Speaker 1 (00:00):

And when we're talking about these processes running parallel, the majority of the time we're talking about a criminal process for, let's say, rape or domestic violence or stalking, and a parallel university or school district process investigating and resolving those same matters to determine whether someone needs to be punished on the school level. So those are the two things we're talking about running parallel. And I think there's a lot of confusion by the school districts about law enforcement's responsibility and law enforcement on what school districts and institutions' responsibility is as well.

Speaker 2 (00:46):

Welcome to the Law and Education, delivering insight into Title IX compliance and its practical application. I'm your host, Courtney Bullard, founder and CEO of Institutional Compliance Solutions. Join me in conversations with campus and school leaders, subject matter experts, and colleagues who navigate the intricate landscape of Title IX and equity and other areas that intersect with this space. These discussions rich with insights and expertise shed light on the legal and practical implications that shape your career in campus and school communities. Hey there. It's great to be back with you on the podcast. Following my recent conversation with Celeste Bradley on the previous episode about the Cornell case and what universities are required to do in Title IX live hearings, I wanted to revisit another important part of that discussion. What happens when a criminal investigation and a Title IX investigation are taking place simultaneously? One of the things we talked about is that there are two very different processes with different purposes, standards, and responsibilities.

(01:54):

And while they may involve the same underlying conduct or allegations, one process does not replace the other. This is an issue we've encountered many times in our work at ICS, and it can present some real challenges for institutions trying to navigate both processes appropriately. I though this would be a good time to bring back an earlier conversation I had with Betsy Smith about parallel criminal and Title IX investigations. It's hard to believe this conversation occurred in 2022, and it is all still applicable today. We discuss how these processes intersect, where institutions and school districts can run into challenges, and some practical considerations for institutions, and some practical considerations for Title IX coordinators at school districts and institutions. I also wanted to share this episode as an educational component for those of you listening who might not be in the Title IX space at all, but where the Cornell matter has raised awareness, and you might be curious to understand more about how this works in real time.

(03:00):

In addition, towards the end of our conversation, Betsy and I discuss domestic violence and dating violence, which is particularly timely as October is Domestic Violence Awareness Month. It's an important reminder of the role our institutions and school districts play in recognizing and responding to DV and also supporting those impacted as well as a small primer on the cycle of abuse and the issues and challenges we see in DV cases. Whether you listened when this first aired four years ago, or this is your first time hearing it, I think you'll find the conversation particularly relevant given the issues receiving attention today. So without further ado, here's my conversation with Betsy. Betsy Smith, welcome to the podcast.

Speaker 1 (03:48):

Hi, I'm excited to be here.

Speaker 2 (03:50):

I mean, we only talk 50 times a day, but I love that we're actually sitting down to talk through some concepts that I think will really help folks in a podcast episode. And you really encouraged me to get the podcast back up and running, so I appreciate that.

Speaker 1 (04:04):

Well, people have missed it, including me, so I'm glad we're here.

Speaker 2 (04:08):

Me too. We have about 120,000 things we could discuss together, but I think what we've decided to talk about today is starting with kind of the parallel criminal process with the Title IX process on the ground and all of the different issues and challenges that school districts and institutions run into and ways to manage that. And the reason I wanted you to talk about this topic is because of your background as a former prosecutor. So can you talk a little bit about that?

Speaker 1 (04:38):

Yeah. I started out my career in law as a prosecutor, and some of my responsibilities included prosecuting domestic violence cases. So I learned a lot about the interplay between survivors of domestic violence and their abusers, as well as the court system and the law enforcement responsibilities in place to protect them through that. And then combined with my on the ground experience at an institution and how those are playing together, the law enforcement side as well as the institution side and handling these types of cases, not necessarily well, but trying to work through it together.

Speaker 2 (05:25):

So I'm gonna be candid for a moment and just say that... Well, I have two thoughts right now. <laugh> Just say that prior to you being on the team, I didn't fully understand the benefits of having someone with the prosecutor background doing this work. And there are a lot of colleagues that do it with the prosecutor background who I have a lot of respect for, but I just never fully got the parallels, like I don't think it really cemented in my mind until you and I started working together. And part of what I've learned from you, I'd already taken sort of trauma-informed courses, right, before you got on the team, but I will say that your experience in serving as a DV prosecutor and also for child sex crimes has really enriched what we're doing as a team, what we put into our content on being trauma informed.

(06:18):

So can you talk a little bit about your experience too, and maybe I just covered it <laugh> as prosecuting child sex crimes as well?

