

## Title IX and Sexual Harassment Prevention Training for Illinois Central College Employees

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# Title IX and Sexual Harassment Prevention Training for Illinois Central College Employees

Presented By: Emily P. Bothfeld  
October 16, 2020

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1

## Overview of Relevant Laws



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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.

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1

## Relevant Laws

### • **Illinois Human Rights Act (IHRA):**

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

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## Relevant Laws

### • **Title VII of the Civil Rights Act of 1964 (Title VII):**

- Prohibits discrimination, including discrimination based on sex, in employment.

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## Relevant Laws

- **Title IX of the Education Amendments of 1972 (Title IX):**
  - Prohibits sex-based discrimination, including sexual harassment, in educational programs and activities receiving federal financial assistance.

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## 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.

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6

## Illinois Human Rights Act



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7

## IHRA Definition of Sexual Harassment

- Sexual harassment means any unwelcome conduct of a sexual nature when:
  - Submission to such conduct is made a term or condition of an individual's employment,
  - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
  - Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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8

## Break It Down: “Unwelcome Conduct”

- Sexual conduct becomes sexual harassment when the behavior is unwelcome.
  - Behavior may be unwelcomed in the sense that the victim did not solicit or invite it, or in the sense that the victim regarded the conduct as undesirable or offensive.
  - Conduct welcomed by one person may not be welcomed by another.

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9

## Break It Down: “Unwelcome Conduct”

- A recipient of conduct can change their mind over time.
  - What starts off as welcome behavior (consensual joking) can cross a line and become unwelcome behavior.
  - It is not a defense for the perpetrator to say, “You started it” or “You changed your mind.”

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10

## Break It Down: “Unwelcome Conduct”

- How to tell behavior may be unwelcome:
  - Ask directly—and respect the answer.
  - Has the recipient of the conduct actively indicated they are open to it?
  - Does the context—preexisting relationship, time, place—make it inappropriate?

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11

## Break It Down: “This-for-That” Harassment

- Also called *quid pro quo*
- When accepting or performing sexual conduct is required to:
  - Access some job benefit (promotion, raise, preferred assignment, etc.), or
  - Avoid some negative job consequence (demotion, bad performance review, discipline, etc.).
- “If you want to do well here, you just have to deal with it.”

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12

## Break It Down: “Hostile Environment”

- When sexual conduct has the *purpose or effect* of:
  - Substantially interfering with work performance; or
  - Creating an intimidating, hostile or offensive working environment.
- Good intentions are not enough to avoid sexual harassment.
- One incident can constitute sexual harassment.

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13

## When Does An Environment Become Sexually Hostile?

- Courts look to the following factors to determine if a hostile work environment exists:
  - Frequency of the alleged conduct;
  - Severity of the conduct;
  - Whether the conduct is physically threatening or humiliating, or a mere utterance;
  - Whether the conduct unreasonably interferes with an individual’s employment or learning; and
  - Relationship of the parties.

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14



## The Who

- Who is protected—and who can perpetrate?
  - Employees (full-time and part-time), vendors, service providers, and interns.
  - Bystanders and direct recipients of conduct.
- The IHRA also prohibits sexual harassment toward students.
  - Defined as “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.”

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## The Who

- Perpetrators and recipients of conduct can have the same or different:
  - Sex
  - Gender identity
  - Sexual orientation

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## Sexual Harassment Under Title VII



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## Sexual Harassment Under Title VII

- Under the Title VII, it is unlawful to harass a person because of that person's sex when:
  - It is so frequent or severe that it creates a hostile or offensive work environment; or
  - It results in an adverse employment decision.

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18

## Sexual Harassment Under Title VII

- Sexual harassment may include unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- However, the harassment does not have to be of a sexual nature. It can include offensive remarks about a person's sex.
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

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19

## Definition of "Working Environment"



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## Definition of "Working Environment"

- An employee's "working environment" is not limited to the physical location where the employee is assigned.
- The "working environment" extends to other work sites including off-site, mobile, or moving work sites/locations.
- Off-work conduct may be considered sexual harassment if it impacts the workplace.

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21

## Sexual Harassment in Online Environments

- Conduct online and through social media can constitute sexual harassment even when it occurs "off the clock," "off-site," or even "out of state."
- Online sexual harassment includes using e-mail, cell phone texts, internet posting, online comments, blog posts, and social media (such as Facebook, Twitter, LinkedIn, Instagram, YouTube, and Snapchat) to send communications of a sexual nature.

