Training for Danville Area Community College Title IX Personnel

September 14th and 16th, 2020

Frank B. Garrett III
fgarrett@robbins-schwartz.com

Michelle L. Weber
mweber@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 Danville Area Community College Title IX Personnel

Presented By: Frank B. Garrett III and Michelle L. Weber

September 14 & 16, 2020

Robbins Schwartz

1

Background on New Title IX Regulations

Robbins Schwartz

2

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.
© 2020 Robbins Schwartz

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 Higher Education Institutions

- The new Regulations require:
  - Revisions to institutional policies and procedures
  - Staffing determinations
  - Training for all personnel involved in an institution'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 institution's website

Robbins Schwartz

5

Overview of Relevant Laws

Robbins Schwartz

6

Relevant Laws

- The relevant requirements of the below laws have been incorporated into the College's proposed Sex-Based Misconduct Policy and Procedures:
  - Title IX of the Education Amendments of 1972 ("Title IX")
  - Title VII of the Civil Rights Act of 1964 ("Title VII")
  - Preventing Sexual Violence in Higher Education Act ("PSVHEA")
  - Illinois Human Rights Act ("IHRA")
  - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")
  - Violence Against Women Act ("VAWA")

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

- **Preventing Sexual Violence in Higher Education Act:** Requires Illinois higher education institutions to adopt comprehensive policies concerning sexual violence, domestic violence, dating violence and stalking.
- **Illinois Human Rights Act**:
  - Prohibits discrimination in Illinois, including in employment.
  - Also prohibits sexual harassment in elementary, secondary and higher education.

Robbins Schwartz

9

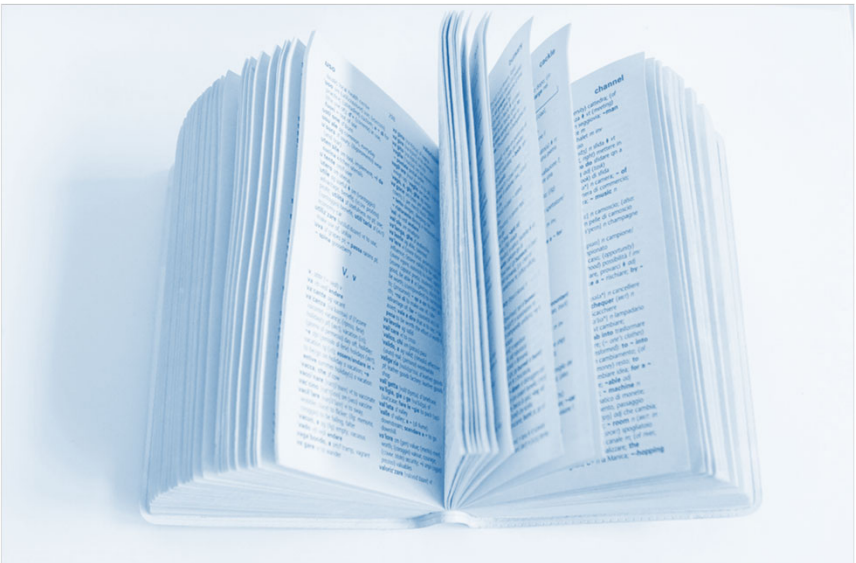
Relevant Laws

- **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.

Robbins Schwartz

10

Key Definitions



Robbins Schwartz

11

Title IX Sexual Harassment

Sexual harassment includes:

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** (as defined in Clery Act/VAWA)

Robbins Schwartz

12

Title IX Sexual Harassment: **Quid Pro Quo**

- When an employee of the college conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.
  - Example: Professor Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct in his office after class.

Robbins Schwartz

13

Title IX Sexual Harassment: **"Hostile Environment"**

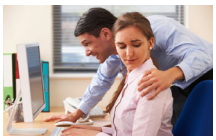
- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
  - Severe <u>and</u> pervasive <u>and</u> offensive
  - Denial of equal educational access

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 Clery Act/VAWA

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

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; and
  - Sexual coercion.

