

# Robbins Schwartz

## Investigating Student and Employee Matters For Hazel Crest School District 152.5

August 2, 2020

**Frank B. Garrett III**

[fgarrett@robbins-schwartz.com](mailto:fgarrett@robbins-schwartz.com)

**Michelle L. Weber**

[mweber@robbins-schwartz.com](mailto:mweber@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

The materials on this webpage are the property of Robbins Schwartz and may not be copied, adapted, shared, or displayed without the express written permission of Robbins Schwartz.

# Investigating Student and Employee Matters

Hazel Crest School District 152.5  
Presented by: Frank B. Garrett III and Michelle L. Weber  
August 2, 2022

Robbins Schwartz

1

## Agenda

1. Title IX Overview and Reporting Obligations
2. Student Discipline Investigations
3. Bullying Investigations – Best Practices
4. Employee Investigations and Evaluations

Robbins Schwartz

2

# Title IX: Overview of 2020 Regulations and Reporting Obligations

Robbins Schwartz

3

## Background on Title IX Regulations



- On May 6, 2020, the U.S. Department of Education released new Title IX regulations establishing how education programs that receive federal funding must respond to sexual harassment under Title IX.
- Among other changes, the new regulations prescribe a narrower definition of sexual harassment than in previous Title IX guidance, and they require school districts to follow detailed procedures when adjudicating formal Title IX sexual harassment complaints.
- The regulations went into effect on August 14, 2020.

Robbins Schwartz

4

## Recent Guidance & Current Status

- Since taking office, President Biden and his Administration have issued key guidance documents interpreting the 2020 regulations and taken action/steps to amend certain aspects of the regulations in the coming months.
  - March 2021 Executive Order
  - April 2021 Letter to Stakeholders
  - June 2021 Title IX Public Hearing
  - July 2021 Question & Answer Document
  - February 2022 Draft Amendments to Office of Information and Regulatory Affairs (OIRA)
  - Notice of Proposed Rule-Making June 23, 2022, seeking to amend the 2020 regulations

Robbins Schwartz

5

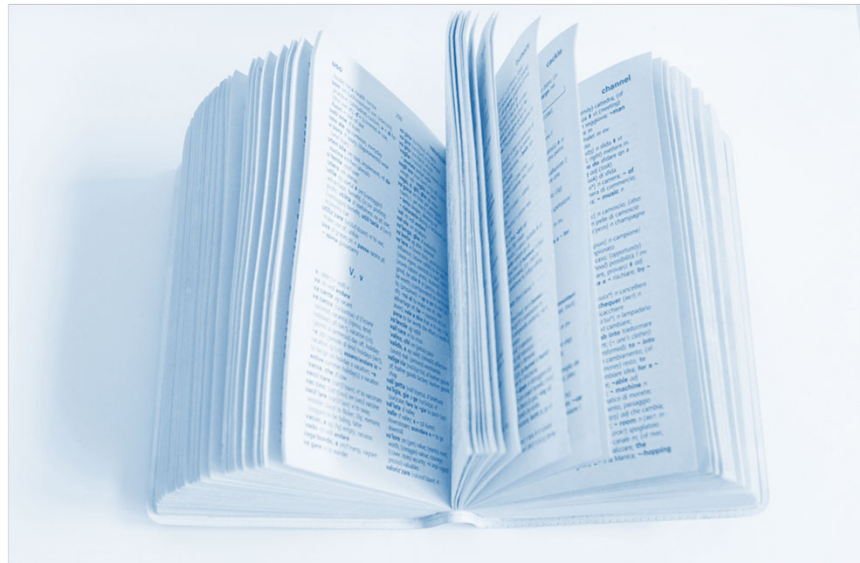
## Impact on School Districts

- The 2020 Regulations require:
  - Revisions to policies and procedures
  - Staffing determinations
  - Training for all personnel involved in a school district's investigation and grievance process, including:
    - Title IX Coordinator(s)
    - Investigators
    - Decision-makers
    - Appellate decision-makers
    - Informal resolution facilitators
  - Publishing of information and training materials on the district's website

Robbins Schwartz

6

## Key Definitions



Robbins Schwartz

7

## Title IX Sexual Harassment

### Sexual harassment includes:

1. **Quid pro quo** harassment by a District 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**

Robbins Schwartz

8

## Title IX Sexual Harassment: Quid Pro Quo

- When an employee of the District conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.
  - Example: Mr. Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct after class.



Robbins Schwartz

9

## Title IX Sexual Harassment: "Hostile Environment"

- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
  - Severe and pervasive and offensive
  - Denial of equal educational access

Robbins Schwartz

10

## Title IX Sexual Harassment: "Hostile Environment"



- Compare with Title VII definition for workplace hostile environment claims:
  - Unwelcome sexual advances and other conduct of a sexual nature having the purpose or effect of **interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.**

Robbins Schwartz

11

## Title IX Sexual Harassment: "Hostile Environment"

- Compare with IHRA definition:
  - Any conduct of a sexual nature exhibited by an education representative toward a student, when such conduct has the purpose of **substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment.**

Robbins Schwartz

12

## Title IX Sexual Harassment: Other Categories

- Title IX's definition of sexual harassment also includes:
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking



*As defined under the Clery Act/Violence Against Women Act*

Robbins Schwartz

13

## Sexual Assault, Dating Violence, & Stalking

### **Sexual Assault:**

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program.

### **Dating Violence**

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

### **Stalking**

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

Robbins Schwartz

14



## Domestic Violence



- A felony or misdemeanor crime of violence committed:
  - By a current or former spouse or intimate partner of the victim;
  - By a person with whom the victim shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
  - By any other person against an adult or youth victim who is protected.

Robbins Schwartz

15

## Key Definitions: Hypothetical

- You have been assigned to investigate a formal complaint alleging that a student was sexually harassed by his guidance counselor.
  - What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive and objectively offensive?
  - What types of evidence/information would be relevant to determining whether the alleged harassment resulted in a denial of equal educational access?