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22

## Sexual Harassment in Online Environments

- Examples of online sexual harassment may include:
  - Flirting and requests or demands to go on a date or have sex
  - Sending inappropriate pictures or videos including sexually graphic material
  - Using sexual language or comments including sexually offensive language
  - Cyber stalking

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## Sexual Harassment Under Title IX



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## Title IX Sexual Harassment

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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## Title IX Sexual Harassment

### 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.

### 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.

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26

## Title IX Sexual Harassment

### Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

### Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

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27

## Sexual Violence Under the Preventing Sexual Violence in Higher Education Act



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## Sexual Violence Under the PSVHEA

- 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.

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29

## Sexual Violence Under the PSVHEA

- 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)

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30





## Sexual Harassment Examples

- Examples of sexually harassing physical conduct:
  - Deliberate touching, leaning over, or cornering another person
  - Massaging neck, shoulders, etc.
  - Touching another employee such as their clothing, hair, or body
  - Actual or attempted rape or sexual assault

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## Sexual Harassment Examples

- Examples of other sexually harassing conduct:
  - Pressure for sexual favors or to go out on a date
  - Kissing sounds, howling and smacking lips
  - Telling lies or spreading rumors about a person's sex life
  - Referring to another as a "girl," "hunk," "doll," "babe," "honey," "tootsie," etc.
  - Sexual looks or gestures or whistling at someone
  - Sending letters, telephone calls, e-mails, texts, or other materials of a sexual nature

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34

## Hypotheticals



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## Scenario 1

- Joe is a security officer at the College who enjoys joking and “horsing around” a little with male coworkers. The horseplay includes slapping guys on the butt along with an “atta boy” for a job well done, just like he did with teammates on the football team 25 years ago.
- Joe is a perfect gentleman to his female colleagues and tries not to display this behavior in front of them to avoid offending.
- Is Joe’s conduct sexual harassment?

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## Scenario 2

- You walk by a faculty member's office. You observe the faculty member in the office alone, talking to a person who appears to be a student, over Zoom.
- You hear the faculty member say, "You did really well on last week's test. I'm so proud of you that I'm going to send you a photo of me when I get home."
- Does this conduct constitute sexual harassment?

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## College's Sex-Based Misconduct Policy and Procedures



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## Sex-Based Misconduct Policy and Procedures

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

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39

## Sex-Based Misconduct Policy and Procedures

- Apply to:
  - Students
  - Employees & independent contractors
  - Volunteers
  - Visitors
  - Board members
- Prohibit retaliation against any person reporting alleged sex-based misconduct or participating in an investigation of alleged sex-based misconduct.
  - Employees who engage in retaliation may be subject to disciplinary action, up to and including discharge.

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## Sex-Based Misconduct Policy and 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

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## Reporting Alleged Sex-Based Misconduct



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## 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)

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43

## Student Reporting to Responsible Employees

Title IX Coordinator	College Administrators	Supervisors and Managerial Staff
Human Resources Staff	Advisors and Student Services Staff	Faculty (Full and Part Time)
Campus Security and Police	Coaches	Advisors of Student Clubs and Organizations

- Responsible Employees must report all relevant details to the Title IX Coordinator, if known.
  - What happens next?

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44

## Student Confidential Reporting

- The College's designated Confidential Advisors include:
  - ICC's Counseling Coordinator
- Confidential Advisors are not required to report any information about an alleged incident to the Title IX Coordinator without the student's permission.

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45

## Student Anonymous and/or Electronic Reporting

- Students may report anonymously online.
- Before the student enters information, the system will notify the student that entering personally identifiable information may serve as notice to the College for purposes of triggering an investigation.

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## Employee Reporting

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

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47

## IDHR Sexual Harassment Helpline

- Calling the State of Illinois Sexual Harassment and Discrimination Helpline: 1-877-236-7703
  - These calls are confidential and can be made anonymously.
  - Representatives can help callers navigate their reporting options and share additional information related to counseling, legal assistance, and frequently asked questions.

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48

## IDHR Complaint

- The Illinois Department of Human Rights (IDHR) is a state agency responsible for enforcing the IHRA.
- Complainants may file a charge at any time within 300 days of the incident(s).
- After IDHR completes its investigation, the Complainant may:
  - May file a lawsuit in civil court, or
  - May file a complaint with the Illinois Human Rights Commission (HRC) if IDHR found "substantial evidence" of a violation.
- Complainants who prevail may be awarded remedies that the IHRA provides to make them whole.