Robbins Schwartz

20

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

- The PSVHEA requires that institutions adopt a policy which includes a definition of consent consistent with the Act, 110 ILCS 155/10.
- **Consent**:
  - Must be freely given
  - May not be inferred from lack of verbal or physical resistance, from submission resulting from the use of threat or force, from a person's manner of dress, from a person's consent to past sexual activity, or from a person's consent to engage in sexual activity with another person
  - May be withdrawn at any time
  - 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)

Robbins Schwartz

21

Key Definitions: **Hypothetical**

- You receive a report of a student being sexually assaulted by another student on campus.
- Do you need to evaluate the severity, pervasiveness, and offensiveness of the sexual assault?

Robbins Schwartz

22

Key Definitions: **Hypothetical**

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

Robbins Schwartz

23

Jurisdiction

Robbins Schwartz

24

Jurisdiction Under Title IX

- Institutions must respond when sexual harassment occurs "in the institution's education program or activity, against a person in the United States."

Robbins Schwartz

25

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.

Robbins Schwartz

26

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

- Danville Area Community College examples for discussion:
  - College grounds rented by an outside organization for an event ?
  - Local long-term care facility where students are participating in clinical experiences?
  - Faculty member's home?
  - Social media?

Robbins Schwartz

27

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?

Robbins Schwartz

28

Jurisdiction: **Hypothetical**

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

Robbins Schwartz

29

Proposed Sex-Based Misconduct Policy

Robbins Schwartz

30

Proposed Sex-Based Misconduct Policy

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

Robbins Schwartz

31

Proposed Sex-Based Misconduct Policy

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

Robbins Schwartz

32

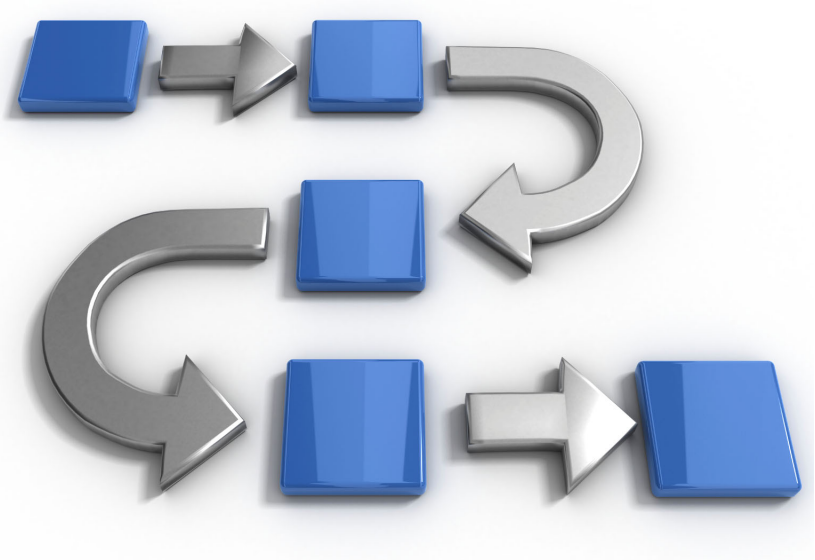
Proposed Sex-Based Misconduct Policy

- **Prohibits retaliation** against any person reporting alleged sex-based misconduct or participating in an investigation of alleged sex-based misconduct
- Directs the College administration to **establish, maintain and publish procedures** implementing the College's Sex-Based Misconduct Policy.

Robbins Schwartz

33

Sex-Based Misconduct Procedures



Robbins Schwartz

34

Purpose of Procedures

- Implement the College's proposed Policy Prohibiting Sex-Based Misconduct and the College's Discrimination and Harassment Policy.
- Ensure a safe and healthy educational and employment environment.
- Meet relevant legal requirements.