Robbins Schwartz

16

## Jurisdiction



Robbins Schwartz

17

## Jurisdiction Under Title IX

- The Title IX regulations apply only to alleged sexual harassment that occurs “in the district’s education program or activity, against a person in the United States.”

Robbins Schwartz

18

**Title IX  
Jurisdiction:  
Scope of  
District's  
Education  
Program or  
Activity**

- Includes locations, events, or circumstances over which the school district exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.



Robbins Schwartz

19

**Title IX  
Jurisdiction:  
Scope of  
District's  
Education  
Program or  
Activity**

- Hazel Crest SD examples for discussion:
  - Hotel during overnight athletic competition?
  - Local business where students are participating in District fundraising activities?
  - Off-campus District-sponsored field trip?

Robbins Schwartz

20

## Jurisdiction: “... in the United States”

- To fall under Title IX, the alleged misconduct must have occurred in the United States.
- Example: Sexual assault that occurs during high school study abroad program?

Robbins Schwartz

21

## Jurisdiction Analysis

- If the alleged misconduct did not occur in the District’s education program or activity and/or did not occur in the United States, look to other applicable laws (i.e. Title VII, IHRA) and other district policies, such as:
  - 2:260, *Uniform Grievance Procedure*
  - 5:10, *Equal Employment Opportunity*
  - 5:90, *Abused and Neglected Child Reporting*
  - 5:120, *Ethics and Conduct*
  - 7:20, *Harassment of Students Prohibited*
  - 7:180, *Prevention of and Response to Bullying, Intimidation and Harassment*
  - 7:185, *Teen Dating Violence Prohibited*
  - 7:190, *Student Behavior*



Robbins Schwartz

22

## Jurisdiction: Hypothetical

- Compare:
  - A student athlete allegedly sexually harasses another student while off-campus on a school field trip.
  - A student athlete allegedly sexually harasses another student while at a teacher's home (the two students are friends with the teacher's child, who is also a student at the high school)
- Which type of alleged misconduct falls under Title IX?
- What are the District's response obligations with regard to each type of alleged misconduct?

Robbins Schwartz

23

## Reporting Alleged Sexual Harassment



Robbins Schwartz

24

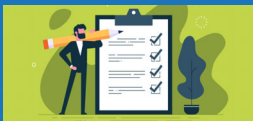
## Reporting: The Who

- Who can report?
  - Anyone – including students, employees and third parties
  - Need not be the person who is alleged to be the victim of the misconduct
- To whom should reports be made?
  - Title IX Coordinator
  - District administrator (Principal, AP, Dean of Students)
  - Any employee with whom the person is comfortable speaking

Robbins Schwartz

25

## Reporting: Employee Obligations



- Under Policy 2:265:
  - All District employees must report allegations of sexual harassment, including anonymous reports.
  - School employees must respond to incidents of sexual harassment by promptly making or forwarding a report to the Title IX Coordinator.
  - An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.

Robbins Schwartz

26

## Reporting: Confidentiality of Reports

- Under Policy 2:265, reports of alleged sexual harassment will be confidential to the greatest extent practicable, subject to the District's duty to investigate and maintain an educational program or activity that is productive, respectful, and free of sexual harassment.

Robbins Schwartz

27

## Abused and Neglected Child Reporting Act

- Provides for the reporting and investigation of child abuse and neglect.
- Education personnel are required to immediately report when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.
- All reports of suspected child abuse or neglect made under this Act must be made immediately.

Robbins Schwartz

28

## Response to Reports Alleging Sexual Harassment



Robbins Schwartz

29

## “Actual Knowledge” Under Title IX

- Notice of sexual harassment or allegations of sexual harassment to any District employee or to the District’s Title IX Coordinator

Robbins Schwartz

30



## “Deliberate Indifference” Under Title IX



- Once the District has actual knowledge of alleged sexual harassment, the District must respond to the allegations:
  - Promptly
  - In a manner that is not “clearly unreasonable in light of the known circumstances”

Robbins Schwartz

31

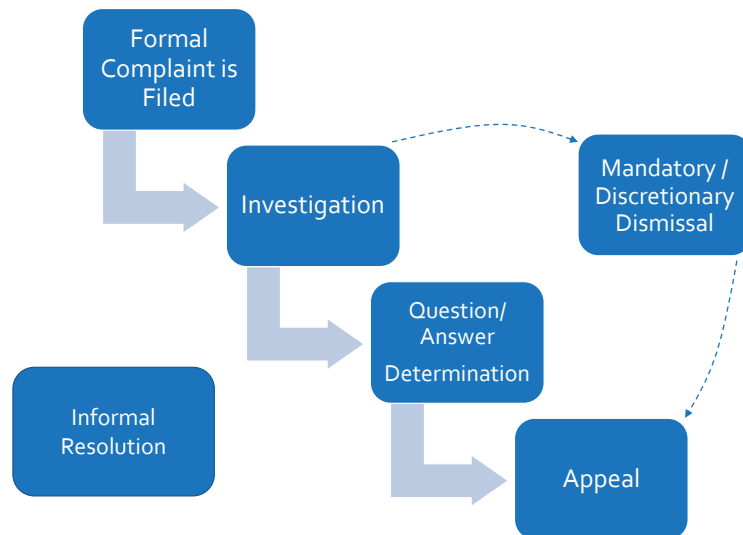
## Overview of District Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment, promptly contact the Complainant to:
  - a. discuss and offer supportive measures,
  - b. consider the Complainant’s wishes with respect to supportive measures,
  - c. explain that supportive measures are available with or without filing a formal complaint, and
  - d. explain the process for filing a formal complaint.

Robbins Schwartz

32

## Overview of Grievance Process



Robbins Schwartz

33

## Hypothetical

- Susan, an 8<sup>th</sup> grader at your school, reports to her Math teacher, Mrs. Jones, that for the past few months, two boys in her PE class (Robert and James) have been giving her dirty, inappropriate looks and making sexual gestures at her. She has tried to ignore them but it has continued and it is making her very uncomfortable. Recently, the behavior has started to escalate and James attempted to touch her breasts when no one was looking. Susan asks Mrs. Jones not to tell anyone. What should Mrs. Jones do?
- Mrs. Jones ends up telling you about Susan. What is your response?

