

Annual Legal Update for Illinois Higher Education Institutions

September 22, 2022
8:00 a.m. – 3:30 p.m.

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PRAYER ON CAMPUS, FLAG DISPLAYS, AND MORE: HIGHLIGHTS FROM THE SUPREME COURT OCTOBER 2021 TERM AND IMPLICATIONS FOR HIGHER EDUCATION INSTITUTIONS

September 22, 2022

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Introductions



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Agenda

- I. Campus Prayer: *Kennedy v. Bremerton School District*
- II. Flag (and Other) Displays: *Shurtleff v. City of Boston*
- III. Censure of Elected Officials: *Houston Community College System v. Wilson*
- IV. Emotional Distress Damages: *Cummings v. Premier Rehab Keller, P.L.L.C.*



Campus Prayer:
*Kennedy v. Bremerton
School District*

June 27, 2022

142 S. Ct. 2407



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Kennedy: Factual Background

- High School football coach instituted practice of praying at the 50-yard line after each game.
- Kennedy initially prayed alone, but eventually, several student athletes chose to join Kennedy in the prayer.
- Kennedy also led the team in prayer during locker room pre-game events and occasionally gave motivational speeches that were religious in nature.
- School district directed Kennedy to stop prayer activity and religious inspired speeches.

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Kennedy: Factual Background

- Kennedy agreed to stop locker room prayers and religiously motivated speeches, but refused to stop praying at the 50-yard line.
- District eventually suspended and declined to rehire Kennedy, claiming he engaged in “public and demonstrative religious conduct while still on duty as an assistant coach.”
- Kennedy filed suit, claiming the district violated his First Amendment rights to free speech and the free exercise of religion.
- Both the District Court and Court of Appeals denied Kennedy’s request for an injunction requiring the district to reinstate him.



Kennedy: Holding

- The Supreme Court ruled that the district’s actions violated Kennedy’s First Amendment rights.
- The Supreme Court rejected the school district’s position that the Establishment Clause of the First Amendment required it to stop Coach Kennedy’s 50-yard line prayer.



Kennedy: Legal Analysis

- Was Kennedy’s prayer “private speech?”
 - Kennedy’s Position: Engaged in a sincerely held religious exercise by giving “thanks through prayer” briefly and by himself on the football field.
 - School District’s Position: District was required to stop the prayers to avoid endorsement of religious activity and prevent students from coercion.



Kennedy: Legal Analysis

Court: *Pickering* Balancing Test:

1. Is employee speaking “pursuant to their official duties” or as a “private citizen addressing a matter of public concern?”
2. If employee is speaking as a private citizen on a matter of public concern, can employer show that its interests outweigh the employee’s private speech rights?



Kennedy: Legal Analysis

Court Ruling – Applying the *Pickering* Test – Part 1

- Kennedy’s speech was **private** speech.
 - Made outside of his coaching duties.
 - Not instructing or coaching players during his prayers.
 - Coaches appeared to be “off-the-clock” during post-game period.



Kennedy: Legal Analysis

Court Ruling – Applying the *Pickering* Test – Part 2

- District **did not** establish a compelling reason to stop Kennedy’s private speech.
- Court relied (in part) on the following:
 - District never actually endorsed Kennedy’s speech, and no complaints that it did.
 - No evidence of coercion or pressure on students to join the prayer.



Kennedy: Hypothetical

- The president of a public university’s Student Government Association informs you that the Dean of Students, who serves as the SGA advisor, has instituted a practice of beginning each SGA meeting by engaging in a moment of silence. During the moment of silence, the Dean clasps her hands together and bows her head. After remaining silent for one minute, the Dean says “Amen” and the SGA meeting proceeds. The SGA President says that several SGA members raised concerns with this new practice. The Dean responded that the students could simply leave the room during the moment of silence if they did not want to participate.
 - Based on the Court’s holding in *Kennedy*, are the Dean’s actions permissible?
 - How should you respond to the SGA President’s concerns?



Kennedy: Takeaways

- **Does not** mean colleges must always allow employees to pray on campus.
- Employees acting pursuant to and within their official duties are subject to the employer’s right to regulate their speech.
 - A factual inquiry considering all circumstances is required, not just reliance on the employee’s job description.



Kennedy: Takeaways

- Review your institution's policies and procedures governing speech and/or religious expression on campus.
 - Add or strengthen language stating that expressions of employees on private time are not college endorsed.
 - Assess job descriptions and language regarding employees' supervisory responsibilities for students beyond the classroom or extracurricular activities.
- Concerns about coercion of students or other employees to join in religious expression should be based on evidence, not speculation.

Flag (and Other) Displays: *Shurtleff v. City of Boston, Massachusetts*

May 2, 2022

142 S. Ct. 1583



Shurtleff: Factual Background

- In 2005, Boston created a program to allow private groups to request use of a flagpole outside of Boston City Hall to raise flags chosen by the group.
- The city never denied a request . . . until 2017.
- In 2017, Shurtleff requested to fly a Christian flag, and the City Commissioner denied his request based on the Establishment Clause of the First Amendment.



Shurtleff: Factual Background

- Shurtleff claimed a violation of the Free Speech Clause of the First Amendment and sought an immediate order requiring Boston to allow the flag.
- The District Court and Court of Appeals denied Shurtleff's request, holding that flying private groups' flags from city hall amounted to government speech.
- Shurtleff appealed to the Supreme Court, asking it to decide (a) whether the flags Boston historically allowed constituted government speech, and (b) whether Boston could deny Shurtleff's flag-raising request under the First Amendment.





Shurtleff: Holding

- Supreme Court ruled in favor of Shurtleff, finding that Boston's flag raising program constituted private citizen speech and that denying Shurtleff's request constituted impermissible viewpoint discrimination.



Shurtleff: Legal Analysis

Does Boston's flag-raising program constitute government speech?

- Government speech vs. private expression:
 - Effect of government **inviting people to participate**
- Court considered historical practice of flag flying at government buildings (indicative of City's stance that flag flying is government speech).
- But Court noted the City's lack of meaningful involvement in selection of flags or crafting of the flag's messages to support finding of private speech.





Shurtleff: Legal Analysis

Did City's denial of Shurtleff's request constitute viewpoint discrimination, in violation of the First Amendment?

- Court held that:
 - When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."

Shurtleff: Hypothetical

- At Perkoski Community College, there is a large bulletin board located in the Student Center, which students commonly refer to as "Joe's Wall," after the current College President. Joe's Wall is known around campus as the designated location where official College announcements are posted.
- Earlier this year, the College began allowing student organizations and community groups to reserve a space on Joe's Wall for one week per semester to post advertisements and flyers. The College's reservation form only asks for the name of the organization and the dates on which the organization wishes to reserve space on Joe's Wall. An unofficial student organization called LAA ("Life Above All") has just submitted a reservation form, requesting to reserve a space on Joe's Wall during finals week to post flyers. The College's Student Activities Director looks up LAA on social media and sees pictures of the group's members on various streetcorners around town, passing out flyers containing Bible verses.
 - Can the College deny LAA's reservation request? Why or why not?
 - What if instead of containing Bible verses, the flyers being passed out by the LAA members in the social media photos contained graphic depictions of abortion procedures?

Shurtleff: Takeaways

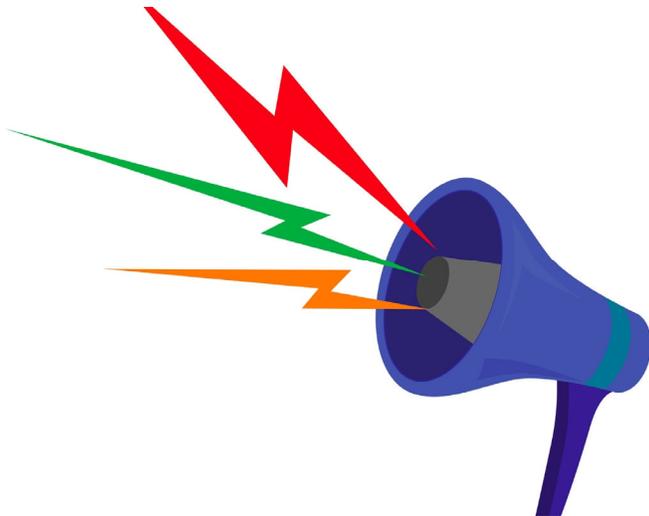
- Government entities (including public institutions of higher education) may not impermissibly discriminate based on viewpoint when regulating expressive activities in a public forum.
- Government speech or private speech?
 - Key factor is the **amount of government control**
- Institutions should be aware of any policies or practices that commingle the appearance of institution-sponsored speech and private speech.



Censure of Elected Officials: *Houston Community College System v. Wilson*

March 24, 2022

142 S. Ct. 1253



Wilson: Factual Background



- Wilson was elected to serve on the Board of Trustees for the Houston College Community System (“HCC”) in 2013.
- In 2017, Wilson began to voice concerns about the Board.
- Wilson hired private investigators to investigate other Board members and publically broadcasted his concerns through robo-calls and the local radio station.



Wilson: Factual Background

- The Board adopted a resolution censuring Wilson.
- The resolution required Wilson to “immediately cease and desist from all inappropriate conduct” and warned him that any further inappropriate behavior would result in more disciplinary actions.
- Wilson then brought suit, arguing that the Board’s censure resolution violated his right to free speech under the First Amendment.



Wilson: Factual Background

- The District Court granted HCC’s motion to dismiss Wilson’s complaint for lack of standing and for failure to state a claim.
- The Court of Appeals reversed, finding that Wilson’s reporting of potential “municipal corruption” was protected “speech on a matter of public concern” and that the Board’s censure resolution violated his First Amendment rights.
- Wilson sought Supreme Court review.



Wilson: Holding

- The Supreme Court reversed, concluding that the Board’s resolution censuring Wilson did not violate the First Amendment.



Wilson: Legal Analysis

The Supreme Court noted numerous examples of elected bodies censuring their members, including as far back as 1811 in the United States Senate.

The Court noted that, although elected bodies can censure their members for various reasons, there may be circumstances where a verbal censure could violate the First Amendment.

Wilson: Legal Analysis

- The Court also considered Wilson's claim that the censure was a material (and therefore impermissible) adverse action in response to his speech.
- The Court determined that the censure was an immaterial adverse action.
 - Elected board member is expected to shoulder a degree of criticism about their public service.
 - First Amendment allows elected representative to speak freely about government policy, but it cannot be used to silence other representatives seeking to do the same.
 - The Board's censure of Wilson did not prevent him from doing his job, it did not deny him any privilege of office, and he did not allege that the censure was defamatory.
 - The censure did not inhibit Wilson's ability to speak freely.

Wilson: Hypothetical

- A community member has been regularly attending the board meetings of her local public college for the past two years. The community member almost always speaks during public comment and often talks about her disagreements with the board's decisions. At last month's meeting, the community member took her comments a step further, claiming that the board chair hasn't paid her taxes in five years and demanding that the chair resign from the board and be thrown in jail. The board chair wants to send the community member a letter, directing that she cease and desist her personal, targeted attacks on the chair and stating that any future comments she wishes to submit to the board must be in writing.
- Would the chair's proposal violate the First Amendment?

Wilson: Takeaways

- The Supreme Court's holding in *Wilson* is limited to elected bodies (including college and university governing bodies) and censure of one member by other members of the same body.
 - It does not involve expulsion, exclusion, or any other form of punishment.
 - It entails only a First Amendment retaliation claim, not any other claim or any other source of law.
- College and university governing bodies are permitted to maintain standards of behavior and decorum
 - Generally allowed to censure members who engage in inappropriate conduct or behavior, including expressive activity that violates standards of decorum.

Emotional Distress
Damages:
*Cummings v. Premier
Rehab Keller, P.L.L.C.*

April 28, 2022

142 S. Ct. 1562



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Cummings: Factual Background

- Cummings was deaf and legally blind, and communicated with others using American Sign Language (“ASL”).
- Cummings experienced chronic back pain and chose Premier Rehab Keller, P.L.L.C. (“Premier”) for physical therapy services.
- Cummings requested that Premier provide an ASL interpreter during her treatment. Premier declined, noting that their therapist could communicate with her using other methods.
- Cummings left Premier, but ultimately came back and again requested an ASL interpreter.
- Premier declined a second time.

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Cummings: Factual Background

- Cummings sued Premier, alleging violations under the Americans with Disabilities Act (“ADA”), Rehabilitation Act and Patient and Affordable Care Act (“ACA”).
- The District Court granted Premier’s motion to dismiss, ruling that Cummings failed to state a plausible claim for damages under any of the three statutes.
- Cummings appealed the District Court’s holding that damages for emotional distress are unrecoverable under the ADA, Rehabilitation Act and ACA.
- The Court of Appeals affirmed, and Cummings filed an appeal with the Supreme Court.



Cummings: Holding

- The Supreme Court affirmed, holding that emotional distress damages are not recoverable in a private action to enforce the ADA, Rehabilitation Act or ACA.



Cummings: Legal Analysis

Key factor: whether a funding recipient had “clear notice” of liability when accepting the funds.

Recipients of federal funds have clear notice of liability expressly written into the statute. Assumed to have clear notice of **general** contract liability and “traditionally available” remedies.



Cummings: Takeaways

- The Supreme Court’s ruling can also be interpreted to bar emotional distress damages under:
 - Title VI of the Civil Rights Act of 1964 (prohibiting race, color and national origin discrimination in federally funded programs and activities)
 - Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in education programs and activities receiving federal funds).
- The ruling benefits Colleges and universities who are often named defendants in lawsuits filed by students, employees and community members alleging violations of the ADA, Rehabilitation Act, Title IX and/or Title IX.



Summary



- *Kennedy*: A public official's speech is considered that of a private citizen when they are acting outside of their duties as an employee.
- *Shurtleff*: When government speech and speech by private citizens commingle, the government's ability to regulate the speech of private citizens based on viewpoint may be limited by the First Amendment.
- *Wilson*: Elected bodies are able set rules for decorum and, in most cases, may censure elected members without fear of violating the First Amendment.
- *Cummings*: A public body accepting federal funds is only liable for damages of which the public body has "clear notice" when accepting the funds.





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STUDENT AND EMPLOYEE DIVERSITY, EQUITY, AND INCLUSION INITIATIVES: CONSIDERATIONS FOR DEI PLANNING & SURIVING DEI LEGAL CHALLENGES

September 22, 2022

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Introduction

- Colleges and universities have been leaders in understanding and advocating for more diversity and in implementing diversity, equity and inclusion initiatives (DEI)
- DEI initiatives are being used much more frequently by educational institutions and public and private employers and must be crafted to avoid actions that violate non-discrimination laws and the U.S. Constitution.
- This presentation will examine various student and employee DEI initiatives and the legal and community challenges these initiatives often face.



Defining “Diversity”, “Equity” and “Inclusion”

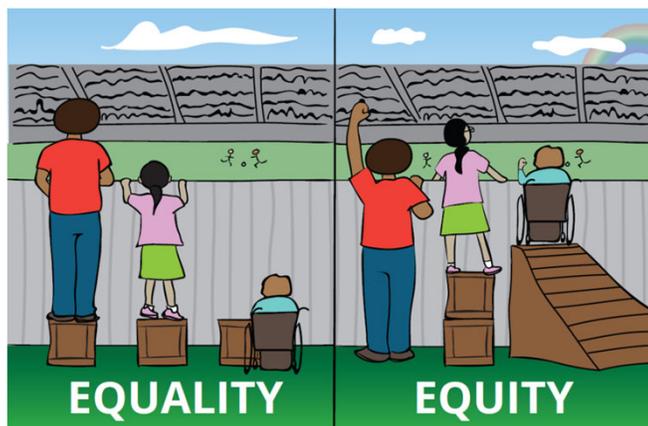
Diversity refers to the individual differences that sets one person apart from another. These include demographics such as race, national origin, sex, religion, sexual orientation, ableism, age and more.



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Defining “Diversity”, “Equity” and “Inclusion”

Equity speaks to fairness and a leveling of the playing field. Equity can mean employers offering diverse employees a variety of supportive measures to ensure they have an opportunity at being successful, and are treated fairly.



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Defining “Diversity”, “Equity” and “Inclusion”

Inclusion refers to bringing traditionally excluded individuals into programs, processes, leadership positions and decision-making roles whereby they feel valued, respected and included in the organization.

“Diversity is being invited to the party, inclusion is being asked to dance.”
Verna Myers, Diversity Advocate.



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The Benefits of Workplace Diversity and Inclusion



Leads to better creativity and problem-solving



Assists instructors and staff to better serve diverse students



Increased employee retention



Improvement in hiring of diverse and younger applicants as these applicants seek and expect a diverse workplace



Improvement in student and community relationships

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Relevant Laws Related to DEI Programs and Initiatives

DEI plans should be drafted and implemented in compliance with federal laws, and the U.S. Constitution:

- Title VII of the Civil Rights Act;
- Title VI of the Civil Rights Act;
- U.S. Constitution's Equal Protection clause.



Additionally, colleges should review and be mindful of their state's anti-discrimination laws.



Legal Challenges to Workplace DEI Initiatives

Workplace DEI initiatives face legal challenges claiming they are:

- A form of unlawful discrimination against employees or applicants for employment based on protected categories such as race or sex;
- Creating preferential treatment for certain employees based only on race or sex,
- A violation of the Constitution's equal protection clause: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process..."
- An unfair advantage for job applicants and employees only because of their protected characteristics.



Community Challenges to Employer DEI Initiatives

- Community and “outside” pressures may present challenges to DEI plans often based on:
 - A misunderstanding of what DEI is;
 - Outdated concepts that DEI means race based hiring quotas and preferential treatment;
 - Concerns that DEI initiatives will lead to employment of “unqualified” instructors, administrators and staff;
 - “Cultural wars” that our society is currently facing.
- Regular communications and focus groups meeting with your community, at which the Colleges DEI plans are shared and discussed, can help lessen these challenges.



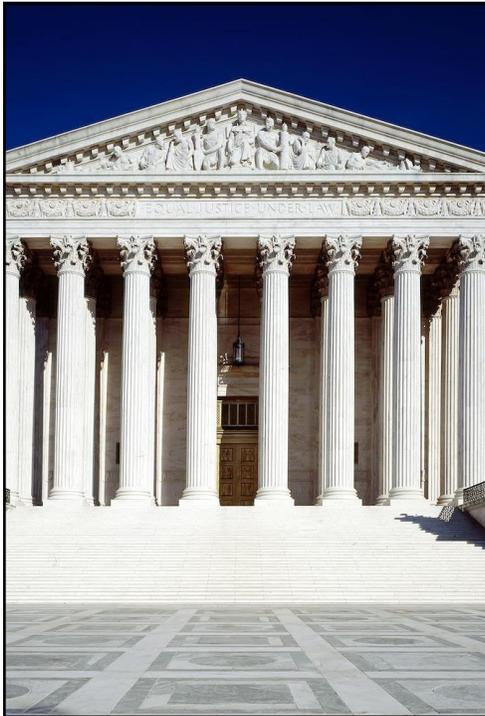
Relevant Legal History Of Affirmative Action (What We Now Call DEI)

United Steel Workers of America v. Weber (1979)

United Steel Workers of America implemented an “Affirmative Action Plan” reserving 50% of the eligible positions in its training program for black employees. The plan was implemented to rectify the historic and systemic refusal to include black employees in the training program precluding their eligibility for promotion and salary increases.

- Brian Weber, a white employee, applied for and was passed over for the training program. He filed suit alleging the training program was a form of race discrimination in violation of Title VII.
- In a 5 – 2 decision, the Supreme Court upheld the training program as a valid method of eliminating prior racial segregation and discrimination at the company.
- The Court noted that the plan did not prohibit white employees from advancing in the company because they were still eligible to participate in the training program.





