Speaker 1 (00:00:00):

As a hearing officer, you're looking at your scale, and so you're weighing every piece of evidence that's provided to you. You're looking at credibility determinations, which I don't like to say credibility determinations. I like to say you're looking for consistencies or inconsistencies and really having to base all of this on the policy definitions. That's the hard part is we could look at case and say, "Oh, my gut tells me." Well, we can't base that on what our gut says. We've got to base it on what evidence was provided to us. So sometimes when you don't have a party participate, that really causes an issue and an imbalance because we're only getting one side and we're only getting that evidence. And if that's what we have, we have to use what we've been given to make that decision.

Speaker 2 (00:00:48):

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. Hi everyone, and welcome to the podcast. I am happy to be recording this episode with Celeste today and to be back in the podcast space after a little bit of a break. I am hoarse because I have been training at Beaufort County School District in South Carolina the last few days, and it was such a great time in person at a school district working hand in hand live with compliance teams covering Title IX, Title VI, Title VII, IDEA 504.

(00:01:57):

Our team has been really busy this last month with training. Fall is always an intense training time as schools get their compliance teams up to speed, both through our on-demand learning platform as well as tailored training and ICS hosted a training or a summit I should say on the ground with Gwinnett County Public Schools. And it was really a great successful few days. As we look ahead to spring, our training calendar will be released pretty soon. So we're excited about that. We're always having to plan ahead. And if you're a district or institution interested in tailored training, meaning training specific to your school or having ICS come to host and invite other schools in a regional training, please don't hesitate to reach out. But we're recording this podcast episode today because the Cornell case has received significant national attention over the last few weeks. And I myself have received so many text messages, emails, and phone calls from friends and family where the awareness surrounding this case is getting everybody sort of involved in wanting to understand the work we do here at ICS, understand what's happening with this case.

(00:03:12):

And of course, for our parents of college students, really want more understanding on prevention and education. Much of the focus, of course, has been on the allegations themselves, but for those of us who work in Title IX, it also raises important questions about processes, what happens when a university receives a report of sexual assault, which is a definition that falls under sexual harassment, what a university is required to do, what happens in a live hearing, and how that process differs from a criminal investigation. We're not here today to second guess Cornell's findings or weigh in on what happened. Instead, we're using the attention surrounding the case as an opportunity to talk about a process that is often misunderstood and about what colleges and universities are actually required to do when they receive allegations of this nature. Sidebar before I jump into this conversation with Celeste, and that is to announce a new initiative at ICS before campus.

(00:04:13):

One of my passion projects and one of the things that's really important to the core mission of ICS is to look at the obligations of institutions in school districts and how they respond to and address sexual

harassment with kind of a 360 lens, not just what happens when something occurs, but how do we prevent and educate before something occurs? And college campuses and school districts certainly are working in this area. For ICS, I want us to be thinking about that as well. We are launching before campus and I'm really excited about it. We'll have some pilot programs in the spring to help educate seniors in high school and their parents and guardians before they set foot on a college campus. And we're doing that in working with college preparatory schools as well as PTAs who want to have us come and have these sessions. So quickly a little bit about before campus.

(00:05:10):

If you are a parent or guardian who has a child in college like I do, I have two, you have gone perhaps to orientation at the university where they talk about Title IX, they talk about how to report some education on the office, all of those good things for incoming freshmen and sometimes for transfer students, which is important. Some colleges, universities also put this in their first year experience courses. But at ICS, what I'd like to see and what I know our team would like to see is conversations about all of this well before a student comes onto campus. And what we've found is a lot of those conversations aren't being had, that students are coming to campus and they're thinking about so many things in that orientation. Sometimes orientation's one day, sometimes it's three days. They're learning a lot of things, where to get their keys, how to pay their bill, where to get their swipe card, how their payment plans work for their food plan, resident's life.

(00:06:12):

They're nervous about meeting friends. What about their school schedule? They're getting registered for classes. There is so much else happening in addition to the Title IX office getting in front of them. And for parents, a lot of times they have no idea what any of this means until their child is involved in a matter, whether they're a witness, whether they're somebody who's experienced sexual harassment or whether their child has been accused of sexual harassment. And that's when I will get a phone call or someone on our team will get a phone call from folks who know we do this work and say, "I think you do something related to Title IX and my child is facing X, Y, Z." So Before Campus is in our minds, what seniors should know before they leave to college. It closes the gap in an in-person session with parents and students.

(00:07:03):

And so what we say is schools spend a lot of time at K-12 level preparing students for the academic portion of college, but not for what actually happens on a college campus in real life. So Before Campus covers campus safety, knowing where to turn when something goes wrong, healthy relationships, boundaries and consent, alcohol and the realities of campus culture, hazing and how to recognize it, mental health and support resources available on campus and FERPA and what changes legally once a student turns 18. And while we can't cover everything in a two-hour session, we certainly want to do our part in trying to raise awareness so by the time your student walks on campus, that this is not the first time they've heard some of that information. So you can follow us on Instagram. We have an Instagram handle before campus as well as more information coming out of ICS.

(00:07:59):

So I look forward to launching this new initiative, having our pilot programs. I've done this for free to sold out audiences here locally in Chattanooga Tennessee where we're headquartered over the years. So I'm really excited to launch it formally. All right, so back to the conversation at hand today in the Cornell case, Title IX hearings, criminal investigations in the university's role. I want to turn it over to my conversation with Celeste Bradley. Hey Celeste, how are you? Hi

Speaker 1 (00:08:28):

Courtney. I'm good.

Speaker 2 (00:08:30):

So glad to have you jump on with me. I know we kind of made this decision at the 11th hour because of the attention with the Cornell case and just all the questions we're getting personally and professionally surrounding this. So I'm really excited for you to jump on with us. I did not say in my introduction, but for those who don't know, Celeste Bradley is our chief solutions officer. And what that means is that she works with school districts institutions when they ask for services from ICS and sort of onboarding them, getting that information and then staffing them. So making sure our team has capacity to handle them. And I say this because it's relevant for this conversation because today we're going to talk a little bit about Title IX hearings and what they look like. And our team is regularly serving as hearing officers in Title IX matters.

