

## Training for Ridgewood HS Title IX Personnel

September 18, 2020

**Matthew M. Swift**

[mswift@robbins-schwartz.com](mailto:mswift@robbins-schwartz.com)

**Emily P. Bothfeld**

[ebothfeld@robbins-schwartz.com](mailto:ebothfeld@robbins-schwartz.com)

**Chicago**

55 West Monroe Street, Suite 800  
Chicago, IL 60603  
p 312.332.7760  
f 312.332.7768

**Champaign-Urbana**

301 North Neil Street, Suite 400  
Champaign, IL 61820  
p 217.363.3040  
f 217.356.3548

**Collinsville**

510 Regency Centre  
Collinsville, IL 62234  
p 618.343.3540  
f 618.343.3546

**Bolingbrook**

631 East Boughton Road, Suite 200  
Bolingbrook, IL 60440  
p 630.929.3639  
f 630.783.3231

**Rockford**

2990 North Perryville Road, Suite 4144B  
Rockford, IL 61107  
p 815.390.7090

The materials on this webpage are the property of Robbins Schwartz and may not be copied, adapted, shared, or displayed without the express written permission of Robbins Schwartz.

# Training for Ridgewood High School Title IX Personnel

Presented By: Emily P. Bothfeld and Matthew M. Swift

September 18, 2020

Robbins Schwartz

1

## Background on New Title IX Regulations



Robbins Schwartz

2


## Background

- September 22, 2017: U.S. Department of Education released a Dear Colleague Letter formally withdrawing two key Obama-era guidance documents:
  - 2011 Dear Colleague Letter on Sexual Violence
  - 2014 Q&A on Title IX and Sexual Violence

Robbins Schwartz

3

## Current Status

- Proposed Title IX Regulations released in November 2018
  - 60-day public comment period yielded over 120,000 comments
- Proposed Final Rules released on May 6, 2020 and published in Federal Register on May 19, 2020
- Effective date: August 14, 2020 

Robbins Schwartz

4

## Impact on School Districts

- The new Regulations require:
  - Revisions to policies and procedures
  - Staffing determinations
  - Training for all personnel involved in a school district's investigation and grievance process, including:
    - Title IX Coordinator(s),
    - Investigators
    - Decision-makers
    - Appellate decision-makers
    - Informal resolution facilitators
  - Publishing of information and training materials on the district's website

Robbins Schwartz

5

## Overview of Relevant Laws



Robbins Schwartz

6

## Relevant Laws

- The below laws are relevant to the District's policies and procedures that address sexual harassment:
  - 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")
  - Abused and Neglected Child Reporting Act ("ANCRA")
  - Every Student Succeeds Act ("ESSA")

Robbins Schwartz

7

## Relevant Laws

- **Title IX:** Prohibits sex-based discrimination, including sexual harassment, in educational programs and activities receiving federal financial assistance.
- **Title VII:** Prohibits discrimination, including discrimination based on sex, in employment.

Robbins Schwartz

8

## Relevant Laws

- **Illinois Human Rights Act:**

- Prohibits discrimination in Illinois, including in employment.
- Also prohibits sexual harassment in elementary, secondary and higher education.



- **Abused and Neglected Child Reporting Act:** Requires immediate reporting when a school employee has reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.

Robbins Schwartz

9

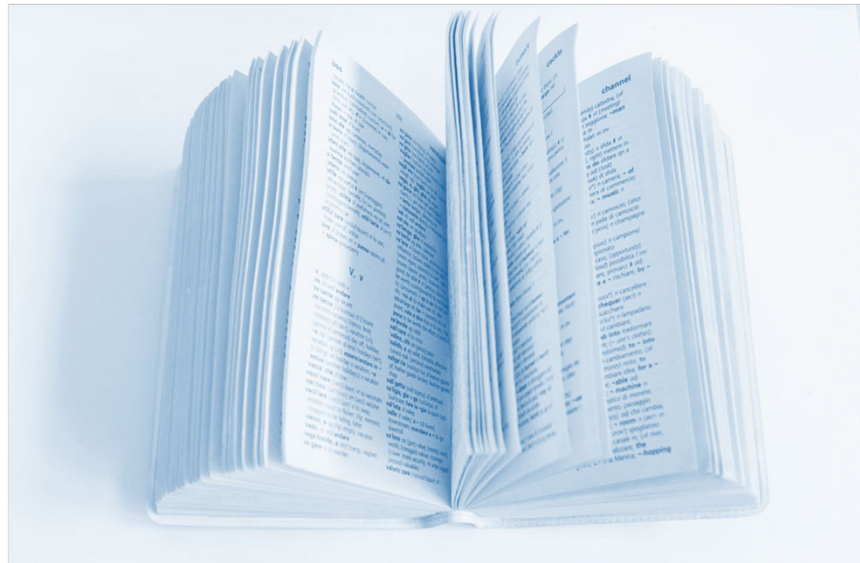
## Relevant Laws

- **Every Student Succeeds Act:** Requires states and districts to have in place policies prohibiting the "aiding and abetting of sexual abuse."

Robbins Schwartz

10

## Key Definitions



Robbins Schwartz

11

## Title IX Sexual Harassment

### Sexual harassment includes:

1. **Quid pro quo** harassment by a District 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**

Robbins Schwartz

12

## Title IX Sexual Harassment: Quid Pro Quo

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

- Example: Mr. Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct after class.