Wygant v. Jackson Board of Education (U.S. Supreme Court 1986)

In response to community and school racial tension, the school board and teachers' union agreed to add a provision to their collective bargaining agreement (“CBA”), stating that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of lay-off.

The CBA provision, according to the district, was designed to align with the District’s hiring goal of increasing the percentage of minority teachers.

- Certain white teachers who were laid off, although more senior to minority teachers retained, filed suit alleging the CBA provision violated the Equal Protection Clause of the Constitution.



Wygant v. Jackson Board of Education (1986)

- Although unable to reach a majority decision, five justices of the Supreme Court did agree that the layoff provision violated the equal protection clause. According to these justices, in order to avoid an equal protection claim, the District must show that it had a **compelling governmental interest** for using race as a part of its lay-off provision.
- Additionally, in rejecting the District’s reliance on racial tension, in the community and society, the court stated “societal discrimination” alone is not a compelling governmental interest.
- However, the Court agreed with the District’s argument that a voluntary Affirmative Action Plan need not be preceded by a court decision that the school district engaged in past discriminatory acts.



Minneapolis Public Schools' Teacher Lay-Off Initiative

- On March 25, 2022, the Minneapolis Public Schools and Minneapolis Federation of Teachers (MFT) reached agreement on a new collective bargaining agreement (“Agreement”).
- The new Agreement, in part, contains a “layoff” provision similar to Wygant. The “layoff” or “reduction-in-force” provision in the Minneapolis School’s Agreement also exempts from lay-off, “teachers from under-represented populations” as a way to remedy the continuing effects of past discrimination.
- Although, there have been statements that the language is discriminatory and threats to pursue a legal challenge by certain groups, no lawsuit has yet been filed.



Employer Legally Compliant DEI Initiatives to Increase Diversity and Inclusion

- Revising job descriptions and employment ads to attract more diverse talent and removal of non-inclusive language from college media and publication;
- Placing job advertisements in publications, and online/social media sites focused on a more diverse audience;
- Recruitment at colleges and universities at which more diverse students are enrolled;
- Requiring that a diverse candidate(s) be included at each stage of the hiring/interview process;
- Train screening and hiring team members on the college’s DEI goals, non-discrimination policies and implicit bias; and
- Creating workplace practices, procedures and supports to help retain, mentor and promote diverse employees within the college.



Workplace DEI Initiatives

Community College Want-To-Do Better #1 has developed a Workplace Equity and Diversity Policy after hearing from students and the community that there are not enough black or male instructors in the college. The new policy and its initiatives are shared with college instructors, staff and administrators at the beginning of the school year during a 30-minute meeting. The policy and initiatives are not shared with the community members.

The DEI initiative focuses on increased recruitment efforts directed toward black and male applicants, Want-To-Do-Better's DEI plan also commits to hiring two black and two male instructors each year.

Thoughts on the College's DEI plan and its rollout?



Legal Requirements for Student DEI Initiatives

Required Components of the Student Equity Plans & Practice

- On June 7, 2022, Governor Pritzker signed into law, effective immediately, HB 5464 (P.A. 102-149), which amends the Illinois Board of Higher Education Act ("Act").
- All public institutions of higher education in Illinois must develop and submit to the Illinois Board of Higher Education ("IBHE") an equity plan and practices to increase the access, retention, completion and student loan repayment rates of minorities, rural students, adult students, women, and individuals with disabilities who are traditionally underrepresented in education programs and activities.



Development and Reporting on Student Equity Plans & Practice

IBHE, in collaboration with the Illinois Community College Board (“ICCB”), must:

1. require each covered institution to submit an equity plan and implement practices that, “at a minimum, close gaps in enrollment, retention, completion and student loan repayment rates for underrepresented groups and encourage all private institutions of higher education to develop and submit such equity plans and implement such practices”;
2. conduct studies of the effectiveness and outcomes of the institution’s methods and strategies outlined in an institution’s equity plan;
3. require components of an institution’s equity plan to include strategies to increase minority students’ student loan repayment rates;
4. require institutions to “establish campus climate and culture surveys”; and
5. continue to mandate all public institutions of higher education “and encourage all private institutions of higher education,” to submit data and information to determine compliance with these requirements.



Challenges to Student DEI Initiatives

Creating Legally Sound DEI Initiatives

- The adoption or implementation of college policies or practices that treat students differently based on a legally protected category must satisfy constitutional requirements under the 14th Amendment’s Equal Protection Clause.
- The Supreme Court has held that government classifications based on race or ethnicity are only constitutional under the Equal Protection Clause if they survive “strict scrutiny.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
- To satisfy this standard, racial/ethnic classifications must be aimed at a “compelling governmental interest” and must be “narrowly tailored” to reach that goal.



Challenges to Student DEI Initiatives, contd.

- In contrast to the strict scrutiny that applies to race-conscious policies or programs, policies or programs that condition benefits based on sex trigger "intermediate scrutiny," which means that such programs must:
 - Serve "important" or "exceedingly persuasive" (rather than "compelling") governmental objectives; and
 - Be "substantially related" (rather than "narrowly tailored") to the achievement of those objectives.
 - This standard is less demanding than strict scrutiny, but nonetheless requires the justification to be "exceedingly persuasive" and "genuine, not hypothesized or invented post hoc in response to litigation." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).



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Challenges to Student DEI Initiatives, contd.

- "Rational basis" is the lowest standard of constitutional review, and is applied to classifications based on characteristics other than race/ethnicity and sex.
 - Rational basis requires only that the purpose or interest be "legitimate," and that the means be "rationally related" to the accomplishment of that interest.
 - The U.S. Supreme Court has consistently recognized that the educational benefits associated with increasing student diversity – improved teaching and learning and preparation for a 21st Century workforce, for instance – are compelling as a matter of law, and establishes an important baseline to guide higher education institutions in their framing of related institutional goals.
- There are also First Amendment and free speech considerations for the expression of diverse perspectives, points of view, and speech.

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Students for Fair Admissions v. Harvard; and Students for Fair Admissions v. UNC (Certiorari granted Jan. 24, 2022)

- Issue: (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether the institutions are violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.
- **Significance:** This case is significant because it has the potential to severely curtail or bar the consideration of race and use of race-conscious practices in the college and university admissions or other processes.



Students for Fair Admissions v. Harvard; and Students for Fair Admissions v. UNC (Certiorari granted Jan. 24, 2022)

- **Summary:** Students for Fair Admissions, Inc. (“SFFA”), a nonprofit organization, sued Harvard College (“Harvard”) and the University of North Carolina (“UNC”) in separate actions.
- SFFA alleged that Harvard and UNC used a “race-conscious undergraduate admissions process” in violation of the Equal Protection Clause and Title VI.
- In the case against Harvard, SFFA specifically alleged that Harvard was discriminating against Asian Americans in their admissions process.

Discrimination
Discrimination is the
prejudicial treatment act
Discrimination against
disallowing one from
recognized as empl
discrimination

Students for Fair Admissions v. Harvard; and Students for Fair Admissions v. UNC, (Certiorari granted Jan. 24, 2022)

- The First Circuit Court of Appeals held that Harvard’s race-conscious admissions policy survived strict scrutiny because it had a (1) compelling interest (exposure to different cultures and viewpoints), (2) was narrowly tailored (no racial balancing or using race as a “mechanical plus factor”), and (3) there were no other “race-neutral alternatives” that would work in Harvard’s admissions process. Because Harvard’s admissions policy had a compelling interest, was narrowly tailored, and had no other alternatives, the First Circuit affirmed the district court’s finding that Harvard did not discriminate against Asian Americans.
- The U.S. District Court found that while UNC had a compelling interest in using race in its admissions process, there was a “genuine dispute of material fact” that UNC’s admissions process was narrowly tailored because UNC may have used race “as more than a ‘plus’ factor in its admissions decisions.” The court also determined that there was a “genuine dispute” that UNC had considered all available “race-neutral alternatives” when evaluating the admissions process.



Common Student DEI Initiatives to Increase Diversity

- Reviewing admission requirements for specialized/limited enrollment programs with an eye toward promoting uniformity/consistency to the extent practicable.
- Tailoring recruitment efforts to be inclusive of historically underrepresented students.
- In support of retention, where analysis finds that all other factors (e.g., parental educational attainment, standardized test scores, grades, etc.) being equal, minoritized racial group membership or gender, statistically result in a lower success rate at the institution, engaging in focused efforts for students of the relevant race and gender, or other membership, may be justifiable so long as programming is inclusive, with participation by other students who demonstrate need.



Common Student DEI Initiatives to Increase Diversity, contd.



- Financial aid and scholarship offerings and requirements often advance institutional diversity goals associated with mission-driven aims and may also foster a more inclusive and broadly diverse student body.
- English Language Learner identification and support.
- Access for students with disabilities and pregnant students.
- Inclusive teaching strategies and curricular coverage of areas related to diversity, equity and inclusion.
- Training of recruitment team members and faculty on best practices to avoid discrimination and implicit bias.



Student DEI Scenario

College Want-To-Do Better #2 has developed a “Latinx Heritage Mentee and Scholarship Program” to increase matriculation and graduation rates of Latinx students. Through the brand new “Latinx Mentorship Program,” the college encourages students who identify as Latinx to apply to receive scholarship monies and a spot in the program where the recipients would receive both group and one-on-one mentorship from faculty members.

The application process requires prospective and current students who wish to participate to write a 500-word essay about their Latinx heritage and provide some sort of documentation that provides evidence of that heritage. The college refuses to accept any students into the program where it finds that their Latinx heritage is “too attenuated” or nonexistent.

Thoughts on the College’s DEI plan?

Student DEI Scenario

What if the program was not based on race/ethnicity, but rather on gender?

- For example, Women in Engineering or Men in Social Work Mentee and Scholarship Program.

What if the program was not based on race/ethnicity/gender, but rather on military/veteran status?

Thoughts on the College's DEI plan now?



Final Thoughts on Employee & Student DEI Planning

Creating Legally Sound DEI Initiatives

- What is the current reality at the College? Examine demographics, past history, hiring, promotion data, student enrollment, achievement and matriculation data.
- Evaluate the success, or lack thereof, of current DEI initiatives. Where are the gaps between your goals and the results?
- Communicate with all stakeholders the benefits of diversity, equity and inclusion to obtain more “buy-in” and support for the initiatives;
- Carefully review and analyze employee and student data used to support your DEI initiatives. Make sure your metrics support your initiatives;
- Understand and be aware of the legal constraints on DEI initiatives;
- Remember, “neutral” DEI policies and practices are more likely to withstand legal challenge;
- Include a process within the DEI Plan for regular review and assessment;
- Establish end date(s) for your DEI initiatives.





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PURCHASING AND BIDDING: HOW TO IMPROVE DIVERSE CONTRACTORS' PARTICIPATION

September 22, 2022

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Introductions



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What is the Business Enterprise Act?

- The Business Enterprise for Minorities, Females, and Persons with Disabilities Act (30 ILCS 575/1, et seq.), or “the Business Enterprise Act, is a law requiring state agencies and public institutions of higher education including community colleges to set aspirational goals to increase the participation of businesses owned by minorities, females, and persons with disabilities in contracts that these public bodies award.



How does the Business Enterprise Act Apply to Community Colleges?



- The Act was amended on August 25, 2015 to specially include community colleges, as well as to establish aspirational goals, compliance requirements and reporting obligations for community colleges and other institutions of higher education.

What Businesses Qualify under the Act?

For each of the applicable categories (minority, female, and persons with disabilities), the business must be at least 51% owned by one or more persons who fits that criteria (minority, female, or person with a disability).

The business must also be managed and have its daily operations controlled by one or more of the persons who fits that criteria.

Businesses that are owned by at least 51% of any combination of minority persons, females, or persons with disabilities also qualify, even if none of the classes alone hold a 51% interest on their own.

What Contracts Remain Subject to the Act?



The Act continues to apply to any contract required by law for the award of a State contract.



As explained below, certain waivers and exemptions continue to apply to contracts entered by community colleges.

What Contracts Remain Subject to the Act?

- Construction Contracts – “all State contracts entered into by a ... public institution of higher education for the repair, remodeling, renovation or construction of a building or structure.”
- Professional Service Contracts – contracts for insurance services, investment services, information technology services, accounting services, architectural and engineering services, and legal services.
- State Contracts – “all contracts entered into by ... any public institution of higher education including community college districts, regardless of the source of the funds with which the contracts are paid.”

Does the Source of Funds for the Contract Matter?

- **No.** The new definition of “state contracts” explicitly states that state contracts means “all contracts entered into ... regardless of the source of funds with which the contracts are paid...” State construction contracts are defined as “state contracts” that concern construction activities.
- The Act does acknowledge that if any contract subject to the Act becomes subject to any federal laws or regulations which conflict with the Act’s requirements, then the federal laws and regulations shall apply.



What “Aspirational Goals” Are Established by the Business Enterprise Act?

- In 2015, the Business Enterprise Act was amended to add the word “aspirational” when establishing goals for the award of contacts by community colleges and other State agencies.
- The term distinguished goals from quotas, which would be illegal.
- As a result, the procedures and efforts of community colleges in attempting to meet the goals will be critical in gauging compliance.

What are the “Aspirational Goals” for Contracting under the Business Enterprise Act?

- As a result of Public Act 101-0657, the aspirational goals under the Business Enterprise Act increased on January 1, 2022.

Type of Contracts	Total % of MFD*	Minority Owned Businesses	Female Owned Businesses	Persons with Disability Owned Businesses
State Contracts	20% -30%	11% -16%	7% -10%	2% -4%
Construction Contracts	20% -30%		At least 50% of the total minority and female contracts	
Professional Services Contracts	20% (collectively)	11%	7%	2%

*MFD – Businesses owned by minorities, females, and persons with disabilities.



Are the Aspirational Goals Subject to Change?

- Yes. After the recent amendments, all aspirational goals are contingent upon the results of the most-recent disparity study conducted by the State, which community colleges will need to monitor in order to adjust their goals.

Bidding Requirements – 110 ILCS 805/3- 27.1



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Section 3-27.1 of the Community College Act

- Requires community colleges to publicly bid all contracts for purchase of supplies, materials or work involving an expenditure over \$25,000, or a lower amount as required by Board policy.
- Invitation to bid must be advertised in newspaper published in the community college district at least 10 days before the deadline to submit bids.
- Bidder must receive at least three days' notice of time and place of bid opening.
- Bids must be sealed by the bidder and opened by Board member or college employee at public bid opening where the bids are announced.

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Section 3-27.1 of the Community College Act

- Contracts shall be awarded to “lowest responsible bidder considering conformity with specifications, terms of delivery, quality, and serviceability.”



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Bidding Exemptions –
110 ILCS 805/3-27.1

EXEMPT

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Professionals

- Contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part (architects, engineers, consultants, construction managers, etc.).



Change Orders

- Publicly bid contracts for materials or work that, due to unforeseen circumstances not the fault of the contractor, must be revised to increase the contract price by less than 10% of the contract price.



Dealer Maintenance

- Contracts for the maintenance or servicing of, or provision of repair parts for, equipment which are made with the manufacturer or authorized service agent of that equipment where the provision of parts, maintenance, or servicing can best be performed by the manufacturer or authorized service agent.



Data Processing

- Purchases and contracts for the use, purchase, delivery, movement, or installation of data processing equipment, software, or services and telecommunications and inter-connect equipment, software, and services.



Copy Machines and Supplies

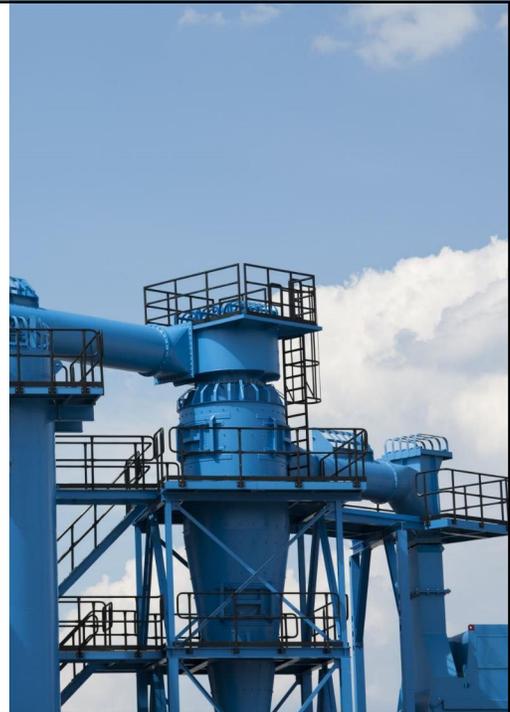
- Contracts for duplicating machines and supplies.



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Natural Gas

- Contracts for the purchase of natural gas when the cost is less than that offered by a public utility.



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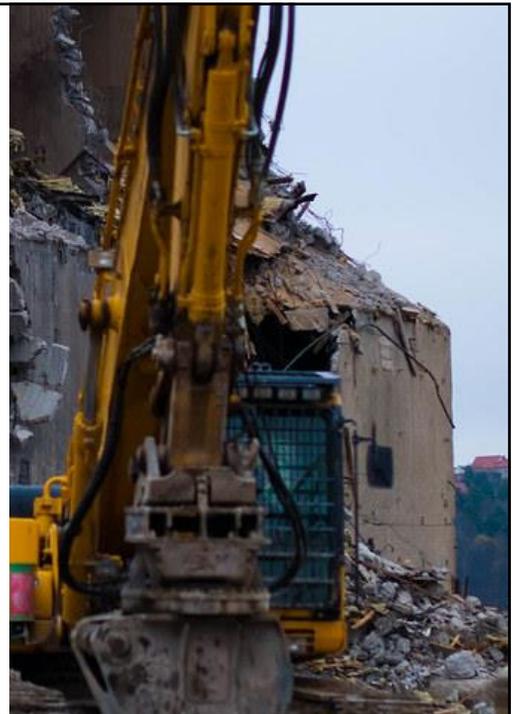
Used Equipment

- Purchases of equipment previously owned by some entity other than the district itself.



Small Remodeling Project Exception

- Contracts for repair, maintenance, remodeling, renovation, or construction not exceeding \$50,000 and not involving a change or increase in the size, type, or extent of an existing facility.



IGAs

- Contracts for goods or services procured from another governmental agency.

Single Source

- Contracts for goods or services which are economically procurable from only one source, such as for the purchase of magazines, books, periodicals, pamphlets and reports, and for utility services such as water, light, heat, telephone or telegraph.



Perishable Foods and Beverages

- Contracts for the purchase of perishable foods and perishable beverages.

Emergencies

- Funds expended in an emergency and approved by $\frac{3}{4}$ of the members of the Board.



Governmental Joint Purchasing Act 30 ILCS 525/1, et seq.



Allows community colleges to jointly purchase personal property, supplies, and services with any other governmental unit.



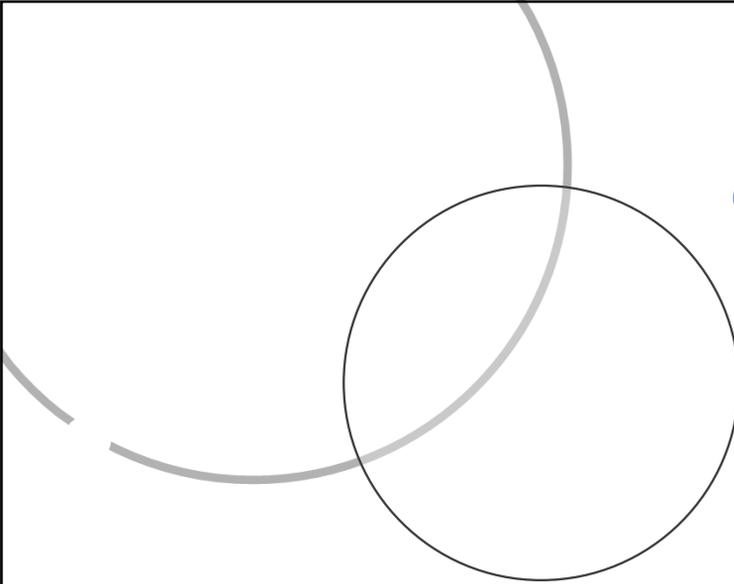
The bidding procedures in Section 4 of the Governmental Joint Purchasing Act supersede the bidding procedures under Section 3-27.1 of the Community College Act.