Robbins Schwartz

35

Jurisdiction

- Procedures apply to alleged sex-based misconduct whenever the alleged misconduct occurs:
  - On campus; or
  - Off campus property if:
    - The conduct was in connection with a College or College-recognized program or activity; or
    - The conduct may have the effect of creating a hostile environment for a member of the College community.

- Broader than Title IX jurisdiction

Robbins Schwartz

36

Role of Title IX Coordinator

- Coordinate College's compliance with Title IX and related laws.
- Oversee College's response to all reports of alleged sex-based misconduct.
- 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.

Robbins Schwartz

37

Options for Assistance Following Incident of Sex-Based Misconduct

- Healthcare
  - OSF Sacred Heart Medical Center
  - Carle Hoopeston Regional Medical Center
  - Carle Main Campus in Urbana
- Advocacy and support
  - Survivor Resource Center
  - ICASA
  - RAINN's National Sexual Assault Hotline
- Illinois Department of Human Rights sexual harassment and discrimination helpline

Robbins Schwartz

38

Reporting Alleged Sex-Based Misconduct

Robbins Schwartz

39

Reporting Generally

- 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
  - College administrator
  - Any responsible employee (students only)

Robbins Schwartz

40

Student Reporting

- Reporting to Responsible Employees
  - Responsible Employees include:
    - Title IX Coordinator
    - Supervisors and Managerial Staff
    - College Administrators
    - Faculty
    - Campus Police & Safety
    - Coaches
    - Advisors of Student Clubs/Organizations
  - REs must report all relevant details to the Title IX Coordinator, if known.

Robbins Schwartz

41

Student Reporting

- Confidential Reporting
  - The College's designated Confidential Advisors include:
    - Survivor Resource Center
    - Illinois Coalition Against Sexual Assault
    - RAINN's National Sexual Assault Hotline
    - College's Procedures list individuals on campus who are able to refer students to confidential advisors.
  - Confidential Advisors are not required to report <u>any</u> information about an alleged incident to the Title IX Coordinator without the student's permission.

Robbins Schwartz

42

Employee Reporting

- Employees should report to:
  - Title IX Coordinator
  - Department of Human Resources

Robbins Schwartz

43

Questions?

Robbins Schwartz

44

College Response to Reports of Alleged Sex-Based Misconduct

Robbins Schwartz

45

"Deliberate Indifference Standard" Under Title IX

- College must respond to allegations of Title IX sexual harassment:
  - Promptly
  - In a manner that is not "clearly unreasonable in light of the known circumstances"

Robbins Schwartz

46

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

Robbins Schwartz

47

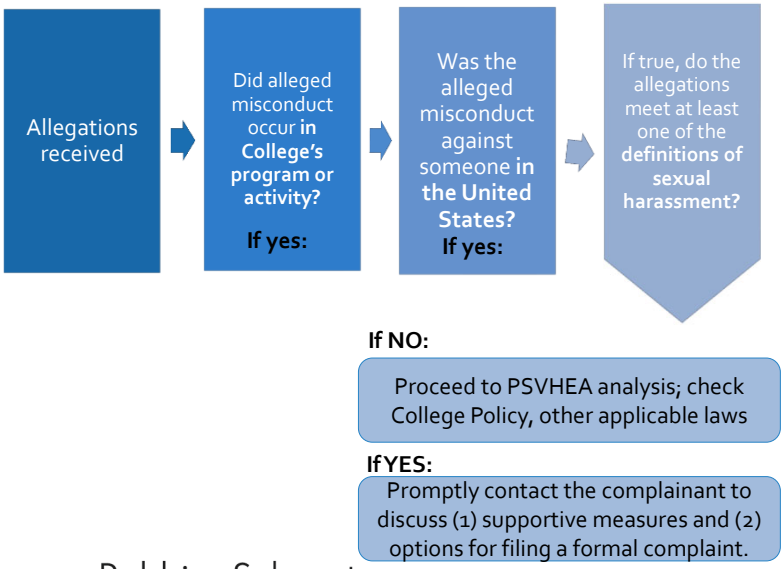
Overview of College Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment and/or alleging sexual violence, domestic violence, dating violence or stalking pursuant to the PSVHEA, promptly contact the complainant.
3. Discuss and offer supportive measures.
4. Explain the process for filing a formal complaint.