Robbins Schwartz

13

## 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 educational access

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

Robbins Schwartz

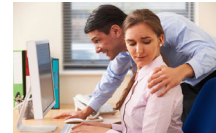
14



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.**



Robbins Schwartz

15

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.**

Robbins Schwartz

16

## 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*

Robbins Schwartz

17

## Sexual Assault, Dating Violence, & Stalking

### 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.

Robbins Schwartz

18

## Domestic Violence

- A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the victim;
- By a person with whom the victim shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth victim who is protected.

Robbins Schwartz



19

## Key Definitions: Hypothetical

- You receive a report of a student being sexually assaulted by another student while on an overnight school-sponsored field trip.
- Do you need to evaluate the severity, pervasiveness, and offensiveness of the sexual assault?



Robbins Schwartz

20

Key  
Definitions:  
**Hypothetical**

- You have been assigned to investigate a formal complaint alleging that a student was sexually harassed by his history teacher.
- What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive and objectively offensive?

Robbins Schwartz

21

Jurisdiction



Robbins Schwartz

22

## Jurisdiction Under Title IX

- A school district must respond when sexual harassment occurs “in the district’s education program or activity, against a person in the United States.”

Robbins Schwartz

23

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

- Includes locations, events, or circumstances over which the school district exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.

Robbins Schwartz

24

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

- Ridgewood High School examples for discussion:
  - School facilities rented by an outside group for an event?
  - Local business where students are participating in school fundraising activities?
  - Teacher's home?
  - Social media?

Robbins Schwartz

25

**Jurisdiction:  
"... in the  
United States"**

- To fall under Title IX, the alleged misconduct must have occurred in the United States.
  - Example: sexual assault that occurs during high school study abroad program?

Robbins Schwartz

26

## Jurisdiction Analysis

- If the alleged misconduct did not occur in the District's education program or activity and/or did not occur in the United States, look to other applicable laws (i.e. Title VII, IHRA) and other district policies, such as:
  - 2:260, *Uniform Grievance Procedure*
  - 5:10, *Equal Employment Opportunity*
  - 5:90, *Abused and Neglected Child Reporting*
  - 5:120, *Ethics and Conduct*
  - 7:20, *Harassment of Students Prohibited*
  - 7:191, *Prevention of and Response to Bullying, Intimidation and Harassment*
  - 7:185, *Teen Dating Violence Prohibited*
  - 7:190, *Student Behavior*

Robbins Schwartz

27

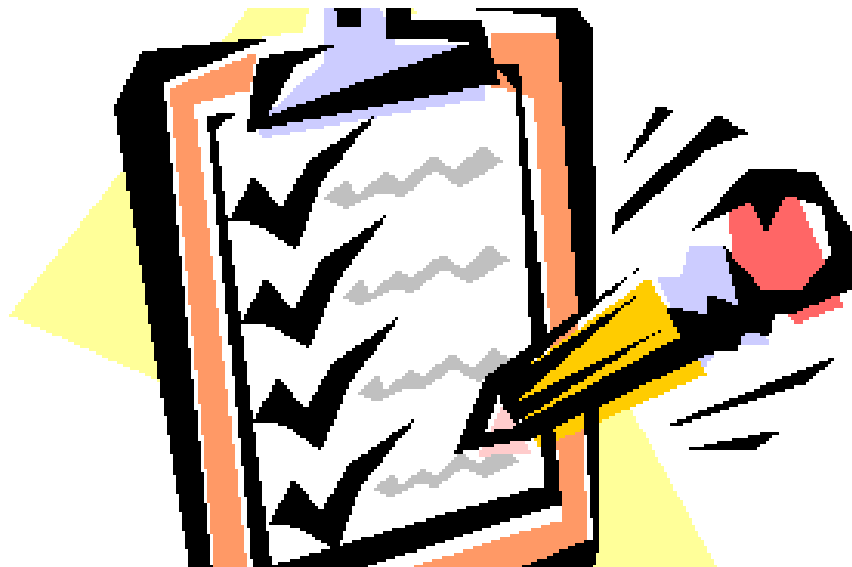
## Jurisdiction: Hypothetical

- Compare:
  - A student athlete allegedly fondles another student athlete while off-campus at a sporting event with their team and coach
  - A student athlete allegedly fondles another student athlete while at a friend's home
- Which type of alleged misconduct falls under Title IX?
- What are the District's response obligations with regard to each type of alleged misconduct?

Robbins Schwartz

28

Board Policy  
2:265 – Title IX  
Sexual  
Harassment  
Grievance  
Procedure



Robbins Schwartz

29

Policy 2:265 –  
Prohibitions

- **Prohibits sexual harassment**, as defined under Title IX.
- **Prohibits retaliation** against anyone who, in good faith, has made a report or complaint, assisted, or participated or refused to participate in any manner in a proceeding under the policy.

Robbins Schwartz

30



## Policy 2:265 – Applicability

- The District complies with Title IX and its implementing regulations concerning everyone in the District’s education programs and activities, including:
  - Applicants for employment
  - Students
  - Parents/guardians
  - Employees
  - Third parties

Robbins Schwartz

31

## Policy 2:265 – Enforcement

- **District employees** found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including discharge
- **Students** found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including suspension and expulsion
- Title IX sexual harassment by **third parties** (e.g., vendors, parents, visitors) will be addressed in accordance with the authority of the Board, in the context of the relationship with the third party

Robbins Schwartz

32

Policy 2:265 –  
Key Definitions

**Complainant:**

- Individual who is alleged to be the victim of conduct that could constitute sexual harassment

**Respondent:**

- Individual who has been reported to be the perpetrator of the conduct that could constitute sexual harassment

Robbins Schwartz

33

Policy 2:265 –  
Key Definitions

**Formal Title IX Sexual Harassment Complaint:**

- Document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
  - Note: Parent/guardian may file a formal complaint on behalf of their child. In such a case, the student is still the “Complainant” for purposes of Title IX.

