



# **Advisors in Title IX Investigations:** Legal, Regulatory, and Public Policy Considerations

July 21, 2020



## DAN SCHORR

MANAGING DIRECTOR

485 Lexington Avenue | New York, NY 10017  
 +1.862.255.4915 Office  
 +1.914.625.6270 Mobile  
 dan.schorr@ankura.com

### EDUCATION

JD, Harvard  
Law School

MA, University  
of Pennsylvania

BA, University  
of Pennsylvania

Dan Schorr is a Managing Director at Ankura, based in New York. A former criminal prosecutor and municipal inspector general, he has more than 20 years of legal and investigative experience. Dan manages a variety of complex assignments, from investigations into major fraud, internal issues at corporations and governmental entities, and sexual misconduct and Title IX violations to litigation support, threat management, construction quality concerns, labor-law compliance, and independent monitorships. Dan began his legal career as an assistant district attorney, specializing in the investigation and prosecution of sex crimes, domestic violence, child abuse, and homicides. He also worked for several years as a vice president in the law division at Morgan Stanley, where he conducted investigations into claims related to client investments. He has appeared as a commentator on legal issues for television news programs on ABC, Fox News, CNN, and the BBC, among others. Dan conducts investigations at educational institutions, corporations, governments, and other entities. He has trained university investigators on best practices when handling Title IX matters and is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.



## ALYSSA-RAE MCGINN

SENIOR ASSOCIATE

60 State Street | Boston, MA 02109  
 +1.516.382.3043 Mobile  
 alyssarae.mcgin@ankura.com

### EDUCATION

MA, St. John's  
University

BA, St. John's  
University

Alyssa-Rae McGinn is a Senior Associate with five years of experience leading and conducting a variety of complex investigations, including monitorships of a large international bank and a governmental child welfare agency. Alyssa-Rae is an ATIXA-certified Civil Rights Investigator. Additionally, she is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit. Alyssa-Rae conducts investigations at educational institutions and corporations into allegations of sexual misconduct and gender-based harassment involving students, faculty, staff, and corporate leadership. These investigations include communication with parties in accordance with school or company policy and Title IX and Title VII regulations, interviews with parties and witnesses, analysis of relevant evidence, and consultation on findings of liability and sanctions.



## EDUCATION

J.D., The University of Virginia School of Law

B.A., *summa cum laude*, University of Arkansas at Little Rock (*English, History, and French*)

# JACKIE WERNZ

PARTNER, *Franczek*

300 S. Wacker Drive | Chicago, IL 60606  
+1.312.786.6137 Mobile  
jw@franczek.com

Jackie offers high-quality, prompt, and personable representation to educational institutions, including K-12 schools, colleges, and universities. Her breadth of experience in education and employment law means she can assist her clients with almost any issue they face, including board and school governance, labor and employment, immigration, discrimination and harassment, special education, student, and business and operations issues.

Jackie is passionate about civil rights law. From 2016 to 2018, Jackie was a Civil Rights Attorney in the Chicago office of the U.S. Department of Education's Office for Civil Rights. Her experience at OCR both before and after the 2016 administration change gives her clients unique insight into some of the most politicized legal issues in education today, including Title IX. Jackie uses this experience to counsel clients on internal investigations into complaints of student and staff misconduct, harassment, and discrimination; to efficiently and assiduously defend clients in legal and administrative civil rights proceedings; and to provide engaging, practical training on civil rights fundamentals and investigation techniques. Jackie has received all necessary training under the 2020 Title IX regulations to serve as an investigator, complaint decisionmaker/hearing officer, appellate decisionmaker, and informal resolution facilitator for Title IX matters. Her significant investigatory experience regarding complaints of discrimination based on race, color, national origin, sex, gender identity, and disability makes her an investigator of choice for high-profile, sensitive investigation facing schools, colleges, and universities.

Jackie is an experienced litigator. She represents clients in all stages of proceedings in state and Federal court; in administrative hearings, including employee dismissal hearings and disability rights hearings; and in proceedings before agencies such as OCR, the Illinois Department of Human Rights (IDHR), and the Equal Employment Opportunity Commission (EEOC).

Jackie crafts legally-compliant policies, procedures, handbooks, and webpage content for schools and regularly handles Freedom of Information Act (FOIA) and Open Meetings Act (OMA) issues for public-sector clients. She drafts, reviews, and negotiates a wide variety of contracts and agreements. Examples include contracts involving purchases of goods and services, employment, cooperative relationships, facilities use, data use, and privacy issues. She advises on all issues related to edtech, including the myriad privacy issues inherent in the use of educational applications, tools, and other products.