Speaker 1 (06:26):

Yeah, absolutely. And I was really fortunate to learn from some great prosecutors before me about how to talk with children who had been sexually assaulted or sexually abused, as well as their parents who are going through a really challenging process as well. And so I'm, I'm fortunate to have that background and to learn from some great forensic examiners on the law enforcement side who taught me a whole lot about this. And it's something that I think I'm still growing in today as we work with individuals who have experienced sexual assault or other types of trauma, but it's definitely a passion and something I'm glad to bring to the team.

Speaker 2 (07:06):

Yeah, perfect. So let's start with the very, very basics. And again, I think I'm in a truth-telling mode today, I guess, or sharing embarrassing things about myself. But I'll be honest, when I went to law school, I had

no experience in the legal world at all. I graduated college young. It was kind of like the next step. I though, oh, that sounds like a good idea. I was a philosophy major. And that was just one avenue for philosophy majors among many. And so I went to law school. So I did not understand until my first year of law school that there were civil courts and criminal courts. Like I had no idea. Now obviously I get it, but I do think the layperson doesn't always, they don't know or fully differentiate. They watch law and order. They think that's all litigation, right? So I think first as a baseline, just wanna establish, there are times when people are held civilly liable when institutions or school districts are sued.

(08:02):

And what we're talking about here is the criminal justice system. Anything I'm missing?

Speaker 1 (08:08):

No, absolutely. I think there's even one more little layer, but each state handles this differently in how their courts are separated and divided up, but we have criminal processes where we're trying to hold someone responsible and send them to jail. We have the civil processes where we could hold an individual responsible for the behavior that occurred or the, as a defendant or respondent in our Title IX world. And then also where we're seeing school districts civilly held responsible or universities civilly held responsible and the employees within those districts or universities or colleges as well.

Speaker 2 (08:47):

Exactly. And those usually come with some type of monetary compensation if there's civil liability. And in the criminal process, not to just muddy the waters more, of course, sometimes there is monetary penalties as well, but we're talking about typically sending someone to jail.

Speaker 1 (09:03):

Yes, absolutely. And when we're talking about these processes running parallel, the majority of the time we're talking about a criminal process for, let's say, rape or domestic violence or stalking and a parallel university or school district process investigating and resolving those same matters to determine whether someone needs to be punished on the school level. So those are the two things we're talking about running parallel. And I think there's a lot of confusion by the school districts about law enforcement's responsibility and law enforcement on what school districts and institutions' responsibility is as well.

Speaker 2 (09:45):

Yes. So much to unpack. Okay. Walk us through, in general, how the criminal process works, starting from the beginning, if someone's been accused of a crime or suspected of a crime.

Speaker 1 (09:58):

Yeah. So the police are going to do an investigation. That may be a big investigation on the front end and then an arrest or indictment or detention later on for a juvenile, or it could be that they have enough information on the front end, probable cause, to make an arrest and then continue their investigation moving forward. Again, I'm saying arrest in juvenile jurisdictions many times that means detention as well, sending an individual to a juvenile detention center, allowing for bond or bail or release from custody, but at least the charges are already happening.

Speaker 2 (10:39):

So the bottom line is, it's not always just an immediate arrest. I go in as a victim, you know, this happened to me. They're not necessarily always just gonna go arrest them. Sometimes it starts with an investigation, then an arrest or detention. Sometimes it's an immediate arrest, depending on the nature of the crime.

Speaker 1 (10:55):

The nature of the crime, absolutely, and how much information they have. Again, they're looking for probable cause before making any type of arrest.

Speaker 2 (11:03):

All right. So I wanna stop there because to me, sometimes this is a misconception as well and probably one that I had at some point. What does it mean to have probable cause? And I understand we have whole courses in law school on this, so it's can be very complex, but just to kind of like make it as simple as possible, what does that mean? And how is it, where does a prosecutor come into all of this?

Speaker 1 (11:27):

Ooh. Ooh, you just asked some loaded questions. A lot of

Speaker 2 (11:29):

Them. I know. I know. Um,

Speaker 1 (11:31):

Let's start with where the prosecutor comes in, because that depends. Again, I'm giving a lot of lawyerly answers here with that depends, but the prosecutor may be consulted really early on to say, "Here's the information I have. Do you think we have met a burden? Do you think we need to get more information?" The police officer or the law enforcement officer is gonna have to get a warrant for arrest. So they're certainly gonna have to talk to a magistrate in most jurisdictions before they're able to get that warrant in order to make an arrest, unless they've caught the situation in the act, which is really, really rare in these types of situations. So the prosecutor's gonna be involved in deciding, do we have enough information to move forward or law enforcement, do I need you to go get a little bit more? And we'll dive into the probable cause discussion as well because that's challenging.