Robbins Schwartz

34

Questions?



Robbins Schwartz

35

## Investigating Student Disciplinary Matters in Compliance with SB100



Robbins Schwartz

36

## Goals of SB 100

- Reduce or eliminate exclusionary disciplinary consequences; i.e. out-of-school suspensions, transfers to alternative schools and expulsions.
- Eliminate zero tolerance policies related to discipline other than those related to possession of a firearm or weapon.
- Eliminate standard/stock disciplinary consequences for offenses; i.e. impose an automatic five day suspension for a fight.
- Require consideration of the student's individual circumstances before imposing a behavioral or disciplinary consequence.

Robbins Schwartz

37

## Goals of SB100



- Consider restorative justice, behavioral interventions and other alternatives to standard consequences.
- Impose an exclusionary consequence only when a student's continued presence in school will cause a significant safety concern or the likelihood of disruption to the school environment.
- Provide supportive services to a student serving a suspension of more than four days to help the student remain connected to school and the school community.
- Implement supports to help the student successfully return to the school setting.

Robbins Schwartz

38

## SB100 Prohibitions

- School officials may not advise or encourage students to drop out voluntarily due to behavioral or academic difficulties.
- A student may not be issued a monetary fine or fee as a disciplinary consequence, though this shall not preclude requiring a student to provide restitution for lost, stolen, or damaged property.
- School boards may not institute “zero tolerance” discipline policies which require administrators to suspend or expel students for particular behaviors unless specifically required by federal or state law.

Robbins Schwartz

39

## Due Process

- The Fifth Amendment to the U.S. Constitution states that no person will be “deprived of life, liberty or property without due process of law.”
- The Fourteenth Amendment is called the “Due Process Clause” and it contains the same words as the Fifth Amendment to the same effect.

Robbins Schwartz

40

## General Principles for Investigating Student Discipline



- Any student accused of misconduct must have an opportunity to share their side of the story.
- Keep detailed notes of any investigative interviews with students.
- Provide student and witnesses an opportunity to submit a written statement.

Robbins Schwartz

41

## SB100 Suspensions of 3 days or Less

- Would the student's continuing presence pose:
  - a. A threat to school safety; OR
  - b. A disruption to other students' learning opportunities?
- If yes, then the Administration can suspend for up to 3 days.

Robbins Schwartz

42

## SB100 Suspension of 4-10 days



1. Would the student's continuing presence pose:
  - a. Pose a threat to the safety of other students, staff members or the school community
  - b. Substantially disrupt, impede or interfere with the operation of the school?
2. Have other appropriate behavioral and disciplinary interventions been exhausted?
3. If yes, then the Administration can suspend for 4 days or more.
4. But note – Support services must be provided for suspensions of 5 days or more!

Robbins Schwartz

43

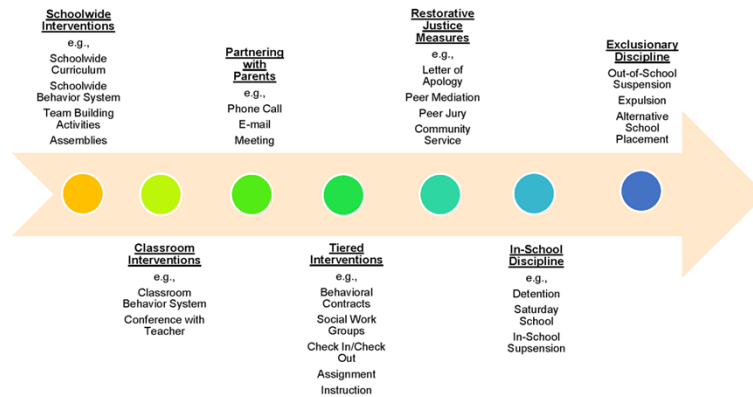
## SB 100 Expulsions

1. Would the student's continuing presence:
  - a. Pose a threat to the safety of other students, staff members or the school community?
  - b. Substantially disrupt, impede or interfere with the operation of the school?
2. Have other appropriate behavioral and disciplinary interventions been exhausted?
3. Is expulsion in the best interest of the school?
4. Note - A school district may refer students who are expelled to appropriate and available support services.

Robbins Schwartz

44

## Behavioral and Disciplinary Interventions



Note: While the above diagram is visually depicted as a spectrum, districts should remember that multiple interventions and consequences can be utilized simultaneously in order to promote pro-social behavior.

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.  
© 2016 Robbins Schwartz

Robbins Schwartz

45

## Missed Assignments

- Suspended student must have the opportunity to make up work for equivalent academic credit.
- If suspended from the school bus and does not have alternate transportation to school, student must have opportunity to make up work for equivalent academic credit.
  - Parent obligation to notify school that student suspended from the bus does not have alternate transportation.

Robbins Schwartz

46



## Disciplinary Notices

- Notice of Out-of-School Suspension (1-3 days v. 4-10 days)
- Notice of Expulsion Hearing
- Notice of Suspension Review Hearing (if applicable)



Robbins Schwartz

47

## Police Interviews on School Grounds

- Before a law enforcement officer, school resource officer, or other school security person detains and questions a student under 18 years of age suspected of committing a criminal act, Administration must:
  1. Notify (or attempt to notify) the student's parent/guardian and document the time and manner in writing;
  2. Make reasonable efforts to ensure parent/guardian is present during questioning or, if not present, ensure that school employees are present during the questioning; and
    - Employee could be a school social worker, psychologist, nurse, counselor, or any other mental health professional.
  3. If practicable, make reasonable efforts to ensure a "trained law enforcement officer to promote safe interactions and communications with the student" is present during questioning.

Robbins Schwartz

48

## Hypothetical

- Mrs. Smith (PE Teacher) reports to you that she smelled cigarette smoke near the girls locker room. When she went into the locker room to check, she saw three 8<sup>th</sup> grade girls standing by the window. None of the girls had cigarettes in their hands but Mrs. Smith is adamant that she could smell smoke on them. She says the girls are vehemently denying that they were smoking. She also believes one of the girls is distributing cigarettes to other students in the building.
- What are your next steps?

