

## Making Sense of the Alphabet Soup: FERPA, ISSRA, COPPA, SOPPA, MHDDCA, and PIPA and Strategies for Compliance

January 19, 2022

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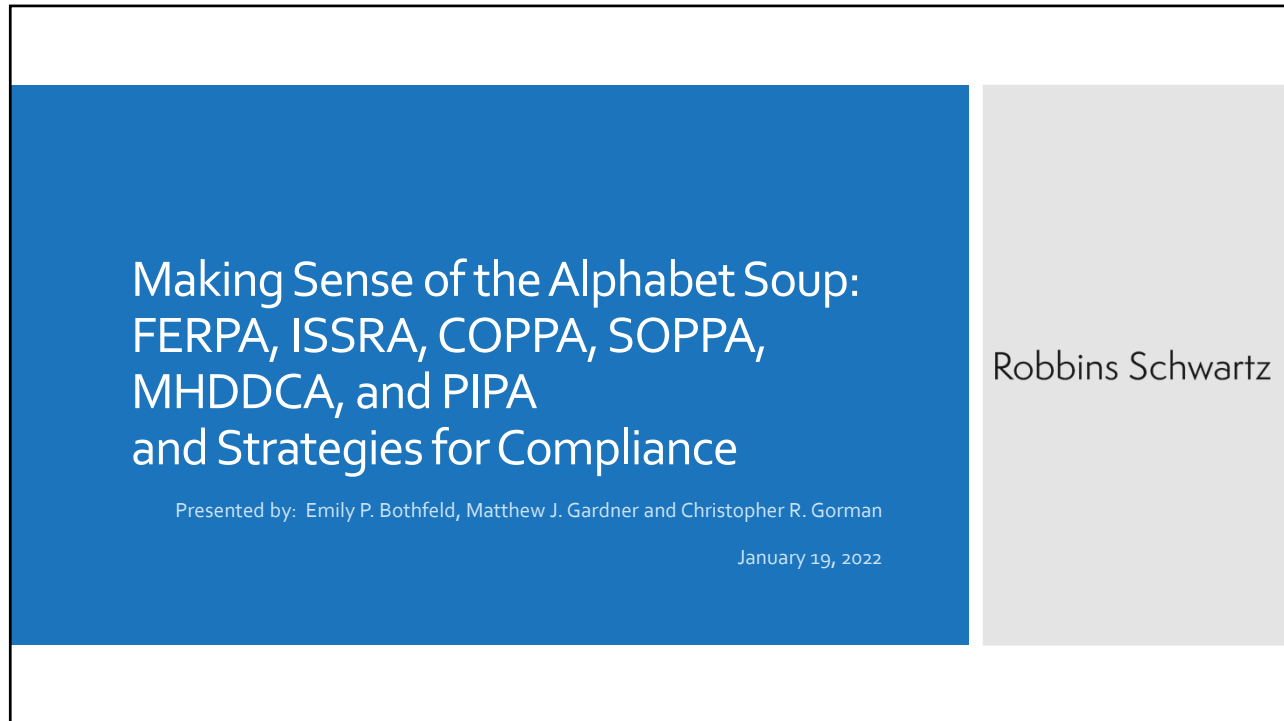
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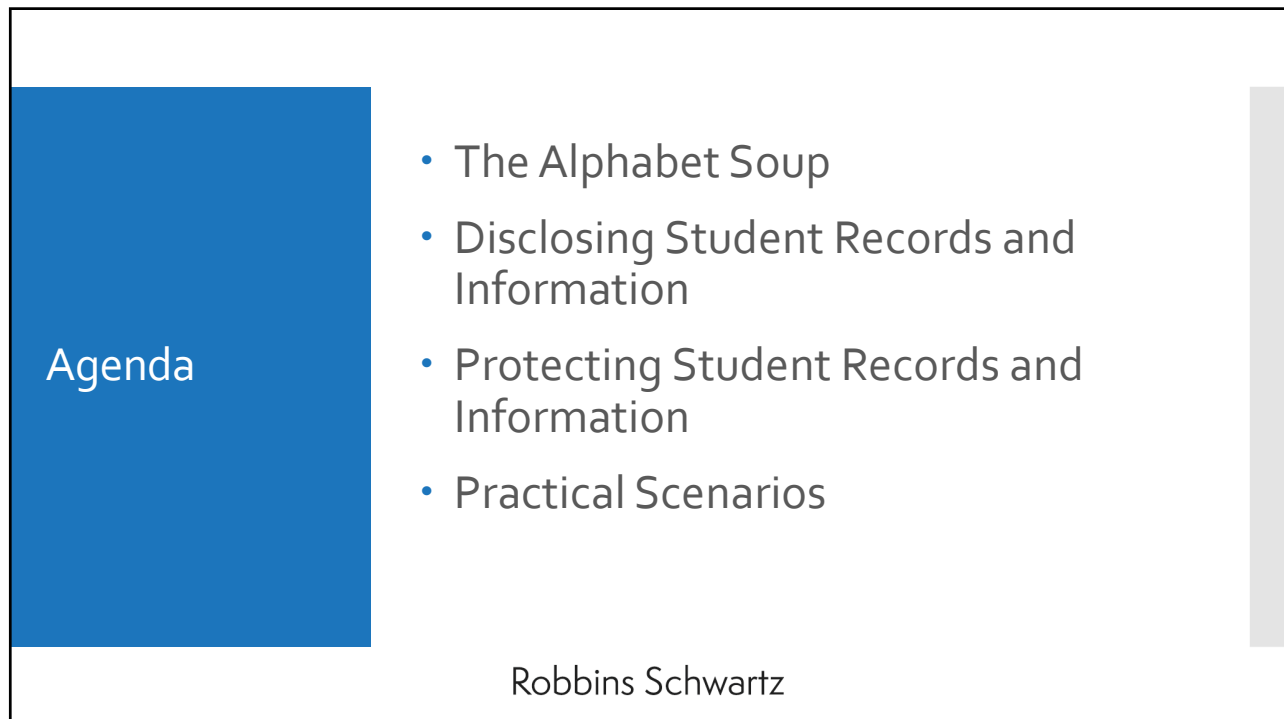
Making Sense of the Alphabet Soup:  
FERPA, ISSRA, COPPA, SOPPA,  
MHDDCA, and PIPA  
and Strategies for Compliance

