



# CONDUCTING TITLE IX HEARINGS AFTER THE *CARDONA* DECISION: NEW GUIDANCE AND BEST PRACTICES

September 29, 2021

**DAN SCHORR, LLC**



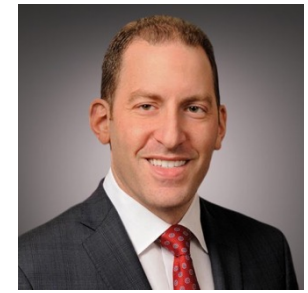
# OUR SERVICES

- 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

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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.

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# 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.

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# JACKIE GHARAPOUR WERNZ

Partner, Thompson & Horton LLP  
Dallas/Fort Worth



Jackie brings a mix of unique perspectives to her representation of schools, colleges, universities, and other education-adjacent organizations. Her forebearers include some of the earliest Southern settlers in the U.S. on one side, but she is also the child of an immigrant. She was born and has deep roots in the rural Ozarks; since graduating from law school, though, she has called big cities home. She has over a decade of experience representing public and private schools, colleges, and universities in private practice, yet benefits from experience regulating educational institutions in the Federal government under two Presidential administrations. Jackie weaves these varied experiences together to provide unparalleled service and empathy to clients, whether they are rural, urban, or suburban, large or small, public or private.

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# SEAN FLAMMER

Assistant General Counsel, The University of Texas System  
Austin



Sean specializes in Title IX, student affairs disputes, employment issues, constitutional litigation, and general litigation. Sean graduated with High Honors and with the Order of the Coif distinction from the University of Texas at Austin School of Law in 2007. After clerking for a federal appellate judge, Sean joined a large litigation firm in Austin. He practiced trial and appellate litigation for over 4 years before he joined the Office of Attorney General. At the Attorney General's office, Sean spent over 5 years representing universities and other state agencies in complex litigation. He had a heavy docket of litigating and advising clients on Title IX/due-process matters.

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# 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.” (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 provision (August 24, 2021)

# PROBLEMS WITH THE SUPPRESSION CLAUSE

- Substantive evidence may be excluded
- Witness scheduling
- Witness or party no-shows
- Examples of matters where suppression clause could be a factor

# PROBLEMS AFTER *CARDONA*

- Incentivizing parties and witnesses to participate
- Due process and credibility determinations
- Negative inferences

# POTENTIAL LITIGATION

- If schools choose to eliminate the suppression clause:
  - Only liable if there is deliberate indifference
  - Supported by *Cardona's* vacating of the clause
- If schools choose to continue to use the suppression clause:
  - May be more difficult position to justify after *Cardona*



# K-12 AFTER *CARDONA*

- K-12 schools not required to hold hearings
- May impact optional hearing process
- May impact on-paper cross-examination process

# CHANGING INSTITUTION POLICIES

- Schools may strike their suppression clause from their policies at any time
- Ongoing hearings and present policy changes
- Issuing new policies mid-year

# 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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