your website in ways that folks can find you, but really, really thank you so much for being patient with me as we've scheduled and canceled and scheduled and canceled getting together, and I'm really excited. We were able to finally get this done.

Speaker 2: It was my pleasure, and this is really important work that all of us do and we're in this together.

Speaker 1: Absolutely.

Speaker 3: Did you know that ICS offers on-demand e-learning Title IX training through community access? Title IX University provides coordinators with the unlimited ability to train their entire Title IX team in compliance with the 2020 regulations with specific courses for investigators, decision makers, advisors, and more. Have a change in one of your team members? No need to wait until they can attend a training. Simply add them to community access and they can get trained on their time. Coordinators can also run reports to track training as well as run other metrics to aid in compliance efforts. Last year alone, over 8,000 learners completed courses through Title IX U and the platform predicts that saved our community partners 30,000 hours in commute time, and $3 million in training costs. Simple, effective, and user friendly, community access provides compliance at your fingertips. Contact us today to find out more about Title IX university and the benefits of becoming an ICS Community partner.

Speaker 1: Let me conclude by first saying that my conversation with Steven really highlights the complexities in the Title IX space, not just with litigation, but doing the work on the ground. As I was telling him offline, I'm just an attorney, I'm not a journalist or anything like that, but someone who loves this area of law and put together a podcast is a way to get information out to those on the ground doing the work or lawyers practicing in this area or lay people who have daughters and sons going to college or who are in college or others who are just interested in the area. But I like to talk about and feature all aspects of this. So be sure to go back and listen to some of my other guests who represent plaintiffs in litigation, for example, and of course, Title IX coordinators who are on the ground.

And we will have much, much more to discuss going forward as we wait on the NPRM, which should be released any day. But I really enjoyed my conversation with Steven, it highlighted a lot for me about the complications and the nuances in this area even though I do the work every day. If you're enjoying the podcast, please subscribe, like, share, and also follow us on social media to keep up with all of the recent updates of everything that we're offering here at ICS. Be safe, be well and until next episode. This podcast is not established an attorney client relationship, which is only formed when you have 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.