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
• Expert Witness Testimony

MORE INFO AT DANSCHORRLLC.COM
Dan Schorr is a former criminal prosecutor and municipal inspector general with more than 25 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 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.
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.
Title IX regulations require higher education institutions to implement a policy and process addressing certain forms and instances of sexual harassment that occur in the institution’s education program or activity. **Title IX Sexual Harassment** is conduct on the basis of sex that satisfies one or more of the following:

- A University employee conditioning the provision of an aid, benefit, or service on another employee’s or student’s participation in unwelcome sexual conduct ("quid pro quo" harassment by an employee); or
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a University education program or activity; or
- Any instance of sexual assault (as defined in the Cleary Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).
  - **Sexual Assault**: Rape, sodomy (oral or anal intercourse), sexual assault with an object, fondling, incest, and statutory rape
  - **Dating Violence**: Violence committed by a person who is or has been in a romantic or intimate relationship with the victim
  - **Domestic Violence**: Violence by a spouse, former spouse, intimate partner, person with whom the victim shares a child, person cohabitating with the victim as a spouse or intimate partner, or person in a role similar to a spouse
  - **Stalking**: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or that of others or suffer substantial emotional distress
THE TITLE IX PROCESS

1. Report
2. Formal Complaint
3. Notice
4. Investigation
5. Evidence Review
6. Final Report
7. Additional Investigation
8. Hearing
9. Decision
10. Appeal
KEY TITLE IX ROLES

• Title IX Coordinator
• Investigator
• Advisor
• Decision Maker / Hearing Officer
INITIATING THE PROCESS
GENERAL GUIDANCE

• Be fair and objective
• Do not pre-judge
• Avoid conflicts of interest (including the appearance of a conflict)
• Maintain independence
• Stay professional
• Do not discuss opinions or conclusions
• Words matter
• Listen, listen, listen!
• Protect confidentiality
• Be prompt, but take the needed time
• Prevent retaliation
• Treat all parties equally
• Beware of sexual assault myths
  • There is not one way to respond to experiencing sexual assault
  • It is not unusual for a complainant to appear numb, detached, or unaffected; delay reporting; blame themselves; express denial, confusion, or fear; minimize their experience; recant some or all of the allegations made; or interact with the respondent after the alleged incident(s)

• Recognize the privilege and power positions you bring into the room
• Assess where you might have unconscious bias toward or against someone
• Be aware of stereotypes
• Cannot evaluate through “that wouldn’t bother me”
• Be aware that your social media can be cited as evidence of bias
UNDERSTANDING CONSENT

- Mutual and voluntary
- Affirmative
- Revocable
- Past consent does not imply current/future consent
- Consent to certain acts does not imply consent to other acts
- Power dynamics
- Age of consent
- Forcible compulsion
- Threats – actual or implied
- Expressed lack of consent
- Incapacitation
AN ALLEGATION LANDS ON YOUR DESK…

- Listen carefully and with compassion
- Provide access to needed services
- Explain process, your role, and complainant’s right to independently involve law enforcement
- Identify an initial list of potential witnesses
- Identify steps needed to obtain evidence
- Understand context to the allegations, relationship between the parties, and motivation for coming forward
- Assure the complainant that you take the matter seriously
- Explain confidentiality
- Do not express opinions or comment on character of others
- How to handle an anonymous report
• Search files of past reports or investigations
• Review school policy
• Determine whether an investigation is necessary
• If allegation involves potential child abuse, report to authorities in accordance with law regardless of your determination of credibility
Title IX regulations require written notice be provided to parties when allegations will proceed to investigation.

Notice must include:
- Detailed allegations, including date and location
- Identities of parties involved
- Statement that respondent is presumed not responsible and determination will be made at the end of the process
- Opportunity to have an advisor of choice who may be an attorney
- Opportunity to review evidence
- Statement regarding prohibition on knowingly false statements or submitting false information

Parties must be kept informed in writing throughout the process, with sufficient notice of all meetings, interviews, and hearings.
INTERIM MEASURES

• Can implement any time during investigation when needed

• May include accommodations (scheduling, excused absences) or measures to ensure safety (no contact orders, interim suspension)

• Document justification for interim measures

• Do not undertake actions that may be perceived as punishment or unequal without documenting justification

• In Title IX matters, the respondent must be noticed and given an opportunity to challenge the decision
PLANNING THE INVESTIGATION

• Who will conduct the investigation?
• Scope of investigation
• Key fact issues
• Who needs to be interviewed?
• In what order?
• What evidence needs to be collected?
• Who needs to be notified?
• Federal regulations provide option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss the investigation or may continue to investigate.

