



Robbins Schwartz
One Team. Making Your Mission Ours.

Title IX, Student Pregnancy, Mental Health, and Other Legal Updates

**ICCCSSO Spring 2023 Meeting
March 9, 2023**

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Title IX, Student Pregnancy, Mental Health, and Other Legal Updates

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Agenda

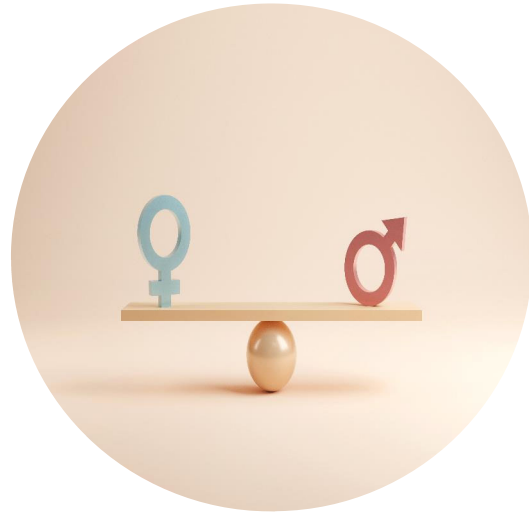
1. Title IX
2. Pregnancy and Lactation Requirements
3. Mental Health Funding
4. Other Legislative Updates



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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.

Title IX: The Pendulum Swings Again



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Timeline for New Regulations

- Department is finalizing review of public comments to proposed amendments that were released in Summer 2022
- Finalized amendments anticipated to be released in May 2023
- Effective date likely 60-90 days after release



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Proposed Regulations – Key Highlights

- Prohibition on “sex-based harassment,” which includes sexual harassment **and** harassment based on:
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
- Broader definitions of quid pro quo and “hostile environment” forms of sex-based harassment



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Proposed Regulations – Key Highlights

- Expanded jurisdiction
 - Conduct that is “subject to institution’s disciplinary authority”
 - Institutions have affirmative obligation to address sex-based hostile environment in their EP&A even where the sex-based harassment contributing to the hostile environment occurred outside the EP&A or outside the U.S.
- Modified employee reporting obligations
 - Some categories of employees have the option of **either** reporting to the Title IX Coordinator **or** providing Coordinator’s contact information and information about how to report.
 - **All employees** (even confidential employees) must provide Title IX Coordinator’s contact information and information about how to report



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Proposed Regulations – Key Highlights

- Elimination of written complaint requirement and requirement that complainant be participating in or attempting to participate in institution's education program or activity at time complainant files formal complaint.
- Permissibility of supportive measures that burden a respondent during pendency of grievance procedures, if certain criteria are met.



Proposed Regulations – Key Highlights

- Two grievance procedures
 - Section 106.45: Required for any complaint of sex discrimination
 - Section 106-46: Required for any complaint of sex-based harassment involving higher education student party, in addition to procedures required under Section 106.45



Proposed Regulations – Key Highlights

- Procedures for all sex discrimination complaints (Section 106.45)
 - Decision-maker **may** be same person as Title IX Coordinator or investigator
 - Dismissals permitted, but not required



Proposed Regulations – Key Highlights

- Procedures for sex-based harassment complaints involving student party (Section 106.46)
 - Equitable access to relevant and not otherwise impermissible evidence **or** written report summarizing evidence
 - Process to assess credibility of parties and witnesses, either through:
 - Cross-examination by party advisor during live hearing; or
 - Posing of relevant questions (including questions proposed by parties) by decision-maker in meeting or live hearing

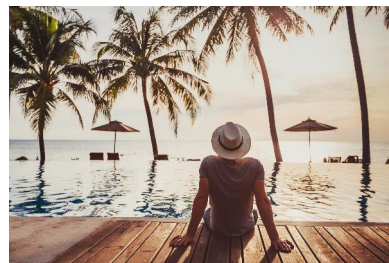
Proposed Regulations – Key Highlights

- Prohibition on adopting policies/practices that prevent students from participating in institution’s education program or activity consistent with their gender identity.
- Gender identity and athletic participation not addressed in proposed regulations.
 - Department of Education plans to issue separate NPRM (expected May 2023) to address question of what criteria, if any, institutions should be permitted to use to establish students’ eligibility to participate on particular male or female athletic team.



Preparation Tips

- Set aside time over the summer to revise policies/procedures.
- Determine what policies/procedures will need to be modified.
 - Sex-based misconduct policy and procedures
 - Discrimination policy and procedures?
 - Students?
 - Employees?