(00:09:17):

We train hearing officers and decision makers. And Celeste, you of course serve as a hearing officer and everyone on our team is amazing, but certainly you are very frequently requested. And so you're a really great person to talk to about this today.

Speaker 1 (00:09:33):

Yeah, I'm excited. It definitely is a issue that is not going away. The conversation is sparking a lot of debate, but it's also sparking some conversation that needs to be had. So between friends calling, I'm sure you've had the same folks asking your opinion. And of course I do think it's causing a little start on campuses in terms of reporting.

Speaker 2 (00:09:53):

Definitely. We're seeing reporting, we're seeing protests, we're seeing just all the things. And quite frankly, there's a little bit of selfishness in this recording as well as wanting to help our Title IX coordinators on the ground because I think it's so good for the public to be educated and especially parents of those who might be going to college soon or who are in college like you and I have. So wanting to touch all those audiences with this conversation because there's a lot of things happening at once on a college campus when these things arise and I think those processes can get confusing. So as we've mentioned, there's been so much attention around this case and we're not going to be getting into whether Cornell got the ultimate outcome right or wrong or any of those nuances. But what about this case has caught your attention as someone who has been working in Title IX for so long?

Speaker 1 (00:10:48):

Yeah. So one of the most interesting things is that we are getting piecemeals of things happening. And so it's easy to make a lot of knee-jerk reactions based on different things we've gotten, but it really has shone a light on this hearing process and also the investigation. I have a lot of questions about the investigation, questions I'm sure I'm not getting an answer to, but it's really made us pause to think, do people truly understand Title IX and do they understand how the entire process works? And as a parent of a college freshman, I will say my son got a lot of introduction to Title IX. And then of course the work that we do, our kids have to hear it all the time, but it is definitely where people are asking how's Title IX different from the criminal side? Can we do both? And kind of treating this process as a criminal process.

(00:11:40):

And so for me personally, it was a, oh wow, more people are hearing about Title IX, which I'm glad about.

Speaker 2 (00:11:48):

Yes. And I will say for the folks doing the work, it's an opportunity to educate the campus on what their office does. And so while it's an unfortunate situation that has raised the awareness, of course, it is something that our coordinators on the ground can use. And also for me, I think what stood out, and I can't remember which colleague, I'm not going to act as though I initially came up with this though process, but I saw somebody post on LinkedIn about what's being covered with Cornell. You've got this blend together of all these processes in the coverage. So you have a Title IX process, you have a criminal process, and now you have civil litigation. And all three are very different and serve different purposes. And so that is a distinction that I've gotten reached out to by the media. I've wanted to talk to reporters just to educate on that alone because when you're writing a headline for any of these cases, that gets lost in the shuffle.

(00:12:46):

And so I recorded a podcast with Betsy Smith on parallel criminal processes that we will be reposting next week after this episode. So we won't dive significantly into that, but we will touch on it today. But that is a distinction that I think is important for everyone to understand, especially if they're following this particular situation and also for our campus communities to understand and our Title IX practitioners. So when someone reports conduct that could constitute a crime, but can also fall under Title IX, what is the university being asked to determine versus what is law enforcement looking at just broadly? And again, we talk about this in more detail in the podcast, but I think in general, walking through briefly what Title IX offices are looking at when they get this report can be helpful.

Speaker 1 (00:13:38):

Yeah. So typically when a report is made to the Title IX office, that coordinator is triaging that to figure out does it fit under their policy and what part of their policy does it fit under? So they're not looking at it in the same lens as a police officer based on violations of the law. So they're looking at does it fit under Title IX? ICS, we call our stuff the buckets. So is it quid pro quo? Is it severe pervasive and objectively offensive behavior? Or is it kind of the big ones in that bigger bucket that have the more specific definitions like rape and fondling, stalking, dating violence? So they are looking at policy violations. What does their policy say on campus about each of those things, which is not always identical to the law for each state.

Speaker 2 (00:14:26):

Side note as well, because I think this is what is confusing. Yet number one, and we talked about this in our training this week in Beaufort, a lot of folks still think of Title IX as athletics, and there's been a lot of news coverage about Title IX and athletics specifically. So for the general public listening, just FYI or a reminder if you already know, Title IX encompasses a lot of things including how an institution or a school district responds to and addresses sexual harassment. And sexual harassment encompasses all the things that you just mentioned, including sexual assault, rape, which is what's of course at issue or has been raised in the Cornell case, but it also covers dating violence, stalking, a lot of other conduct that I think most people are not aware of. And that ultimately what universities are looking at is whether or not someone violated their policies and procedures.

(00:15:17):

So most people would say, oh, policies and procedure, if my child gets in trouble in school for plagiarism, there's a policy that's followed by the university in order to determine whether they engaged in plagiarism or some kind of academic misconduct. This is another policy about this type of conduct. So we've got these very criminally charged words like rape. So it's very easy to conflate what a university is doing in the criminal process as a result of that. I do want to note or ask you, can you have a situation where you have law enforcement not pursuing charges or a prosecutor not prosecuting a case, but the university still has an obligation to move forward as a result of Title IX and their policies and procedures?

Speaker 1 (00:16:02):

Yeah, absolutely. And we actually see that a lot. I mean, there are different standards they're looking at. And so it may be even that a student chooses not to pursue the criminal side, which they're free to do, and still pursue their allegations and reports on the internal administrative side for schools. When police are looking at things, their definitions are very different. The evidence they're looking at is different. There's so many rules of evidence that we'll talk about later, I'm sure, that necessarily don't apply with the school. So there are going to be times when the police say, "We don't have what we need. We don't have the evidence we need right now in its face, and so we're not going to move this forward." And you can have a Title IX coordinator who hears the same allegations and says, "We have a duty to move it forward due to the severity, the concerns on the campus and ensuring that that student that's brought that complaint has access and support, which those are the two things we're looking at, access to their education and support to be able to be in a harassment-free educational environment.

