

Title IX Compliance: Guidance for Investigations and Hearings Under the New Rules

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Guidance for Investigations and Hearings Under the New Title IX Rules

Presented by: Emily P. Bothfeld and Kevin P. Noll
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1

Department of Education's New Title IX Rule

Department of Education's Description of its New Title IX Rule

- Restores fairness on college and university campuses by upholding a student's right to written notice of allegations, the right to an advisor, the right to submit, cross-examine, and challenge evidence at a live hearing
- Designed to provide consistent, predictable, and reliable means for securing non-discrimination at education institutions



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Significant Changes – Investigations

- Colleges can no longer use a “single investigator” model
- Colleges must provide the parties with equal access to inspect and review the evidence
- The Investigator must submit an investigation report summarizing the relevant evidence gathered throughout the investigation

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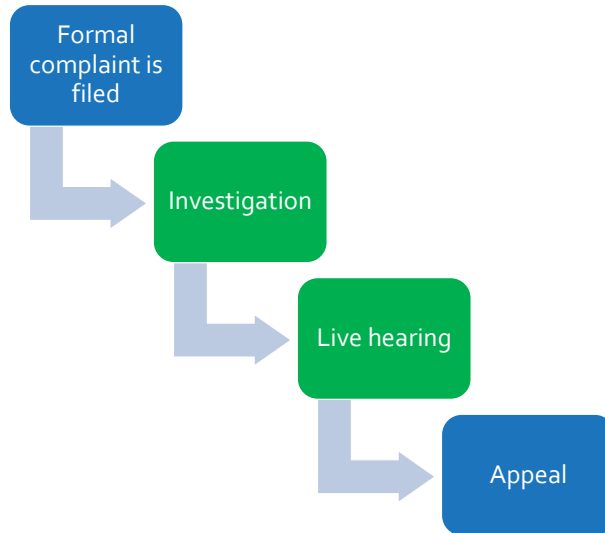
Significant Changes – Live Hearings

- The parties now have the right to a live hearing where advisors may cross-examine the opposing party
- Live hearings are conducted by a Hearing Officer who considers the relevant evidence and renders a written decision as to responsibility

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Overview of the Grievance Process



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Title IX Investigations



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Investigations: Written Notice

- Written notice required to both parties:
 - Allegations
 - Investigative interviews, meetings, or hearings
 - Mandatory or discretionary dismissal

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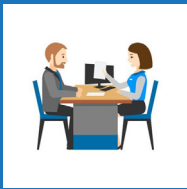
Investigations: Evidence

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

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Investigations: Advisors



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

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Investigations: Advisors

- The Investigator should set the parameters of the advisor(s)' role at the outset of the investigation
- The parameters for the Complainant's advisor must be the same as the parameters for the Respondent's advisor

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Investigations: Questioning

- Primary goal is to ascertain relevant facts and clarify any vague issues
- “W” questions (who, what, when, where, why) are helpful for ascertaining relevant facts



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Investigations: Questioning

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

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Investigations: Questioning

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

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Investigations: Questioning



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

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Investigations: Questioning

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

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Investigations: Questioning

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

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Investigations: Best Practices

- Avoid volunteering information
- Never promise confidentiality
- Have a second Investigator or administrator/non-union employee present to help with notetaking



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Investigations: Access to Evidence

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

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Investigations: 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 may submit a written response to the evidence, which the Investigator must consider prior to completion of his or her investigative report

EVIDENCE

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Investigations: 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
- Remember: the Investigator does not determine whether the Respondent is responsible

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Investigations: Investigation Report

- Title IX Coordinator will:
 - Send to each party (and advisors) the investigative report
 - The parties may submit a written response to the report



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Title IX Live Hearing



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Live Hearing: Logistics

- Upon receipt of the Investigator's report, the Title IX Coordinator will schedule a live hearing
- The Title IX Coordinator will provide both parties with written notice of the hearing date, time, location, participants, and purpose of the hearing

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Live Hearing: Logistics

- The College must create an audio or visual recording, or transcript, of any live hearing and make it available to the parties for inspection and review



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Live Hearing: Logistics

- The live hearing is conducted by the assigned Hearing Officer
- A party may request a substitution of the Hearing Officer if the party believes there is a conflict of interest
 - Conflict of interest: A situation in which the concerns or aims of two parties or people are incompatible
 - Generally not met when the hearing officer simply knows one of the parties

