



Robbins Schwartz
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TITLE IX TRAINING SOUTH SUBURBAN COLLEGE

August 2, 2023

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Title IX Training South Suburban College



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August 2, 2023

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Agenda

Background on Title IX Regulations

Overview of Relevant Laws

Key Definitions

Jurisdiction

College Policy & Procedure

Reporting & Response

Avoiding Conflicts of Interest & Bias

Grievance Process for Formal Title IX

Sexual Harassment Complaints



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Background on Title IX Regulations



Background on Title IX

- “No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(a).



What About Sexual Harassment?

- Although Title IX does not expressly mention sexual harassment, Congress, federal agencies, and courts have interpreted the statute to prohibit sexual harassment in education programs and activities.



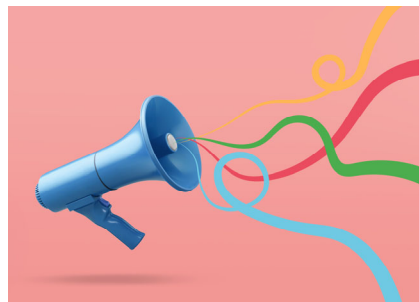
Current Landscape – 2020 Regulations

- Released in May 2020 after formal rulemaking process.
- Went into effect on August 14, 2020.
- Expressly address institutions' obligations to address **sexual harassment** in their educational programs and activities.



Current Landscape – 2020 Regulations

- Major changes from prior guidance interpreting Title IX:
 - Narrower definition of sexual harassment
 - Jurisdictional limitations
 - Single investigator model prohibited
 - Live hearing required for higher education institutions



Changes on the Horizon – 2023 Regulations?

- Department of Education is finalizing review of public comments to proposed amendments to Title IX regulations that were released in Summer 2022.
- Finalized amendments anticipated to be released in October 2023.
- Effective date: TBD (but in 2020, effective date was ~90 days after release).



Changes on the Horizon – 2023 Regulations?

- Likely changes:

- Broader definition of “sex-based harassment”
- Expanded jurisdiction
- Single investigator model permitted
- Live hearings permitted, but not required
- Expanded protections for transgender and nonbinary students and pregnant and parenting students



Changes on the Horizon – 2023 Regulations?

- So long as the Department of Education’s review of the current Title IX regulations is ongoing and until any new regulations go into effect, institutions must continue to comply with the existing regulations.



Overview of Relevant Laws



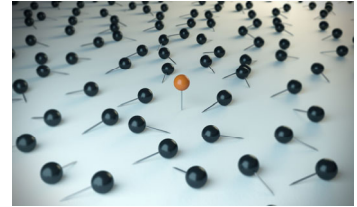
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Relevant Laws

Title IX of the Education Amendments of 1972 ("Title IX")
Title VII of the Civil Rights Act of 1964 ("Title VII")
Illinois Human Rights Act ("IHRA")
Preventing Sexual Violence in Higher Education Act ("PSVHEA")
Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")
Violence Against Women Act ("VAWA")

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Relevant Laws



- Title VII
 - Prohibits discrimination, including discrimination based on sex, in employment. This includes sex-based harassment.
 - Also prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes.
- Illinois Human Rights Act
 - Prohibits discrimination, including in employment.
 - Also prohibits sexual harassment in elementary, secondary and higher education.



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Relevant Laws



- Preventing Sexual Violence in Higher Education Act
 - Requires Illinois higher education institutions to adopt comprehensive policies and procedures concerning sexual violence, domestic violence, dating violence and stalking.



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Relevant Laws

Clery Act: Requires institutions to maintain and disclose crime statistics and security information.

Violence Against Women Act: Expands the rights afforded to campus survivors of sexual assault, domestic violence, dating violence, and stalking.

Key Definitions



Title IX Sexual Harassment

- 1 Quid pro quo harassment by a college employee
- 2 Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
- 3 Any instance of sexual assault, dating violence, domestic violence, or stalking

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Title IX Sexual Harassment: Quid Pro Quo

- When an employee of the institution conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.

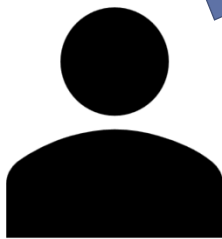


"My math professor offered extra credit if I sent him inappropriate sexual pictures of myself."