(12:26):

It is a lesser burden than a preponderance of the evidence, but there must be enough information to lead one to believe that it occurred. So it's more than a reasonable suspicion. It's less than preponderance of evidence.

Speaker 2 (12:40):

Perfect. So let's say you're a school and you have a Title IX investigation that's starting as well. Some things that we hear that happen all the time, right, by the respondent, the person who's been accused, or by the complainant, frankly, there's a police investigation. And so somehow that adds validity to my allegations. Or they started a police investigation and now they've decided to drop it. And so that adds validity to the fact that I didn't do it, right, at this phase. We haven't even gotten into, like, if there was an actual charge and a finding or a no finding or it's dropped. But we hear those arguments a lot. So anything you can share on that?

Speaker 1 (13:24):

Yeah, absolutely. So the expectation in the law is that we are running these completely separate. So regardless of whether there is a proof beyond a reasonable doubt is our ultimate requirement for a criminal case by a judge or a jury, or there is a finding in a school case that someone is responsible or not responsible, those two things need to be separated. And we're going to go through each process individually, and they're not determinative of each other. So regardless of what happens criminally, we

still need to make sure that we are following up with our school investigation. And the same, obviously, vice versa.

Speaker 2 (14:07):

So you explained this to me one time and it just, like, a light bulb went off in my brain. But there are times when either there's a, I hope I'm getting this right, a proffer or a case is dismissed even after charges, but before it goes all the way through to, let's say, a grand jury or a trial. And there's lots of reasons that that can occur. We see a lot of times, or we've seen several times, where even though these cases are not supposed to be determinative of each other, the criminal process and the, the campus or the school process, that schools have either overturned their decision that someone violated Title IX or put weight on the fact that the criminal case was dismissed. So we're not talking they weren't found guilty or they were found guilty. We're talking a case gets dismissed in the criminal process before that even occurs.

(14:58):

And so they put weight on that saying they didn't violate campus policy or school policy. And you explained it really well one time about why a case being dismissed may or may not mean that that individual did actually engage in that act criminally.

Speaker 1 (15:15):

Yeah, that's a really great question. So there are a lot of safeguards in the criminal law to protect evidence, and there are chains of custody where evidence has to be followed and, or prosecutors commit misconduct, unfortunately, or law enforcement commits misconduct or mishandles evidence. And those types of things can lead to a dismissal of a criminal case. That is not a finding or any sort of outcome as to whether it happened or not, but instead is a legal reason for the dismissal in the matter. And a great example of this actually is we've seen recently with, with the Bill Cosby case, and that his case or his finding, his guilty verdict was overturned because of something that had happened with the prosecutor prior to his guilty verdict. So it doesn't mean that it didn't happen. It just means that there was something that happened in the case earlier on with regard to the evidence or a decision that was made that said he couldn't be found guilty for that situation.

(16:26):

So what I want us to do as school districts and as institutions is to remember that you don't have those same requirements. And if there is something that happens in the police investigation that may rule it as invalid or unable to move forward with prosecution, that does not mean that it didn't happen. And it does not mean that you can't proceed with your investigation or that you have to overturn your decision.

Speaker 2 (16:55):

Super helpful because a lot of times as well, schools or institutions don't know why it was dismissed, right, in the criminal process. So they just are shown by the respondent, "Hey, this was dismissed. You know, I didn't do it. You need to drop the school process." But we're not always gonna have insight or visibility into why the criminal case was dismissed.

Speaker 1 (17:17):

Absolutely.

Speaker 2 (17:18):

Now, and this is so, like, it's interesting because to us, sometimes you think it's so simple and as we're talking through it, it's just highlighting how complicated it can be. <laugh> So you have a, let's just say

we have a parallel school process and a parallel criminal process. And as we've said, they need to be completely separate from each other and one shouldn't be determinant of the other. What we find a lot of times, especially with our school districts, is at the outset of that process at the school level, law enforcement wants to talk to the complainant and the school district needs to talk to the complainant. Same actually at institutions as well. And we're always trying to avoid multiple interviews, all that kind of stuff. We're trying to avoid additional trauma to the complainant. And that gets tough when law enforcement steps in and says, "We need to interview them or you can't interview them until we do." We talk a lot about this in our training, but let's drill down on that a little bit.