Robbins Schwartz

49

## Questions?



Robbins Schwartz

50

# Best Practices for Investigating Student Bullying



Robbins Schwartz

51

## Key Considerations

- Identifying bullying
- Reporting bullying
- Investigating bullying
- Responding to bullying
- Special considerations for students with disabilities
- Board Policy 7:180; *Prevention of and Response to Bullying, Intimidation and Harassment*



Robbins Schwartz

52

## Identifying Bullying

Bullying, including *cyber-bullying*, is defined as any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or reasonably can be predicted to have the effect of one or more of the following:

1. Placing the student(s) in reasonable fear of harm to his/her person or property;
2. Causing a substantially detrimental effect on the student's or students' physical or mental health;
3. Substantially interfering with the student's or students' academic performance; or
4. Substantially interfering with the student's or students' ability to participate in or benefit from the services, activities or privileges provided by the District.

Robbins Schwartz

53

## Identifying Bullying

- Bullying includes conduct such as: harassment, threats, intimidation, stalking, physical violence, sexual harassment, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying.
- This list is illustrative and not exhaustive.
- Bullying frequently involves an actual or perceived imbalance of power.



Robbins Schwartz

54

## Cyberbullying

- Cyberbullying is defined as bullying through the use of technology or any electronic communication,
  - including without limitation any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio electromagnetic system, photo-electronic system, or photo-optical system;
  - including without limitation electronic mail, Internet communications, instant messages or facsimile communications.

Robbins Schwartz

55

## Jurisdiction Under Board Policy 7:180

No student shall be subjected to bullying:

- During any school-sponsored education program or activity;
- While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
- Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
- Through the transmission of information from a computer that is accessed at a non-school related location, activity, function or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school.
  - *This item applies only in cases in which a school administrator or teacher receives a report that bullying through this means has occurred and does not require a district to monitor any non-school-related activity, function or program.*

Robbins Schwartz

56

## Jurisdiction under Board Policy 7:180

- Is it a report of cyber-bullying?
  - If so, first determine whether it is within the scope of the school's jurisdiction.
  - If the cyber-bullying caused a substantial disruption to the education process or orderly operation of a school or there is a nexus to the school, then its within the scope of the District's jurisdiction to investigate.



Robbins Schwartz

57

## Hypothetical

- You receive a report that Jamie (6<sup>th</sup> grade male student) has been posting inappropriate videos and pictures about Tom (other 6<sup>th</sup> grade male student) on social media. According to Tom, the pictures are intended to tease Tom about his weight. Tom also claims that other students have seen the pictures and have also been posting comments. Tom's parents have accused Jamie and other students of bullying Tom.
- Does the school have jurisdiction to investigate this matter?
- If so, what information might be relevant to determining whether Tom is being bullied?

Robbins Schwartz

58

## Reporting Bullying

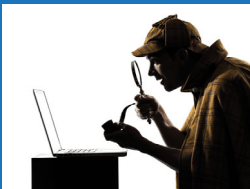
### Who can report bullying?

- Anyone, including staff members and parents/guardians, who has information about actual or threatened bullying is encouraged to report it to the District Complaint Manager or any staff member.
- Anonymous reports are also acceptable.
- Students are encouraged to immediately report bullying.
- A report may be made orally or in writing to the District's Complaint Manager or any staff member with whom the student is comfortable speaking.
- A student will not be punished for reporting or supplying information.

Robbins Schwartz

59

## Investigating Bullying



- Investigations of bullying shall be consistent with District procedures for investigating student misconduct generally, pursuant to Board policy (but be careful!)
- When a bullying allegation suggests a potential discriminatory basis for the bullying, the District Coordinator for Nondiscrimination shall be notified and may participate or lead the investigation.
- Reasonable efforts will be made to complete the investigation within 10 school days after the date the report of bullying was received.

Robbins Schwartz

60

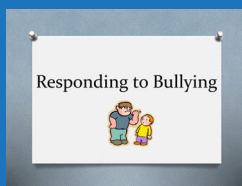
## Investigating Bullying – Tips

- Document your process – including notes and communications!
- Involve appropriate school support personnel with knowledge, experience and training on bullying prevention, as deemed appropriate in the investigation process.
- A bullying investigation should include, at a minimum:
  - ✓ Interviews with involved students
  - ✓ Interviews with staff members who have knowledge of the allegations
  - ✓ Review of student(s) academic record (including attendance, grades, discipline etc.)
  - ✓ Review of student(s) social history
  - ✓ Review of student(s) health history

Robbins Schwartz

61

## Responding to Bullying



- Interventions should be considered for both the alleged victim and the alleged perpetrator.
- Interventions can be put in place both during the pendency of an investigation and/or as a result of the investigation.
- Possible Interventions:
  - Social work or counseling services, restorative justice, safety plan, social-emotional lessons, staff training.

Robbins Schwartz

62



## Responding to Bullying - Discipline

- When disciplining students for bullying, ensure all students are provided with due process.
- When bullying occurs, investigate and document what happened as promptly as possible.
- When disciplining students for bullying, consider alternatives or supplements to traditional discipline (e.g. social probation, restorative measures).

Robbins Schwartz

63

## Parent/Guardian Involvement

Parents/guardians of all students involved in alleged incident of bullying:

- Shall promptly be informed of the allegations and, as appropriate, the availability of social work services, counseling, school psychological services, other interventions and restorative measures.
- Be careful of other students' privacy rights!

Robbins Schwartz

64

## Parent/Guardian Involvement



Parents/guardians of students who are parties to the investigation shall:

- Be provided with information regarding the investigation – be careful of student privacy rights!
- Have an opportunity to meet with the assigned investigator to discuss the investigation, findings and steps taken to address the incident.
- Be provided with information regarding the availability of social work services, counseling, school psychological services, other interventions and restorative measures, as appropriate.

