



# INTERESTED PERSONS' SYMPOSIUM: THE ROLE OF THE UNIVERSITY IN THE TITLE IX RULEMAKING PROCESS

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## AGENDA

01. Introduction

02. Title IX and Trump-era Rules

03. Biden Administration

04. Federal Rulemaking Process

05. Breakout Sessions





# **01 INTRODUCTION**



## TITLE IX & INSTITUTIONAL RESPONSE PRACTICE GROUP



- MMWR's Title IX & Institutional Response Practice Group provides wrap-around crisis management services to our clients in the public and private college and university settings.
- We handle all aspects of Title IX, VAWA & Clery Act policy preparation, compliance guidance, reporting, training, investigations, advising, and adjudication.
- MMWR's Title IX & Institutional Response Team offers a collaborative process for policy audit and drafting, as well as continuing education training and materials as required for both publication to institutions' website and in-person training. Our policy audits offer a valuable supplemental resource to an institution, including auxiliary audit services to ensure internally drafted policies are procedurally and substantively consistent with both current regulations and the institution's core beliefs.
- We also edit and review Code of Conduct policies and grievance procedures outside of the presently promulgated regulations.





## Ashley R. Lynam

Co-Chair, Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

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Ashley R. Lynam has considerable experience in the analysis, implementation and evaluation of written sexual assault and molestation policies and procedures, as well as the proactive investigation of alleged sexual assault and representation of corporate representatives, current and former employees and independent contractors, and other witnesses for deposition and trial.

She also provides wrap-around crisis management services to clients in the public, private, college and university setting, specializing in VAWA and Clery Act compliance as well as investigating, adjudicating, and advisory services under Title IX and student conduct policies. Ashley is certified by the SUNY Student Conduct Institute.

Ashley also has extensive experience in rapid-response investigations for catastrophic and high-exposure losses as well as intensive special investigations of fraudulent claims and misconduct.





## Kacie E. Kergides

Associate, Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

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Kacie E. Kergides concentrates her practice on Title IX investigations and advising, institutional response to sex and/or gender-based harassment and misconduct and the adjudication of student, employee and management disputes, and sports injury cases including traumatic brain injury (TBI) litigation. In addition to handling investigations and litigation in both practice areas, Kacie counsels athletes, schools, and sports organizations on sports-related injuries such as concussion and TBI, provides guidance on the management of sport-related injuries and Title IX complaints, and advises these institutions on minimizing and managing risk.

Kacie has recently presented on recent federal changes to Title IX regulations and the specific role of advisor in the institutional setting. Kacie has also presented on minimizing risk exposure and compliance-related issues at various law schools and undergraduate universities including Villanova School of Law and the University of Michigan, and before various sports organizations, including the Eastern Athletic Trainers' Association.





**02**

# TITLE IX AND TRUMP- ERA RULES



# TITLE IX AND TRUMP-ERA RULES: MAJOR CHANGES



**ADVISOR  
ROLE**



**CROSS-  
EXAMINATION**



## THE FINAL RULE § 106.45(b)(5)(iv)

### *Investigation of a Formal Complaint*

A recipient must provide the parties with the same opportunities to have others present during any grievance proceeding, **including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor** for either the complainant or respondent in any meeting or grievance proceeding; however, **the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties**



***“THE ROLE OF AN ADVISOR IS TO ASSIST AND ADVISE THE PARTY.”***

**“The final regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors.” 85 Fed. Reg. 30254, n. 1041**

- No prohibition of conflict of interest or bias
- No training requirement for advisors
- A party is not precluded from selecting an advisor who may be a witness



## THE FINAL RULE § 106.45(b)(6)(i) *Hearings*

For postsecondary institutions, the recipient's grievance process must provide for a **live hearing**. At the live hearing, **the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility**. Such **cross-examination** at the live hearing must be conducted directly, orally, and in real time **by the party's advisor of choice** and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings ... **If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party...**



## CROSS-EXAMINATION

- A party does not have a right to “self representation” → rather **any and all cross-examination must be conducted by an advisor**
- Final Rule §106.45(b)(6)(i) allows advisors to “ask the other party and any witnesses all **relevant questions and follow-up questions**, including those challenging credibility”
- Cross-examination must be conducted “**directly, orally, and in real time**” by the advisor and **never by the parties**.
- “Cross-examination “on behalf of a party” need not mean more than relaying that party’s questions to the other parties and witnesses. That function could therefore equate to serving as a party’s proxy, or advocating for a party, or neutrally relaying the party’s desired questions; this provision leaves recipients and assigned advisors wide latitude in deciding how to fulfill the role of serving as an assigned advisor.”





**03** **BIDEN  
ADMINISTRATION**

# Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

MARCH 08, 2021 • PRESIDENTIAL ACTIONS

**“All students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination on the basis of sexual orientation or gender identity.”**



## REVIEW OF AGENCY ACTIONS

- *The Secretary of Education in consultation with the Attorney General shall, **within 100 days**, review existing regulations and guidance that are inconsistent with the Administration's policies;*
- *As a part of that review, the Secretary of Education shall review the Trump Administration's Title IX Rule and related guidance for consistency with governing law;*
- *The Secretary of Education shall consider suspending, revising, or rescinding – or publishing for notice and comment proposed rules for suspending, revising or rescinding, agency actions inconsistent with the Administration's stated objectives.*
- *The Secretary of Education shall consider additional enforcement actions to ensure protections are in place to prohibit discrimination against students who identify as LGBTQ+.*





**04**

# **FEDERAL RULEMAKING PROCESS**





# FEDERAL RULEMAKING PROCESS



# INTERESTED PERSONS

The agency must then allow “interested persons an opportunity” to comment on the proposed rule. Typically, an agency will provide at least 30 days for public comment. The agency is required to review the public comments and respond to “significant” comments received, and it may make changes to the proposal based on those comments.



**Question & Answer Portion:**

**Use Chat Box or Text Ashley at 215-932-0400**