Governmental Joint Purchasing

- Needs to meet certain legal requirements in accordance with both:
 - Cooperative consists of all government agencies.
 - Purchases must be based on competitive solicitations.
 - Bids and proposals solicited by public notice as specified by the Joint Purchasing Act.
 - May solicit bids or proposals by sending requests by mail to prospective suppliers.





● The Bidding Process

- Bid Specifications
- Certainty Required
- Sole Sourcing
- Bid Addendum & Questions
- Pre-Bid Meeting



The Bidding Process



Bid Submittals

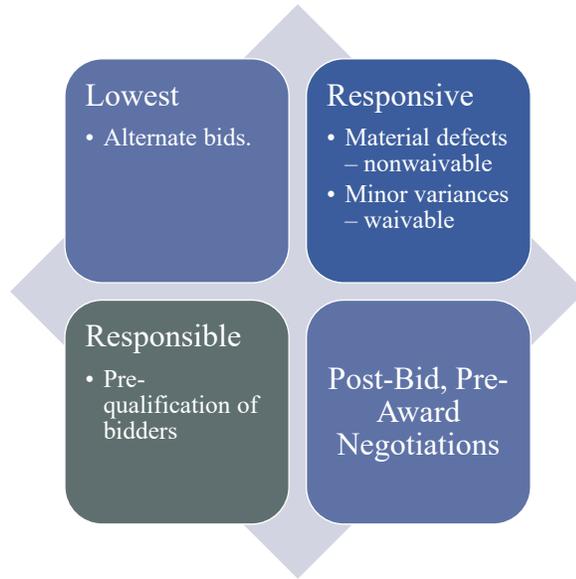
- Sealed Bids
- Electronic Bids
- Timeliness of Bids
- Modification, Withdrawal or Re-submittal of Bids Before Bid Opening

Public Opening and Reading of the Bids

- Withdrawal or Modification after the Bids Are Received



How is a Contract Awarded as a result of Bidding?



Local Government
Professional Services
Selection Act – 50
ILCS 510/1, et seq.



Applies to

- Architectural, engineering, and land surveying services.



Notice

- College must provide notice of potential project and request a statement of interest by:
 - (1) Mailing or emailing firms that filed a statement of qualifications and performance data with the college; or
 - (2) Advertising with a newspaper of general circulation throughout the district; or
 - (3) Advertising on the College's website.

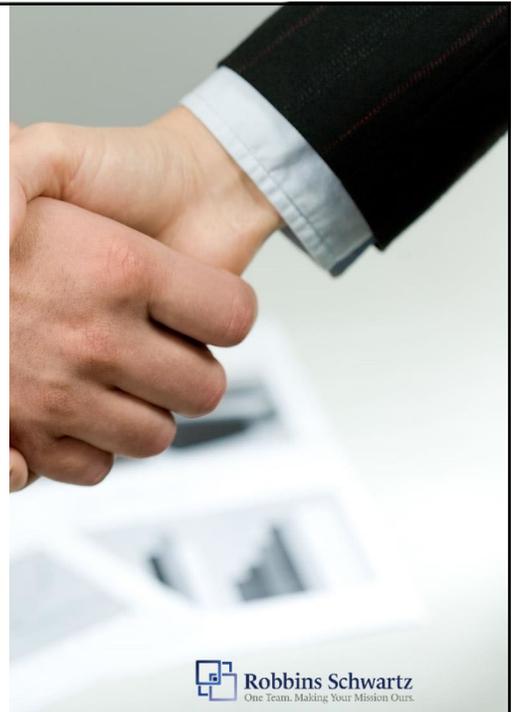
Evaluation

- The College may evaluate responding firms based on factors that the College specifies in its notice documents. At this point in the process, the College cannot seek estimates of cost or compensation from the service provider.



Selection Procedure

- After evaluations, the College selects the three most qualified firms and ranks them in terms of qualifications. College shall negotiate with most qualified firm and attempt to reach an agreement with compensation that the College determines in writing to be fair and reasonable.



Selection Procedure

- If the College cannot negotiate a satisfactory contract, the College shall terminate negotiations and shall begin negotiations with second ranked firm.



Exemptions from the Local Government Professional Services Selection Act

- If the College has a “satisfactory relationship” with one or more firms, no need to go through selection process; the College can simply contract with its previously-retained firm for the new project.



Exemptions from the Local Government Professional Services Selection Act

The College may waive this statutory procedure if it determines by resolution that an emergency situation exists and necessitates selection of a firm in an expeditious manner.

The College may waive this statutory procedure if the cost of the professional services is expected to be less than \$40,000.

S.N. Nielsen Company v. Public Building Commission of Chicago, 81 Ill.2d 290 (1990)

- The plaintiff in this case was the low bidder for the construction contract to build a college in Chicago. The Public Building Commission (“PBC”) was the defendant and awarded the contract to the third lowest bidder based on a formula awarding credits for minority employees.
- The Illinois Supreme Court held that the PBC’s consideration of the contractors’ affirmative action measures complied with the “lowest responsible bidder” standard. The Court stated that a contractor’s affirmative action is something that “may be expected or demanded under the terms of the contract”, particularly when antidiscrimination statutes demonstrate a legislative intention to consider the social responsibility of a contractor in matters of public bidding. Further, the Court stated that the term “responsible” was broader than strictly “financially responsible” and that in proper circumstances, the contract could be awarded to one who is not the lowest bidder, when in the public interest and in the exercise of the public body’s discretion.

Court Street Steak House, Inc. v. County of Tazewell, 163 Ill.2d 159 (1994)

- In Tazewell, the plaintiff was the low bidder on a food-service contract for the Tazewell County Jail who filed a lawsuit challenging the County's award of the contract to the second lowest bidder, a not-for-profit corporation that provided food service training for the mentally handicapped. Plaintiff alleged that it was the low bidder and that the County did not have discretion to award the contract to the second lowest bidder even though the company was a not-for-profit corporation.
- Relying on the reasoning in Nielsen, the Illinois Supreme Court held the County's award of the contract to the second lowest bidder did not violate the competitive bidding statute because the County was also benefited through the food service training for the mentally handicapped. The Court also stated that additional benefits which show proper concern for the welfare of the public body does not indicate an arbitrary preference for one contractor over another.





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TO GET INVOLVED OR TO NOT GET INVOLVED? STUDENT ACTIVISM ON CAMPUS AND THE ROLE OF THE INSTITUTION

September 22, 2022

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Introduction



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Agenda

1. College Protests in the News
2. Legal Background
3. Scenarios
4. Guidance and Takeaways
5. Q&A





Students protest Miami's response to the overturn of Roe v. Wade

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Students protest against a Seattle university's ban on hiring LGBTQ employees

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**Kent, UA student protestors:
'Divisive concepts' bill designed to
comfort white people**

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Marquette students protest lack of diversity, cancel
welcome event

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Legal Background



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Legal Background

The First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech...

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Legal Background

- Public colleges and universities are considered governmental entities.
- Public educational institutions must adhere to the First Amendment's free exercise and free speech clauses.
- But note: The First Amendment's requirements apply only to protected speech.



Supreme Court Precedent

Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)

- Seminal Supreme Court decision on student speech
- Students wore armbands in protest of the Vietnam war.
- School officials cannot censor student expression unless it will create a substantial disruption or material interference in school activities or invade the rights of others.
- “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”



Supreme Court Precedent

Healy v. James, 408 U.S. 169 (1972)

- The Central Connecticut State College President denied official student group status to Students for a Democratic Society (“SDS”), due to concerns that the group’s mission was “antithetical to the [College’s] policies,” that SDS was associated with a national organization that had alleged ties to violent activity, and that recognizing SDS as a student organization would be “disruptive.”
- The Court ruled in favor of SDS, affirming public college students’ First Amendment free speech rights.
- But note: The Court acknowledged that colleges could prohibit activities that “infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”



Time, Place, Manner Regulations

Limitations imposed by the government (the institution) on student expressive activity:

1. Must be content neutral.
2. Must be narrowly tailored to serve a significant governmental interest.
3. Must leave open ample alternative channels for communicating the intended message.





Time, Place, Manner Regulations

- ✓ During business hours
- ✓ Not in the middle of a classroom
- ✓ Reservation requests
- ✓ Noise level
- ✓ Number of participants
- ✓ Size and placement of signs on college/university property
- ✓ Use of college/university intellectual property



Case Example

Young America's Foundation v. Stenger, 2021 WL 378005 (N.D.N.Y. Aug. 24, 2021).

- The State University of New York ("SUNY") Binghamton Young Republicans held a tabling event at a high traffic area of campus known as the Spine.
- The Young Republicans did not obtain a permit from the Student Association to table, which was required for student organization tabling events.



Young America's Foundation v. Stenger

- The purpose of the tabling event was to promote an upcoming event by a President Trump advisor called, "Trump, Tariffs, and Trade Wars," which was to be co-sponsored by the non-profit organization Young America's Foundation ("YAF").
- After about three hours without incident, the College Progressives, another SUNY Binghamton student group, confronted the College Republicans at the tabling event, and there was a verbal and physical altercation between the two groups.
- University Police arrived at the scene and requested that the College Republicans leave.



Young America's Foundation v. Stenger

- The Vice President of Student affairs condemned the tabling event, which took place on the same day as a school shooting, stating that the College Republicans' display which included "posters with gun imagery" was "intended to be provocative."
- SUNY Binghamton did not take any action against the College Progressives after the confrontation.



Young America's Foundation v. Stenger

The "Trump, Tariffs, and Trade Wars" event was packed, and about two minutes into the event, protest erupted.

University Police escorted the Trump advisor out of the event, but took minimal action against the protesters.

After the event, the College Republicans were suspended by the Student Association as a result of their failure to receive a proper permit for the tabling event.



Young America's Foundation v. Stenger

- YAF and the College Republicans filed suit against various officials of SUNY Binghamton, alleging First Amendment violations. SUNY Binghamton officials filed a motion to dismiss.
- The District Court granted the motion in part and denied the motion in part.
 1. **Tabling Event** - the requirement for student groups to obtain a permit prior to tabling was an appropriate time-place-manner regulation, and the SUNY Binghamton officials could not be held liable for the Student Association's decision to suspend the College Republicans for failing to obtain the required permit prior to their tabling event.
 2. **Tariff Event** - it was plausible that the SUNY officials' conduct in removing the speaker (effectively canceling the event) constituted viewpoint discrimination, in violation of the plaintiffs' First Amendment rights.



Young America's Foundation v. Stenger

- Question for Thought:
 - Do you think the Vice President's public condemnation of the Young Republicans' tabling event impacted the Court's analysis?

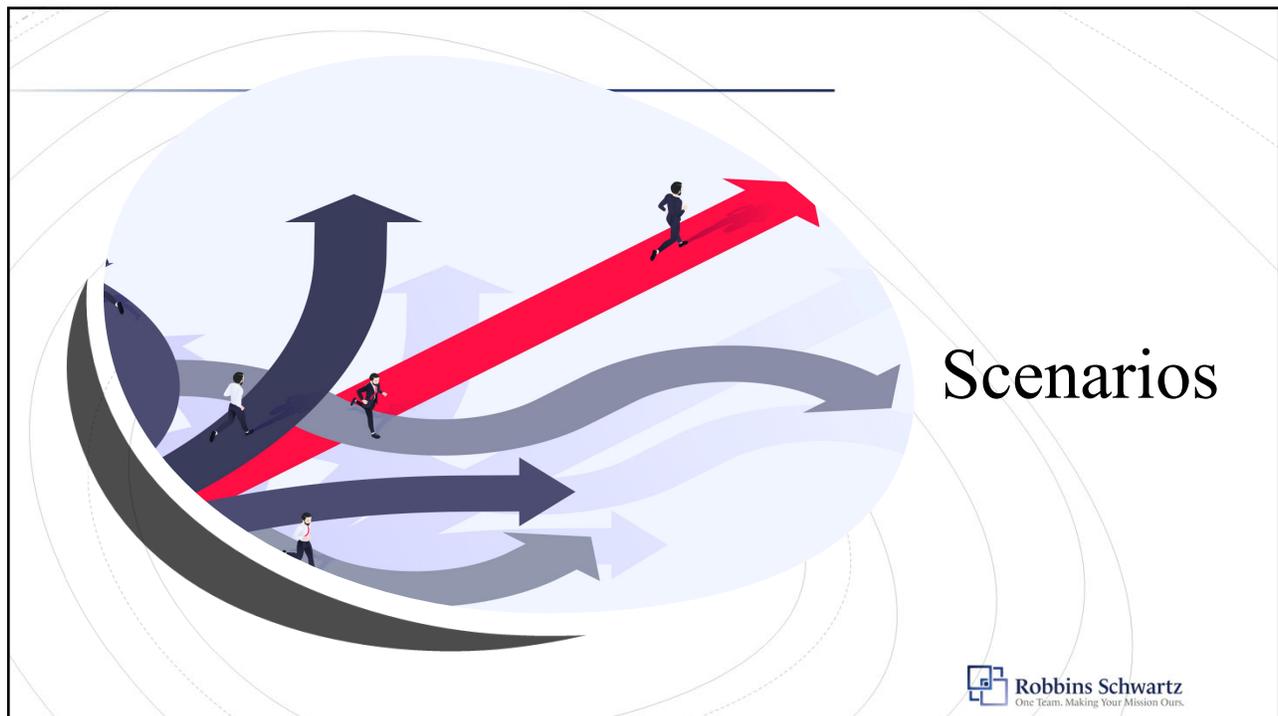


Legal Background: Recap

- Expressive activity on a variety of subjects is protected by the First Amendment, including current events, critique of a college or university, and even speech that many may find extreme and hateful.
- A higher education institution may restrict or prohibit unprotected speech (ex. incitement, fighting words, obscenity). . . but establishing that speech falls outside the purview of the First Amendment can be difficult.

Legal Background: Recap

- ☒ Public colleges and universities may not regulate speech, expression, or assembly based on the content or viewpoint of the speech.
- ☑ Public colleges and universities can place reasonable time, place, and manner restrictions on speech, expression, and assembly.
- ☑ Institutions can also regulate speech that causes (or is likely to cause) a substantial and material disruption.



Scenario #1:

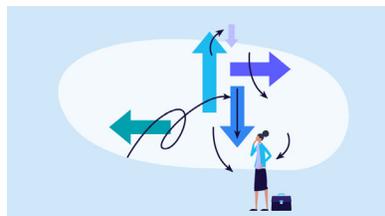
One of a college's reproductive rights student groups organizes a protest initially involving more than 40 students in response to recent Supreme Court decisions and state legislative efforts. In an effort to attract attention, the group decides to protest inside the college's main building, which houses a large number of lecture classrooms. Within the first 30 minutes of the protest, the Dean of Students begins receiving emails from students and faculty stating that the student group is promoting a threatening environment. A growing number of students—both protesters and non-protesters—begins to assemble in the hallway as word of the protest spreads. Consequently, students can no longer pass freely through the halls, and the noise from the gathering is disrupting classes.

What options does the college have?



Scenario #1:

Would your answer change if the college previously allowed an environmental preservation organization to protest in the same building, and the group similarly blocked the halls and made noise while classes were occurring?



Scenario #2:

A small group of students has begun sitting at a table in an outdoor common area on campus with literature about the Second Amendment and signs with the words “Come and Take It” including a picture of an AK-47. The students do not leave the table or approach other students and only engage with students who initiate conversations about the display. The students did not submit a reservation request form or otherwise notify college administrators of their intent to publicly display their signs and literature. After the students have been sitting at the table for a few weeks, two students file a Student Conduct complaint and demand that the students’ table be shut down.

What can/should the college do?



Scenario #2:

The students continue their outdoor tabling activities, and they begin bringing new signs to the table, which depict the college logo next to a picture of the college mascot holding an AK-47.

What options does the college have now?



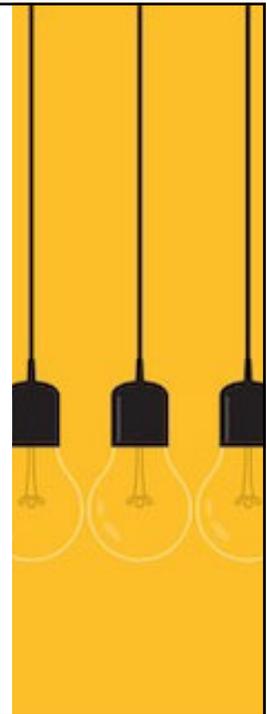
Scenario #3:

The Queer Alliance student group decides to protest outside of the English department's administrative office for recently failing to offer tenure to a beloved LGBTQ+ instructor of color. The protest initially takes place on a Monday for two hours during lunch. On Wednesday, the students return to the English department office area at the same time of day to continue the protest for the same duration of time. While the protests can be faintly heard in some of the small seminar classrooms, no students have complained. The Department Chair, however, is growing agitated by the ongoing effort. He first politely asks the students to leave, but they refuse. He then calls the Dean of Students Office and says if the protests don't stop, he will call campus police and consider other options.

How should the Dean respond?



Guidance and Takeaways



Guidance and Takeaways

General Principles

- In general, student speech must be disruptive or interfere with other students' rights in some way for regulation or restriction by the institution to be permissible.
- It is not sufficient for the speech to be regulated or restricted simply because other students, employees or members of the community are uncomfortable or offended.
- When speech or expression becomes disruptive or creates safety concerns or threats, the institution can intervene. But remember: Censorship should be a last resort.



Guidance and Takeaways

Time, Place and Manner Issues

- Ensure that regulations are applied uniformly and consistently across all types of speech.
- Work with students to make them aware of regulations (ex. timely submission of required forms, reservation requests, limitations on size and format of event, limitations on location/date/time) and build relationships with student groups.
- Think of planning as a dynamic process; active management is needed as events and responses to them evolve.



Guidance and Takeaways



Disruptive Speech

- Notify appropriate administrators and campus police when an activity or event becomes disruptive. Include details about the specific disruptive conduct.
- Focus on the conduct, not the message.
- Do not offer any immediate response to resolve the situation; allow time to evaluate options for making an informed statement and/or taking other responsive measures.



Guidance and Takeaways

Disruptive Speech

- When restrictions are imposed, develop a factual record that clearly demonstrates why it was reasonable to forecast a material disruption or how there was an actual disruption.
- Courts are less likely to second guess an institution's restrictions on expressive activity where there is a factual record supporting the institution's decision.
- Judicial deference is even more likely if the record also shows that the college did not opt for censorship as the first resort.





Question and Answer





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THANK YOU

Other words in the word cloud: HVALA, OBRIGADO, RAHMET, GRAZIE, 谢谢, DANKE, SHUKRAAN, TAK, DANK JE, KIITOS, BARKA, СПАСИБО, TACK, ARIGATO, TAKK, MERCY, GRACIAS, EUCHARISTO.