Robbins Schwartz

34

## Policy 2:265 – Key Definitions

### Supportive Measures:

- non-disciplinary, non-punitive individualized services
- offered as appropriate, as reasonably available, and without fee or charge
- offered to the Complainant or the Respondent before or after a formal Title IX sexual harassment complaint is filed or where no formal Title IX sexual harassment complaint has been filed

Robbins Schwartz

35

## Policy 2:265 – Other Elements

- Requires the Superintendent and/or designee to ensure that the District prevents and responds to allegations of Title IX Sexual Harassment
  - Curriculum components
  - Education and training for school staff
  - Notice of policy and contact information of Title IX Coordinator

Robbins Schwartz

36

## Policy 2:265 – Other Elements

- Reporting and confidentiality of reports
- Initial processing of reports
- Required elements for procedures the District must implement for formal Title IX sexual harassment complaint process

Robbins Schwartz

37

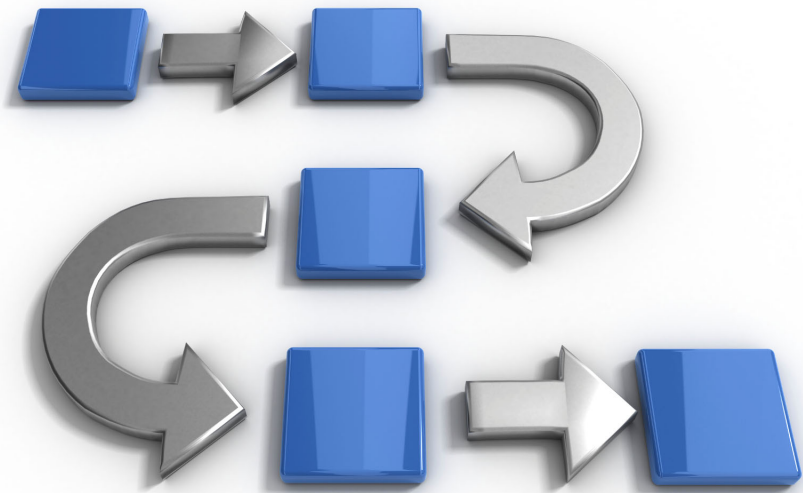
## Policy 2:265 – Key Principles for Procedures

- Treat Complainant and Respondent equitably
- Objective evaluation of relevant evidence
- Presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility
- Compliance with grievance process before any disciplinary actions against a Respondent.
- Include reasonably prompt timeframes for conclusion of the grievance process
- Base all decisions upon the preponderance of evidence standard

Robbins Schwartz

38

Administrative  
Procedures for  
Board Policy  
2:265



Robbins Schwartz

39

Administrative  
Procedures for  
Board Policy  
2:265

- 2:265-AP1, *Title IX Sexual Harassment Response*
- 2:265-AP2, *Formal Title IX Sexual Harassment Complaint Grievance Process*

Robbins Schwartz

40

## Purpose of Procedures

- Implement Board Policy 2:265
- Establish the District's required response to reports of sexual harassment that may violate Title IX (2:265-AP1)
- Establish the District's investigation and response process in response to a formal Title IX sexual harassment complaint (2:265-AP2)

Robbins Schwartz

41

## Role of Title IX Coordinator

- Upon receiving knowledge of sexual harassment allegation, promptly contacts Complainant to discuss supportive measures and explain the process of filing a formal complaint.
- Analyzes reports under other relevant Board policies to determine appropriate method for processing and reviewing reports.
- Maintains the confidentiality of the sexual harassment allegation, to the greatest extent practicable.
- May sign a Formal Title IX Sexual Harassment Complaint.

Robbins Schwartz

42

## Role of Title IX Coordinator

- When a Formal Complaint is filed, follows the Formal Title IX Sexual Harassment Grievance Process (2:265-AP2).
- Ensures a determination is made about whether an emergency removal or administrative leave is necessary, pending the investigation outcome.
- Creates and maintains, for at least seven years, records of any actions and supportive measures taken and provided in response to the report of sexual harassment.

Robbins Schwartz

43

## Role of All District Employees

- Immediately report any suspicion of child abuse or neglect.
- Promptly forward all reports of sexual harassment (including anonymous reports) to the Title IX Coordinator.

Robbins Schwartz

44

## Reporting Alleged Sexual Harassment



Robbins Schwartz

45

## Reporting: The Who

- Who can report?
  - Anyone – including students, employees and third parties
  - Need not be the person who is alleged to be the victim of the misconduct
- To whom should reports be made?
  - Title IX Coordinator
  - District administrator (Principal, AP, Dean of Students)
  - Any employee with whom the person is comfortable speaking

Robbins Schwartz

46



## Reporting: Employee Obligations

- Under Policy 2:265:
  - All District employees must report allegations of sexual harassment, including anonymous reports.
  - School employees must respond to incidents of sexual harassment by promptly making or forwarding a report to the Title IX Coordinator.
  - An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.

