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IMPLEMENTING THE SECTION 106.46 GRIEVANCE PROCEDURE

July 23, 2024 & July 25, 2024

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Implementing the Title IX Grievance Procedure (Section VII.B): A Webinar for Higher Education Institutions

Presented by:

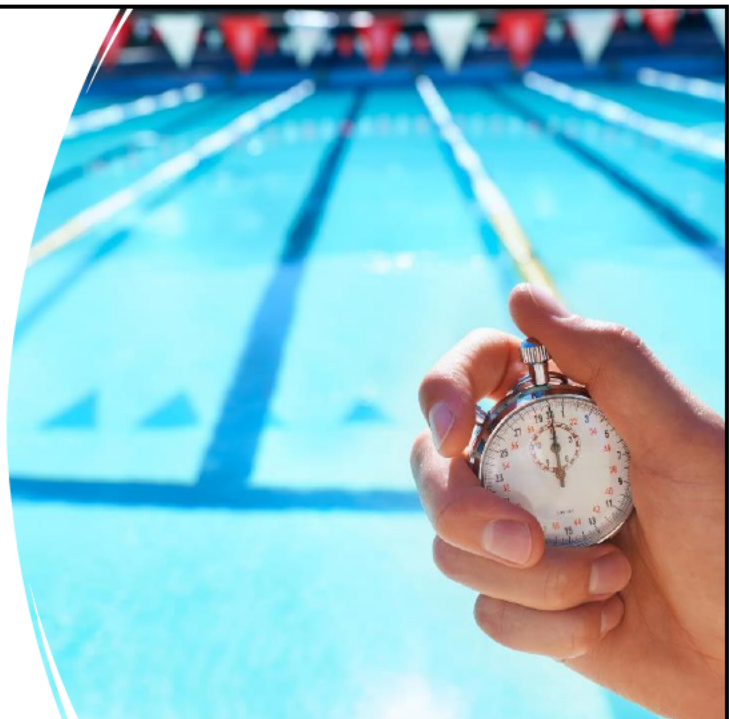
Emily P. Bothfeld and Aidan C. Falk

July 23, 2024 & July 25, 2024

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Robbins Schwartz 2024 Title IX Compliance Training

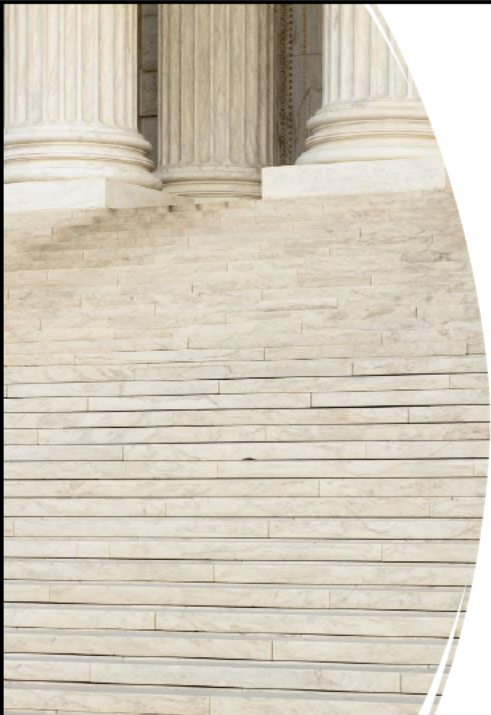
- **Part 4 – Pregnancy and Parenting Requirements**
 - Tuesday, July 30 from 1:00-2:30
 - Thursday, August 1 from 9:00-10:30
- **Part 5 – Illinois Preventing Sexual Violence in Higher Education Act**
 - Tuesday, August 6 from 9:00-10:30
 - Thursday, August 8 from 1:00-2:30



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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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Implementing the Grievance Procedure (Section VII.B) – Agenda

- When Does Section VII.B Apply?
- Complaint Initiation
- Complaint Evaluation
- Notice of Complaint Allegations
- Complaint Investigation
- Decisionmaker Appointment
- Live Hearing/Questioning Proceeding
- Determination Regarding Responsibility
- Appeal

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When Does Section VII.B Apply?