Robbins Schwartz

48

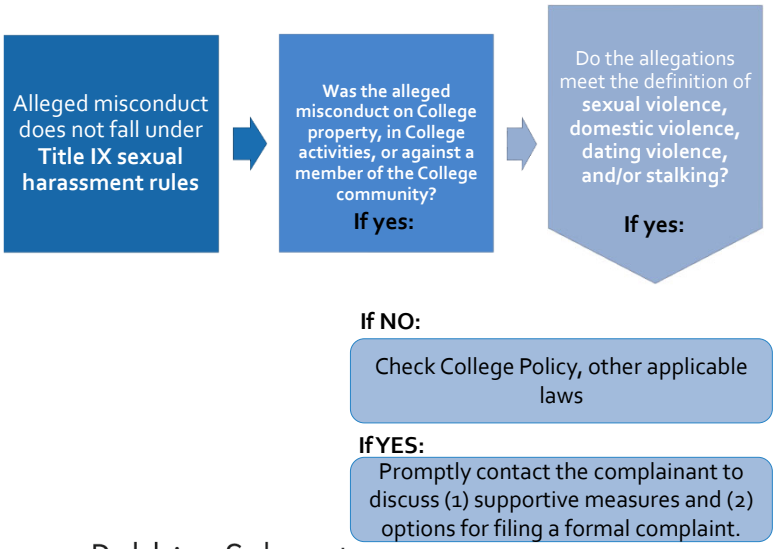
Title IX: **Jurisdiction Analysis**



Robbins Schwartz

49

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



Robbins Schwartz

50

College Response Process

- Step 2: Contact the complainant.
  - "Complainant" is defined as the individual who is alleged to be the victim of alleged sex-based misconduct

Robbins Schwartz

51

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

Robbins Schwartz

52

College Response Process

- Step 4: Explain to the complainant the process for filing a formal complaint.

Robbins Schwartz

53

Grievance Process for Formal Complaints

Robbins Schwartz

54

Grievance Process for Formal Complaints

Formal complaint:

- Document filed by a complainant or signed by Title IX Coordinator alleging
  - (a) sexual harassment in violation of Title IX and/or
  - (b) sexual violence, domestic violence, dating violence or stalking in violation of the PSVHEA.
- At the time of filing 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).

Robbins Schwartz

55

Formal Complaint **Hypothetical**

A student graduates in June. In mid-July, the student contacts the Title IX Coordinator to report that she was sexually harassed by another student the previous February. The student indicates that she would like to file a formal complaint.

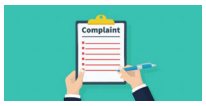
- Can the student file a formal complaint?
- What if the student is working as a research assistant for the summer?
- In the event the complainant cannot file a formal complaint, what options does the College have?

Robbins Schwartz

56

Grievance Process: Notice of Allegations

- Must be sent **simultaneously** to both parties after Title IX Coordinator's receipt of formal complaint.
- Informs 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
  - The Code of Conduct provisions prohibiting knowingly furnishing false information during the grievance process.



Robbins Schwartz

57

Grievance Process: Emergency Removals and Administrative Leave

- 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 the 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.
- College must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Robbins Schwartz

58

Grievance Process: Emergency Removals and Administrative Leave

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

Robbins Schwartz

59

Informal Resolution

Robbins Schwartz

60

Informal Resolution

- Fully discretionary: Requires complainant and respondent's **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.
- 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

61

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

62

Consolidation and Dismissal of Formal Complaints

Robbins Schwartz

63

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

64

Dismissal of Formal Complaints

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.
- *Dismissal does not preclude action altogether – just for purposes of Title IX.*

Robbins Schwartz

65

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 College; or
- Specific circumstances prevent the College from gathering evidence sufficient to reach a determination.
- A party may appeal a decision to dismiss a formal complaint or allegations therein.