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Title IX Sexual Harassment: “Hostile Environment”

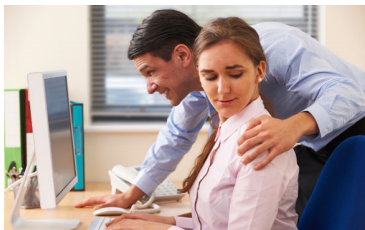
“My classmate is always making sexual comments and gestures at me. It’s so bad that I am considering switching sections so I won’t have to interact with him in class.”



- Unwelcome
- Severe and pervasive and objectively offensive
- Denial of equal educational access

Title IX Sexual Harassment: “Hostile Environment”

- Compare with Title VII definition for workplace hostile environment claims:
 - Unwelcome sexual advances and other conduct of a sexual nature having the purpose or effect of interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.



Title IX Sexual Harassment: “Hostile Environment”

- Compare with IHRA definition
 - Any conduct of a sexual nature exhibited by an education representative toward a student, when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment.



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Title IX Sexual Harassment: Specific Acts

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



**As defined under the Clery Act/VAWA*

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Title IX Sexual Harassment: **Specific Acts**

Sexual Assault

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotional distress.



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Title IX Sexual Harassment: **Specific Acts**

Domestic Violence

- 1) Felony or misdemeanor crimes committed by a current or former spouse or intimate partner under the laws of the jurisdiction and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse.
- 2) A pattern of any other coercive behavior (not necessarily criminal) committed, enabled, or solicited to gain or maintain power and control over a victim, by a person who:
 - is a current or former spouse or intimate partner, or person similarly situated to a spouse of the victim;
 - is cohabitating or has cohabitated with the victim as a spouse or intimate partner;
 - shares a child in common with the victim; or
 - commits acts against an adult or youth victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



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Preventing Sexual Violence in Higher Education Act: **Sexual Violence**

- Physical sexual acts attempted or perpetrated against a person's will or when a person is incapable of giving consent, including without limitation:

- Rape
- Sexual assault
- Sexual battery
- Sexual abuse
- Sexual coercion



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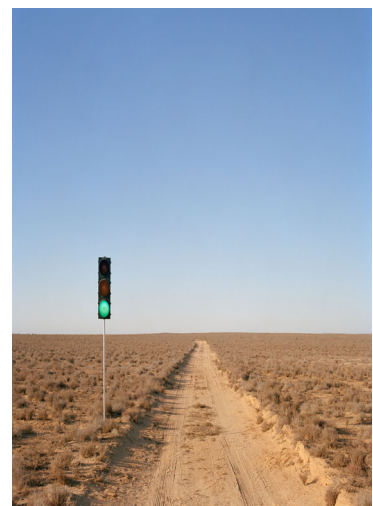
PSVHEA: Sexual Violence and Consent

Must be freely given

May not be inferred from lack of resistance, submission resulting from the use of threat or force, a person's manner of dress, a person's consent to past sexual activity, or a person's consent to engage in sexual activity with another person

Cannot be given by a person who is unable to understand the nature of the activity or give knowing consent due to circumstances (*i.e.*, incapacitation due to alcohol or drugs, age, incapacitation due to mental disability)

May be withdrawn at any time



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Key Definitions: **Hypothetical**

- A student member of the Debate Club reports that they were sexually harassed by the Club advisor.
- What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive, and objectively offensive?

Jurisdiction



Jurisdiction Under Title IX

- The Title IX regulations apply only to alleged sexual harassment that occurs “in the institution’s education program or activity, against a person in the United States.”



Title IX Jurisdiction: Scope of College’s Education Program or Activity

- Includes:
 - Locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurred; and
 - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Title IX Jurisdiction: Scope of College's Education Program or Activity

- Examples for discussion:
 - Hotel during overnight athletic competition?
 - Local business where students are participating in work-study employment?
 - On campus at 2:00 a.m. on the weekend?