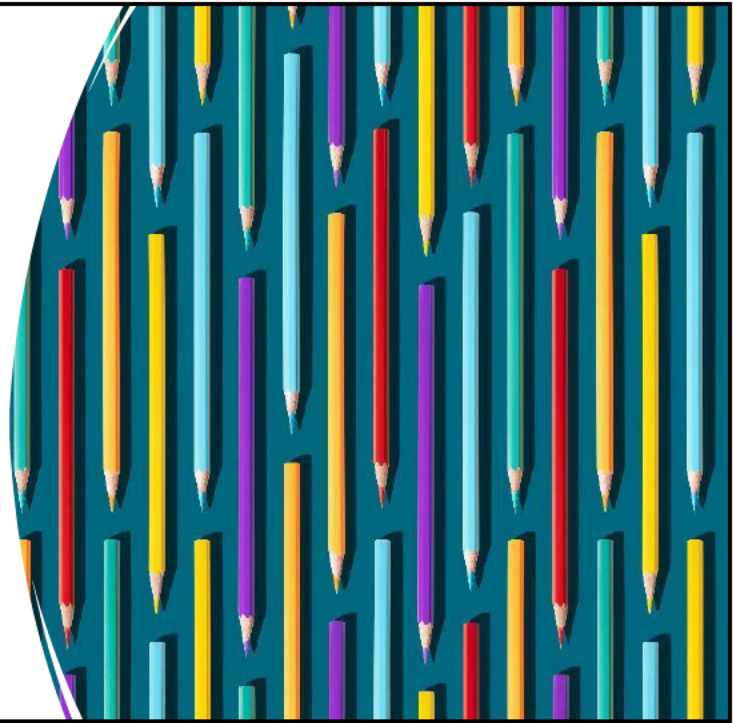


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When Does Section VII.B Apply?

- Student Party (Complainant, Respondent, or Both)
- Sex-Based Harassment
 - Quid Pro Quo
 - Hostile Environment
 - Sexual Assault
 - Sexual Violence
 - Domestic Violence
 - Dating Violence
 - Stalking



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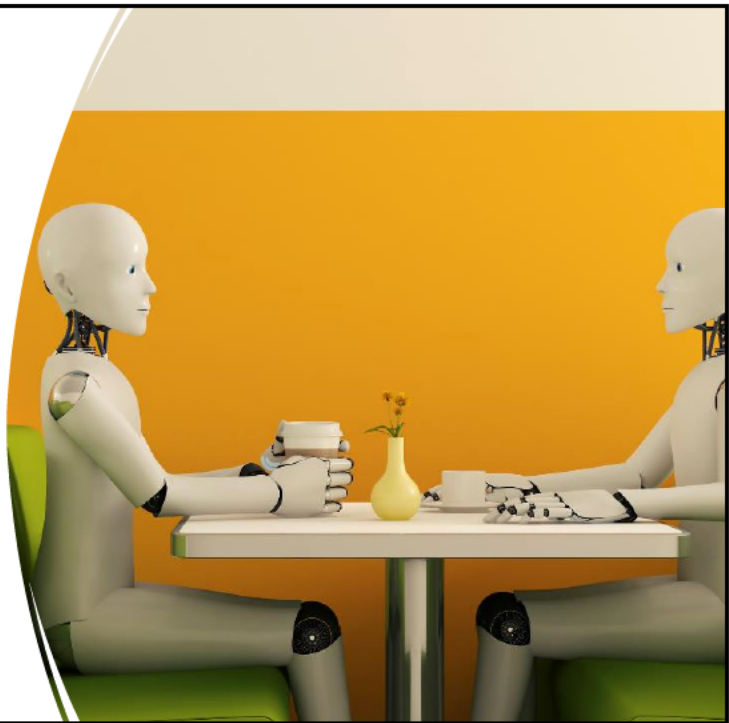
Complaint Initiation



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Who Can Initiate a Sex-Based Harassment Complaint?

