



Weighing the Evidence in Sexual Violence Cases

Bricker 
Graydon

Title IX In Focus
Oct. 30, 2025

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Disclaimers

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

- We are not giving you legal advice
- Consult with legal counsel regarding specific situations
- You will receive slides for today's presentation after we've concluded.

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

Can We Post These Materials?

YES – Post away!

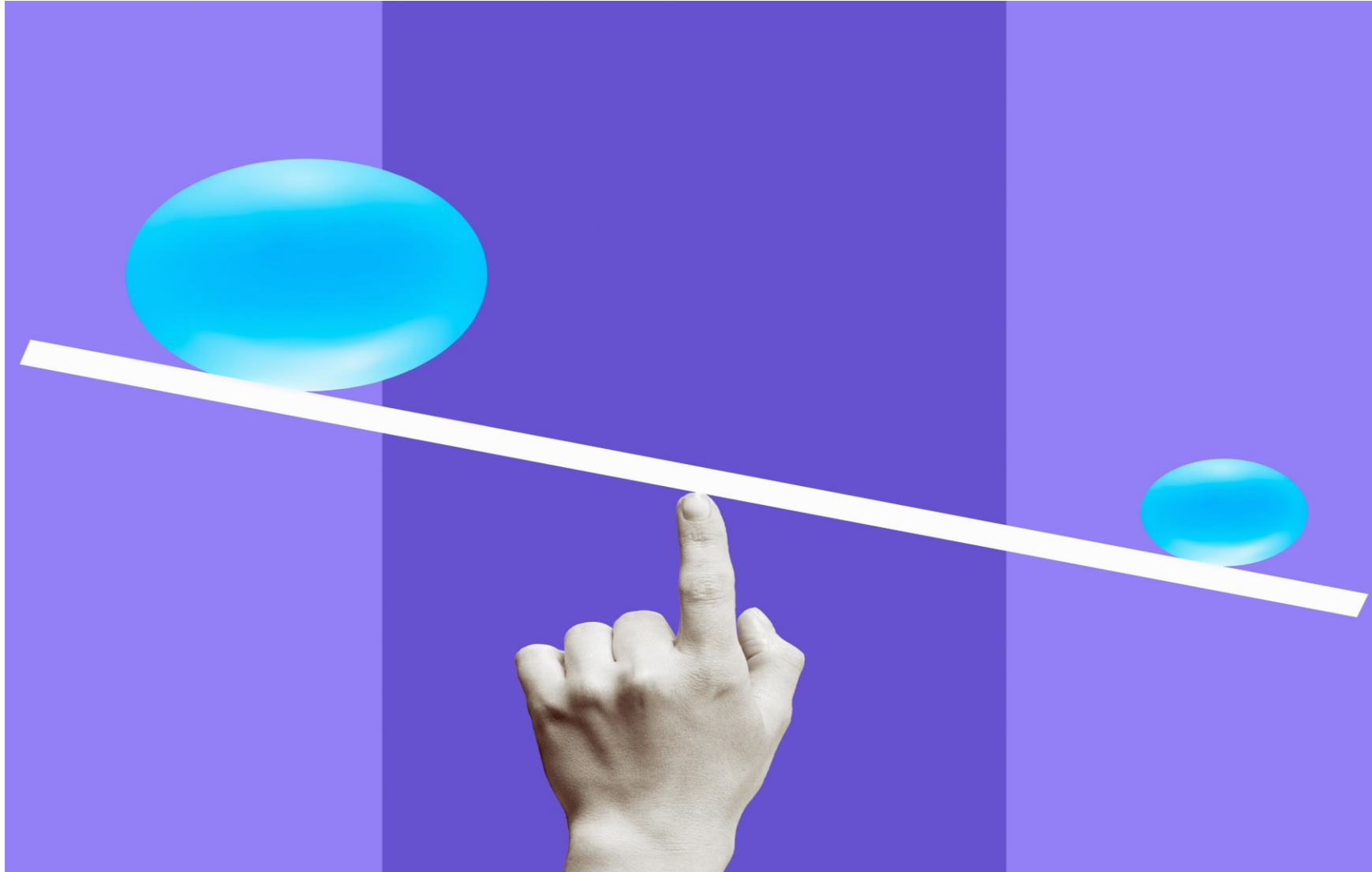
Institutions are required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



Agenda

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

Imagine Putting the Evidence on a Scale



Objectively Evaluating Relevant Evidence (2020 Preamble Considerations)

The Preamble identifies the following considerations:

- That parties may benefit from the opportunity to challenge the opposing party's **“consistency, accuracy, memory, and credibility so that the decision-maker can better assess”** the narrative to be believed. (Preamble, 30315).
- That parties may direct the decision-maker's attention to **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** in a party's statements. (Preamble, 30330).

Quality versus Quantity

- It is the WEIGHT of the evidence, or its STRENGTH in tending to prove the issue at stake that is important
- The QUALITY of the evidence is not determined by its QUANTITY
 - Don't compare 1 witness to 3 witnesses and make assumptions
 - Quantity *can* be a factor, but it should not be automatic

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- 2001 Revised Sexual Harassment Guidance (withdrawn) – page 9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

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.

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 part of their story?
- Should these things be recorded, and if so, how?

- **Plausibility** – Is the story possible, accounting for potential effects of trauma?
- **Consistency** – Is the story consistent over multiple retellings?
- **Corroboration** – Can the story be corroborated by other evidence?
- **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.

- 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?

- “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.”

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

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?

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.

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)

- 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?

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?

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?

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.

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?

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

Even Weight Distribution

If nothing tips the scale:

- No finding of a violation

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- 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.

Upcoming Title IX In Focus Webinars

- All of these are free and held at 12:00 p.m. CT/1:00 p.m. ET
- Sign up at www.brickergraydon.com/events
 - November 20th – Title IX Litigation Update
 - February 26th – Informal Resolution
 - March 26th – Transferrable Skills for Title IX and Title VI Investigators
 - April 23rd – Legal History of Title IX
 - May 28th – Title IX Litigation Update

Upcoming Higher Ed Webinars



All of these are free and held at 11:00 p.m. CT/12:00 p.m. ET

- Nov. 6th – Campus Compliance: Employment Law
- Dec. 12th – Clery Hot Topics
- Feb. 11th – Federal Grants and Sponsored Research
- March 6th - Athletics Hot Topics
- April 8th – The Intersection of Higher Ed and Copyright

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