



Robbins Schwartz
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ILLINOIS PREVENTING SEXUAL VIOLENCE IN HIGHER EDUCATION ACT

August 6, 2024 & August 8, 2024

Emily P. Bothfeld
ebothfeld@robbins-schwartz.com

Michael A. Barracato
mbarracato@robbins-schwartz.com

Chicago

190 South LaSalle St, Suite 2550
Chicago, IL 60603
p 312.332.7760
f 312.332.7768

Champaign

301 North Neil St, 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

Lisle

550 Warrenville Rd, Suite 460
Lisle, IL 60532
p 630.929.3639
f 630.783.3231

Rockford

2990 North Perryville Rd, Suite 4144B
Rockford, IL 61107
p 815.390.7090

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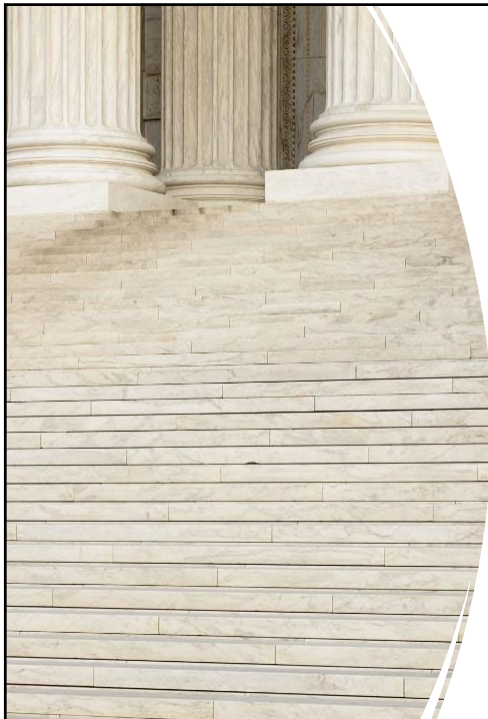
Illinois Preventing Sexual Violence in Higher Education Act: A Webinar for Higher Education Institutions

Presented by:

Emily P. Bothfeld & Michael A. Barracato

August 6, 2024 & August 8, 2024

1



Agenda

- Key Components
- Scope of Prohibited Conduct
- Consent and the Role of Drugs and Alcohol
- Reporting and Response Requirements
- Grievance Procedure for PSVHEA Offenses
- Survivor-Centered and Trauma-Informed Practices

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.

Key Components of the PSVHEA



Key Components of the PSVHEA



- Comprehensive Policy
- Reporting Procedures
- Notification of Rights and Options
- Confidential Advisors
- Complaint Resolution Procedures (AKA Grievance Procedure)
- Campus Training, Education and Awareness
- Campus Task Force
- Annual Report
- Climate Surveys

Scope of Prohibited Conduct



Scope of Prohibited Conduct

- Student party
- Sexual violence
- Domestic violence
- Dating violence
- Stalking



Scope of Prohibited Conduct

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.

Scope of Prohibited Conduct



Domestic Violence

Felony or misdemeanor crimes committed by a person who:

- 1) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the State of Illinois, or a person similarly situated to a spouse of the victim;
- 2) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- 3) Shares a child in common with the victim; or
- 4) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the State of Illinois.

Scope of Prohibited Conduct



Dating Violence

Violence committed by a person:

- 1) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- 2) Where the existence of such a relationship shall be determined based on a consideration of:
 - a) The length of the relationship;
 - b) The type of relationship; and
 - c) The frequency of interaction between the persons involved in the relationship.



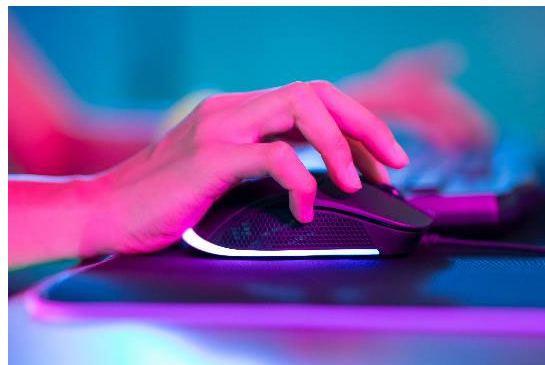
9

Scope of Prohibited Conduct

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- 1) Fear for the person's safety or the safety of others; or
- 2) Suffer substantial emotional distress.



