

## Unpacking the Proposed Title IX Regulations: A Breakfast Briefing for Higher Education Institutions

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**Joseph J. Perkoski**  
[jperkoski@robbins-schwartz.com](mailto:jperkoski@robbins-schwartz.com)

**Emily P. Bothfeld**  
[ebothfeld@robbins-schwartz.com](mailto:ebothfeld@robbins-schwartz.com)

**Kevin P. Noll**  
[knoll@robbins-schwartz.com](mailto:knoll@robbins-schwartz.com)

**Chicago**  
55 West Monroe Street, Suite 800  
Chicago, IL 60603  
p 312.332.7760  
f 312.332.7768

**Champaign-Urbana**  
301 North Neil Street, 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 Road  
Suite 460  
Lisle, IL 60532-4311  
ph: 630.929.3639  
fax: 630.783.3231

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

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# Unpacking the Proposed Amendments to the Title IX Regulations: A Breakfast Briefing for Higher Education Institutions

Presented by: Joseph J. Perkoski, Emily P. Bothfeld and Kevin P. Noll

July 13, 2022

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## Background on Proposed Amendments



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## Background on Proposed Amendments

- Notice of Proposed Rulemaking (NPRM) released on June 23, 2022.
- U.S. Department of Education is seeking to amend the regulations implementing Title IX of the Education Amendments of 1972.

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## How Did We Get Here?

Obama-Era:  
Informal Guidance

Trump-Era:  
Regulations

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## Current Status



- Once published in Federal Register, proposed amendments will be open for public comment for 60 days.
- Options following comment period:
  - Termination of rulemaking process (unlikely)
  - Supplemental NPRM
  - Final Rule
- Effective date of possible changes: TBD

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## Impact on Colleges and Universities

- If finalized in current form, proposed amendments would require:
  - Revisions to policies and procedures
  - Staffing determinations
  - Additional training for employees and students

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## Key Proposed Changes



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## Defining Prohibited Sex Discrimination

Proposed § 106.10

- “Sex Discrimination” includes discrimination based on:
  1. Sex stereotypes
  2. Sex characteristics
  3. Pregnancy or related conditions
  4. Sexual orientation
  5. Gender identity

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## Defining Prohibited Sex-Based Harassment

Proposed § 106.2

- Current regulations prohibit **sexual harassment**, as defined therein.
- Proposed regulations prohibit **sex-based harassment**, which includes sexual harassment **and** harassment based on:
  1. Sex stereotypes
  2. Sex characteristics
  3. Pregnancy or related conditions
  4. Sexual orientation
  5. Gender identity



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## Types of Sex-Based Harassment

Proposed § 106.2

	Quid Pro Quo	Hostile Environment	Specific Acts
<b>Proposed</b>	When an employee <b>or other person</b> authorized by recipient to provide a service <b>explicitly or implicitly</b> conditions that service on a person's participation in unwelcome sexual conduct.	Unwelcome sex-based conduct that is sufficiently severe <b>or</b> pervasive that, based on the totality of the circumstances and evaluated <b>subjectively and objectively</b> , it denies <b>or limits</b> a persons' ability to <b>participate in or benefit from</b> the recipient's education program or activity.	Sexual Assault  Domestic Violence  Dating Violence  Stalking
<b>Current</b>	<ul style="list-style-type: none"> <li>• Employee respondents only</li> </ul>	<ul style="list-style-type: none"> <li>• Reasonable person</li> <li>• Severe <b>and</b> pervasive <b>and</b> objectively offensive</li> <li>• Denial of equal access</li> </ul>	Same

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## Defining Sex-Based Harassment

- What impact would these changes have on a Title IX Coordinator's initial evaluation of reports of alleged sex-based harassment?