- Complainant
- Parent, guardian, or other authorized legal representative, with legal right to act on behalf of Complainant
- Title IX Coordinator, in certain circumstances



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Title IX Coordinator Complaint Initiation

Factors to be considered (at a minimum):

- | | |
|--|---|
| (1) Complainant's request not to proceed with initiation of the complaint. | (5) Age and relationship of the parties, including whether the Respondent is an employee of the College. |
| (2) Complainant's reasonable safety concerns regarding initiation of the complaint. | (6) Scope of the alleged sex discrimination. |
| (3) Risk that additional acts of sex discrimination would occur if a complaint is not initiated. | (7) Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred. |
| (4) Severity of the alleged sex discrimination. | (8) Whether the College could end the alleged sex discrimination and prevent its recurrence without initiating the Grievance Procedure. |



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Complaint Evaluation



Complaint Evaluation

- Must occur within ten (10) business days of Title IX Coordinator's receipt of complaint.
- Key Questions:
 - 1) Could the alleged conduct, if true, constitute sex discrimination as defined in Appendix A?
 - 2) Do any of the grounds for dismissal in Section VII.A.4 apply?

Complaint Evaluation

- 1) Could the alleged conduct, if true, constitute sex discrimination as defined in Appendix A?
 - If yes, go to question 2.
 - If no, dismiss complaint.
 - Note: Before dismissing on this basis, Title IX Coordinator must make reasonable efforts to clarify complaint allegations.

Complaint Evaluation

- 2) Do any of the grounds for dismissal in Section VII.A.4 apply?

College is unable to identify Respondent after taking reasonable steps to do so.

Respondent is not participating in College's education program or activity and is not employed by the College.

Complainant voluntarily withdraws any or all allegations in writing and remaining alleged conduct would not constitute sex discrimination, even if proven.

- If yes, dismiss complaint.
- If no, initiate Grievance Procedure.

Complaint Evaluation – Dismissal

- When complaint is dismissed at evaluation stage (i.e., before Respondent has been notified of the allegations), Title IX Coordinator must:
 - Promptly issue Document H (Notice of Dismissal) to Complainant;
 - Continue to offer supportive measures to Complainant; and
 - Take other steps to ensure that sex discrimination does not continue or recur within College's education program or activity.

Complaint Evaluation – Initiation of Grievance Procedure

- Upon initiation of Grievance Procedure, Title IX Coordinator must:
 - Determine who will investigate (and, if using separate Decisionmaker, who will serve as Decisionmaker); and
 - Issue Document G (Notice of Complaint Allegations) to both parties.

Notice of Complaint Allegations

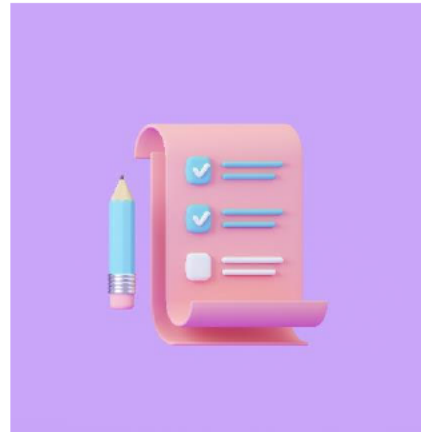


Notice of Complaint Allegations

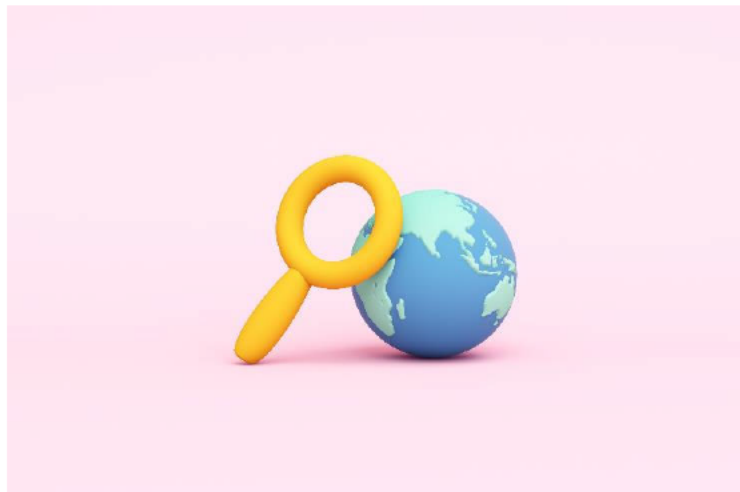
- If not included in NOCA for all sex discrimination complaints, NOCA for sex-based harassment complaints involving a student party must include:
 - Statement that parties may be accompanied to any meeting or proceeding by advisor their choice, who may, but is not required to be, an attorney;
 - Notification that parties will be afforded an equal opportunity to access the relevant and permissible evidence or an investigative report accurately summarizing the evidence; and
 - Identification of relevant College policy provisions that prohibit knowingly making false statements or knowingly submitting false information during the Grievance Procedure.