Presented by: Emily P. Bothfeld, Matthew J. Gardner and Christopher R. Gorman

January 19, 2022

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Agenda

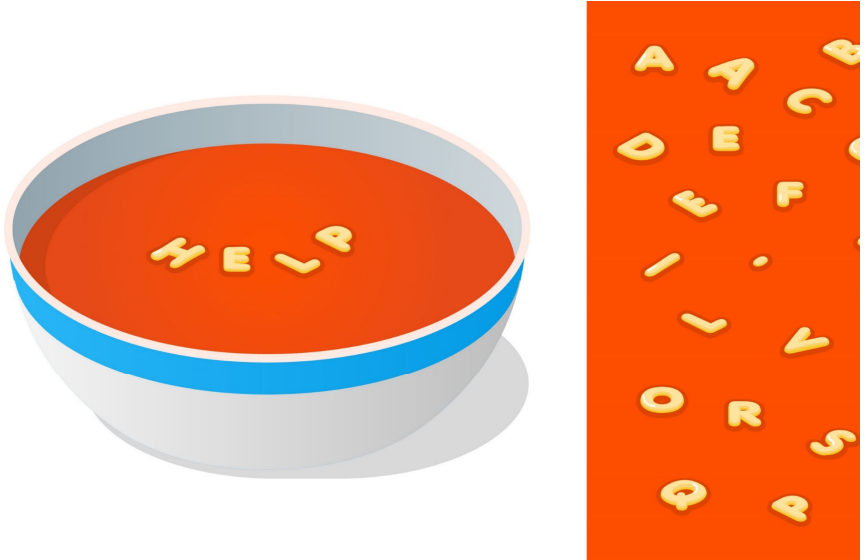
- The Alphabet Soup
- Disclosing Student Records and Information
- Protecting Student Records and Information
- Practical Scenarios

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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.

The Alphabet Soup



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This slide features a blue sidebar on the left with the text "The Alphabet Soup". The main content area contains a 3D illustration of a white bowl with a blue rim, filled with red soup. The letters H, E, L, and A are floating in the soup. To the right is a vertical orange bar with scattered yellow letters, including A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z.