Robbins Schwartz

47

## Reporting: Confidentiality of Reports

- Under Policy 2:265, reports of alleged sexual harassment will be confidential to the greatest extent practicable, subject to the District's duty to investigate and maintain an educational program or activity that is productive, respectful, and free of sexual harassment.

Robbins Schwartz

48

## Abused and Neglected Child Reporting Act

- Provides for the reporting and investigation of child abuse and neglect.
- Education personnel are required to immediately report when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.
- All reports of suspected child abuse or neglect made under this Act must be made immediately.

Robbins Schwartz

49

## Questions?



Robbins Schwartz

50

## Response to Reports Alleging Sexual Harassment



Robbins Schwartz

51

## “Actual Knowledge” Under Title IX

- Notice of sexual harassment or allegations of sexual harassment to any District employee or to the District’s Title IX Coordinator

Robbins Schwartz

52

## “Deliberate Indifference” Under Title IX

- Once the District has actual knowledge of alleged sexual harassment, the District must respond to the allegations:
  - Promptly
  - In a manner that is not “clearly unreasonable in light of the known circumstances”

Robbins Schwartz

53

## Overview of District Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment, promptly contact the Complainant to:
  - a. discuss and offer supportive measures,
  - b. consider the Complainant’s wishes with respect to supportive measures,
  - c. explain that supportive measures are available with or without filing a formal complaint, and
  - d. explain the process for filing a formal complaint.

Robbins Schwartz

54

Response  
Process:  
**Analyze  
Report**

- The Title IX Coordinator will analyze the report to determine whether there is another or an additional appropriate method(s) for processing and reviewing it.

Robbins Schwartz

55

Response  
Process:  
**Analyze  
Report**

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

Robbins Schwartz

56

## Title IX Jurisdiction Analysis



**If YES to 1, 2 and 3:**

Promptly contact the Complainant to discuss supportive measures and options for filing a formal complaint

**If NO to 1, 2 or 3:**

Title IX does not apply. Check other District policies. Send Notice of Applicable Policies.

Robbins Schwartz

57

## Response Process: Contact Complainant

- Step 2: Contact the Complainant.
  - Reminder: Complainant is the individual who is alleged to be the victim of alleged sex-based misconduct



Robbins Schwartz

58

Response  
Process:  
**Contact  
Complainant**

- When meeting with the Complainant, the Title IX Coordinator should:
  - discuss and offer supportive measures;
  - consider the Complainant's wishes with respect to supportive measures;
  - explain that supportive measures are available with or without filing a formal complaint; and
  - explain the process for filing a formal complaint.

Robbins Schwartz

59

Grievance Process  
for Formal Title IX  
Sexual  
Harassment  
Complaints



Robbins Schwartz

60

## Grievance Process for Formal Complaints

### Formal complaint:

- Document filed by a Complainant or signed by Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
- At the time a Complainant files a formal complaint, he or she must be participating in or attempting to participate in the District's education programs or activities.

Robbins Schwartz

61

## Formal Complaint Hypothetical

A student graduates in June. In September, the former student contacts the Title IX Coordinator to report that she was sexually harassed by another student (who is now a current senior) the previous February. The former student indicates that she would like to file a formal complaint.

- Can the former student file a formal complaint?
  - If no, what options does the District have?
- Same scenario as above, but the former student was just hired by the District to serve as a tutor for incoming freshman students. Now can the former student file a formal complaint?

Robbins Schwartz

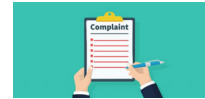
62



## Grievance Process: Notice of Allegations

- Must be sent **simultaneously** to both parties (or the parties parent(s)/guardian(s)) after Title IX Coordinator's receipt of formal complaint.
- Informs the parties of:
  - The grievance process, including informal resolution
    - Notice Letter Regarding Informal Resolution should be enclosed
  - 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
  - The District policies prohibits knowingly making false statements or submitting false information during the grievance process.

Robbins Schwartz



63

## Grievance Process: Emergency Removals and Administrative Leave

- Prior to initiating or completing the grievance process in response to a formal complaint, the District may remove a Respondent from its education program or activity on an emergency basis.
  - Only permitted where the District 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.
- District must provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- **Be mindful of SB 100 requirements.**

Robbins Schwartz

64

## Grievance Process: Emergency Removals and Administrative Leave

- The District may place an employee on administrative leave during the pendency of the grievance process in response to a formal complaint.

Robbins Schwartz

65

## Informal Resolution



Robbins Schwartz

66

## Informal Resolution

- Fully discretionary: Requires parties' **voluntary, written consent**
  - Consent to Participate in Informal Resolution
  - Resolution Documentation / Agreement Template
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- May not be required as condition of:
  - Enrollment/continuing enrollment,
  - Employment or continuing employment,
  - Enjoyment of any right, or
  - Waiver of the right to a formal investigation/adjudication

Robbins Schwartz

67

## Informal Resolution

- Party may **withdraw** at any time prior to a resolution
  - Withdrawal triggers resumption of grievance process.
- May include:
  - Mediation
  - Restorative justice
- Not permitted in allegations of **employee** sexual misconduct toward a **student**

Robbins Schwartz

68

## Consolidation and Dismissal of Formal Complaints



Robbins Schwartz

69

## 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.

Robbins Schwartz

70

## Dismissal of Formal Complaints

- *Dismissal does not preclude action altogether – just for purposes of Title IX.*
  - Notice Letter to Complainant/Respondent of Dismissal of Allegations

### **Mandatory dismissal:**

- Title IX Coordinator or designated investigator determines that conduct alleged in the formal complaint does not meet
  - (a) Title IX's definition of sexual harassment and/or
  - (b) Title IX's jurisdictional requirements.