Robbins Schwartz

66

Investigation of Formal Complaints

Robbins Schwartz

67

Investigations: **Written Notice**

- Written notice required to both parties:
  - Allegations (upon receipt of a formal complaint)
  - Investigative interviews, meetings, or hearings
  - Mandatory or discretionary dismissal

Robbins Schwartz

68

Investigations: **Evidence**

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

Robbins Schwartz

69

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 <u>not</u> speak on behalf of the party

Robbins Schwartz

70

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

Robbins Schwartz

71

Investigation: **Access to Evidence**

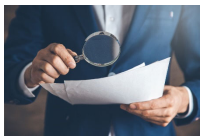
- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
- The parties will have 10 business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.

Robbins Schwartz

72

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.



Robbins Schwartz

73

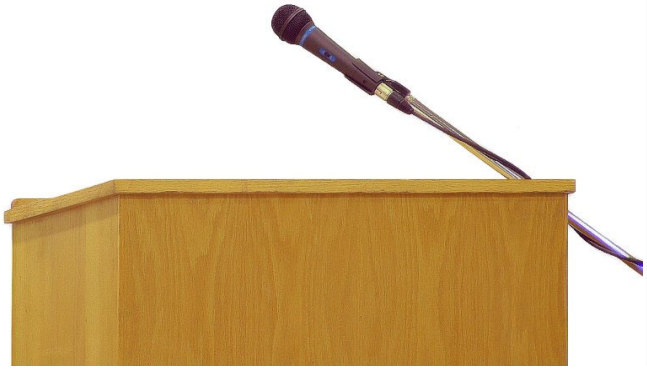
Investigation: **Preparation of Investigation Report**

- At least 10 business 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 business days to submit a written response to the report.

Robbins Schwartz

74

Live Hearings



Robbins Schwartz

75

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.
  - Must contact the Title IX Coordinator within three (3) business days after the party's receipt of the hearing notice to make such a request.

Robbins Schwartz

76

Live Hearings: Process

- Upon request, parties can be separated – requires appropriate technology
  - Must be requested at least **3 days prior to hearing**
  - Must allow parties to simultaneously see and hear each other

Robbins Schwartz

77

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."

Robbins Schwartz

78

Live Hearings: **Advisors**

- College advisor appointed if none available
  - 3 business day notice is required.

Robbins Schwartz

79

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.

Robbins Schwartz

80

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

Robbins Schwartz

81

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

82

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.

Robbins Schwartz

83

Live Hearings: **Rape Shield Protections**

- Questions about sexual pre-disposition or prior sexual behavior are <u>not</u> 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

Post-Hearing Procedure

Robbins Schwartz

85

Written Determination

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

Robbins Schwartz

86

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

Robbins Schwartz

87

Appeals

Robbins Schwartz

88

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 7 business days of receipt of written determination or dismissal
- Title IX Coordinator must forward request to **designated appeals administrator**

Robbins Schwartz

89

Appeals: **Grounds to Appeal**

a) Procedural irregularity occurred

b) New evidence or information exists that could affect outcome

c) Conflict of interest or bias which affected outcome, amongst:
   - Title IX Coordinator, Investigator, or Hearing Officer

d) Sanction disproportionate to violation

Robbins Schwartz

90

Appeals: **Process**

- Appeals administrator will afford both parties the opportunity to submit a statement
- Written decision issued to both parties simultaneously within 7 business days of conclusion of the review
  - Describes outcome and rationale
- Includes statement that **decision is final**

Robbins Schwartz

91

Conflicts of Interest & Bias

Robbins Schwartz

92

Conflict of Interest & Bias

Conflict of interest:

- "A situation in which the concerns or aims of two different parties or people are incompatible."
  - Not: "I know both 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

93

How to Address Implicit Bias

- Check your implicit bias here: Harvard Implicit Bias Test
- 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

94

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[1]
- Can be effective in overcoming stereotypes[2]
- Helps reduce the attention given to biased characteristics that may influence decision-making[3]

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 Affect Gender Bias in Hiring: A Systematic Review, 84 Academic Medicine 1440 (2009).
3. Uhlmann. Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit 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

95

Questions?

