

Courtney Bullard:

Hello and welcome to the Law and Education podcast. I'm Courtney Bullard, your host and the founder and CEO of Institutional Compliance Solutions. It is hard to believe we're already halfway through July. The summer has gone quickly and, true to Title IX, work has been a lot, especially in light of the notice of proposed rulemaking released by the Department of Education on the 50th anniversary of Title IX. Some of you listening already have a firm grasp on the proposed regs, and some of you have not even looked at them and everything in-between. Preparations for the academic school year are in full swing. For institutions, you have new student orientations, trainings for new employees, on and on and on. And for K-12, many of you are starting your professional development.

Courtney Bullard:

It is a busy time, and the addition of the NPRM is certainly another layer. We met with our community partners last week to provide guidance on commenting on the NPRM and to answer any questions, and it was a mixed bag of responses from our community because everyone is trying to get a handle on a plan for their school or institution for compliance for this year with Title IX and related laws and regulations, and at the same time, learn and understand the NPRM so that they can inform their stakeholders.

Courtney Bullard:

A few things regarding NPRM resources. We, at ICS, have a 2022 NPRM webpage that will be linked in the show notes. On that page, there is a free webinar link, one for K-12 and one for higher education, that we did a few weeks ago when the NPRM was released and it provides a lot more detail than I will provide in this episode of what is proposed in these regulations. So for community partners, we're adding supplemental course for the NPRM, and we launched DEI University as an add-on to community access or a standalone product. This is significant in light of the NPRM and its proposed expanding scope because it includes e-learning on diversity, equity and inclusion, but also on EEO, such as investigating a Title VII complaint. And many of your offices investigate reports of all forms of protected class discrimination, and are not just limited to Title IX, sexual harassment.

Courtney Bullard:

Finally, please do not take your foot off the gas when it comes to compliance with the 2020 regulations. Identify your team, train them, tweak your policies and procedures. That is all very important because we know a few things. First, the proposed regulations are just that, proposed regs, and the comment period is set to end on September 12th with the possibility of an extension. We already have approximately 4,000 comments submitted based on when I'm recording this podcast, and many more are anticipated, of course, to come. Second, once the comment period officially ends, the department must review all comments and respond to them in the final regulations in some way, shape or form, so that is going to take time, in addition to the internal process that the final regulations have to go through. The third point is that it's going to be 2023 before we have a release of the final regs. It could even push beyond that. And even when the final regulations are released, we'll have an implementation period of time. So right now, it's a lot of wait and see, and continue to work on your compliance efforts under the 2020 regulations.

Courtney Bullard:

Okay, moving on to the top 10 things our team thinks that are important for you to know regarding the proposed regs. A reminder, this is a high-level overview and our free webinar, or if you're a community

partner, our supplemental course, digs much deeper into all of these different areas. First, the scope and the proposed regulations has expanded on three fronts, specifically. Number one, what constitutes sex discrimination. Number two, off campus activity that might trigger a Title IX obligation. And number three, who has "standing" or the right to bring a complaint of sex discrimination. I'll get into that third one a little bit more in a moment. But with respect to the current definition of sexual harassment, the proposed regulations cover all forms of sex-based harassment, as opposed to only sexual harassment, and discrimination based on sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy-related conditions, sexual orientation, and gender identity.

Courtney Bullard:

We have a clarification on what falls under your education programs or activities, but we also have a statement that the recipient has an obligation to address a sex-based, hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education, program, or activity, or outside the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes, but is not limited to, conduct that occurs in a building owned or controlled by a student organization, language we've heard before, and conduct that is subject to the recipient's disciplinary authority.

Courtney Bullard:

So we have this proposed expansion of when conduct might trigger a response under Title IX by an institution or school, even if it's off campus or outside of the United States. And again, I'm giving you a very broad overview. Number two, mandated training is expanded under these proposed regulations, or as a colleague stated when I was at NACU the other week, training is a premium under these proposed regulations. There's mandated training for three different categories of folks. Number one, all employees. That's new. Number two, anyone responsible for implementing the grievance process, which would generally be your Title IX team. Number three, anyone who has the authority to terminate supportive measures. All employees must be trained on the recipient's obligation to address sex discrimination, and remember, it's a much broader term now under the proposed regs, in its education program or activity. The scope of conduct that constitutes sex discrimination, including the proposed definition of sex-based harassment and all applicable notification and information requirements under the pregnancy and pregnancy-related provisions of the proposed regulations.

