



Association of
Title IX Administrators

Conducting Credibility Assessments and Determinations

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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



THE PROCESS



UNDERSTANDING EVIDENCE

- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX complaints do
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- If credible, it should be considered
 - Evidence is any kind of information presented with the intent to prove what took place
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly
- **Relevance → admissibility of the evidence**
- **Credibility → how much weight admissible evidence is given**



CREDIBILITY ASSESSMENTS IN THE INVESTIGATION

RESEARCH FINDINGS

- “Liars” experience greater cognitive overload
- Truth tellers can generally provide more detail/information than “liars”
- “Liars” prepare for questions they anticipate
- “Liars” develop a relatively fixed narrative that they can provide consistently
- Interview tactics that leverage differences in cognitive processing and strategy use between “liars” and truth tellers
- Verbal cues and elicitation of verifiable details are most diagnostic of credibility

Vrij, A. (2019). Deception and Truth Detection When Analyzing Nonverbal and Verbal Cues. *Applied Cognitive Psychology*, 33, 160–167.

INTERVIEW TACTICS

- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways (e.g., sketch)
- Asking interviewees for details that the investigator can check
 - Truth tellers generally add more “checkable” details
 - Liars provide details that are difficult to verify

WHAT IS CREDIBILITY?

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading **may** impact
- Primary factor is corroboration
- Avoid **too much** focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

COMMON CREDIBILITY ASSESSMENT ERRORS

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

COMMON CREDIBILITY ASSESSMENT ERRORS (CONT.)

- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

CREDIBILITY

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing sense of “logical”

Motive to Falsify

- Do they have a reason to lie?

Corroboration

- Aligned testimony and/or physical evidence

Past Record

- Is there a history of similar behavior?

Demeanor (use caution!)

- Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by Supervisors*

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness.”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (e.g., darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - “I think,” “I’m pretty sure,” “It would make sense”

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, teammates, group membership
 - This can work both directions (e.g., honest teammate)

FACTORS TO CONSIDER FOR CREDIBILITY

Prior Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship
- Use caution; past violations do not mean current violations

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Humans are terrible at spotting liars
- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

OTHER FACTORS

- Credentials and expertise – established
- Neutrality
- Sobriety
- Continuation of the behavior
- Previous, similar, good faith allegations

MAKING CREDIBILITY ASSESSMENTS

- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit investigators to make credibility recommendations which can serve as a roadmap for Decision-maker but are not binding

- NOT GOOD
~~“The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD
“Mark’s testimony about X contradicts Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Point the decision-maker without analysis or weighting
 - “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
 - “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”



CREDIBILITY DETERMINATIONS IN DECISION-MAKING

OVERVIEW OF THE PROCESS

- Anticipate that you will have to concretely articulate the rationale for and evidence supporting your conclusions
- Parse the policy again; remind yourself of the elements that compose each and every allegation
- **Determine credibility of evidence and assess statements as factual, opinion-based, or circumstantial**
- Determine whether it is more likely than not that policy has been violated (or determine whether highly probable if C&C standard applies)
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered.

ROLE OF THE DECISION-MAKERS

- Determine whether policy has been violated based upon the applicable standard of evidence
 - Facilitate exchange of written questions/responses among parties and witnesses
 - Decisions must be based upon an independent assessment of the evidence gathered during the investigation, **to include a credibility assessment of the parties and witnesses**
 - Decisions must be based on the specific policy alleged to have been violated
 - Decisions must be impartial and free of substantive bias

CREDIBILITY DETERMINATIONS BY THE DECISION-MAKER

- The Decision-maker determines the greater weight of credibility on each key point in which credibility is at issue
- First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each
- Then, weight the overall credibility based on the sum total of each contested fact
- When you write the final determination letter, focus on what facts, opinions, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.



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Questions?



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