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49

## EEOC Complaint

- The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII.
- Complainants may file a charge at any time within 300 days of the incident(s).
- After EEOC completes its investigation:
  - The complainant may file a lawsuit in federal court.
  - The EEOC may help parties reach a settlement through an informal process called "conciliation" if the EEOC finds "reasonable cause" to believe discrimination occurred.
- Complainants who prevail may be awarded remedies that Title VII provides to make them whole.

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50

## Hypotheticals



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## Scenario 1

- You notice an employee, Jen, referring to her coworker as "Babe." That coworker, Jeff, does not say anything in response, but you can see that Jeff is uncomfortable.
- What should you do?
- If you decide to report, to whom should you report?

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52

## Scenario 2

- You overhear a coach telling one of your students that she reminds him of his ex-wife.
- You ask the student about it, and she says that the coach has told her this before. She also tells you that her coach refers to her by his ex wife's name when she makes a mistake in a game or practice, and calls her "Doll," his ex wife's nickname, when she does something well.
- What should you do?

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## College Responsibilities



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54

## Preventing Sex-Based Misconduct

- Regularly communicate regarding its sex-based misconduct policy.
- Ensure clear communication on reporting sexual harassment and other types of sex-based misconduct.
- Monitor the work environment to ensure the workplace is free of sex-based misconduct.
- Lead by example and model appropriate conduct – refrain from engaging in conduct of a sexual nature. Employers are strictly liable for sexual harassment perpetrated by management.

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55

## Investigating Sex-Based Misconduct

- Immediately respond to a complaint of sex-based misconduct and initiate an inquiry or investigation.
- Under Title VII, employers are liable for sexual harassment perpetrated by an employee or nonemployee if the employer:
  1. Knew or reasonably should have known of the harassment, and
  2. Failed to take prompt corrective action.
- Under Title IX, once the College has actual knowledge of alleged sexual harassment, the College must respond to the allegations (a) promptly and (b) in a manner that is not “deliberately indifferent.”

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56

## Investigating Sex-Based Misconduct

- Generally, investigations will include:
  - Interviewing the complainant and taking reasonable action to protect the complainant from retaliation or further acts of sex-based misconduct.
  - Interviewing all relevant witnesses.
  - Interviewing the alleged perpetrator.
  - Documenting the investigation results.
  - Taking corrective action as appropriate.
- Note: For Title IX sexual harassment investigations and investigations involving PSVHEA offenses, additional procedural requirements apply.

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57

## Title IX Sexual Harassment/ PSVHEA Grievance Process

- The College's grievance process:
  - Treats complainants and respondents equally;
  - Requires an objective evaluation of all relevant evidence;
  - Requires that individuals involved in implementing the grievance process not have a conflict of interest or bias;
  - Includes a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process;
  - Includes reasonably prompt timeframes for conclusion of the grievance process;
  - Describes the range of possible disciplinary sanctions, remedies and supportive measures;
  - Requires that decision-makers apply a preponderance of the evidence standard;
  - Affords appeal rights to both parties on an equal basis; and
  - Does not permit the use of privileged information.

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58

## Corrective Measures

- Corrective measures may include disciplinary action, up to and including termination (for employees), suspension or expulsion (for students).
- Employees will be disciplined for engaging in sex-based misconduct against:
  - Other employees
  - Students
  - Third parties
- In addition to disciplinary measures, Title IX requires the College to consider whether remedies designed to restore or preserve equal access to the College's education program or activity should be provided to the complainant.

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59

## Corrective Measures

- If the conduct does not rise to the level of sexual harassment or other violation of the College's Sex-Based Misconduct Policy, corrective measures may include counseling, training, and closer supervision of the employee.
- If necessary, update and communicate policies, provide supplemental or tailored sexual harassment training, and restructure the working environment or reporting relationships.

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60





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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)

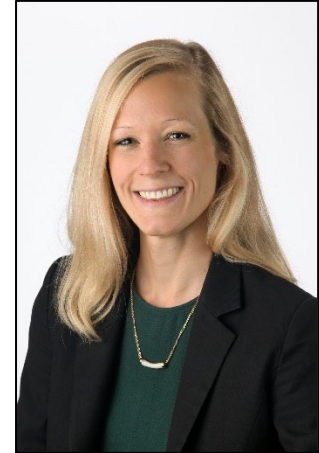
### **RECENT PRESENTATIONS**

*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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