

## Preparing for Implementation of the New Title IX Regulations: Recommendations for Higher Education Institutions

**Webinar**  
**May 28, 2020**

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Preparing for Implementation of  
the New Title IX Regulations:  
Recommendations for Higher Education Institutions

Webinar Presented by Emily P. Bothfeld, Caroline A. Roselli and  
Frank B. Garrett III  
May 28, 2020

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Background on  
Title IX  
Regulations



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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.

## 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



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## Impact on Higher Education Institutions

- New Rules will require:
  - Revisions to institutional policies and procedures
  - Staffing determinations
  - Training for all personnel involved in an institution's investigation and grievance process
  - 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 school 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

- 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 of filing 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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## Definitions



- Supportive measures = individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.

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## Institutional Response Obligations

- Upon receipt of a report alleging sexual harassment, an institution must, at a minimum:
  - Promptly contact the victim confidentially to discuss supportive measures and options for filing a formal complaint.
  - Investigate sexual harassment allegations in any formal complaint.
  - 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 school's education program or activity against a person in the United States, the institution must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the institution deems appropriate under its own code of conduct.

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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.

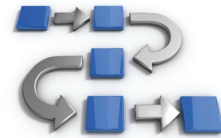


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## Grievance Process

- Institution must send written notice to both parties (complainants and respondents) 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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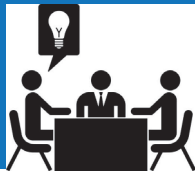
## Grievance Process

- 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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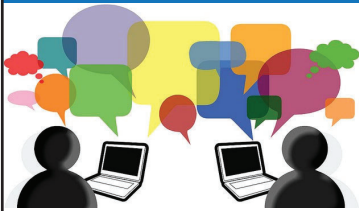
## Hearings

- 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 on behalf of that party.
  - May, but is not required to be an attorney.

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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
  - 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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## Title IX: Not Just a Student Concern



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## Employees of Educational Institutions Are Entitled to Title IX Protections

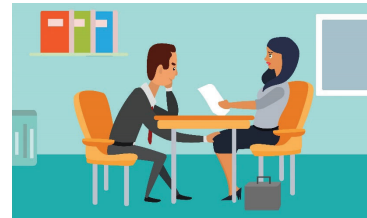
- The Department of Education's latest rules make clear that Title IX applies to employees as well as students:
  - **"No person** in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX, 20 U.S.C. 168

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## Interplay Between Title IX and Title VII

- The Department acknowledges that employers must fulfill their obligations under Title IX and also under Title VII.
- Title VII's definition of "sexual harassment" and "notice of harassment" differs from Title IX.



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## Interplay Between Title IX and Title VII

	Title IX	Title VII
Notice of Sexual Harassment for Liability Purposes	When the educational entity has actual knowledge of sexual harassment	<ul style="list-style-type: none"> <li>• If the employer knew or should have known of the harassment.</li> <li>• If the harassment is from a supervisor and it resulted in an adverse job action, the employer is liable.</li> </ul>
Definition of Sexual Harassment	Any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access	Unwelcome sexual advances... and other conduct... of a sexual nature having the purpose or effect of interfering with an individual's work performance of creating an intimidating, hostile or offensive working environment.

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## Interplay Between Title IX and Title VII

- The Department, however, states: 
  - There is no inherent conflict between the two statutes and students and employees, including faculty and student workers should not be treated differently.
- Employees are entitled to the same due process protection as students

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## Administrative Actions Only with Regard to Employee Title IX Complaints

- The Department's Rules do not create a private right of action for employees.
- The Department recognizes that its authority is limited to administrative enforcement actions.
  - OCR investigations, findings and resolutions
  - Administrative action can include stopping federal funding to the educational institution.