Robbins Schwartz

71

## Dismissal of Formal Complaints

### **Discretionary dismissal if:**

- Complainant gives written notification of desire to withdraw formal complaint or certain allegations;
- Respondent is no longer enrolled in or employed by the District; or
- Specific circumstances prevent the District from gathering evidence sufficient to reach a determination.
- A party may appeal a decision to dismiss a formal complaint or allegations therein.

Robbins Schwartz

72

## Investigation of Formal Complaints



Robbins Schwartz

73

## Investigations: Written Notice

- Written notice required to both parties:
  - Allegations (upon receipt of a formal complaint)
    - Notice Letter to Complainant/Respondent of Allegations
  - Investigative interviews or meetings
    - Notice Letter of Investigative Interview
  - Mandatory or discretionary dismissal
    - Notice Letter to Complainant/Respondent of Dismissal of Allegations

Robbins Schwartz

74

## Investigations: Evidence

- Equal opportunity for parties to provide:
  - Fact witnesses
  - Expert witnesses
  - Inculpatory evidence
  - Exculpatory evidence
- No gag orders

Robbins Schwartz

75

## 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



Robbins Schwartz

76

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, ISSRA and student privacy considerations.
  - Consider whether redactions are necessary
  - Notify parties of parameters/limitations on re-disclosure of records and evidence.

Robbins Schwartz

77

Investigation:  
**Access to  
Evidence**

- 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.
  - Notice Letter to Complainant/Respondent of Investigation Evidence and Right to File Response
- The parties will have 10 school business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.
  - Investigator must also to send a copy of each party's written response to the other party.

Robbins Schwartz

78



## 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 initial decision-maker.
  - Investigation Report Template



Robbins Schwartz

79

## Investigation: Preparation of Investigation Report

- At least 10 school business days prior to the initial decision-maker's determination, the investigator must send to each party (and their advisors) the investigative report and allow the parties 10 school business days to submit a written response to the report.
  - Notice Letter to Complainant/Respondent of Final Investigation Report and Right to File Response

Robbins Schwartz

80

## Submission of Written Questions



Robbins Schwartz

81

## Written Questions: Process

- Alternative to live hearing
- Opportunity given to both parties by the decision-maker after investigator sends investigative report
  - Notice Letter to Complainant/Respondent of Opportunity to Submit Written Questions
- Parties may only submit written, **relevant** questions they want the initial decision-maker to ask of any party or witness
- Parties must submit questions within five (5) school business days after they receive the Notice of Opportunity to Submit Written Questions.

Robbins Schwartz

82

## Written Questions: Process

- The initial decision-maker must:
  - Exclude any irrelevant questions
  - Forward relevant questions to the appropriate party or witness
    - Notice Letter to Party or Witness of Questions Requiring Answers
  - Give party or witness five (5) school business days to respond
  - Provide asking party with answers and explain any decision to exclude questions
    - Notice Letter to Complainant/Respondent of Exclusion of Submitted Questions
  - Allow both parties limited follow-up questions

Robbins Schwartz

83

## Written Questions: 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.

Robbins Schwartz

84

## Determination Regarding Responsibility



Robbins Schwartz

85

## Issues for Decision

- Initial decision-maker's role is to determine:
  - Whether facts presented establish that the alleged conduct occurred;
  - Whether that conduct constitutes Title IX sexual harassment; and
  - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.

Robbins Schwartz

86

## 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
  - The parties' written questions and answers
  - Police reports, photographs and/or video footage (if any)
  - Prior discipline records
    - Only relevant to issue of appropriate sanction



Robbins Schwartz

87

## 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.

Robbins Schwartz

88

## Written Determination

Determination of Responsibility Letter must include:

- Identification of allegations potentially constituting Title IX sexual harassment
- 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 recommended
  - Whether any remedies will be provided to the Complainant
- Procedures and permissible bases for Complainant and Respondent to appeal

Robbins Schwartz

89

## Remedies

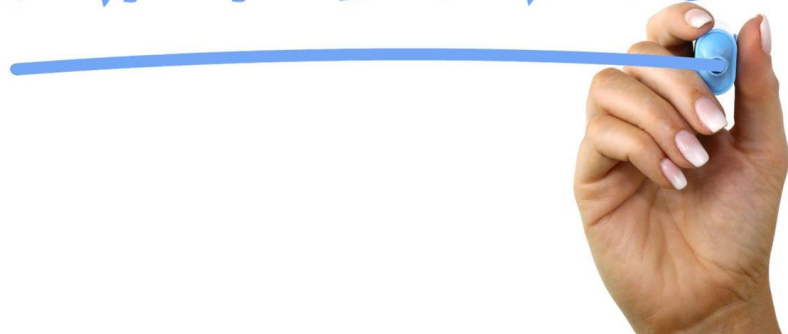
- The Title IX Coordinator is responsible for implementing any remedies for the Complainant, as ordered by the decision-maker.

