

Overview of the New Rules for Title IX

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Emily P. Bothfeld
ebothfeld@robbins-schwartz.com

Kevin P. Noll
knoll@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

Overview of the New Title IX Regulations

Presented by: Emily P. Bothfeld and Kevin P. Noll

September 11, 2020

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Background on Title IX Regulations



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Background

- September 22, 2017 – U.S. Department of Education released 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

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Background

- Proposed Title IX Regulations released in November 2018
- 60-day public comment period
- Over 120,000 public comments received

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Current Status

- Final Rules released on May 6, 2020 and published in Federal Register on May 19, 2020
- Effective date: **August 14, 2020**
 - But note: New Rules are not retroactive.



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Impact on Higher Education Institutions

- New Rules 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 Coordinators
 - Investigators
 - Decision-Makers
 - Appeal Decision-Makers
 - Informal Resolution Facilitators
 - Publishing of information and training materials on the institution's website

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Key Provisions and Changes



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Definition of 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)

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Definition of Sexual Harassment

- The second type of sexual harassment must be severe and pervasive and objectively offensive.



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Jurisdiction

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

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Jurisdiction

- “In the institution’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.

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Definitions



- Complainant:
 - Individual alleged to be the victim of conduct that could constitute sexual harassment
- Respondent:
 - Individual reported to be the perpetrator of conduct that could constitute sexual harassment

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Definitions



- 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

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Definitions

- Formal complaint:
 - Written document filed by a complainant or signed by a TIX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the alleged harassment.



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Definitions

- At the time a complainant files a formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the institution with which the formal complaint is filed.

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“Deliberate Indifference Standard” Under Title IX

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

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Institutional Response Obligations

- Upon receipt of a report alleging Title IX sexual harassment, an institution must, at a minimum:
 - Promptly contact the complainant confidentially to discuss supportive measures and options for filing a formal complaint.
 - Where a formal Title IX sexual harassment complaint is filed:
 - Investigate the allegations; and
 - Follow a grievance process that complies with the Final Rules before imposing any disciplinary sanctions against a respondent.

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Mandatory Dismissal Requirement

- If the allegations in a formal complaint do not meet the Title IX definition of sexual harassment, or did not occur in the institution's education program or activity against a person in the United States, the institution must dismiss such allegations for Title IX purposes.
 - Note: Dismissal does not preclude action altogether – just for purposes of Title IX.

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Informal Resolution

- An institution may (but is not required to) offer and facilitate an informal resolution process, within certain parameters to ensure such informal resolution occurs only with the voluntary, written consent of both parties.
- Informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.

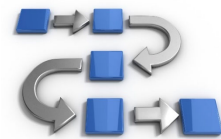


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Grievance Process

- Must send written notice to both parties (complainant and respondent) of the allegations upon receipt of a formal complaint.
- Must afford both parties an equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- “Gag orders” not permitted.



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Grievance Process

- Must afford both parties same opportunity to select an advisor of the party's choice, who may or may not be an attorney.
 - Note: Limitations on role of advisor are permissible.
- Must send parties written notice of any investigative interview, meeting or hearing, and afford parties sufficient time to prepare.

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Grievance Process

- Must send parties, and their advisors, evidence directly related to allegations, in electronic format or hard copy, with at least 10 days for parties to inspect, review, and respond.
- Must send parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for parties to respond in writing.
 - Must be sent at least 10 days prior to hearing.

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Hearings



- Decision-maker(s) must permit each party's advisor to cross-examine the other party and any witnesses.
- Cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

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Hearings

- At request of either party, institution must provide for entire live hearing (including cross-examination) to occur with parties located in separate rooms with technology enabling them to see and hear each other.

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Hearings

- Cross-examination and other questions must be relevant, as determined by decision-maker(s).
 - Rape shield protections apply.
- If a party does not have an advisor present at the live hearing, the institution must provide, free of charge, an advisor of the institution's choice, for purposes of conducting cross-examination of the opposing party and any witnesses.
 - Consider notice requirement.

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Hearings



- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - But note: Inferences based solely on individual's absence or refusal to answer questions are not permitted.
- Virtual hearings are permitted.
- Live hearings must be audio/video-recorded or transcribed.

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Standard of Evidence and Written Determination

- Title IX allows preponderance of the evidence standard or clear and convincing evidence standard.
 - Illinois institutions must use preponderance standard, per the *Preventing Sexual Violence in Higher Education Act*.
- Decision-maker(s) must issue detailed written determination, to be sent simultaneously to the parties, with information about appeal rights.