(18:16):

What are your thoughts and suggestions there?

Speaker 1 (18:19):

Well, I think the best case scenario is that we can interview them once together, and we being law enforcement and a school district or an institution. That doesn't always work feasibly and under the law. So the goal would be that, that we would work together, we would do an interview, we would have both the law enforcement and the school representative there, and we're able to get out as much information as necessary in that initial interview. What we know is that Title IX requires us to give notice of allegations to the respondent and the complainant before we conduct our full interview. So we need notice of allegations plus notice of interview. Sometimes that doesn't work on the law enforcement timeline. And so we certainly don't want to interfere with the law enforcement timeline to hold up an interview. And also, law enforcement doesn't always want extra individuals there.

(19:17):

And I totally understand that from a prosecutorial perspective as well. So we just need to be thoughtful about it. And there may be situations where if we've worked together enough, and hopefully we can talk about this piece in just a moment, but if we've worked with our law enforcement enough from an institutional or, or K-12 level, they're prepared to understand our process and we can find the best ways to work through every situation together and work through them on a case by case basis.

Speaker 2 (19:48):

Yeah. What we've seen time and time again is the detectives or law enforcement saying to the school, "Do not do anything until we investigate because you are interfering with a criminal investigation." We've seen it over and over and over where we've even had clients where DAs have sent letters and said, "You are not to do this." And then school is sitting there saying, "But we have these Title IX obligations." We've had schools who simply do stop, and then we have others, you know, of course, that try to run a parallel investigation. So let's talk about trying to establish that relationship with law enforcement and some suggestions that you've given in the past to try to mitigate some of that tug of war that ends up happening in pushback. It's not perfect. It doesn't always work, but there are some things that may be helpful. So talk through those.

Speaker 1 (20:42):

Yeah. And I'm gonna be on the same honesty train as you were earlier in that when I was prosecuting, I did not know the requirements of Title IX. So if a school had come to me at that time, and granted, it was 10 years ago, if someone had come to me and said, "Hey, this other person or district or professional is gonna conduct an investigation," I would've said, "Hold up. Wait a minute. Stop. That can't happen. Let us finish first." And so I probably would've been one of those individuals who sent that letter because I wouldn't have been informed or I wasn't informed, whether that's on me or the system or whatever, to know that this other process had to happen at the same time. So for all our law enforcement out there

listening, like, we totally get it and we want you to be informed so that you can help in this process as well.

(21:36):

And that requires our school districts reaching out to have conversations with law enforcement about what your requirements are. And I encourage this to happen over lunch or breakfast or invite them to your space so that they can see. Have your attorney there or allow them to watch some of the trainings that you've been through to talk about the interplay between law enforcement and, and Title IX investigations and truly let them see what your requirements are. Because to be quite honest, many of them probably don't know and/or don't believe it when they're told because they're so ingrained in this criminal world and making sure that justice is served, rightfully so, that they're missing all the knowledge about these other parallel processes that have to happen.

Speaker 2 (22:27):

Yeah. And what I saw on the ground at the higher ed level was times where this is before the regs when everyone for the school was a responsible employee, including campuses that have law enforcement. And there were times when matters of sexual harassment were not reported by law enforcement to the Title IX coordinator because in their criminal brain, you know, it didn't rise to the level of a crime and that was it. And they weren't thinking about the lower, quote unquote, lower level sexual harassment that might not rise to the level of a criminal charge, but it's still very much sexual harassment and at the time required reporting. So just to your point of this is the world that they're in, it's a very criminal world. And then in the school district side of things, you have your SROs who are very much embedded in the school district.

(23:16):

They're not an employee of the district, but they're like an employee of the district because they're there every single day. And so I think for districts, they have maybe more opportunities to try to establish that relationship with local law enforcement, but it can get a little tricky. And for higher ed, if they have law enforcement on the ground, great, and they have their own police force, but then most of those matters get referred out to the local police. And so you've really got to go beyond. And we always recommend MOUs and things like that if you can get them to write in those Title IX obligations just to help, help with that when the time arises. Is there anything else I'm missing on that subject?