Robbins Schwartz

65

## Parent/Guardian Involvement

- **TIP:** Provide parents/guardians with a brief letter detailing the findings of the investigation.
- Make sure you keep a copy of the letter in the student's file.

Robbins Schwartz

66

## School District Liability

Actions may be brought alleging violations of the following Federal anti-discrimination laws:

- 1) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- 2) Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin; and
- 3) Section 504 of the *Rehabilitation Act of 1964* and Title II of the *Americans with Disabilities Act* ("ADA"), which prohibits discrimination on the basis of disability.

Robbins Schwartz

67

## School District Liability



- TIP: To avoid violation of anti-discrimination laws, seek to ensure that schools are not creating a "hostile environment."
- Harassment creates a hostile environment when the conduct is so **severe, pervasive or persistent** as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by a school.
- "Deliberate indifference" standard applied.

Robbins Schwartz

68

## Disability- Based Discrimination

- Section 504 and Title II require a school with notice of possible disability-based harassment to take prompt effective steps to determine what occurred and to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from recurring.
- Whether the district violated Section 504 will frequently turn on whether it investigated the alleged harassment in a timely manner and took appropriate steps to prevent it from recurring.

Robbins Schwartz

69

## Students with Disabilities

- Schools have an obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE
  - Obligation exists regardless of why the student is being bullied.
- Look out for: a sudden decline in grades, onset of emotional outbursts, increase in the frequency of behavioral disruptions or a rise in missed classes as evidence of academic or behavioral changes

Robbins Schwartz

70

## Students with Disabilities

- If it is determined that a student with a disability was involved in an incident of bullying, convene the IEP team or the Section 504 team to determine whether, and to what extent:
  - The student's educational needs have changed;
  - The bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and
  - Additional or different services, if any are needed, and to ensure any needed changes are made promptly

Robbins Schwartz

71

## Students with Disabilities

- OSERS cautions that, if the IEP team is considering a change in placement due to bullying, it do so carefully, bearing in mind IDEA's least restrictive environment ("LRE") mandate and ensuring parental participation.

Robbins Schwartz

72

## Hypothetical



- After class one day, Robert tells you that another student, James, has been threatening to beat him up. According to Robert, James has left threatening notes in Robert's locker. Robert is afraid to walk home from school by himself and has been walking out of class and leaving school early to avoid running into James on his walk home. Robert asks you not to say anything for fear that James will retaliate and hurt him even worse.
  - How would you handle this situation? What are your next steps?
  - What if Robert is a student with a disability? Would this change your course of action?
  - What if James is a student with a disability? Would this change your course of action?

Robbins Schwartz

73

## Quick Recap

- ✓ Respond promptly
- ✓ Investigate thoroughly
- ✓ Communicate with parents of involved students in a timely fashion
- ✓ Consider interventions for both the alleged victim and alleged perpetrator
- ✓ Make a written record
- ✓ Impose reasonable consequences
- ✓ Prohibition on retaliation
- ✓ Consider IEP/504 meetings for students with disabilities
- ✓ Check in with involved students periodically

Robbins Schwartz

74

Questions?



Robbins Schwartz

75

## EMPLOYEE INVESTIGATIONS AND EVALUATIONS: BEST PRACTICES

Robbins Schwartz

76

## Why Conduct an Investigation into Alleged Misconduct?

- Establish the facts.
- Satisfy any discipline standard (e.g., "just cause").
- Due process requirements.
- Minimize District liability.



Robbins Schwartz

77

## Why Issue Post – Investigation Discipline?

- Conformance with work rules, directives, and general standards.
- Limits District liability.
- Encourages employee behavior consistent with District expectations.



Robbins Schwartz

78



## Consequences of Failing to Conduct *Effective* Investigations

- Inadequate Supervision claim.
- Negligent Retention claim.
- Employer liability concerns.



Robbins Schwartz

79

## Basic Guidelines



### Investigatory Principles

- Watch for **retaliation**.
- **Timing** considerations.
- Follow any policy and CBA steps.

Robbins Schwartz

80

## District Checklist

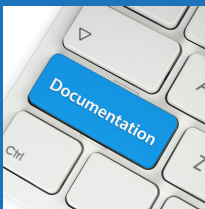
### Pre-Investigation Checks

- Who are the investigators?
  - Examine your policies and procedures.
- Who not to use?
- Think about safety and preventing immediate harm.
- Review relevant records.
  - **Tip:** create a confidential administrative file.
- Contact HR and/or Legal Counsel
- Notice to the accused.

Robbins Schwartz

81

## District Checklist



### The Investigation

- Review the initial documentation.
  - Written complaint and/or written statement from complainant.
  - Computer and/or electronic network files.
- External electronic information.
- If applicable, any evidence provided by the complainant.
- Keep the matter **CONFIDENTIAL** and do not discuss with those not involved.

Robbins Schwartz

82

## District Checklist

### The Investigation

- Interviews
  - Order?
- Tips
  - Who, what, when, where, and why?
  - Ask follow-up questions.
  - Never promise confidentiality.
  - **Reminder:** retaliation is prohibited.



Robbins Schwartz

83

## District Checklist

### The Investigation

- Complainant's interview
  - Confirm the allegations.
  - No conclusory statements.
  - Written statement.
  - Pay attention to demeanor.
  - Identify potential witnesses to the incident(s).

Robbins Schwartz

84

## District Checklist



### The Investigation

- Witness Interviews
  - Goal is to find out what, if anything, the witnesses saw or heard.
  - Get specifics.
  - Written statement.
  - Remind of confidentiality/retaliation.

Robbins Schwartz

85

## District Checklist

### The Investigation: Interviewing the Accused

- Right to union representation.
- Role of union rep during meeting?
- Check the relevant CBA and policy language.
- Advise that no decision has been made yet regarding the allegations and/or investigatory outcome.
  - The interview is designed to provide due process and gather facts.

Robbins Schwartz

86

## District Checklist

### The Investigation: Interviewing the Accused

- Review the factual allegations of misconduct.
  - Allow employee to respond to each specific allegation/incident.
- Do not make a statement regarding recommended disciplinary action or findings at this interview.
- Advise of retaliation prohibition.