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Live Hearing: Logistics

- The Hearing Officer should clearly explain the parameters of the hearing at the start of the hearing
 - Overview of the process for the hearing
 - Role of advisors
 - Ground rules
 - Expectation of civility
- The parameters must apply to both parties



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Live Hearing: Logistics

- The Hearing Officer must conduct a “live” hearing in “real time”
- The College has discretion to host the live hearing either in-person or remote
- Upon request, or at the Hearing Officer’s discretion, the parties can be separated

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Live Hearing: Technology

- The parties must be able to see and hear each other and any witnesses answering questions
- The parties and the Hearing Officer must be able to view the evidence presented
- The parties should be able to speak with their advisors in private

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Live Hearing: Advisors

- Each party may bring an advisor of their choice to the live hearing
- If a party does not have an advisor, then the College must provide an advisor for no charge to conduct cross-examination on behalf of the party



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Live Hearing: Cross Examination

- The Hearing Officer must allow advisors to cross-examine the opposing party and witnesses
 - Oral questions
 - Real-time
 - Relevant questions
 - Can challenge credibility
- A party is prohibited from directly asking the opposing party questions

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Live Hearing: Cross Examination

- If a party or witness does not submit to cross-examination at the live hearing, the Hearing Office cannot rely on any statement of that party or witness in reaching a determination regarding responsibility
- However, inferences based solely on an individual's absence or refusal to answer questions are not permitted

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Live Hearing: Relevant Evidence

- The Hearing Officer must exclude irrelevant evidence and irrelevant questioning at the live hearing
- Whether evidence or a question is "relevant" is determined by the Hearing Officer
 - Relevancy is a broad concept
 - Sidebars with the advisors
 - Can reserve a ruling on relevancy



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Live Hearing: Relevant Evidence

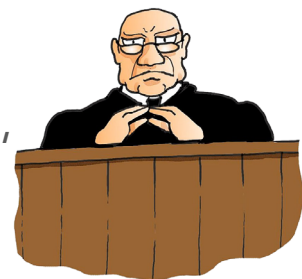
- Rape shield protections: questions about sexual pre-disposition or prior sexual behavior are not permitted unless:
 - Offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Questions and evidence concern specific incidents of the Complainant's prior sexual behavior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

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Live Hearing: Hearing Officer's Role

- Whether the facts presented establish that the alleged conduct occurred
- If the alleged conduct occurred, whether the conduct constitutes sexual harassment under Title IX
- The appropriate sanction, if any



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Live Hearing: Evidence Considered

- The Hearing Officer should consider all evidence, including but not limited to:
 - The formal complaint
 - The written notice of the allegations
 - The investigative report
 - The parties' written responses to the evidence and investigation report
 - Evidence produced at the live hearing including the credibility of witnesses
 - Prior discipline records (only to determine the sanction)

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Live Hearing: Credibility

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

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Live Hearing: Credibility

- Quality over quantity: the testimony of a single, disinterested witness is more reliable than the testimony of multiple biased witnesses
- Example:
 - The College's star baseball player is the Respondent and is alleged to have sexually assaulted the Complainant in the athletic training room immediately after a playoff game
 - Which testimony is more reliable at the live hearing:
 - The testimony from 4 baseball teammates stating that they were with the Respondent at a restaurant immediately after the game, or
 - The testimony from the waiter at the restaurant stating that he served the Respondent at the restaurant immediately after the game

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Live Hearing: Standard of Review

- Preponderance of the evidence standard
- "More likely than not"
- If 50/50, then no violation



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Live Hearing: Written Determination

- The Hearing Officer's written determination must include:
 - Identification of the allegations
 - Description of the procedural steps
 - Findings of fact
 - Conclusion regarding the application of conduct standards
 - Rationale for the result of each allegation, including:
 - Determination of responsibility
 - Sanctions, if any
 - Whether any remedies will be provided to the Complainant
 - Procedures and permissible bases of appeal

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Live Hearing: Sanctions

- The Hearing Officer should apply a consistent range of sanctions for a given violation, but the Hearing Officer should consider each case's unique circumstances
- The Hearing Officer should consider:
 - The severity of the misconduct
 - Impact of the misconduct
 - Respondent's disciplinary history
 - Aggravating or mitigating factors

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Questions?



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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

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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

RECENT PUBLICATIONS

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

RECENT PRESENTATIONS

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)



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Education Law
Special Education
Student Discipline

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Supreme Court of Illinois

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Illinois Council of School Attorneys

National Council of School Attorneys