



Robbins Schwartz
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Unpacking the 2024 Title IX Regulations: A Webinar for Higher Education Institutions

Webinar
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Background on 2024 Regulations



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How Did We Get Here?



- Record-breaking 240,000 comments
- Final Regulations were expected in May 2023... then October 2023... then January 2023...then March 2023...

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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.

Finally!

- Final Regulations issued on April 19, 2024.
 - 1,561-page document consists of 1,504 pages of Preamble and 57 pages of actual Regulations.
 - Regulations go into effect on **August 1, 2024**. But note:
 - 2024 Regulations apply to incidents occurring **on or after August 1, 2024**
 - Incidents occurring **before August 1, 2024** must be resolved using current (2020) Regulations
- ...regardless of when the incident is reported.*



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Unpacking the 2024 Regulations



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Scope of Prohibited Conduct: Sex Discrimination

§ 106.10

- Includes discrimination based on:
 1. Sex stereotypes
 2. Sex characteristics
 3. Pregnancy or related conditions
 4. Sexual orientation
 5. Gender identity



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Gender Identity

§ 106.31(a)(2)

- Prohibition on adopting policies/practices that **prevent a person from participating** in institution's education program or activity **consistent with their gender identity**.

person- anyone participating in a college event:
visitors, applicants, students, staff,
volunteers, etc



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Scope of Prohibited Conduct: Sex-Based Harassment § 106.2

- Includes:
 - Quid pro quo harassment
 - Hostile environment harassment
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking



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Types of Sex-Based Harassment

§ 106.2

Quid Pro Quo

When an **employee, agent, or other person** authorized by the institution to provide an aid, benefit or service **explicitly or implicitly** conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct.

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Types of Sex-Based Harassment

§ 106.2

Hostile Environment

Unwelcome sex-based conduct that, based on the totality of the circumstances, is **subjectively and objectively** offensive and is so severe **or** pervasive that it **limits or denies** a person's ability **to participate in or benefit from** the recipient's education program or activity.



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Jurisdiction

§ 106.11

- Conduct that occurs under an institution's education program or activity:
 - Conduct that occurs in any building owned or controlled by an officially recognized post-secondary student organization.
 - Conduct that is subject to the institution's disciplinary authority.



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Jurisdiction

§ 106.11

An institution has an obligation to address a sex-based **hostile environment in its education program or activity in the United States**, even where the sex-based harassment contributing to the hostile environment occurred outside the education program or activity or outside the U.S.



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Other Key Terms

Complainant

Complaint

Knowledge

Peer
Retaliation



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Employee Notification Requirements

§§ 106.44(c)(2)(i)-(ii) & 106.44(d)(2)

Employee Category	Requirement
Any employee who is not a confidential employee and who either has authority to institute corrective measures or has responsibility for administrative leadership, teaching, or advising	Notify TIXC
All other employees except confidential employees	Notify TIXC or provide TIXC contact information and information about how to make a complaint
Confidential employees	Explain confidential status, how to contact TIXC and make a complaint, and that TIXC may be able to offer and coordinate supportive measures, as well as initiate informal resolution process or investigation under grievance procedures



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Title IX Coordinator Response Obligations

§ 106.44(f)

Title IX Coordinator must take the following steps upon being notified of conduct that reasonably may constitute sex discrimination:

- | | |
|--|---|
| (1) Treat complainant and respondent equitably. | (5) In response to a complaint, initiate grievance procedures or informal resolution process. |
| (2) Offer and coordinate supportive measures to complainant and respondent. | (6) In absence of complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination. |
| (3) Notify complainant of institution's grievance procedures and informal resolution process, if any. | (7) If the Title IX Coordinator initiates a complaint, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others. |
| (4) If complaint is made, notify respondent of grievance procedures and notify parties of informal resolution process, if any. | (8) Regardless of whether a complaint is initiated, take other prompt and effective steps to ensure that sex discrimination does not continue to recur, in addition to providing remedies. |



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Supportive Measures § 106.44(g)