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## Employee Title IX Complaints Now Must Provide Increased Due Process Protections

- **WARNING:** Employees pursuing formal complaints of sexual harassment are entitled to all of the grievance processes provided students:

- Notice and Inspection of Evidence
- A Live Hearing
- Cross-Examination Rights
- Right to submit written questions to the other party and witnesses
- Written Decision which includes a rationale for each conclusion reached; and
- Appeal Rights



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## Specific Title IX Language Regarding Employees

- Language Specific to Employees
  - The Final Rules allow an educational institution to place employees accused of sexual harassment on administrative leave, paid or unpaid, during the formal complaint grievance process.
    - This administrative provision may have to be squared up with current policy, procedure, and applicable collective bargaining agreement language.
- Informal resolution of a sexual harassment allegation is not an option when it involves employee-to-student claims.

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## Preparation Tips



# Prepare for Success

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## Tip #1

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



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## Tip #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 as investigators and decision-makers or outsource those functions to contractors (or a combination of both);

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## Tip #2

- 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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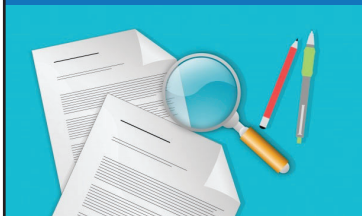
### Tip #3

- Designate key players:
  - Title IX Coordinator
  - Investigator(s), if separate from Title IX Coordinator
  - 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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### Tip #4



- Revise institutional policies and procedures.
  - Title IX/sexual misconduct policy and procedures.
    - Remember: Preventing Sexual Violence in Higher Education Act's policy/grievance procedure requirements still apply.
  - Student code of conduct and disciplinary procedures?
  - Employee harassment policy and procedures?

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## Tip #5

- Coordinate training of Title IX personnel.
  - Remember: Preventing Sexual Violence in Higher Education Act training requirements still apply.
- Post training materials on college website.

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## Tip #6



- Employee Sexual Harassment Policies and Procedures will likely have to be revised to comply with the Department's Final Rules on Title IX.
- Educational Institutions should also review collective bargaining agreement language regarding sexual harassment process and procedure.
- Employees charged with investigating sexual harassment complaints involving employees must be trained.

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Questions?



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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)

*The Ever-Changing Landscape Under Title IX*, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)



### PRACTICE AREAS

Education Law  
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J.D., *with honors*, George Washington University Law School

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U.S. Court of Appeals for the Seventh Circuit

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Supreme Court of Illinois

### ORGANIZATIONS

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

*FERPA and FOIA: Compliance and Considerations, Illinois Community College  
Chief Student Services Officers Winter Meeting (January 2017)*

*Residency and Homelessness: Legal Update and Considerations When  
Challenging a Student's Status (October 2016)*

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Frank B. Garrett III represents school districts, community colleges, local governmental bodies and public and private companies in all aspects of employment law, including complaints and charges of unlawful discrimination, wrongful termination, sexual harassment, civil rights violations, employee discipline and termination. Frank also counsels and provides training to employers in the following areas: ADA and FMLA compliance, avoiding claims of unlawful discrimination and harassment in the workplace: evaluation and discipline of employees, and diversity in the workplace.

Frank represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. He is an active member of the American Bar Association and Illinois Council of School Attorneys.

### **AWARDS**

Illinois Leading Lawyer, Government and Regulatory-Related  
Illinois Leading Lawyer, Employment and School Law  
Illinois Super Lawyers

### **RECENT PUBLICATIONS**

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit,"  
*Chicago Daily Law Bulletin* (2017)

"First Amendment Protections Get Broader for Government Employees,"  
*Chicago Daily Law Bulletin* (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims,"  
*Chicago Daily Law Bulletin* (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision,"  
*Chicago Daily Law Bulletin* (2015)



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District Court for the  
Northern District of Illinois

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

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

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

Supreme Court of Illinois

“Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution,” *Inquiry & Analysis*, National School Boards Association’s Council of School Attorneys (2013)

Contributing author, “Employment Discrimination,” *ILLINOIS SCHOOL LAW*, IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

#### **RECENT PRESENTATIONS**

*Debunking Some Common Employee FMLA Leave Myths*, IASPA Annual Conference (January 2020)

*Legislative Update: A Review of New Laws Affecting Illinois Community Colleges*, Illinois Council of Community College Presidents Retreat (September 2019)

*Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes*, Illinois GFOA Annual Conference (September 2019)

