

# Robbins Schwartz

## Title IX Decision-Maker/Hearing Officer Webinar for Higher Education Institutions

August 2, 2022

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# Title IX Decision-Maker/Hearing Officer Webinar for Higher Education Institutions

Presented By: Emily P. Bothfeld and Kevin P. Noll

August 2, 2022

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You have just been appointed to serve as the Hearing Officer for a formal Title IX complaint. Now what?

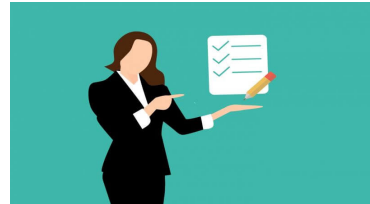


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## Hearing Officer's Role Generally

- Preside over live Title IX hearing.
- Ensure that parties' advisors are afforded opportunity to conduct cross-examination of opposing party and witnesses.
- Determine relevance and permissibility of cross-examination questions in real time.



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## Hearing Officer's Role Generally

- Ensure hearing procedures are followed and applied consistently and equitably.
- Determine responsibility (and sanctions, if appropriate) using preponderance of the evidence standard.
- Issue written determination to both parties simultaneously, with information regarding appeal rights.

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## Hearing Officer's Role: A Step-by- Step Look



- 1) Check for potential conflicts of interest or bias.
- 2) Gather investigation materials from Title IX Coordinator.
- 3) Conduct preliminary review of investigation materials.
- 4) Ensure all pre-hearing procedures have occurred.
- 5) Conduct optional pre-hearing conference.

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## Hearing Officer's Role: A Step-by- Step Look

- 6) Convene the hearing.
- 7) Review investigation materials and additional information presented at hearing.
- 8) Determine responsibility and, if applicable, associated sanctions and/or remedies.
- 9) Prepare and issue written determination of responsibility within required timeframe.

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STEP 1:  
Check for  
Potential  
Conflicts of  
Interest or Bias



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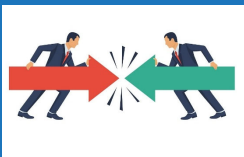
Conflicts of  
Interest / Bias

- The Title IX Regulations provide that any individual designated by an institution as a Decision-Maker must not have a conflict of interest or bias.
- Remember: One of the permissible grounds for appeal is that the Decision-Maker had a conflict of interest or bias that affected the outcome.
  - Identifying and addressing any claims of a conflict or bias prior to the hearing may help prevent a later appeal.

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## Conflicts of Interest / Bias



- Where you self-identify a conflict of interest or bias, notify the Title IX Coordinator that you will need to recuse yourself.
- Where a party believes that you have a prohibited conflict of interest or bias, the party must contact the Title IX Coordinator to request a substitution.
  - The Title IX Coordinator may request information from you to help him/her evaluate the claim.

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## Conflicts of Interest / Bias Hypothetical

- You have just been appointed to serve as the Hearing Officer for an employee-on-employee Title IX sexual harassment case. The complainant is very outspoken on social media about political issues, and you strongly disagree with her position on almost every issue. You have even left a few strongly worded comments on her social media posts.
  - Can you serve as the Hearing Officer for this case?

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## STEP 2: Gather Investigation Materials



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## Investigation Materials

- Relevant materials should include, at a minimum:
  - Formal complaint
  - Initial written notice of allegations
  - Investigation report
  - Parties' written responses to the investigation report

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## Investigation Materials

- Other relevant materials, if not summarized in investigation report and/or if additional information is needed:
  - Police reports, photographs, video footage, e-mail communications, text messages or other supporting evidence gathered by Investigator
  - The parties' written responses to the evidence
  - Documentation of procedural steps followed during the Investigation
    - \*Note: This information will need to be included in the determination of responsibility letter.

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## STEP 3: Conduct Preliminary Review of Investigation Materials



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## Tips for Preliminary Review

- Make a checklist of allegations to be proven/disproven, noting the evidence gathered relative to each allegation during the investigation.



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## Sample Checklist of Allegations

Complainant, a current College student, alleges that Respondent, an adjunct faculty member, engaged in unwelcome conduct of a sexual nature that a reasonable person would find so severe, pervasive and objectively offensive that it deprived a person equal educational access.

Specific allegations:

Date of Alleged Incident	Complainant's Allegation	Respondent's Response	Other Evidence
8/16/2020	R sent C a private chat message during Zoom class session saying "You look beautiful today. Stay after class?" At the end of class, R verbally asked C to stay in the Zoom session so he could "answer her question about the last quiz." C said she had to go, and signed off with the rest of the class.	R denies messaging C privately and denies ever telling C that she looked beautiful.  R admits he asked C to stay in the Zoom after class so he could answer her question about the quiz.	No copy of private chat message; class was not recorded.  W1 and W2 recall R asking C to stay after class to discuss the last quiz. W1 says C looked "uncomfortable."