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NAVIGATING EMPLOYEE USE OF PTO AND LEAVES: *PANDEMIC TO ENDEMIC EDITION*

September 22, 2022

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Introductions



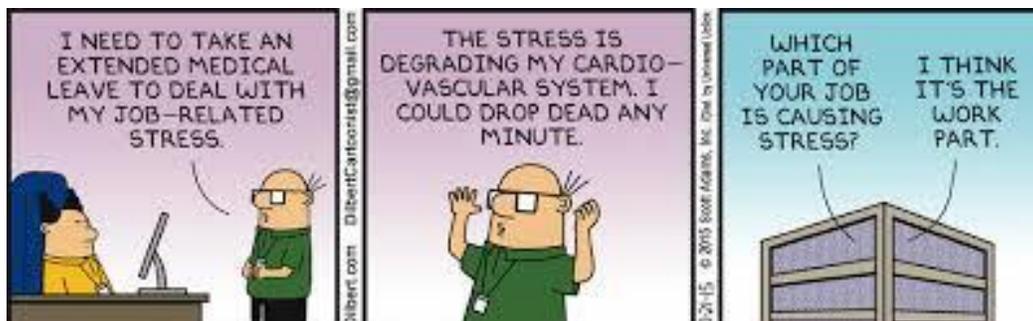
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Navigating Employee Use of PTO and Leaves



State Statutory Paid Time Off for a COVID-19 Reason

Public Act 102-697 (eff. 4/5/22)

- COVID-19 Sick Leave
- COVID-19 Paid Administrative Leave



COVID-19 Sick Leave

Return of Sick Leave Days Used During the 2021-2022 Academic Year for a COVID-19 Reason

- Conditions:
 - Fully Vaccinated (Booster Not Required)
 - Employee restricted from college property for a COVID-19 Reason
 - Employee caring for a child in elementary or secondary school who is restricted from school property





COVID-19 Sick Leave

COVID-19 Qualifying Reasons

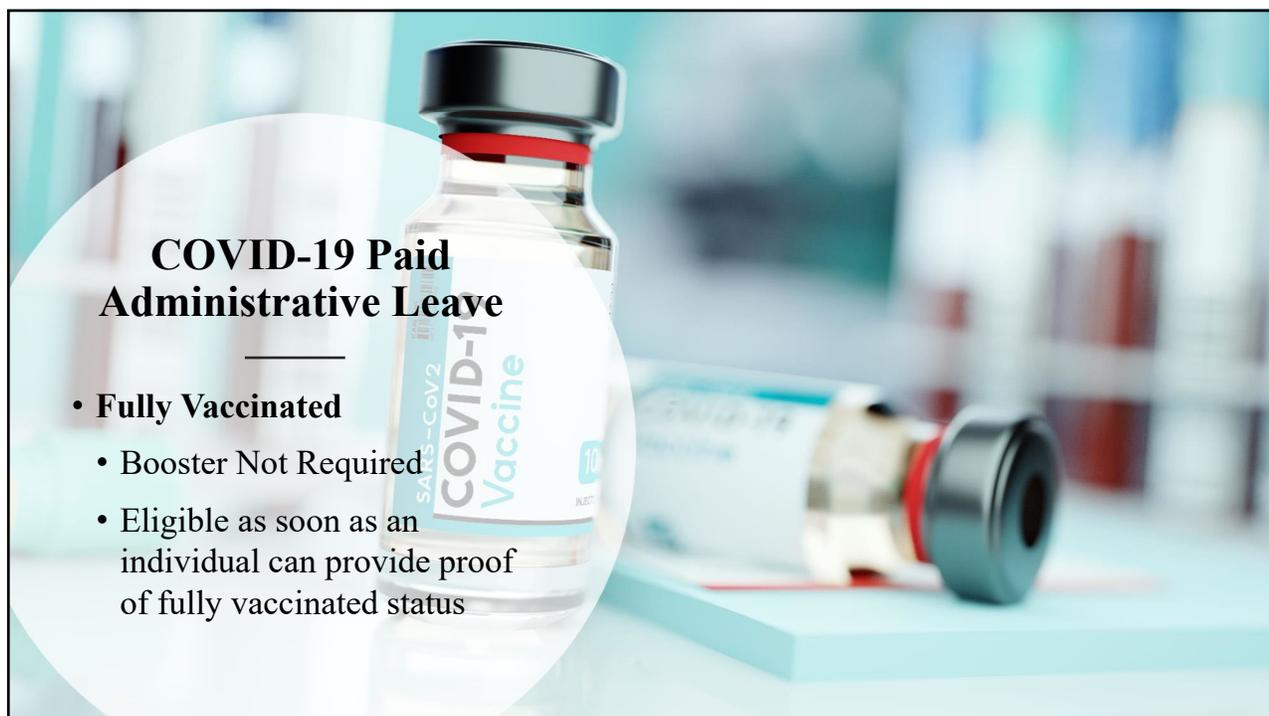
- COVID-19 positive (diagnostic test)
- COVID-19 probable (antigen test)
- Close contact to a confirmed COVID-19 case and is required to be excluded from college or school property
- Required by college or school district policy to be excluded from property



COVID-19 Paid Administrative Leave

- Applies to “fully vaccinated” individuals employed on or after 4/5/22
- Retroactive and Prospective Application
- Receive COVID-19 Paid Administrative Leave Days for COVID-19 Absence
- Governor has Declared a Disaster Due to Public Health Emergency and an LPHD has issued guidance, mandates or rules that restrict an employee’s access to property
- Documentation Can Be Required





COVID-19 Paid Administrative Leave

Retroactive and Prospective Application

- Apply retroactively only to the start of the 2021-2022 academic year for qualifying individuals who lost pay for a COVID-19 reason.
- Apply prospectively (beginning 4/5/22 and forward) for qualifying individuals/reasons (irrespective of whether they have personal, paid benefit days) so long as the Governor has issued a disaster declaration due to a public health emergency and a community college, the State or an LPHD has issued guidance, mandates or rules that restrict access to college/school property.
 - *No limit on provision of days, if for a qualifying COVID-19 reason.*
 - *No accrual or carryover.*



COVID-19 Paid Administrative Leave

COVID-19 Qualifying Absence

- COVID-19 positive (diagnostic test)
- COVID-19 probable (antigen test)
- Close contact to a confirmed COVID-19 case and is required to be excluded from college or school property
- Required by college or school district policy to be excluded from property



COVID-19 Paid Administrative Leave

During Times When Governor has Declared a Disaster Due to Public Health Emergency

- Successive disaster proclamations have been issued since March 12, 2020
- No disaster proclamation = No Statutorily-provided COVID-19 Paid Administrative Leave
 - *May negotiate greater benefits with union or set greater benefits by policy*



Sample Certification Form

SAMPLE EMPLOYEE CERTIFICATION FOR COVID-19 PAID ADMINISTRATIVE LEAVE

Eligibility for Receipt of COVID-19 Paid Administrative Leave: Absence must be for a COVID-19 qualifying reason (defined below), the employee must be “fully vaccinated against COVID-19” (2 weeks after receipt of 2 shots in dual shot series or 1 shot in single shot series), the Governor must have declared a disaster for a public health emergency, and a community college, the State or a local department of public health has issued guidance, mandates or rules that restrict access to college/school property.

Receipt of Paid Administrative Leave for a COVID-19 qualifying reason includes:

1. I had a confirmed COVID-19 diagnosis via a PCR test.
2. I had a probable COVID-19 diagnosis via an antigen test.
3. I was in close contact with a confirmed COVID-19 case and was required to be excluded from college property.
4. I was required by the college or college policy to be excluded due to COVID-19 symptoms.
5. To care for my child who was unable to attend their elementary or secondary school because they were: a confirmed COVID-19 case, a probable COVID-19 case, a close contact with a confirmed COVID-19 case or required by the school or school district policy to be excluded due to COVID-19 symptoms.

Documentation Required by the College

Supporting documentation for receipt of COVID-19 paid administrative leave for a COVID-19 qualifying reason includes: a copy of the positive PCR test result, a copy of the positive antigen test result, doctor’s note, written notice of close contact designation and/or notice of exclusion from the College (for self) or from your child’s elementary or secondary school. *Supporting documentation must be attached to the request.*

Certification

I certify that I am entitled to COVID-19 paid administrative leave on each of the following days because I was absent for a COVID-19 qualifying reason (as defined above). List date of each absence and the COVID-19 qualifying reason from the above list (use a second sheet if necessary):

I hereby certify I have read all the above statements and the information I submitted is true and correct to the best of my knowledge. I understand that falsifying an employee certification form or supporting documentation for receipt of COVID-19 paid administrative leave may result in disciplinary action up to and including termination.

Employee Printed Name and Signature: _____



Bargaining Considerations for COVID-19 Paid Administrative Leave

Provide notice to union prior to use of certification form and meet to discuss, if requested.

Avoid bargaining now about what happens when the statutory benefits end.



PTO Scenarios Under Disaster Declaration



COVID-19 Paid Administrative Leave or Other Paid Time Off (PTO)?

- A fully vaccinated employee reports an absence to care for their college-aged child who was diagnosed with COVID-19.
- A fully vaccinated employee reports an absence because their 2-year old cannot attend daycare due to a runny nose.
- An employee received the first shot of Moderna and reports an absence the next week following a COVID-19 diagnosis.
- A fully vaccinated employee was diagnosed with COVID-19 2 months ago and reports an absence for fatigue which they believe is stemming from the prior COVID-19 diagnosis.
- A fully vaccinated employee reports an absence to stay home with their fully vaccinated high school student who was exposed to COVID-19 over the weekend.



What Happens When COVID-19 Paid Administrative Leave Ends and COVID-19 Still Exists?

1. Refer to collective bargaining agreements, board policies or employment contracts for permissible use of sick leave.
2. Exercise management rights set forth in collective bargaining agreements, board policies or employment contracts to request/require documentation to support absence request.
3. Consistently apply leave provisions.
4. If negotiate extension of COVID-19 paid administrative leave days, look at narrow application for eligibility (i.e., self-COVID diagnosis or if exhaust other PTO), limited number of days (i.e., linked to quarantine/isolation protocol) and short duration.



Application of Other Leave Rights to COVID-19

Family and Medical Leave Act

Americans with Disabilities Act

Board Policies

Collective Bargaining Agreements

Individual Employee Contracts



Family and Medical Leave Act ("FMLA")



FMLA Generally

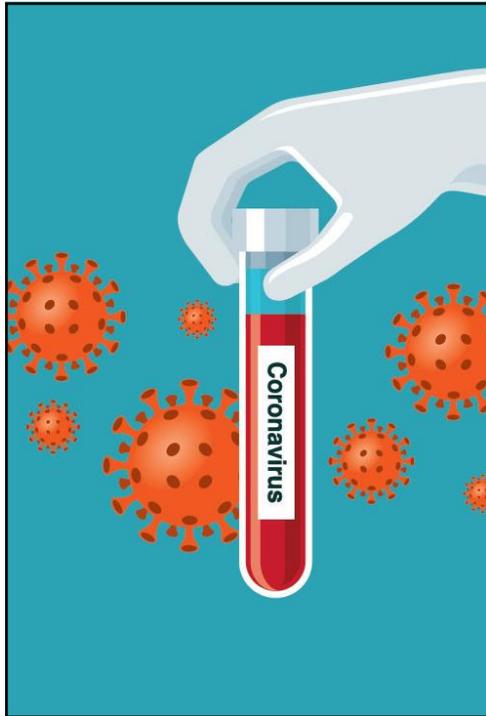
- An eligible employee is entitled to 12 weeks of unpaid leave during a 12-month period for:
 - the employee’s own serious health condition that renders the employee unable to perform the essential job functions, or
 - to care for the employee’s spouse, son, daughter, or parent who has a serious health condition.



FMLA Generally

- “Eligible Employees”:
 - Employed by a covered employer;
 - Employed for at least 12 months; and
 - Worked at least **1,000 hours** in the 12-month period immediately preceding the request for leave. *See Public Act 102-335 (eff. 1/1/22)*





Is COVID-19 a Serious Health Condition?

- A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that:
 - Necessitates and overnight stay in a hospital or other medical care facility;
 - Incapacitates the employee or the employee’s family member (for example, unable to work or attend school) for more than three consecutive days and that include ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care, such as prescription medication); or
 - Chronic conditions that cause occasional periods when the employee or the employee’s family member is incapacitated, and which require treatment by a health care provider at least twice a year.
- Depending on the severity of symptoms, COVID-19 and related conditions could be a “serious health condition” under the FMLA.



Rights Upon Return - FMLA



- An employee is entitled to reinstatement to the same or equivalent position as the employee held at the commencement of the leave.
- An employee is entitled to reinstatement even if a replacement employee is hired or the job has been restructured to accommodate the employee’s absence.
- Fitness for duty certifications may be required so long as it’s part of a uniformly-applied policy or practice.



FMLA Leave to Avoid Getting COVID-19?

- Can an employee stay home under FMLA leave to avoid getting COVID-19?
 - No, per the Department of Labor.
 - *The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition.*
 - *Leave taken by an employee solely for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.*



Americans with Disabilities Act (“ADA”)



ADA Generally

- An employee is protected under the ADA if the employee is a qualified individual with a disability.
- “Disability” is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual.



ADA Generally

Overview of the ADA



- A “qualified individual with a disability” is an employee who can:
 - Satisfy the requisite skills, experience, education, and other job-related requirements of the position; and
 - Perform the “essential functions” of the position with or without a reasonable accommodation.



ADA Generally

- The ADA “interactive process” is the process of determining:
 - Whether the employee has a “disability” under the ADA; and
 - Whether a reasonable accommodation is available that would allow the employee to safely return to the workplace to perform the essential functions of his or her position.



Is COVID-19 a Disability Under the ADA?

Under the EEOC’s most-recent guidance, it is unclear at this time whether COVID-19 is or would be a disability under the ADA.

Notwithstanding, an employee may seek a reasonable accommodation for a disability that puts the employee at a greater risk of severe illness from COVID-19.



Is a Leave of Absence a Reasonable Accommodation Under the ADA?

- It may constitute a reasonable accommodation under the ADA.
- Per the EEOC, leave qualifies as a reasonable accommodation “when it enables an employee to return to work following the period of leave.”
- However, a U.S. Court of Appeals for the Seventh Circuit ruled that a multi-month non-Family and Medical Leave Act leave of absence is not a reasonable accommodation under the ADA, because an extended leave of absence does not give a disabled employee the means to work — instead, it excuses the employee from working, which the Seventh Circuit ruled is not required by the ADA. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (2017).



Rights Upon Return - ADA

If a leave is granted under the ADA, the employee is entitled to the position they held prior to the leave, assuming the employee is still qualified for the position, unless the employer demonstrates that holding the job open would cause undue hardship to the business or organization.



COVID-19: ADA Requests for Family Members



- Are employees entitled to ADA accommodations, including a leave of absence, based on a family member's medical condition?
 - *No. The ADA only requires employers to provide reasonable accommodations necessary for a qualified employee's own disability.*

COVID-19: ADA Requests for General Fears and Anxiousness



- Are employees entitled to accommodations based on a general fear of exposure to COVID-19?
 - *General fear or worry about returning to work due to COVID-19 is not a legal basis for an employee to remain off campus. However, certain preexisting mental health conditions could qualify as ADA disabilities, such as anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder.*

COVID-19: ADA Requests

- In response to accommodation requests based on a general fear or anxiety, the employer should first determine whether the condition is a disability under the ADA, including requesting medical documentation if needed.



COVID-19: ADA Interactive Process



- The employer may seek documentation verifying:
 - The employee has a disability as defined by the ADA; and
 - The accommodation is needed because the disability may put the individual at higher risk from COVID-19.

Refusing a Reasonable Accommodation

- What if an employee with a disability that puts them at higher risk from COVID-19 asks for an extended leave of absence as an accommodation but there are other reasonable accommodations that can be provided in the workplace which would allow the employee to continue working?
- The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual *may* be considered not qualified.



Long COVID

- Long COVID may qualify as a serious health condition under the FMLA.
- Joint Guidance from The Office for Civil Rights of the Department of Health and Human Services and the Civil Rights Division of the Department of Justice explains that long COVID can be a disability under the ADA.
- According to the Centers for Disease Control and Prevention (CDC), people with long COVID have a range of new or ongoing symptoms that can last weeks or months after they are infected with COVID-19 and that can worsen with physical or mental activity.
- An individualized assessment is necessary to determine whether a person's long COVID condition or any of its symptoms substantially limits a major life activity, which would be covered by the ADA.



Long COVID

Examples of common symptoms of long COVID include:

- Tiredness or fatigue
- Difficulty thinking or concentrating (sometimes called “brain fog”)
- Shortness of breath or difficulty breathing
- Fast-beating or pounding heart (known as heart palpitations)
- Chest pain
- Cough
- Joint or muscle pain
- Depression or anxiety
- Organ damage



Long COVID and Leaves

- **Is an employee experiencing symptoms of long COVID eligible for COVID-19 Paid Administrative Leave?**
 - Only if a disaster declaration is in place, the employee is fully vaccinated AND they are restricted from college property as a result of their symptoms.
- **Is an employee eligible for COVID-19 Paid Administrative Leave if their child is experiencing symptoms of long COVID?**
 - Only if a disaster declaration is in place, the employee is fully vaccinated AND the child is restricted from school property as a result of their symptoms.

Long COVID and Leaves



- **What steps should the College take if an employee is requesting FMLA for long COVID symptoms?**
 - Determine if the employee is eligible for FMLA leave and issue an eligibility notice and rights and responsibilities notice.
 - Require the employee to submit a completed Certification of Health Care Provider form.
 - Review the completed form and issue a designation notice, as appropriate or otherwise follow-up with the employee.



Long COVID and Leaves

- **What steps should the College take if an employee is requesting a leave of absence for long COVID symptoms and has exhausted or is not eligible for FMLA leave?**
 - Engage in the ADA interactive process to determine if the employee is entitled to a reasonable accommodation in the workplace or a leave of absence as a reasonable accommodation.





QUESTION & ANSWER



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A word cloud featuring the phrase "THANK YOU" in the center, surrounded by various international expressions of gratitude in different colors and sizes. The words include: HVALA, OBRIGADO, RAHMET, GRAZIE, 谢谢, KIITOS, DANKE, SHUKRAAN, TAK, DANK JE, THANK YOU, BARKA, СПАСИБО, MERCI, ευχαριστώ, GRACIAS, TACK, ARIGATO, and TAKK.



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EMPLOYEE STAFFING SHORTAGES: MID-TERM BARGAINING, BASE WAGE AGREEMENTS, SUBCONTRACTING, AND OTHER OPTIONS

September 22, 2022

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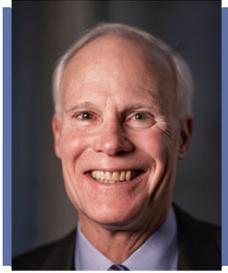
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Introductions



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What's the Problem?

- COVID-19 → the “Great Resignation”
 - In 2021, more than 47 million workers quit their jobs – CNBC
- Difficulties attracting and retaining employees
- Rising inflation



Unique Problems Faced by Higher Education

- In 2021-2022, the overall higher education workforce saw a decline in numbers. Source: CUPA-HR.
- The median salary increase for all higher education professionals was less than ½ of the 2021-2022 inflation rate. Source: CUPA-HR.
- Moody's Investor Service: expectation that colleges will face their highest expense growth in over a decade.
- Significant declines in student enrollment.



How to Address the Staffing Shortage Problem?

- Mid-Term Bargaining
 - Wage/Benefit Adjustments
- Subcontracting
- Successor CBA Negotiations



Mid-Term Bargaining Generally

- Section 10 of the Illinois Educational Labor Relations Act sets forth the scope of a college's duty to bargain:
 - “An educational employer and the exclusive representative have the authority and the duty to bargain . . . with respect to wages, hours, and other terms and conditions of employment, . . .”
- The Illinois Educational Labor Relations Board has held that an employer has a duty to mid-term bargain over issues not fully bargained over covered by the parties' CBA, absent an express waiver of mid-term bargaining or “zipper” clause.