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## Jurisdiction

Proposed § 106.11

- Conduct that occurs under an institution's **education program or activity** includes, but is not limited to:
  - 1) Conduct that occurs in **any building owned or controlled by an officially recognized student organization.**
  - 2) Conduct that is subject to the institution's **disciplinary authority.**
    - Compare with current standard: "substantial control"


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## Jurisdiction

Proposed § 106.11

- An institution has an obligation to address a sex-based **hostile environment in its education program or activity**, even where the sex-based harassment contributing to the hostile environment occurred outside the education program or activity or outside the U.S.



What is the impact of the alleged conduct?

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## Jurisdiction

Proposed § 106.11

- Compare with current regulations:
  - **Do not** require institutions to respond to alleged sexual harassment that occurs outside the education program or activity.



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## Jurisdiction

- Would this change result in a heightened burden on institutions to monitor off-campus conduct?

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## Responding to Sex Discrimination

Proposed §106.44(a)

- Current
  - Duty to respond to potential sexual harassment when an employee with authority to institute corrective measures has **actual knowledge** of the harassment.
  - Must respond in a manner that is **not deliberately indifferent**.
- Proposed
  - Duty to take **prompt and effective action** to **end** any prohibited sex discrimination that has occurred in the educational program, **prevent** its recurrence, and **remedy** its effects.

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## Responding to Sex Discrimination

- What steps would be required for an institution to demonstrate compliance with the “prompt and effective action” standard?

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## Employee Reporting Obligations

Proposed §§  
106.44(c)(2)(i)-(ii) &  
106.44(d)(2)

Employee Category	Obligation(s)
Employees with authority to institute corrective measures	Report to Title IX Coordinator
Employees with responsibility for administrative leadership, teaching, or advising	<u>Student</u> complainant: Report to TIXC  <u>Employee</u> complainant: Report to TIXC <b>or</b> provide TIXC contact information and information about how to report
All other employees <b>except</b> confidential employees	Report to TIXC <b>or</b> provide TIXC contact information and information about how to report
Confidential employees	Provide TIXC contact information and information about how to report

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## Employee Reporting Obligations

- Would the proposed Title IX regulations require an institution to hire a “confidential employee”?

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## Definition of Complaint

Proposed § 106.2

### Current

#### “Formal Complaint”

**Document** filed by a complainant or signed by the Title IX Coordinator alleging **sexual harassment** against a respondent and requesting that the institution investigate the allegation of sexual harassment.

### Proposed

#### “Complaint”

**Oral or written** request to the recipient to initiate the recipient’s grievance procedures for **sex discrimination** under Section 106.45 and, if applicable, Section 106.46.

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## Right to File Complaint

Proposed §§ 106.2 & 106.45(a)(2)

- Current:
  - Complainant must be “participating in or attempting to participate” in the education program or activity at the time the complainant files a formal complaint.
- Proposed:
  - Complainant is permitted to file a complaint about sex discrimination even if they have chosen to leave the education program or activity as a result of the discrimination or for other reasons.

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## Filing Complaints

- Under the proposed regulations, would a Title IX Coordinator still be permitted to file a complaint without consent from the complainant?

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## Title IX Coordinator Response Obligations

Proposed § 106.44(f)

### Title IX Coordinator must take the following steps upon being notified of possible sex discrimination:

(1) Treat complainant and respondent equitably.	(2) Notify complainant of institution's grievance procedures.
(3) If complaint is made, notify respondent of grievance procedures.	(4) Notify parties of informal resolution process, if any.
(5) Offer and coordinate supportive measures to complainant and respondent.	(6) In response to a complaint, initiate grievance procedures or informal resolution process.
(7) In absence of complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination.	(8) Take other prompt and effective steps to ensure that sex discrimination does not continue to recur, in addition to providing remedies.

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## Supportive Measures

Proposed § 106.44(g)

- Purpose: restore or preserve a person's access to the institution's education program.
- Examples: counseling, extension of deadlines, restrictions on contact between parties, voluntary **or involuntary** changes in class, work, housing, or extracurricular or other activities.

