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Title IX Decision-Maker Webinar for K-12 School Districts

August 2, 2022

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Title IX Decision-Maker Webinar for K-12 School Districts

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

August 2, 2022

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1

Overview

You have just been appointed to
serve as the Decision-Maker for a
formal Title IX complaint. **Now what?**



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Decision-Maker's Role Generally

- Review the allegations and supporting evidence.
- Facilitate the written question and answer process equitably and efficiently.



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Decision-Maker's Role Generally

- Determine responsibility (and sanctions, if appropriate) using preponderance of the evidence standard or clear and convincing evidence standard.
 - Note: PRESS Policy 2:265 uses preponderance standard.
- Issue written determination to both parties simultaneously, with information regarding appeal rights.

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4

Overview

1. Check for potential conflicts of interest.
2. Gather investigation materials from Title IX Coordinator or Investigator.
3. Conduct preliminary review of investigation materials.
4. Afford parties an opportunity to submit written questions to be asked of the opposing party and/or witnesses.
5. Determine relevance of submitted questions, then forward to appropriate party and/or witnesses.



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5

Overview

6. Provide parties with answers to submitted questions and identify any excluded questions, with rationale for exclusion.
7. Allow for limited follow-up questions.
8. Review investigation materials and additional information from the question-and-answer process.
9. Determine responsibility and, if applicable, associated sanctions and/or remedies.
10. Prepare and issue written determination of responsibility.

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6

Step 1:
Check for
Conflicts of
Interest

CONFLICT OF INTEREST



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7

Conflicts of Interest

- The Title IX Regulations provide that any individual designated by an institution as a Decision-Maker must not have a conflict of interest.
- **Key question:** Does the Decision-Maker's prior or existing relationship with or knowledge of a party prevent the Decision-Maker from serving impartially?
- Remember: One of the permissible grounds for appeal is "that the Decision-Maker had a conflict of interest that affected the outcome."
- Identifying and addressing any claims of a conflict prior to making the determination of responsibility may help prevent a later appeal.

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8

Conflicts of Interest

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

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Conflict of Interest: Hypotheticals

- In each of the following scenarios, what information would be relevant to determining whether you have a conflict of interest?
 - The Complaint involves a student Complainant and an employee Respondent. The employee Respondent is your neighbor.
 - The complaint involves two students, one of whom is your childhood best friend's son.
 - You are the Assistant Principal and oversee student discipline. The complaint involves a student whom you have disciplined on several occasions for making inappropriate gestures during class.

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Step 2: Gather Investigation Materials



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Investigation Materials

- Relevant materials should include, at a minimum:
 - Formal Complaint
 - 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: Preliminary Review



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Tips for Preliminary Review

- Make a checklist of allegations that need to be proven or disproven.
- This will help you objectively analyze the evidence to avoid bias.

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Sample Checklist of Allegations

Complainant, a high school student, alleges that Respondent, a fellow student, 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
9/5/2022	R follows C out of science class and to her locker on a daily basis. R repeatedly asks C to come over after school because his parents will not be home and the two can "skinny dip" in his parent's swimming pool. R also repeatedly sends C pictures of the swimming pool.	R denies making any reference to "skinny dipping." R admits he has asked C to come over to swim in his parent's swimming pool.	Copies of text messages from R to C with pictures of the swimming pool. W recalls seeing R talking to C at her locker and said C looked "uneasy."

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Tips for Preliminary Review

- Identify any relevant disputed issues of fact between Complainant and Respondent.
 - **Example:** How many times did the Respondent sit next to the Complainant on the bus and ask her to go on a date?
 - Complainant: Every day of the fall semester.
 - Respondent: Only once.

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17

Tips for Preliminary Review

- Follow up with the Investigator, if needed.
 - Example: Complainant identified three other students who allegedly witnessed Respondent making inappropriate comments of a sexual nature, but it appears that the Investigator only interviewed two of those students. **Why was the third student not interviewed?**

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18

Step 4:
Submission of
Written
Questions



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19

Notice of
Opportunity to
Submit
Written
Questions

- Issue Notice of Opportunity to Submit Written Questions to both parties.
 - If party is a student, letter should be addressed to student's parent/guardian.
- Questions must be submitted to Decision-Maker within five (5) school business days.