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## Tips for Preliminary Review

- Identify any relevant disputed issues of fact between complainant and respondent.
  - Example: On what date did the parties' romantic relationship end?
    - Complainant: October 1, 2020 (prior to alleged sexual assault)
    - Respondent: October 9, 2020 (after alleged sexual assault)

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## Tips for Preliminary Review



- Make a list of witnesses who may be called to testify during the hearing.
  - Draft list of potential questions or issues for follow-up for each witness.

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## Tips for Preliminary Review

- Identify potential follow-up questions for Investigator.
  - Example: Complainant identified three other students who allegedly witnessed Respondent making inappropriate comments of a sexual nature, but the Investigator only interviewed two of those students. Why was the third student not interviewed?

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STEP 4:  
Ensure all pre-hearing procedures have occurred.



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## Pre-Hearing Checklist

- 1) Did the Title IX Coordinator issue written notice of hearing to both parties?
- 2) Was a copy of the Investigation Report enclosed with the hearing notice or otherwise provided to the parties at least ten (10) business days prior to the hearing?

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## Pre-Hearing Checklist

- 3) Did either party request a substitution of the hearing officer?
  - If yes, what was the outcome of that request? Is the decision documented in writing?
- 4) Did either party request that the hearing be conducted virtually or with the parties in separate rooms?
  - If yes, confer with Title IX Coordinator to ensure proper arrangements have been made.

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## Pre-Hearing Checklist

### 5) Do both parties have an advisor to conduct cross-examination during the hearing?

- If a party requested that an advisor be appointed to conduct cross-examination, confirm that the appointment has occurred.



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## Pre-Hearing Procedures Hypothetical

- You have been appointed to serve as the Hearing Officer for a Title IX case involving a student complainant and an employee respondent. Two days before the scheduled hearing, the complainant notifies you that the individual she had planned to bring as her advisor to the hearing is no longer available. The complainant requests that the College appoint an advisor for her.
  - What should you do?

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STEP 5:  
Hold Optional  
Pre-Hearing  
Conference



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Pre-Hearing  
Conference

- The Hearing Officer has discretion to hold a pre-hearing conference with the parties, their advisors, and other appropriate individuals.
- Need not be held in person or with all parties at the same location.

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## Pre-Hearing Conference

- Recommended issues for discussion:
  - Confirmation of compliance with pre-hearing procedures
  - Scheduling of the hearing
  - Witnesses
  - Rules for testimony and cross-examination
  - Evidentiary issues



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## Pre-Hearing Conference

- Recommended issues for discussion:
  - Hearing Officer's expectations for appropriate decorum and civility from parties and advisors, and possible consequences for violating such expectations
  - Other procedural or logistical matters

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## STEP 6: Convene the Hearing



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## Hearing Participants

- Hearing participants should include:
  - You (the Hearing Officer)
  - Complainant
  - Complainant's advisor
  - Respondent
  - Respondent's advisor
  - Title IX Coordinator
  - Investigator
  - Witnesses, if requested to attend by either party
  - Court reporter, if using one

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## Hearing Procedures



- 1) Go "on the record"
  - The Title IX Regulations require that an institution create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- 2) Introduction by Hearing Officer
- 3) Identification of individuals present

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## Hearing Procedures

- 4) Preliminary review of hearing procedures by Hearing Officer
- 5) Optional opening statements by parties
- 6) Optional presentation of information by Title IX Coordinator and/or Investigator

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## Hearing Procedures



### 7) Complainant's presentation

- "Direct" testimony by complainant
- Cross-examination of complainant by respondent's advisor
- "Direct" testimony by complainant's invited witnesses
- Cross-examination of complainant's witnesses by respondent's advisor

### 8) Respondent's presentation

- "Direct" testimony by respondent
- Cross-examination of respondent by complainant's advisor
- "Direct" testimony by respondent's invited witnesses
- Cross-examination of any witnesses presented by respondent by complainant's advisor

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## Hearing Procedures

### 9) Questioning by Hearing Officer

- May occur after each party or witness testifies, or at the end after all parties and witnesses have testified.

### 10) Brief closing statements by parties

- Complainant's closing statement
- Respondent's closing statement

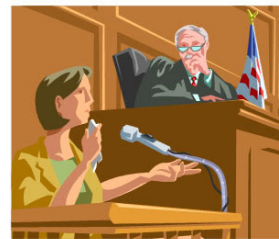
### 11) Conclude the hearing and go "off the record."

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## Live Hearing Q&A

- Q: May the parties' advisors cross-examine the Investigator about his/her investigation report or the investigation process?