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## Supportive Measures

Proposed § 106.44(g)

- **May** include temporary measures that burden a respondent if:
  - 1) Imposed for non-punitive/non-disciplinary reasons; and
  - 2) Designed to protect safety of complainant or institution's educational environment or to deter respondent from engaging in sex-based harassment.
- Measures that burden a respondent may be imposed only during pendency of grievance procedures.
- Measures must be no more restrictive than **necessary to restore or preserve complainant's access** to education program or activity.

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## Supportive Measures

Proposed § 106.44(g)

- Involuntary measures that burden respondent are not permitted during informal resolution.
- Party may seek modification or reversal of supportive measures.

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## Supportive Measures

- Would the proposed regulations still permit an institution to place an employee on administrative leave during the pendency of the grievance procedures? Must the employee be paid during this administrative leave?

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## Grievance Procedures

Proposed §§ 106.45 & 106.46

- Current:
  - One grievance process
  - Required for any formal complaint of sexual harassment
- Proposed:
  - Two grievance procedures
  - Section 106.45: Required for any complaint of sex discrimination
  - Section 106.46: Required for any complaint of sex-based harassment involving higher education student party, in addition to procedures required under Section 106.45

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## Grievance Procedures for All Sex Discrimination Complaints

Proposed § 106.45

### Required Elements:

- Equitable treatment of parties
- No conflicts of interest or bias
- **Decision maker may be same person as Title IX Coordinator or investigator**
- Presumption that respondent is not responsible until a determination is made
- Reasonably prompt timeframes
- Reasonable steps to protect privacy of all parties
- Objective evaluation of evidence

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## Grievance Procedures for All Sex Discrimination Complaints

Proposed § 106.45

### Required Elements (continued):

- Notice of allegations
- **Dismissals permitted, but not required**
- Consolidation of complaints permitted
- Process that enables decision-maker to assess credibility of parties and witnesses when relevant
- Informal resolution process
- Possible supportive measures
- List of disciplinary sanctions and remedies

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## Grievance Procedures for All Sex Discrimination Complaints

Proposed § 106.45

### Required Elements (continued):

- Burden on institution to gather evidence
- Equal opportunity for all parties to present evidence
- Determination by decision-maker of what evidence is relevant and permissible
- Provide parties with **description** of relevant evidence and reasonable opportunity to respond
- **Preponderance of the evidence standard**
- Notice to parties of outcome and opportunities to appeal (\*but note: **appeal is optional**)
- Completion of process before imposition of sanctions
- Provision and implementation of remedies by TIXC
- **No discipline against anyone for making false statement or engaging in consensual sexual conduct based solely on determination of whether sex discrimination occurred**

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## Grievance Procedures for Sex-Based Harassment Complaints Involving Higher Education Student Party

Proposed § 106.46

### Required Elements:

- Written notice of allegations, dismissals, delays, meetings, interviews, and hearings.
- Opportunity to have advisor of party's choice at any meeting or proceeding.
- Equitable access to relevant and not otherwise impermissible evidence **or** to written report summarizing evidence.

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Grievance  
Procedures  
for Sex-Based  
Harassment  
Complaints  
Involving Higher  
Education  
Student Party

Proposed § 106.46

Required Elements (continued):

- Process to assess credibility of parties and witnesses, when necessary
  - Must either:
    - Allow decision-maker to ask relevant questions in meeting or at live hearing, and allow parties to propose relevant questions for decision-maker or investigator to ask during meeting or live hearing; OR
    - Allow advisor for each party to ask relevant questions to other parties and any witnesses during live hearing.
  - D-M must determine relevance and permissibility prior to question being posed and explain any decision to exclude a question.
  - Questions that are unclear or harassing are prohibited.
  - D-M cannot rely on statements that support party's position if party refuses to answer credibility questions.