Robbins Schwartz

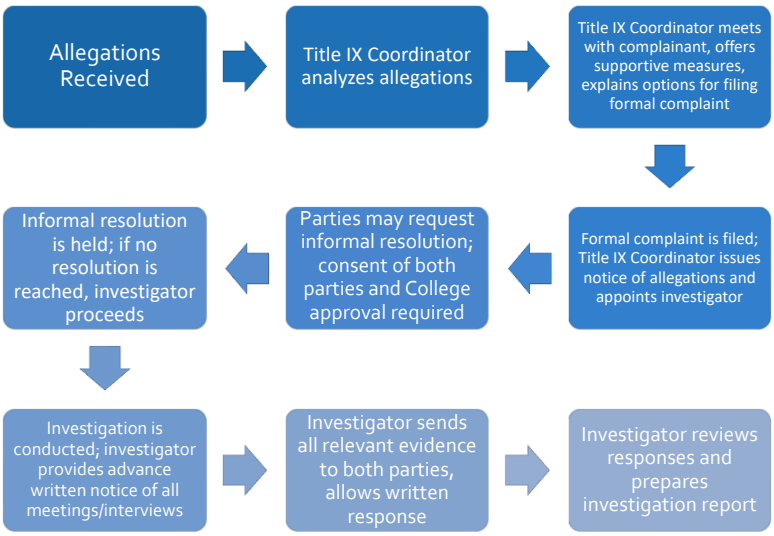
96

Final Review and Hypothetical

Robbins Schwartz

97

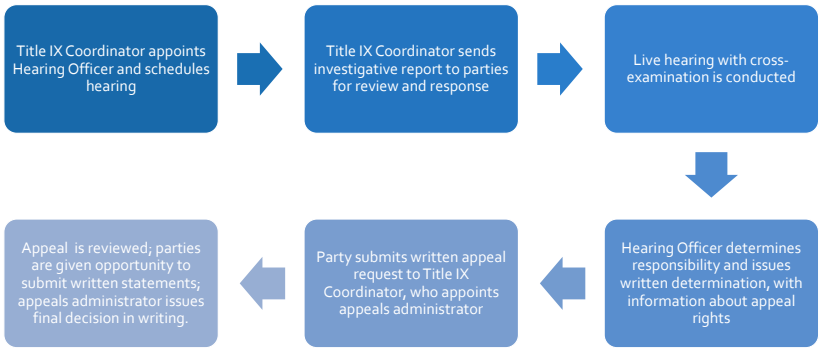
Final Review of Grievance Process (Pre-Hearing)



Robbins Schwartz

98

Final Review of Grievance Process (Hearing + Appeals)



Robbins Schwartz

99

Hypothetical

- Jen, a student, reports to her College advisor that a classmate, Kevin, has been making inappropriate sexual jokes and innuendos.
  - She and Kevin 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, over Zoom, and required the exchange of personal contact information.
  - After the project was complete, Kevin allegedly called Jen and asked her out. Jen said no.
  - Jen states that Kevin began teasing her on social media and telling all of their mutual friends that Jen "is a prude."

Robbins Schwartz

100

Hypothetical

- The teasing became increasingly more offensive, and he allegedly began making false statements that:
  - Jen is homosexual,
  - She is afraid to date because she is a hermaphrodite, and
  - That Jen sent him sexually explicit photos.
- Jen alleges that Kevin's comments took place over the course of the summer, at various off-campus social distanced class gatherings where the instructor and other students were present.
- Most recently, Kevin and Jen both attended the same party at a house owned by the College's Theater Club, of which Jen is a member.
- At the party, Kevin (who is 21) was drinking. He tried to pressure Jen (who is 19) into drinking as well. Jen reports that Kevin stated, "Some alcohol will allow you to drop your guard, and hopefully, allow me to drop your pants."