Speaker 1 (23:54):

Well, you just made me think, as many of you know, and I talk about often, my husband is a K-12 administrator and something I don't talk about often or haven't so far is that my brother-in-law was an SRO. He currently is still a police officer, but formerly worked as an SRO in, not in the same school or anything, but I often hear the two of them talking about how that SRO role feels like a dual role. And sometimes there are conflicting pieces that go into it. So you're feeling like, I know I need to do this right thing by the school district because they've told me that this has to happen, but my superiors over here at the sheriff's department or the city police chief is telling me that I have to do something different and that I can't listen to that thing. And so making sure that the SROs are communicating those differences and perhaps having the higher level school leaders communicating with the higher level police officers or sheriffs or police chiefs to make sure that that understanding exists and that we're not putting our SROs in that really challenging space.

Speaker 2 (25:02):

Yeah, you just articulated exactly what I was trying to articulate. <laugh> Which is they're almost like a, they are in a, in a dual role very much so, even though they might be employed by the sheriff's department, for example. They feel like a school district employee because they're so ingrained in the day-to-day life at that district. So the other point I wanna make too, before we move into other areas of

the criminal process and burdens of proof and things like that, is that very often, and again, we're gonna go back to school districts for a moment. When we're doing training, so under the regulations, when a school employee is on notice of sexual harassment, the district is deemed on notice. So that means we highly encourage school districts to train all of their employees on what types of conduct mandate them to report to their Title IX coordinator so the district can then fulfill those Title IX obligations.

(25:54):

So things like what kind of conduct constitutes sexual harassment, how to receive a report, where to report it, you know, who their Title IX coordinator is, so on and so forth. A lot of times when we have these conversations with school districts, they will say, "Well, so are you telling us not to report to law enforcement?" So just clarifying really quickly before we move on, and we have this in the responsible employee training that we provide for districts, that that is separate and apart from the obligations of school employees to report to the police and those mandatory reporting requirements under criminal law.

Speaker 1 (26:30):

Yeah. Every individual has a responsibility to report to law enforcement under mandatory reporting statutes within their state, and those vary, but it is always my advice that if you have something that is potentially a crime and potentially child abuse, that you call that number of Children's Protective Services or call that number of your local law enforcement and say, "Hey, this is the situation. Is this a mandatory report? And if so, I'm calling to report it." And then that you document that you've done that. We definitely don't wanna miss that. And honestly, we wanna make sure that that's our first step. We gotta think about safety first. So we're gonna think safety planning for an immediate situation. If we have a safety concern in the school, we need to take care of that immediately. Then our next thing needs to be a report to law enforcement or to Children's Protective Services or whatever it might be called within your state.

(27:27):

So please take care of that and make sure that you're doing it to protect the individuals and also yourself and your law requirements.

Speaker 2 (27:35):

And then you go to Title IX.

Speaker 1 (27:37):

Absolutely.

Speaker 2 (27:38):

Parallel processes, they continue through. Things aren't dismissed. The criminal investigation charges is all rocking on the Title IX investigation is rocking along by the school district or the school. And then you come to where there's going to be a determination of responsibility or non-responsibility by the school of their policies and procedures or a finding of guilty or not guilty on the criminal space. One of my big, I shouldn't say pet peeves because I understand why it happens, but I'm always trying to correct people that in the school process, we're not finding people guilty. We're finding them responsible or not responsible. And it's very easy to start using that language just because that's what a lot of people see or hear. And the parties in the process sometimes become confused if it's not explained well and often, because they're stressed out going through this process, they don't always hear everything, of course, that this is only a finding of whether a policy was violated.

(28:41):

And so you get to the end and we have two different burdens of proof. So in the criminal process, beyond a reasonable doubt, anything you can share layman's term what that means, except for the fact that it's a really high burden.

Speaker 1 (28:54):

It is. It's a really high burden. I've heard judges use to describe it is that a juror could lay their head on the pillow at night and know that they've made the right decision, that there was enough information to move forward to say this person was guilty of this violation. And that doesn't sound very legalistic, but it's definitely the way that I've heard it best described on kind of a human level. You can lay your head down at night and know that information that you have means that this person is guilty and you have to be there beyond a reasonable doubt that it happened. So it's hard. Jurors struggle with this, judges struggle with this. And saying the word guilty and conviction, it feels very punitive because it is. And so it's, it's a high burden because we're taking away someone's right to be free and not in custody or to be under the rule of the courts with probation or things like that as well.

(29:52):

So it's definitely a high burden.