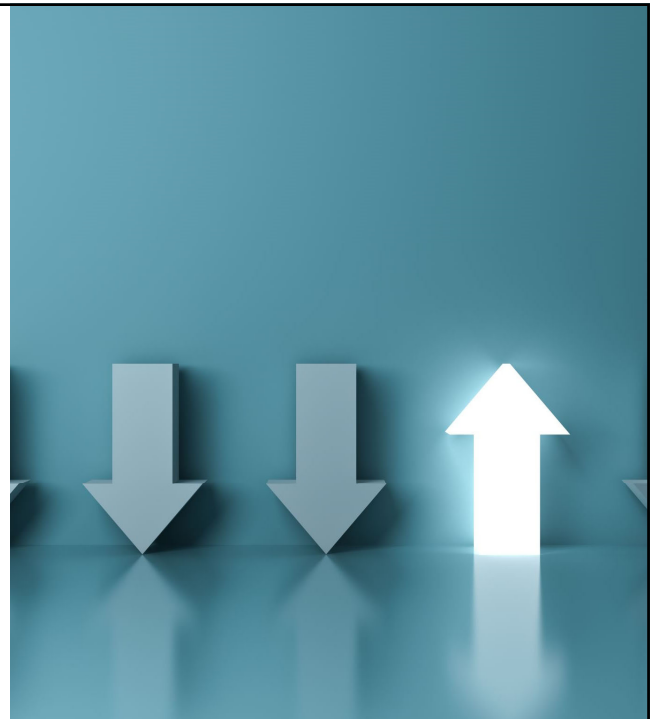
- May not unreasonably burden either party and must be designed to:
 - Protect the safety of the parties;
 - Protect the recipient's educational environment; and/or
 - Provide support during the recipient's grievance procedures or informal resolution process.
- May not be imposed for punitive or disciplinary reasons.
- Includes restrictions on contact applied to **one or more parties and changes** in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative.**



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Supportive Measures § 106.44(g)

- May be modified or terminated at conclusion of resolution process.
- Either party may challenge any decision to provide, deny, modify or terminate supportive measures applicable to that party.
- Challenge must be reviewed by impartial employee with ability to modify or reverse original decision.



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Informal Resolution

§ 106.44(k)

- Permitted whenever institution receives complaint of sex discrimination **or has information about** conduct that reasonably may constitute sex discrimination under Title IX.
- Participation must be voluntary.
- Institution cannot require parties to waive right to investigation and determination as condition on participation in informal resolution.
- Not permitted in **K-12** employee-on-student cases.

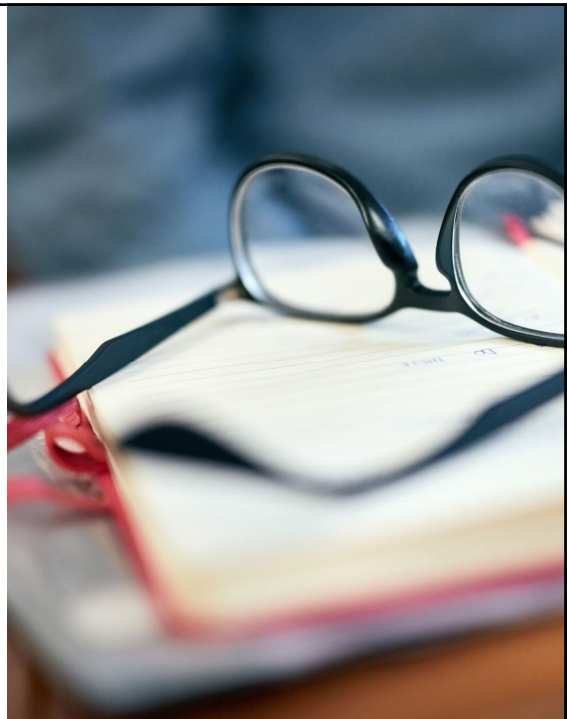


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Grievance Procedures

§§ 106.45 & 106.46

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



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Grievance Procedures

§§ 106.45 & 106.46

- General requirements:
 - Equitable treatment of both parties
 - No conflicts of interest or bias
 - Presumption of non-responsibility
 - Reasonably prompt timeframes
 - Reasonable steps to protect privacy of all parties
 - Objective evaluation of evidence
 - For sex-based harassment complaints, description of range of supportive measures and list/description of range of possible disciplinary sanctions.
- Decisionmaker may be the same person as Title IX Coordinator or Investigator



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Grievance Procedures

§§ 106.45 & 106.46

- Confidentiality
 - Institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.



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§ 106.45 Procedures

- Notice of allegations
 - Not required to be in writing
 - Must be amended if new allegations are made or allegations are dismissed
 - Must include:
 - Grievance procedures
 - Informal resolution process, if any
 - Identities of parties
 - Description of alleged conduct, including dates and locations (if known)
 - Prohibition on retaliation
 - Equal opportunity to access relevant evidence or description of relevant evidence



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§ 106.45 Procedures

- Dismissals permitted (but not required) when:
 - Institution unable to identify respondent after taking reasonable steps to do so
 - Respondent no longer enrolled in or employed by institution
 - Complainant voluntarily withdraws any or all complaint allegations
 - Alleged conduct would not constitute sex discrimination, if proven
- Either party may appeal dismissal decision.
- Appellate decisionmaker must not have had prior involvement in investigation or dismissal.