Robbins Schwartz

87

## District Checklist

### The Investigation

- Complete any follow-up interviews.
- Document your investigation.
- Resolve any credibility issues.



Robbins Schwartz

88



## Common Issues In an Investigation

### The Confidentiality Condition

- "I'll participate, as long as my identity remains confidential."
- The District cannot guarantee confidentiality or anonymity.



Robbins Schwartz

91

## Common Issues In an Investigation

### Access to Interview Notes

- Generally, not obligated to provide copies of interview notes to witnesses and unions.

### The Uncooperative Accused Wrongdoer

- Advise employee that administration will conclude its investigation and make its findings without considering information from employee.
- Failure to comply with directives to attend interviews and/or answer questions may be insubordination and subject employee to discipline.

Robbins Schwartz

92

## Issuing Employee Discipline



### Determine Employment Status

- Contractual employees.
  - Teachers CBA
  - Support Staff CBA
- "At-Will" employees.
  - Board Policy 5.270
- Probationary employees.

Robbins Schwartz

93

## Issuing Employee Discipline

### Progressive Discipline

- Verbal warning;
- Written reprimand;
- Suspension without pay;
- Discharge.
- Exceptions?
- Advantages?



Robbins Schwartz

94



## Suspensions Without Pay

- Support Staff CBA, Article XV, 15.4
  - Employees shall not be suspended without pay for longer than 10 workdays or dismissed without just cause unless on probationary status.

Robbins Schwartz

95

## Discipline Standards

- Custodial Employees, Article 7.
  - May be suspended without pay for disciplinary reasons for a period not to exceed 30 working days.

Robbins Schwartz

96

## Issuing Employee Discipline

- Pre-Dismissal Warning
  - “Continued misconduct may result in additional disciplinary action, up to and including termination of employment.”
  - Risks of not doing so?
- Be consistent with discipline.
- Review the employee’s file, Board policies and CBA before issuing discipline.
- Document the discipline.



Robbins Schwartz

97

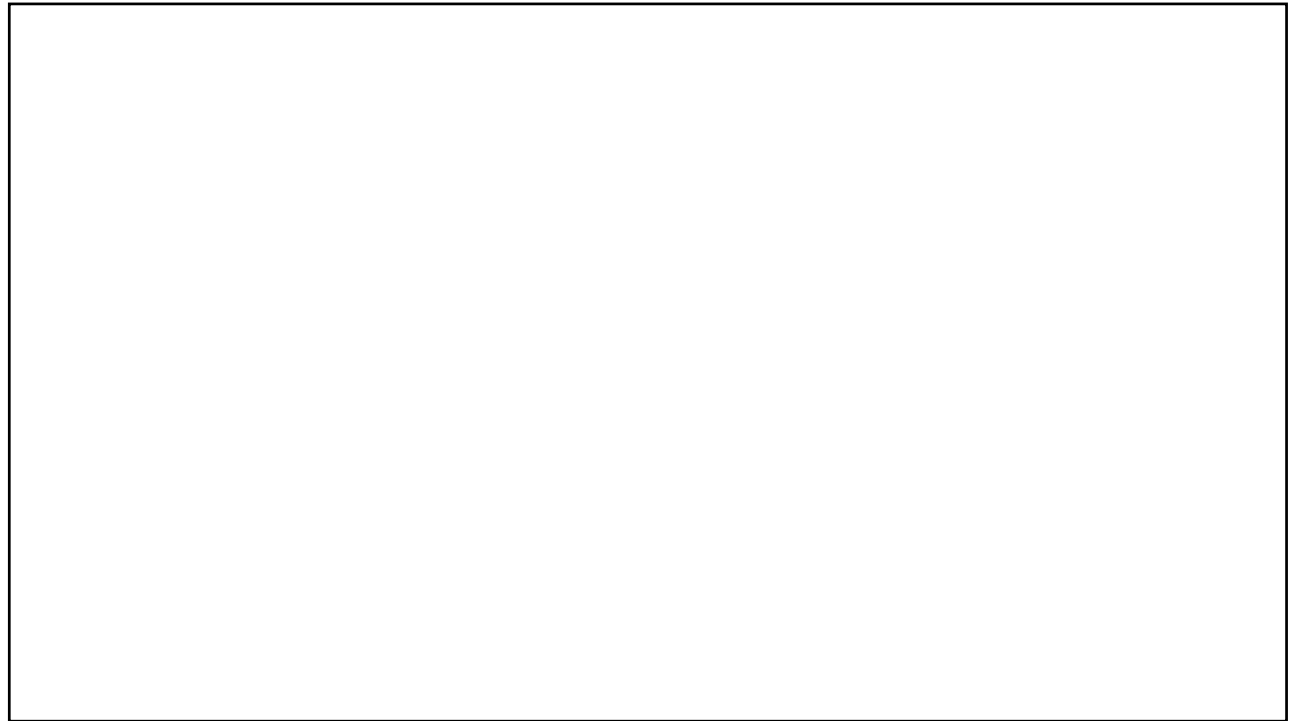
## Issuing Employee Discipline

### Teachers Contract, Article VII

- Teachers must be notified of anything to be added to their personnel file in writing asap.
- Teachers are expected to acknowledge receipt of the discipline in writing.


Robbins Schwartz

98



99

Tips for  
Employee  
Evaluations and  
Performance  
Management



Robbins Schwartz

100

## Importance of Evaluations

- 105 ILCS 5/24A-5: non-tenured teachers must be evaluated at least once every school year.
- Teachers CBA, Article VI and XV.
- Contract non-renewal = adverse employment action.
  - 105 ILCS 5/24-11(f): specific reasons for dismissal only need to be provided to the teacher in their final year of probationary service.
  - However, the District should have legitimate, non-discriminatory reasons to support any non-renewal decision in order to defend the District against claims of discrimination, harassment, or retaliation.

Robbins Schwartz

101

## Documenting Employee Performance

- Communicate the expectations regularly and clearly.
- Document performance proportionately, consistently, credibly, and clearly.