Robbins Schwartz

101

Hypothetical

- Jen reports that she told Kevin he was not funny, and to leave her alone.
  - One of Jen's friends allegedly witnessed Kevin trying to pour some of his vodka into Jen's cup when she wasn't looking.
  - According to Jen's friend, when Kevin was caught, he laughed and told her to "Stop cock-blocking me."

- Jen is distraught. Kevin is enrolled in two of the same classes as Jen for the fall 2020 semester. Jen is considering dropping the classes so she will not have to interact with Kevin.
- The College advisor documents her discussion with Jen. What should the College advisor do with these allegations? Discuss.

Robbins Schwartz

102

Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
- Reminder:
  - Kevin's behavior began after the completion of their virtual project. He teased her via social media.
  - Kevin's behavior continued at off-campus events where the instructor and other students were present.
  - Kevin's most recent actions were at a house owned by a College-recognized student organization during the first weekend of school.
- Do Kevin'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**

Robbins Schwartz

103

Hypothetical

- Jen files a formal complaint. The parties proceed to a live hearing.
  - Can Kevin's advisor ask Jen if she has ever had a sexual relationship with Kevin?
- After a full grievance process, the College's appointed Hearing Officer (who is close friends with the College advisor to whom Jen made her initial report) finds that Kevin is responsible for engaging in Title IX sexual harassment.
  - After receiving the Hearing Officer's determination, Kevin 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?

Robbins Schwartz

104

Questions?

Robbins Schwartz

105

FRANK B. GARRETT III

PARTNER, CHICAGO
312.332.7760
fgarrett@robbins-schwartz.com

Frank B. Garrett III represents school districts, community colleges, local governmental bodies and public and private companies in all aspects of employment law, including complaints and charges of unlawful discrimination, wrongful termination, sexual harassment, civil rights violations, employee discipline and termination. Frank also counsels and provides training to employers in the following areas: ADA and FMLA compliance, avoiding claims of unlawful discrimination and harassment in the workplace: evaluation and discipline of employees, and diversity in the workplace.

Frank represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. He is an active member of the American Bar Association and Illinois Council of School Attorneys.

AWARDS

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

RECENT PUBLICATIONS

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

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

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

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

PRACTICE AREAS

Education Law
Labor & Employment
Litigation

EDUCATION

J.D., DePaul University College of Law

B.A., Oberlin College

ADMITTED TO PRACTICE

Supreme Court of the United States

U.S. Court of Appeals for the Seventh Circuit

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

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

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

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

Supreme Court of Illinois

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

Contributing author, "Employment Discrimination," *ILLINOIS SCHOOL LAW,* IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

RECENT PRESENTATIONS

Debunking Some Common Employee FMLA Leave Myths, IASPA Annual Conference (January 2020)

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

Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes, Illinois GFOA Annual Conference (September 2019)

Navigating the Legal Liability Minefield in the Recruitment, Interview and Selection of Qualified Applicants, AASPA Personnel Administrator Boot Camp (June 2018)

The Ever-Changing Landscape Under Title IX, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)

Practical Guidance on Employee Misconduct Investigations and Discipline, Illinois Association of School Personnel Administrators, Tenth Annual State Conference (January 2017)

ORGANIZATIONS

American Bar Association, Section on Labor and Employment

Chicago Bar Association

Cook County Bar Association

Illinois Council of School Attorneys

Michelle L. Weber

Associate, Chicago
312.332.7760
mweber@robbins-schwartz.com

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

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

Escalating Student Behavior and Safety Concerns: Legal Options and Considerations, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

Student Bullying Legal Framework & Recommended Practices, In-Service (August 2018)

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