(00:17:05):

So those don't always work out the same way. We've seen cases that there have been no finding, for example, no sort of finding on the school side, but maybe something was pursued, order of protection, different things on the criminal side. So you really have to look at those sometimes as two completely separate processes.

Speaker 2 (00:17:24):

Yes. And so there's a different burden of proof,

(00:17:27):

So many differences. And so again, the episode that we'll have after this one with Betsy goes into that in a lot more detail, and you'll even hear us in that conversation struggle with explaining it sometimes, but it is so different. And Betsy's a former prosecutor, and so she brings a lot of good explanation to that. So we won't get too in the weeds on that, but just note for the listeners, very different processes, very different reasons one might move forward without the other, and we're going to kind of focus on what happens in the campus process. So before a live hearing ever occurs, and some folks following this might've seen this in the news, we want to talk through what happens. So we already mentioned that once a report comes in of sexual assault or sexual harassment, the Title IX coordinator who's the person responsible for Title IX compliance on a campus is going to, what we call at ICS, triage that report to determine what pathway it goes through, and that's dependent on the policies and procedures of that campus.

(00:18:28):

You just mentioned support and access. So where do what is called supportive measures fit in even before we know what the ultimate outcome will be?

Speaker 1 (00:18:38):

Well, as soon as a report is made, what we want to see always is that a Title IX coordinator is reaching out to provide supportive measures, and those are going to look completely different based on everybody's situation. They are definitely individualized. So you've got things like no contact directives, you've got schedule changes, maybe it's an issue where they just need a time to take a test in a different location or at a different time even. So all of those are the supportive measures that are offered counseling. Anything that is seen as to be helpful throughout that process for the student, we're going to look at it as a supportive measure, but not just the respondent we're talking about, not just the complainant, but the respondent too. We want to make sure that that's equitable. And so that supportive measure doesn't just stop once you have that initial conversation.

(00:19:22):

We're checking in with students throughout the entire process, throughout the investigation, the hearing, the determination, and then even after the determination is made. So that's kind of our number one. Are we able to provide access to that educational opportunity, which means how can we keep that student in school? And then how can we help them feel supported? So those are the two early on things that we want to make sure happens, that access and support.

Speaker 2 (00:19:48):

And for somebody listening who is not in the Title IX space, we've got this terminology that we're used to talking about in Title IX, of course, because we train on it and work in it every day, that is pretty foreign to most people. Complainant would be the person that is alleged to have experienced that sexual harassment. Respondent is the person who's accused of it. And so schools have a burden to provide supportive measures to both to ensure they continue to have access to their education. And from there, we can see the Title IX process sort of kick off, so to speak. And that process, I guess I'll say generally is the coordinator's going to triage things. If it's going to move forward, it goes into an investigation and then in higher ed, a live hearing where you have an ultimate outcome where there's a determination of whether or not this student violated the policies and procedures of the institution.

(00:20:42):

So just to tell people where we're going with all this. But before we go there, when that coordinator gets that report, there also might be an active criminal investigation that starts, or there may not be. We don't know. So does the university simply wait for law enforcement to complete their investigation before they launch into their own process or what happens? Well,

Speaker 1 (00:21:04):

In an ideal situation, we'd work with the police and try to get things happening at one time, but we know that doesn't always work out. So waiting a little bit as far as a couple of days, talking through with them, is there some reason we need to really hold off for a couple of days might be helpful, but our obligation is not stopping. So the school's obligation doesn't stop. They've got to be able to provide that support immediately and provide that process. So simply saying we're going to let the police handle it is not an option. You really have to look at this as, I'll look at it in two different ways. When you go through this Title IX process, we're looking at that respondent's access to their education. So we're looking at what happens as a result of the allegations with their school going forward.

(00:21:49):

When the police are involved, we're looking at a whole different situation. We're looking at their freedom in terms of, is there jail time associated with that? What are those ramifications? So very different outcomes. So when you think about it, it's got to be from those two different perspectives. The standard of review are very different, but I want to kind of preface all this with that's what we're talking about is from that respondent's perspective, and again, we don't say defendant, we don't say victim, we don't use those same words. Those are criminal side words. But for the student process, what does this look like for their education? Very different from what does this look like outside of that educational space? And then I wanted to add, Courtney, the jurisdictional piece is really important. And so when things happen and a Title IX coordinator is evaluating it, if it doesn't happen on that campus or in a university controlled environment, then we have to look at, is this outside of Title IX?

(00:22:44):

If it's outside of Title IX, there's still a whole nother process that could be happening through a student conduct hearing or that process. And so I think it's important to realize it's more sometimes than those two. Sometimes you've got student conduct. If it involves an employee for the university, then we've got an HR process. So it is not just a clean line of you get to pick and choose. It's based on the law, the regulations, and it can be very complicated at times.

Speaker 2 (00:23:09):

Yes. As you're talking through it, I'm like, we literally talk about this all day, every day. Somebody asked me Wednesday after training, how many of these trainings have you done? And I was like, I don't even know at this point. So for us, it's so second nature,

(00:23:23):

But for someone else who is looking at this, they're like, I hope what's resonating is it's complicated. So it's really complicated. It's hard to explain to folks sometimes. And I think you're exactly right. Sometimes there's a criminal investigation happening at the same time, but schools cannot wait. They have their own obligations under Title IX to move forward. And I think the other piece that stands out to me as we're thinking about it and talking about it is that when I was general counsel, and now that's been a while ago, over 10 years ago, every time we had an attorney representing a respondent, someone who'd been accused, they would say all of this should be left to the criminal process. And we see that all the time. There's lots of opinions out there of folks who don't think universities have any business involved in this process.