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FERPA and ISSRA



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This slide features a blue sidebar on the left with the text "FERPA and ISSRA". The main content area contains a photograph of a desk with a laptop, a calendar, and several folders.

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## FERPA and ISSRA

- The *Family Educational Rights and Privacy Act* (“FERPA”), 20 U.S.C. § 1232g, applies to educational agencies and institutions, including K-12 school districts, that receive federal financial assistance.
- The *Illinois School Student Records Act* (“ISSRA”), 105 ILCS 10/1 *et seq.*, applies to Illinois public preschools, daycare centers, kindergartens, nurseries, elementary and secondary educational institutions, special education facilities and persons, agencies or institutions which maintain student records from more than one school.

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## FERPA and ISSRA



- FERPA and ISSRA define student records differently—but, practically, they cover the same records.
  - FERPA protects “education records.”
  - ISSRA protects “school student records.”

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## FERPA: Definition of "Education Record"

- FERPA defines "education record" as information recorded in any way, including handwritten documents, electronic files, video or audio recordings, that:
  - Contains information directly related to a student; and
  - Is maintained by an educational entity.

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## ISSRA: Definition of "School Student Record"

- ISSRA defines "school student record" as any writing or other recorded information concerning a student and by which a student may be individually identified that is maintained by a school or school district or any employee of a school or school district, regardless of how or where the information is stored.

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## Permanent vs. Temporary Records

- "Student Permanent Record" means the minimum personal information necessary to a school in the education of the student and contained in a school student record.
  - Examples: Student's name, birth date, address, grades and grade level, parents' names and addresses, attendance records.
- "Student Temporary Record" means all information contained in a school student record but not contained in the student permanent record.

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## Retention of Student Records

- A school must maintain a student's permanent record and the information contained in it for 60 years after the student has transferred, graduated or otherwise permanently withdrawn from the school.
- A school must maintain student temporary records for 5 years after the student has transferred, graduated, or otherwise permanently withdrawn.

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## MHDDCA



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## MHDDCA

- Certain types of student records are also protected by the *Mental Health and Developmental Disabilities Confidentiality Act* ("MHDDCA"), 740 ILCS 110/1 *et seq.*
- The MHDDCA generally protects records and communications kept by a "therapist," defined as a psychiatrist, physician, psychologist, social worker, nurse or similar professional engaged in the provision of mental health or developmental disabilities services.

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## COPPA



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## Who Does COPPA Apply To?

*The Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506, applies to operators of websites or online services that are directed to children under the age of 13, or who have actual knowledge that they are collecting personal information from children under 13.*

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## COPPA's Restrictions on Operators

- COPPA prohibits an operator from collecting personal information from a child (under 13) unless:
  - The operator provides notice on the website or application of the type of information that is collected from children, how the information is used, and the operator's disclosure practices; and
  - The operator obtains verifiable parental consent for the collection, use, or disclosure of personal information from the children.

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## COPPA and Schools

### What do schools need to know about COPPA?

- COPPA does not apply to schools directly.
- But beware of contracts that seek to shift the burden of obtaining consent.

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## SOPPA



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## Who Does SOPPA Apply To?

The *Student Online Personal Protection Act* ("SOPPA"), 105 ILCS 85/1 *et seq.*, applies to operators of websites, online services, and mobile applications with actual knowledge that the site, service, or application is used primarily for K-12 school purposes and was designed and marketed for K-12 school purposes.

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## SOPPA's Restrictions on Operators

- SOPPA is more comprehensive than COPPA and prohibits operators from using information created or gathered from the use of the operator's website for:
  - Targeted advertising;
  - Amassing a profile about a student; or
  - Selling or renting a student's information.

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## SOPPA Requirements for Operators

SOPPA also requires operators to:

- Implement and maintain reasonable security practices and procedures;
- Delete a student's covered information within a reasonable time period if the school requests deletion;
- Publicly disclose information about its collection, use, and disclosure of covered information;
- Enter into a written agreement with the school;
- Notify the school within 30 days after a determination that a breach occurred; and
- Provide a list of any third-parties or affiliates that the operator discloses covered information to.