10

Consent and the Role of Drugs and Alcohol



11

Consent

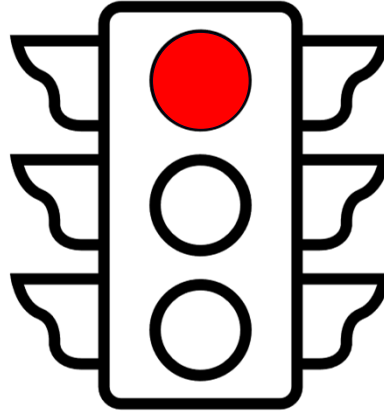
- Freely given agreement to sexual activity
- Can be withdrawn at any time



12

Not Consent

- Lack of verbal or physical resistance
- Submission resulting from use or threat of force
- Person's manner of dress



More on Consent

- Person's consent to past sexual activity does not constitute consent to future sexual activity.
- Person's consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another person.
- Person cannot consent to sexual activity if they are unable to understand the nature of the activity or give knowing agreement due to:
 - Being asleep or unconscious;
 - Being a minor;
 - Being incapacitated due to a mental disability; or
 - Being incapacitated due to use or influence of alcohol or drugs.

Drugs and Alcohol

- “Under the influence” vs. “intoxicated” vs. “incapacitated”
- Signs that may indicate incapacitation vary widely, but include (among others):
 - Stumbling or unsteady walking
 - Inability to communicate coherently
 - Vomiting
 - Inability to focus eyes
 - Inability to use basic motor skills
 - Disorientation
 - Emotional volatility
 - Combativeness
 - Unresponsiveness
 - Unconsciousness



Intoxication or Incapacitation of Both Parties

- Person initiating sexual activity has a responsibility to obtain consent, regardless of their own level of intoxication.
- Person’s state of mind may affect their ability to interpret the other party’s words or behavior, but person is still accountable for their own behavior.



Reporting and Response Requirements



17

Options for Assistance Following an Incident

- Procedures Section IV
- Emergency Services
 - On-campus law enforcement or security
 - Off-campus law enforcement
- Crisis Response Services
 - On-campus Confidential Employees
 - Off-campus confidential resources
 - *Note which resources are Confidential Advisors (as defined under PSVHEA)
- Medical Services
 - On- and off-campus healthcare facilities and providers
 - Availability of medical forensic examination at no charge



18

Reporting Options



- Electronic Reporting
- Anonymous Reporting
- Confidential Reporting
- Reporting by Third Parties and Bystanders

Notification of Rights and Options

- Upon being notified of alleged PSVHEA offense, College must provide survivor, when identified, with concise notification of their rights and options, including:
 - Right to report to College and/or law enforcement
 - Right to assistance with reporting to law enforcement
 - Ability to request supportive measures
 - Right to assistance with accessing health and mental health services
 - Summary of College's grievance procedure
- 12-hour requirement for electronic reports.

Grievance Procedure for PSVHEA Offenses



Grievance Procedure for PSVHEA Offenses

- Section VII.B of Procedures Implementing College Policy Prohibiting Sex Discrimination.
 - Student party (complainant, respondent, or both)
 - Alleged conduct, if true, would constitute sex-based harassment (as defined in Appendix A), which includes:
 - Quid pro quo harassment
 - Hostile environment harassment
 - Sexual assault
 - **Sexual violence**
 - **Domestic violence**
 - **Dating violence**
 - **Stalking**

Required Components of Grievance Procedure

- Opportunity for prompt and timely resolution
- Adequate availability of trained staff
- Preponderance of the evidence standard
- Advance notification of decisionmaker and opportunity to request substitution
- Process for determining interim supportive measures
- Privacy protections
- Equal right to present evidence and witnesses

23

Required Components of Grievance Procedure

- Equal right to present evidence and witnesses
- Prohibition on direct cross-examination between parties
- Right to advisor of party's choice
- Prohibition on compelling party to testify in presence of other party
- Simultaneous written notice of outcome within 7 days of decision
- Right to appeal within 7 days of receiving written notice of outcome
- Expanded grounds for appeal

24

Survivor-Centered and Trauma-Informed Practices



What is Trauma?