Speaker 2 (29:55):

If anybody out there is interested, I will say, I'm sure there's lots of closing arguments now that are Something you could go watch. But the one in the OJ Simpson trial, it's essentially a lot of what you're saying, but is a really good way to hear someone explain beyond a reasonable doubt. I though it was a really, really interesting and I, I show it to my students in the course that I'm an adjunct for all the time. So that is different than the burden of proof for schools and universities in the Title IX process. And there's two options, a preponderance of the evidence or clear and convincing. And we see the majority of schools going with a preponderance of the evidence, although just a few here and there that are clear and convincing. So talk through those.

Speaker 1 (30:39):

Yeah. Clear and convincing is probably the hardest one to describe or even think about. So I'm gonna start with preponderance of the evidence and go the easy route. What we think about is a scale and the two sides on the scale. If they're even, we have not reached a preponderance of the evidence. If the information and the weight of the evidence that you've received is even and there is nothing to tilt that scale either way, then you have not reached a preponderance of the evidence. It is a more likely than not standard. So if we add a feather of weight to one side of that scale, we have reached a preponderance of the evidence, more likely than not. So more than just even. Clear and convincing falls between preponderance of the evidence and beyond a reasonable doubt.

Speaker 2 (31:29):

You're exactly right. It's hard. Clear and convincing is hard. What I might get on my soapbox for a hot minute for <laugh> one area, which is notice we're saying like preponderance of the evidence. So Betsy and I spent a long time with a client over the holidays in their decision making phase. And this happens a lot because it's human nature, right? Where decision makers are relying on lots of things that aren't actually evidence. So I just really think this happened, but there's not actual evidence <laugh> to show it happened. Do you see, do you follow where I'm going with this?

Speaker 1 (32:05):

Yeah, absolutely. We have individuals who are thinking about their own opinions and beliefs and using those to base their determinations. And so we really have to avoid that both at the criminal level, obviously, and at the school level, which is where we see it most often.

Speaker 2 (32:22):

Yes. So just wanted to put that little side note in there. Okay. Anything else we haven't talked about, about these parallel processes and words of advice for those on the ground who are trying to navigate those processes or differences that we haven't touched on?

Speaker 1 (32:37):

Well, we did a course on this in, it's in Title IX University, but I think the biggest takeaway from that course as it was being produced and our talk today is communicate with your law enforcement, make sure that they understand your processes, build that relationship. Don't be afraid of it because you're going to need it. So don't stop your process. I just said there was one big takeaway. Here's takeaway number two, sorry. But make sure that you are following your process. Don't stop it because there's law enforcement. Explain it and keep moving. And first and foremost, take care of the safety of your district and of the individuals and your university for our campuses and colleges out there as well.

Speaker 2 (33:23):

Exactly. Perfect. Okay. What I also wanted to talk about with you in this episode is dating violence, domestic violence, sexual assault, all fall under this definition of sexual harassment under the new regulations. As you and I have gone out and done training recently, we've been using a lot of dating violence hypotheticals. We love hypotheticals. That's how we do a lot of our training and gotten some strong reactions, right? Because it's a hard space. So the first thing I wanna say is dating violence, domestic violence included in the definition of sexual harassment and that there is sometimes a huge... It's really not so much at the higher ed level, I think because they've had VAWA and Cleary in place for some time. But with school districts, it's very new, right? In the past, dating violence and domestic violence wasn't something they would think about as sexual harassment.

(34:17):

And it's not something we naturally think about as sexual harassment, which I know you're gonna talk about. But I wanna start by saying we train a lot on it with school districts because so many times they're tagging something as assault when actually it's dating violence and it falls under Title IX.

Speaker 1 (34:37):

Yeah. This is such a confusing area, Courtney, like you've brought up. We've talked about it before we started the podcast today just because we were talking about situational matters. And honestly, I had a conversation with my husband about it this morning because I was trying to figure out how to discuss this. <laugh> It's really challenging. It's one of the reasons that I think law enforcement is confused about the school processes because dating violence and domestic violence don't typically fall under the same category in the criminal law as sexual harassment or sexual assault. They're treated separately, they're looked at separately. And in the real world, you and I do this every day. So you and I know that sexual harassment in Title IX includes all of these things. But before I was doing this work, or if I talked to a friend or a family member about sexual harassment, just the term sexual harassment to them means inappropriate comments and that's it.

(35:38):

You know, the whole world is not thinking about this in this very specific way that we are as Title IX professionals. And so explaining that to students, to law enforcement, to everyone who's an interested

party, parents is really challenging in why these things need to fit under this big umbrella. So Courtney, if you're okay, I'm gonna explain it there and then take off onto domestic violence and dating violence.