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## SOPPA and Schools

### What do schools need to know about SOPPA?

- Pursuant to a 2019 amendment, which went into effect in July 2021, SOPPA now imposes multiple requirements on Illinois schools:
- Written contracts with operators containing specific information;
- Post information on the school's website regarding contracts, operators, and types of information that the school collects and maintains;
- Provide written notification of any data breach;
- Implement reasonable security procedures and practices that meet or exceed industry standards;
- Request, in certain circumstances, that an operator delete covered information on behalf of a student's parent.

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## Key SOPPA Prohibitions

### A school district may not:

- Sell, rent, lease or trade covered information.
- Except in limited circumstances, transfer, disclose, or provide access to a student's covered information to an entity or individual, other than the student's parent, school personnel, appointed or elected school board members, or the State Board, without a written agreement.

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## Disclosing Student Records and Information



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## Disclosure of Student PII under FERPA and ISSRA

- FERPA and ISSRA generally prohibit school districts from disclosing personally identifiable information contained in a student's education records/school student records ("student PII") without the specific, dated, written consent of the student's parent/guardian (or, if the student is 18 years or older, the student).
- There are a number of exceptions to this general prohibition, however.

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## Disclosure of Directory Information

- "Directory Information" may be released to the general public, unless a parent requests that any or all the directory information not be released on his/her child.
- School districts must notify parents annually of the information that is considered to be "directory information" and of the procedures to be used by parents to request that specific information not be released.

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## Disclosure of Student PII to Contractors



- FERPA and ISSRA allow a school district to release student PII, without consent, to other school officials with a "legitimate educational interest" in such information.
- A contractor, consultant, volunteer or other party to whom the district has outsourced institutional services or functions may be considered a "school official" under FERPA and ISSRA, provided that the outside party:
  - Performs an institutional service or function for which the district would otherwise use employees;
  - Is under the direct control of the district with respect to the use and maintenance of student records; and
  - Is subject to FERPA and ISSRA's requirements governing the use and re-disclosure of student PII.

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## Disclosure of Records and Information under MHDDCA



- Among other exceptions, a therapist may use, disclose or re-disclose records or communications, without consent, to:
  - The therapist's supervisor, a consulting therapist, members of a staff team participating in the provision of services, a member of an interdisciplinary team, or a person acting under the supervision and control of the therapist.
  - An integrated health system.
  - A record custodian.
  - A business associate.

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## Contracting Requirements



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## Contracting Requirements

- FERPA and ISSRA's school official/contractor exception requires that the school district have a **written agreement** with the outside entity to which it will be disclosing student PII.

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## Contracting Requirements

SOPPA requires schools and operators to enter into a written agreement that addresses specific topics:

- List of "covered information" provided to operator;
- Description of service provided to the school;
- FERPA statement (acting as a school official);
- Operator will implement and maintain reasonable security practices;
- When operator will delete or transfer covered information;
- Acknowledgment that agreement will be published on the school's website; and
- Allocation of costs in the event of a data breach.

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## Protecting Student Records and Information



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## FERPA, ISSRA and Cyber Security

- The Federal government enacted FERPA in 1974. ISSRA followed shortly after in 1975. Neither has been significantly amended since.
- As a result, neither statute addresses major considerations relating to cybersecurity.
  - No specific security controls are required;
  - There are no specific provisions relating to a breach of educational data, even though breaches can lead to a violation of either statute; and
  - Both statutes fail to address retention and destruction requirements in a manner that addresses common data practices.
- Generally, educational institutions must adopt *reasonable methods* to protect against unauthorized disclosures.

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## FERPA, ISSRA, and Online Educational Services

- Despite FERPA and ISSRA's failure to address the information economy since first being enacted nearly half a century, online educational service providers have proliferated.
- The U.S. Department of Education has largely addressed issues relating to the privacy of student information through guidance.
- Some states, including Illinois, have attempted to address student privacy issues through targeted reforms, which often mimic or work in conjunction with consumer protection laws.

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## Data Breaches and Student Information



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## SOPPA Requirements

Under SOPPA, a school must notify parents of the following within 30 days of an operator's notification of a data breach:

- The date or estimated date of the breach;
- A description of the covered information that was compromised;
- Information that the parent may use to contact the operator and school;
- Toll-free numbers, addresses, and websites for consumer reporting agencies, and the Federal Trade Commission ("FTC"); and
- Statement that the parent may obtain information from the FTC and consumer reporting agencies about fraud alerts and security freezes.