(00:24:14):

But what I just want to say that I don't think is talked about in my conversation with Betsy, without getting too in the weeds on it, is that the criminal process can take a long time. So yes, it might be initiated and someone might be charged with a crime, that same person charged with a crime, but we might not know the outcome of that for a very, very long time and that student could still be on campus. That's

Speaker 1 (00:24:39):

Exactly right. Or

Speaker 2 (00:24:41):

They might drop the case, as I talk about with Betsy, and nothing happened for a variety of reasons. And so universities are tasked with making sure they have students on their campus who should be members of their campus. And the way that they do that is through their policies and procedures, through student conduct. And then of course we have this whole different set of rules when there's an allegation of sexual harassment. So many, many, many, many things to think about. So I mentioned before with the triage to determine what policy something goes through, and before we ever get to a live hearing, there's going to be an investigation, assuming that the complainant or the Title IX coordinator decides to proceed forward with this process and a lot of other things that I'm trying so hard not to go in training mode.

Speaker 1 (00:25:29):

I know, I know.

Speaker 2 (00:25:30):

But more high level, but there's going to be an investigation, and that's something that has been covered a little bit in the news articles on Cornell. But what are we trying to accomplish? What does the investigation accomplish in these Title IX matters?

Speaker 1 (00:25:46):

So we hear a lot about the hearing and it's so hard to understand that before we even get to that, there's so much has already happened. So my hope is that universities are using really good trained investigators who are going in, asking all the questions, asking them in a compassionate way. That's the thing, being trauma-informed with those questions, but getting all the evidence that they can get. The decision maker

at that hearing stage cannot really have a meaningful hearing without that solid investigation report. And so the idea is by the time we have gotten to the hearing, we've gotten the investigation, we've gotten the evidence, the evidence has been exchanged with the parties. They've had a chance to respond to all of that. And when we say evidence, Courtney, we're talking about, I mean, you and I see pages and pages and pages of evidence in cases that involve text messages, Snapchat messages, videos, everything you can think of.

(00:26:39):

You got a party and somebody says they're intoxicated or there's an allegation of someone being intoxicated. We're looking at video footage. We're looking at text messages between the parties, receipts. There are all kinds of things that people turn in, which starts to sound a lot like the criminal process, but it's very different. We don't have the chain of command issues that you see in criminal cases, but we're collecting all of those things. So that's not an easy one week. I wish it was a one week process, but you're talking about getting on people's calendars. You got witnesses we're talking to. The investigator is then drafting a report, bringing all of those things together in a way that makes sense to the decision maker. And so this sometimes takes months and months to do, which I think people don't realize. It's not that you've got one week and you line all your witnesses up and you get it done.

(00:27:31):

You've got to work with students on their schedules, think about holiday time. I mean, it's just a lot into even getting those meetings scheduled. Sometimes it takes multiple interview times. And so it is a long, tedious process, but you've got to have good investigators. And I think what we're hearing now from Cornell, we have no idea about the pieces of evidence. When were they given? Was this evidence that is new? Is this evidence that was available to the investigator, available to the decision maker? We have no idea, but I can tell you it's somewhere in somebody's report and that investigative report in that evidence file, there's a log that kind of outlines what was available at the time.

Speaker 2 (00:28:10):

And just to back up to its simplest form, every school must have a Title IX investigator by law, whether they have somebody internal that's an employee of the institution or whether they hire somebody like us to serve externally. And that investigator has to be trained on some specific things by law. So this Title IX investigator is somebody who's trained and they're going to go in and start this investigation. And as Celeste mentioned, these can go very long. There's by law some prescribed time periods in there that will make it longer, but also, like you mentioned, depending on the number of witnesses and their availability and school closings for obviously the holidays, but maybe there's a weather event like we're about to be looking at with some of our schools coming up this weekend, so many things that go into it. And then if you have multiple people accused of the same conduct, that also creates maybe multiple investigations that are going

Speaker 1 (00:29:09):

On - And multiple hearings.

Speaker 2 (00:29:10):

And multiple hearings that are going on simultaneous. One of the takeaways I think for investigators as we just talk through this, and we know this, but I think for investigators who've been doing this a long time, just remembering really strong documentation of the why of the decisions that investigators are making throughout their investigation. And as you mentioned, all of that should be in this investigative report that comes at the end of the investigation. Is there anything I'm missing there?

Speaker 1 (00:29:39):

No, I think that you nailed it. It's just the why. We stress that, Courtney, all the time, document your why. So if you chose not to interview a witness, making sure that you put in there why you chose, even if the witness doesn't participate and they just say, "I don't want to participate," making sure you record that that was their statement. Cornell is a great example of the You're looking at things hindsight. When you go in there and you pull the file and there are questions, that helps us learn. There's some valuable lessons learned for all of the institutions of that documentation. Is it there? Is your why documented? And can you support it when it's argued sometimes years later?

Speaker 2 (00:30:17):

Yeah, years later. And we are mentioning Cornell because it's in the news. There's a lot of other cases happening that are also in the news that people might not be recognizing that have been in the news over the years, including the Larry Nasser case a while ago. And so they're not the only institution where things have hit this point, but the point being, if you're sued, if you become under investigation, you want to be able to pick up an investigator's file and understand all the steps taken through their investigation and the why behind the steps they took or maybe didn't take. So at the end of all that, where does the investigator's role end and then the decision making begin?

Speaker 1 (00:30:58):

So as an investigator, being neutral is vital. And so your investigator is going in and getting all the information in a unbiased way, putting it all together. And once that investigation is complete, their part is to hand over that investigation file to the decision maker. Some schools require that that investigator be part of that hearing process and answer questions if there are some. But typically that role, once that investigation is done for that investigator is up. There's no decision making from them. The report should be written in a way that does not lean one way or the other. And I love when I do some bias training, Courtney, because I get a chance to talk through, are there biases in our writing? And if so, how do we correct that? But just making sure that the facts are just easily laid out for that decision maker to then ask additional questions or check for credibility determinations.