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Jurisdiction: “... in the United States”



- To fall under Title IX, the alleged misconduct must have occurred in the United States.
- If not, look to other applicable laws (e.g., PSVHEA)
- Example: sexual assault that occurs during study abroad program?

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Jurisdiction: Hypothetical

- Compare:
 - A faculty member allegedly sexually assaults a student while at an off-campus academic conference.
 - A faculty member allegedly sexually assaults another faculty member while at a third faculty member's home for a birthday party.
- Which type of alleged misconduct falls under Title IX?
- What are the College's response obligations with regard to each type of alleged misconduct?

Board Policy 410.01 Discrimination and Sexual Harassment



Board Policy 410.01 Discrimination and Sexual Harassment

- Prohibits all forms of sex-based misconduct, including but not limited to:
 - Sex discrimination
 - Sexual harassment
 - Sexual violence
 - Domestic violence
 - Dating violence
 - Stalking



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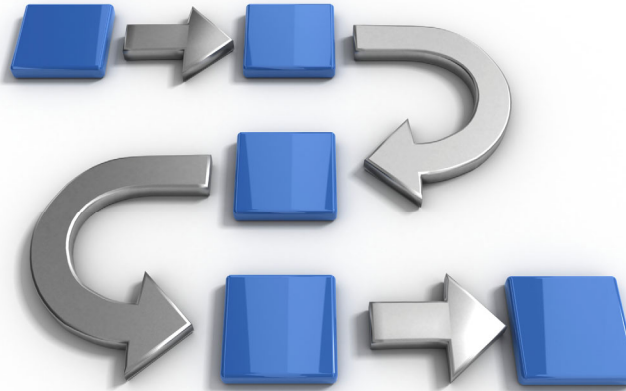
Board Policy 410.01 Discrimination and Sexual Harassment

- Applies to:
 - Students
 - Employees & independent contractors
 - Volunteers
 - Visitors
 - Board members



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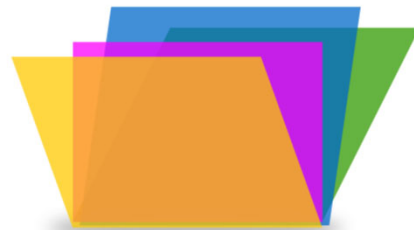
Title IX Sexual Harassment Grievance Procedure



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Purpose of Procedure

- Implement Board Policy 410.01
- Ensure a safe and healthy educational and employment environment.
- Meet relevant legal requirements.



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Jurisdiction

- Procedure applies to alleged sexual harassment whenever the alleged misconduct occurs:
 - On College property; or
 - Off College property, including outside a College education program or activity, if the alleged behavior affects the College environment or likelihood of student or employee success.
- Broader than Title IX jurisdiction



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Role of Title IX Coordinator

- Coordinate the College's compliance with Title IX and related laws.
- Oversee the College's response to all reports of alleged sexual harassment.
- Analyze reports to determine appropriate method for processing and reviewing.
- Oversee grievance process for formal Title IX/PSVHEA complaints.
- Coordinate the provision of supportive measures and implementation of remedies.
- Ensure adherence to policies/procedures.
- Ensure appropriate training is provided to students, faculty and staff.



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Reporting and Responding to Alleged Sexual Harassment



Reporting Alleged Sexual Harassment

Who can report?

- Anyone – including students, employees and community members
- Need not be the person who is alleged to be the victim of the misconduct

To whom should reports be made?

- Title IX Coordinator
- Other College officials with authority to institute corrective measures

“Deliberate Indifference Standard” Under Title IX

- The College must respond to allegations of Title IX sexual harassment promptly and in a manner that is not clearly unreasonable in light of the known circumstances.

