



# INDIVIDUAL WISHES VS. RISK OF HARM

When and How to Proceed Without a Cooperative Complainant

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**DAN SCHORR, LLC**

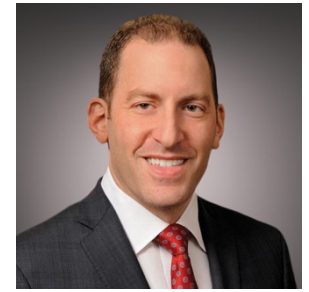
# OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
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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.

# RELUCTANT COMPLAINANTS

- Mistrust of the organization, investigation process, or the system in general
- Discomfort with or fear of:
  - Strangers/investigators
  - Subject matter
  - Cross examination at live hearing
  - Re-traumatization
  - Retaliation
  - Not being believed
  - Getting in trouble
- Denial or being unprepared to fully process an incident

# VIOLENCE RISK ASSESSMENT

- May need to conduct a Violence Risk Assessment (VRA)
- Assess potential risk posed by respondent and/or others
- Consider risk factors that escalate the potential for violence
- Evaluate influences that reduce the risk of violence
- What information supports conclusion of higher/lower risk of violence?
- This process is not a finding of responsibility or a sanction, but rather a crucial process focused on campus safety

# ASSUMING RISK

- Based on complainant's account, is there reason to believe respondent is an ongoing threat?
- Consider threat to community and threat to complainant
- 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

# TITLE IX REGULATIONS

- 2020 DOE regulations provide the option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss or continue to investigate
- However, even if the process continues without complainant, regulations require that 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”
- Even if investigation not required by Title IX regulations, there may be important state law, public policy, or civil liability reasons for proceeding

# NEW YORK'S "ENOUGH IS ENOUGH" LAW

NY Article 129 B § 6446

- “[A reporting party] declining to consent to an investigation shall be honored unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community”
- Factors used to determine whether to honor such a request include, but are not limited to:
  - History of violent behavior or repeat offenses
  - Escalation in unlawful conduct
  - Risk that the accused will commit additional acts of violence
  - Use of a weapon or force
  - Reporting individual is a minor
  - There are other means to obtain evidence
  - Pattern behavior at a given location or by a particular group



# OTHER CONSIDERATIONS

- Even if your state or federal law does not mandate an investigation, consider initiating one
- Respondent may pose risk to the safety and well-being of your community
- Duty to protect your community
- Potential liability if organization fails to protect community from a known risk
- Important to document all available information in case matter resurfaces in future

# EXPLAINING COMPLAINANT OPTIONS

- Ask the complainant to articulate why they are hesitant to move forward
- Be transparent & open with complainant about reasons to consider moving forward
- Explain anti-retaliation and amnesty policies
- Express your concern regarding ongoing risk
- Ensure they know that they maintain agency and ownership over their experience and account
- Offer time to think or to speak with counselor or advisor
- Explain the investigative and hearing process, including separate rooms for live hearing
- Do not press or force, and remain compassionate, kind, and understanding of the difficulty of this situation
- Offer services and accommodations regardless of complainant cooperation with investigation
- When can you allow complainant to remain anonymous?

# PROCEEDING WITHOUT A COMPLAINANT

- Especially in cases of sexual or identity-based violence, it is important to consider the need for the complainant to have control over their account and the process
  - Complainant may not be ready to proceed now, but may decide to in the future
  - Weigh evidence of recurrence of an incident against complainant's hesitation and stage of processing experience
  - If you decide ongoing risk is great enough, keep complainant informed
  - Provide option for complainant to remain involved as much as they want to
  - In cases of pattern behavior and multiple allegations, may offer complainant option to be involved as a witness

# INVESTIGATING WITHOUT A COMPLAINANT

- Without a complainant, you must rely upon other evidence to “build” your case
- Consider:
  - What information did the complainant provide?
  - Were witnesses mentioned, including outcry?
  - What other available evidence independently shows misconduct?
- May have to cast a wider net and interview respondent earlier
- Witness interviews may be based on vague/unclear information until key witnesses identified

# ALTERNATIVE RESOLUTIONS

- When you determine that the ongoing risk to the community or the complainant is not sufficient to proceed with an investigation, offer alternative resolutions:
  - Party agreements
  - Facilitated dialogue/mediation
  - Restorative practices
- Do not pressure complainant into alternative resolutions
- Basic principles of alternative resolutions:
  - Listen actively to and be guided by what parties need and want
  - Allow space for airing harms and apologies
  - Consider repairing individual *and* community harms
  - Ensure willing and voluntary agreement to alternative measures by all parties
- Integrate alternative resolutions and trained facilitators into school practices

# THE TITLE IX AND CIVIL RIGHTS

PODCAST



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