Speaker 2 (00:31:53):

Yes. And I think one thing for our practitioners out there, just a tidbit of a reminder, especially if you haven't had training lately, is that that investigative report is a roadmap for the decision maker. And I think when our team works as decision makers and we're picking up a report at an institution from an investigator, it's very clear for us when our work is easier as a result of the investigative report and when our job as the hearing officer or decision maker is going to be harder. Would you agree with that?

Speaker 1 (00:32:30):

Oh, 100%. The training of investigators is so important. And lots of times we see, even with our K-12 districts where we see people just kind of step in who are in a totally different role, have never really been trained and they go into an investigation and it's a page of notes and we've got to do something with that. It's pretty difficult. And so you're a hundred percent right in that either our jobs can be made much easier. It doesn't mean we don't have questions. It doesn't mean we're not going to ask some of the same questions, but when we do receive a report that is, what's a good word for it? This is kind of missing some things. It makes us almost have to reinvestigate during a hearing, which is very difficult.

Speaker 2 (00:33:11):

Yes. And you might see decision makers go back to investigators and ask additional questions. A lot can happen there that we're not going to get into. But ultimately you've got this investigative report and now you're going to be having, a school's going to designate a decision maker. And in the higher ed context

that we're going to focus on today, you might see one decision maker or you might see a hearing chair with a panel of folks, correct?

Speaker 1 (00:33:40):

Yes.

Speaker 2 (00:33:41):

And it all just depends on the university that we're working, what the university decides to do.

Speaker 1 (00:33:45):

They get to have flexibility in their policy and their policy and procedure should outline. Is this a one person decision maker? Is it external, internal? Is it, like you said, a panel of four and who comprises that panel? So that all should be, and I want my coordinators out here listening to think through, does my policy or procedure outline how that's going to work?

Speaker 2 (00:34:06):

Yes. We don't want it different every time in every case. So the law requires that institutions, when you have a matter involving sexual harassment, which includes sexual assault, have a live hearing. Again, we're going to slow down here for a moment because this is where it's going to sound like a legal proceeding and it's not. So let's start from the basics. What does having a live hearing mean?

Speaker 1 (00:34:32):

It's so funny. I was at soccer practice for my younger one last night and had a parent say, "When you say you are a hearing officer, does that mean you travel all over the place?" And so I was explaining to her that a live hearing can be a virtual live hearing. And I would say 95% of our cases are live hearing. I've had a couple that are in person, but they have to be live in that the parties, the witnesses have to be, this can be a pre-recorded sort of situation. It has to be live. Most of ours luckily are over Zoom. So we represent institutions all over, which gives us the flexibility of...

Speaker 2 (00:35:07):

We don't represent them. We just work

Speaker 1 (00:35:09):

With them. Yeah. I'm so sorry. Let me not use that word. So we serve and provide support. We provide solutions. How about that? But we provide support to them in that hearing capacity from all over. And so we're able to not only coordinate with the coordinator schedules, but the students. Lots of times they don't want to be in the same room. After these sort of allegations, it's very difficult to be in that same room. So it's easier to have those folks all on Zoom and we ask those questions all live on Zoom.

Speaker 2 (00:35:43):

As simple as we can, you are handed a case as a decision maker to conduct this live hearing, kind of walk through what this looks like.

Speaker 1 (00:35:53):

First of all, I love having pre-hearing conferences. Not all schools have that in their policies and procedures, but I like it. It gives me a chance to meet with each party separately and to ease their concerns

about this process. It is a scary process. I do feel for both parties having to bear all that's happened in their personal lives to me in front of each other, in front of their advisors. And so I like the opportunity to get in front of them and say, "Hey, I'm not a judge. I am a lawyer. I'm not acting in that capacity. I'm acting as a hearing officer. I'm going to ask you some questions. Please do not read into the questions I'm asking you. I've got to get some information." I walk them through what I'm going to allow as far as the other side asking questions. The relevancy determination, which we'll talk about I'm sure later, gets very difficult.

(00:36:43):

So I like giving them a little bit of a hint about I'm going to ask you a question. The other party will ask you a question, you're going to pause. Their advisor will ask you a question. You pause. I'm going to determine if it's relevant before you answer. And that is so clunky, but it's the best way to get on the record that we're allowing the right questions, but I want to ease their concerns. This is a scary process. It feels like almost testifying in a court, but you're not. There's no one else there except for the people we've talked through. And so after having that pre-hearing conference, which is usually a week or so before we start the hearing, most schools, their process allows for a statement to be provided by the parties at the beginning. Does that sound like an opening statement in a court?

(00:37:26):

Yes, it does. But that is one time the parties get to be heard. So they get the opportunity to tell their story, say whatever they want to say for a limited amount of minutes each, and then we go into the question period. And that's where there's a, and I'm going to use the word cross-examination because that's what it's called, but that's where the parties' advisors, not themselves, but the advisors get to cross-examine the other party. I make a determination on are they going to answer that? Is it relevant to the allegations? If it's relevant, they answer. If it's not, I state why it's not. We move on. And then after the parties, we call witnesses, same thing. They get to ask those questions of the witness and then there's an opportunity for closing statements. And so it sounds so much like this judicial process, right?

(00:38:15):

We're saying cross-examination, we're saying opening, but it's a much more relaxed atmosphere. At least let me say this, my goal is for those students to feel heard and to get an opportunity to tell their side in a way that makes the most sense to them to clarify anything from the investigation. And after those closing statements, we conclude that hearing. So there's no deliberation that happens in front of them. That all happens when they receive a letter at the end of it. But that hearing process, I've had some, Courtney, take 30 minutes. I've had some that have lasted three days. It just depends on the number of witnesses and how complex the cases are.

Speaker 2 (00:38:55):

Yes. And a couple things I want to note. So you mentioned advisors. What does that mean? Who are they? What is their role?

Speaker 1 (00:39:03):

So an advisor can be any person that the student wants to serve as their advisor, whether that's an attorney, a parent, although I say to parents, stick to your parent role and support your child. It's not always best to serve in that advisor role. That role is limited to asking those cross-examination questions and that is it other than providing support. And when I say support, I mean that emotional type support for them, a sounding board for them, helping them maybe prepare their statements. But the only time that advisor is allowed to do any talking in the hearing is for those cross-examination questions. That's it.