Jackie is a sought after speaker on the national, state, and local levels on education and labor and employment law topics. She especially enjoys training administrators, staff, and students on topics such as disability accommodations, discrimination and harassment, bullying, sexual harassment and assault, student data privacy, and acceptable use of technology.

# The Advisor's Role

- ▶ **Advisors (even attorney advisors) are not new to Title IX proceedings**
- ▶ **Advisors have historically served as support and/or guidance during the misconduct process**
- ▶ **Students can choose who serves as advisors**
- ▶ **Schools can place reasonable limits on an advisor's role, including attorneys**
- ▶ **General role of complainant advisors**
- ▶ **General role of respondent advisors**
- ▶ **ADA accommodations**

# The Advisor's Role

- ▶ **The new Title IX regulations shift the role of the advisor**
  - ▶ An advisor may still act as:
    - ▶ Emotional support
    - ▶ Assistance in understanding the process
    - ▶ Guidance in preparing statements, evidence, and other materials
    - ▶ A second perspective on the matter
  - ▶ Under the new regs, an advisor also acts as:
    - ▶ Representation in the hearing
    - ▶ Cross-examiner of other parties and witnesses

# Choosing Advisors

## ▶ When a party elects to have an advisor, it should be someone of their choice

### ▶ An advisor can be:

- ▶ A parent
- ▶ A friend
- ▶ A trusted faculty or staff member
- ▶ A counselor
- ▶ An attorney

### ▶ However, an advisor should not be:

- ▶ A witness
- ▶ Someone who may influence the party's account

# Choosing Advisors

- ▶ In guiding choice of an advisor or providing an advisor, an advisor should be well-trained in the misconduct process, including the rules governing the hearing, evidence evaluation, and cross-examination of witnesses and parties
- ▶ Cost considerations for providing advisors
- ▶ Develop pool of advisors to choose from, if possible (*can include school employees*)
- ▶ Consider training for advisors

# During the Investigation

- ▶ **Depending on institution policies, the advisor may have direct contact with the Title IX Coordinator or investigators**
- ▶ **Advisors' key role in the investigation is to attend interviews with parties**
- ▶ **Interviewers should set boundaries with advisors, but be flexible**
- ▶ **Difficult advisors may require re-direction or be asked to leave**

# Impact of the New Regulations on Advisor Role

- ▶ Advisors are not subject to the requirement to be impartial and free from bias
- ▶ Must send evidence to parties (*and advisors if applicable*) prior to completion of investigation report
- ▶ For higher education, must provide an advisor at no cost if requested by a party
- ▶ Only the advisor can attend the hearing with the parties, unless someone else is required to attend by law
- ▶ An advisor can appear even if the party they are advising does not appear

# Impact of the New Regulations on Advisor Role

- ▶ If an advisor and party do not appear, a provided advisor must still cross-examine the other appearing party, resulting in consideration of the appearing party's statement (*without any inference being drawn based on the non-appearance*)
- ▶ Advisors must be permitted to question the opposing party directly, orally, and in real time on all relevant questions and follow up questions, including those challenging credibility, during a hearing (*for higher ed*) and through written questions (*for K-12*)
- ▶ Even if a hearing is held at K-12, live cross-examination is not required
- ▶ Prehearing conferences
- ▶ *What if advisor is doing a poor job with advising/cross-examination?*
- ▶ *What if advisor is disruptive during investigation or at hearing?*

# Limitations on Advisors

- ▶ **Can limit their participation in the process, but be particularly careful with limitations re: cross-examination**
- ▶ **Should not limit the ability of the advisor to investigate or communicate with opposing advisor**
- ▶ ***BUT: can limit contact with opposing party through a mutual no contact order***
- ▶ **Cross examination/written cross questions must be relevant; if not, decisionmaker/hearing officer must say why on the record**
- ▶ **It is up to the decisionmaker/hearing officer, not the advisor, to decide if a question is relevant**

# K12 vs. Higher Ed

- ▶ **In K12, advisors are likely to be parents**
- ▶ **When interviewing minors, always allow parents to attend if they want to**
- ▶ **In higher ed, complainant advisors are likely to be friends or counselors, while respondent advisors are likely to be parents or attorneys**
- ▶ **Hearings with live cross-examination by advisors not required in K-12**

# Conclusion

## Q&A

### **DAN SCHORR**

Managing Director

485 Lexington Avenue | New York, NY 10017  
+1.862.255.4915 Office | +1.914.625.6270 Mobile  
dan.schorr@ankura.com



### **ALYSSA-RAE MCGINN**

Senior Associate

60 State Street | Boston, MA 02109  
+1.516.382.3043 Mobile  
alyssarae.mcginin@ankura.com



### **JACKIE WERNZ**

300 S. Wacker Drive | Chicago, IL 60606  
+1.312.786.6137 Mobile  
jw@franczek.com