- The result of an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual wellbeing.

Source: https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf

Types of Traumatic Life Experiences

Physical or sexual abuse	Abandonment, neglect, or betrayal of trust	Death or loss of a loved one
Caregiver having a life-threatening illness	Domestic violence	Poverty and chronically chaotic housing and financial resources
Automobile or other serious accident	Bullying	Life-threatening health situations or painful medical procedures
Witnessing or experiencing community violence	Witnessing police activity or having a family member incarcerated	Life-threatening natural disasters
Acts or threats of terrorism	Military combat	Historical trauma

Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



27

Trauma on College Campuses

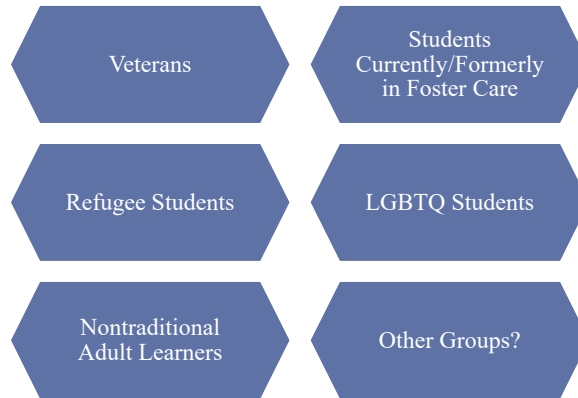
- Out of every 1,000 people in the general population, about 108 are suffering the effects of trauma.
- By the time they reach college, 66 to 85 percent of youth report having been exposed to a traumatic event during their lifetime, with many reporting multiple exposures.

Sources: <https://safesupportivelearning.ed.gov/Trauma-Sensitive-Campus-Health-Centers> and <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



28

Student Groups at Elevated Risk



Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



29



Neurobiology of Trauma

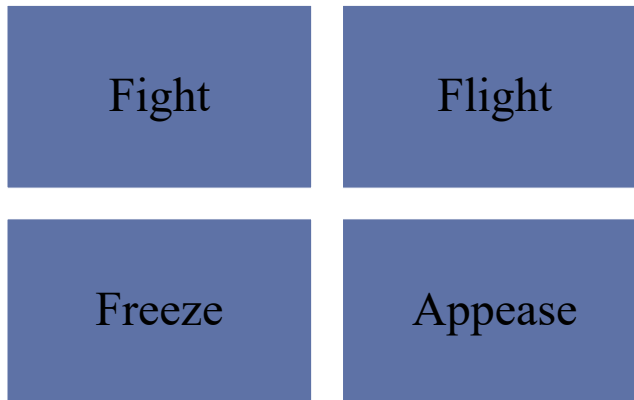
- Limbic system → stores emotional responses to experiences
- Amygdala → “fear center” of the brain; where trauma response and memory is stored
- Hippocampus → involved with recall of memory, particularly long-term memory

Source: <http://stacarecenter.org/wp-content/uploads/2015/09/The-Care-Center-Neurobiology-of-Trauma-Nov-2016.pdf>



30

Trauma Responses

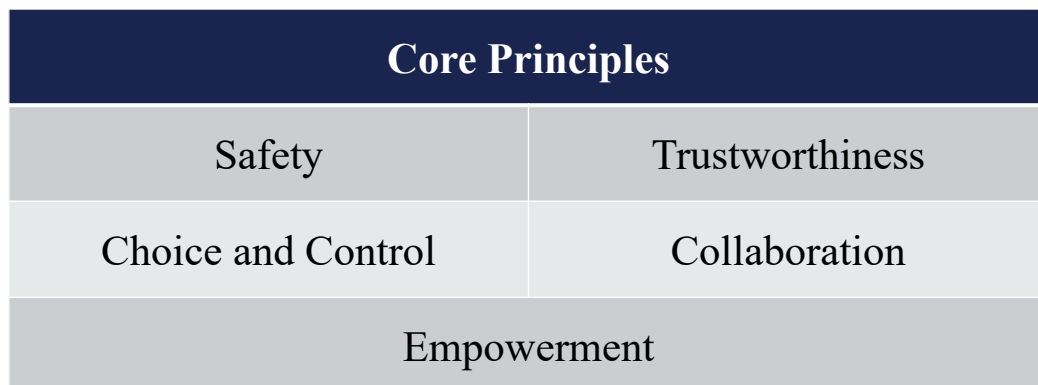


Source: <http://stacarecenter.org/wp-content/uploads/2015/09/The-Care-Center-Neurobiology-of-Trauma-Nov-2016.pdf>