Speaker 2 (00:39:41):

And I want to be clear, under the law, the parties must be provided an advisor in this live hearing.

Speaker 1 (00:39:49):

Yeah, and some schools provide those. So some schools have folks trained as advisors. So if you were to say as a complainant or respondent, "I don't have anyone. I feel comfortable serving in this role," the school has to provide advisors. We serve as advisors. And so some of our team, they get a chance to go serve in those roles. Courtney, you and I have served as advisors on some cases. And as lawyers, I will say, and as a hearing officer myself, sometimes the lawyers don't understand the Title IX process. And so there are objections and I have to correct them to say, "You can't object. The only thing in this process is you get to ask the cross-examination questions." And they want to put a lot of things on the record. Again, I have to say, this is not a criminal or a civil proceeding.

(00:40:33):

The rules of evidence don't apply here. Here's what applies here in this school's procedure. This is what we're basing it on. So for lawyers like us, it is very difficult sometimes to see this process and hear how legal it is and understand that our role is very, very limited. When we train folks, we say their role is a potted plant. And what we just simply mean by that is you are seen more than you're heard. Your words are limited to that cross-examination question. And for lawyers, that can be very, very difficult.

Speaker 2 (00:41:05):

Yes. And it's up to, here's our sidebar for our practitioners. The hearing officers need to be well-resourced, well-trained. It is the school's process, not the advisor's process. And so that can get challenging depending on who the advisors are and their training and their understanding of the Title IX process. And more often than not, I think we would all agree, a lot of these advisors have never experienced this process before or they are typically criminal lawyers by trade, things like that. And so they come in and they don't understand that this is not a courtroom, this is not a court proceeding because everything feels like a court proceeding in a courtroom in a lot of ways. So if you are a coordinator, advisors are not required to be trained, but we highly encourage you train your advisors that you're using to provide to the parties if they don't have one on this process, that they're familiar with it, that they understand it.

(00:42:05):

And if you're a lawyer listening to this who might be a criminal lawyer or an attorney that works with parties in these campus proceedings, we just really encourage folks to understand what these proceedings are and what they're not. And my only other caveat I would say is there are some states that require an advisor participation be a little different than what we're explaining more than what we're explaining, but by and large, they're only serving in the role to ask questions of the other party and witnesses. So want to be clear, the parties aren't asking questions of each other. It is all flowing through an advisor. And then you as a decision maker, are you asking any questions, Celeste?

Speaker 1 (00:42:46):

Oh, absolutely. So I'm asking questions really to flush out maybe things from the report I don't understand or to clarify timelines, but this is my only chance to get something clarified before I provide a decision. And so I'm absolutely asking questions when need be, but I say this and I can't stress this enough, compliance and compassion go together and there's a way for us to ask questions in a very thoughtful way that's very trauma informed without re-traumatizing a person. And that's a skill that just takes time. It really does. When I first started doing this work, I would say it was very difficult to shift from that attorney role where you've got a client and you're asking questions in a way to elicit information versus understanding these are college kids for the most part for these hearings that are literally sitting in front of you telling you about some traumatic experience that they've had and recanting that to a parent too.

(00:43:45):

They look at you as this is what my mom is, you're the same age as my mom. I'm telling you all these things. And so it can be an embarrassing process and I have had all sorts of reactions from students on both sides in this process. And so making them understand what your role is is so crucial. But yeah, definitely I've had questions, I've had my questions answered and that's what I'm depending on to write that determination. So any holes I have found in the investigation, any clarifications, they've got to happen at that hearing phase.

Speaker 2 (00:44:17):

Yes. And so as a reminder for our Title IX folks, the burden is on the institution to get information and evidence during the investigation, although their ability to get it is limited because again, not a criminal process. We don't have subpoena power. We can't force people to come and meet with the investigators. Same thing in the hearing process. The burden is on the institution, which flows through the decision maker to ask the questions that need to be asked because as folks can imagine, some parties might have very seasoned advisors as attorneys who are going to think through a lot of different things to ask and some may not have strong advisors and everything in between. And so the decision makers there to fill those gaps for the hearing, it's all recorded, correct and transcribed. So there will be a hearing transcript. So for those following Cornell where there's multiple hearings for multiple different respondents, there will be a hearing transcript of what happened in that hearing that both parties have access to.

(00:45:20):

And then one more thing about the hearing process. It's so hard. I'm just going to say this and be vulnerable about it. It's very hard to explain all this in a 45 minute to an hour long podcast and to keep it at a level that anyone listening to this can hopefully somewhat understand. So we are not covering all that there is to cover about these hearings, but there are situations where one party does not attend, correct? Or they attend, but they won't answer. Can you talk about that just a little bit?

Speaker 1 (00:45:53):

Oh, that's where it gets really complicated.

Speaker 2 (00:45:54):

I know. We don't have to get into all the complications, but just the fact that it can occur.

Speaker 1 (00:45:59):

Yeah, it can definitely occur. And depending on what jurisdiction you're in, we're relying on maybe evidence that the party provided during the investigation. So we have that a lot of times where the students are saying, "I don't want to participate in this. It's too much for me to be able to see this person. I don't want to do it live." And so they don't show up and they have a right not to show up. Having an advisor there and allowing that advisor to still ask questions can be important. And so is that happening? There are some jurisdictions where if that party's not there, what they're saying is not necessarily relied upon, able to be relied upon, and that gets very difficult. So I'll just say talk to your counsel when it comes to whether a party doesn't show up and how that impacts you as a decision maker into what evidence you get to rely on.

Speaker 2 (00:46:48):

So at the end of all this, you have this investigation, then it goes into this live hearing that's held. And then what is the decision maker doing with all of this?