What Mid-Term Changes Must be Bargained?

- “Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of service, its overall budget, the organizational structure and selection of new employees and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives . . .”



What if We Cannot Agree with the Union?

- You are not stuck. A college has the right to propose changes to bargaining unit employees' wages or benefits during the term of the CBA provided it notifies the union and bargains in good faith to agreement or impasse. Should an impasse be reached, the employer may implement its last best offer.
- What is impasse?
 - A stalemate in negotiations process which may prevent an agreement.
 - The IELRB will review each negotiation on a case-by-case basis to determine whether impasse exists.
- Can the union strike if it does not like the implemented terms?
 - Short answer – no, not during the term of the CBA.



Mid-Term Bargaining Options & Strategies

- Consider market value for the position(s) in question
- Targeted wage adjustments
 - Contact union representatives to begin discussions for mid-term adjustments.
 - Explain nature of the problem, proposed adjustment, and rationale.
 - Make clear this is targeted based upon the problem and not for all union members.
 - Option – negotiate a one-time adjustment to the starting wage rate for the position category and extend the maximum wage range or top salary step.
 - Memorialize the adjustments via memorandum of agreement.



Mid-Term Bargaining Options & Strategies

- Signing bonuses
 - Consider the specific bonus terms.
 - Still have a bargaining obligation even though it is to be paid to new hires. Notify the union of the proposed plan and bargain upon request.
 - Be prepared for union proposal of a concurrent “retention” bonus for current staff.
 - Memorialize any plan and include a “sunset” provision.



Mid-Term Bargaining Options & Strategies

- Remote work
 - Consider whether feasible for certain designated positions.
 - Key: can the employee perform their essential job duties effectively from home or must they be on-site?
 - If offering the option, consider terms of the proposed plan, including:
 - What positions are eligible?
 - Frequency?
 - Scheduling?
 - Work hours and tracking procedures?
 - Use of technology?

Mid-Term Bargaining Options & Strategies

- Remote work
 - Approach the union with the proposed plan and framework – must negotiate over the issue.
 - Distinguish from individual employee requests as an ADA accommodation.
 - Ensure that HR and the supervisor retain the right to determine eligibility and limit a position to on-site work.
 - Be clear that the option is not indefinite and depending on performance, the option can be modified at any time at management’s discretion.
 - Distinguish from “flex” scheduling.



Subcontracting

- Subcontracting is a mandatory subject of bargaining if members of the bargaining unit have a reasonable expectation of performing the subcontracted work.
- College should not subcontract any services which could be performed by union staff without negotiations unless:
 - The CBA specifically reserves the employer’s right to unilaterally subcontract services; or
 - The union expressly waives its right to bargain over the subcontracting decision.



Subcontracting

- To satisfy bargaining obligations, the college must:
 1. Notify the union that the college may consider subcontracting services.
 2. Meet with the union to provide an opportunity to discuss proposed decision.
 3. Provide necessary information to the union to allow it to prepare any alternative proposals.
 4. Give appropriate consideration to any union counterproposals.
 5. Memorialize any agreement to limit exposure to grievance or ULP charge.



Tips for Subcontracting

- Consider your specific CBA language and any limitations on management's ability to subcontract.
- Consider involving union in discussions about staffing shortages before a formal demand to bargain is issued.
- Provide formal written notice to the union of any proposed plan.
- Consider alternate hiring and retention options before subcontracting services.
- Consider proposing subcontracting on a temporary basis to staff hard-to-fill positions.

Successor CBA Negotiations

- Planning for Bargaining
 - Reviewing comparable employers' compensation packages is more important than ever – also consider non-educational comparable employers in area.
 - Review the entire compensation package, including insurance and retirement benefits, as well as when that contract was negotiated.
 - Consider whether any mid-term agreements were reached which would increase that package.
 - Consider other benefits the college provides that are unique and not offered by other employers.
 - Share data with the union and seek to obtain union agreement on the comparables.
 - Be prepared to respond to union contention that college is understaffed and that employees are overworked and underpaid.



Successor CBA Negotiations

- Use this as an opportunity to address the staffing shortage but consider whether it is more effective to address via mid-term bargaining outside of the CBA.
- Be armed with data to explain why targeted wage adjustments are necessary for certain hard-to-fill positions.
- Discuss signing bonuses and remote work options outside of the CBA.
- Contract Duration?
 - Be prepared to agree to a CBA of less than three years or a longer-term CBA with a contingent re-opener provision.



Successor CBA Negotiations

- Re-Opener Clauses
 - Provides for reconsideration of an issue (or issues) during the life of the agreement.
 - Explicitly includes the issue(s) to be reconsidered as well as the triggering event leading to the reconsideration.
- Drawbacks?
 - Require negotiation with and agreement from the union.
 - Both unions and employers often hesitant to include based upon uncertainty of future economic situation.
 - Waiver of a no-strike clause is a significant concession for management.





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BEST PRACTICES IN SAFEGUARDING DATA IN AN INCREASINGLY DIGITAL UNIVERSE

September 22, 2022

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Best Practices for Safeguarding Data in an Increasingly Digital Universe



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SEPTEMBER 22, 2022

Introduction



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Agenda

- Legal Requirements and Risk
- Threats Facing Higher Education
- Mitigating Potential Dangers
- Responding to Data Breaches and Other Cyber Threats
- Recent Trends and Hot Topics



Legal Requirements and Risk

Laws Impacting Data Privacy and Security at Institutions of Higher Education



The Family Educational Rights and Privacy Act (“FERPA”)

- FERPA defines “Education Records” to be information recorded in any way, including handwritten documents, electronic files, video or audio recording, that:
- Contains information directly related to a student; and
- Is maintained by the college.
- Examples of “Education Records” include: registration documents, grade reports, special education records, disciplinary records, and medical and health records that the school creates or collects and maintains.



The Family Educational Rights and Privacy Act (“FERPA”)

- FERPA defines “Education Records” to be information recorded in any way, including handwritten documents, electronic files, video or audio recording, that:
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- Examples of “Education Records” include: registration documents; grade reports; records concerning disability accommodations; disciplinary records; and medical and health records that the school creates or collects and maintains.



Education Records – Exclusions

- The term **education record** does **not** include:
 - Records that are **kept in the sole possession of the maker**, are used only as a personal memory aid and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;
 - Records of the **law enforcement unit** of an educational agency or institution;
 - Records **relating to an individual who is employed** by an educational agency or institution that are made and maintained in the normal course of business, relate exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose; and
 - **Treatment records.**
 - But note: A school may disclose an eligible student's treatment records for purposes other than the student's treatment, provided that the school has consent or an exception to FERPA's written consent exception applies. Once such occurs, the treatment records are considered education records and are subject to FERPA requirements.



Prohibitions under FERPA

- FERPA generally prohibits higher education institutions from disclosing personally identifiable information contained in a student's education records ("student PII") without the specific, dated, written consent of the student.
- There are a number of exceptions to this general prohibition, however.



PII Defined under FERPA

“Personally Identifiable Information” includes the following under FERPA:

- (a) the student’s name;
- (b) the name of the student’s parent or other family members;
- (c) the address of the student or student’s family;
- (d) a personal identifier, such as the student’s social security number, student number, or biometric record;
- (e) other indirect identifiers, such as the student’s date of birth, place of birth and mother’s maiden name;
- (f) information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances to identify the student with reasonable certainty; or
- (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.



Directory Information

- **Directory information** is “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.”
- Directory information may be released to the general public, unless an eligible student requests that any or all of their directory information not be released.
- Colleges must notify eligible students annually of the information that is considered to be "directory information" and of the procedures to be used to request that specific information not be released.

Disclosure of Student PII to Outside Contractors

- FERPA allows an educational institution to release student PII, without consent, to other school officials with a “legitimate educational interest” in such information.
- A contractor, consultant, volunteer or other party to whom the district has outsourced institutional services or functions may be considered a “school official” under FERPA, provided that the outside party:
 - Performs an institutional service or function for which the college would otherwise use employees;
 - Is under the direct control of the college with respect to the use and maintenance of student records; and
 - Is subject to FERPA’s requirements governing the use and re-disclosure of student PII.



Disclosure of Student PII to Researchers

- FERPA permits a college to release student PII, without consent, to organizations conducting studies for, or on behalf of the college, to:
 - Develop, validate, or administer predictive tests;
 - Administer student aid programs; or
 - Improve instruction.



Law Enforcement Records

- Investigative reports and other records **created and maintained** by a college's "law enforcement unit" for the purpose of law enforcement are not considered "education records" subject to FERPA. Accordingly, educational institutions may disclose information from law enforcement units to anyone, including outside law enforcement authorities, without student consent.
- But note: If the records are maintained by other school officials, outside the law enforcement unit, such records are education records subject to FERPA. Therefore, an institution's law enforcement unit records should always be maintained separately from a student's education records.



Law Enforcement Records

- If a college's law enforcement unit reviews or is given access to any education records, the education records remain subject to the FERPA requirements and do not lose their status as education records when in the possession of the law enforcement unit.
- For this exception to apply, educational institutions must indicate in its policy or information provided to students which office serves as the institutions "law enforcement unit."





Contracting Requirements

- Both the school official/contractor exception and the research/studies exception require that the school district have a **written agreement** with the outside entity to which it will be disclosing student PII.



Federal Privacy Law

- Currently no federal data privacy law that applies to all data
 - Rather, various federal laws regulate privacy with respect to different industries (FERPA for education)
- American Data Privacy and Protection Act (H.R. 8152)
 - Bipartisan support but questionable whether legislation can pass
 - Applicable to "covered entities": governmental bodies are excluded
 - Notable provisions include: duty of loyalty, data minimization, transparency, consumer data rights (right to review, correct, and delete), private right of action



Other Laws Relevant to Data Privacy and Higher Education Operations

- The Personal Information Protection Act ("PIPA")
- The Biometric Information Privacy Act ("BIPA")
- The Health Insurance Portability and Accountability Act ("HIPAA")
- The Gramm-Leach-Bliley Act ("GLB Act")
- General Data Protection Regulation ("GDPR")
- The Illinois Local Records Act



Privacy Tort Law

- Illinois recognizes four privacy torts
 - Intrusion upon seclusion
 - Appropriation of name or likeness
 - Public disclosure of private facts
 - False light
- Tort Immunity Act defenses

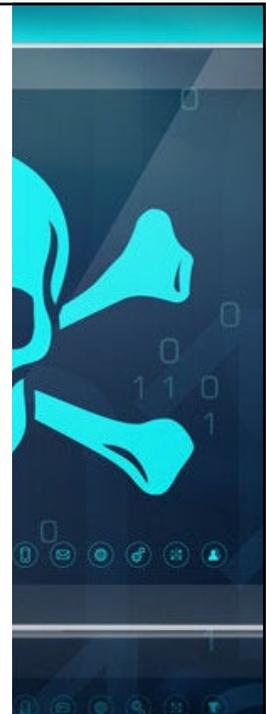


Other Considerations Relevant to Data Privacy and Higher Education Operations

- Service Agreements and Terms of Service
- Cyber Insurance Policies
- Board Policies
- Administrative Procedures
- Monitoring and Training



Threats Facing Higher Education



Growing Risk and Escalating Costs

- Ransomware cost government organizations across America \$18.88 billion in recovery costs and downtime in 2020 (Comparitech, March 17, 2021)
- 1,300 data breaches at U.S. school districts and colleges since 2005 (Comparitech, March 17, 2021)
- Since 2017, cyberattacks on state and local governments rose an average of 50% (BlueVoyant, August 27, 2020)



Growing Risk and Escalating Costs



- 1,300 data breaches at school districts and colleges since 2005 (Comparitech, March 17, 2021)
- Since 2017, cyberattacks on state and local governments rose an average of 50% (BlueVoyant, August 27, 2020)
- Ransomware cost government organizations across America \$18.88 billion in recovery costs and downtime in 2020 (Comparitech, March 17, 2021)



Growing Risk and Escalating Costs

- Pandemic brings growth of public-sector organizations moving to cloud computing and increased phishing risk (72% increase in attacks)
- Average Ryuk ransomware payment increases from \$1.3 million in Q1 2020 to \$7.4 million in Q4 2020
- Colleges and universities in particular saw a surge in ransomware attacks in 2021, with nearly two-thirds of institutions reporting ransomware attacks. Of those, nearly three-quarters were successful (Sophos, *The State of Ransome Ware in Education, 2021*)



Data Breaches – Legal Exposure and Increased Costs

- Potential claims against vendor and/or the college
- Miscellaneous costs
 - Notification costs and credit monitoring
 - Network shutdowns, business disruption, and additional software/programs
 - Insurance deductible, increased premiums, and legal expenses
 - Public relations issues



Responding to Data Breaches and Other Cyber Threats



Navigating a Cyber Incident

- Trust your Information Technology team, provide them the necessary training and allow them to lead
- Contact your insurance carrier and legal counsel immediately
- Defer to law enforcement authorities and the instructions of your insurance carrier
- Work with legal counsel to determine the obligations of the parties
- Forensic audit to identify source and scope of the incident, impacted students, and the notification response requirements





Mitigating Potential Dangers

Decreasing Exposure through Best Practices, Insurance and Contracting



Best Practices – FERPA Compliance

- When contracting with any outside entity providing an online platform that may be collecting and/or maintaining student PII, the written agreement between the entity and the college should include provisions for safeguarding student data, including:
 - A provision designating the outside entity as a "school official," as defined under FERPA;
 - A provision whereby the entity agrees to comply with FERPA's confidentiality requirements and limitations on use and re-disclosure of student PII; and
 - A provision containing procedures the entity will follow in the event of a breach affecting student PII.



Best Practices



- Set your privacy & cybersecurity team
 - Designate at least one employee to oversee your college's cybersecurity risk management
 - The designated employee must be a part of high-level discussions regarding risk management, planning, and coordination with your insurance carrier and legal team
- Review your policies and procedures and update if needed
 - Develop cyber incident/breach response plan
- Review your security practices and procedures to confirm that they meet industry standards
 - Multifactor authentication, passwords, firewalls, endpoint monitoring, etc.
 - IT security audit and penetration testing



Best Practices

- Meet with insurance professionals and review the college's cyber insurance coverage
- Regularly provide training for employees to avoid phishing attacks
- Vendor and contractor review
 - Conduct an inventory of all vendors currently receiving confidential information (PII, student records, other proprietary information)
 - Understand the scope and types of data being shared
 - Review contract provisions governing security and breach



Cyber Liability Insurance – Current Marketplace

- The recent escalation in ransomware attacks has substantially impacted the insurance market. Significant increase in demand for cyber liability coverage
- Some carriers withdrew from the market, or reduced market segments (public sector)
- Previously cyber liability insurance might be included under commercial property or casualty coverage, but carriers are generally now issuing cyber liability as a separate policy
- Carriers are limiting exposure by reducing policy limits, raising premiums, and increasing exclusions
 - 2021 had average rate increases of 101%, but 2022 has shown some stabilization of rates (See Marsh "*The State of the U.S. Cyber Insurance Market*," Third Quarter 2021; "*Shifting Cyber Insurance Market Gives Cause for Cautious Optimism*," June 29, 2022.)



Cyber Liability Insurance – Common Requirements for Coverage

- Greater scrutiny of prior claims history
- Mandating minimum standards for cybersecurity practices
- Requiring offsite storage of backups
- Increasing use of multi-factor authentication
- Focusing on risks posed by third-party data access and management



Cyber Liability Insurance – Strategies for Vendor Coverage

- Require vendors to maintain cyber liability coverage
- Existing coverages may not be adequate
- Coverage should include (at a minimum):
 - \$1 million per occurrence/\$2 million aggregate
 - Limits should be increased based on nature of service and data being stored
 - Technology E&O for IT firms
 - COIs, policy endorsement and additional insured status
- Legal review



Risk Management through Contracts and Purchasing



- Who is reviewing the contracts?
 - Could be Chief Information Officer, Chief Technology Officer, Records Custodian, or members of the purchasing department
- What types of purchases require analysis of privacy/data protection considerations?
 - Software programs, cloud services, and any other purchase where the vendor will have access to confidential and/or private information
- What is the contract?
 - Where there is no existing written agreement in place between the client and vendor, consider entering into one
 - Look beyond the purchase order. Vendor-friendly terms and conditions and privacy policies are often linked into the purchase order
- Give yourself time!



Key Contract Terms for Data Security and Privacy

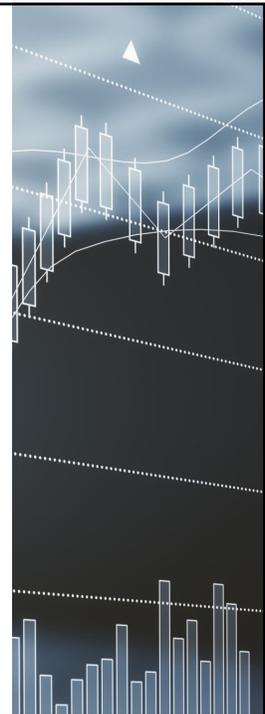
- Contracts should address how each element of data security is addressed when handling information or data received from the public body, including:

Access	Use
Disclosure	Modification
Destruction / Retention	Breach Notification
Cyber Insurance	Indemnification
Limitations of Liability	Subcontractors



Recent Trends and Hot Topics

Hypotheticals from the Real World



Hypothetical #1

- Professor X at College Y receives notification that one of his students, Student Z, may have engaged in unauthorized activity while taking his mid-term examination remotely. Professor X received notice of the alleged unauthorized activity from the College's approved remote proctoring service. The notice informs Professor X that there is a video recording of the unauthorized activity, and that he may request a copy of the recording.
 - Is the recording itself permissible?

Hypothetical #2

- Professor X views the footage and determines that Student Z was using his cell phone during the examination, in violation of the College's Academic Integrity Policy. The College initiates disciplinary action against Student Z. Student Z requests a copy of the video recording from the examination.
- Is the College required to provide Student Z with a copy of the video footage?

Hypothetical #3

- Professor Smith is planning on conducting her course lectures via Zoom and recording the lectures. After class, she plans to post the recordings on her course webpage so that students may access the lectures outside of class hours.
- Does Professor Smith need consent from the students to post the lectures on her class webpage?
- What, if any, steps should she take if she wants to institute this practice?