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Written Questions Q&A

- Q: Can a parent/guardian or advisor submit written questions on behalf of a party?



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21

Written Questions Q&A

- Q: Can a parent/guardian or advisor submit written questions on behalf of a party?
- A: **Yes.** Although the right to submit written questions belongs to the party and not to the party's parent/guardian or advisor, a party may elect to have an advisor or parent/guardian prepare the written questions on the party's behalf.

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22

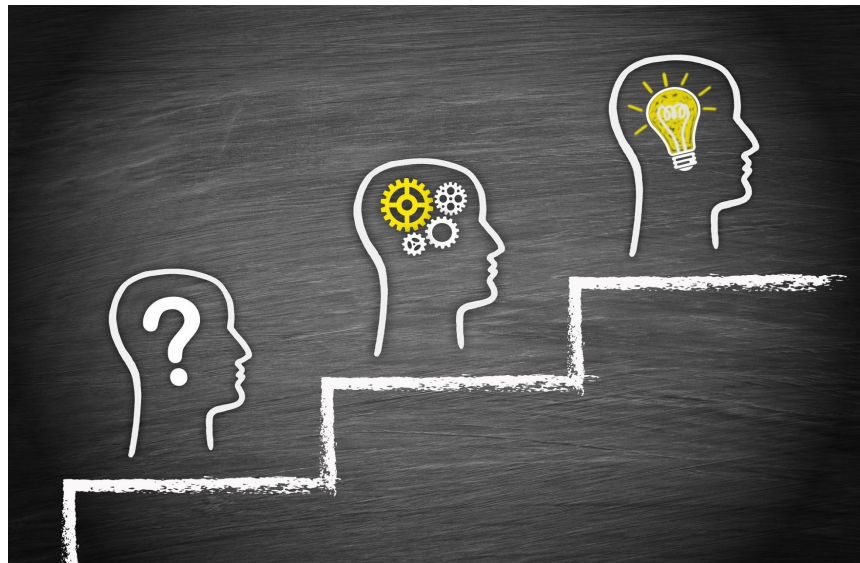
Written Questions Hypothetical

- You issue the Notice of Opportunity to Submit Written Questions to both parties. The deadline to submit written questions is Tuesday, October 5. On Monday, October 4, Respondent emails you to request an extension because she has COVID-19 and has not been able to focus on preparing questions.
 - What should you do?

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23

Step 5: Determine Relevance and Forward Relevant Questions



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24

Determining Relevance

- **Key considerations:**
 - Will the question potentially elicit an answer that tends to prove or disprove an allegation?
 - Will the question lead to the discovery of a fact that will inform your decision?

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Relevance & Rape Shield Protections

- Questions about the Complainant's sexual predisposition 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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Questioning and Relevance Q&A

- Q: May the parties submit written questions to be asked of the Investigator?



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Questioning and Relevance Q&A

- Q: May the parties submit written questions to be asked of the Investigator?
 - A: **Yes**, but such questions are subject to the same limitations as other written questions (i.e. they must be relevant).

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Questioning and Relevance Q&A

- Q: Is the Decision-Maker required to forward written questions to a witness who is not a District student or staff member, such as a law enforcement officer who completed a police report?

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Questioning and Relevance Q&A



- Q: Is the Decision-Maker required to forward written questions to a witness who is not a District student or staff member, such as a law enforcement officer who completed a police report?
- A: **Yes**, if the Decision-Maker has the contact information for that witness or is able to obtain the witness' contact information through a reasonable inquiry.

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Questioning and Relevance Hypotheticals

Which, if any, of the following questions would you exclude? Why?

Complainant's Questions
for Respondent:

1. Did you send Johnny a text admitting that you grabbed my butt?
2. Do you regularly delete your text messages?
3. How could you do this to me?

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Relevance: Hypothetical Questions

Which, if any, of the following questions would you exclude? Why?