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§ 106.45 Procedures

- Consolidation of complaints permitted
- Investigation must be adequate, reliable and impartial
- Burden is on institution to investigate and gather sufficient relevant evidence



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§ 106.45 Procedures

- Must provide equal and reasonable opportunity for parties to:
 - Provide fact witnesses and evidence
 - Access relevant and not otherwise impermissible evidence
 - Respond to evidence gathered
- Must include process that enables decisionmaker to assess credibility of parties and witnesses when relevant.

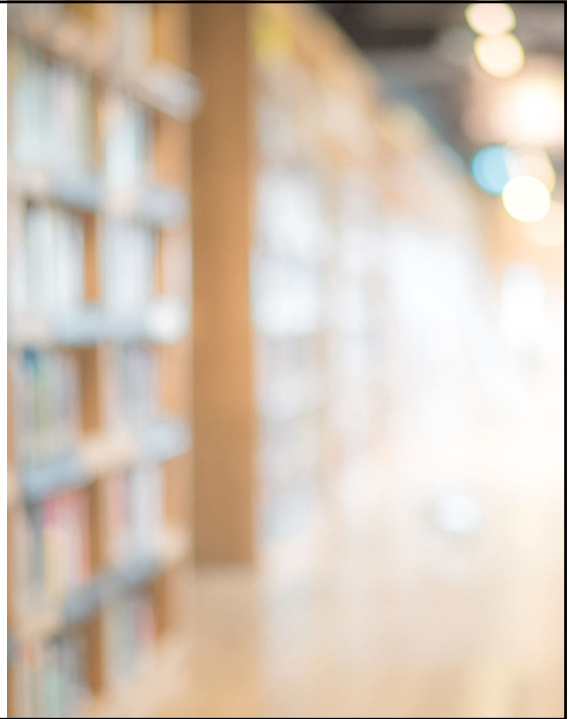
Not required to but recommend a
summary of the investigation of the
relevant information



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§ 106.45 Procedures

- Written determination
 - Preponderance of the evidence standard
 - Rationale for determination
 - Procedures and permissible bases for appeal
 - Disciplinary sanctions (must notify complainant) and remedies



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§ 106.46 Procedures

- Notice of allegations
 - Must be in writing and give parties sufficient time to prepare response before any initial interview
 - Must include everything in 106.45, **plus**:
 - Presumption of non-responsibility
 - Right to advisor of party's choosing
 - Equal opportunity to access relevant evidence or investigation report
 - Prohibition on knowingly making false statements or providing false information, if applicable



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§ 106.46 Procedures

- Other required elements:
 - Written notice of allegations, dismissals, delays, meetings, interviews, and proceedings
 - Equal opportunity to have advisor of party's choice at any meeting or proceeding
 - Equitable access to relevant and not otherwise impermissible evidence **or** to written report summarizing evidence
 - Opportunity to respond to evidence/report
 - Reasonable extension of timeframes on a case-by-case basis with good cause



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§ 106.46 Procedures

- Must include process for assessing credibility of parties and witnesses.
- Two options:
 - 1) Live hearing with cross-examination by advisors; OR
 - 2) Questioning by investigator/decisionmaker during individual meetings, with opportunity for parties to suggest questions of other party and witnesses.



ON AIR

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§ 106.46 Procedures

- Simultaneous written notice of determination
- Determination becomes final either on date institution provides parties with appeal determination or, if no party appeals, date on which appeal would no longer be considered timely.
- Must allow appeals based on (at a minimum):
 - Procedural irregularity that would change the outcome
 - New evidence that would change the outcome and was not reasonably available at time of initial determination/dismissal
 - Conflict of interest or bias on part of Title IX Coordinator, investigator, or decisionmaker that would change the outcome



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Pregnancy or Related Conditions – Students

§ 106.40

- When student notifies employee of student's pregnancy or related condition, employee must notify person that they may inform TIXC and must provide TIXC's contact information.
- After receiving notice of student's pregnancy or related condition, TIXC 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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Pregnancy or Related Conditions – Employees

§ 106.57

- Comparable treatment to other temporary medical conditions for all job-related purposes
- Voluntary leaves of absence
- Reasonable break time for lactation and clean and private lactation space



Training Requirements

§ 106.8(d)

- All employees must receive training upon hiring, upon change of position that alters their duties under Title IX, and annually. Training must cover, at a minimum:
 - Institution's obligation to address sex discrimination in its education program or activity
 - Scope of conduct that constitutes sex discrimination
 - Applicable notification requirements
- Other training requirements largely mirror 2020 Regulations.

Final Dos and Don'ts

- Don't
 - Panic!
 - Throw away your 2020 Title IX policy and procedures.
 - Wait until August (or even July) to start on your Title IX implementation checklist.
- Do
 - Determine who will oversee your institution's preparation and compliance efforts.
 - Develop a plan and timeline for updating policies and procedures and providing training to employees.
 - Designate key players for grievance procedures.
 - Utilize external resources as a guide.