College Response: Definitions

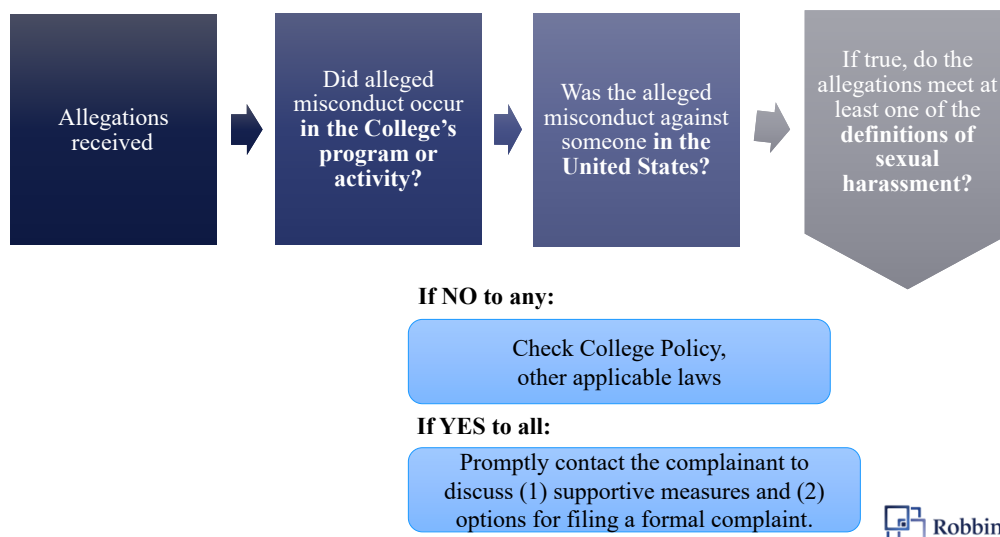
- Complainant:
 - Individual who is alleged to be the victim of alleged sex-based misconduct
- Respondent:
 - Individual who is reported to be the perpetrator of alleged sex-based misconduct

College Response Process

- Step 1: Analyze the Report.
 - Does Title IX apply?

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Title IX: Jurisdiction Analysis

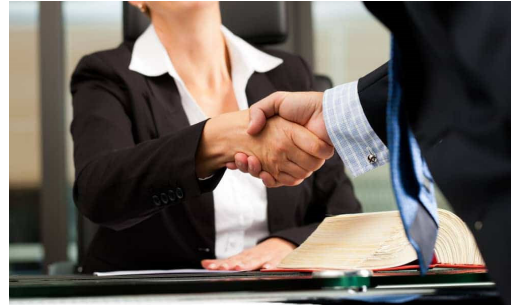


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College Response Process

Step 2: Contact the complainant.

- Remember: “Complainant” is defined as the individual who is alleged to be the victim of alleged sex-based misconduct



College Response Process

- Step 3: Discuss and offer supportive measures.
 - Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party
 - Designed to ensure equal educational access, protect safety, or deter sexual harassment

Supportive Measures

- Examples of supportive measures:

- Schedule changes
- Counseling services
- Housing accommodations
- Leaves of absence
- Extensions or other academic accommodations
- Mutual no-contact directives



Supportive Measures

- The Title IX Coordinator is responsible for coordinating appropriate supportive measures.
- Such coordination may require consultation with other College personnel (campus police, registrar, counseling staff, faculty, etc.).



Supportive Measures: Hypothetical

- You teach a statistics course at the College. One of your students, Alex, contacts you to report that another student, Sam, has been making inappropriate comments and gestures toward Alex during class. Alex says she asked Sam to stop, but his behavior has only gotten worse. Alex says she is having trouble concentrating during class and asks if you can move Sam to a different class section.
 - How should you respond to Alex?
 - Should you move Sam into a different class section? Why or why not?



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College Response Process

- Step 4: Explain the process for filing a **formal complaint**



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Reporting & Response: Hypothetical #1

- You overhear a coach telling one his players that she reminds him of his favorite professional athlete. You ask the student about it, and she says that the coach has told her this several times. She also tells you that the coach refers to her by the athlete's name and calls her "Babe" when she plays well in a game. The student says she likes the special attention from her coach, but she has noticed the other players seem uncomfortable with how the coach treats her and have stopped inviting her to team get-togethers.
 - Assuming the allegations are true, could the coach's conduct meet the definition of sexual harassment?
 - How would you respond in this situation?



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Reporting & Response: Hypothetical #2

- You are a Department Chair. One of the instructors in your Department contacts you to report that her students are referring to her as their "girlfriend" during class. In addition, she notes that several students have jokingly asked to take her on a date after class in front of the other students. The instructor reports that she typically responds to the comments and jokes by laughing or saying, "I'm married," but that the comments and jokes are making her feel increasingly uncomfortable.
 - Could the students' alleged conduct constitute sexual harassment?
 - Should you report the instructor's allegations?



