

Courtney Bullar...: Welcome back to the Law and Education Podcast and this informational episode hosted by me, Courtney Bullard. If you want to learn more about my background, you can go all the way back to episode one and learn about my origin story of becoming a lawyer and my journey to starting institutional compliance solutions and growing the team that we have today. In this episode, I'm going to talk a little bit about emergency removals and administrative leave under Title IX. First, a reminder that we are currently under the 2020 Title IX regulations. As I mentioned in my conversation in my last episode with my guest Andrea and Joe, the new regulations are not out yet and we do not know when they will be released. We have proposed regs that give us a fairly good idea of what will be contained in these new regulations, and I have a podcast episode on that as well.

And we did a free webinar on that in June, but for now, we are still under the 2020 regulations. We have a lot of clients and requests for services from potential clients who are still struggling to get in compliance with those regs even three years later. No judgment here. They are difficult. And as we've lived the regs, we've certainly learned a lot over these three years. But what I do want to encourage you to do is that if you are not compliant, if you don't have your policies and procedures up to date, you haven't identified or trained your Title IX team, those are your starting points. You need to go ahead and get to work on that now. We have some folks who come to us and are considering becoming community partners and are waiting to use their professional development money until the new regs come out, but their district or institution is still not fully compliant with these regs.

And what I just want to mention to you all as you're in budgeting season and all of that, and considering your professional development going into this next fiscal year, is that you should invest in that now. The regs are still very much in effect and the Department of Education very much expects you to be in compliance with them. So if you're struggling, we would love to have you as a part of our community to assist you with compliance through our triage tools, our courses, our flow charts and updates and all the things. Or of course, we've got great colleagues in the space doing the work as well. But we just want you to get in compliance so that when the new regs come out, you're ready to go. Today though, I am focusing on emergency removals and administrative leave under Title IX for my community partners who are diamond level.

We do have a level-two specialty course on this topic, but we all learn differently. Sometimes it's helpful to just listen to someone talk about it. Sometimes you need a course, sometimes you need interaction, maybe all of the above. But this topic is really appropriate for our Title IX coordinators, who you will hear me say, we want making the ultimate decision of an emergency removal or administrative leave, but also deputy Title IX coordinators, student affairs professionals and human resource professionals and threat assessment teams who hopefully are at the table as these decisions are being made, especially with respect to emergency removal.

So as you'll recall, the formal Title IX grievance process is pretty prescriptive under the 2020 Title IX regulations. And when a Title IX coordinator receives a report, they're doing that all important triage to determine whether or not the report on its face meets the definition of sexual harassment and falls within your education program or activity.

Now, title IX coordinators can do some limited follow up with a potential complainant in a matter to determine whether or not the report on its face rises to the level. But you cannot go and interview a respondent or have a full-blown interview of a complainant to make that determination. So that triage by the Title IX coordinator is so important and it's exactly why we develop the triage tool. It's just another aid to help coordinators with that step.

So once you get that report, if you determine a matter does rise to the level of Title IX sexual harassment and fall under your education program or activity, you're required to go through the Title IX formal grievance process in order to discipline the respondent. The Title IX coordinator should be once they get that report and decide that it does fall within Title IX will try to meet with the complainant. So that's the person who is alleged to have experienced the sexual harassment to offer supportive measures and may at that moment consider emergency removal.

So a reminder that supportive measures are non-punitive, individualized, and interactive, and the burden is on the school or institution to offer supportive measures to a complainant or a respondent as the matter moves forward. We talk a lot about supportive measures in all of our trainings. It's a very important factor in the Title IX regulations or an important requirement for school districts and institutions. And you're also supposed to be documenting the supportive measures that you offer when they're taken, when they're not, and show your work as far as that interaction with the complainant and respondent throughout a matter to determine whether supportive measures continue to be appropriate that you might have put in place.

Supportive measures are different than an emergency removal and are certainly different than discipline. You heard me say earlier, supportive measures are non-disciplinary in nature. So the 2020 regulations require that you go through the formal grievance process, investigation with the timelines, decision making, all of that in order to discipline a respondent if it rises to the level of Title IX sexual harassment and falls within your program or activity.

Emergency removal is seen as a type of discipline. And so there's very specific requirements under the regulations if you decide you're going to administer an emergency removal of a respondent. So you must do an individualized safety and risk assessment under 106.44Z of the regulations. That assessment needs to determine whether there's an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment. So three things, immediate threat, two, to the physical health or

safety of any student or other individual. And three, arising from the allegations of sexual harassment.

When we had our conference last month, and I did a presentation on this, I said to our participants, "Emergency removal is for what?" And they all said back, "Emergencies." So I want you to keep that in mind as I continue this explanation. So the Department of Education wants you to use emergency removal in situations where you have a true emergency, an immediate threat. So you need to be considering the appropriateness of supportive measures in lieu of an emergency removal. Said another way, if there's a way to manage the situation through supportive measures, that is what the Department of Education wants you to do in lieu of an emergency removal of a respondent.

