

Robbins Schwartz

Training for Higher Education Title IX Investigators

July 26, 2022

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Training for Higher Education Title IX Investigators

Presented by: Michelle L. Weber and Matthew M. Swift

July 26, 2022

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1

Background on
the Title IX
Investigator Role



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Background: New Training Requirements

- Title IX investigators must receive training on:
 - Final rules' definition of sexual harassment
 - Scope of the education program or activity
 - How to conduct investigation and grievance process
 - How to serve impartially
 - Issues of relevance
- Focus today:
 - What facts matter most when investigating Title IX sexual harassment
 - How to conduct investigatory interviews
 - How to handle evidence and prepare the investigation report

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3

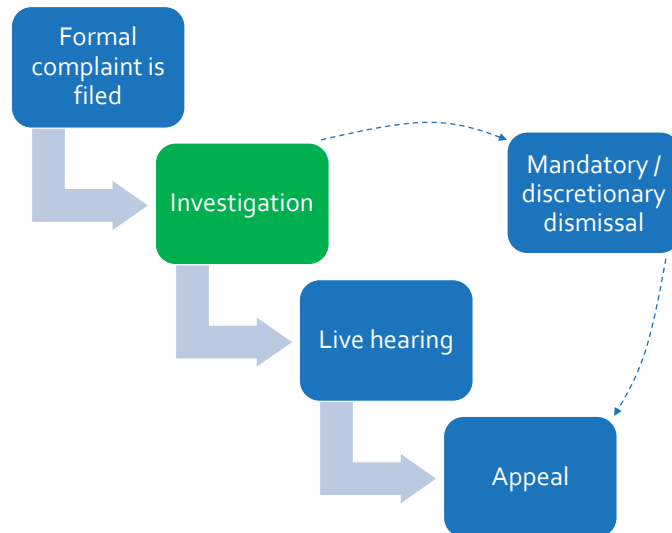
Background: Key Rules for Investigations

- Colleges can no longer use a "single investigator" model
 - An investigator assigned to a formal complaint may not serve as a decision-maker for that complaint.
- Title IX Coordinator may serve as an investigator, but not as a decision-maker
- Colleges must provide the parties with equal access to inspect and review the evidence
- Investigator must submit an investigation report summarizing the relevant evidence

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Background: Overview of Grievance Process



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Background: Key Definitions

- Title IX 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 access to the education program or activity
 - Sexual assault, dating violence, domestic violence or stalking
- Education program or activity
 - locations, events, or circumstances over which the college 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 the college
- Complainant
 - An individual alleged to be the victim of conduct that could constitute sexual harassment

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Spotting the Elements of Title IX Sexual Harassment



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Title IX Sexual Harassment: Quid Pro Quo

- When an employee of the college conditions aid, benefits, pay, a position, grades, discipline, or opportunities for advancement on unwelcome sexual conduct.
 - Example: Mr. Jones promises his student, Jane, that he will write a strong recommendation letter for her if she engages in sexual conduct after class.
 - Example: Ms. Smith tells her subordinate, Bob, that he should “just play along” with a vendor’s sexual advances and “take one for the team” since his performance review is coming up.

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Title IX Sexual Harassment: Quid Pro Quo

- When accepting or performing unwanted sexual conduct is required:
 - To access some benefit, or
 - To avoid some negative consequence
- Key elements:
 - Employee Respondent
 - Exchange of “this for that”
- Can be explicit or implicit



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Title IX Sexual Harassment: Hypothetical

- Jane alleges that her professor Mr. Jones started giving her lower grades on her assignments after she turned down his requests to take her on a date.
- What specific information and evidence would you want to gather?
- What steps would you take to investigate these allegations?

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Title IX Sexual Harassment: "Hostile Environment"

- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal access to the education program or activity

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Title IX Sexual Harassment: "Hostile Environment"

• Key elements:

- Unwelcome conduct
- Severe and pervasive and offensive
 - Severity factors: age of Respondent, relationship of the parties, physical contact, etc.
 - Pervasiveness factors: affecting other school/work relationships, incidents in multiple contexts, conduct repeated over time, etc.
 - Offensiveness: humiliation, threats, physical safety, interference with work/learning, "hostile or abusive," etc.
- Denial of equal access
 - Examples: falling grades, limiting enrollment in classes, student group participation, positions or assignments, job benefits, etc.



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12

Title IX Sexual Harassment: Hypothetical

- Mike, a custodian, alleges that his coworker Joe regularly slapped him on the butt with an “atta boy” at the end of his shifts. Mike says that he asked Joe to stop, but Joe responded, “You should enjoy it,” and that Joe now often comments on Mike’s sexuality and tries to slap Mike’s butt unexpectedly.
 - What specific information and evidence would you want to gather?
 - What steps would you take to investigate these allegations?