Notice of Complaint Allegations

- NOCA should also:
 - List supportive measures being offered to the party, if not already documented in prior written communication to that party;
 - Include informal resolution information, if applicable; and
 - Include language about emergency removal or administrative leave, if applicable (Respondent's NOCA only).



Complaint Investigation



Investigation

- Key Requirements
 - Written notice to party of investigative interview or meeting (Document I)
 - Advisor participation
 - Equal opportunity for parties to present fact witnesses and other relevant and permissible evidence
 - Expert witnesses → Investigator discretion
 - Access to relevant and not impermissible evidence or investigative report that accurately summarizes the evidence (Documents J and K)

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Investigation

- Timeframe
 - To be completed within 30 business days after Investigator's receipt of NOCA, unless extended pursuant to Section VII.A.1.
 - Good cause
 - Written notice to parties, including reason for delay
 - Extension requests
 - Must be submitted in writing at least one (1) business day in advance of deadline.
 - Notify both parties, in writing, of determination and any amended timeframe/deadline that applies as result of determination.

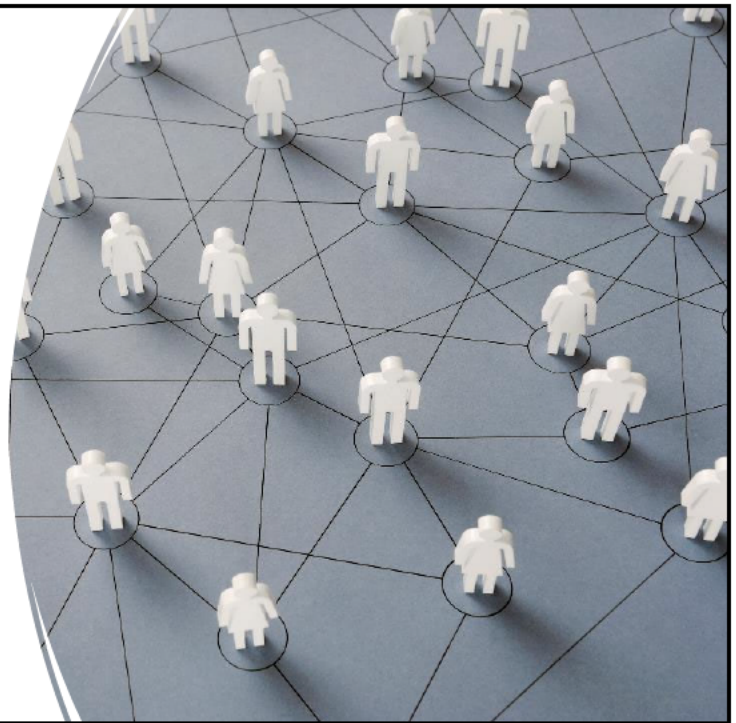
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Evidence

- “Relevant and not otherwise impermissible”
- Evidence is “relevant” when it may aid a Decisionmaker in determining whether alleged sex discrimination occurred.



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Impermissible Evidence

- May not be accessed, considered, disclosed, or otherwise used regardless of whether it is relevant.



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Types of Impermissible Evidence

- Evidence protected under privilege recognized by federal or State law, unless person to whom privilege is owed has voluntarily waived privilege.
 - Physicians, attorneys, clergy, etc.
- Evidence provided to a confidential resource (Confidential Employee or Confidential Advisor), unless person to whom confidentiality is owed has waived confidentiality.
- Records maintained by a physician, psychologist, or other recognized professional in connection with provision of treatment to the party or witness, unless College obtains party's or witness's voluntary, written consent for use of such records in Grievance Procedure.