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Questions?



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Break



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Grievance Process for Formal Title IX Sexual Harassment Complaints



Filing of Formal Complaints

Formal complaint:

- Document filed by a Complainant or signed by Title IX Coordinator, alleging:
 - (a) sexual harassment, as defined under Title IX; and/or
 - (b) sexual violence, domestic violence, dating violence or stalking, as defined under the PSVHEA.
- At the time the Complainant files a formal complaint, the Complainant must be participating in or attempting to participate in the College's education programs or activities (either as a student or an employee).

Formal Complaint: Hypothetical

- A student, Paula, graduates in June. In July, Paula applies for a research assistant position at the College for the upcoming fall semester. Paula finds out that the faculty member assigned to review her research assistant application is her former Biology instructor, who made inappropriate and offensive sexual comments toward Paula when she was in his class. Paula contacts the Title IX Coordinator and states that she would like to file a formal Title IX sexual harassment complaint against the faculty member.
- Can Paula file a formal Title IX complaint? Why or why not?



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Signing of Formal Complaint by Title IX Coordinator

- There are circumstances where a Title IX Coordinator may need to sign a formal complaint, triggering the formal complaint investigation process.
- This often arises in situations where:
 - The Complainant is not eligible to file a formal complaint themselves (i.e., because the Complainant is not deliberately indifferent for the Title IX participating in or attempting to participate in the College's educational programs or activities); or
 - The Complainant is eligible to file a formal complaint but elects not to do so.
- Key question: Would it be deliberately indifferent for the Title IX Coordinator not to sign a formal complaint?



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Signing of Formal Complaint by Title IX Coordinator

- Example of a situation where the Title IX Coordinator may be required to sign a formal complaint:
 - The College has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority.
- This is because the College “has a Title IX obligation to provide all students, not just the Complainant, with an educational environment that does not discriminate based on sex.” July 2021 Q&A on Title IX Regulations.



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Notice of Allegations

- Upon the Title IX Coordinator’s receipt of a formal complaint, the Title IX Coordinator must issue a notice of allegations to both parties, simultaneously.
- The notice of allegations must inform the parties of:
 - The grievance process, including informal resolution options;
 - The allegations;
 - The presumption of non-responsibility on the part of the Respondent;
 - The parties’ right to an advisor;
 - The parties’ right to inspect and review evidence; and
 - The Code of Conduct provisions prohibiting knowingly furnishing false information during the grievance process.



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Emergency Removal of Respondent

- Prior to initiating or completing the grievance process in response to a formal complaint, the College may remove a Respondent from its education program or activity on an emergency basis.
 - Only permitted where College has determined, based on an individualized safety and risk analysis, that an immediate threat to the physical health or safety of an individual arising from the allegations of sexual harassment justifies removal.
- The College must provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.



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Administrative Leave

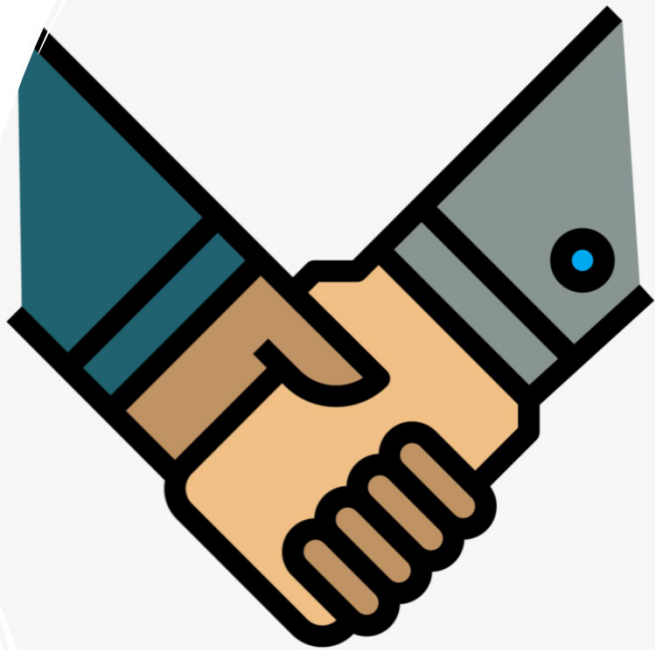
- The College may place an employee on administrative leave during the pendency of the grievance process in response to a formal complaint.
 - Check applicable CBA provisions.