• However, without a complainant, you must rely upon other evidence to “build” your case, which is often difficult.
INITIAL MISTAKES

- Taking too long to respond to notice of a potential issue
- Acting too aloof, uncaring, or dismissive
- Overpromising
- Expressing judgments or opinions
- Explaining the process poorly or not at all
- Misrepresenting parties’ rights
- Failing to offer needed services
- Gathering too little information
- Failing to inform appropriate administrators or authorities
- Discussing the matter with inappropriate people
- Not considering necessary interim measures
- Assigning inappropriate investigators (conflict of interest, bias, inexperience)
- **Failing to follow school policies and local, state, and federal law**
CONDUCTING INTERVIEWS
WHO TO INTERVIEW

- The complainant
- The respondent
- Anyone who was present for and observed a relevant incident
- Other witnesses with relevant information
- Outcry witnesses
- People with whom the respondent has spoken about alleged incidents
- People who you have been asked to interview
INTERVIEWING BASICS

• Ask questions to elicit detail
• Understand who, what, when, where, how
• “How do you know that?”
• Clarify facts and discrepancies
• Ask for relevant names, especially potential witnesses
• Ask for relevant documents
• Maintain confidentiality of past interviews
WHY MAY INTERVIEWEES BE RELUCTANT?

- **Mistrust** of the organization, the investigation process, the interviewers, or the system in general
- **Discomfort** with strangers/interviewers
- **Discomfort** with subject matter
- **Fear** of retaliation
- **Fear** of not being believed
- **Fear** of retraumatization
- **Fear** of getting in trouble

Complainant may have reasons for being reluctant that are significant to analyzing their report:
- **Discomfort or trauma**
- **Pressure not to report**
- **Wanting to protect the respondent**
- **Concern that their report will not meet violation threshold**
• Clearly introduce yourself and your role as an independent investigator
• Explain how you will be conducting a comprehensive, prompt, and fair investigation
• Be clear that you are there to listen to everything they have to say, review their evidence, and speak with their witnesses
• Do not make promises you cannot keep and keep your promises
• Set realistic timelines and keep them apprised of the process as it progresses
• State upfront that you may need to follow up with them or re-interview them
• Be clear about policies regarding activities such as drug/alcohol use
• Treat the interviewee with respect, empathy, and kindness
• Recognize that this is difficult for all involved
• Offer services/resources to both parties, as well as witnesses if needed
• Be open-minded and non-judgmental
• Remember that many cases are in gray areas, and most people are telling you some version of their truth
• Make your body language reflect your listening stance
• If an interviewee becomes confrontational, don’t mirror their demeanor – keep calm, take a break, redirect
• ENSURE YOU ARE EQUALLY KIND TO ALL PARTICIPANTS
• Be/act comfortable with sexual terms, behaviors, and choices
• In video interviews, be/act comfortable with videoconferencing
• If you are uncomfortable, they will be uncomfortable
• Allow them to speak in their own language (crude language, etc.), but clarify
• If there is something that makes you uncomfortable:
  • Do research
  • Practice talking about it
  • Re-evaluate whether you are the right person for the interview
• Be aware of unconscious bias and the power positions & identities you bring into the room
• Bring your real personality into the interview and engage in a conversation: listen and respond
• Don’t be afraid to be personal
• Be true to your own style of speaking
• Be flexible and let the conversation take its natural course
• Guide the conversation, but let them set their own pace and tell their story in their way
• Utilize silence, especially when you ask hard questions
ASKING THE HARD QUESTIONS

• Wait to push back until they have finished telling their story

• “Let’s go back through that slowly:” Return to parts of their story that require clarification or questions or that are disputed by physical evidence

• Wait to confront with adverse evidence – may make an interviewee less willing to continue talking

• When asking the hard questions:
  • Phrase your questions so that they are respectful of the story you’ve heard
  • Don’t be accusatory
  • Explain the motivation for your question

• Let them know that as an investigator, you are trying to figure out what doesn’t track and why
HOW DO SCHOOLS GET IN TROUBLE?