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Types of Impermissible Evidence

- Evidence that relates to Complainant's sexual interests
- Evidence that relates to Complainant's prior sexual conduct, unless it is:
 - Offered to prove that someone other than Respondent committed the alleged conduct; or
 - Evidence about specific instances of Complainant's prior sexual conduct with Respondent that is offered to prove consent to alleged sex-based harassment.
- Note: Fact of prior consensual sexual conduct between Complainant and Respondent does not, by itself, demonstrate or imply Complainant's consent to alleged sex-based harassment or preclude determination that sex-based harassment occurred.



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Preparation of Investigation Report

- Document K (Investigation Report Template)
- Components:
 - Summary of Complaint
 - Definition(s) of Prohibited Conduct
 - Investigation Process
 - Standard of Review
 - Supportive Measures Offered
 - Emergency Removal / Administrative Leave
 - Notice Checklist
 - Summary of Relevant Evidence
 - Investigatory Interviews
 - Documents/Other Evidence



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Access to Evidence/Investigation Report

- Document J (Notice of Investigation Report) must be sent to each party (and party's advisor, if any), with Investigation Report attached.
- Informs parties of right to inspect relevant and permissible evidence upon request
 - Within 5 business days of party's receipt of Notice and Investigation Report
- Informs parties of right to submit written response to Investigation Report (and/or evidence, if party elects to inspect evidence)
 - Within 15 business days of receipt of Notice and Investigation Report



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Final Notes for Investigator



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Decisionmaker Appointment



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Decisionmaker Appointment

- Document L(a)/L(b) (Notice of Decisionmaker Appointment and Live Hearing/Questioning Proceeding)
- Upon appointment of Decisionmaker, both parties will have opportunity to request substitution if participation of appointed Decisionmaker poses a conflict of interest.



Substitution of Decisionmaker

- Party wishing to request substitution must notify Title IX Coordinator, in writing, within 3 business days after party's receipt of name of appointed Decisionmaker.
- Title IX Coordinator is responsible for reviewing and determining whether to grant a substitution request (unless Title IX Coordinator is serving as Decisionmaker).
- Title IX Coordinator should notify both parties, in writing, of decision (and name of new appointed Decisionmaker, if applicable).





Decisionmaker Review

- Upon resolution of substitution request, or if neither party requests substitution, Title IX Coordinator should forward relevant materials to Decisionmaker:
- Investigative report and all relevant and not otherwise impermissible evidence
- Parties written responses to investigative report, if any
- Decisionmaker should review Investigative report and other materials before holding live hearing or question-and-answer meetings.



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Live Hearing /
Questioning
Proceeding



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Choose Your Own Adventure

- For sex-based harassment complaints, process enabling Decisionmaker to question parties and witnesses to assess their credibility must allow parties to propose and ask relevant and permissible questions, including questions challenging credibility.
- Live Hearing → Document L(a)
- Questioning Proceeding → Document L(b)



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Option 1: Live Hearing

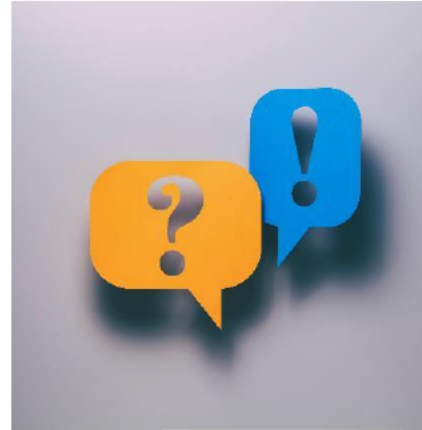
- Notice must be issued to both parties in writing at least 10 business days prior to hearing.
- May be conducted with parties physically present in same location OR with parties in separate locations with technology enabling Decisionmaker and parties to simultaneously see and hear person speaking.
 - Decisionmaker discretion
- Party may request – must submit in writing at most 3 business days after party's receipt of Notice of Hearing.