If you look at a matter and you determine that there is an immediate threat to the physical health or safety of a student or other individual that arises from the allegations of sexual harassment, the regs have specific notice requirements. So you must provide notice to the respondent that is sufficiently detailed to alert the respondent to the specifically identified emergency threat of physical safety or harm that compelled the decision. And you must provide the respondent an immediate opportunity to challenge the emergency removal.

Note that there is no definition provided in the regulations of what constitutes immediate, and that opportunity to challenge does not have to follow the grievance process spelled out in 106.4 of the regs, that very prescriptive grievance process. But you do have to give sufficient notice with an opportunity to challenge.

A few notes here. This should all be spelled out in your policies and procedures, number one. Number two, that immediate opportunity to challenge, again, there's no definition of immediacy. Usually a few days should be sufficient. But if somebody challenges, I want you to consider now, if a respondent challenged an emergency removal, who, which administrator at your institution or your school district is going to review the challenge to avoid a bias or conflict of interest?

So if the Title IX coordinator is making the ultimate decision on emergency removal, we don't recommend that the Title IX coordinator be the administrator who reviews a challenge of an emergency removal, or your investigator or decision maker in that matter just to ensure that you avoid conflicts of interest. So emergency removal is for emergencies, immediate threat. So the example of an alleged rape, let's say that you have a student who alleges a rape by another student respondent that occurred six months prior to the report that comes in to the Title IX coordinator, a lot of our coordinators have that knee-jerk reaction of we need to put the respondent out on emergency removal or interim suspension. And is a lot of times what they'll refer to it as. And you just need to remember that first requirement of immediate threat. Okay?

So emergency removal is for emergencies. Administrative leave is different. Administrative leave is not for emergency situations. It is after a formal complaint is signed and specifically for non-student employees. And we really recommend that HR be involved in that determination for administrative leave with pay. Without pay would be punitive or disciplinary. So it needs to be with pay. So going back to our emergency removal, we want you to involve your threat assessment team. If you don't have a relationship with your threat assessment team or don't know what your campus or your school district is doing with respect to threat assessment, then I encourage you to have a seat at the table or make those introductions now. If you are putting together a threat assessment team or a care team or sometimes called a behavioral intervention team for the first time, I recommend that you seek out some support for that. And Brian Van Brunt with D Prep is fantastic with that work.

So we'll make sure to have that in here. But we want you to involve the threat assessment team, but we want the ultimate authority for making that emergency removal to reside with a Title IX coordinator in order to have consistency in the decision making. So I just went through your requirements for an emergency removal under the regs and put that side by side with emergency removal, which is a little bit different treatment under the regulations. Again, encourage you to talk to your threat assessment or BIT team or care team or whatever they're called in advance of something like this coming up. But this is not something that has to be shouldered alone by your Title IX coordinator. And I also want you to remember that all of these decisions and analyses can be or should be ongoing throughout a Title IX formal grievance process.

So perhaps you get a report that you do determine is falls under Title IX on its face, but at that time you determine that an emergency removal of the respondent is not necessarily you don't have those requirements met, and you instead put into place some supportive measures. The matter then goes on to a formal complaint signed by the Title IX coordinator or the complainant, or if you're in K-12, their parent or legal guardian and you're in the investigative phase and some more information comes to light or something happens during the investigation, just for example, that leads you to reevaluate an emergency removal of that respondent. That's something you should be doing. Similarly, thinking about administrative leave with pay. So you may determine that an administrative leave is not appropriate for the non-student employee respondent at the outset of a matter, but once you get into the investigation, you learn some facts that make it maybe more appropriate to put that employee on administrative leave.

So this should be ongoing analysis throughout the formal grievance process, but you always want to consider if there are appropriate supportive measures that can be put in place in lieu of an emergency removal. And for my K-12 listeners, really important that you not place a respondent, you not suspend a respondent before going through the formal Title IX grievance process. If the matter rises to Title IX sexual harassment and falls within your program or activity, you need to

be utilizing what's provided in the regs for your basis for an emergency removal. And I know this is really hard on the ground for K-12, but I just wanted to give you that little caveat.

All right, so that's my quick overview of emergency removals and administrative leave under Title ix. Be sure to go back, check your policies, make sure you have something in there on on your notice requirements and all of that when it comes to an emergency removal. If you have any questions, feel free to ask us. Again, we have a course in Title IX University for our diamond level community partners. It's a level-two specialty course, so if you want more information, be sure to check that out. And I will see you next episode with hopefully an interview with some of my team members on some important topics that are coming up, and we'd love to see you in one of our free webinars. We've got webinar Wednesdays at the end of April three in a row, some dedicated to just K-12, some dedicated to just higher ed, and one, the one on pregnancy discrimination and accommodations is appropriate for all.

Thanks as usual for listening. If you like the podcast, I'd love for you to rate, review, subscribe, share, all of the things. That's really helpful to us, and lets me know that we should continue forward with recording these podcasts. And I hope that you are doing well out there on the ground. Keep working hard. We see you. We know this is hard work, and we appreciate you. Until next episode.

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