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TITLE IX CHANGES ON THE HORIZON (AGAIN): WHAT TO EXPECT AND HOW TO PREPARE

September 22, 2022

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Introduction



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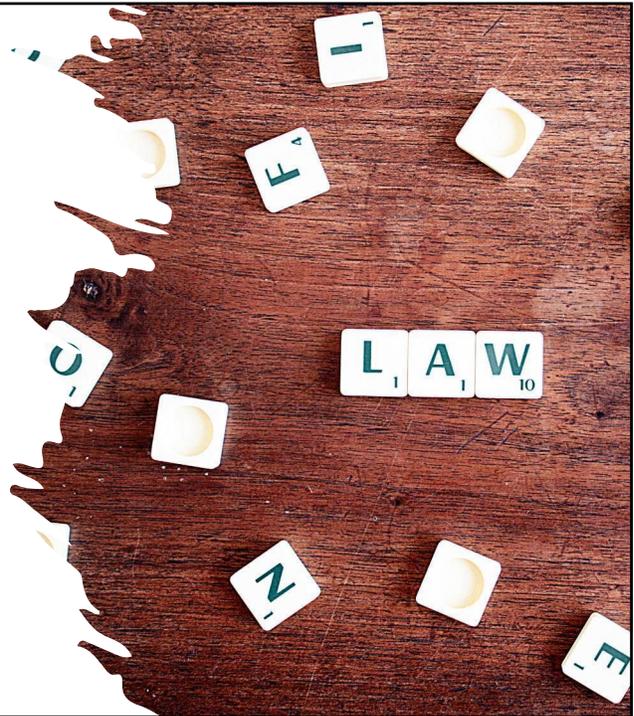


Agenda

1. Background on the Proposed Amendments
2. Key Proposed Changes
3. How to Prepare (Again)



Background on Proposed Amendments



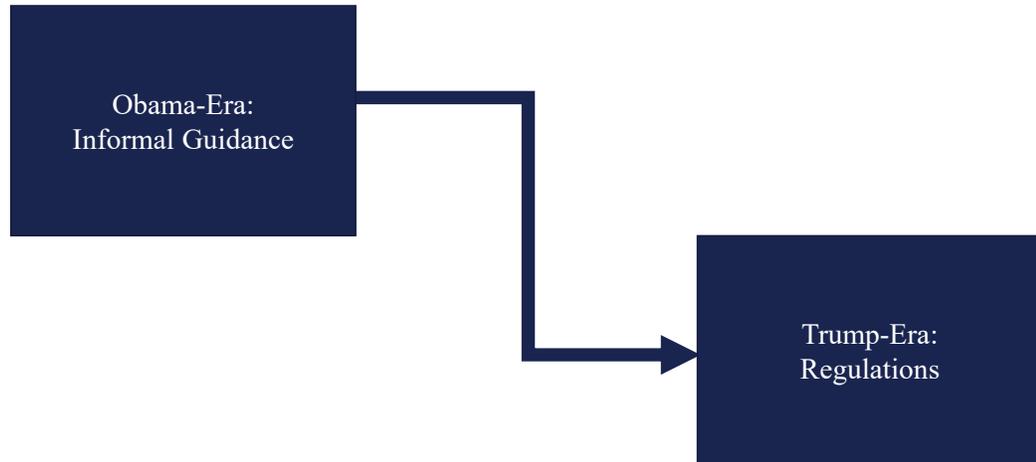
Background on Proposed Amendments

Notice of Proposed Rulemaking (NPRM) released on June 23, 2022.

U.S. Department of Education is seeking to amend the regulations implementing Title IX of the Education Amendments of 1972.



How Did We Get Here?



Current Status

- Published in Federal Register, amendments were open for public comment for 60 days. Public comment period closed September 12, 2012.
- Options following comment period:
 - Termination of rulemaking process (unlikely)
 - Supplemental NPRM
 - Final Rule
- Effective date of possible changes: **TBD**



Public Comments – Key Trends

- Definition of sexual harassment under 2020 regulations too narrow.
- 2020 regulations discourage victims from filing a grievance.
- 2020 regulations have slowed complaint resolutions considerably; Colleges not able to comply with requirement to resolve complaints “promptly.”
- Compliance with the 2020 regulations has required significant staffing increases, contributing part of the increased costs.



Impact on Colleges and Universities

- If finalized in current form, proposed amendments would require:
 - Revisions to policies and procedures
 - Staffing determinations
 - Additional training for employees



Key Proposed Changes



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Defining Prohibited Sex Discrimination

Proposed § 106.10

- “Sex Discrimination” includes discrimination based on:

1. Sex stereotypes
2. Sex characteristics
3. Pregnancy or related conditions
4. Sexual orientation
5. Gender identity

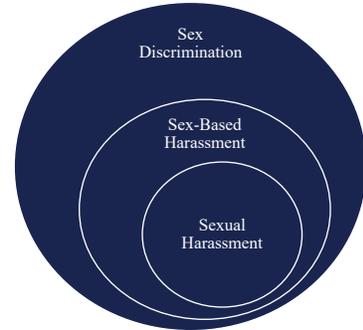


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Defining Prohibited Sex-Based Harassment

Proposed § 106.2

- Current regulations prohibit **sexual harassment**, as defined therein.
- Proposed regulations prohibit **sex-based harassment**, which includes sexual harassment **and** harassment based on:
 1. Sex stereotypes
 2. Sex characteristics
 3. Pregnancy or related conditions
 4. Sexual orientation
 5. Gender identity



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Types of Sex-Based Harassment

Proposed § 106.2

	Quid Pro Quo	Hostile Environment	Specific Acts
Proposed	When an employee or other person authorized by recipient to provide a service explicitly or implicitly conditions that service on a person's participation in unwelcome sexual conduct.	Unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively , it denies or limits a persons' ability to participate in or benefit from the recipient's education program or activity.	Sexual Assault Domestic Violence Dating Violence Stalking
Current	<ul style="list-style-type: none"> • Employee respondents only 	<ul style="list-style-type: none"> • Reasonable person • Severe and pervasive and objectively offensive • Denial of equal access 	Same

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Jurisdiction

Proposed § 106.11

- Conduct that occurs under an institution’s **education program or activity** includes, but is not limited to:
 - 1) Conduct that occurs in **any building owned or controlled by an officially recognized student organization.**
 - 2) Conduct that is subject to the institution’s **disciplinary authority.**
- Compare with current standard: “substantial control”



Jurisdiction

Proposed § 106.11

- An institution has an obligation to address a sex-based **hostile environment in its education program or activity**, even where the sex-based harassment contributing to the hostile environment occurred outside the education program or activity or outside the U.S.

What is the impact of the alleged conduct?



Jurisdiction

Proposed § 106.11

- Compare with current regulations:
 - **Do not** require institutions to respond to alleged sexual harassment that occurs outside the education program or activity.



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Responding to Sex Discrimination

Proposed §106.44(a)

- Current
 - Duty to respond to potential sexual harassment when an employee with authority to institute corrective measures has **actual knowledge** of the harassment.
 - Must respond in a manner that is **not deliberately indifferent**.
- Proposed
 - Duty to take **prompt and effective action** to **end** any prohibited sex discrimination that has occurred in the educational program, **prevent** its recurrence, and **remedy** its effects.

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Employee Reporting Obligations

Proposed §§ 106.44(c)(2)(i)-(ii) & 106.44(d)(2)

Employee Category	Obligation(s)
Employees with authority to institute corrective measures	Report to Title IX Coordinator
Employees with responsibility for administrative leadership, teaching, or advising	<u>Student</u> complainant: Report to TIXC <u>Employee</u> complainant: Report to TIXC or provide TIXC contact information and information about how to report
All other employees except confidential employees	Report to TIXC or provide TIXC contact information and information about how to report
Confidential employees	Provide TIXC contact information and information about how to report



Definition of Complaint

Proposed § 106.2

Current
“Formal Complaint”
Document filed by a complainant or signed by the Title IX Coordinator alleging **sexual harassment** against a respondent and requesting that the institution investigate the allegation of sexual harassment.

Proposed
“Complaint”
Oral or written request to the recipient to initiate the recipient’s grievance procedures for **sex discrimination** under Section 106.45 and, if applicable, Section 106.46.



Right to File Complaint

Proposed §§ 106.2 & 106.45(a)(2)

- **Current:**
 - Complainant must be “participating in or attempting to participate” in the education program or activity at the time the complainant files a formal complaint.
- **Proposed:**
 - Complainant is permitted to file a complaint about sex discrimination even if they have chosen to leave the education program or activity as a result of the discrimination or for other reasons.



Title IX Coordinator Response Obligations

Proposed § 106.44(f)

Title IX Coordinator must take the following steps upon being notified of possible sex discrimination:

(1) Treat complainant and respondent equitably.	(2) Notify complainant of institution’s grievance procedures.
(3) If complaint is made, notify respondent of grievance procedures.	(4) Notify parties of informal resolution process, if any.
(5) Offer and coordinate supportive measures to complainant and respondent.	(6) In response to a complaint, initiate grievance procedures or informal resolution process.
(7) In absence of complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination.	(8) Take other prompt and effective steps to ensure that sex discrimination does not continue to recur, in addition to providing remedies.





Supportive Measures Proposed § 106.44(g)

- Purpose: restore or preserve a person's access to the institution's education program.
- Examples: counseling, extension of deadlines, restrictions on contact between parties, voluntary **or involuntary** changes in class, work, housing, or extracurricular or other activities.



Supportive Measures

Proposed § 106.44(g)

- **May** include temporary measures that burden a respondent if:
 - 1) Imposed for non-punitive/non-disciplinary reasons; and
 - 2) Designed to protect safety of complainant or institution's educational environment or to deter respondent from engaging in sex-based harassment.
- Measures that burden a respondent may be imposed only during pendency of grievance procedures.
- Measures must be no more restrictive than **necessary to restore or preserve complainant's access** to education program or activity.



Supportive Measures Proposed § 106.44(g)

Involuntary measures that burden respondent are not permitted during informal resolution.

Party may seek modification or reversal of supportive measures.

Grievance Procedures

Proposed §§ 106.45 & 106.46

- Current:
 - One grievance process
 - Required for any formal complaint of sexual harassment
- Proposed:
 - Two grievance procedures
 - Section 106.45: Required for any complaint of sex discrimination
 - Section 106.46: Required for any complaint of sex-based harassment involving higher education student party, in addition to procedures required under Section 106.45

Procedures for All Sex Discrimination Complaints

Proposed § 106.45

Required Elements:

- Equitable treatment of parties
- No conflicts of interest or bias
- **Decision maker may be same person as Title IX Coordinator or investigator**
- Presumption that respondent is not responsible until a determination is made
- Reasonably prompt timeframes
- Reasonable steps to protect privacy of all parties
- Objective evaluation of evidence



Procedures for All Sex Discrimination Complaints

Proposed § 106.45

Required Elements (continued):

- Notice of allegations
- **Dismissals permitted, but not required**
- Consolidation of complaints permitted
- Process that enables decision-maker to assess credibility of parties and witnesses when relevant
- Informal resolution process
- Possible supportive measures
- List of disciplinary sanctions and remedies



Procedures for All Sex Discrimination Complaints

Proposed § 106.45

Required Elements (continued):

- Burden on institution to gather evidence
- Equal opportunity for all parties to present evidence
- Determination by decision-maker of what evidence is relevant and permissible
- Provide parties with **description** of relevant evidence and reasonable opportunity to respond
- **Preponderance of the evidence standard**
- Notice to parties of outcome and opportunities to appeal (*but note: **appeal is optional**)
- Completion of process before imposition of sanctions
- Provision and implementation of remedies by TIXC
- **No discipline against anyone for making false statement or engaging in consensual sexual conduct based solely on determination of whether sex discrimination occurred**



Procedures for Sex-Based Harassment Complaints Involving Student Party

Proposed § 106.46

Required Elements:

- Written notice of allegations, dismissals, delays, meetings, interviews, and hearings.
- Opportunity to have advisor of party's choice at any meeting or proceeding.
- Equitable access to relevant and not otherwise impermissible evidence **or** to written report summarizing evidence.



Procedures for Sex-Based Harassment Complaints Involving Student Party

Proposed § 106.46

Required Elements (continued):

- Process to assess credibility of parties and witnesses, when necessary
 - Must either:
 - Allow decision-maker to ask relevant questions in meeting or at live hearing, and allow parties to propose relevant questions for decision-maker or investigator to ask during meeting or live hearing; OR
 - Allow advisor for each party to ask relevant questions to other parties and any witnesses during live hearing.
 - D-M must determine relevance and permissibility prior to question being posed and explain any decision to exclude a question.
 - Questions that are unclear or harassing are prohibited.
 - D-M cannot rely on statements that support party's position if party refuses to answer credibility questions.



Procedures for Sex-Based Harassment Complaints Involving Student Party

Proposed § 106.46

Required Elements (continued):

- Simultaneous written notice of determination
- Opportunity to appeal based on procedural irregularity, new evidence, or conflict of interest or bias, as well as any other ground(s) offered equally to parties.
- Privacy protections
 - Take reasonable steps to prevent and address parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through sex-based grievance procedures



Informal Resolution

Proposed § 106.44(k)

Current

- Permitted only when formal complaint alleging Title IX sexual harassment has been filed.
- Participation must be voluntary.
- Not permitted in employee-on-student cases.

Proposed

- Permitted whenever institution receives complaint of sex discrimination **or has information about** conduct that may constitute sex discrimination under Title IX.
- Participation must be voluntary.
- Not permitted in employee-on-student cases.



Retaliation

Proposed §§ 106.2 & 106.71

- Proposed regulations would **clarify** that Title IX protects individuals from retaliation, including peer retaliation (student-on-student).
- Retaliation = intimidation, threats, coercion, discrimination, or taking disciplinary action against anyone **because** the person has reported possible sex discrimination, made a sex discrimination complaint, or participated in any way in an institution's Title IX process.





Pregnancy or Related Conditions Proposed § 106.2 and 106.40

- Includes:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to the above
 - Recovery from the above
- When student notifies college employee of student's pregnancy or related condition, employee must notify person that they may inform TIXC and must provide TIXC's contact information.



Pregnancy or Related Conditions

Proposed § 106.2 and 106.40

- After receiving notice of student's pregnancy or related condition, TIXC must:
 - Notify student of institution's obligations concerning pregnancy and related conditions
 - Provide voluntary reasonable modifications
 - Allow voluntary leave of absence for medical reasons and reinstatement upon return
 - Provide clean, private space for lactation
- Pregnant employees must be provided with (a) reasonable break time for lactation and (b) clean and private lactation space.



Sexual Orientation, Gender Identity, and Sex Characteristics

Proposed §§ 106.10 & 106.31(a)(2)

- Prohibition on adopting policies/practices that **prevent student from participating** in institution's education program or activity **consistent with their gender identity**.



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Big Picture Summary

Current Regulations:

- Actual Knowledge
- Deliberate Indifference
- Narrower definitions and scope
- Formal complaint to trigger action

Proposed Regulations:

- Prompt and effective action
- End, prevent, remedy
- Broader definitions and scope
- Verbal complaints permitted



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How to Prepare... Again

- Consider changes to current Title IX team, including size of the team and whether to maintain a decision-maker that is separate from the investigator.
 - Fewer complaints going through the entire grievance process
 - Broader scope of what conduct is covered under Title IX regulations
- Revise policies and procedures to align with proposed rule changes if they are adopted and become effective.



How to Prepare... Again

- Train Title IX staff on new requirements if adopted.
- Maintain compliance with current training requirements under both Title IX and the Preventing Sexual Violence in Higher Education Act.
- Review existing grievance procedures for allegations of sex-based discrimination and sexual harassment falling outside of Title IX.





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MANAGING CONSTRUCTION PROJECTS IN AN EVER- CHANGING ECONOMIC CLIMATE & DEALING WITH SUPPLY CHAIN ISSUES

September 22, 2022

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Introduction



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Agenda

- Status of Supply Chain Disruptions in the Construction Industry
- Planning Considerations for Construction Projects and Preparing for Uncertainty
- Contracts and Bidding for Public Construction Projects
- Responding to Construction Phase Problems Under Current Conditions
- Closing Out Construction



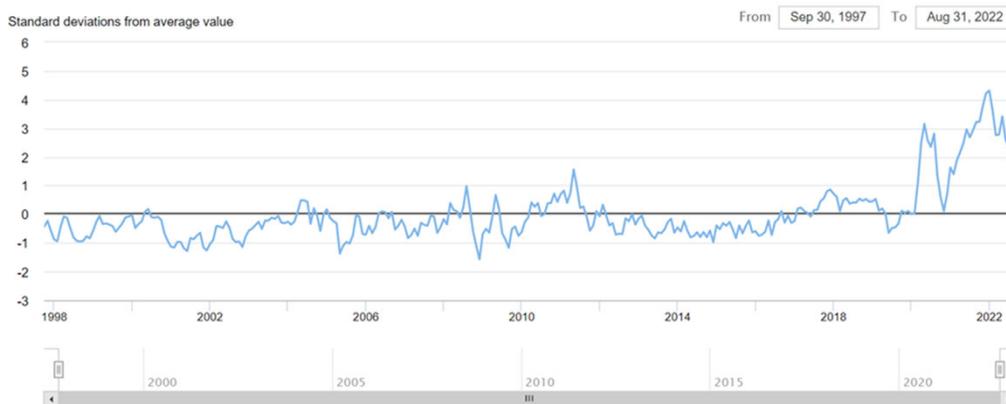
State of Supply Chain Disruptions and Future Outlook

Is this a Temporary Challenge or the "New Normal"?



What is the Economic Climate? Are we Done with Supply Chain Issues?

- Supply chain disruptions have eased over the last year but are still historically high



(See Federal Reserve Bank of New York, Global Supply Chain Pressure Index, <https://www.newyorkfed.org/research/gscpi.html>.)



What is the Economic Climate? Are we Done with Supply Chain Issues?

<p>+40 weeks Roofing insulation</p>	<p>Lead times for roofing insulation (along with other roofing materials), are currently among the longest in the entire construction industry.</p>	<p>Material</p>	<p>Current lead time</p>	<p>Two-year change</p>
<p>+36 weeks HVAC equipment</p>	<p>Lockdowns in China have significantly reduced manufacturing output for HVAC equipment, while hot weather continues to boost demand. Semiconductor shortages are also contributing to delays.</p>	Paint	2-3 weeks	+200%
<p>+18 weeks Wood doors & frames</p>	<p>Shutdowns and strained labor pools in manufacturing and shipping have led to a major backlog in the supply of wood doors, as well as hardware and hollow metal door frames.</p>	Steel beams & decking	10-14 weeks	+75%
		Drywall & metal studs	14-16 weeks	+600%
		Lighting & controls	14-20 weeks	+100%
		Wood doors & frames	18-20 weeks	+233%
		Open web joists	18-30 weeks	+125%
		Aluminum storefront glazing	16-32 weeks	+300%
		Appliances	20-30 weeks	+400%
		Electrical panels	30-40 weeks	+433%
		Roofing membranes	35-45 weeks	+800%
		HVAC equipment	36-50 weeks	+250%
		Roofing insulation	40-50 weeks	+667%

- (See CBRE Econometric Advisors, CBRE Strategic Investment Consulting, April 2022, <https://www.cbre.com/insights/books/2022-us-construction-cost-trends/03-supply-chain-disruption>)



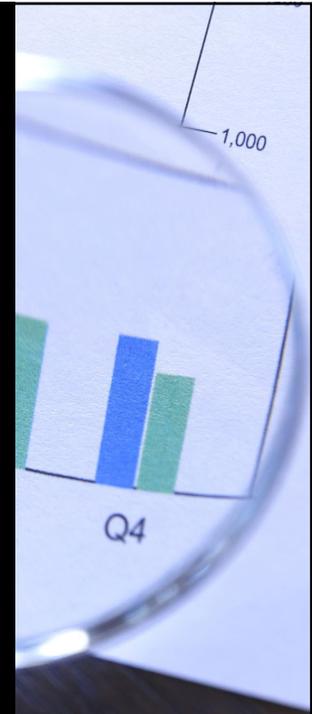
What are the Causes of the Supply Chain Disruption?

- Logistics, shipping, and trucking costs (often due to labor shortages)
- Goods and producer price inflation in the U.S. and E.U.
 - Material prices
 - Chip shortages
 - Increase global demand
- Energy prices
- Climate change
- Global events (war in Ukraine, factory shutdowns in China, tariffs, etc.)