31

Survivor-Centered & Trauma-Informed Practices



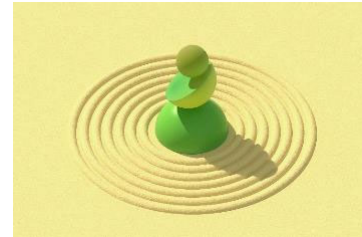
Source: <https://educationnorthwest.org/sites/default/files/resources/trauma-informed-practices-postsecondary-508.pdf>



32

Application

- How can we apply survivor-centered and trauma-informed practices in the context of a Title IX/PSVHEA proceeding?
 - Consideration of supportive measures
 - Explanation of process, roles, expectations
 - Flexibility in questioning/obtaining evidence
 - Environmental considerations
 - Communication strategies
 - Resolution options



Sources: <https://store.samhsa.gov/sites/default/files/pep23-06-05-005.pdf> and <https://victimrights.org/wp-content/uploads/2020/11/Tool-for-Incorporating-Trauma-Informed-Practices-into-Final-Title-IX-Rule-Legal-Framework.pdf>



33



34



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EMILY P. BOTHFELD

PARTNER, CHICAGO

312.332.7760

ebothfeld@robbins-schwartz.com

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

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

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)



MICHAEL A. BARRACATO

ASSOCIATE, CHICAGO

312.332.7760

mbarracato@robbins-schwartz.com

Michael A. Barracato is an Associate within the Student Rights group at Robbins Schwartz. His commitment to making a difference is reflected in his dedication to serving clients and upholding the principles of justice and equity. Michael's journey into the legal profession has been shaped by his unique background and experiences.

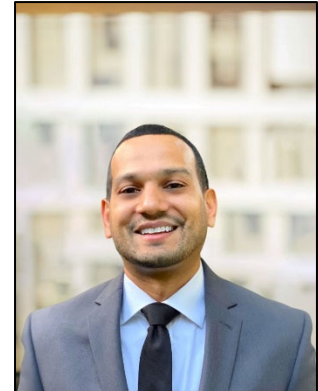
As an attorney, Michael excels in crafting creative solutions to intricate legal problems. His background in education has equipped him with a unique perspective and insight into the intersection of education and law. He is committed to providing knowledgeable and empathetic advocacy for educational institutions, families, and students.

Michael's strengths as an attorney include his ability to navigate complex educational regulations, handle disciplinary proceedings, and ensure the rights of students and staff are upheld. His innovative approach to problem-solving has led to successful outcomes for his clients.

Michael's career path was inspired by his firsthand experience with the impact of legal issues on educational settings. Motivated to merge his knowledge of educational systems with legal advocacy, he pursued a career in law. Michael's decision to specialize in educational law was driven by his desire to address the unique challenges faced by schools, students, and families.

Prior to embarking on his legal career, Michael served as an Assistant Principal, where he navigated a wide range of issues, from student discipline to staff management. Through this role, Michael gained invaluable experience in critical thinking, conflict resolution, and effective communication. His experience provided him with a deep understanding of the complexities of educational environments, preparing him to handle diverse client needs with empathy and expertise. These skills have been instrumental in his transition to the legal field.

Michael's upbringing in New York's diverse cultural landscape has instilled in him a deep appreciation for various perspectives and backgrounds. This diversity informs his legal practice, particularly in education law, where inclusivity and understanding are paramount.



PRACTICE AREAS
Student Rights

EDUCATION
J.D., The John Marshall
Law School

ADMITTED TO PRACTICE
Supreme Court of Illinois
(pending admission)

ORGANIZATIONS
American Bar Association

Chicago Bar Association