



IX ISSUES TO CONSIDER IN 2022

January 26, 2022

DAN SCHORR, LLC

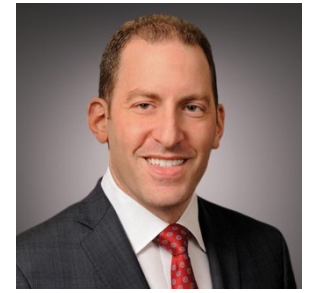
OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
- Hearing and Process Advisors
- Trainings
- Policy and Program Reviews
- Interim Title IX Coordinator Coverage

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DAN SCHORR

President
New York



Dan Schorr is a former criminal prosecutor and municipal inspector general with more than 20 years of legal and investigative experience. He manages a variety of complex assignments, including investigations into sexual misconduct, Civil Rights, and fraud allegations at educational institutions, corporations, and government entities. In addition to specializing in Title IX investigations, Dan assists higher education and K-12 schools by conducting policy and program reviews, training personnel on all aspects of Title IX and Civil Rights compliance, and serving in hearing officer and decision maker roles. Dan is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

ALYSSA-RAE MCGINN

Vice President, Investigations
Boston



Alyssa-Rae McGinn has extensive experience leading a variety of complex investigations, with particular expertise in conducting investigations at educational institutions and corporations into allegations of sexual misconduct and identity-based harassment involving students, faculty, staff, and corporate leadership. Alyssa-Rae was previously a Senior Associate at Ankura, where she and Dan established the firm's Title IX and Civil Rights Investigations practice and grew it to assist institutions nationwide. Prior to Ankura, Alyssa-Rae was an Associate Director in Kroll's Business Investigations & Intelligence practice.

I. UNDERSTAND AND CORRECTLY IMPLEMENT *VICTIM RIGHTS LAW CENTER V. CARDONA*

“Therefore, in the absence of evidence that the Department adequately considered section 106.45(b)(6)(i)’s prohibition on statements not subject to cross-examination, this Court finds and rules said prohibition arbitrary and capricious.” (D.Mass; July 28, 2021)

*Section 106.45(b)(6)(i): “If a party or witness **does not submit to cross-examination** at the live hearing, the decision-maker(s) **must not rely on any statement** of that party or witness in reaching a determination regarding responsibility...”*

- OCR announced it will cease enforcement of this “suppression clause” (August 24, 2021)
- IMPORTANT: What do your policies say about this issue?
- Does your institution intend to consider statements by parties or witnesses who are not cross-examined at hearings?
- Are you following your policies during your next hearing?

II. PROHIBITED HEARING QUESTIONS

“Questions and evidence about the **complainant’s sexual predisposition or prior sexual behavior are not relevant**, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

- Other areas that are generally prohibited include:
 - Questions about a party or witness’s health, including mental health
 - Questions about aspects of a party or witness’s life that are not pertinent to the alleged conduct
 - Questions that improperly blame a complainant or witness for the alleged conduct
 - Questions that are phrased rudely or unkindly, or intended to bully a party or witness
 - Questions that ask the party or witness to speculate
 - Questions that the party or witness would not know the answer to

III. ISSUING CLEAR AND COMPLETE NOIAs

- Include required NOIA (Notice of Investigation and Allegations) language:
 - No violation until proven
 - Right to advisor-of-choice
 - Prohibition against false statements
- Description of allegations should be *detailed and accurate*
 - Names
 - Dates and times
 - Locations
 - Full description of alleged conduct including what specific policy section(s) were allegedly violated
- If you learn the NOIA is inaccurate during the investigation, issue revised NOIA
- NOIA will guide the scope of the investigation, hearing, and determination, so it must be accurate

IV. PROCEEDING WITHOUT A COOPERATIVE COMPLAINT

- Numerous situations when potential complainants do not want to participate in investigation/hearing, but institution has reason to believe there may be serious misconduct and/or threat to campus community
- Based on complainant's account, is there reason to believe respondent is an ongoing threat?
- Consider threat to community and threat to complainant (Violence Risk Assessment)
- Important to understand cycle of violence in matters involving potential intimate partner violence
- Factors to consider:
 - Pattern behavior
 - Number & severity of incidents
 - Apparent escalation of behavior
 - Predatory behavior
 - Use of a weapon

V. IS YOUR ADVISOR POOL PREPARED?

- Relevant federal and state law
- Relevant institution policies
- Understanding consent
- Expectations before, during, and after the investigation and hearing
- Guiding parties through the process and necessary decisions
- Evaluating evidence and credibility
- Designing appropriate and effective cross-examination questions
- Preparing parties and witnesses to undergo cross-examination
- Conducting cross-examination

VI. SECURING EVIDENCE IMMEDIATELY AFTER COMPLAINT

- Some evidence may only be available for a short period of time and must be secured immediately, including:
 - CCTV
 - Social media
 - Building entrance records
 - Additional electronic information
 - Rape kit evidence
 - Clothing
 - Bed sheets
 - Other physical evidence

VII. CLEAR DECISION RATIONALES

- Hearings require clarity and detail in verbal and written explanations of determination rationales
- Lack of clarity can lead to confusion, anger, appeals, and litigation
- Ensure decision-makers and anyone else who may be involved in delivering and discussing decisions are prepared to explain in clear detail:
 - Credibility assessments and decisions
 - Evidence weighed
 - “Common sense” and experience-based assumptions and understandings used
 - How the evidence is found to support or not support each element of policy
 - Institutional precedent considered
 - Sanctions matrices or metrics applied

VIII. POST-DECISION SUPPORT

- Even when the matter is concluded, it is important to continue providing support
- One (or both) parties will probably not be satisfied with the outcome
- The hearing may trigger negative mental and emotional responses for participants
- Ensure everyone impacted is connected to needed services
- Be transparent, clear, and honest about next steps and moving forward
- Be available for future assistance – it might take time for someone to realize what they need

IX. WHEN AND HOW TO CONSIDER RESTORATIVE JUSTICE

- When implementing restorative justice in response to gender-based violence, consider:
 - Campus or community reporting climate
 - Prevalence of victimization and perpetration
 - Student demand for alternative resolutions
 - Compliance with law and policy
 - Disparate impact
 - Intersectionality

THE TITLE IX AND CIVIL RIGHTS

PODCAST



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"Final Table is a compelling, timely, and fast-paced story of a sexual assault survivor's fight to regain control of her life in the face of fear, self-doubt, international intrigue, and looming retribution. Former sex crimes prosecutor Dan Schorr's nuanced and layered debut novel smashes stereotypes and cliches with a strikingly original and memorable narrative."

- **SUNNY HOSTIN**,
Emmy-Winning Co-Host of *The View* and best-selling author of *I Am These Truths* and *Summer on the Bluffs*



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