Speaker 1 (00:46:58):

Yeah, this is where I say a decision maker's work is really hard because they're having to go back and they've read, before the hearing even starts, they've already read that investigation file, they have looked at all the evidence and they prepared all the questions they need to ask and they've asked them live. And so at that point, they're taking all of this information and making that determination. And so this is where we have to understand it's all based on the standard of review that's provided for in the policy. So for most of our schools, I would say the standard of review is a preponderance of the evidence, which is your, basically it's like that 51%, right? It's you line up, he said, she said, whatever on the other side, he said, she said, and what is that feather that tilts that scale? And so really as a hearing officer, you're looking at your scale.

(00:47:49):

And so you're weighing every piece of evidence that's provided to you. You're looking at credibility determinations, which I don't like to say credibility determinations. I like to say you're looking for consistencies or inconsistencies and really having to base all of this on the policy definitions. That's the hard part is we could look at case and say, oh, my gut tells me. Well, we can't base that on what our gut says. We've got to base it on what evidence was provided to us. So sometimes when you don't have a party participate, that really causes an issue and an imbalance because we're only getting one side and we're only getting that evidence. And if that's what we have, we have to use what we've been given to make that decision. So this is where I say the really hard part comes in because not only are you reaching that determination, you're then looking at sanctions, which is the hard part.

(00:48:41):

It's determining what happens with that respondent. Again, not for their life in terms of freedom, but we're talking about what happens with the institution. Are they going to be suspended, expelled, all the things. And so yeah.

Speaker 2 (00:48:55):

So they can be found responsible for violating the policy or they can be found not responsible. And we just noted for investigators, that's not their role. And let me just say the investigator has to be different than the decision maker by law. And so I think we've had with our own team members, they might be serving as an investigator for a while and now they're being asked to serve as a decision maker and the weight of determining a student's future or finding someone not responsible or finding them responsible, it impacts both parties and that can be, it's just hard. On both sides. Yes, it's the reality of the work we do, but it can be really hard. So again, you mentioned if they're found responsible for a violation of the policy procedure, then the decision maker is determining sanctions, which could be a slew of things, correct?

Speaker 1 (00:49:45):

Right. So you're looking at educational opportunities, you're looking at suspensions, probation, expulsion. We've definitely expelled some folks before. And I mean, that's a big deal. That's a weight on you as a decision maker to know that the evidence that you've been provided was enough to find that student responsible. The hearing officer then will provide that determination with the sanctions. And sometimes when you're looking at sanctions, Courtney, we're talking to the student conduct office, for example, to figure out if this student is already on the last warning, then we're looking at a suspension or expulsion. And so making sure we look at the entire student file. And so dealing back with the school to figure out where are they? And also, is this in line with other sanctions the school has given before? So there's always some checks and balances with that. So it's not like I get to, as a decision maker, just throw out a determination and a sanction that is completely out of line with what a school has ever done before, but we've got those checks and balances in place.

(00:50:43):

But once that determination is made and that coordinator provides that back to the students, it's so important that they still continue that support we were talking about at the beginning of this, they're still figuring out how can we still provide support. In my determinations, I like to say your supportive measures are still going to be happening. So if we had a no contact order or whatever we've got in place, I want the students to know that's still going to be in place.

Speaker 2 (00:51:08):

Yes. So we have our sanction or discipline, which if you are following the Cornell case, there's been a lot of discussion about what sanctions did or did not happen or discipline did or did not happen with these respondents. Is the matter then done?

Speaker 1 (00:51:25):

Yeah. Once you've gotten... First of all, what goes into that determination letter, Courtney, of course, as you know, is it's the determination, the evidence and stacking it up, but also the appeal rights. And so there's an entire... We could have a whole entire podcast on just the appeal itself, but there are different grounds for which they can appeal. New evidence that could have resulted in a different determination, a different outcome. And

Speaker 2 (00:51:49):

That wasn't available at the time.

Speaker 1 (00:51:51):

Yes, that was not available at the time. So they're usually in your policy. So again, for my coordinators, this is where we do a check to see how we spell these things out in our policy, but you've got your new evidence that wasn't reasonably available at the time that would've changed the outcome. You've got the procedural regularity. Again, could that have changed the outcome? Or you've got a bias or conflict of interest. So those are the ones you have to have. Some schools have additional appeal grounds, but a sanction cannot occur until after that appeal time is up. So we're holding for a while until that appeal time is up to see if that's a true grounds for appeal, and then we got to go through that whole appeals process.

Speaker 2 (00:52:33):

And both parties can appeal, to be clear.

Speaker 1 (00:52:35):

Both parties are allowed to appeal.

Speaker 2 (00:52:37):

Both the complainant and the respondent. Yes. And that's very different from other processes on college campuses that is very specific to processes that involves allegations of sexual harassment.

Speaker 1 (00:52:50):

Yep. Very different.

Speaker 2 (00:52:52):

So if someone's listening, you could see how this could take a very long time. So the investigation can take some time, getting scheduled for a hearing, having the hearing, getting the result of the hearing, the

written determination, and then if there's an appeal, these matters can go on for quite some time after the report of the allegation. And so I think for the lay person listening who's not as familiar, or if they're involved in a situation or the child's involved in a situation, it's easy to say, "Well, that should not have taken very long." Just talk to some people and make a decision, but that's not how it works in reality.

Speaker 1 (00:53:28):

Right. Yeah. It can take a long time, Courtney, because part of the issue with the appeal is the appellant officer, because now you got to find another person, you got to find an appellate officer, right? That person can say, "You know what? New evidence is critical. Go back and reinvestigate." So think about when I talked about how long that investigation can take, if they remand it back for an investigation, we're talking about, like you said, even longer. Even if there was a sanction for suspension or expulsion, guess what? It's on hold now. At some point, students graduate too, so you've got so many moving pieces. This is not as clear cut as people think it might be.

