



TITLE IX HEARINGS TRAINING

Massachusetts Community Colleges

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DAN SCHORR, LLC

OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
- Policy and Program Reviews
- Trainings

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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.

POLICY ON AFFIRMATIVE ACTION, EQUAL OPPORTUNITY & DIVERSITY

TITLE IX DEFINITIONS

- 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 College'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 College 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 College education program or activity; or
 - Any instance of sexual assault (as defined in the Clery 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

TITLE IX PROCESS

- Complainant contacts the Title IX Coordinator or designee and makes a **Formal** Title IX Complaint
- Within 5 days, respondent is noticed in writing about the complaint and may submit a written response within 5 days
- Informal resolution options are offered to the complainant (when appropriate, and if allegations are not against an employee)
- An investigation is conducted within 15 days of respondent's written response, where practicable
- Within 10 days of the receipt of all evidence, the Title IX Coordinator or designee sends the evidence to the parties for review and written response
- Within 10 days of party responses to evidence, the Title IX Coordinator or designee prepares and delivers an investigative report to the parties
- Parties have 10 days to submit responses to the report
- Within 10 days, the Title IX Coordinator or designee delivers a final investigative report to the Decision Maker

TITLE IX PROCESS

- Within 10 days of the Decision Maker's receipt of the report, a hearing is held
- Title IX Coordinator or designee:
 - Schedules the hearing
 - Notifies the parties, advisors, and witnesses of the hearing
 - Provides the Decision Maker with appropriate materials
 - Coordinates videoconferencing as necessary
 - Secures a hearing location
 - Acts as liaison between parties and Decision Maker on procedural matters
- Decision Maker conducts the hearing, including:
 - Decision Maker summarizes the Hearing Policy
 - Title IX Coordinator or designee briefly states allegations and summarizes the investigative report
 - Advisors question parties and witnesses by presenting questions through the Decision Maker
 - Decision Maker determines whether questions are relevant, and if so, directs party/witness to respond
 - Decision Maker questions parties and witnesses
 - Decision Maker informs parties that they will issue a decision within 10 days based on preponderance of the evidence
- Decision Maker issues written decision to parties, who may appeal within 5 days

BEFORE THE HEARING

GENERAL GUIDANCE

- Be fair and objective
- Maintain independence
- Stay professional
- Words matter
- Listen, listen, listen!
- Protect confidentiality
- Be prompt, but take the needed time
- **Treat all parties equally**

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
- Have alternate Decision Maker(s) available, and be ready to recuse a Decision Maker if party has valid conflict of interest claim
- Changing hearing officer may be inconvenient and cumbersome, but litigation alleging decision was tainted by a conflict often will be worse

BEWARE OF BIAS

- 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)
- Assess where you might have unconscious bias, including pre-determined outcomes
- 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

ROLE OF THE DECISION MAKER

- The Decision Maker(s) determines whether a respondent has violated policy
- May be single person or panel, and must not be Title IX Coordinator, investigator, or appellate Decision Maker
- Single Decision Maker or panel chair manages hearing proceedings and advisors, leads cross-examination, determines question relevance, and leads deliberations
- Cross-examination questions aimed at eliciting relevant information needed to make a decision after reviewing investigative report and evidence

PREPARING FOR HEARING

- Read investigative report
- Review all evidence
- Ensure you are aware of procedures that preceded hearing
- Familiarize yourself with relevant policies and procedures
- Draft questions: What do you need to know after reviewing the report and evidence?
- For Decision Maker(s), prepare rules for hearing, communicate with parties/advisors
- For advisors, prepare your party for cross-examination
 - Explain hearing process and cross-examination rules
 - Prepare party to be truthful, complete, and non-combative in all answers, including with facts that may present themselves in poor light
 - Conduct mock cross-examination

HEARING RULES

- 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 College 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 Decision Maker 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 College
 - Decision Maker controls the hearing, maintains order, and makes necessary and final rulings

PRE-HEARING CONFERENCE

- 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

THE HEARING

WHO SHOULD BE PRESENT?