Courtney Bullard:

Employee Title IX reporting requirements are different. There's a lot of nuances there for higher education and who must report what and where. As opposed to for school districts, all employees must report conduct to the Title IX coordinator, just like we have now in K-12, but we have that added, mandated training provision. For higher education, we have not gone back to the responsible employee days of 2011 through about 2016, but we're also not ... There's discretion on reporting. We're somewhere in the middle, and we've got some compliance aids that we provide to our community partners to help with this breakdown. But generally, employee Title IX reporting requirements are broken down into confidential employees, employees with the authority to institute corrective measures, employees who are responsible for administering, teaching, or advising, and all other employees. And so in each category, we have different notification requirements. I bring this up in this block of my top 10 because it will make training of your employees imperative, and it will be very nuanced for higher education. K-12, not so much because all employees must report.

Courtney Bullard:

Outside of your employees, we also have that mandated training for your Title IX team. And again, there are some nuances there, but inspection links are still required. We still see school districts and institutions not posting their training on their website, as required under the 2020 regulations, and that requirement will still remain under the proposed regulations. So something to take a look at and understand, that training mandates are going to expand if they stick as proposed under these regulations. Number three, we have additional definitions and modified definitions. So we, at ICS, talk a lot about being consistent with definitions under the current 2020 regulations, as you work through your formal Title IX grievance process.

Courtney Bullard:

The proposed regulations have a lot of new definitions that are different. There's no longer formal complaint. There's just complaint. We have a definition of confidential employee. We have a definition for program, or activity and program. We have a definition for relevant information, for retaliation, sex-based harassment, which we currently know as sexual harassment, a definition for student, just to highlight a few. For K-12, we have a definition of parental status, which is also helpful to know for higher ed. We also have a lot of definitions including post-secondary institution. So making sure that you understand that we've got a lot of different terminology and language, and if the proposed regulations stick, we're going to have to retool our brains around that. But for now we're under those definitions we've been working under, under the 2020 regulations.

Courtney Bullard:

Number four, these proposed regulations mean that the Title IX coordinator's role will be just as, if not more, complex. There is a new proposed provision, which requires monitoring and remedying barriers to reporting. It's section 106.44B, which is on page 672 of the unofficial version of the proposed regulations, which we'll put in the show notes, as well as the official version that was published in the federal register. There's an emphasis on the analysis of moving forth the grievance process that the Title IX coordinator needs to go through, and additional reporting requirements that I'll talk about towards the end. So there is more discretion in these proposed regulations, but with more discretion comes a lot more scrutiny on Title IX coordinators for the decisions they do or do not make under Title IX.

Courtney Bullard:

The proposed regulations also have a very clear statement of what a school district or institution must require its Title IX coordinator to do, the steps it must require your coordinator to take when the coordinator is notified of conduct that may constitute sex discrimination. That's in section 106.44 on page 675, again, of the unofficial version of the proposed regulations. We have a nice graph that, of course, Betsy Smith put together to kind of help illustrate the six steps that are required. Supportive measures are also part of your responsibilities and slightly expanded with these regulations, in that, this to me is a big point, they can burden a respondent during the pendency of a grievance procedure, but cannot be more restrictive than necessary to restore or preserve a complainant's access, and that you must provide for an ability to seek modification or reversal of supportive measures that are put in place from someone other than the individual who instituted the measures.

Courtney Bullard:

We're calling this a supportive measure review administrator, SMRA. But that's an important thing to take a look at, for you Title IX coordinators out there, as you consider what these proposed regulations

might look like in practice. Number five is a big one. We are moving away from the definition of Title IX sexual harassment to sex-based harassment in a modification of the three buckets we are currently working under, under the 2020 Title IX regulations that are still in effect and that you should be following. So under the current definition of Title IX sexual harassment, we know there are those three buckets. Quid pro quo, the severe, pervasive, and objectively offensive bucket, and the big four that were brought over, as I call them, from clearing. Under the proposed sex-based harassment, we still have those three buckets, but each bucket is defined a little bit differently.

Courtney Bullard:

The quid pro quo bucket is expanded slightly. And most importantly, we now have hostile environment in place of severe, pervasive, and objectively offensive. It is defined as unwelcome, sex-based conduct that must be sufficiently severe or pervasive that based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education, program, or activity. So much broader than the definition we're working under, currently. They do give us factors to consider in that analysis, but really important change. And then the big four is now called specific offenses, but those generally overlap and are the same in that third bucket.

Courtney Bullard:

Number six, we have a less prescriptive grievance process, but it encompasses broader complaints of discrimination. As I mentioned before, we no longer have a definition of formal complaint. We just have a definition of complaint and that complaint can be oral or written to the recipient, so no specific requirement that it has to go to the Title IX coordinator. There's a removal of mandatory dismissal, but permissive dismissal remains in three different instances with a required appeal. And then, who has standing or the right to make a complaint of sex discrimination is different depending on which category of behavior you fall under with the allegations.