Robbins Schwartz

102

## Documenting Employee Performance

- Advantages of thoroughly documenting employee performance concerns:
  - Improves compliance with the expectations.
  - Provides fair notice to employees of any deficiencies.
  - Minimizes employee complaints and grievances.

Robbins Schwartz

103

## Documenting Employee Performance

- Potential consequences of inadequate evaluatory documentation:
  - Adversely impacts the District's ability to issue corrective action and/or discipline.
  - Adversely impacts the District's defense to complaints and grievances.
  - Hinders the employee's ability to improve performance.

Robbins Schwartz

104

## Performance Evaluations



Review all deficiencies in performance evaluations to ensure all issues are properly documented.



Follow all procedures in the Evaluation Plan and CBAs.



Be honest in your assessment.

Robbins Schwartz

105

## Constructive Comments



- Identify the facts.
- Label the behavior, not the person.
- Provide specific examples to support statements.
- Attach copies of documents that support comments.

Robbins Schwartz

106

## Ineffective Comments

### **“Bonnie is not a team player.”**

- This statement is of little value to the employer in future litigation unless specific facts are provided to support this statement.
- Remember, litigation can take years to resolve. Crucial facts and chronologies will be forgotten if not documented.

Robbins Schwartz

107

## Effective Comments

### **“Bonnie failed to assist Joe when he was ill . . . ”.**

- Even better:  
“I asked Bonnie on September 1 to phone Joe, who was at home sick, to find out if he needed assistance completing the budget projections. Bonnie said she would, but never called. Subsequently, the budget was not completed on time.”

Robbins Schwartz

108

## Describe the Behavior

### **“Bonnie is a poor word processor.”**

- Even Better:

“Bonnie’s word processing skills need improvement. At the present time she inputs approximately 55 words per minute with an average of 15 mistakes. This should be improved to at least 70 words per minute with an average of five mistakes.”



Robbins Schwartz

109

## Provide Specifics

### **“Bonnie’s offer letter contained numerous typographical and factual errors that delayed the on-boarding process for the new hire.”**

- Attached to the warning are copies of the offer letter with errors.

Robbins Schwartz

110



Questions?



Robbins Schwartz

111

Follow Us on  
Twitter

Frank B. Garrett III | @FGarrett\_RS  
Michelle Webber | @MWeber\_RS

Robbins Schwartz | @RSchwartzLaw



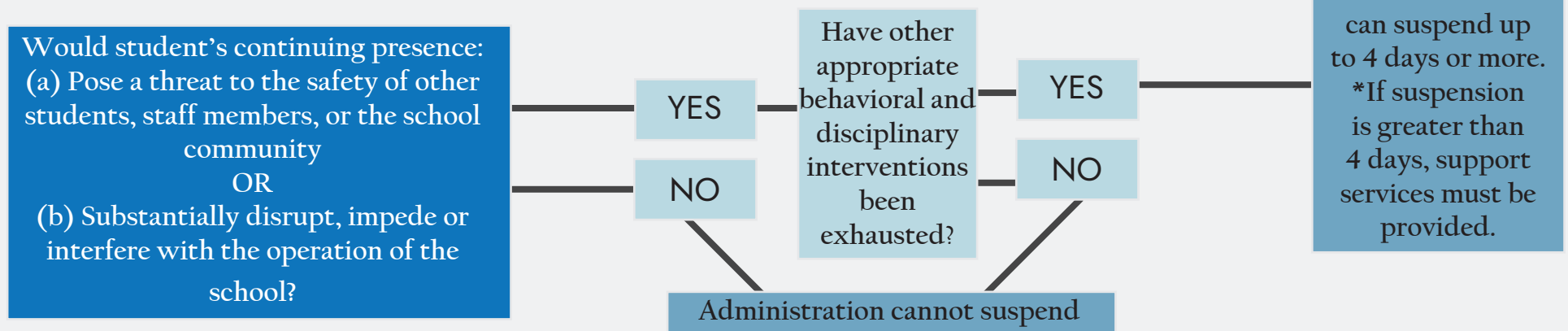
Robbins Schwartz

112

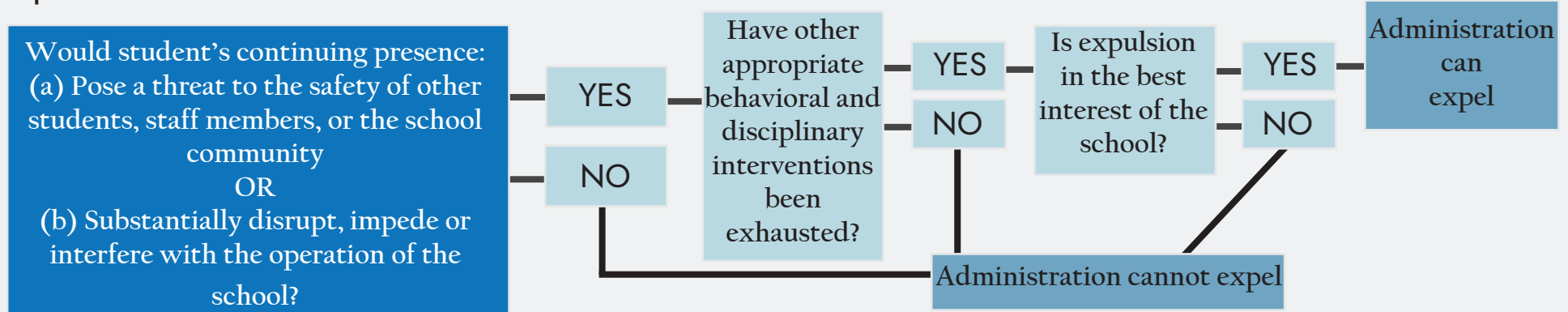
## Out Of School Suspension - 3 days or less



## Out Of School Suspension - 4 days or more



## Expulsion



## SUSPENSION *Checklist*

### 1) Notice of Suspension

- ✓ Details the specific act of gross misconduct resulting in the decision to suspend and the specific duration of the suspension, including actual dates of suspension
- ✓ Includes information about an opportunity to make up work missed during the suspension for equivalent
- ✓ Provides notice to the parent(s)/guardian(s) of their child's right to a review of the suspension
- ✓ For a suspension greater than 4 days, documents what, if any, appropriate and available support services will be provided during the period of suspension