• Lack of promptness
• Displays of partiality or bias
• Inequitable treatment of parties
• Compromising confidentiality
• Poor planning
• Failure to thoroughly evaluate all relevant witnesses and evidence
• Offering opinions
• Overpromising
• Not consistently and equitably following policies and procedures
• Failure to maintain relevant documents and evidence
• Not including exculpatory information in the investigative report
• Failure to properly document and justify conclusions and actions
• Not consulting counsel when potential legal issues / litigation arise
COLLECTING EVIDENCE
TWO TYPES OF EVIDENCE

DIRECT vs. CIRCUMSTANTIAL
EVIDENCE EXAMPLES

- Text messages
- Social media
- Emails
- Memos or other documents
- Photographs
- Receipts
- Device logs
- Surveillance video
- Building access records
- WiFi connection records
- Other sources
OBTAINING EVIDENCE

• Instruct parties and witnesses to preserve evidence
• Go to the source and get primary documentation when possible
• Deleted items may still exist
• Be aware of fakes
ASSESSING CREDIBILITY
CREDIBILITY FACTORS

• Inherent plausibility and logic of story
• Consistency
• Demeanor
• Level of detail provided
  • Beware of the “categorical denial”
• Past record and pattern behavior
• Cross-corroboration
• Corroboration by evidence
• Not a moral judgment on honesty
• Evaluating credibility is a continuous process
ROLE OF THE ADVISOR
An advisor typically acts as:

- Emotional support
- Assistance in understanding the process
- Guidance in preparing statements, evidence, cross-examination questions, and other materials
- A second perspective on the matter

Under current federal regulations, an advisor also acts as:

- Representation in the hearing
- Cross-examiner of other parties and witnesses
• Understand your advisee’s account
• Ensure access to needed services or support
• Facilitate communication with Title IX Coordinator if needed
• Ensure your advisee understands relevant policies and procedures
• Ensure your advisee understands their rights
ADVISOR ROLE: DURING THE INVESTIGATION

• Attend interviews with your advisee
• Provide emotional and procedural support
• Confer privately if necessary
• Take notes and observe interview
• Advisors typically do not speak much in interviews
• After the interview, continue to provide support, assistance, and guidance
• Review evidence packet and investigative report with advisee and assist in preparing requests for additional investigative steps or responses
DOCUMENTING THE INVESTIGATION
• Memorialize everything that happens in emails, notes, or interview summaries
• When communication happens via phone call or in person, note the content of the conversation
• Convert interview notes into narrative summary of interview
• Include basic information: date, location, names of all in attendance
• Introductory language: indicate that summary is not verbatim
• Include summary of information and explanations provided to interviewee

Schorr and McGinn introduced themselves and explained that they had been hired by the College to independently investigate O’Reilly’s complaint against Samuels. Schorr described the investigation process and explained the scope of confidentiality for the interview. Schorr stated that the parties to this investigation will see the final investigative report, which will include Smith’s name and what is said in this interview.

Schorr informed Smith that she will have the opportunity to review this interview memorandum. Schorr stated that College policy prohibits any retaliation as a result of Smith’s participation in this investigation and asked Smith to please communicate any potential retaliation to the investigators or the College.
• Summary should reflect the narrative told by the interviewee
• Does not need to be in the order of the interview (can be chronological or in another logical order)
• All statements should be sourced, to the interviewee and to their source
  • Did they see this firsthand or did someone else tell them this information?
• Use fact-based, “dry” language; avoid “colorful” language
• Write in a formal, professional manner
• Use direct quotes where available and to add “color”
• Goal is to present the interviewee’s voice from your objective perspective
• Well-written summaries allow you to pinpoint outstanding gaps and needed follow-up
• Summaries will become building blocks of investigative report
Smith said that she knew Robertson and that he was “more a friend of [Johnson’s].” She said in the first few weeks of the Fall 2019 semester, Robertson would come to the office and spend time talking with Johnson at her desk. Smith said that Johnson told her that she spent time with Robertson outside of work on several occasions, but they were “never that serious.” Smith also stated that she was aware that Johnson and Robertson frequently communicated via text message during the day.
Jones stated that during the party, he believed Hill “got some wrong signals” from McCall because Hill said to Jones, “This new girl Laura [McCall], she’s pretty.” Jones said that he determined from Hill’s tone that “[Hill] was thinking, ‘Maybe she likes me,’ or something like that.”