Courtney Bullard:

For sex discrimination, the broader bucket of prohibited conduct, any student, employee, or third party participating in, or attempting to participate in, the recipient's education program or activity can bring a complaint and a complainant, a person with the right to make a complaint on behalf of the complainant, and a Title IX coordinator can bring a complaint. If the conduct falls under the bucket of sex-based harassment, which includes those three buckets I just went over with you, then only a complainant, a person with the right to make a complaint on behalf of the complainant, or the Title IX coordinator, can bring forward a complaint. Remember, that complaint can be orally or in writing. We have a nifty visual to kind show how these two things work in higher ed, because depending on how you bucket the behavior, depends on which procedure is proposed under the regulations.

Courtney Bullard:

Any allegations of sex discrimination, broadly, are under 106.45 for the procedure, and those allegations that fall under sex-based harassment that are brought by a student complainant, or against a student respondent, fall under 106.46 only for post-secondary institutions. For school districts, 106.45 is the complete procedure for a Title IX grievance process. 106.45 is not as prescriptive as what we're working under, currently. You've got a removal of those 10 day review periods, et cetera, but there's broad implications to allowing for more discretion. Some things to note is that you still must provide a party

with at least a description of evidence and the opportunity to respond, and a process to adequately assess the credibility of parties and witnesses in your investigation.

Courtney Bullard:

There's also a discussion of, and proposal of, relevancy versus impermissible evidence or information. That is new. That, I encourage you to take a look at. And then when you get into your decision-making process, you have the discretion of using a single investigator model, meaning the investigator and the decision maker can be the same person, unless your state law, of course, dictates otherwise, and your Title IX coordinator can serve as an investigator or decision maker, which I think will be good news for most of you smaller institutions and for school districts. But remember, that does not alleviate the need for an appellate decision maker for those permissive dismissals, somebody to review those supportive measures, if they are challenged, and, as I'll talk about in a moment, informal resolution facilitator.

Courtney Bullard:

During the decision-making process, you must still notify the parties of the outcome, and the proposed regulations state that you have to comply with 0.45 before you engage in any disciplinary sanctions if the conduct falls under the definition, that broad definition of sex discrimination. Note that 0.45 does not have a required right to appeal for the parties, and it does not have required advisors, or that school district or institution allow for advisors, during that process. So that is where K-12 ends. For post-secondary institutions. We have the addition of 0.46, which encompasses everything in 0.45, but adds some more things. It's only for processes where the student is a complainant or a respondent is a student, and it involves allegations of sex-based harassment. In those circumstances, I like to state that 0.46 gives you door number one or door number two as options for your decision making process. There's some other additional items as well, but I wanted to highlight this.

Courtney Bullard:

Door number one is a decision maker-facilitated process, and remember the decision maker can be the same as the investigator. We have the ability to test credibility and the parties have a right to their advisor of choice, which we don't have in 0.45. Door number two is the option of a live hearing. So live hearings are permissible, and if you, in your live hearing, allow for advisor-conducted questions, then you must provide the parties with an advisor if they do not have one. Lots more to discuss there, but that's an overview of these procedures. I think the bottom line is that there is more discretion and there's a less prescriptive process with what is proposed in the regulations. Finally, with respect to the procedures, the emergency removal provision remains. However, it has been broadened with the removal of the word physical, related to threat to health or safety in your evaluation.

Courtney Bullard:

Number seven, you can initiate informal resolution any time prior to a determination. So again, we no longer have a formal complaint requirement in the proposed regs, so you can initiate informal resolution at any time, set the discretion of the Title IX coordinator. There is those notice requirements we're operating under now with some additional information that is required in the notice under these proposed regs, and the informal resolution facilitator cannot be the investigator or the decision maker, and there's mandated training for that individual. Number eight, the proposed regulations strengthen retaliation protections. Specifically, the proposed regulations state that retaliatory conduct is not necessarily conduct that would constitute sex-based harassment. Instead, it is a distinct form of sex discrimination. Therefore, it is the department's current position that retaliation complaints may be

made by any of the persons specified and proposed 106.45, as entitled to make a complaint of sex discrimination, and this is on page 557. We've got an added definition of pure retaliation and an obligation to respond to and prohibit retaliation.

Courtney Bullard:

Number nine, discrimination based on pregnancy. There's two sections in the proposed regulations. Section 106.40, which is on page 669 of the unofficial version addresses students, and section 106.57 on page 698 addresses employees. This is the first time we see discrimination based on pregnancy or pregnancy-related conditions codified in this way, plus some other items that you'll hear me talk about. With students, the proposed regulations state that a recipient must not adopt or apply any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex. That's in 106.40. There are four different things that are required for the Title IX coordinator to do once notified of pregnancy or related conditions by a student, or an individual with a legal right to act on the student's behalf.