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Title IX Sexual Harassment: Other Categories

- Title IX’s definition of sexual harassment also includes:
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

As defined under the Clery Act/Violence Against Women Act

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Title IX Sexual Harassment: Sexual Assault

Sexual Assault

- Any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.
- Examples include offenses that meet the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program
- Generally, forcible sexual contact or sexual contact without consent due to incapacitation, intoxication, or age
- Incest: sexual contact between individuals with a familial relationship of a degree prohibiting marriage

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Title IX Sexual Harassment: Dating Violence & Stalking

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: Domestic Violence (2022 VAWA)



- **Domestic violence** includes:
 - 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, or
 - 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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Title IX Sexual Harassment: Hypothetical

- A student alleges that her boyfriend, who is also a student, physically abused her while they were on campus.
- What specific information and evidence would you want to gather?
- What steps would you take to investigate these allegations?



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Title IX Sexual Harassment: Hypothetical

- A student alleges that her coach has been telling her that she reminds him of his ex-wife. She also says her coach refers to her by his ex-wife's name when she makes a mistake, and calls her "Doll," his ex-wife's nickname, when she does something well.
- The student alleges that her coach's taunts have gotten raunchier and are distracting her, and he is keeping her on the bench more as her performance deteriorates.
- What kind(s) of sexual harassment are you investigating?
- What additional facts do you need to ask about?

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Other Relevant Laws

- The below laws also may be relevant to allegations of sexual harassment:
 - Title VII of the Civil Rights Act of 1964 ("Title VII")
 - Illinois Human Rights Act ("IHRA")
 - Abused and Neglected Child Reporting Act ("ANCRA")
 - Preventing Sexual Violence in Higher Education Act ("PSVHEA")

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Conducting Investigatory Interviews



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Investigatory Interviews: Title IX Requirements

- Send notice of any interview or meeting and give each party sufficient time to prepare.
- Give the parties an equal opportunity to select advisor of their choice.
- Provide equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Avoid “gag orders.”
 - The college must not restrict the ability of either party to discuss the allegations.

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Investigatory Interviews: Preparation

- Review:
 - The allegations
 - Relevant policies and procedures
 - Relevant student or employee records
 - Any documentary evidence received so far
- As applicable, check for employee notice or union representation requirements
- Decide whether to conduct the interview by videoconference, in person, or by phone
- Schedule meetings promptly
 - Notice Letter of Investigative Interview



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Investigatory Interviews: Hypothetical

- You are trying to schedule interviews with a student, a teacher, and a community member. All three are either not responding to you or outright refusing to participate.
 - What can you do to try to convince them?
 - If they still will not participate, how do you proceed?

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Investigatory Interviews: Preparation

- Plan your questions, considering:
 - Specific parts of the relevant definition(s) of sexual harassment and other misconduct
 - How to ask about the specific allegations objectively and equitably
 - What additional facts might be helpful
 - “Point me in the right direction” questions
- Plan how to begin and end the interview

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Investigatory Interviews: 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 answer on behalf of the party
- Parameters for both parties’ advisors must be the same



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Investigatory Interviews: Hypothetical

- You are interviewing Jill, an employee who has been accused of sexual harassment. Jill brought her attorney Jack as her advisor, and Jack is making the interview difficult.
- What should you do if Jack:
 - repeatedly answers for Jill or “clarifies” her testimony?
 - objects to most of your questions and tells Jill she doesn’t have to answer?
 - demands to see evidence or have questions answered before Jill answers?

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Investigatory Interviews: Questioning

- Open-ended questions are best
 - Closed-ended:
 - Q: “Were you in Frank’s office when the phone rang?”
 - A: “No.”
 - Open-ended:
 - Q: “Where were you when the phone rang?”
 - A: “I was in the hallway outside Frank’s office.”

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28

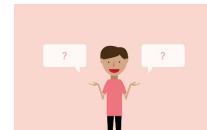
Investigative Interviews: Questioning

- Avoid multiple choice questions
 - Bad Example: “Where were you when the phone rang—in Frank’s office, in the hallway, or in the stairwell?”
- Avoid compound questions
 - Bad Example: “Where were you and who were you with when the phone rang?”

