

#aiTIXAdvInvestigator



# Advanced Title IX Investigator Training and Certification

June 24 - 26, 2020



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## ADVANCED TITLE IX INVESTIGATOR TRAINING AND CERTIFICATION

**Jean M. Hobler, J.D.**  
Owner | Jean M. Hobler, Esq., APC

**Jill M. Thomas, J.D.**  
Educator and Consultant

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## NEW REGULATIONS AND THE TITLE IX INVESTIGATION PROCESS



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### AGENDA

Review of the new Title IX regulations regarding investigation process

Address gaps in the new law that could impact the way investigations are facilitated



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## NEW REGS

# TITLE IX

- Overarching summary - a neutrally trained investigator must gather relevant evidence, including exculpatory and inculpatory (but not privileged material unless consent), and fairly summarize the case in a report
- Investigator training [*§106.45(b)(1)(3)*]
- Conflict of interest and bias [*§106.45(b)(1)(iii)*]
- “Not Responsible” Presumption [*§106.45(b)(1)(iv)*]
- Medical records [*§106.45(b)(5)(i)*]

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## NEW REGS

# TITLE IX

- Focus is “equity” for both parties.
- Advisor of choice [*§106.45(b)(3)(iv)*]
- Equal opportunity to present witnesses and offer information inculpatory and exculpatory info [*§106.45(b)(5)(ii)*]
- No gag orders on parties; ability to gather and present relevant information [*§106.45(b)(5)(iii)*]
- Legal privileges; waiver [*§106.45(b)(1)(x)*]
- Right to inspect, review, access, and respond to information [*§106.45(b)(3)(vi)*]

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## NEW REGS

# TITLE IX

➤ **Written** communication will also be required throughout:

➤ (v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate

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## NEW REGS

### Inspection of Evidence (vi):

**WHAT** Equal opportunity to inspect and review any evidence

- inculpatory or exculpatory evidence whether obtained from a party or other source

**WHY** Each party can meaningfully respond to the evidence prior to conclusion of the investigation.

**WHEN** Prior to completion of the investigative report...the parties must have at least 10 days to submit a written response

**WHO** Send evidence to each party and advisor, if any

**HOW** electronic or hard copy

**PURPOSE** the investigator will consider prior to completion of the investigative report

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## THE INVESTIGATIVE REPORT [§106.45(b)(3)(vii)]

- Must fairly summarize relevant info
- AGAIN - Must be sent to both parties and advisors at least 10 days prior to scheduled hearing or time of determination regarding responsibility
- AGAIN - Must be in electronic format or hard copy
- AGAIN - Allows for both parties to review and/or provide written response

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## Case law DOE v. USC - 2018



No fair hearing because 3 key witnesses not interviewed



No ability to assess credibility



University's procedures for hearing weren't followed



Failed to request tangible, available evidence

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## CASE LAW DISCUSSED IN THE NEW REGULATIONS

DOE v. U of Cinn – 6<sup>th</sup> Cir.  
2017

“In the case of competing narratives, ‘cross-examination has always been considered a most effective way to ascertain truth.’”



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## CASE LAW DISCUSSED IN THE NEW REGULATIONS



DOE v. Baum – 6<sup>th</sup> Cir. 2018



“...where university Title IX sexual misconduct proceeding turned on credibility of parties, the university must provide a hearing with opportunity for parties to cross-examine each other.”



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## REASONABLE PERSON



...a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence) (m-w.com)

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## CHAT

**What gaps have you found in the new regulations regarding investigations?**

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## RESOURCE

### Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



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## QUESTIONS



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