Speaker 2 (00:54:02):

Yes. So also note, as I mentioned before, your investigators must be trained, decision makers must be trained. In my little baby PSA here, your appellate decision makers must be trained, and that is the least attended trainings that we do. Granted, there's less appellate decision makers than there are investigators, for example. However, your appellate decision makers are usually kind of high level folks at your university. Sometimes getting them trained is very difficult, but their role in the Title IX process is so important. So wanting the general public to understand everyone involved in this process at an institution is trained on these processes, but also wanting to have that reminder for our Title IX practitioners to ensure your team has gotten really great, robust training and resources to do this very complex work. Does that high level cover everything that happens in these Title IX processes?

Speaker 1 (00:55:00):

Oh, very high level, yes.

Speaker 2 (00:55:02):

Yes. I've kind of written a post on LinkedIn about what coordinators and institutions could take away from some of this coverage, and I think we've already talked about it, but I just want to double down on the importance of documentation from every single person involved in a Title IX matter, from the coordinator and the report being received all the way through the end, if there's appeal of the appeal. I also want to take a moment to note, and I know you spoke last week to school district attorneys about some legal updates. And so we've talked a lot about higher ed, and I just want to take a moment to note that we do have a new Office for Civil Rights initiative that was released with respect to educator sexual misconduct and in K-12 context, not circumventing the Title IX process and relying solely on the criminal process, which sometimes we do see happen in the K-12 world.

(00:56:00):

So I want to take a moment. We haven't covered that in a podcast. We have covered it in some Tuesday takeaways and in our back to school webinar, and you covered it in the webinar last week and we're covering everywhere, but we haven't covered it in a podcast episode. So I just want to put a pin in that and we'll make sure it's in the show notes for our coordinators listening, especially in the K-12 space, that it just reiterates what we already knew. And that is that these are parallel processes and you can't not have your Title IX process as a result of the fact that it's also being investigated by law enforcement. Is there anything else you want folks to be thinking about? Anything like the Title IX coordinator listening to this episode, you want them to go back and look at their process tomorrow?

(00:56:44):

Any other high level points that might be worthwhile for them to consider?

Speaker 1 (00:56:47):

Yeah, my takeaway for the coordinator listening is to walk through their process from the student's perspective. I think that's so important. When I say that, I mean a student has an allegation of something that's occurred over the weekend, can they easily on the website even figure out where do I report this? How do I report this? I love when I can walk around college campuses, Courtney, and going in the bathrooms and I see all of these consent signs and bystander training and all those things about Title IX and numbers, phone numbers, QR codes. I love it. I feel like that's what we need to be thinking about from these students' perspective. So do they know how to file a complaint or file a report? And then do they understand what's going to happen? Sometimes I think we are so quick and we know this stuff so well, we just assume all of our students have read our policies, they know how Title IX works and they don't.

(00:57:39):

And we love our workflows and we love our flow charts. And so being able to sit down with a student and say, "Let me just walk you through what's going to happen. I want to make sure you feel supported throughout this process, you know where to come to if you have any questions." But sometimes those very things, students just want to be heard. They want to understand the process. We've had parents recently on the K-12 side who've been very thankful that you've had someone as a coordinator sit down with them, listen to them and walk them through what's going to happen and set those expectations. So coordinator, please pull your policy, pull your process, look at your flow charts and see if you are a student sitting down in front of you, are you able to tell them what's going to happen and assure them that your institution cares, you're taking care of things, your role is neutral, but your role is always to provide care and support to all the parties involved.

(00:58:32):

Do they fully understand that? And so that's a mouthful, but at the end of the day, I think that if you go there and you start that process, you're going to figure out where your weaknesses are, where you can definitely build with prevention, and then always know that you've got folks like us here to help on any of those roles as a decision maker, investigator. Some schools are just not equipped coordinator. They're smaller. You got that, what we call the halo and horn bias where they're very familiar with their students, either on the good side or the bad side. And so being able to get someone to come in and help you even explain that process is critical.

Speaker 2 (00:59:10):

Yes. So we serve as interim coordinators. We serve in all these other roles we've discussed in addition to other roles we haven't discussed. And so yes, thinking through that I think is so important. At ICS, we're big on the practical pieces of this. I love what you said about just trying to step back and think about it from a student's perspective going through the process and PS, Title IX also applies to employees and staff. We haven't even talked about that, but what generally you see in the news are student-on-student cases, and that's a lot of our cases, of course, on the ground, documentation. And then you alluded to the prevention piece that we feel passionate about at ICS. We don't want to just be looking at it from the response, which is the seat that we're always in. Well, we're not always in, but the seat that we serve in when we're serving in these roles.

(01:00:00):

We do training for schools and institutions and those serving in these roles. And the prevention piece is something that is a passion project of mine, and I know of everyone on our teams, which is not just looking at it on hindsight, but what can we do leading up to it? And I talk about it in the introduction that we'll be launching our new initiative before campus, but it's just a small way that we want to get in front.

And of course, we are now college parents. So our students only hearing about all of this for the first time when they go to orientation their freshman year, a lot of times, yes. Same with parents. And of course, nobody wants to think that their student's ever going to be wrapped up in this, whether as a complainant or respondent or a witness. But our kids have heard about it so much.

(01:00:50):

But I had one child who was a potential witness in a Title IX matter, and he told me about it two hours before he was supposed to meet with the investigator. And I was like, wait a second, you live in a house with this all the time. So we want to have the conversations well in advance before campus is designed to do that. But I know you and I also have spoken at schools that are local. Others on our team have been asked to come and speak. We're always willing to do that. And I'm really excited to get this initiative off the ground just to kind of do our small part to help educate parents and rising juniors and seniors in high school before they step on campus and are told about it in a one hour part of orientation.

Speaker 1 (01:01:31):

So true. I love it. I love it.

Speaker 2 (01:01:33):

Okay. Well, we covered a lot on a Friday after a week of training, but I'm so glad we talked about it just because I think it's important always, but right now with this awareness, wanted to take the opportunity to talk through it. So thank you so much and just appreciate all you do every day working in this role for ICS and for institutions and school districts.

Speaker 1 (01:01:55):

Thanks, Courtney.

Speaker 2 (01:01:57):

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