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## PIPA

- The *Personal Information Protection Act* ("PIPA"), 815 ILCS 530/1 *et seq.*, requires "data collectors" to provide notice to affected individuals whenever a data breach occurs.

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## Data Collectors under PIPA

- A “data collector” under PIPA includes government agencies, public and private universities, privately and publicly held corporations, financial institutions, retail operators *and any other entity that, for any purpose, handles, collects, disseminates, or otherwise deals with nonpublic personal information.*

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## Personal Information under PIPA

- “Personal information” under PIPA includes an individual’s first name or first initial and last name together with:
  - Social Security number;
  - Driver’s license number or State identification card number;
  - Account numbers;
  - Medical information;
  - Health insurance information; and
  - Unique biometric data “generated from measurements or technical analysis of human body characteristics.”
- “Personal Information” also includes a username or email address in combination with a password or security question and answer that would permit access to an online account.
- Encrypted information is excluded from the definition of “personal information” until the “keys” to unencrypt the information are acquired without authorization.

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## Breach Response under PIPA

- Data collectors that *own or license* personal information must notify any Illinois resident of the breach of the security of the system data “in the most expedient time possible and without unreasonable delay.”
- Notification should be consistent with “any measures necessary” to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the breached data system.

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## Breach Response under PIPA

- Data collectors that *maintain or store* computerized data that includes personal information must *immediately* notify the owner or licensee of the information of any breach of the data system if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.
- Such data collectors must cooperate with the owner in responding to the breach.

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## Breach Response under PIPA

- The notice to affected individuals *must* include:
  - toll-free numbers and addresses for consumer reporting agencies;
  - the toll-free number, address, and website of the FTC; and
  - a statement that the individual can obtain fraud alerts and security freezes from those sources.
- For breaches involving only usernames and email addresses, the notice may be provided electronically and should direct the impacted individual to promptly change his or her username or password and take other appropriate steps to secure their account.

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## Notifications under PIPA

- Notices under PIPA can take one of three forms:
  - Written notice;
  - Electronic notice; or
  - Substitute notice.

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## Practical Scenarios



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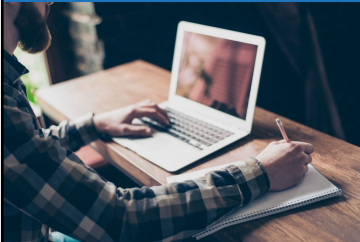
## Scenario #1

- You are the Technology Director at a large unit district. You receive an email from a teacher in the Business Studies Department. The teacher says he is interested in having a group of high school students create accounts on ConnectIn, a business-related social media website. The students will be creating personal profiles on the site and connecting with business owners in the community for purposes of identifying possible internship opportunities.
- The teacher says he would normally just have the students sign up for ConnectIn without asking for approval, but he remembered you saying something about a new law called "SOOPA" during staff orientation and he decided to run the idea by you before having the students sign up.
- How should you respond to the teacher?

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## Scenario #2



- The District maintains all students' special education records electronically on an electronic platform called StarIEP.
- StarIEP notified you, the District's records custodian, that it received a subpoena for all records and information maintained on its platform concerning two siblings who receive special education services. The responsive records include psychological assessments and counseling logs. StarIEP is asking you how to respond to the subpoena.
- What should you do?

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## Scenario #3

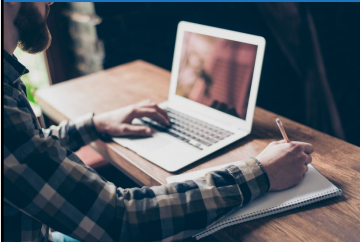
- The Athletic Director for your District decides to adopt a new "app"—ScoreBoard— that will streamline the District's communication about extracurricular activities. The app requires parents of District students to create a username and password to access information provided by the District about upcoming athletic events, stats and players. In case a parent forgets their username and password, they are asked to answer a security question, which the app stores in a database along with the parent's username and password.
- Are there any compliance concerns that you, as the Technology Director, need to raise?

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## Scenario #4



- The District's parents are huge fans of ScoreBoard, and nearly all the District's parents have created accounts. In addition, ScoreBoard added a new feature that allows parents to purchase apparel and other items to help support athletic events using credit card payments process by ScoreBoard.
- Just as the new feature is launched, the Athletic Director arrives in your office panicked. ScoreBoard just called to let him know that they suspect that their data system has been breached.
- What should you do?