Jones stated that McCall is “very openly friendly,” and that Hill “[took] it the wrong way and thought she wanted more.” Jones said that he “saw [Hill] might’ve been thinking something would happen,” but Jones knew that McCall “was just being polite.”
What’s wrong with these summaries?

• Rodriguez said he couldn’t see what was going on with Murphy and Novak, but Novak was always acting weird with people around campus. Murphy told him later that Novak had made inappropriate comments to him.

• Ibrahim said that Rossi touched her and her friends’ boobs and butts.

• Persaud said that he asked Wilson not to mock him in front of the class. Persaud exclaimed, “I told her not to, but she did it anyway!”

• Miller said that prior to the incident involving Devi, he had sent an e-mail to Williams, in which he wrote about other incidents when Devi touched him inappropriately. He said that Devi touched his penis over his pants and that he was upset about this.
• **Scope:** a clear description of the scope and procedural history of the investigation

• **Executive Summary:** bulleted high-level facts, findings, recommendations, and conclusions, but do not overgeneralize or misrepresent facts

• **Summary of Evidence:** relevant parts of interview summaries and other relevant evidence, synthesized to create one narrative that flows and highlights areas of corroboration and discrepancy

• **Summary of Findings:** overall summary of evidence and analysis of evidence, including credibility assessments, discussion of discrepancies, and comparison to policy
  
  • May also include conclusions or recommendations regarding finding of responsibility of respondent, if not in Title IX process
  
  • Should continue writing style from prior sections — formal, objective, fact-based
  
  • Includes judgments, but **all judgments must be defensible and based in evidence and policy**
  
  • Avoid personal or moral judgments
Mendel and Aguero both reported that they then entered a smaller stairwell, which Aguero described as “colder” than the first one. They both stated that Mendel sat on the stairs and Aguero stood by the door, which was closed.

Aguero reported that Mendel then asked her if she wanted to sit down and said, “I can make room,” and she told him, “No, I’m going to go.” Both parties reported that Mendel stood up and said, “I can warm you up.” Aguero said that Mendel then started to touch her buttocks. Mendel also reported that he touched Aguero’s buttocks.

Aguero stated, “I don’t know, I just froze because I didn’t know what to do.” She said that she told Mendel, “Maybe we should go. I’m tired. You have a girlfriend.” Aguero said that Mendel responded, “It’s fine. She’s not going to find out,” and kept repeating this statement and touching her.
TITLE IX HEARING PROCESS

- Title IX Coordinator or designee:
  - Schedules the hearing
  - Notifies the parties, advisors, and witnesses of the hearing
  - Provides the Decision Maker panel with appropriate materials
  - Coordinates videoconferencing as necessary
  - Secures a hearing location
  - Acts as liaison between parties and Decision Maker panel on procedural matters

- Hearing Officer conducts the hearing, including:
  - Hearing Officer summarizes the Hearing Policy
  - Investigator briefly states allegations and summarizes the investigative report
  - Advisors question parties and witnesses by presenting questions through the Hearing Officer
  - Decision Maker panel determines whether questions are relevant, and if so, directs party/witness to respond
  - Decision Maker panel questions parties and witnesses
  - Decision Maker panel informs parties that they will issue a decision based on preponderance of the evidence

- Decision Maker issues written decision to parties, who may appeal this decision
HEARING RULES

• Hearing Officer should meet with advisors in pre-hearing conference to clearly communicate procedural rules for hearing

• Hearing Policy:
  • Questions and evidence about complainant’s prior sexual behavior are irrelevant unless needed to prove that someone else committed the alleged misconduct or to prove consent
  • If a party does not have an advisor, the University will provide a trained advisor
  • Only advisors may conduct cross examination
  • Live hearings will be conducted with parties in the same location, unless otherwise requested
  • Only relevant questions may be asked, as determined and explained by the Hearing Officer before the party/witness answers the question
  • Formal rules of evidence in courtroom proceedings do not apply in the hearing
  • The hearing will be recorded and the recording retained by the University
  • Hearing Officer controls the hearing, maintains order, and makes necessary and final rulings
WHO SHOULD BE PRESENT?