Robbins Schwartz

90

## Appeals

# APPEALS



Robbins Schwartz

91

## Appeals

- Both parties have right to appeal any determination regarding:
  - Responsibility
  - Dismissal of any formal complaint or allegations therein
- Party must submit written appeal request to Title IX Coordinator
  - Within 10 school business days of receipt of written determination or dismissal
- Title IX Coordinator must forward request to **designated appeals administrator**

Robbins Schwartz

92

## Appeals: Grounds to Appeal

- a) Procedural irregularity that affected the outcome
- b) New evidence or information exists that could affect the outcome but that was not reasonably available at the time the determination was made
- c) Conflict of interest or bias that affected outcome, amongst:
  - Title IX Coordinator, Investigator, or Initial Decision-Maker

Robbins Schwartz

93

## Title IX Coordinator

- Notifies the other party in writing that an appeal has been filed.
  - Notice Letter to Complainant/Respondent of Appeal
- Provides both parties five (5) school business days to submit a written statement in support of, or challenging, the outcome.
- Promptly forwards all materials relative to the appeal to the Appellate Decision-Maker.

Robbins Schwartz

94



## Appellate Decision Maker

- Affirms, reverses, or amends the written determination regarding responsibility or the notice of dismissal.
  - 2:265-AP2 requires this to occur within 30 school business days of the appeal.
- Written decision issued to both parties simultaneously within 5 school business days after conclusion of the review.
  - Appeal Determination Letter

Robbins Schwartz

95

## Recordkeeping



Robbins Schwartz

96

## Recordkeeping

- District must create and maintain, for at least seven (7) years, records of:
  - The sexual harassment investigation, including any determination regarding responsibility, any sanctions imposed on the Respondent and any remedies provided to the Complainant;
  - Any appeal and its result; and
  - Any informal resolution and its result.
- Compare with ISSRA requirement for maintenance of temporary school student records.

Robbins Schwartz

97

## Conflicts of Interest & Bias



Robbins Schwartz

98

## Conflict of Interest & Bias

Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by the District to facilitate an informal resolution process, must not have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent.

Robbins Schwartz

99

## Conflict of Interest & Bias

### **Conflict of interest:**

- In the decision-making context, a situation in which an individual is “subject to two coexisting interests that are in direct conflict with one another.”
  - 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.”

Robbins Schwartz

100

## How to Address Implicit Bias

- More deliberate or conscious thinking
  - Sometimes called “Staring” (as opposed to “Blinking”)
  - This involves allowing yourself time to fully think through a scenario before coming to a decision/conclusion

Robbins Schwartz

101

## How to Address Bias: Create a Checklist

- Create a checklist beforehand
  - For ex: A pre-made checklist of allegations to be proven/disproven
- Decision-making checklists can encourage less biased decisions; they provide an objective framework to assess your thinking<sup>1</sup>
- Can be effective in overcoming stereotypes<sup>2</sup>
- Helps reduce the attention given to biased characteristics that may influence decision-making<sup>3</sup>

1. Arkes, Hal R. Arkes & Victoria A. Shaffer, Should We Use Decision Aids or Gut Feelings? in G. GIGERENZER & C. ENGEL, EDS., HEURISTICS AND THE LAW (2004).  
2. Isaac, Carol Isaac, Barbara Lee & Molly Carnes, Interventions That Reduce Implicit Bias in Hiring: A Systematic Review, 84 Academic Medicine 1440 (2009).  
3. Uhlmann, Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining When to Justify Discrimination, 16 PSYCHOL. SCI. 474 (2005).  
All materials compiled by the ABA Implicit Bias Toolkit, which can be found here: <https://www.americanbar.org/groups/diversity/resources/implicit-bias/>

Robbins Schwartz

102

Questions?