Key Planning Considerations at the Outset to Avoid Delays

Planning, Programming and Preconstruction during Changing Market Conditions



Planning Considerations for Construction in Challenging Market Conditions

- To avoid delays and uncertainty down the road, ensure that the college's internal team is informed of the scope of the project (including functionality, cost, timelines, etc.) and is supportive
- Board is fully apprised of conditions and supportive of the project
- Administrative team is aware of their individual roles and that you have qualified people to manage the project internally
- Community (including alumni and students) are informed
- Begin considering the programming and contingencies for the project, some of which may be shared with the internal stakeholders



Planning Considerations for Construction in Challenging Market Conditions

- Acquiring real property during a tight real estate market
 - Discuss with Board in closed session (5 ILCS 2(c)(5))
 - Stay on schedule!
 - Extending offers and considering options
 - Due diligence issues
- Intergovernmental opportunities and challenges
 - Zoning codes
 - Storm water requirements
 - Site access
 - Utility permits and connections



Planning Considerations for Construction in Challenging Market Conditions

- Project financing and covering the (potential) cost of construction
 - Cash on hand
 - Acquiring debt
 - Purchasing bonds
 - Specialty consultants
- Grant funding and related requirements
- Controlling contingency and allowances



Planning Considerations for Construction in Challenging Market Conditions

- Selecting your external project team
- Work with legal counsel for applicable procurement requirements
- Ask for list of comparable projects and make sure they have enough manpower to complete the work
- Project team members: Does the economic uncertainty change the considerations?
 - Architect/Engineer - Performs design services
 - Construction Manager – Professional services (CM-advisor v. CM-at-Risk)
 - General Contractor – Selected through bid process and performs the construction services
 - Owner’s Representative – Unburdens college staff and has a fiduciary duty
 - Commissioning Agent – Works on behalf of the college to confirm that the building operates as designed
 - Specialty Consultants – Hired by the college to consult about the design & construction of specialty projects



Planning Considerations for Construction in Challenging Market Conditions

- Key planning considerations
 - Setting the timeline
 - Skill set of administrative staff
 - Public body’s employees’ input during design
 - Site access/building safety
 - Controlling the budget
 - Board approval
 - Completing on time



Practical Considerations for Construction in Challenging Market Conditions

- Setting the timeline
 - Programming 3 months
 - Space Planning 3 months
 - Schematic Design 3 months (many factors drive)
 - Design Development 3 months (many factors drive)
 - Construction Documents 3 months (many factors drive)
 - Bid Time Frame 2 months
 - Board Approval 1-2 months
 - Physical Construction 4-12 months



Contracts and Bidding for Public Construction Projects

Establishing a Reliable Framework
for Responding to Changing
Conditions



Using Bidding and Contracts to Keep Your Project on Schedule and Under Budget

- Key Tools:
- Good contracts: add terms to prevent unjustified change orders and delays
- Use allowances, contingencies, and bid alternates to keep the project under budget
- Ordering equipment: discuss lead times before issuing bid and consider having owner purchase directly and/or establishing deadlines to order
- Performance bonds
- Communication!

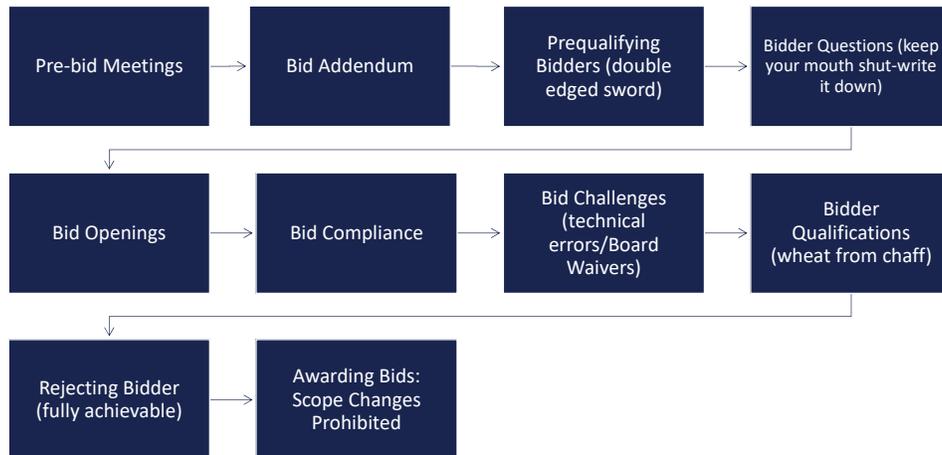


Considerations and Importance of Bidding

- Advertisement and Getting Contractors to Bid on Your Project
- Bidding Documents
- Instructions to Bidders
- Bidder Qualification Criteria
- General and Special Conditions
 - Substitution process
 - Deadlines for ordering equipment/materials
- Contract Form
- Bid Bond



Considerations and Importance of Bidding



Considerations and Importance of Bidding

- Bid documents must notify of, and contracts must require, compliance with the Prevailing Wage Act
- Applies to contracts for “public works”:
 - Definition: “fixed works constructed or demolished by any public body, or paid for wholly or in part out of public funds.”
 - Includes “any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.”
- Certified payrolls submitted on a monthly basis directly to the Department of Labor

Contract Terms for a Timely and Successful Project: AIA Contracts

- AIA Contract Documents from Design to Closeout
 - Contract Sum and Change Orders
 - Progress Meetings (Include Requirements for Ordering Materials/Equipment)
 - Allowances and Contingencies
 - Progress Payments & Retainage
 - Substantial Completion
 - Liquidated Damages



Contract Terms for a Timely and Successful Project: Bonds

- Payment and Performance Bonds (30 ILCS 550/1)
 - Each contract for public work in Illinois exceeding \$50,000 requires the contractor to furnish performance and payment bonds in the full amount of the contract.
- A Performance Bond is:
 - A surety company's guarantee to the owner that the contractor will complete the project in accordance with the contract, and defines the duty of the surety to the owner in the event of the contractor's default.
- A Payment Bond is:
 - A surety company's guarantee to the owner that the contractor will pay all contractors furnishing material and/or labor on the project, in accordance with the contract.

Considerations for Contracting Your Project

- Public bodies should require each contractor having a contract with the public body to have the bonds required by the Public Construction Bond Act, 30 ILCS 550/1, et seq.
- If public body is paying subcontractors directly (if using a construction manager), the subcontractors should be required to provide the bond.



Responding to Construction Phase Problems under Current Conditions

Practical Considerations for When Things Go Wrong and Strategies for Legal Action if Necessary



Construction Phase Problems: Keep Your Eye on the Target (Successfully Completed Project)

- Problems Will Arise: Try to Minimize through Communication and Consider the Ramifications of Termination
- Taking Over Portions of the Project: Practical Approach
 - Can a new contractor complete the work?
 - Will it cost more? Will the bond cover the additional cost? Will it take longer? Will it be the same quality or better/worse? Bidding requirements?
 - Warranties with multiple contractors on site?
 - Potential litigation?
 - Will the current contractor ever be able to complete the work?
 - Will it be good workmanship? Create dangers/hazards?
 - Trustee of public money – does the contractor deserve to be able to finish and be paid?



Construction Phase Problems

- Delays in Ordering Equipment: Substitutions/Change Orders
- Unforeseen Conditions: Change Orders
- Contractor Default: Nuclear Option
- Surety Claims
- Construction Defects
 - Contractor Errors
 - Design Errors and Omissions



Construction Phase Problems: Construction Litigation

- What evidence to you have? Keep good records!
- How long do you have to file a lawsuit?
- Who is included in the lawsuit?
- The role of experts.
- Alternative dispute resolution (ADR)
 - Arbitration or mediation?
- Building repairs during the litigation.
- What are the recoverable damages?



Mitigating Construction Phase Problems

- Small Projects: Many rules still apply
- Contractor Certificate of Insurance Review
- Payment and Performance Bond Review
- Pay Requests
- Certified Payrolls
- Change Order Issues
- Delay Issues
- Labor Disputes (Picketing and Strikes)





Closing Out Construction



Mitigating Construction at Closeout

- Project Close Out Issues
 - Lien Claims
 - Punch List Problems
 - Retainage Issues
 - Warranty Documents
 - 12 Month Walk-through



Mitigating Construction at Closeout

ACTIVITY DESCRIPTION	BOARD ACTION REQUIRED	TASK COMPLETED
Public Bidding		
Pre-bid Meetings		
Bid Addendum		
Prequalifying Bidders		
Bidder Questions		
Bid Openings		
Bid Compliance		
Bid Challenges		
Bidder Qualifications		
Rejecting Bidders	X	
Awarding Bids	X	
Small Projects	X	
Contractor Certificate of Insurance Review		
Payment and Performance Bond Review		
Pay Requests	X	
Certified Payrolls		
Change Order Issues	X	
Delay Issues		
Labor Disputes (Picketing and Strikes)		
Unforeseen Conditions	X	
Contractor Default	X	
Taking Over Portions of the Project	X	
Surety Claims	X	
Construction Defects	X	
Contractor Errors		
Design Errors and Omissions		
Project Close Out Issues		
Lien Claims		
Punch List Problems	X	
Retainage Issues	X	
Warranty Documents		



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As managing partner, Joseph Perkoski represents educational institutions and public sector employers with a focus on board and executive leadership. Joseph also represents his clients on a broad range of labor and employment issues including collective bargaining, grievance arbitration and contract interpretation. Joseph has defended employers in unfair labor practice charges before the Illinois Education Labor Relations Board, the Illinois State and Local Labor Relations Boards and the National Labor Relations Board. In addition, Joseph has litigated on behalf of management claims involving civil rights, discrimination, wrongful discharge, and harassment issues.

AWARDS

Fellow, The College of the Labor & Employment Lawyers

Illinois Super Lawyers, 2008-2020

Illinois Leading Lawyer, Employment, Labor and School Law

RECENT PUBLICATIONS

"Have You Had Your Shot? Legal Consideration in Mandating Employee Vaccination," IASBO (2021)

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations*, IICLE (2017)

Contribution author, "Labor Relations: Contract Administration Including Unfair Labor Practices," *Illinois School Law: Personnel and Student Issues*, IICLE (2010, 2012, and 2015)

"Finding a New Way: Subcontracting Revisited," *UPDATE Magazine*, Illinois ASBO (2011)

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law – Transaction Practice*, IICLE (2010)

RECENT PRESENTATIONS

Legal Update, ICCFCO Spring Conference (April 2022)

Legal Update, ICCFCO Spring Conference (April 2021)

Hot Legal Topics, Bargaining in a Post-Covid World, ICCFCO (April 2021)

Will it Count? Teacher Evaluations in a Hybrid and Virtual World, Large Unit District Association Virtual Fall Conference (October 2020)



PRACTICE AREAS

Education Law

Employee Benefits

Labor & Employment

Litigation

Municipal Law

Student Discipline

EDUCATION

J.D., The Ohio State University, The Mortiz College of Law

M.A., The Ohio State University

B.A., *with honors*, The Ohio State University

ADMITTED TO PRACTICE

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

U.S. District Court for the Eastern District of Wisconsin

U.S. District Court for the Western District of Wisconsin

Leaves and Absences During a Pandemic, Illinois Association of School Administrators (October 2020)

Leaves and Absences During a Pandemic, Illinois Association of School Administrators (September 2020)

Remote Learning Meme Fatigue: Legal and Practical Considerations as Students and Staff Return to School with Restrictions, Large Unit District Association Virtual Spring Conference (June 2020)

Resetting Bargaining Objectives in the Midst of the COVID-19 Crisis, Large Unit District Association (May 2020)

Legal Update, ICCCFD Spring Conference (April 2020)

Hot Legal Topics, Bargaining in a Post-Covid World ICCCFD (April 2020)

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

Court Cases and Other Legal Updates for the Higher Education Workplace, Illinois CUPA-HR Spring Conference (May 2019)

Legal Update, ICCCFD Spring Conference (April 2019)

Supreme Court of Illinois

Supreme Court of Wisconsin

Superior Court for the District of Columbia

ORGANIZATIONS

American Bar Association

Trustee, Associated Colleges of Illinois

Fellow, College of Labor and Employment Lawyers

Council of School Attorneys

Federal Bar Association

Illinois Association of School Business Officials

Illinois Bar Association

National School Boards Association

Wisconsin Bar Association



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Ken Florey concentrates his practice representing public and private clients, including municipalities, school districts, community colleges, townships, libraries, private owners, contractors and design professionals regarding land use, municipal law, construction, tax, finance and litigation. Ken has also started offering his services as a mediator with an emphasis on construction disputes.

Ken was the Chair of the DuPage County Bar Association's Local Government Committee. He was appointed Special Assistant Attorney General to prosecute and defend construction litigation claims on behalf of the Illinois Capital Development Board. Ken is also a member of the Illinois ASBO Service Associate Advisory Committee. He served as a Trustee for the Village of Lombard for eight years and is a member of the Lombard Fire and Police Commission.

MEDIATOR CERTIFICATE: Northwestern University 2017

AWARDS

Illinois Leading Lawyer, Construction Law; Governmental, Municipal, Lobbying & Administrative Law; Land Use, Zoning & Condemnation Law; and School Law

Illinois Association of School Business Officials, Above and Beyond Award

Illinois Institute for Local Government Law, Litigation Award

RECENT PUBLICATIONS

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions & Solutions" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Meditation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)



PRACTICE AREAS

Commercial Law
Construction Law
Education Law
Energy Law
Litigation
Mediation
Municipal Law
Public Finance & Taxation
Real Estate Development
Zoning, Planning & Land Use

EDUCATION

J.D., DePaul University
College of Law; Managing
Editor, *DePaul Journal of
Art and Entertainment
Law*

B.A., University of Illinois
at Urbana Champaign

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

Contributing author, "Organization, Finance, and Property," Illinois School Law, IICLE (2017)

"Construction Project and Contract Pitfalls" *Update Magazine*, Illinois ASBO (2017)

"The Good, the Bad and the Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"Settlement Crumbles; Appeals Court Declines to Put Pieces Back Together," *Chicago Daily Law Bulletin* (2015)

"On Public Display: Advertising in Schools," *UPDATE Magazine*, Illinois ASBO (2015)

RECENT PRESENTATIONS

School Construction and Purchasing Scenarios: Common Problems with Practical Solutions, ASBO International and AC&E (October 2021)

Using ESSR Funds for Facilities Improvements: School Construction from Start to Finish, Illinois ASBO and IASPA (October 2021)

Prevailing Wages and Bidding, Northeastern Illinois Facility Professionals (November 2021)

No Weak Links: Fostering Positive Intra-Board Relationships, IASB/ISA/IASBO (November 2021)

No Weak Links: Fostering Positive Intra-Board Relationships, IASB (July 2021)



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Frank B. Garrett III represents and counsels public and private employers in all aspects of employment law, including litigation defense of workplace complaints and charges. Frank also reviews, audits and trains organizations on their Diversity, Equity, and Inclusion initiatives. Frank is often called upon to investigate workplace complaints of harassment, discrimination, violation of employer leave policies and employee discipline incidents.

Frank practices regularly in both state and federal courts at both the trial and appellate levels. Frank is a regular presenter on employment law and workplace issues at both the state and national levels. He is continually recognized as an Illinois Leading Lawyer.

AWARDS

Illinois Leading Lawyer, Government and Regulatory-Related
Illinois Leading Lawyer, Employment and School Law
Illinois Super Lawyers

RECENT PUBLICATIONS

Contributing Author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (1996, 1999, Supp. 2001, 2005, 2010, 2012, 2015, and 2021)

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit," *Chicago Daily Law Bulletin* (2017)

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

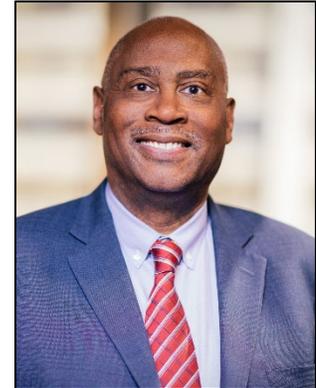
"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims," *Chicago Daily Law Bulletin* (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision," *Chicago Daily Law Bulletin* (2015)

"Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution," *Inquiry & Analysis*, National School Boards Association's Council of School Attorneys (2013)

RECENT PRESENTATIONS

School District Diversity, Equity and Inclusion Guidance, Northwest Personnel Administrators Group Meeting (September 2022)



PRACTICE AREAS

Employment Law
Diversity, Equity and Inclusion Review, Audits and Training
Education Law
Litigation

EDUCATION

J.D., DePaul University
College of Law

B.A., Oberlin College

ADMITTED TO PRACTICE

Supreme Court of the
United States

U.S. Court of Appeals for
the Seventh Circuit

Trial Bar of the U.S.
District Court for the
Northern District of Illinois

U.S. District Court for the
Northern District of Illinois

U.S. District Court for the
Central District of Illinois

U.S. District Court for the
Southern District of Illinois

Supreme Court of Illinois

Safeguarding School District's Diversity, Equity and Inclusion Initiatives from Unlawful Discrimination Challenges, American Association of School Personnel Administrators (April 2022)

A Review of Important New Laws Impacting Illinois School Districts, Illinois Association of School Boards (January 2022)

Sexual Violence and Harassment on Campus, Illinois Community College Trustee Association (June 2021)

Responding to COVID-19 Related Employee Accommodations and Leave Requests, American Association of School Personnel Administrators (October 2020)

Workplace Liability in the Post Pandemic Era, Illinois Large Unit District Association (June 2020)

Debunking Some Common Employee FMLA Leave Myths, Illinois Association of School Personnel Administrators Annual Conference (January 2020)

Legal Updates for Illinois Community College Chief Student Services Officers' Meeting, Illinois Community College Student Services Officers (June 2019)

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

ORGANIZATIONS

American Bar Association,
Section on Labor and
Employment

National Association of
Diversity Officers in
Higher Education

Chicago Bar Association

Illinois Council of School
Attorneys



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Phil Gerner counsels and represents school districts and community colleges in collective bargaining negotiations, union representation petitions and IELRB proceedings, teacher evaluations, remediations and dismissals, employee discipline and discharge issues, labor contract administration and grievance arbitration and other labor and employment issues. Phil has represented school districts and community colleges in numerous labor arbitrations, unfair labor practice hearings, tenured teacher dismissals and IDHR and EEOC proceedings. Phil has successfully handled a number of appellate court appeals on issues of significance for educational employers, including short-term employee bargaining unit exclusion standards, teacher evaluation plan bargaining obligations and RIF/seniority rights of tenured teachers.

Phil is a frequent presenter for IASB, IASA, Illinois ASBO, ICCTA and other educational employer associations on a full range of labor and employment issues, including collective bargaining negotiations, teacher evaluation and remediation, school administrator employment contracts, employee discipline and discharge, and public employee speech and concerted activity issues.

AWARDS

Illinois Leading Lawyer, Employment and School Law, 2004-2012

RECENT PUBLICATIONS

"Collective Bargaining During COVID-19" IASA Leadership Matters Magazine (2021)

"Hot Topics in Collective Bargaining," IASB.COM, IASB (2014)

Contributing author, "Labor Relations: Contract Administration Including ULPs," Illinois School Law, IICLE (2005, 2010 and 2012)

"Collective Bargaining Implications of the Performance Evaluation Reform Act of 2010 (SB 315) and the Education Reform Act (SB 7)," UPDATE Magazine, Illinois ASBO (2011)

RECENT PRESENTATIONS

Legal Issues Regarding Mandatory Employee Vaccinations, Illinois Association of School Personnel Administrators Webinar (September 2021)

COVID-19 HR Webinar: Vaccine Mandate for Staff, 2021 Illinois Association of School Business Officials Conference (September 2021)



PRACTICE AREAS

Education Law
Employee Benefits
Labor & Employment
Litigation

EDUCATION

J.D., Washington
University School of Law

B.A., *cum laude*, St.
Lawrence University

ADMITTED TO PRACTICE

U.S. District Court for the
Central District of Illinois

U.S. District Court for the
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Todd Hayden practices in the areas of school and municipal law. He provides governmental employers with guidance and counseling regarding labor and employment, including employee discipline and termination, board governance, collective bargaining, contract, public finance and transactional matters.