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## Live Hearing Q&A



- Q: Is the College required to ensure that any witnesses interviewed during the investigation process appear at the live hearing?

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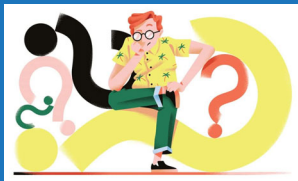
## Live Hearing Hypotheticals

- You are the appointed Hearing Officer on a stalking case. The complainant reported the stalking to the local police department, in addition to making a report with the Title IX Coordinator. During the investigation, the Investigator obtained a copy of the police report from the local police department and attached it to the Investigation Report.
  - Is the police officer who completed the police report required to appear at the hearing as a witness?
  - If the police officer does not attend the hearing, may you rely on the police report in reaching a determination regarding responsibility?

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## Live Hearing Hypotheticals



- An employee filed a formal Title IX sexual harassment complaint alleging that his supervisor engaged in quid pro quo harassment by demoting him after he refused to submit to the supervisor's sexual advances. An investigation was conducted, and you are now presiding over the live hearing.
  - Can the complainant's advisor ask the respondent whether he has ever slept with a subordinate?
  - Can the respondent's advisor ask the complainant whether he has ever slept with the respondent?

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## Reminder: Rape Shield Protections

- Questions about the complainant's sexual pre-disposition or prior sexual behavior are not permitted unless:
  - Offered to prove that someone other than the respondent committed the alleged conduct; or
  - Questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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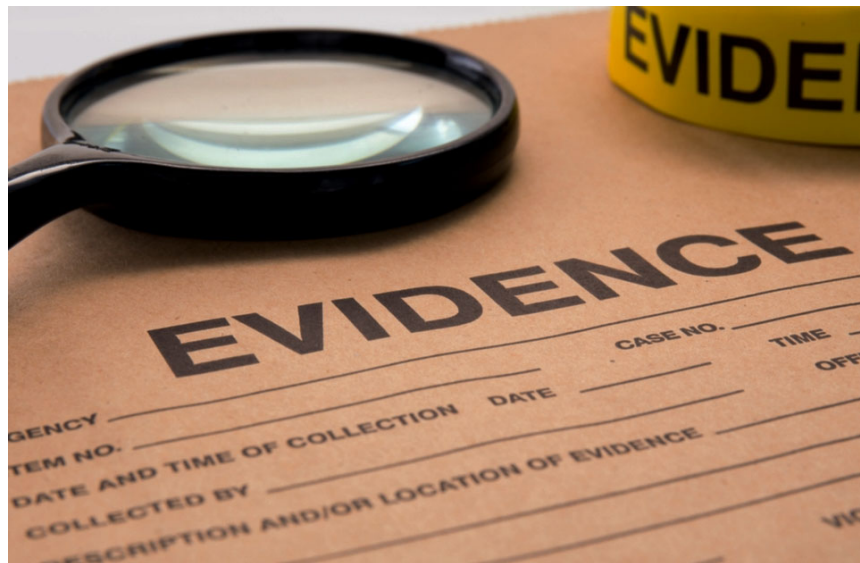
## Live Hearing Hypotheticals

- You are serving as the Hearing Officer during a live hearing involving an alleged student-on-student sexual assault. The respondent brought his defense attorney as his advisor. The attorney has refused to allow the respondent to speak and has advised him not to answer any questions. The attorney has objected to every cross-examination question posed by the complainant's advisor and has begun slamming his fist down on the table whenever the complainant's advisor asks a question that he doesn't like. You have warned the respondent's advisor several times about his behavior, but each time he has responded that he is "just being a zealous advocate" or "just doing [his] job."
  - What should you do?

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STEP 7:  
Review  
investigatory  
materials and  
evidence from  
hearing



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Considering  
Evidence

- Relevant documents may include, but are not limited to:
  - The formal complaint
  - The initial written notice of the allegations
  - Written statement(s) and responses by the parties and/or witnesses
  - The investigation report
  - Police reports, photographs and/or video footage (if any)
  - Hearing testimony and/or documents presented during hearing
  - Prior discipline records
    - Only relevant to issue of appropriate sanction



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STEP 8:  
Determine  
Responsibility



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Preponderance  
of the Evidence  
Standard

- "More likely than not"
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation.