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Investigative Interviews: Questioning



- The interviewee must fully understand the question to give a reliable answer
- If the interviewee asks you to repeat or rephrase a question, you should do so
- Give the interviewee time to think and respond before asking the next question

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Investigatory Interviews: Questioning

- Complete a line of questioning before moving on to questioning about a different issue
- When possible, clarify issues on which there is conflicting testimony before concluding the interview

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Investigations: Questioning

- Allow the interviewee to respond to each factual allegation
- Do not hesitate to ask follow-up questions
- Ask whether any witnesses can confirm the interviewee's testimony
- Obtain names and, if necessary, contact information for witnesses

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Investigatory Interviews: Credibility

- Factors for determining credibility of a witness:

- Does the witness have personal knowledge of the facts?
- Does the witness have any reason to be untruthful?
- Does the witness have a bias, hostility, or some attitude that affected the truthfulness of their testimony?
- Does the witness have a special relationship with a party?
- Was the witness's testimony consistent with other testimony or the evidence presented?
- Has the witness made inconsistent statements?
- Is there evidence of trauma that could impact the witness's testimony?



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Investigatory Interviews: Credibility

- Quality over quantity: the testimony of a single, disinterested witness is more reliable than the testimony of multiple biased witnesses

- Example:

- The college's baseball coach is the Respondent and is alleged to have sexually assaulted the Complainant in the athletic training room immediately after a game
- Which testimony is more reliable in an interview:
 - The testimony from 4 players stating that they were with the Respondent at a restaurant immediately after the game, or
 - The testimony from a waiter at the restaurant stating he served the Respondent at the restaurant immediately after the game

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Investigative Interviews: Employee Respondents

- As applicable, include the right to union representation in the notice and check other CBA requirements
- Request that they document testimony by a written, signed statement or fact chronology
- Document union representation, any critical factual admissions, and the opportunity to respond to allegations

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Investigative Interviews: PSVHEA Allegations

- Coordinate with law enforcement
- For cases involving sexual abuse of a minor, coordinate with DCFS and/or Children's Advocacy Center
- Use survivor-centered and trauma-informed response training on sexual violence, domestic violence, dating violence, and stalking



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Investigatory Interviews: Other Best Practices

- Avoid volunteering information
- Never promise confidentiality
- Have a second investigator or administrator / non-union employee present to help with notetaking
 - Take your own notes at or immediately afterward
 - Give a basis for your credibility assessments
- Advise that retaliation is prohibited
 - "Gag orders" vs. prohibiting harassment, discrimination, or retaliation

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Investigatory Interviews: Hypothetical

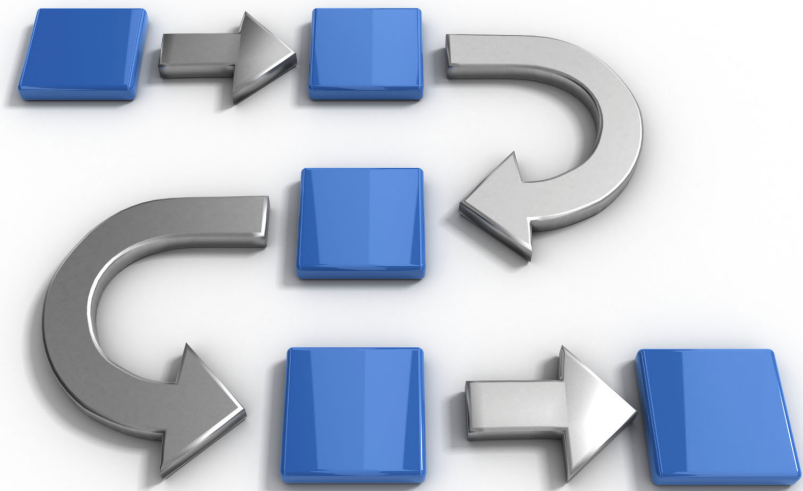
- Bonnie alleges that her coworker Clyde has been using his work laptop to cyberstalk her. Bonnie also reported the stalking to local law enforcement, with whom you have coordinated the timing of your interview of Clyde.
- Clyde comes to the interview but refuses to answer some questions, asserting his Fifth Amendment right against self-incrimination.
 - How do you respond?



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Evidence and Investigatory Report Procedures



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Investigation: Relevant Evidence

- “Relevant” includes relevant to determining:
 - The truth or falsity of specific factual allegations
 - Evidence about nature and circumstances of misconduct
 - Evidence affecting credibility
 - Whether the facts establish an element of the relevant type(s) of sexual harassment
 - Evidence about intent or consent
 - Evidence about impacts of any misconduct
 - Other evidence that would inform a reasonable person’s perception of the conduct
 - What potential sanctions/discipline or remedies are appropriate

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Investigation: Relevant Evidence



- Generally irrelevant:
 - Information protected by a legally recognized privilege
 - A party's medical, psychological, or other similar treatment records (without written consent)
 - Prior disciplinary history (except to determine potential sanctions/discipline)
 - A Complainant's sexual predisposition or sexual history