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Grievance  
Procedures  
for Sex-Based  
Harassment  
Complaints  
Involving Higher  
Education  
Student Party

Proposed § 106.46

Required Elements (continued):

- Simultaneous written notice of determination
- Opportunity to appeal based on procedural irregularity, new evidence, or conflict of interest or bias, as well as any other bas(es) offered equally to parties.
- Privacy protections
  - Take reasonable steps to prevent and address parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through sex-based grievance procedures

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## Grievance Procedures

- What are the proposed regulations' grievance procedure requirements for employee-on-employee complaints of sex-based harassment?
- Would institutions still be prohibited from instituting "gag orders" under the proposed regulations?

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## Informal Resolution

Proposed § 106.44(k)

### Current

- Permitted only when formal complaint alleging Title IX sexual harassment has been filed.
- Participation must be voluntary.
- Not permitted in employee-on-student cases.

### Proposed

- Permitted whenever institution receives complaint of sex discrimination **or has information about** conduct that may constitute sex discrimination under Title IX.
- Participation must be voluntary.
- Not permitted in employee-on-student cases.

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## Informal Resolution

- Would the proposed regulations allow the Title IX Coordinator to serve as the informal resolution facilitator?

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## Retaliation

Proposed §§ 106.2 & 106.71

- Proposed regulations would **clarify** that Title IX protects individuals from retaliation, including peer retaliation (student-on-student).
- Retaliation = intimidation, threats, coercion, discrimination, or taking disciplinary action against anyone **because** the person has reported possible sex discrimination, made a sex discrimination complaint, or participated in any way in an institution's Title IX process.

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## Retaliation

- Would the proposed Title IX regulations prohibit employee-on-employee retaliation?

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## Pregnancy or Related Conditions

Proposed § 106.2 and 106.40

- Includes:
  - Pregnancy, childbirth, termination of pregnancy, or lactation
  - Medical conditions related to the above
  - Recovery from the above
- When student notifies college employee of student's pregnancy or related condition, employee must notify person that they may inform TIXC and must provide TIXC's contact information.

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## Pregnancy or Related Conditions

Proposed § 106.2 and 106.40

- After receiving notice of student's pregnancy or related condition, TIXC must:
  - Notify student of institution's obligations concerning pregnancy and related conditions
  - Provide voluntary reasonable modifications
  - Allow voluntary leave of absence for medical reasons and reinstatement upon return
  - Provide clean, private space for lactation
- Pregnant employees must be provided with (a) reasonable break time for lactation and (b) clean and private lactation space.

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## Pregnancy or Related Conditions

- What does "private space" for lactation mean?

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## Sexual Orientation, Gender Identity, and Sex Characteristics

Proposed §§ 106.10 & 106.31(a)(2)

- Prohibition on adopting policies/practices that **prevent student from participating** in institution's education program or activity **consistent with their gender identity**.

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## Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics

- What would this proposed regulation require with respect to bathroom and locker room access by transgender and non-binary students?
- What about sports participation?

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## Big Picture Summary



- Current Regulations:
  - Actual Knowledge
  - Deliberate Indifference
  - Narrower definitions and scope
  - Formal complaint to trigger action
- Proposed Regulations:
  - Prompt and effective action
  - End, prevent, remedy
  - Broader definitions and scope
  - Verbal complaints permitted

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Questions?



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  - August 9 from 9:00am – 10:30am
- Title IX Coordinator
  - August 15 from 9:00am – 10:30am

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# Robbins Schwartz

## JOSEPH J. PERKOSKI

MANAGING PARTNER, CHICAGO

312.332.7760

jperkoski@robbins-schwartz.com

As managing partner, Joseph Perkoski represents educational institutions and public sector employers with a focus on board and executive leadership. Joseph also represents his clients on a broad range of labor and employment issues including collective bargaining, grievance arbitration and contract interpretation. Joseph has defended employers in unfair labor practice charges before the Illinois Education Labor Relations Board, the Illinois State and Local Labor Relations Boards and the National Labor Relations Board. In addition, Joseph has litigated on behalf of management claims involving civil rights, discrimination, wrongful discharge, and harassment issues.