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## Issues for Determination

### 1) Does the testimony and/or evidence presented establish that the alleged conduct occurred?

#### Things to Consider:

Admission or denial by the Respondent	Witness corroboration
Physical evidence (i.e. photographs, video footage)	Prior consistent (or inconsistent) statements by parties and witnesses
Post-incident conduct of the parties	Credibility of parties and witnesses

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## Issues for Determination

### 2) Does the conduct constitute Title IX sexual harassment or a PSVHEA offense?

- Title IX sexual harassment includes:
  - Quid pro quo harassment by a college employee
  - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
  - Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)
- Sexual violence includes physical sexual acts attempted or perpetrated against a person's will or when a person is incapable of giving consent, including but not limited to rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

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## Issues for Determination

- 
- 
- 3) If the answers to questions 1 and 2 are "yes," what sanctions and/or remedies are appropriate?

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## Determining Appropriate Sanctions: Tips and Considerations



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## Determining Appropriate Sanctions

- Goals in determining appropriate sanctions:
  - Educate the respondent on the impact of his/her behavior
  - Prevent future inappropriate behavior by the respondent
  - Deter other individuals from engaging in similar misconduct
  - Maintain a safe campus community

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## Determining Appropriate Sanctions

- Aim to strike a balance between consistency and individuality.
  - Apply a consistent range of sanctions for a given violation, but take into account each case's unique circumstances.

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## Determining Appropriate Sanctions

- Relevant considerations include, but are not limited to:
  - Severity of the misconduct
  - Consequences/impact of the misconduct (both actual and potential)
  - Disciplinary history (or lack thereof)
  - Aggravating or mitigating factors (i.e. respondent's intent/motivation, respondent's willingness to accept responsibility for his/her actions)



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## Determining Appropriate Sanctions: Students

- A combination of administrative sanctions (i.e. warning, probation or suspension) and educational sanctions (i.e. participation in sexual harassment training) is permissible.
- Other possible sanctions include, but are not limited to:
  - Limitations on campus movement and participation in campus activities
  - Parameters around participation in extra-curricular activities
  - Ongoing monitoring

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## Determining Appropriate Sanctions: Employees

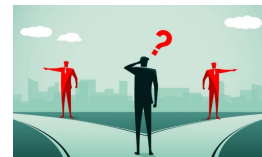
- Employee sanctions may include a warning, written reprimand, suspension, or recommendation for termination, as well as non-disciplinary sanctions such as training or counseling.
- It is important to review limitations and requirements under collective bargaining agreements and/or employee policies and procedures.

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## Determining Remedies

- In addition to determining appropriate sanctions, the Hearing Officer must also determine whether any remedies designed to restore or preserve equal access to the college's education program or activity will be afforded to the complainant.



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## Determining Remedies

- Such remedies may include the same “supportive measures” that were afforded to the complainant during the investigation process.
- Unlike supportive measures, however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

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## Determining Remedies

- Examples of potential remedies:
  - Ongoing counseling or mental health supports
  - Academic adjustments or accommodations
  - Modifications to class schedules
  - No-contact directives
  - Other campus safety measures



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## Implementation of Sanctions and Remedies

- The Title IX Coordinator is responsible for coordinating the effective implementation of any sanctions and/or remedies.

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## STEP 9: Prepare and Issue Written Determination



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## Written Determination

- Must be issued to both parties simultaneously within 7 business days of decision being reached.
- Consult Sex-Based Misconduct Procedures for any requirements regarding the method of transmission (i.e. via e-mail, U.S. mail, certified mail, etc.).
  - As a best practice, issue the letter both electronically and in hard copy.

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## Required Components of Written Determination

- Identification of allegations
  - See initial written notice of allegations and Investigation Report.
- Description of procedural steps taken
  - Should be included in Investigation Report; if not, request information from Title IX Coordinator.

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## Required Components of Written Determination

- Findings of fact supporting determination
  - In most cases, this can be a brief 1-2 paragraph summary.
- Conclusions regarding application of conduct standards
  - General finding of whether the respondent engaged in conduct prohibited by College's Sex-Based Misconduct Policy.



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## Required Components of Written Determination

- Statement & rationale for result of each allegation, including:
  - Determination of responsibility
    - You must conclude whether each specific alleged incident occurred.
    - However, you may consider all alleged incidents as a whole when determining severity, pervasiveness and offensiveness and when determining whether the complainant was deprived equal educational access.
  - Disciplinary sanctions being imposed
    - Disciplinary sanctions must be identified in both the complainant's and respondent's letter.
  - Whether any remedies will be provided to the complainant
    - Need not identify the specific remedies in the respondent's letter, unless such remedies involve the respondent (i.e. a no-contact directive).

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## Required Components of Written Determination

- Procedures and permissible bases for complainant and respondent to appeal
  - Consult Sex-Based Misconduct Procedures for timelines and permissible grounds.

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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

*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

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

B.S., *cum laude*, Vanderbilt University

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U.S. Court of Appeals for the Seventh Circuit

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

Supreme Court of Illinois

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Trustee, Associated Colleges of Illinois

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

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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

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J.D., The John Marshall Law School

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

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