- Decision Maker
- Title IX Coordinator
- 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

DOCUMENTING THE HEARING

- Hearing should be **recorded**
- Confirm technology is working before and during hearing
- Make sure record reflects that parties were given all procedural and substantive rights afforded to them
- Clearly explain reason for all important decisions, especially admissibility of evidence and disagreements over cross-examination questions
- If it's not clearly on record, either party can argue in litigation that it never happened or occurred improperly

CONDUCTING CROSS-EXAMINATION

- Follow rules of the hearing and defer to the Decision Maker
- Understand your advisee's account
- Ask questions in order to elicit information that will help support your advisee's account and/or cast doubt on the other party's account
- Decision Maker(s) should use the principles of "Asking the Hard Questions" when questioning a party or witness about uncomfortable or difficult subjects (see upcoming slide)
- Do not exclude a question because it makes you uncomfortable to ask it
- Do not bully or become confrontational with a party or witness
- Be professional and diligent
- Listen for gaps or areas for follow-up questions

QUESTIONING BASICS

- Be transparent
- Be kind
- Be comfortable
- Be prepared, but flexible
- Clarify facts and discrepancies
- Treat all parties equally

ASKING THE HARD QUESTIONS

- Wait to confront with adverse evidence – may make a party/witness 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 you are trying to figure out what doesn't track and why

IDENTIFYING IRRELEVANT QUESTIONS

“Only **relevant** cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the Decision Maker(s) must first **determine whether the question is relevant** and **explain any decision to exclude** a question as not relevant.”

“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

DISRUPTIVE BEHAVIOR

- Maintain professional and fair hearing atmosphere, even if participants become inappropriately argumentative and/or disrespectful
- Despite pre-hearing discussions, participants may not follow pre-established guidance for hearing decorum
- Don't mirror improper tone of participants
- Advisors and others who are disruptive need to be cautioned about expected rules and decorum of hearing
- Despite inconvenience, may need to take hearing breaks or even adjourn if parties/advisors are precluding a fair and respectful hearing

INFORMATION NOT SUBJECT TO CROSS-EXAMINATION

“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...”

“...however, that the Decision Maker(s) **cannot draw an inference** about the determination regarding responsibility based solely on a party’s or witness’s **absence** from the live hearing or **refusal** to answer cross-examination or other questions.”

- Confirm with parties and witnesses before initial statement that they intend to answer cross-examination questions
- If party or witness does not complete cross-examination, make sure hearing panelists and parties understand what information must now be disregarded

AFTER THE HEARING

DELIBERATIONS

- Only the Decision Maker(s) should be involved in deliberations
- Consider each allegation in turn and weigh the evidence for and against a finding of responsibility
- Evaluation of the evidence includes credibility assessment, analysis of discrepancies and corroboration, and comparison to policy
- For panels, all Decision Maker(s) must have the opportunity to voice opinions
- Withhold judgment until all evidence has been considered
- Do not rely on outside or excluded evidence or inferences based on a party/witness's refusal to submit to cross-examination
- Discuss each element of policy to determine whether it has been met
- For each allegation, vote to determine findings and document rationale of Decision Maker(s) involved in deliberations

TWO TYPES OF EVIDENCE

DIRECT

Supports the truth of an account directly

CIRCUMSTANTIAL

Relies on inference to support a conclusion of facts

ASSESSING CREDIBILITY

- 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

POWER IMBALANCES AMONG PANELISTS

- Hearing panel may include personnel from different organizational levels
- Example: Senior administrator serving with junior staff member
- **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

WRITTEN DETERMINATION

- Policies considered
- Procedural steps from receipt of complaint through determination
- Statements of determinations as to each allegation
- Findings of fact and rationales for determinations as to each allegation
- Sanctions for findings of responsibility
- Remedies provided to the complainant to restore or preserve access to education program or activity impacted by allegations
- Procedures and bases for appeal

DETERMINING SANCTIONS

- 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
- Sanctions should be consistent with other similar cases at your institution

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