Speaker 2 (36:04):
Yes, let's do it.

Speaker 1 (36:05):
Okay. So Courtney and I often talk about this big umbrella that is Title IX. So we have Title IX and that includes a whole lot of different types of discrimination. So we have pregnancy discrimination. We have sexual orientation, gender identity discrimination. We have discrimination or equity in athletics, inequity in athletics. There are a whole lot of types of discrimination that fall under Title IX in addition to sexual harassment. And sexual harassment is the type of discrimination that has been dictated by law about our response. And so that's why we focus so much on it. And included in that sexual harassment, we'll call it raindrop that's falling from the side of our umbrella, are the three buckets that you and I always talk about. Those sexual harassment buckets are quid pro quo, severe pervasive and objectively offensive behavior. And then finally, this third bucket that's a catchall that has little cups inside of it that are sexual assault, dating violence, domestic violence and stalking.

(37:20):
And so that's a whole lot of behavior that doesn't necessarily fit neatly together that is considered sexual harassment. So I think that's one of the reasons that everyone gets confused about what exactly is this thing, Title IX sexual harassment that we're talking about. Yeah. Hopefully that was at least some type of explanation of it.

Speaker 2 (37:40):
No, it's super helpful. I mean, as I said in the year end review I recorded yesterday, I mean, there's just so much more to Title IX than just sexual harassment. The other thing I wanna say is that we can't emphasize enough that you understand all those definitions in those three buckets, especially the domestic violence and dating violence. I feel like I know I'm a broken record all the time, but that is probably the number one area we see districts missing because they wanna tag it as assault. And they get very frustrated and with good reason when we do training and we give them a dating violence example and they say, "If we see on video a physical altercation occur, let's just say in this case it is between a female and a male, then that's assault and we're going to take action and deal with that under our code of conduct." But when they talk to those students and they learn, well, they were in a relationship of some sort, we're actually getting into that dating violence, domestic violence bucket, which has all these Title IX obligations tied to it, which can slow down the process, which is really frustrating and understandably so for our districts.

(38:50):
Am I capturing this correctly?

Speaker 1 (38:52):
Yeah, you sure are. And I think even more so we're talking not just those physical assaults, but also threats of violence, right? Acts of violence, threats of violence, dating relationship. We are talking about dating violence under these regulations and we have to handle it using this very formalized process. Don't get us wrong, it is frustrating. But we have seen so many schools have to take steps back and take longer even than the regs would require because they're starting over with this full type of investigation after realizing or getting advice from council or us that this situation actually needs to be handled under Title IX. So recognizing it on the front end is so

Speaker 2 (39:36):

Important. And a reminder, you can still do an emergency removal under the regs. I talk about that in another podcast with that safety and risk assessment. So it's not that schools are completely hamstrung, but at the same time, it does implicate Title IX. So when we've done some of our trainings and you did a webinar on domestic violence and dating violence, because in my mind, there's just simply not enough education around it. Like we have a lot more education on being trauma informed, on sexual assault, on not victim shaming and things like that when it comes to sexual assault or even sexual harassment. But there just isn't a lot out there on domestic violence and dating violence. I've learned a lot from you because of what you learned as being a DV prosecutor. Anything you can share with us that would be helpful. I know it's, it's a whole class, but on statistics, on things that it would be helpful for Title IX coordinators to understand and especially investigators and decision makers, because these are such complex cases.

Speaker 1 (40:37):

Yeah. So our coordinators and professionals should be really prepared to address these situations with complainants or individuals who have experienced the sexual harassment to recant or initially report something and then say, "Nevermind. I don't want you to do anything about it." Because they're in this repetitive cycle of abuse. We're even seeing it at the late elementary school, early middle school, and all through high school ages that the behavior or the patterns of behavior are continuing. So we're thinking that we have this honeymoon cycle where everything seems great and then there is an act of violence, a threat of violence, a blow up, and then we break up or separate. And then all of a sudden we are wooed back and come back into the situation. And, and the studies are all over the place about how many times a domestic violence or dating violence survivor goes back into a situation before finally removing themselves.