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Hearing Procedures

- Decisionmaker may question parties and witnesses.
- Parties may propose and/or ask (through advisors) relevant and not otherwise impermissible questions and follow-up questions of other party and witnesses, including questions challenging credibility.
 - Option 1: Parties propose questions to be asked by Decisionmaker.
 - Option 2: Parties' advisors ask questions
- If electing Option 2, College must appoint advisor for party who does not have advisor available to conduct questioning.
 - Appointed advisor may not be a Confidential Employee.



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Hearing Procedures

- Decisionmaker must determine relevance and permissibility of each question/proposed question and must explain any decision to exclude a question that is not relevant or otherwise impermissible.
 - Questions seeking privileged or confidential information
 - Questions seeking treatment records
 - Questions violating rape shield protections
- Unclear or harassing questions not permitted.
 - BUT before excluding question as unclear or harassing, party or advisor propounding/proposing question must be given opportunity to clarify or revise.

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Hearing Procedures

- Decisionmaker must create audio or audiovisual recording or transcript of live hearing and make it available to parties for inspection and review.



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Option 2: Questioning Proceeding

- Written notice to parties of opportunity to submit proposed questions to be asked of opposing party and any witnesses during individual meetings.
- Decisionmaker must determine relevance and permissibility of each question/proposed question and must explain any decision to exclude a question that is not relevant or otherwise impermissible.

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Question- and- Answer Meeting Procedures

Decisionmaker will pose submitted questions deemed relevant and permissible.

Decisionmaker may also pose own questions to party or witness.

If party has an advisor, advisor will be permitted to accompany party to their individual meeting(s), subject to limitations on advisor's role.

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Question-and- Answer Meeting Procedures

-
- Decisionmaker must create audio or audiovisual recording or transcript of each individual meeting and provide each party with recording or transcript with enough time for party to have reasonable opportunity to propose follow-up questions.



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Determination Regarding Responsibility



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Determination Regarding Responsibility

- Same standard of proof as other sex discrimination complaints (preponderance)
- Deadline for making determination = 30 business days after parties' deadline to request substitution of appointed Decisionmaker (or, if Decisionmaker is substituted, parties' receipt of name of substituted Decisionmaker).
- Extensions permitted pursuant to Section VII.A.1.

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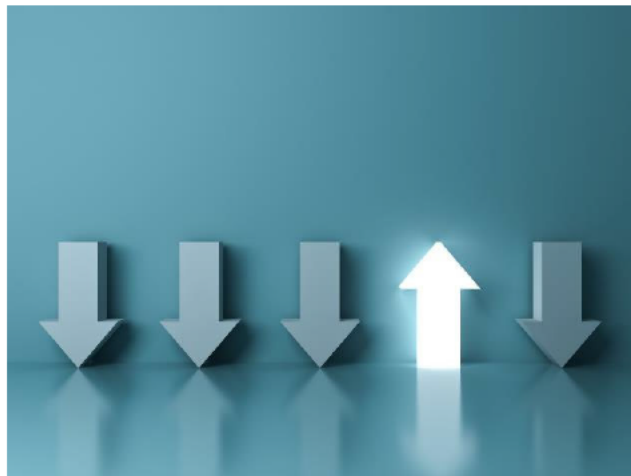
Determination Regarding Responsibility

- Document M (Determination Regarding Responsibility) must be sent simultaneously to both parties within 7 business days after determination is reached.
 - Description of alleged sex-based harassment
 - Policies and procedures used to evaluate allegations
 - Evaluation of evidence and determination
 - Recommended disciplinary sanctions for Respondent
 - Remedies for Complainant, if any
 - Other students identified by College as experiencing effects of sex-based harassment (if applicable and appropriate)*
 - Appeal procedures and permissible bases for appeal



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Appeal



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Appeal Rights

- Party seeking to appeal determination regarding responsibility or dismissal must submit written request to Title IX Coordinator within 7 business days of receipt of written determination or notice of dismissal.
- Permissible grounds for appeal:
 - Procedural irregularity that would change the outcome.
 - New evidence that was not reasonably available and would change the outcome.
 - Conflict of interest or bias by Title IX Coordinator, Investigator, or Decisionmaker that would change the outcome.
 - **Sanction is disproportionate to violation.**