Todd has represented employers in various employer-employee disputes including federal and state litigation, EEOC/Department of Human Rights charges, State Labor Board Proceedings and grievance and arbitration proceedings. Todd has extensive experience in collective bargaining, including unit formation proceedings, negotiations, mediation and interest arbitration. He has performed construction contract reviews, served as local bond counsel and worked on school boundary changes.

Todd is approved by the Illinois State Board of Education to provide school board member training.

AWARDS

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

RECENT PUBLICATIONS

Contributing author, "Civil Rights Litigation," *Illinois School Law*, IICLE (2021)

RECENT PRESENTATIONS

Collective Bargaining 2021, LUDA Spring Conference (June 2021)

Legislative Update, ED-RED (June 2021)

Remote Work or Leave of Absence Due to Covid-19?, LUDA Fall Conference (October 2020)

Workplace Liability in the Post Pandemic Era, LUDA Spring Conference (June 2020)



PRACTICE AREAS

Commercial Transactions
Education Law
Employee Benefits
Labor & Employment
Litigation
Municipal Law
Public Finance & Taxation
Student Discipline

EDUCATION

J.D., *cum laude*, Indiana University School of Law

B.A., University of Michigan

ADMITTED TO PRACTICE

Supreme Court of the United States

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Trial Bar of the U.S. District Court for the Northern District of Illinois

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois



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Catherine Locallo's practice focuses on labor and employment law and board governance matters. She counsels employers in all aspects of employment law including hiring, employment contracts, employee discipline issues, terminations and reductions in force, collective bargaining and labor relations, nonimmigrant worker visas and employment discrimination matters. She also counsels public bodies on compliance with Illinois' Freedom of Information Act and Open Meetings Act. Catherine has extensive experience representing clients in court and administrative agency proceedings involving discrimination, retaliation, and harassment claims.

Catherine is approved by the Illinois State Board of Education to provide school board member training.

AWARDS

Illinois "Rising Star," Employment & Labor Law (2015-2018)

RECENT PUBLICATIONS

"Employee's Loss of Ability To Maintain Privacy Rights Is Not Injury Compensable Under Workers' Compensation Act," *Employment and Labor Law Flashpoints*, IICLE (2022)

"OSHA Pauses Vaccination and Testing ETS Following Legal Challenges," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Chicago Teachers Union Claim Doesn't Survive Summary Judgment on Race Discrimination Claim," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Effective January 1, 2022: Vast Expansion of VESSA," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Illinois Committed to Restrictive Covenant Reform Through Passage of Senate Bill 672," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Plaintiff's Cat's Paw Theory of Liability Failed To Scratch Surface," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Walmart Need Not Change Shift Rotation Practice To Accommodate Religious Beliefs" *Employment and Labor Law Flashpoints*, IICLE (2021)

"CBA Provision Clearly Rebutted At-Will Employment Presumption for IT Employee," *Employment and Labor Law Flashpoints*, IICLE (2021)



PRACTICE AREAS

Education Law
Labor & Employment
Litigation

EDUCATION

J.D., *cum laude*, The John Marshall Law School,
Order of John Marshall

B.S., Southern Illinois
University

ADMITTED TO PRACTICE

U.S. Court of Appeals for
the Seventh Circuit

U.S. District Court for the
Central District of Illinois

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

“Employer’s Judgment and Job Description Defeat Failure To Accommodate Claim,” *Employment and Labor Law Flashpoints*, IICLE (2021)

“Recent Department of Labor Opinion Letters: Pay for Training and Travel,” *Employment and Labor Law Flashpoints*, IICLE (2021)

“Sexual Harassment Prevention Training Compliance Required Before New Year,” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Will ‘Scabby the Rat’ Live To Fight Another Day?” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Superintendent’s Police Report is Protected Speech” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Changing the Landscape: Abusive Conduct Not Protected Under NLRA” *Employment and Labor Law Flashpoints*, IICLE (2020)

“COVID-19 Changes to Claims for Unemployment Benefits in Illinois” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Seventh Circuit: Jury, Not Judges, Must Decide Coach’s Sex Discrimination Claim” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Examining DOL Rule on New Employee Leave Rights” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Better Safe Than Sued – Issuing Timely FMLA Notices” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Unions Strike Back Through Amendments to Illinois Public Labor Acts” *Employment and Labor Law Flashpoints*, IICLE (2020)

RECENT PRESENTATIONS

You’re On the Board, Now Elevate Your Game, ICCTA Annual Conference (November 2021)

Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings, IASPA Annual Conference (January 2020)

A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act, LUDA Annual Conference (October 2019)

Community College Trustees Training Session, ICCTA (June 2019)

ORGANIZATIONS

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

National Council of School Attorneys

Third Vice President, Justinian Society of Lawyers

Co-Chair, Justinian Society of Lawyers Endowment Fund Scholarship Committee

Member, Oakton Community College Paralegal Advisory Committee

Member, Triton College School of Business Advisory Legal Committee

President, Board of Directors, Glenview Stars Hockey Association

UNICO National



EMILY P. BOTHFELD

PARTNER, CHICAGO

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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education’s Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

RECENT PUBLICATIONS

“Disabled Athlete Can’t Support ADA Claims,” *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)

Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges’ Risk Management Practices, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

A Student’s “Right” to a College Education: Due Process Rights in Academic and Non-Academic Discipline, Illinois Community College Chief Student Services Officers’ Summer Meeting (June 2019)



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

J.D., *with honors*, George Washington University Law School

B.S., *cum laude*, Vanderbilt University

ADMITTED TO PRACTICE

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Trustee, Associated Colleges of Illinois

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys



MATTHEW J. GARDNER

PARTNER, CHICAGO

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Matthew Gardner is a member of the firm's construction, real estate, and public finance practice groups. Matt represents private and public project owners over the course of construction and development projects, beginning with property acquisition, zoning, contract negotiation and bidding, project management, surety and warranty claims and any resulting litigation concerning payment, delays or design or construction defects. Matt also represents contractors, subcontractors and suppliers on a variety of construction-related matters, including payment claims, preserving and enforcing lien rights and defending defect claims.

Matt is the past Chair of the Chicago Bar Association Construction Law and Mechanics Lien Subcommittee (2018-19), has testified before the General Assembly on construction-related matters, and is a member of the Illinois State Bar Association and Chicago Bar Association Judicial Evaluation Committee. Matt has also performed pro bono services representing clients through Chicago Volunteer Legal Services and Franciscan Outreach.

AWARDS

Illinois "Rising Star", by Super Lawyers Magazine, in the area of Construction Litigation (2020-2021)

RECENT PUBLICATIONS

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Meditation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"The Good, The Bad and The Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"School District and Zoning Exemptions," *Chicago Daily Law Bulletin* (2015)

RECENT PRESENTATIONS

Legal Considerations Related to Renewable Energy, Illinois ASBO Administrator Academy: Sustainability for PK-12 Schools (May 2022)



PRACTICE AREAS

Commercial Law
Construction Law
Public Finance & Taxation
Real Estate Development

EDUCATION

J.D., University of
Wisconsin Law School

B.S., University of Utah

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

Supreme Court of Utah

Supreme Court of
Wisconsin

ORGANIZATIONS

Chicago Bar Association

Illinois State Bar
Association

School Bidding, Procurement, and Prevailing Wages: From the Basics to the Advanced, IASA Spring Legal Seminar (March 2022)

Legal considerations related to renewable energy, Illinois ASBO Administrator Academy: Sustainability for PK-12 Schools (November 2021)

Construction Law 101, National Business Institute (December 2019)

Foolproof Contract that Abide by State Laws, 2019 Illinois ASBO Annual Conference (May 2019)



HOWARD A. METZ

PARTNER, CHICAGO

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Howard Metz counsels and represents school districts, community colleges, park districts and municipalities with respect to real estate, commercial transactions, construction law and land use and zoning matters. He has resolved construction cases involving issues such as disputed architectural fees, construction defects, bidding disputes and construction delays. Howard has also litigated issues involving zoning laws and municipal control over school property.

RECENT PUBLICATIONS

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "Public Body Social Media Rules Make Retention, Ready Retrieval Imperative," *Chicago Daily Law Bulletin* (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"Look Before You Leap: Evaluating Your Joint Purchasing Options," *UPDATE Magazine*, Illinois ASBO (2016)

Contributing author, "School Property and Environmental Issues," *Illinois School Law*, IICLE (2010 and 2012)

RECENT PRESENTATIONS

School Bidding, Procurement, and Prevailing Wages: From the Basics to the Advanced, IASA Spring Legal Seminar (March 2022)

Legal considerations related to renewable energy, Illinois ASBO Administrator Academy: Sustainability for PK-12 Schools (November 2021)

Foolproof Contract that Abide by State Laws, 2019 Illinois ASBO Annual Conference (May 2019)

Construction Contracts: Boilerplate Language Landmines You May Not Know, NBI (February 2019)



PRACTICE AREAS

Commercial Transactions
Construction Law
Education Law
Finance
Municipal Law
Real Estate Development

EDUCATION

J.D., IIT Chicago-Kent
College of Law

B.S., University of Iowa

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois



ZARIA N. UDEH

PARTNER, CHICAGO

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Zaria practices in the area of education law focusing in the areas of special education and students issues. Zaria counsels school districts with respect to IEP meetings, 504 accommodations, OCR, ISBE, and IDHR complaints, due process hearings, residency and homeless dispute hearings, student discipline matters, board policy and student handbook review, FOIA requests, student record compliance and contract review. Zaria also counsels community colleges on student related issues.

Prior to joining Robbins Schwartz, Zaria worked for the Chicago Public School District, where she represented the district as a special education attorney in due process matters and special education disputes.

RECENT PUBLICATIONS

"Medical Cannabis at School Wins Legislative OK," Chicago Daily Law Bulletin (2018)



PRACTICE AREAS

Education Law
Special Education
Student Discipline

EDUCATION

J.D., DePaul University
College of Law

B.A., Yale University

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

Supreme Court of the
Commonwealth of
Massachusetts

ORGANIZATIONS

Chicago Bar Association



THOMAS C. GARRETSON

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Tom counsels employers in all aspects of labor and employment law, including internal misconduct investigations, disciplinary action, labor relations, collective bargaining, and federal and state employment discrimination matters under the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Illinois Human Rights Act, Title VII, and other federal and state anti-discrimination and wage laws. Tom represents employers in a variety of venues, including federal/state courts, the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, and federal/state labor boards.

Prior to joining Robbins Schwartz, Tom worked in Labor Relations for the Cook County Health System. During law school, Tom interned with the U.S. Equal Employment Opportunity Commission's Enforcement Unit.

RECENT PUBLICATIONS

"Seventh Circuit Certifies Question to Illinois Supreme Court Regarding When BIPA Claim Accrues" *Employment and Labor Law Flashpoints*, IICLE (2021)

"Get off my Property: SCOTUS Limits Union Access to Employer Premises," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Seventh Circuit: Jury, Not Judges, Must Decide Coach's Sex Discrimination Claim," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Unions Strike Back Through Amendments to Illinois Public Labor Acts," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Heading Into the New Year with New Employment Laws," *Employment and Labor Law Flashpoints*, IICLE (January 2019)

RECENT PRESENTATIONS

Never a Dull Moment - Case Studies and Tales from HR, IASPA Annual Conference (January 2022)

Updates from the Department of Human Rights, IAPD/IPRA Soaring to New Heights Conference (January 2022)

The Nuts and Bolts of Employee Leave Rights Under the FMLA, ADA, and Illinois Law, IAPD/IPRA Soaring to New Heights Conference (January 2022)



PRACTICE AREAS

Labor & Employment

EDUCATION

J.D., Chicago-Kent College of Law

B.A., *with honors*,
Michigan State University

ADMITTED TO PRACTICE

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Mid-Term and Successor Bargaining Trends Post-COVID-19, IASA Legal Workshop (December 2021)

Employee Misconduct Investigations and Discipline During a Pandemic, IASPA Annual Conference (January 2021)

Is it ADA, FMLA, or Other Leave? Navigating the Murky Waters of Employee Leave Benefits, IAPD/IPRA Soaring to New Heights Conference (January 2020)

Updates from the DOL: New Developments for FMLA, FLSA, and IWPCA, IAPD/IPRA Soaring to New Heights Conference (January 2020)



CHRISTOPHER R. GORMAN

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Chris practices in the firm’s commercial, construction, and real estate practice groups, representing public sector clients in commercial transactions, contracting, construction and related transactional matters. Chris has also served in the firm’s labor and employment practice group and counseled employers in all aspects of labor and employment law, including labor relations, collective bargaining, grievance and dispute resolution, workplace investigation, employee discipline, terminations and reductions in force, and employment discrimination. Chris also advises clients on board governance and compliance with the Illinois Freedom of Information Act and Open Meetings Act.

Prior to joining Robbins Schwartz, Chris served as in-house counsel for a nonprofit organization, a charter school management organization and a state regulatory agency overseeing higher education financing.

RECENT PUBLICATIONS

Contributing author, “Labor Issues in the Transactional Side of the Project,” *Construction Law: Transactional Considerations 2021 Edition*, IICLE (2021)

“Continuing Controversy Over FCC’s Efforts to Improve Broadband Connectivity,” *Energy, Utilities, Telecommunications and Transportation Newsletter*, Illinois State Bar Association (2021)

“The Future of For-Profit Online Charter Schools,” *Labor and Employment Law Quarterly*, American Bar Association (2016)

RECENT PRESENTATIONS

School Bidding, Procurement, and Prevailing Wages: From the Basics to the Advanced, IASA Spring Legal Seminar (March 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA and PIPA, The Learning Technology Center of Illinois SecurED Schools Annual Conference (January 2022)

Staffing Shortages Following the Pandemic: Strategies and Legal Considerations for Subcontracting, IASBO SupportCon (December 2021)



PRACTICE AREAS

Commercial Transactions
Construction Law
Labor & Employment
Real Estate Development

EDUCATION

J.D., University of
Minnesota Law School

B.A., University of
Minnesota – Twin Cities;
Presidential Scholar

ADMITTED TO PRACTICE

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Illinois State Bar
Association



AARON J. KACEL

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Aaron counsels' employers on various aspects of labor and employment law, including internal investigations, employee discipline, labor relations, workplace policies, and state and federal labor and employment law matters under the Illinois Human Rights Act, Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Occupational Safety and Health Act, Uniformed Services Employment and Reemployment Rights Act, Title VII, and other laws.

Aaron represents employers in litigation and before administrative agencies including the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, the U.S. Department of Labor, and the Illinois Department of Labor.

Aaron also provides training to employers on internal investigation best practices and avoiding charges of unlawful discrimination and harassment in the workplace.

Prior to joining Robbins Schwartz, Aaron served as in-house employment law counsel for the Cook County Sheriff's Office. He has previously worked for the City of Chicago and a large, international law firm. During law school, he served as Managing Executive Editor of the Northwestern Journal of Law & Social Policy and President and Founder of the Northwestern Labor & Employment Law Society.



PRACTICE AREAS

Labor & Employment

EDUCATION

J.D., Northwestern
University Pritzker School
of Law

B.A., Washington
University in St. Louis,
magna cum laude

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Member, Associate Board,
Lawyers for the Creative
Arts

Chair, Labor and
Employment Committee,
Young Lawyers Selection

Chicago Bar Association

Chair, Vice Chair,
Secretary, Board of
Directors, About Face
Theatre



KEVIN P. NOLL

ASSOCIATE, CHICAGO

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Kevin's practice focuses in the area of labor and employment law. Kevin counsels school districts, community colleges, libraries, and municipalities with issues involving employee discipline, internal investigations, employee leaves of absences, and alleged discrimination and harassment claims. Kevin also defends clients in litigation and administrative charges in federal and state court, the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, and the Illinois Department of Labor. In addition to his experience in labor and employment law, Kevin has trained school districts and community colleges pursuant to Title IX of the Education Amendments Act of 1972.

Prior to joining Robbins Schwartz, Kevin represented individuals with employment matters, civil rights claims, and consumer protection litigation.

AWARDS

Illinois "Rising Star," by Super Lawyers Magazine

RECENT PUBLICATIONS

"OSHA Pauses Vaccination and Testing ETS Following Legal Challenges," *Employment and Labor Law Flashpoints*, IICLE (2021)

Contributing author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (2021)

"NLRB Takes New Look at Charter Schools," *Chicago Daily Law Bulletin* (2019)

RECENT PRESENTATIONS

Updates from the DOL: New Developments for FMLA, FLSA, and IWPCA, IAPD/IPRA Soaring to New Heights Conference (January 2020)

Is it ADA, FMLA, or Other Leave? Navigating the Murky Waters of Employee Leave Benefits, IAPD/IPRA Soaring to New Heights Conference (January 2020)

Illinois Minimum Wage: Nutz and Bolts Overview, IGFOA Payroll Seminar (October 2019)



PRACTICE AREAS

Labor & Employment

EDUCATION

J.D., The John Marshall Law School

B.A., Indiana University

ADMITTED TO PRACTICE

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Illinois State Bar Association

Kane County Bar Association



MATTHEW M. SWIFT

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Matthew is a member of the labor and employment practice group. He counsels employers in various aspects of labor and employment law, such as employee discipline, labor relations, wage and hour, and employment discrimination matters under both federal and state laws such as the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act, and Illinois Human Rights Act. He also represents clients in state and federal courts and advises on Illinois Freedom of Information Act and Open Meetings Act matters.

Before he joined Robbins Schwartz, Matthew served as in-house counsel and FOIA Officer for the Illinois Office of the Governor. In that role, he counseled dozens of agencies on compliance with sensitive FOIA requests, advised on current and potential litigation issues, and served as a legal liaison to the Illinois Department of Human Rights and the Illinois Human Rights Commission.

RECENT PUBLICATIONS

“All Together Now – Employment Law Issues in the New Title IX Rules,”
Chicago Daily Law Bulletin (2020)

“Life After Leave: Bringing Employees Back in a COVID-19 Age” *Best Practices Magazine*, American Association of School Personnel Administrators (2020)

RECENT PRESENTATIONS

Red Light, Green Light? Responding to Recent Decisions about COVID-19 Mitigations, ED-RED's Virtual Member Meeting (February 2022)



PRACTICE AREAS

Education Law
Labor & Employment

EDUCATION

J.D., University of Chicago
Law School

M.P.P., University of
Chicago, Harris School of
Public Policy

B.B.A., *summa cum laude*,
Baylor University

ADMITTED TO PRACTICE

U.S. District Court for the
Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association



MICHELLE L. WEBER

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Michelle practices in the area of education law with a focus on special education and student matters. She counsels school districts and community colleges regarding the IEP process, due process, Section 504, student discipline, board policy and student records.

Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

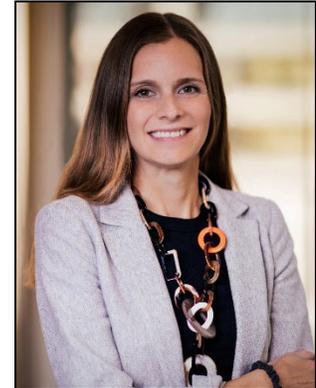
RECENT PUBLICATIONS

“DeVos Rollbacks Could Hit Schools Hard,” *Chicago Daily Law Bulletin* (2017)

RECENT PRESENTATIONS

Removals to Interim Alternative Educational Setting for 45 School Days... Who, What, Where, When, Why, and How?, Illinois Alliance of Administrators of Special Education Winter Conference (February 2022)

Risk Assessments, Threat Assessments and the Impact on Students with Disabilities, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)



PRACTICE AREAS

Education Law
Special Education
Student Discipline

EDUCATION

J.D., Loyola University
College of Law

M.A., Loyola Marymount
University

B.A., Trinity College

ADMITTED TO PRACTICE

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Illinois Council of School
Attorneys