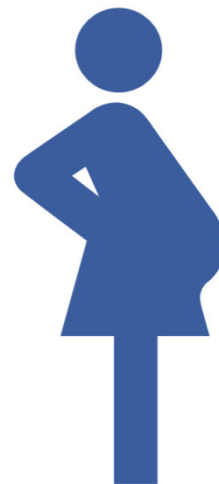


Preparation Tips



- Evaluate Title IX staffing options.
 - Fewer complaints going through dual grievance procedures (106.45 and 106.46)
 - But broader scope of what conduct is covered under Title IX regulations
- Anticipate that Title IX team members will likely need to undergo supplemental training.
- Don't panic!

Accommodating Pregnant and Lactating Students



Section 504/ADA

- Pregnancy itself is not a physical or mental impairment under Section 504 or the ADA.
- **But** complications associated with pregnancy may constitute a temporary disability for purposes of ADA/Section 504 eligibility if the complications substantially limit one or more major life activities for an extended period of time.



Title IX

- No application of rules concerning actual or potential parental, family, or marital status that treat students differently based on sex.
- No discrimination, harassment or exclusion of a student based on student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless student requests voluntarily to participate in separate portion of program or activity.



Title IX

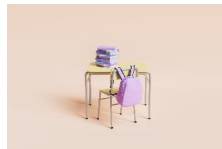


- College may require pregnant student to obtain medical certification of physical/emotional ability to participate only if such certification is required of all students with physical or emotional conditions requiring attention of a physician.
- College must allow leaves of absence due to pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom for period of time deemed “medically necessary” by student’s physician.
 - Following leave, student must be reinstated to pre-leave status.
 - College may offer alternatives to making up missed work, such as retaking a semester, participating in online course credit recover program, or allowing student additional time in the program to continue at same pace and finish at later date. Student should be allowed to choose how to make up the work.



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FAQs



- **Can an institution require a pregnant student to obtain a doctor’s permission before allowing the student to attend school late in her pregnancy if the institution is worried about the student’s health or safety?**
 - No, unless same requirement to obtain a doctor’s note applies to all students being treated by a doctor.
- **What types of assistance must institutions provide to pregnant students?**
 - Adjustments to regular program that are reasonable and responsive to student’s temporary pregnancy status.
 - Examples: larger desk, allowing more frequent restroom trips, temporary access to elevators.

*From *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*, U.S. Department of Education Office for Civil Rights (June 2013).



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FAQs

- **Are institutions required to provide special services to pregnant students?**
 - Institutions must provide the same special services to pregnant students that they provide to students with temporary medical conditions.
 - Examples: online instruction, tutoring.
- **What if some faculty members or academic programs have their own policies about class attendance and make-up work?**
 - Institutions must ensure that policies and practices of individual faculty and programs do not discriminate against pregnant students.
 - Institutions should ensure that all faculty and program administrators are aware of and follow Title IX requirements.

*From *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*, U.S. Department of Education Office for Civil Rights (June 2013).



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Proposed Title IX Regulations



- When student notifies college employee of student's pregnancy or related condition, employee must notify student that they may inform the Title IX Coordinator and must provide student with Title IX Coordinator's contact information.
- After receiving notice of student's pregnancy or related condition, Title IX Coordinator must:
 - Notify student of institution's obligations concerning pregnancy and related conditions
 - Provide voluntary reasonable modifications
 - Allow voluntary leave of absence for medical reasons and reinstatement upon return
 - Provide clean, private space for lactation



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Proposed Title IX Regulations

- Pregnant employees must be provided with (a) reasonable break time for lactation and (b) clean and private lactation space.
 - Already required in Illinois pursuant to Nursing Mothers in the Workplace Act (820 ILCS 260/1 et seq.).
 - See also sections (I) and (J) of Illinois Human Rights Act (775 ILCS 5/2-102(I)-(J)).



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Tips and Recommendations

- Review existing policy/procedures governing student leave to ensure compliance with Title IX.
- Review process for evaluating student requests for pregnancy-related accommodations.
- Assess existing employee lactation spaces and formulate plan for potential expansion to include students.



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Mental Health Funding



Mental Health Early Action on Campus Act

110 ILCS 58/1 et seq.

- Passed in 2019 and went into effect July 1, 2020.
- Previous unfunded.
- In January 2023, Governor Pritzker signed into law P.A. 102-1122, which provides \$9 million in supplemental appropriations to Illinois higher education institutions for administration of MHEACA.
- Allocations were based on institutions' survey submissions to Commission on Government Forecasting and Accountability and are for utilization in FY 2023.

Mental Health Early Action on Campus Act

110 ILCS 58/1 et seq.

- Key requirements fall under 6 main categories:



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Mental Health Early Action on Campus Act

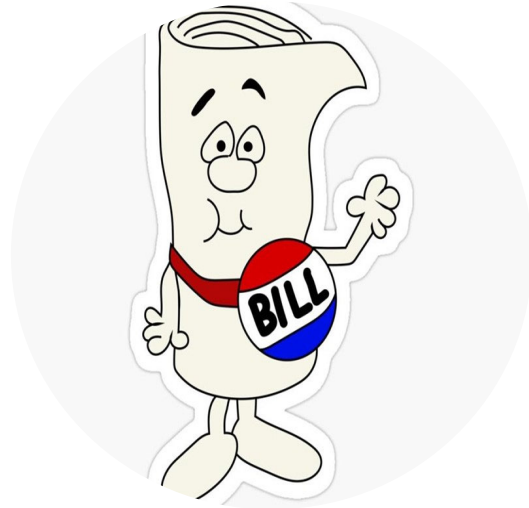
110 ILCS 58/1 et seq.