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Coming Soon from Robbins Schwartz

Policy and
Procedure
Templates

Trainings

Updated Title IX
Toolkit



To receive Title IX updates and other legal development alerts from Robbins Schwartz, sign up for our newsletter by emailing marketing@robbins-schwartz.com.



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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
Washington University
Law School

B.S., *cum laude*,
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ADMITTED TO PRACTICE

U.S. Court of Appeals for
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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)



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Holly counsels employers on many aspects of labor and employment law, including employee discipline, internal investigations, federal and state employment discrimination matters, labor relations, and Title IX investigations and compliance. She represents both private and public sector employers and advises school districts, municipalities, and institutions of higher education.

Prior to joining Robbins Schwartz, Holly clerked at a private higher education firm, interned with the Equal Employment Opportunity Commission and Chicago Public Schools, and served as a judicial extern for the Honorable Judge Virginia M. Kendall of the United States District Court for the Northern District of Illinois. She received her Juris Doctor from Loyola University Chicago, where she also completed a master's degree in Cultural and Educational Policy Studies. Her master's thesis focused on legal reparations and decolonization efforts regarding Indigenous boarding schools in Canada and the United States. During law and graduate school, she served as the Editor-in-Chief of the Loyola International Law Review, and published articles at Loyola University Chicago and Columbia University. Prior to law school, Holly taught English as a Second Language in Nordhorn, Germany.

Holly is a member of the American Educational Research Association, which is a national research society dedicated to advancing knowledge about education and promoting the use of research to improve education and serve the public good. She was selected as a peer reviewer for research paper submissions to AERA's 2024 Annual Meeting.

AWARDS

American Educational Research Association - selected reviewer for submissions to AERA 2024 Annual Conference; Panels reviewed: De/Colonization and Transformative Curriculum Studies; Legal and Judicial Issues for Equity and Access; Decolonial, Postcolonial, and Anti-Colonial Studies in Education; Indigenous Peoples of the Americas; and Law and Education.

RECENT PUBLICATIONS

Jacobs. H (2023). Decolonizing a Settler Colonial State: How Canada and the United States Have Approached Investigations into Indigenous Boarding and Residential Schools



PRACTICE AREAS

Labor & Employment

EDUCATION

J.D., *cum laude*, Loyola University Chicago

M.A., Loyola University Chicago

B.A., *magna cum laude*, University of Montana

ADMITTED TO PRACTICE

Supreme Court of Illinois

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Member, American Educational Research Association

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Michael A. Barracato is an Associate within the Student Related Issues group at Robbins Schwartz. His commitment to making a difference is reflected in his dedication to serving clients and upholding the principles of justice and equity. Michael's journey into the legal profession has been shaped by his unique background and experiences.

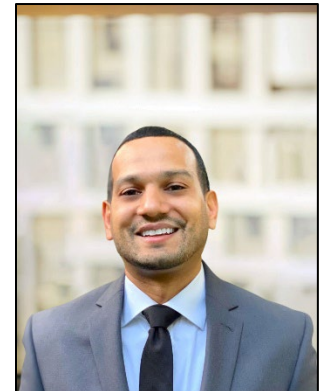
As an attorney, Michael excels in crafting creative solutions to intricate legal problems. His background in education has equipped him with a unique perspective and insight into the intersection of education and law. He is committed to providing knowledgeable and empathetic advocacy for educational institutions, families, and students.

Michael's strengths as an attorney include his ability to navigate complex educational regulations, handle disciplinary proceedings, and ensure the rights of students and staff are upheld. His innovative approach to problem-solving has led to successful outcomes for his clients.

Michael's career path was inspired by his firsthand experience with the impact of legal issues on educational settings. Motivated to merge his knowledge of educational systems with legal advocacy, he pursued a career in law. Michael's decision to specialize in educational law was driven by his desire to address the unique challenges faced by schools, students, and families.

Prior to embarking on his legal career, Michael served as an Assistant Principal, where he navigated a wide range of issues, from student discipline to staff management. Through this role, Michael gained invaluable experience in critical thinking, conflict resolution, and effective communication. His experience provided him with a deep understanding of the complexities of educational environments, preparing him to handle diverse client needs with empathy and expertise. These skills have been instrumental in his transition to the legal field.

Michael's upbringing in New York's diverse cultural landscape has instilled in him a deep appreciation for various perspectives and backgrounds. This diversity informs his legal practice, particularly in education law, where inclusivity and understanding are paramount.



PRACTICE AREAS

Student Related Issues

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J.D., The John Marshall
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ADMITTED TO PRACTICE

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ORGANIZATIONS

American Bar Association

Chicago Bar Association