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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)

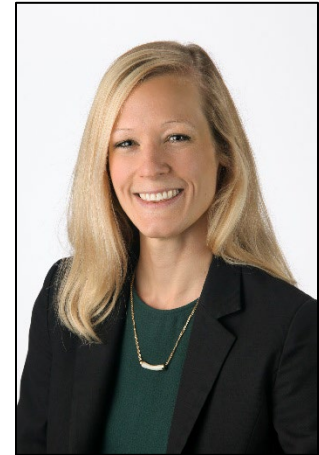
### RECENT PRESENTATIONS

*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)



### PRACTICE AREAS

Education Law  
Higher Education  
Special Education  
Student Discipline

### EDUCATION

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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Chicago Bar Association

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# Robbins Schwartz

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Matthew Gardner is a member of the firm's construction, real estate, and public finance practice groups. Matt represents private and public project owners over the course of construction and development projects, beginning with property acquisition, zoning, contract negotiation and bidding, project management, surety and warranty claims and any resulting litigation concerning payment, delays or design or construction defects. Matt also represents contractors, subcontractors and suppliers on a variety of construction-related matters, including payment claims, preserving and enforcing lien rights and defending defect claims.

Matt is the past Chair of the Chicago Bar Association Construction Law and Mechanics Lien Subcommittee (2018-19), has testified before the General Assembly on construction-related matters, and is a member of the Illinois State Bar Association and Chicago Bar Association Judicial Evaluation Committee. Matt has also performed pro bono services representing clients through Chicago Volunteer Legal Services and Franciscan Outreach.

### **AWARDS**

Illinois "Rising Star", by Super Lawyers Magazine, in the area of Construction Litigation (2020-2021)

### **RECENT PUBLICATIONS**

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Meditation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)

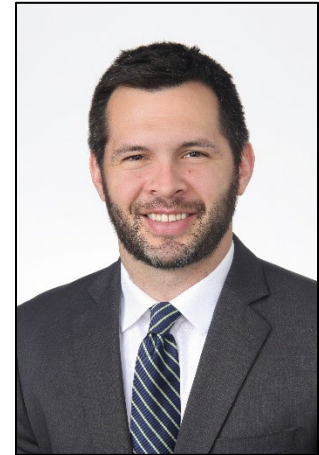
Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"The Good, The Bad and The Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"School District and Zoning Exemptions," *Chicago Daily Law Bulletin* (2015)

### **RECENT PRESENTATIONS**

*Construction Law 101*, National Business Institute (December 2019)



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Commercial Law  
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Public Finance & Taxation  
Real Estate Development

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Chicago Bar Association

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*Foolproof Contract that Abide by State Laws*, 2019 Illinois ASBO Annual Conference (May 2019)

*Construction Purchasing & Bidding Common Problems & Solutions*, Illinois ASBO (March 2019 *Construction Contracts: Boilerplate Language Landmines You May Not Know*, National Business Institute (February 2019)

*The Anatomy of a Mechanics Lien Claim*, Illinois State Bar Association (May 2018)

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Chris practices in the firm's commercial, construction, and real estate practice groups, representing public sector clients in commercial transactions, contracting, construction and related transactional matters. Chris has also served in the firm's labor and employment practice group and counseled employers in all aspects of labor and employment law, including labor relations, collective bargaining, grievance and dispute resolution, workplace investigation, employee discipline, terminations and reductions in force, and employment discrimination. Chris also advises clients on board governance and compliance with the Illinois Freedom of Information Act and Open Meetings Act.

Prior to joining Robbins Schwartz, Chris served as in-house counsel for a nonprofit organization, a charter school management organization and a state regulatory agency overseeing higher education financing.

### **RECENT PUBLICATIONS**

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations 2021 Edition*, IICLE (2021)

"Continuing Controversy Over FCC's Efforts to Improve Broadband Connectivity," *Energy, Utilities, Telecommunications and Transportation Newsletter*, Illinois State Bar Association (2021)

"The Future of For-Profit Online Charter Schools," *Labor and Employment Law Quarterly*, American Bar Association (2016)



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