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Informal Resolution

- Requires both parties' **voluntary, written consent**.
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- Party may withdraw at any time prior to reaching a resolution.
- Not permitted in allegations of employee sexual misconduct toward a student.



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Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints where the allegations of sex-based misconduct arise out of the same facts or circumstances.

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Dismissal of Formal Complaints

Mandatory Dismissal

- The College must dismiss a formal Title IX sexual harassment complaint where the Title IX Coordinator or designated Investigator determines that the conduct alleged in the formal complaint:
 - (a) Does not meet Title IX's definition of sexual harassment; and/or
 - (b) Does not satisfy Title IX's jurisdictional requirements.
- *Note: Dismissal does not preclude action altogether – just for purposes of Title IX.*



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Dismissal of Formal Complaints

Discretionary Dismissal

- The College may, but is not required to dismiss a formal complaint where:
 - The Complainant gives written notification of their desire to withdraw the formal complaint or certain allegations;
 - The Respondent is no longer enrolled in or employed by the College; or
 - Specific circumstances prevent the College from gathering evidence sufficient to reach a determination.



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Dismissal of Formal Complaints

- A party may appeal a decision to dismiss a formal complaint or allegations therein.



Quiz Time

- In each of the following scenarios, is dismissal mandatory or discretionary?
 1. The respondent resigns from employment at the College.
 2. The respondent gets arrested and is being held without bond pending their criminal trial.
 3. After initiating the investigation, the investigator determines that all of the conduct alleged by the complainant occurred while the parties were on a college-sponsored trip to Spain.

Avoiding Conflicts of Interest & Bias



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Conflicts of Interest & Bias

- Title IX Regulations provide that any individual designated to serve as the Title IX Coordinator, Investigator, Decision-Maker, Appellate Decision Maker must not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent.
- Can be a basis for appeal if the conflict of interest or bias affects the outcome.

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Conflicts of Interest

- The PSVHEA requires that an institution have a sufficient number of individuals trained to resolve complaints so that:
 - A substitution can occur in the case of a conflict of interest; and
 - Any appeal brought by a party will be heard by an individual with no prior involvement in the initial determination or finding.

Conflicts of Interest

- Key question:
 - Does the Title IX team member's prior or existing relationship with or knowledge of a party prevent the team member from serving impartially?



Conflicts of Interest

- Where a Title IX team member self-identifies a conflict of interest, they should notify the Title IX Coordinator that they will need to recuse themselves.
- Where a party believes that a team member has a prohibited conflict of interest, the party must contact the Title IX Coordinator to request a substitution.
 - The Title IX Coordinator may request information from the team member to help them evaluate the claim.

Bias

- Title IX Regulations prohibit bias for or against:
 - Complainants or respondents generally; and/or
 - An individual Complainant or Respondent.



Bias

- **How** might bias be exhibited in the context of Title IX proceedings?
 - Making decisions based upon stereotypes, personal opinions, or something other than the facts/evidence.
 - Treating the complainant and respondent differently based upon their sex or other protected characteristic.

Bias

- **When** might bias be exhibited in the context of Title IX proceedings?
 - Deciding whether to sign a formal complaint against a Respondent?
 - Considering what supportive measures are appropriate?
 - Conducting investigatory interviews?
 - Providing the parties with access to evidence?
 - Assessing the parties' credibility?

Tips for Promoting Objectivity/Impartiality

- Avoid pre-judging the facts.
 - Wait until all evidence is presented to determine whether policy violation occurred.
- Create and follow checklists.
 - Procedural requirements
 - Allegations to be proven/disproven
- Document treatment of both parties.
 - Opportunities to provide evidence
 - Details of the parties' interviews (time to prepare, breaks, advisors' roles, etc.)
 - Access to relevant evidence
 - Offering flexibility or granting requests for accommodations
- Document rationale for credibility determinations.



