



Weighing the Evidence in Sexual Violence Cases

**Bricker
Graydon**
Title IX In Focus
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**Bricker
Graydon**



- Melissa is based in Columbus, Ohio and Kylie is based in Quantico, Virginia
- Both are experienced Title IX investigators and decision-makers
- Both also regularly provide legal advice to institutions of higher education regarding Title IX compliance
- Both will be part of our presentation team on a free webinar later this afternoon regarding the new Title IX regulations – 3:00 p.m. ET. Register at www.brickergraydon.com/events

Disclaimers



We can't help ourselves. We're Lawyers.

- We are not giving you legal advice
- Consult with legal counsel regarding specific situations
- You should have received slides for today's presentation
 - If not, watch for a "Thank you for attending" email that will have the slides attached.

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And another one...



Specific to the Title IX In Focus Webinar Series

- The 2020 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss *some* of the required subject matter, none of these one-hour webinars will cover *all* of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

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But Wait, There's More!



Those 2024 Regulations are now out, effective August 1, 2024.

- What we are discussing today is applicable under both the 2020 and 2024 regulations, as well as any other disciplinary process at your institution.
- In other words, you can use these concepts to help train your student conduct administrators, human resource professionals, and anyone else that is investigating allegations of misconduct and making decisions about whether a policy violation occurred.

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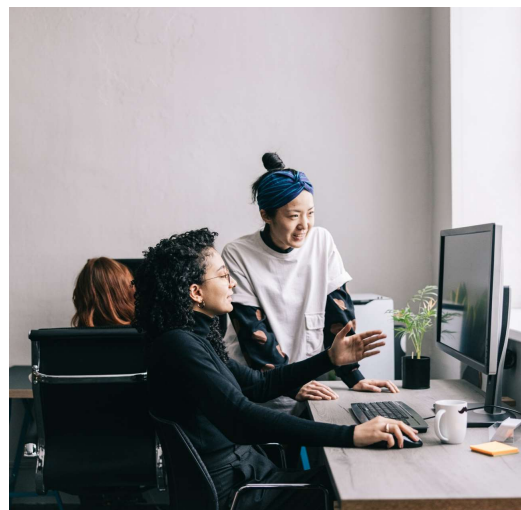
Can We Post These Materials?

YES – Post away!



Institutions subject to Title IX are currently required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.

As of August 1, 2024, posting will be optional but training materials must be provided upon request, so keep this handy.



Agenda



- What is credibility?
- Demeanor evidence
- Elements of credibility
- Checking for bias
- Weighing the evidence

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When is credibility at issue? 2024 Preamble



“The Department **cannot opine on the percentage** of sex discrimination complaints on which credibility is at issue. ... At least one Federal court has recognized that credibility disputes may be **more common in sexual assault or harassment cases** than other types of cases that recipients handle. *See Univ. of Cincinnati*, 872 F.3d at 406.” (2024 regs, page 844)

Also, “The Department **declines to define credibility**, but notes that at least one Federal court has explained that cases in which credibility is in dispute and relevant to evaluating the allegations of sex discrimination would include those in which the recipient’s determination relies on testimonial evidence, including cases in which a recipient ‘has to **choose between competing narratives** to resolve a case.’ *Baum*, 903 F.3d at 578, 584.” (2024 regs, page 844)

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Judges vs. Machines



- If you haven't read *Talking to Strangers*, by Malcolm Gladwell, please check it out.
- Chapter Two tells a fascinating story about bail hearings, and whether judges or computers were better able to predict who to release on bail without additional crimes being committed.
- Of the 1% of defendants flagged as "high risk" by the computers, the judges released 48.5% of them on bail!
- What is the difference? Demeanor.

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The Trouble with Demeanor



- Demeanor is made up of the non-verbal observations of an individual.
 - Are they refusing to make eye contact?
 - Are they laughing inappropriately?
 - Do they fidget in their seat?
- Demeanor cues are processed according to cultural and societal expectations, myths about truthfulness, and other subjective "rules" to determine whether someone is being honest.
- Demeanor is not evidence. It's a clue to ask more questions.

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Do You Write Demeanor Down?



- What if a party asks for repeated breaks and goes off camera after critical questions have been asked?
- What if a party asks to consult with their advisor after critical questions have been asked?
- What if a party stares at you for a full five minutes in silence before answering a question?
- What if a party begins crying or stuttering at a certain party of their story?
- Should these things be recorded, and if so, how?

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What goes into Credibility?



- 2001 Revised Sexual Harassment Guidance (withdrawn) – page 9
 - Level of detail and consistency
 - Corroborative evidence is lacking where it should logically exist
 - Evidence that the respondent has been found to have harassed others
 - Evidence that the complainant has been found to have made false allegations against other individuals
 - Reaction after the incident
 - Complainant took steps to report the conduct soon after
 - Complainant writes down the conduct soon after it occurred
 - Complainant tells others about the conduct soon after it occurred

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Boiling it Down



- **Plausibility** – Is the story possible, accounting for potential effects of trauma?
- **Consistency** – Is the story consistent over multiple retellings?
- **Reliability** – Was the person in a good position to witness what they are sharing, and to remember it accurately?