Courtney Bullard:

One is informing the student of certain obligations of the recipient. The next is to provide voluntary, reasonable modifications to the education program or activity. The third is to allow for a voluntary leave of absence for a period of time, deemed medically necessary by a physician or other licensed healthcare provider. And the fourth is to ensure availability of lactation space, other than a bathroom, that must be clean and private. We also see notice by employees informed of a student's pregnancy or related conditions by that student, or a person with a legal right to act on behalf of this student, specifically spelled out. And there are some nuances, but that employee who is informed must inform the person how to notify the Title IX coordinator for assistance and provide contact information for the Title IX coordinator.

Courtney Bullard:

For employees, there is a whole lot. I encourage you to read that section and involve human resources. The more I read it, the more implications, I think, there are going to be in implementing this provision if it sticks. But there's several sections in there that's towards the very, very end of the regulations, and we see statements like, "A recipient shall not adopt or apply any policy, practice, or procedure, or take any employment action on the basis of sex concerning current, potential, or past parental, family, or marital status of an employee or applicant for employment, which is based on whether an employee or applicant for employment is the head of household or principal wage earner. In addition, a recipient shall not discriminate against, or exclude from employment, any employer applicant for employment on the basis of current, potential, or past pregnancy or related conditions. And then, we see sections proposed on comparable treatment to temporary disabilities or conditions, pregnancy leave, lactation time and space, and pre-employment inquiries. All of this must be implemented and coordinated by the Title IX coordinator.

Courtney Bullard:

Lastly, the proposed regulations, number 10, expand record keeping requirements. It expands them to cover records related to the recipients' actions and response to all forms of sex discrimination, not only sexual harassment, and maintaining the seven-year retention period for records and the general types of records described in the current regulations. Recipients also must retain records of certain training materials, but broadens the scope of the training materials to cover all forms of sex discrimination,

including, but not limited to, sexual harassment. So again, a premium on training. We know that there will be litigation challenges, and there already are, to the NPRM and once it's released as a final regulation, there will certainly be more after that, just like we saw with the 2020 regulations.

Courtney Bullard:

As I mentioned before, this is a broad overview of our top 10. There's a lot I haven't discussed with you. For example, there's a pretty robust discussion of the evidentiary standard, the cost of compliance, specifically, record keeping. The proposed regulations address adoption and publication of non-discrimination policy and grievance procedures. Page 565 of the unofficial version has directed questions, so if you are planning to comment, that's a good place to look at where the department is looking for some feedback. There's also discussion of the ADA and IDEA crossover, specifically with K-12, and implementing supportive measures and a requirement that you talk to your IDEA folks when you're implementing those measures, and there's a lot of discussion about the burden on small institutions.

Courtney Bullard:

But the bottom line that I want you to take away from this, and that we say in our trainings and webinars as well, is to take a deep breath. We encourage you to comment on the NPRM, or your institution or school to comment. This is your chance, but we also know there's a lot going on on the ground, as always, but we're going through this commenting period. After that, there will be a long waiting period, so we want you to keep following your 2020 regulations. We're still seeing a lot of deficiencies on the ground with training and following the procedures that are required now.

Courtney Bullard:

We also want you to take a look at your policies and procedures on how you address Title IX, non-harassment discrimination. What pathways do you have in place for addressing retaliation complaints, complaints of discrimination based on pregnancy or pregnancy-related conditions, or requests for accommodations for pregnancy or pregnancy-related conditions, how you're addressing allegations of sexual orientation and gender identity discrimination, et cetera? Because we know, right now, one thing that the proposed regulations is giving us is a glimpse into the office for civil rights and where they're focusing, currently. Use that to evaluate your own policies and procedures and pathways that you have in place, currently, but please don't take your foot off the gas of your current compliance efforts.

Courtney Bullard:

Along those lines, we have our fall schedule up for virtual live trainings. We also have an in person training in our headquarters in Chattanooga, Tennessee on September 15th for K-12 investigators. We'd love to see you there. I've already mentioned the launch of DEI University within Title IX University for our community partners. We have our 2022 refresher and update courses about to launch. Lots and lots going on. We are trying to keep up and keep getting you information as fast as possible, in the most digestible way as possible, as things continue to change and evolve in this space.

Courtney Bullard:

I also have a lot of great guests lined up, so we will be recording on topics like climate surveys, name, image, and likeness, and the overlap with Title IX. We'll talk more about the employment overlap with Celeste Bradley on my team, and on and on and on. We are going to a lot of school districts and institutions in person, as well, to conduct training, which has been great and a ton of fun. So if we can help you out in any aspect of your compliance efforts, as always, please feel free to reach out. I'll be sure

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the show notes contain the NPRM and all of that. And if you listen to this podcast and you would like a few sample compliance AIDS with respect to the NPRM, reach out to us at info@icslawyer.com, and we will share those with you. We hope to see you in a future training. Thank you, as always, for tuning into the podcast, and I will see you next episode.

Speaker 2:

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Speaker 3:

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