Conflicts of Interest & Bias: Hypothetical

- You serve on the College's Behavioral Intervention Team. At a BIT meeting several months ago, you took part in a decision to remove a Respondent from the College's educational program on an emergency basis. The College subsequently conducted a Title IX investigation with respect to that Respondent, and you have just been appointed to serve as the Hearing Officer for the case.
 - Do you have a prohibited conflict of interest?

Investigation of Formal Complaints



Investigations: Written Notice

Required written notices

- Notice of allegations (upon receipt of a formal complaint)
- Notice of investigative interview, meeting, or hearing
- Notice of (mandatory or discretionary) dismissal



Investigations: Evidence

- Equal opportunity for parties to provide:
 - Fact and expert witnesses
 - Inculpatory and exculpatory evidence
- No gag orders



Investigations: Advisors

- Both parties may select an advisor of their choosing
 - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
- May not speak on behalf of the party



Investigation: Access to Evidence

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
 - Be mindful of FERPA and student privacy considerations.
 - Notify parties of parameters/limitations on re-disclosure of records and evidence.

Investigation: Access to Evidence

- The parties will have 10 days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.



Investigation: Preparation of Investigation Report

- After receiving/reviewing the parties' written responses, the investigator must create an investigative report that fairly summarizes the relevant evidence, which the investigator will forward to the Title IX Coordinator.
- Upon receipt of the investigator's report, the Title IX Coordinator will schedule a hearing.



Investigation: Preparation of Investigation Report

- At least 10 days prior to the hearing, the Title IX Coordinator will:
 - Provide both parties with written notice of the hearing date, time, location, participants and purpose of the hearing; and
 - Send to each party (and advisors) the investigative report;
 - Allow parties 10 days to submit a written response to the report.

Live Hearings



Live Hearings: Process

- Conducted by designated Hearing Officer
 - Assigned by Title IX Coordinator
- A party may request a substitution if the participation of the Hearing Officer poses a conflict of interest.
- Upon request, parties can be separated – requires appropriate technology



Live Hearings: Technology

- Technology considerations:
 - Parties must be able to hear and see each other.
 - Parties and Hearing Officer must be able to view evidence being presented.
 - Consider screen-sharing and/or sending documents electronically in advance.
 - Parties should have ability to communicate with their respective advisors in private.
 - Consider “breakout rooms.”

Live Hearings: Advisors

- If a party does not have an advisor to conduct cross-examination at the hearing, the College must appoint one.

Issues for Hearing

- Hearing Officer's role is to determine:
 - Whether facts presented establish that the alleged conduct occurred;
 - Whether that conduct constitutes Title IX sexual harassment, sexual violence, domestic violence, dating violence or stalking; and
 - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.
- The evidence presented must be relevant to one or more of the issues above.



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Considering Evidence

- Relevant documents may include, but are not limited to:
 - The formal complaint
 - The initial written notice of the allegations
 - Written statement(s) and responses by the parties and/or witnesses
 - The investigation report
 - Police reports, photographs and/or video footage (if any)
 - Prior discipline records
 - Only relevant to issue of appropriate sanction



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Preponderance of the Evidence Standard

- “More likely than not”
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation.



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Live Hearings: Cross-Examination

- Advisors are permitted to ask opposing party and witnesses all relevant questions and follow-up questions.
 - Relevance determined by Hearing Officer.



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Live Hearings: Rape Shield Protections

- Questions about the complainant's sexual pre-disposition or prior sexual behavior are not permitted unless:
 - Offered to prove that someone other than the respondent committed the alleged conduct; or
 - Questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Post-Hearing Procedure



Written Determination

Issued to both parties simultaneously within 7 business days of decision being reached.



Written Determination

- Must include:
 - Identification of allegations
 - Description of procedural steps taken
 - Findings of fact supporting determination
 - Conclusions regarding application of conduct standards
 - Statement & rationale for result of each allegation, including:
 - Determination of responsibility
 - Disciplinary sanctions being imposed
 - Whether any remedies will be provided to the complainant
- Procedures and permissible bases for complainant and respondent to appeal

Written Determination

- Note: Pursuant to the August 2021 Letter to Stakeholders, a decision-maker may rely upon statements by an individual who does not submit to cross-examination in reaching a determination.