Credibility is a determination that can be made statement by statement.
It is not necessary to call someone a liar to make a credibility determination.

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Plausibility



- This is foundational. If it's not plausible, it can't be credible.
- Consider:
 - Body positions, relative height/weight
 - Distribution of body weight
 - Transition from one position to the other
 - Who was in control of the rhythm and movement
- Does it make sense, accounting for potential trauma? If not, is there anything that would make it make sense?

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Plausibility – Bias Check



- “It’s not plausible because I wouldn’t have done that in this situation.”
 - You are using your own self as a standard by which you are measuring the evidence. Is this because you are the reasonable person, or is this an effect of bias?
- Be careful of substituting rape myths for plausibility analysis.
 - E.g. “They were in love, so it couldn’t be rape. That wouldn’t be plausible.”

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Consistency – Considerations



- To whom is the telling?
 - Friend
 - Parent
 - Police
 - School authority
- What is the purpose of the telling?
 - To receive sympathy and support
 - To make a formal report
- In what mode is the listener?
 - Supportive
 - Investigating

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Consistency – Concerns



- Is the telling getting more specific and detailed over time, and if so, why might that be?
- Are details that are inconsistent across retellings important, or are they minor in nature?
- Is the person leaving out information that would be reasonable to include in their retelling?

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Consistency and Outcry Witness(es)



- Who is the first person that the party told?
- Under what circumstances?
 - Do those circumstances affect credibility? (Motive)
- More witnesses mean more chances to show consistency – or inconsistency.
 - In other words, these witnesses don't tell us whether the allegations are true. They tell us whether the party is credible in their retelling due to consistency.

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Considering Consistency



- Look at the retellings in the order of earliest to latest.
- Is there a reasonable explanation for any differences?
- Does the story evolve over time into something else?
- 2020 Regulations Preamble: “Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to **trauma**, the effects of **drugs or alcohol**, or **simple fallibility of human memory**.” 85 FR 30026, 30323 (May 19, 2020)

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Reliability



- How much time has passed?
 - Is there any reason this particular occasion might have “stuck out” to someone?
- Was the person intoxicated or high?
- Was the person in a position to observe the conduct?
- Has the person’s story been influenced by another party/witness, or by social situations?
- Does the person have a motive to lie?
- Does the person have special training such that their information might be given more weight on a particular point?

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Reliability – Bias Check



- Are we assigning a reliability value based on the identity of the party?
 - Complainant vs. respondent
 - Status as a police officer or school administrator
- Are we assigning a reliability value based on a person's:
 - Alcohol/drug problems
 - Mental health issues
 - Cognitive/intellectual disabilities
 - Age
 - And if so – is that supportable under the circumstances?

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Check for Other Bias



- Switch the race, sex, or other protected characteristic of the parties. Would your decision come out the same? If so, is that appropriate?
 - This is particularly important when allegations go against the “stereotypical norms” for a situation.
- Are you making any assumptions that are not based on the evidence, and if so, are those fair under the circumstances?

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Weighing the Evidence



- What is the most important? What are the rocks upon which you can build a solid foundation?
- What is less important? What can be reasonably explained?

Each fact is found using the standard of evidence your institution has chosen (e.g. preponderance of the evidence).

Each element of a policy violation is analyzed using that same standard.

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Two Ways to Tackle



- Elemental – What evidence do we have in support of or against each element?
- Credibility – What evidence do we know is not credible?

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Things Not To Include



- Demeanor
- Impermissible evidence (e.g., medical records without consent)
- Pattern evidence where not substantially similar to the conduct in question such that it is relevant

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Let It Go



- You don't have to resolve every factual dispute.
- Consider whether it is important for credibility purposes or necessary to your findings. If not, do we need to go there?
- If you aren't considering something, particularly if the parties thought it was important, explain why.

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Upcoming Title IX In Focus Webinars



April 25, 2024: Weighing the Evidence in Sexual Violence Cases

May 10, 2024: Title IX Litigation Update (11:00 a.m. CT/12:00 p.m. ET)

August 29, 2024: Trauma-Informed Resolutions

September 26, 2024: Hostile Environment Basics

October 31, 2024: Common Issues in Investigating IPV

November 21, 2024: Title IX Litigation Update

February 27, 2025: Employee Sexual Misconduct Cases

March 27, 2025: The Romanticizing of Stalking Behavior

April 24, 2025: Sexual Misconduct Hearings

May 29, 2025: Title IX Litigation Update

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Upcoming Higher Ed Webinars



• Higher Education **Free** Webinar Series:

- **TODAY** – 2024 Title IX Regulations – 3 pm ET/2 pm CT
- Title IX Litigation Update – May 10, 2024 – 12 pm ET/11 am CT
- 2024 Title IX Regulations for Board Members – 3 pm ET/2 pm CT

Subscribe to our newsletter at www.brickergraydon.com/subscribe to keep up to date on our trainings, including a policy bootcamp that will be rolled out next month, and an in-depth session on pregnancy and parenting in June!

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