- Implementation considerations:
 - Funding beyond 2023 is not guaranteed, but State mental health advocates have indicated that they will seek renewed funding each year.
 - Some requirements (i.e., adoption of standardized policies and procedures) are dependent on action by IBHE Technical Assistance Center.
 - Not all requirements necessitate direct funding.



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Other Legislative Updates



CROWN Act (Public Act 102-1102) Eff. 1/1/2023

- Broadens Illinois Human Rights Act's definition of "race" to include "traits associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists."
- Unlawful discrimination against a person because of their "actual or perceived race" includes discrimination based on hair texture or hairstyle.
- Institutions should review policies and procedures governing employee appearance and grooming, as well as any appearance-related guidelines for students participating in clinical/specialty programs, to verify compliance with the Act.

Public Act 102-1102 – IHRA and Places of Education Eff. 1/1/23

- Modifies IHRA’s language conferring jurisdiction on Illinois Department of Human Rights (“IDHR”) to investigate and resolve discrimination charges brought against places of education, including public colleges and universities.
- New language provides that IDHR has jurisdiction over the “denial or refusal of the full and equal enjoyment” of the facilities, goods, or services of a school (elementary, secondary, undergraduate, or postgraduate), non-sectarian nursery, day care center, or other place of education.
- Previously, language reflected that IDHR’s jurisdiction was limited to the “denial of access” to a place of education’s facilities, goods, or services.
- With this amendment, Illinois legislature has made clear that the IHRA recognizes a broad right to the full and equal enjoyment of educational institutions’ facilities, goods, and services, consistent with the scope of rights recognized for other places of public accommodation.



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Public Act 102-861 – Abused and Neglected Child Reporting Eff. 1/1/23

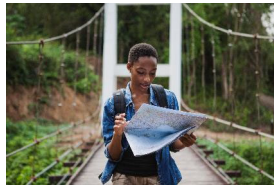
- Expands ANCRA’s list of mandated reporters to specifically include athletic trainers, physical therapists, physical therapy assistants, occupational therapists, and occupational therapy assistants.
- ANCRA already includes employees of higher education institutions in its list of mandated reporters who must contact DCFS when they have reasonable cause to believe that a child they know in their professional or official capacities may be an abused or neglected child.
- Colleges that contract with third-party agencies to fill athletic department or other positions should be aware that third-party contractors, even if not considered college employees, may nonetheless have mandatory DCFS reporting obligations while engaged in a professional capacity at a college if they fall under one of the newly included categories of mandated reporters under ANCRA.



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Public Act 102-1045 – Benefits Navigator Eff. 1/1/23

- Requires each public university and community college in Illinois to designate a “benefits navigator” to assist students in identifying and applying for benefit programs and campus-wide and community assistance programs for which they are eligible.
- A “benefit program” is defined by the Act as “any federal, state, or local program that provides assistance or benefits to individuals on the basis of need.”



Public Act 102-1045 – Benefits Navigator Eff. 1/1/23 (cont'd.)

- Benefits navigator must assist in coordinating and providing culturally specific resources, including resources for non-English speakers, to help support students.
- Each public college and university is required to participate in a statewide consortium, to be overseen by the IBHE (for universities) and ICCB (for community colleges), for the purpose of sharing information and best practices for helping students apply for and receive assistance from benefit programs.
- While many institutions already maintain a centralized office or department to coordinate need-based assistance and benefits for students, the Benefits Navigator Act aims to ensure that all students have access to a designated on-campus point person to help them seek and apply for qualified benefits, which in turn will afford students the tools and resources they need to successfully reach their educational goals.



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THANK YOU

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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily 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 defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before 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.



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

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

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

ADMITTED TO PRACTICE

U.S. Court of Appeals for
the Seventh Circuit

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

Supreme Court of Illinois

ORGANIZATIONS

Trustee, Associated
Colleges of Illinois

Chicago Bar Association

Illinois Council of School
Attorneys

National Council of School
Attorneys

RECENT PUBLICATIONS

“College Admissions Under Fire as Top Court Takes Affirmative Action Case,”
Chicago Daily Law Bulletin (2022)

“Disabled Athlete Can’t Support ADA Claims,” *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023)

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)

Preparing for Implementation of the New Title IX Regulations: Recommendations for Human Resources Professionals, Illinois Association of School Personnel Administrators (November 2020)

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)