Robbins Schwartz

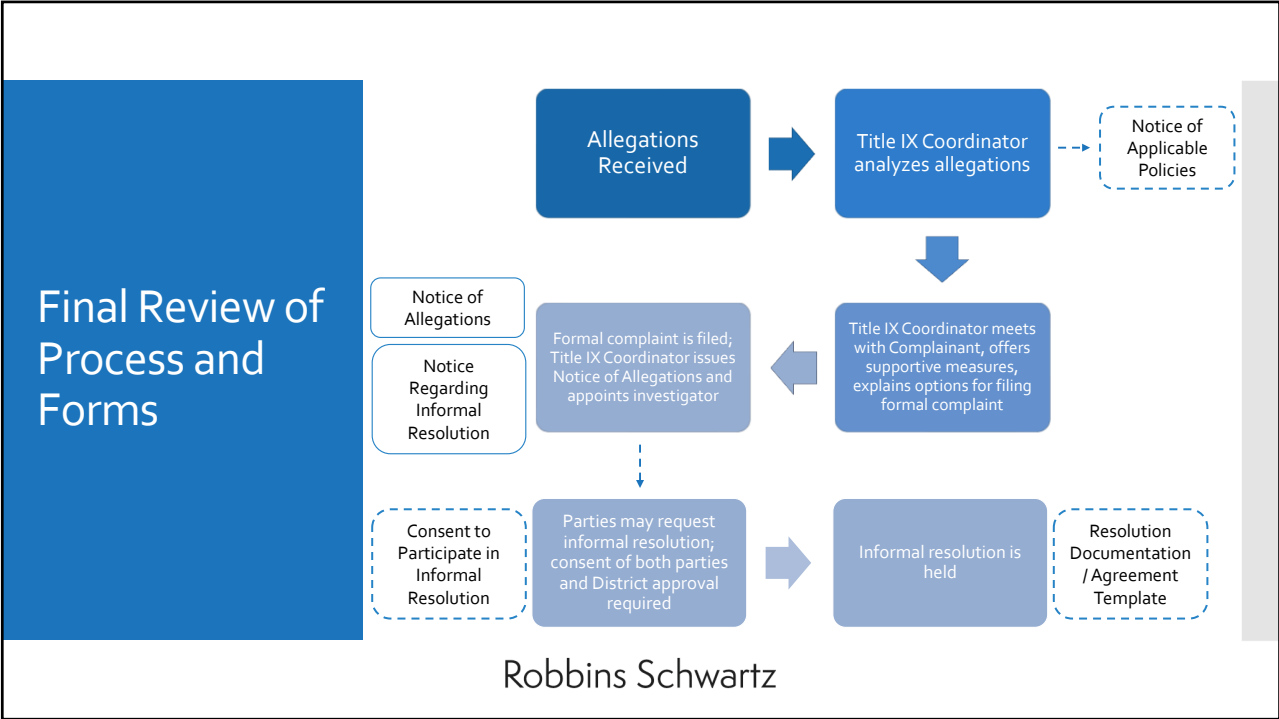
103

Final Review  
and  
Hypothetical

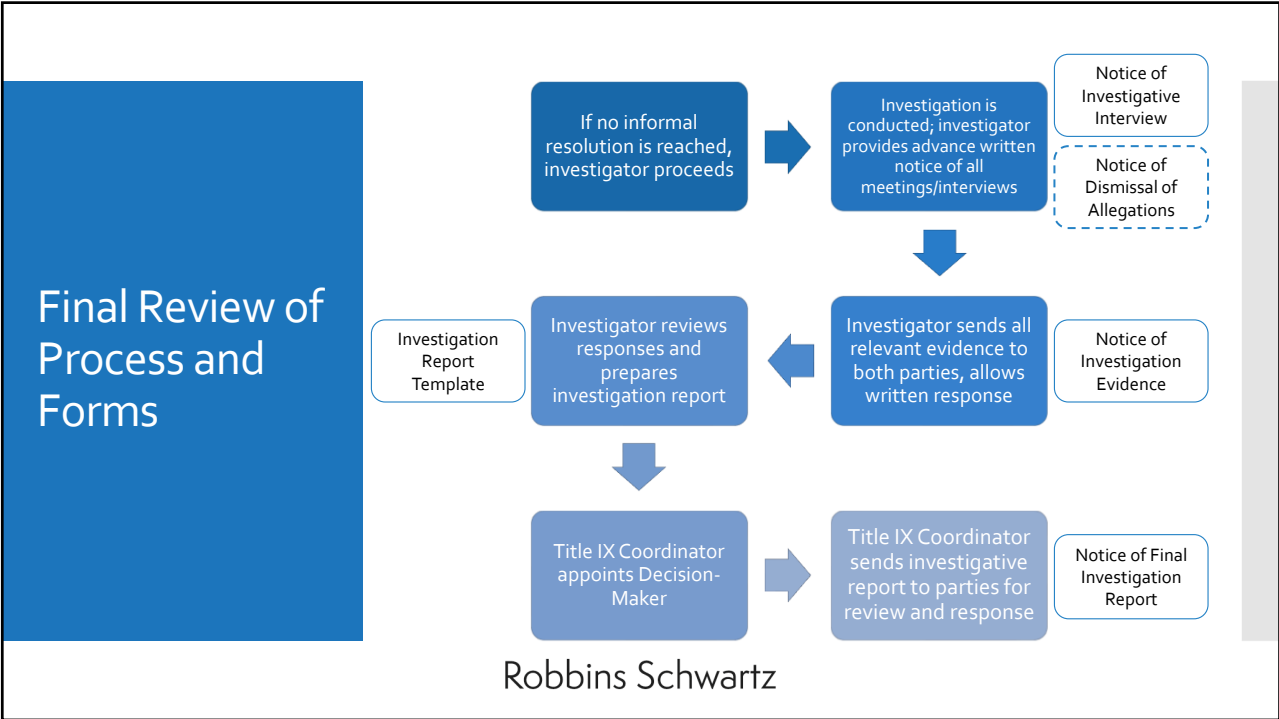


Robbins Schwartz

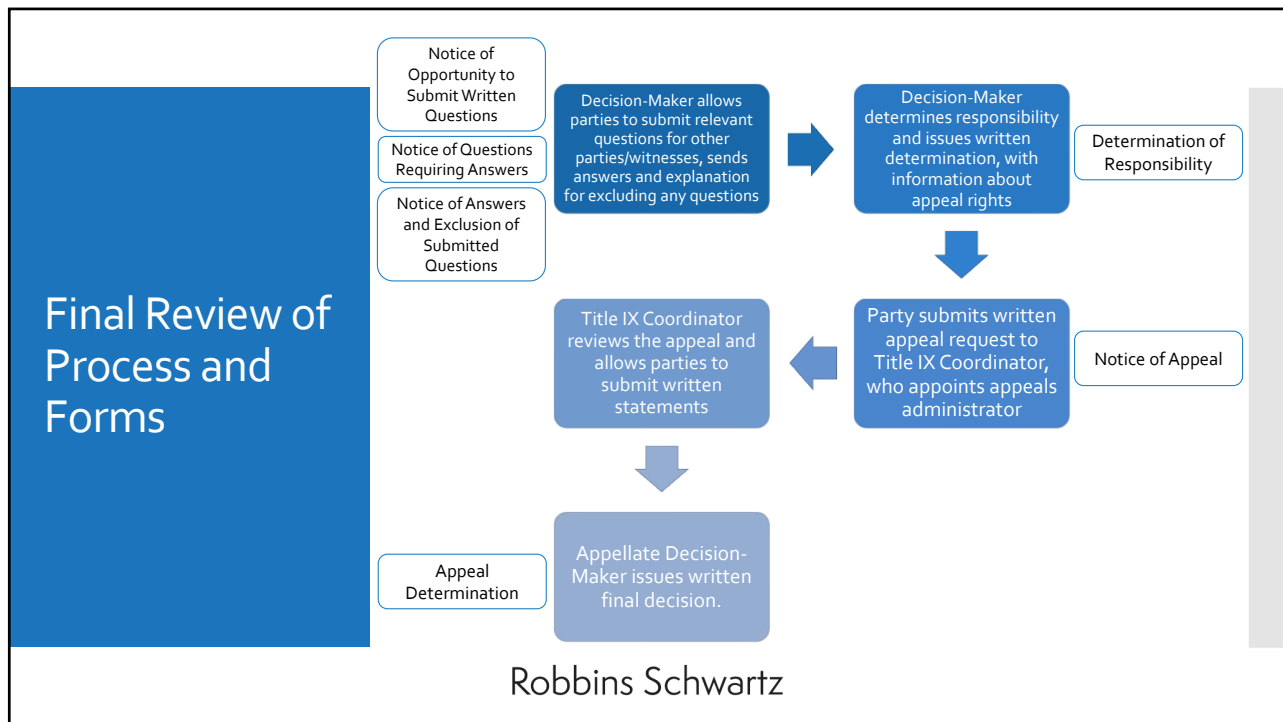
104



105



106



107

## Hypothetical

- Jen, a student, reports to her teacher that a classmate, Steve, has been making inappropriate sexual jokes and innuendos.
  - She and Steve both attended the same virtual summer school course.
  - They were assigned to work on a project together, much of which was to be done on their own time, and required the exchange of personal phone numbers.
  - After the project was complete, Steve allegedly called Jen and asked her out. Jen said no.
  - Jen states that Steve began teasing her on Snapchat and telling all of their mutual friends that Jen “is a prude.”

Robbins Schwartz

108

## Hypothetical

- The teasing became increasingly more offensive, and Steve allegedly began making false statements that Jen stuffs her bra and that Jen sent him sexually explicit photos.
- Jen alleges that Steve's comments took place over the course of the summer through Snapchat, sometimes during virtual class meetings.
- Most recently, Steve and Jen both attended the same party at a mutual friend's house.
- At the party, Steve (who is 18) was drinking. He tried to pressure Jen (who is 16) into drinking as well. Jen reports that Steve stated, "Some alcohol will allow you to drop your guard, and hopefully, allow me to drop your pants."

Robbins Schwartz

109

## Hypothetical

- Jen reports that she told Steve he was not funny, and to leave her alone. Steve allegedly responded, "I'd like to see you try to stop me."
- Jen is distraught. Steve and Jen have both been involved in the school newspaper. Jen is considering dropping out of that activity so she will not have to interact with Steve.
- The teacher documents her discussion with Jen. What should the teacher do with these allegations? Discuss.



Robbins Schwartz

110



## Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
- Reminder:
  - Steve’s behavior began after the completion of their virtual project. He teased her by spreading false information to her friends.