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Appeals



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Appeals

- Both parties have right to appeal:
 - Any determination regarding responsibility
 - Any dismissal of a formal complaint or allegations therein
- Party must submit written appeal request to Title IX Coordinator
- Title IX Coordinator must forward request to designated individual assigned to review appeal.



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Appeals: Grounds to Appeal Under Title IX

- Procedural irregularity that affected the outcome of the matter
- Newly discovered evidence that could affect the outcome of the matter
- Title IX personnel had a conflict of interest or bias that affected the outcome of the matter



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Appeals: Process

- Appellate decision-maker must afford both parties the opportunity to submit a statement
- Written decision will be issued to both parties simultaneously
 - Describes outcome and rationale
 - Includes statement that decision is final



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Putting It All Together



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Hypothetical

- Alex, a student, reports to her College advisor that a classmate, Aaron, has been making inappropriate sexual jokes and innuendos.
 - They both attended the same online summer school course.
 - They were assigned to work on a project together, much of which was to be done on their own time, over Zoom, and required the exchange of personal contact information.
 - After the project was complete, Aaron allegedly called Alex and asked her out. Alex said yes.
 - Alex states that they went on a few off-campus dates, but Alex decided not to pursue the relationship any further.

Hypothetical

- Alex alleges that Aaron began telling all of their mutual friends that Alex “sleeps around,” and he allegedly began making false statements that she sent him sexually explicit photos.
- Alex alleges that Aaron’s comments took place over the course of the summer, at various off-campus class gatherings where the instructor and other students were present.
- Most recently, they both attended the same party at a house owned by the College’s Peer Mentoring Club, of which Alex is a member.
- At the party, Aaron (who is 21) was drinking. He tried to pressure Alex (who is 19) into drinking as well. Alex reports that Aaron stated, “Rumor has it, you’re more fun when you’re drunk.”
- Alex reports that she told Aaron he was not funny, and to leave her alone.

Hypothetical

- Aaron reportedly became drunk, and one of Alex's friends witnessed Aaron showing other party-goers a sexually explicit photo of a female and telling them it was Alex.
 - The photo did not show a face, so others at the party did not know if the photo was of Alex or not. Some male classmates seemed to believe Aaron.
- Alex is distraught. Aaron is enrolled in two of the same classes as Alex for the fall 2023 semester. Alex is considering dropping the classes so she will not have to interact with Aaron.
- The College advisor documents her discussion with Alex. What should the College advisor do with these allegations? Discuss.



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Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
 - Did Aaron's conduct occur in the College's education program or activity?
- Could Aaron's actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
 - Quid pro quo harassment by a college employee
 - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
 - Any instance of sexual assault, dating violence, domestic violence or stalking



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Hypothetical

- Alex files a formal complaint. The parties proceed to a live hearing.
 - Can Aaron's advisor ask Alex if she has ever had a sexual relationship with Aaron?
- After a full grievance process, the College's appointed Hearing Officer (who is close friends with the College advisor to whom Alex made her initial report) finds that Aaron is responsible for engaging in Title IX sexual harassment.
 - After receiving the Hearing Officer's determination, Aaron feels that the Hearing Officer had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.
- What steps does the Title IX Coordinator need to take with respect to the appeal?

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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily 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 defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before 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.



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

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

B.S., *cum laude*,
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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

RECENT PUBLICATIONS

"College Admissions Under Fire as Top Court Takes Affirmative Action Case,"
Chicago Daily Law Bulletin (2022)

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED
Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023)

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)



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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.

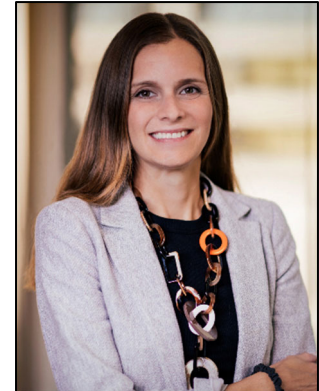
Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and 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)



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