

## Title IX Decision Maker and Hearing Officer Webinar

November 18, 2020

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**Title IX Decision-Maker/Hearing Officer Webinar:**

Presented in Partnership with the Illinois Community College Chief Student Services Officers Commission

Presented By: Frank B. Garrett and Emily P. Bothfeld

November 18, 2020

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1



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

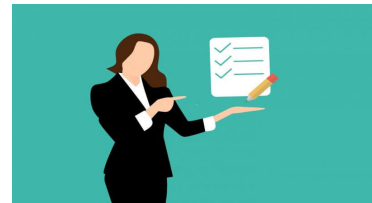
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2

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.  
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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.
- 2) Gather investigation materials from Title IX Coordinator.
- 3) Conduct preliminary review of investigation materials.
- 4) Ensure all pre-hearing procedures have occurred.

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

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

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STEP 1:  
Check for  
Potential  
Conflicts of  
Interest



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7

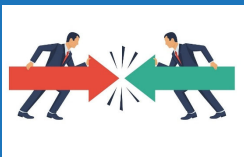
Conflicts of  
Interest

- 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 Hearing Officer's prior or existing relationship with or knowledge of a party prevent the Hearing Officer 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 the hearing 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 that you have a prohibited 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 him/her evaluate the claim.

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9

## Conflicts of Interest Hypothetical

- You serve on the College's Behavioral Intervention Team. At a BIT meeting several months ago, you took part in a decision to remove a respondent from the College's educational program on an emergency basis. The College subsequently conducted a Title IX investigation with respect to that respondent, and you have just been appointed to serve as the Hearing Officer for the case.
  - Do you have a conflict of interest?

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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.<br><br>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.<br><br>W1 and W2 recall R asking C to stay after class to discuss the last quiz. W1 says C looked "uncomfortable." |

16

## 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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20

## 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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21

## 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 she just secured an attorney to serve as her advisor during the hearing, but that the attorney is not available on the scheduled hearing date. The complainant requests that the hearing be postponed to a later date so that her advisor can attend.
  - What should you do?

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## STEP 5: 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
  - Explain how the hearing will progress from start to finish.
  - Review expectations regarding behavior and being respectful of all individuals present.
  - Review role of the advisor and expectations regarding advisors' conduct, and remind parties that they may not cross-examine each other directly.
  - Explain procedures for presenting documents – ensure that copies are provided to the Hearing Officer and opposing party for review.
  - Remind parties that only relevant questions may be asked, and explain process for how relevancy determinations will be made (i.e., the answering party/witness should pause before answering each question so the Hearing Officer may interject if question is deemed not relevant).

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## Hearing Procedures



### 5) 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

### 6) 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

### 7) Questioning by Hearing Officer

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

### 8) Brief closing statements by parties

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

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

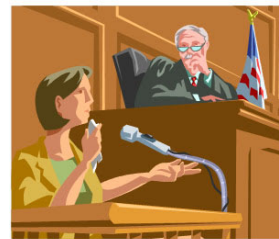
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## Live Hearing Q&A

- 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: May the parties' advisors cross-examine the Investigator about his/her investigation report or the investigation process?
  - A: Yes, but this questioning is subject to the same limitations as other cross-examination questioning.

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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 Q&A



- Q: Is the College required to ensure that any witnesses interviewed during the investigation process appear at the live hearing?
  - A: Generally, no. Colleges do not have subpoena power to compel parties and witnesses to attend hearing.
    - But note: If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

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34

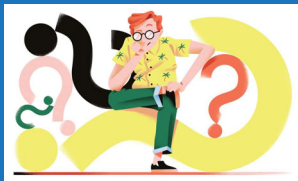
## Live Hearing Hypotheticals

- 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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36

## 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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37

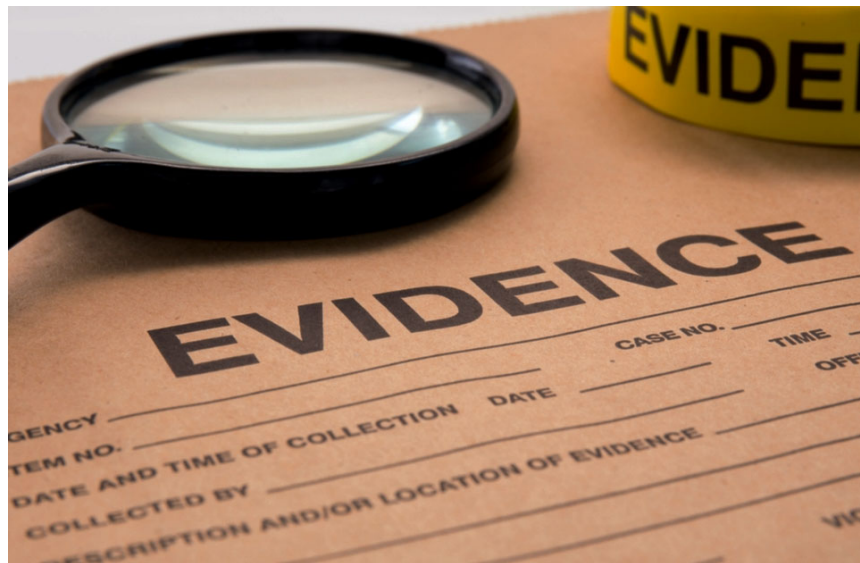
## Live Hearing Hypotheticals

- 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 6:  
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 7:  
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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42

## 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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43

## 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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46



## 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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47

## 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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49

## 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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50

## Determining Appropriate Sanctions: Employees

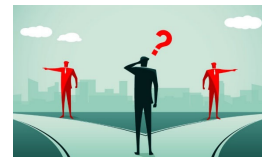
- Employee sanctions may include a warning, written reprimand, suspension, or recommendation for termination, as well as non-disciplinary sanctions such as training or counseling.
- It is important to review limitations and requirements under collective bargaining agreements and/or employee policies 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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52

## 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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53

## 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 8: Prepare and Issue Written Determination



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56

## 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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59

## 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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Frank B. Garrett III represents school districts, community colleges, local governmental bodies and public and private companies in all aspects of employment law, including 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 represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. 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**

"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**

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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)

Contributing author, “Employment Discrimination,” *ILLINOIS SCHOOL LAW*, IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

#### **RECENT PRESENTATIONS**

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

*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)

*Navigating the Legal Liability Minefield in the Recruitment, Interview and Selection of Qualified Applicants*, AASPA Personnel Administrator Boot Camp (June 2018)

*The Ever-Changing Landscape Under Title IX*, Joint meeting of Illinois Community College Presidents, Chief Academic Officers and Chief Student Services Officers (January 2017)

*Practical Guidance on Employee Misconduct Investigations and Discipline*, Illinois Association of School Personnel Administrators, Tenth Annual State Conference (January 2017)

#### **ORGANIZATIONS**

American Bar Association,  
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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

### RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

### RECENT PRESENTATIONS

*Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices*, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

*A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline*, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)

*Updates and Recent Developments out of the U.S. Department of Education*, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

*Legal Hot Topics for Nursing Program Administrators and Faculty*, Illinois Organization of Associate Degree Nursing (March 2019)



### PRACTICE AREAS

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National Council of School Attorneys