- Decision Maker panel
- Title IX Coordinator (optional)
- Advisors
- Witnesses, parties, and investigator(s) for cross-examination by both parties’ advisors and hearing officer(s)
- Parties do not have to be present for entire hearing
- Testimony and cross-examination can be conducted via video so parties remain separated
HEARING PANEL – STEP ONE:
FAMILIARIZING WITH THE CASE

• Read investigative report and review all evidence
• Ensure you are aware of procedures that preceded hearing
• Familiarize yourself with relevant policies and procedures
• Coordinate with other panel members to ensure understanding of expectations
• Identify and address any potential conflicts of interest
• Determine whether there are any reasons why the investigation needs to be re-opened
• Draft your questions
• Draft/adapt your script
• Understand which parties and witnesses may appear at the hearing
HEARING PANEL – STEP TWO: PRE-HEARING MEETINGS

- Hearing Officer holds pre-hearing meetings with advisors and parties in order to:
  - Set ground rules and expectations
  - Alleviate fear of the hearing
  - Meet and establish rapport with parties and advisors

- Content:
  - Roles of the hearing officer, hearing panel, parties, advisors, and support people
  - Hearing schedule
  - Rules of Decorum and other expectations
  - Hearing procedures
  - Relevance and admissibility in questioning
  - Technology
  - Accommodations

- Clearly document the content and proceedings of the pre-hearing meetings in writing and distribute to all parties
• Your introduction: procedural information, allegations, ensure confidentiality, review technology

• Questioning parties and witnesses:
  • When questioning, be transparent, kind, comfortable, and flexible
  • Set the same tone for advisors conducting questioning
  • Exclude irrelevant and inadmissible questions and explain rationales

• The purpose of the hearing is not to conduct a trial but to gain as full and fair an account as possible in order to determine responsibility

• Deal with disruptive behavior through warnings, breaks, and removal if needed
• Discuss advisee’s account, evidence, and investigative report with advisee
• Develop list of questions you and your advisee have for other parties and witnesses
• Prepare advisee for questions you will ask them
• Prepare advisee for cross-examination, including conducting mock questioning
• Prepare advisee to be truthful, complete, and non-combative in all answers, including with facts that may present them in poor light
• Attend pre-hearing conferences
• Understand the rules and expectations of the hearing officer(s)
• During the hearing, conduct direct questioning of your advisee, cross-examination of other parties and witnesses, and be ready to raise concerns or issues that arise
• After a decision is rendered, you may need to aid your advisee through the appeals process
• Throughout entire process, continue to support your advisee
• The Hearing Officer may prohibit certain types of questions from being asked of parties and witnesses. Some irrelevant types of questions might include:
  • Questions about a party or witness’s sexual history
  • Questions about a party or witness’s health, including mental health
  • Questions about other aspects of a party or witness’s life that are not pertinent to the alleged conduct
  • Questions to establish character
  • Questions that make assumptions or 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

• Ultimately, the Decision Maker panel must make decisions regarding relevance based on the facts and circumstances of the matter
HEARING PANEL – STEP FOUR: DELIBERATION AND DECISION

- Analyze relevant evidence, credibility, and policy standards
- Panel deliberations should be private and give each panelist an equal opportunity to voice opinions
- Consult with administrators on sanctioning
- Draft written determination:
  - Explain rationale for determination and sanctions in full
  - Use clear, plain language
  - Be thorough and address all elements of all allegations
  - Address evidence that undermines your decision
  - Include procedural history, policies and allegations, any issues during the hearing phase, and appeal information
- Title IX Coordinator issues decision to parties
EVALUATING THE EVIDENCE

• Decision Maker must consider the evidence presented in the investigative report and/or the hearing.

• Decision Maker must not draw any inference about responsibility based solely on a party or witness's refusal to submit to cross-examination.

• Evaluation of the evidence includes credibility assessment, analysis of discrepancies and corroboration, and comparison to policy.

• **All judgments must be defensible and based in evidence and policy.**

• Determine responsibility based on a preponderance of the evidence.

• Panel deliberations – each panel member has equal standing, regardless of their positions at the University.

• Determinations and reasoning must be documented in a letter or report.
DETERMINING SANCTIONS AND REMEDIES

• Sanctions should be appropriate considering severity and pervasiveness of behavior
• May also consider complainant’s requests regarding sanctions, as well as respondent’s demonstration of accountability and remorse
• Sanctions must be defensible according to evidence and policy
• Remedies are designed to restore or preserve Complainant’s equal access to the educational program or activity
POTENTIAL NEW TITLE IX REGULATIONS

• Hearing optional?
• Changes for standard of proof?
• New policy definitions?
• Other regulatory revisions?