(41:40):

And it's anywhere from seven to 12. The statistics, as I said, vary, but times of receiving abuse and then going back into that abuse and perhaps even before reporting that anything has happened. So we need to be prepared for that. There are a lot of emotions that are involved. There's a lot of family history that may lead to this being involved in a domestic or dating violence relationship. And so as coordinators, we need to be thinking about how are we going to protect the individual? And if we put in a no contact directive, are we prepared to enforce that no contact directive if these individuals are back in a relationship? Are we sure of, well, or as sure as we could be that putting a no contact directive in place isn't going to create additional dangers? And so we've seen a lot of litigation in this area.

(42:35):

Courtney, you talked about it the other day in your year-end review, but when there are these dating violence situations, we're putting potential dangers to our campuses and school districts. And so we need to be cautious and thoughtful about how we're putting these protective measures in place and perhaps involving our SROs, our school security, et cetera.

Speaker 2 (42:58):

Yes. And these are so hard because safety's the first priority in these cases, especially there's a high risk for additional violence, I think is sometimes what we say with dating or domestic violence when the report comes forward and you have sometimes the survivor saying, "Please don't do anything because I'm afraid they'll hurt me, but I want you to know." And you're sitting there trying to figure this out. But what we tell folks is you don't have to figure it out alone. Hopefully you have a behavioral intervention team or a threat assessment team to go to in helping make those determinations.

Speaker 1 (43:30):

Yeah, for sure. Having someone besides just the Title IX coordinator is imperative. No one wants to make these decisions on their own.

Speaker 2 (43:38):

Yes. Going back to that cycle of abuse. So what I hear you saying is you could have, for example, the video I used earlier, a video of an alterca - a physical altercation. So there's just no question it happened. And you approach that person, the victim in that situation and say, "Hey, we saw this video." And you go through the whole thing that you go through as a Title IX coordinator about the opportunity to file a formal complaint and everything else. And that individual's like, "No, everything's fine. Everything's fine. I don't want you to do anything." Sometimes he just gets angry. And then assuming the Title IX coordinator doesn't decide to move forward with it, we'll just assume that for these purposes, a couple weeks later, that same individual comes in and says, "I wanna file a complaint." And then you do the complaint and you start the investigation and a couple weeks later that same individual doesn't wanna participate anymore and is back to saying everything's fine, right?

(44:32):

So that's what you mean as far as the cycle of abuse. And you see that in sexual harassment cases too, or sexual assault cases, I should say. But definitely in domestic violence and dating violence cases, it's much more prevalent.

Speaker 1 (44:44):

It is so much more prevalent in the DV cases. And those are the type of situations where Title IX coordinators are having to make that decision, "Am I gonna sign the formal complaint? Because if I just go ahead and sign it, then we're gonna move forward anyway." Again, a lot of times that's a great resolution or a great way to move forward, but we have to think about safety and we have to think about what we're gonna do during that investigation to make sure that an individual is safe. And also looking for evidence and information outside of what our complainant is able to provide to us, because they may not participate. Depending on where they are in that cycle, they may not participate in our investigation or in our hearing.

Speaker 2 (45:29):

Yes. So much to learn about that cycle of abuse. I really encourage anybody listening who does this work or touches this work in any capacity, investigator, decision maker, advisor, of course, Title IX coordinator, to seek out further education on all of this because it's complex and, again, broken record. There's not enough out there on it, so this is really helpful. I really wanna talk about trauma, but I'm gonna wait for another episode. <laugh> We do have a course on it. We do talk about it. We've trained lawyers on it who do these investigations on trauma-informed practices, but just look forward to that with Betsy and I in the future because lots to talk about there from your experience as a sex crimes prosecutor. Anything else you wanna share in closing just for today?

Speaker 1 (46:20):

Yeah. I just wanna thank you all out there for, for doing this work. We are seeing transition out of this work at a rapid pace, and you all are so important. So please keep doing the work because it's important and we appreciate you and we see you and, and we hear you and we know it's hard, but please keep on doing it because we need you.

Speaker 2 (46:42):

Yes. All right. Well, thank you for getting this done with me this morning, and I know I'll have you back very soon. Yeah, it

Speaker 1 (46:49):
Was fun. We'll talk later.

Speaker 2 (46:52):
Thank you for joining today's episode of The Law and Education. Be sure to subscribe to the podcast so you're the first to know about any new episodes released. Our library of podcast episodes is always available online for easy reference and to share with colleagues. We would appreciate your feedback and enjoy having you join the conversation online with our ICS community partners. Visit icslawyer.com for further information. Stay tuned and join me, Courtney Bullard, as we continue to shed light on the legal and practical implications you need to stay ahead. This podcast does not establish 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.