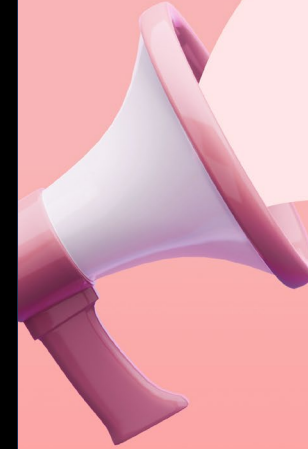


# Believe It or Not: Credibility Under Title IX

Title IX Conference:  
Higher Ed & K-12 Training  
July 23-24, 2024



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# Today's Panel

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# Credibility – 2020 Rule

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Overall, the 2020 rules made it clear that investigators and decision-makers should evaluate and ask questions designed to help judge the credibility of the parties and witnesses. But, the 2020 rules also had words of caution...

From the 2020 preamble: If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it.



# Credibility - 2020 Rule

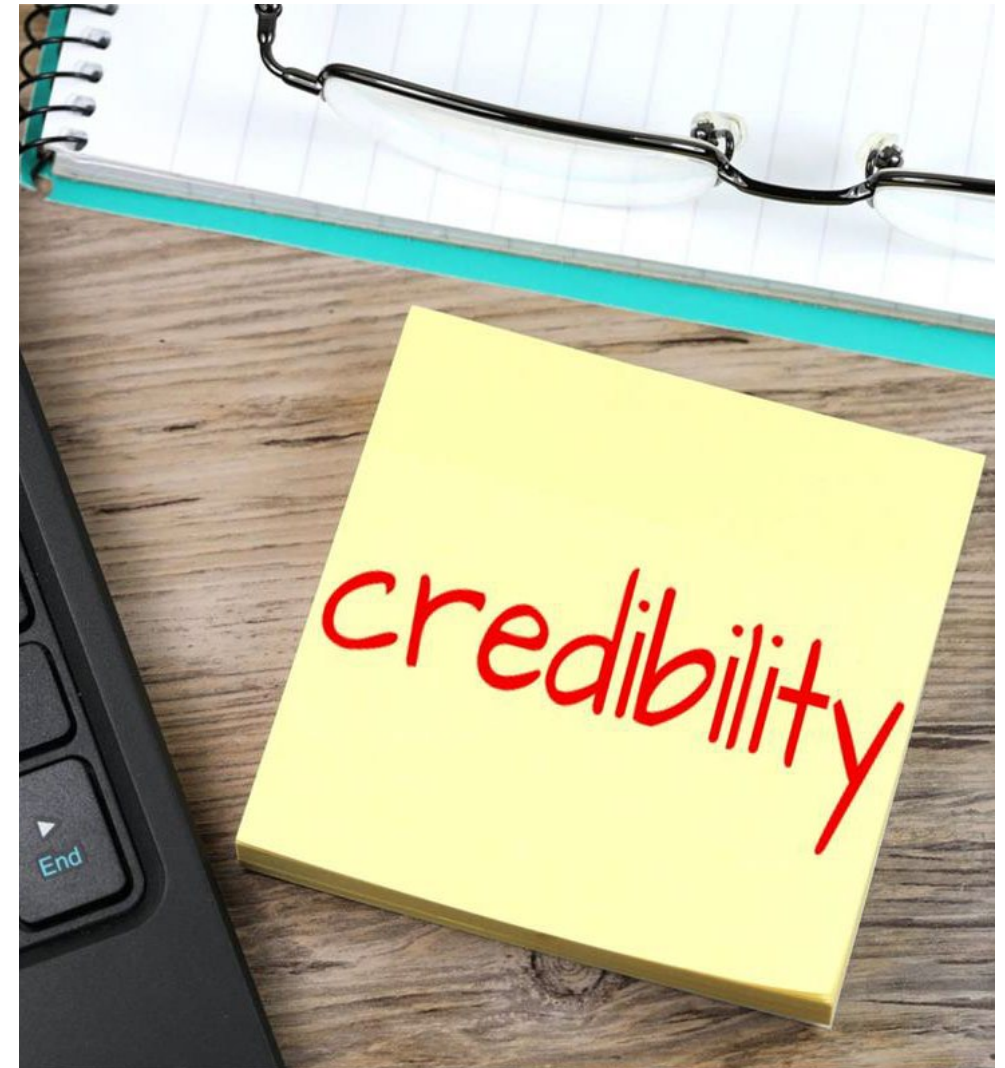
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## More from the 2020 preamble:

We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).

So, what is the overall theme?

- Avoid inferences based solely on a person’s status as a complainant, respondent, or witness
- We must assess credibility, but the Dept of Ed is leaving it up to us how to do so





# 2024 Rule - What has changed?

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Section 106.45 requires institutions to provide a process enabling the decisionmaker to question parties and witnesses to assess credibility.

106.46

Individual Meetings (no hearings)

Each party may propose questions to be asked of any party or witness, AND

Has the right to have those relevant questions, including questions challenging credibility, asked by the investigator or decisionmaker during individual meetings

Hearings

Allow decisionmaker to ask questions and either:

A) Allow parties to propose questions and have asked by decision-maker or advisor

Prohibit basing credibility determinations on a person's status as a complainant, respondent, or witness.

§ 106.45(b)(6).

A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility, to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination. For additional discussion of the evaluation of allegations and assessment of credibility, see the discussion of § 106.45(g).

## **When is credibility in dispute?**

When the recipient's determination relies on testimonial evidence, including cases in which a recipient "has to choose between competing narratives to resolve a case."

# 2024 Rule

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- *Refusal to respond to questions and inferences based on refusal to respond to questions.* A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.



# Haven't we been using this all along?

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Yes, the factors we will now cover in greater detail have been published since 1999 by the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

- Panel - If we had to define credibility, how would you?



## Credibility Factors

- Inherent Plausibility
- Motive to Falsify
- Corroboration
- Consistency
- Past Record
- Effect on Complainant\*
- Demeanor\*



## Inherent Plausibility

- A few questions to ask yourself:
  - Is this testimony believable on its face?
  - Does it make sense?

## Motive to Falsify

A few questions to consider:

- Did the person have a reason to lie?
- Why might someone lie? Is it the reason you think (watch for bias). If unsure, explore more within permissible bounds.

A few questions to ask yourself:

Is there witness testimony

First-hand eyewitnesses?

People who saw a Party immediately after  
and discussed the events?

Physical Evidence that supports the testimony?

Corroboration

## Consistency

A few questions to ask yourself:

- How is the person's testimony consistent overtime?
  - Within interview?
  - Between interviews?
  - With witnesses?
  - At decisionmaking or hearing phase?
  - Subtle differences in how the person phrases events

## Past Record

A few questions to ask yourself:

- Does the Respondent have a history of similar behavior in the past



Effect on  
Complainant

A few questions to ask yourself:

- How might a reasonable person react after event? (there is NO right or wrong answer)
- Not determinative
- *Could* add some weight if immediately after there is some sort of adverse reaction by complainant

## Demeanor

A few questions to ask yourself:

- Did the person seem to be lying or telling the truth?
- Other factors
- What other reasons could someone be acting in that way?

# Panel Discussion

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# Panel Discussion

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