



TITLE IX HEARINGS: LESSONS LEARNED IN 2021

November 17, 2021

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

[MORE INFO AT DANSCHORRLLC.COM](https://danschorrllc.com)

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.

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 then announced it will cease enforcement of this “suppression clause” (August 24, 2021)
- BUT: Policies may still include language on this issue; must follow institutional policy

COMMUNICATION WITH PARTIES

- Hold **pre-hearing discussions** with advisors and parties in order to:
 - Set ground rules and expectations
 - Understand what witnesses and evidence will be presented
- Clearly document the content and proceedings of the pre-hearing discussion in writing
- Document in writing the substance of pre-hearing discussions
- If hearing chair meets with parties/advisors separately, each party/advisor should be notified in writing about what was discussed with other party/advisor

CONFLICTS OF INTEREST

- Avoid hearing officer conflicts of interest, **actual** or **perceived**
- Even the appearance of a conflict can undermine the perceived fairness of hearing
- Don't take conflict allegations personally
- Be willing to change hearing officer if party has reasonable conflict of interest argument, even if you ultimately disagree
- Changing hearing officer may be inconvenient and cumbersome, but litigation alleging decision was tainted by a conflict often will be worse

COMBATIVE CROSS-EXAMINATION

- Hearing chair must balance protecting parties and witnesses from improperly combative cross-examination while preserving a party's right to fully cross-examine
- Rules of decorum should be explained at pre-hearing conferences
- Advisors (especially attorney advisors) must understand that this is an adversarial proceeding but not a courtroom
- Must protect parties and witnesses as much as possible from retraumatization during hearing
- Hearing chair should make clear rulings with explanation on the record about excluded or prohibited questions and behavior
- Additional breaks and conferences with advisors and parties may be necessary

PROHIBITED 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

COMPASSION AND OBJECTIVITY

- Remember this is a difficult, stressful process for all involved
- Maintain compassion, empathy, and respect in your attitude and approach
- Compassion does not negate objectivity
- But, be cautious of overfriendliness or informality
- Be equally kind to all participants!

RELEVANCE AND WEIGHT OF EVIDENCE

- Only relevant evidence should be allowed into hearing for consideration
- Chair must make consistent and fair rulings on what evidence is relevant
- Decision-maker(s) are responsible for evaluating admitted evidence and making determination
- Once evidence is deemed relevant and admissible, decision-maker(s) must make separate determination during deliberations about what weight to give evidence
- Evaluation of the evidence includes credibility assessment, analysis of discrepancies and corroboration, and comparison to policy

PANEL DISAGREEMENTS

- Hearing panel may include personnel from different organizational levels
- **All** members of hearing panel have **equal** influence on hearing panel decisions, including deliberations regarding responsibility determination
- Important to ensure junior personnel do not feel pressure to follow opinions of more senior panelists
- Hearing chair must maintain decorum during deliberations and ensure all members have opportunity to express themselves freely
- Break down individual alleged offenses and elements, and isolate which of these panel has agreements and disagreements about
- Ultimately panel will vote and majority will decide

UNCLEAR 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

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

TRAINING ADVISORS

- 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

THE TITLE IX AND CIVIL RIGHTS

PODCAST



WEEKLY EPISODES
AVAILABLE ON ALL
STREAMING SERVICES

DAN SCHORR, LLC

AVAILABLE
NOW

DAN SCHORR, LLC

"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*



DAN SCHORR

President

dan@danschorrllc.com

477 Madison Avenue, 6th Floor

New York, NY 10022

+1.914.625.6270 Mobile

@danschorr

ALYSSA-RAE MCGINN

Vice President, Investigations

alyssarae@danschorrllc.com

Boston, MA

+1.516.382.3043 Mobile

@alyssaraemcginn

DAN SCHORR, LLC

[MORE INFO AT DANSCHORRLLC.COM](https://danschorrllc.com)