Respondent's Questions
for Complainant:

1. Didn't you and Ted make out under the bleachers at last week's football game?
2. Didn't you tell me that you liked when I called you "hot stuff?"
3. Were you drinking on the night you say I "assaulted" you?

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Step 6: Issue Notice of Questions Requiring Answers



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Answering Written Questions

- Forward relevant questions to the party/witness to whom they are directed.
- Allow five (5) school business days for the party/witness to respond.
- After five (5) school business days have passed, issue Notice of Answers to and Exclusion of Submitted Questions to the party who submitted the questions.
 - Attach answers to relevant questions
 - Identify which questions have been excluded and provide rationale for exclusion.

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Answering
Written
Questions
Q&A

- Q: Is the party or witness to whom a question is directed obligated to submit a response?

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Answering
Written
Questions
Q&A

- Q: Is the party or witness to whom a question is directed obligated to submit a response?
 - A: **No.**



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Answering Written Questions Q&A

- Q: If the Respondent refuses to answer written questions submitted by the Complainant, can the Decision-Maker use the Respondent's refusal as a basis to make a finding of responsibility?

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Answering Written Questions Q&A

- Q: If the Respondent refuses to answer written questions submitted by the Complainant, can the Decision-Maker use the Respondent's refusal as a basis to make a finding of responsibility?
- A: **No**. The Decision-Maker should not draw inferences about the determination regarding responsibility based on a party's failure or refusal to answer written questions.

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Step 7: Allow for Follow-Up Questions



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Follow-Up Questions

- The Notice of Answers to and Exclusion of Written Questions includes language providing that the party may submit *limited* follow-up questions.
- What does “limited” mean?
 - The regulations do not define the term “limited” and give school districts flexibility to establish reasonable parameters.
 - Duplicative questions and questions that are not relevant or that violate the rape shield protections should be excluded.
 - Follow-up questions should relate to the answers that the party/witness provided during the first round of questioning.

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40

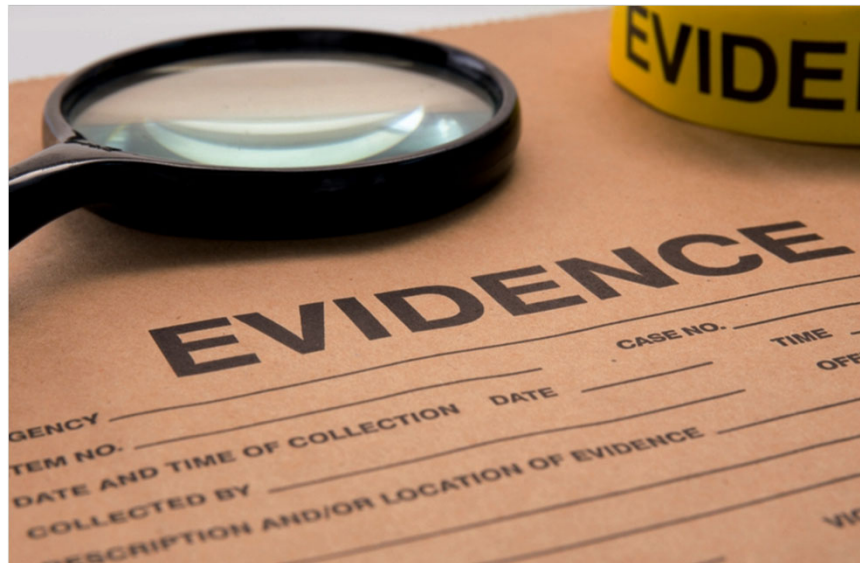
Follow-Up Questions

- Allow five (5) school business days for parties to submit follow-up questions
- Upon receipt of follow-up questions, review for relevance
- Forward relevant questions to opposing party or witness.
- Wait five (5) school business days for responses.
- Issue Notice of Answers to and Exclusion of Written Questions, with answers attached.
 - Remember to identify any excluded questions, with rationale for exclusion.