### AWARDS

Illinois Super Lawyers, 2008-2020

Illinois Leading Lawyer, Employment, Labor and School Law

### RECENT PUBLICATIONS

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations*, IICLE (2017)

Contribution author, "Labor Relations: Contract Administration Including Unfair Labor Practices," *Illinois School Law: Personnel and Student Issues*, IICLE (2010, 2012, and 2015)

"Finding a New Way: Subcontracting Revisited," *UPDATE Magazine*, Illinois ASBO (2011)

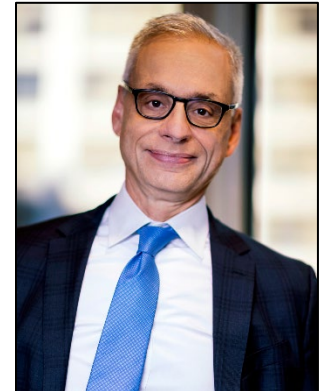
Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law – Transaction Practice*, IICLE (2010)

### RECENT PRESENTATIONS

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

*Court Cases and Other Legal Updates for the Higher Education Workplace*, Illinois CUPA-HR Spring Conference (May 2019)

*Legal Update*, ICCCF Spring Conference (April 2019)



### PRACTICE AREAS

Education Law  
Employee Benefits  
Labor & Employment  
Litigation  
Municipal Law  
Student Discipline

### EDUCATION

J.D., The Ohio State University, The Mortiz College of Law

M.A., The Ohio State University

B.A., *with honors*, The Ohio State University

### ADMITTED TO PRACTICE

U.S. Court of Appeals for the Seventh Circuit

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

U.S. District Court for the Eastern District of Wisconsin

U.S. District Court for the Western District of Wisconsin

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**ORGANIZATIONS**

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Trustee, Associated  
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and Employment Lawyers

Council of School  
Attorneys

Federal Bar Association

Illinois Association of  
School Business Officials

Illinois Bar Association

National School Boards  
Association

Wisconsin Bar Association

# Robbins Schwartz

## EMILY P. BOTHFELD

PARTNER, CHICAGO

312.332.7760

ebothfeld@robbins-schwartz.com

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

*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)

*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)



### 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

# Robbins Schwartz

## KEVIN P. NOLL

ASSOCIATE, CHICAGO

312.332.7760

knoll@robbins-schwartz.com

Kevin's practice focuses in the area of labor and employment law. Kevin counsels school districts, community colleges, libraries, and municipalities with issues involving employee discipline, internal investigations, employee leaves of absences, and alleged discrimination and harassment claims. Kevin also defends clients in litigation and administrative charges in federal and state court, the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, and the Illinois Department of Labor. In addition to his experience in labor and employment law, Kevin has trained school districts and community colleges pursuant to Title IX of the Education Amendments Act of 1972.

Prior to joining Robbins Schwartz, Kevin represented individuals with employment matters, civil rights claims, and consumer protection litigation.

### AWARDS

Illinois "Rising Star," by Super Lawyers Magazine

### RECENT PUBLICATIONS

"OSHA Pauses Vaccination and Testing ETS Following Legal Challenges," *Employment and Labor Law Flashpoints*, IICLE (2021)

Contributing author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (2021)

"NLRB Takes New Look at Charter Schools," *Chicago Daily Law Bulletin* (2019)

### RECENT PRESENTATIONS

*Updates from the DOL: New Developments for FMLA, FLSA, and IWPCA*, IAPD/IPRA Soaring to New Heights Conference (January 2020)

*Is it ADA, FMLA, or Other Leave? Navigating the Murky Waters of Employee Leave Benefits*, IAPD/IPRA Soaring to New Heights Conference (January 2020)

*Illinois Minimum Wage: Nutz and Bolts Overview*, IGFOA Payroll Seminar (October 2019)



### PRACTICE AREAS

Labor & Employment

### EDUCATION

J.D., The John Marshall Law School

B.A., Indiana University

### ADMITTED TO PRACTICE

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

Supreme Court of Illinois

### ORGANIZATIONS

Chicago Bar Association

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