  - Steve’s behavior continued on social media, sometimes during virtual class meetings.
  - Steve’s most recent actions were at a friend’s house during a party that was not part of a District-recognized activity.
- Do Steve’s actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
  - **Quid pro quo** harassment by a District 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**

Robbins Schwartz

111

## Hypothetical

- Jen files a formal complaint. The parties proceed to submitting written questions to the decision-maker.
  - Can Steve have the decision-maker ask Jen if she has ever had a sexual relationship with Steve?
- After a full grievance process, the District’s appointed decision-maker (who is close friends with the teacher to whom Jen made her initial report) finds that Steve is responsible for engaging in Title IX sexual harassment.
  - After receiving the decision-maker’s determination, Steve feels that the decision-maker 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?

Robbins Schwartz

112

Questions?



Robbins Schwartz

# Robbins Schwartz

## **MATTHEW M. SWIFT**

**ASSOCIATE, CHICAGO**

312.332.7760

[mswift@robbins-schwartz.com](mailto:mswift@robbins-schwartz.com)

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)



### **PRACTICE AREAS**

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



# Robbins Schwartz

## EMILY P. BOTHFELD

ASSOCIATE, CHICAGO

312.332.7760

ebothfeld@robbins-schwartz.com

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)

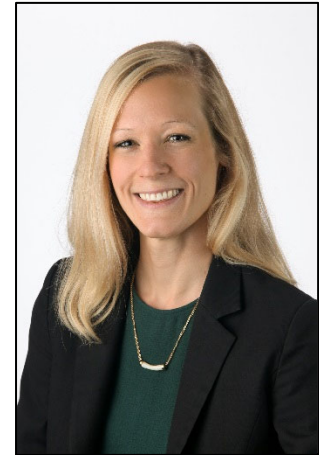
### RECENT PRESENTATIONS

*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)

*Updates and Recent Developments out of the U.S. Department of Education*, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

*Legal Hot Topics for Nursing Program Administrators and Faculty*, Illinois Organization of Associate Degree Nursing (March 2019)



### PRACTICE AREAS

Education Law  
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

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