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41

Step 8: Review Investigatory Materials and Evidence



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Considering Evidence

- Relevant documents may include, but are not limited to:
 - The Formal Complaint
 - The initial written Notice of Allegations
 - Written statement(s) and responses by the parties and/or witnesses
 - The Investigation Report (and any recommendation)
 - Police reports, photographs and/or video footage (if any)
 - Written responses to submitted questions and follow-up questions
 - Prior discipline records
 - Only relevant to issue of appropriate sanction



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Considering Evidence

- **Remember:** You should follow up with the Investigator for clarification on any information from the Investigation Report that is unclear.

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Step 9:
Determine
Responsibility



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Standard of
Evidence

- For districts that subscribe to IASB PRESS, Policy 2:265 uses the “preponderance of the evidence” standard.

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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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47

Issues for Determination

- 1) Does the 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?

- Title IX sexual harassment includes:
 - **Quid pro quo harassment** by an 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)

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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 and Remedies



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Determining Appropriate Sanctions

- Goals in determining appropriate sanctions:
 - Educate the Respondent on the impact of their behavior
 - Prevent future inappropriate behavior by the respondent
 - Deter other individuals from engaging in similar misconduct
 - Maintain a safe school 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 consider 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 their 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 movement within the school building
 - Limitations on continued participation in extra-curricular activities
 - Ongoing monitoring
- Note: If you are considering suspension or expulsion, ensure compliance with SB 100 (and IDEA for special education students).

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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 Decision-Maker must also determine whether any remedies designed to restore or preserve equal access to the District'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 school safety measures



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59

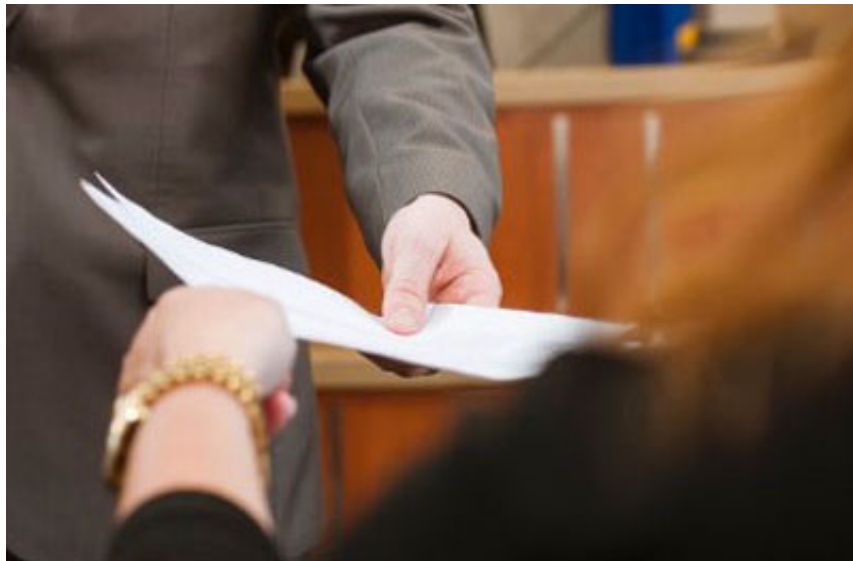
Implementation of Sanctions and Remedies

- The Title IX Coordinator is responsible for coordinating the effective implementation of any sanctions and/or remedies.
- Be sure to copy Title IX Coordinator on the Written Determination

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60

Step 10: Prepare and Issue Written Determination



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61

Written Determination

- Must be issued to both parties simultaneously.
- No required timeframe within which determination must be issued, but it should be issued as soon as possible once decision is reached.
- Don't forget to send a copy to the Title IX Coordinator.
- Neither the Title IX regulations nor 2:265-AP₂ contain specific 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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62

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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63

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 Policy 2:265.

REQUIRED

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64

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 2:265 AP2 for timelines and permissible grounds for appeal.

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Questions?



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67

Contact Us!

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68

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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

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

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Trustee, Associated Colleges of Illinois

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Illinois 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

EDUCATION

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B.A., Indiana University

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

Supreme Court of Illinois

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Chicago Bar Association

Illinois State Bar Association

Kane County Bar Association