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41

Investigation: Rape Shield Protections

- During the live hearing, certain questions are irrelevant and not permitted. As a result, investigators also should consider evidence about the following topics irrelevant:
 - the Complainant's sexual pre-disposition, and
 - the Complainant's prior sexual behavior, unless:
 - the evidence is offered to prove that someone other than the Respondent committed the alleged conduct; or
 - the evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent

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42

Investigation:
**Access to
Evidence**

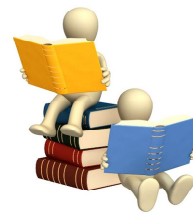
- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
 - Be mindful of FERPA and other privacy considerations
 - Consider whether redactions are necessary
 - Notify parties of parameters/limitations on re-disclosure of records and evidence

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Investigation:
**Access to
Evidence**

- At the end of the investigation and before completing the investigator's report, the investigator must send both parties a copy of all relevant evidence.
 - Notice Letter to Complainant/Respondent of Investigation Evidence and Right to File Response



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Investigation: Hypothetical

- You are investigating allegations that Jane's professor Mr. Jones started giving her lower grades on her assignments after she turned down his requests to take her on a date.
- Are either of the following relevant?
 - Jane's sexual orientation?
 - Jane's relationship with a teacher two years ago?
- When sharing evidence, should you redact:
 - Jane's grades in Mr. Jones's class or other classes?
 - Testimony from Jane's social worker?
 - The name of Katy, another student witness?
 - Mr. Jones's disciplinary history?

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Investigation: Preparation of Investigation Report

- The parties will have 10 school business days to submit a written response to the evidence, which the investigator must consider prior to completing the investigative report.
- The investigator must create an investigative report that fairly summarizes the relevant evidence and forward the report to the decision-maker.
 - Investigation Report Template

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Investigation: Preparation of Investigation Report

- Parts of an investigation report:
 - Summary of complaint allegations
 - Definition(s) of sexual harassment and any other misconduct at issue
 - Description of steps in the investigation process
 - Summary of supportive measures, emergency removal, and/or administrative leave
 - Summaries of relevant evidence from:
 - Interviews
 - Documents
 - Written responses
 - Recommended findings of fact (optional)



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Conflicts of Interest & Bias



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Conflict of Interest & Bias

- Any Title IX investigator 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

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Conflict of Interest & Bias

Conflict of interest

- The investigator is “subject to two coexisting interests that are in direct conflict with one another.”
 - Examples: spousal or family relationship with a party, party’s relationship to a supervisor
 - Not: “I know one of the parties.”

Bias

- “Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”
 - Basis for bias need not be a protected category
 - Consider ability to remain objective

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How to Address Implicit Bias

- More deliberate or conscious thinking
 - Allow time to fully think through a scenario before coming to a decision / conclusion
- Create and follow checklists
 - Procedural requirements
 - Allegations to be proven / disproven
- Document treatment of both parties and ensure it remains equitable
 - 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



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Key Takeaways and Recommendations for Investigators



Prepare for Success

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52

Takeaways and Recommendations

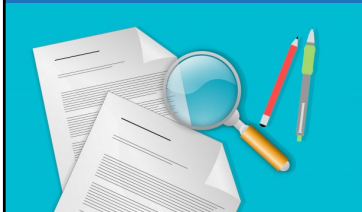
- 1) "Begin with the end in mind"
 - Think about what the decision-maker will need
 - Prepare outlines for interviews
- 2) Break it down
 - Consider what facts are most important for each part of an alleged policy violation



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Takeaways and Recommendations



- 3) Show your work...
 - Document the steps you take
 - Take interview notes, including about your credibility determinations
 - Keep copies of or notes on communications with the parties
- 4) ...but not confidential records.
 - Don't share irrelevant evidence.
 - Redact when necessary.
- 5) Treat the parties equitably.

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54



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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)



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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.

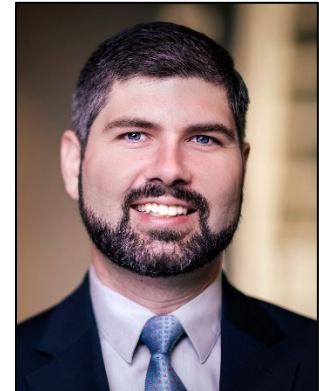
RECENT PUBLICATIONS

“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)



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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.

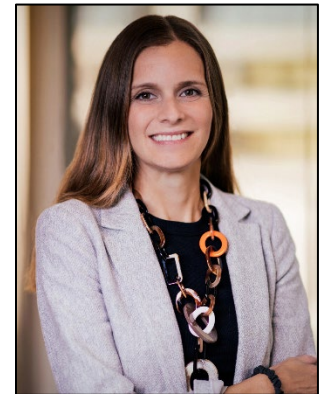
RECENT PUBLICATIONS

"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)



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