Appeal Procedures

- Within 7 business days of receiving an appeal request, Title IX Coordinator will:
 - Forward appeal request and relevant materials to the Appellate Decisionmaker.
 - Notify both parties in writing of appeal.
 - Provide Respondent with notice of allegations, if not previously provided.
 - Inform parties of opportunity to submit statement supporting or challenging determination or dismissal.
- Document N

Appeal Procedures

- Within 10 business days after parties' deadline for submitting statements, Appellate Decisionmaker will:
 - Review appeal and relevant materials.
 - Affirm, reverse, or modify dismissal or determination regarding responsibility.
- Appellate Decisionmaker must notify parties, in writing, of result and rationale within 7 business days after conclusion of appeal review.
- Document O



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Final Determination

- Determination of Responsibility becomes final on:
 - Date of written appeal determination; or
 - Date on which an appeal would no longer be considered timely if no appeal is filed.
- If there is determination that sex-based harassment occurred, Title IX Coordinator must:
 - Coordinate provision and implementation of remedies;
 - Coordinate imposition of disciplinary sanctions; and
 - Take other appropriate prompt and effective steps to ensure sex-based harassment does not continue or recur.

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Aidan C. Falk is an Associate Attorney renowned for her dedication to advocacy and passion for equality in the legal profession. Through focusing on Litigation, Education Law, and Student Rights, Aidan brings a unique perspective to her practice. With a background rooted in sports and a commitment to serving her community, she has become known for her unwavering commitment to her clients and her strong advocacy skills.

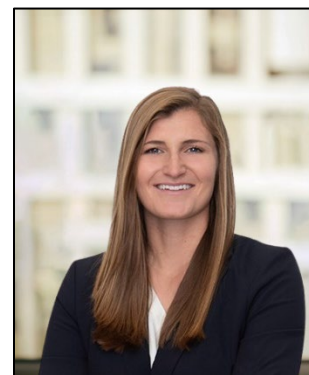
Aidan takes pride in her ability to work hard and ensure her clients receive the fullest degree of representation. Her career highlights include successful motions to dismiss and motions for summary judgment, as well as her continuous improvement in deposition and courtroom skills.

Aidan's journey into law began with a diverse range of experiences. Before attending law school, she worked as a legal assistant in a Real Estate/Estate Planning law firm in Chicago.

Inspired by her father, a litigator in New York, Aidan pursued a career in law to advocate for those who cannot advocate for themselves. She was drawn to the competitive and dynamic nature of litigation and began her journey in the medical malpractice/general liability/insurance defense world. Recently, Aidan shifted her focus to Education Law, particularly Title IX, influenced by her experiences playing softball at the University of Michigan under Coach Carol "Hutch" Hutchins, a Title IX pioneer.

Growing up witnessing her father's zealous advocacy and playing for Coach Hutch at the University of Michigan instilled in Aidan a desire to make a positive impact through her career. She approaches the law with the same dedication and discipline as she did athletics, striving to improve every day and make equality more attainable for all.

Outside of work, Aidan enjoys staying active and spending time outdoors. Her hobbies include running, rollerblading, and Pilates. She cherishes moments outdoors with her dog and finds joy in being surrounded by nature. A lesser-known fact about Aidan is that she attended the same high school as soccer legend Abby Wambach, highlighting her connection to sports and her community.



PRACTICE AREAS

Education
Litigation
Student Rights

EDUCATION

J.D., Loyola University
Chicago School of Law

B.A., University of
Michigan

ADMITTED TO PRACTICE

Supreme Court of Illinois

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

ORGANIZATIONS

Chicago Bar Association

Illinois State Bar
Association

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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily 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 defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before 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.



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

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Law School

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Vanderbilt University

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U.S. Court of Appeals for
the Seventh Circuit

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

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Trustee, Associated
Colleges of Illinois

Chicago Bar Association

Illinois Council of School
Attorneys

National Council of School
Attorneys

RECENT PUBLICATIONS

"College Admissions Under Fire as Top Court Takes Affirmative Action Case,"
Chicago Daily Law Bulletin (2022)

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

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED
Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023)

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of
Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA,
and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and
Cybersecurity Conference (January 2022)