### 2) Notice of Suspension Review Hearing (if parent requests suspension review hearing)

- ✓ Provides the date/time/location of suspension review hearing
- ✓ Notifies parent(s)/guardian(s) of their right to appear and be represented by counsel
- ✓ Sent via certified mail

### 3) Suspension Review Hearing (3 days or less)

- ✓ Board motion
- ✓ Letter from administrator to parent(s)/guardian(s) confirming decision of the Board
- ✓ Both motion and letter must:
  - Detail the specific act of gross misconduct resulting in the decision to suspend;
  - State that the student's continued presence at school would pose a threat to school safety and/or a disruption to other students' learning opportunities; and
  - Include a rationale as to the specific duration of the suspension

### 4) Suspension Review Hearing (4 days or more)

- ✓ Board motion
- ✓ Letter from administrator to parent(s)/guardian(s) confirming decision of the Board
- ✓ Both motion and letter must:
  - Detail the specific act of gross misconduct resulting in the decision to suspend;
  - State that the student's continued presence at school would pose a threat to the safety of other students, staff or members of the school community, and/or substantially disrupt, impede or interfere with the operation of the school;
  - Include a rationale as to the specific duration of the suspension;
  - Document whether other behavioral and disciplinary interventions were attempted or whether it was determined that there were no other appropriate and available interventions; and
  - For suspensions of more than 4 days, document whether appropriate and available support services were provided during the period of suspension, or whether it was determined that there are no such appropriate and available support services.

## EXPULSION *Checklist*

### 1) Notice of Expulsion Hearing

- ✓ Provides the date/time/location of the expulsion hearing
- ✓ Briefly describes what will happen during the hearing
- ✓ Details the specific act of gross misconduct resulting in the decision to recommend expulsion
- ✓ States that the School Code allows the School Board to expel a student for a definite time period not to exceed 2 calendar years, on a case-by-case basis
- ✓ Notifies parent(s)/guardian(s) their right to appear and be represented by counsel
- ✓ Sent via certified mail

### 2) Expulsion Hearing

- ✓ Board motion
- ✓ Letter from Administrator to Parents/Guardians confirming decision of the Board
- ✓ Both motion and letter must:
  - Detail the specific act of gross misconduct resulting in the decision to expel;
  - State that the student's continued presence at school would pose a threat to the safety of other students, staff or members of the school community, and/or substantially disrupt, impede or interfere with the operation of the school;
  - Detail the specific reasons as to why removing the student from the learning environment is in the best interest of the school;
  - Include a rationale as to the specific duration of the suspension;
  - Document whether other behavioral and disciplinary interventions were attempted or whether it was determined that there were no other appropriate and available interventions; and

## Robbins Schwartz

55 West Monroe Street, Suite 800  
Chicago, IL 60603

t: 312-332-7760

f: 312-332-7768

[www.robbsins-schwartz.com](http://www.robbsins-schwartz.com)

# Robbins Schwartz

## FRANK B. GARRETT III

PARTNER, CHICAGO

312.332.7760

fgarrett@robbins-schwartz.com

Frank B. Garrett III represents public and private employers in all aspects of employment law, including defense of 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 practices regularly in both state and federal courts at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law at both the state and national levels.

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

Contributing Author, "Employment Discrimination" *School Law: Personnel and Student Issues*, IICLE (1996, 1999, Supp. 2001, 2005, 2010, 2012, 2015, and 2021)

"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)



### PRACTICE AREAS

Education Law  
Labor & Employment  
Litigation

### EDUCATION

J.D., DePaul University  
College of Law

B.A., Oberlin College

### ADMITTED TO PRACTICE

Supreme Court of the  
United States

U.S. Court of Appeals for  
the Seventh Circuit

Trial Bar of the U.S.  
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)

#### **RECENT PRESENTATIONS**

*A Review of Important New Laws Impacting Illinois School Districts*, Illinois Association of School Boards (January 2022)

*Sexual Violence and Harassment on Campus*, Illinois Community College Trustee Association (June 2021)

*Responding to COVID-19 Related Employee Accommodations and Leave Requests*, American Association of School Personnel Administrators (October 2020)

*Workplace Liability in the Post Pandemic Era*, Large Unit District Association (June 2020)

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

*Legal Updates for Illinois Community College Chief Student Services Officers' Meeting*, Illinois Community College Student Services Officers (June 2019)

*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)

#### **ORGANIZATIONS**

American Bar Association,  
Section on Labor and  
Employment

Chicago Bar Association

Illinois Council of School  
Attorneys

# Robbins Schwartz

## **MICHELLE L. WEBER**

**SENIOR COUNSEL, CHICAGO**

312.332.7760

mweber@robbins-schwartz.com

Michelle practices in the area of education law with a focus on special education and student matters. She counsels school districts and community colleges regarding the IEP process, due process, Section 504, student discipline, board policy and student records.

Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

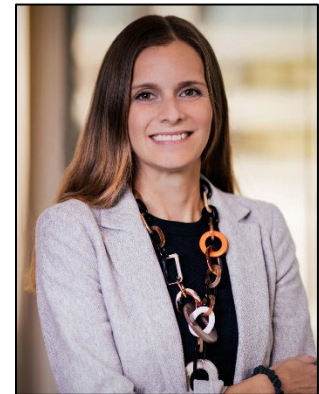
### **RECENT PUBLICATIONS**

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

### **RECENT PRESENTATIONS**

*Removals to Interim Alternative Educational Setting for 45 School Days... Who, What, Where, When, Why, and How?*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2022)

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



### **PRACTICE AREAS**

Education Law  
Special Education  
Student Discipline

### **EDUCATION**

J.D., Loyola University  
College of Law

M.A., Loyola Marymount  
University

B.A., Trinity College

### **ADMITTED TO PRACTICE**

Supreme Court of Illinois

### **ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School  
Attorneys