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Appeals

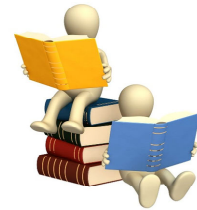
- Institution must offer both parties an appeal from a determination regarding responsibility, and from a dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity
 - Newly discovered evidence
 - Conflict of interest or bias
- Institution may offer an appeal equally to both parties on additional bases.
 - i.e. the sanction is disproportionate with the violation (see 110 ILCS 155/25(b)(14)).

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Training Requirements

- Individuals who must receive training include, at a minimum:
 - Title IX Coordinators
 - Investigators
 - Decision-makers (including appellate decision-makers)
 - Informal resolution facilitators



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Training Requirements

- Title IX personnel must receive training on:
 - Final Rules' definition of sexual harassment
 - Scope of institution's program or activity
 - How to conduct investigation and grievance process, including hearings, appeals and informal resolution processes (as applicable)
 - How to serve impartially
 - Any technology to be used at a live hearing
 - For decision-makers and investigators: Issues of relevance, including how to apply the rape shield protections provided for complainants

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Training Requirements

- Institutions must post “all materials used to train Title IX personnel” on their websites, if any, or make materials available for members of the public to inspect.

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Recommendations for Effective Implementation of New Title IX Regulations



Prepare for Success

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Recommendations

- 1) Designate administrator(s) to oversee your institution's compliance efforts.



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Recommendations

- 2) Determine any required changes to your institution's grievance process.
 - Consider issues such as:
 - "Reasonable timeframe" that will apply to grievance process.
 - Remember Preventing Sexual Violence in Higher Education Act timelines.
 - Whether to use the college's own employees to investigate and adjudicate, or whether to outsource investigatory and/or adjudicatory functions (or a combination of both);

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Recommendations

- 2) Determine any required changes to your institution's grievance process.
 - Consider issues such as (continued):
 - Whether, and the degree to which a party's advisor of choice may actively participate in the grievance process;
 - Whether to use an individual decision-maker or a panel of decision-makers;
 - Whether to offer informal resolution options; and
 - Procedures for appeals.



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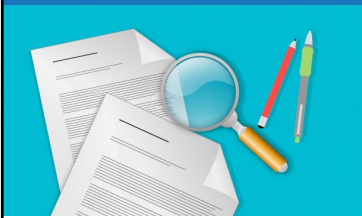
Recommendations

- 3) Designate key players:
 - Title IX Coordinator
 - Must be a college employee
 - Investigator(s)
 - Decision-maker(s) and appellate decision-maker(s)
 - May not be the Title IX Coordinator.
 - Informal resolution facilitator(s), if offering informal resolution option
 - Appointed advisors

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Recommendations



4) Revise institutional policies and procedures.

- Title IX/sexual misconduct policy and procedures.
 - Robbins Schwartz Sex-Based Misconduct Policy and Procedures templates
- Student code of conduct and disciplinary procedures?
- Employee harassment policy and procedures?

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Recommendations

5) Coordinate training of Title IX personnel.

- Robbins Schwartz 3-hour training for college Title IX personnel.

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Recommendations



- 6) Post all materials used to train Title IX personnel on college website.
 - Note: copyright considerations apply.

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Recommendations

- 7) Publish Title IX/sexual misconduct policy and contact information for Title IX Coordinator in handbooks/catalogs and on college website.

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Recommendations

8) Prepare grievance process notices and forms.

- Robbins Schwartz Title IX Toolkit for Higher Education Institutions.

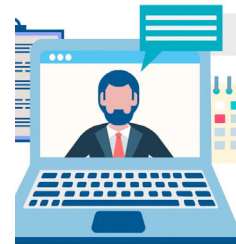
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Recommendations

9) Plan for COVID-related challenges.

- Be mindful of considerations related to:
 - Notice and mailing requirements
 - Documentation and recordkeeping
 - Technology



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Questions?



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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

Robbins Schwartz

KEVIN P. NOLL

ASSOCIATE, CHICAGO

312.332.7760

knoll@robbins-schwartz.com

Kevin's practice focuses in the area of labor and employment law. Kevin routinely counsels employers in all aspects of employment law including employee discipline, labor relations, and federal and state employment discrimination matters under the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Illinois Human Rights Act, Title VII and other federal and state anti-discrimination and wage laws. Kevin represents employers in a variety of venues including both federal and state court, as well as the U.S. Equal Employment Opportunity Commission and the Illinois Department of Human Rights.

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

AWARDS

Illinois "Rising Star," by Super Lawyers Magazine (2017-2020)

RECENT PUBLICATIONS

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

RECENT PRESENTATIONS

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

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

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



PRACTICE AREAS

Labor & Employment

EDUCATION

J.D., The John Marshall Law School

B.A., Indiana University

ADMITTED TO PRACTICE

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

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Illinois State Bar Association

Kane County Bar Association