*Navigating the Legal Liability Minefield in the Recruitment, Interview and Selection of Qualified Applicants*, AASPA Personnel Administrator Boot Camp (June 2018)

*The Ever-Changing Landscape Under Title IX*, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)

*Practical Guidance on Employee Misconduct Investigations and Discipline*, Illinois Association of School Personnel Administrators, Tenth Annual State Conference (January 2017)

#### **ORGANIZATIONS**

American Bar Association,  
Section on Labor and  
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Caroline Roselli practices in the areas of special education law and student rights. She counsels school districts and colleges concerning student discipline, student records, policy development, students' rights and other student-related matters. She assists school districts in responding to complaints from the Illinois State Board of Education and Office of Civil Rights and she regularly represents public school districts at IEP meetings, due process hearings, mediations, student expulsion and suspension hearings and residency hearings. Caroline has successfully defended school district decisions and prevailed at due process hearings on issues regarding eligibility, requests for residential placements and denial of FAPE claims.

Caroline has presented at annual conferences for both the Illinois Association for School Boards and for the Illinois Alliance of Administrators of Special Education. She is a co-author of the "Special Education" chapter of the Illinois Institute of Continuing Legal Education's School Law treatise. Caroline also regularly conducts workshops and in-service programs on a variety of special education related topics, including IEP compliance, response to intervention and child find, evaluation procedures, eligibility determinations, autism litigation and discipline of special education students.

### **AWARDS**

Illinois Emerging Lawyer, School Law (2017-2018)

Illinois "Rising Star," Super Lawyers Magazine, Schools and Education Law (2012-2017)

### **RECENT PUBLICATIONS**

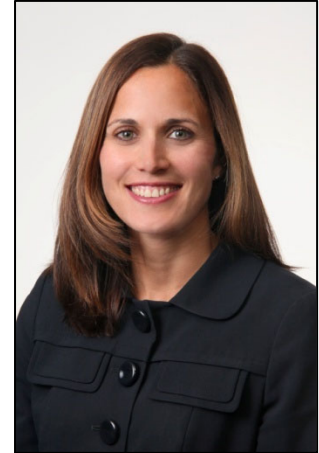
"Students Should Know the Consequences of Sexting," *Chicago Daily Law Bulletin* (2015)

"What Does State Law Say about Measles Prevention and Control in Schools?" *Chicago Daily Law Bulletin* (2015)

Contributing author, "Special Education," *Illinois School Law*, IICLE (2010, 2012 and 2015)

### **RECENT PRESENTATIONS**

*Due Process: To Go or Not to Go? Special Education Update*, Illinois Council of School Attorneys, 33rd Annual Seminar on School Law (November 2019)



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National Council of School Attorneys

*Seclusion, Restraint, and Time Out 2020*, Illinois Alliance of Administrators of Special Education Region 1 Roundtable (November 2019)

*Risk Assessment, Threat Assessments and the Impact on Students with Disabilities*, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

*Legal Issues Related to School Safety and Security: Addressing the Complex Challenges Facing Schools*, Large Unit District Association, (May 2019)

*Responding to Requests for Homebound Instruction*, Illinois Alliance of Administrators of Special Education Webinar (April 2019)

*Tips for Preparing Legally Defensible Eligibility Determinations for Specific Learning Disability*, Illinois Alliance of Administrators of Special Education Roundtable Presentation (March 2019)

*Absenteeism, School Refusal, and Truancy in Special Education: Legal Issues when Students Don't or Can't Come to School*, Illinois Alliance of Administrators of Special Education Roundtable Presentation (March 2019)

*Escalating Student Behavior and Safety Concerns: Legal Options and Considerations*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

*The Ins & Outs of Residential Placements: Rules, Regulations, & Recommendations*, Illinois Alliance of Administrators of Special Education Fall Conference (October 2018)

*Just What the Doctor Ordered: Responding to Increasing Requests for Homebound Instruction*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2018)

*Special Education Law Goes to the Supreme Court*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2017)

*Unilateral Placements for Special Education Students: A Big Gamble?*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2017)

*Child Find, Evaluation and Eligibility in an Rtl World*, Illinois Alliance of Administrators of Special Education Fall Conference (October 2016)