Believe It Or Not: Credibility and Decision-Making

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education civil rights

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Reminders!

- To post or not to post?
- This is a training on Federal Law
- This is not legal advice
- Keep it hypothetical
- Ask questions
- Have fun!

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Required Decisionmaker Training (2024 Rule)

In this training:

- Required grievance procedures related to decisions
- The meaning of the term "relevant" in relation to questions and evidence
- The types of evidence that are impermissible regardless of relevance
- How to serve impartially

***All other required training covered in the first two sessions of this training*

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The Initial Decisionmaker

- Investigator:Collector::Decisionmaker:Decider
- One or More (Can be Investigator)
- Standard of Evidence (e.g., Preponderance)
- Decision Based on Quality of Evidence

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Who is the Decisionmaker?

2020 Rule: Different Decision-maker

Decision-maker cannot be Title IX Coordinator or investigator

2024 Rule: Investigator-Decisionmaker

- Same person can be investigator and Decisionmaker – should it be?
- Can be the Title IX Coordinator – should it be?

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Single Investigator-Decisionmaker Model

Pros

- Efficiency
- Cost-Effectiveness
- Confidentiality/Privacy
- Allows Use of Most Qualified Individual
- Similar to Comparable Cases in K-12 Context

Cons

- Risk of Bias from Investigation
- Lack of Checks/Balances
- Less Ability to Challenge Other Party
- Perceived Unfairness
- Burden on Investigator-Decisionmaker

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##/## Join at: **vevox.app** ID: **158-512-262** Question slide

What is not part of the decisionmaker's role under the 2024 Rule?

Deciding what evidence is relevant to each fact and issue in dispute 0%

Assessing the credibility of parties, witnesses, and evidence 0%

Deciding whether there is sufficient evidence to support each disputed fact 0%

Deciding whether there is sufficient evidence based on all factual findings to support a finding of a policy violation 0%

Deciding what consequences and remedies to impose 0%

None of the above/the decisionmaker is responsible for all of the above 0%

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The Decisionmaker's Role

- The decisionmaker must do all of the following:
  - Review the evidence to determine what is relevant to and permissible to consider for each fact or issue in dispute
  - Analyze the relevant and not otherwise impermissible evidence to determine whether there is sufficient evidence to support each disputed fact
  - In completing that analysis, make decisions about the weight of the evidence based on credibility and other factors
  - Look at all facts for which there is sufficient evidence and determine if there is sufficient evidence of a policy violation, i.e., of sex discrimination

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Relevance Definition (2024 Rule)

- The 2020 Rule does not define "relevant"
- The 2024 Rule defines "relevant" as "related to the allegations of sex discrimination under investigation as part of the grievance procedures.
  - Relevant **questions** seek evidence that may aid in showing whether the alleged sex discrimination occurred
  - Relevant **evidence** aids a decisionmaker in determining whether the alleged sex discrimination occurred

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Relevance Definition (2024 Rule)

- Relevance in practice:
  - Does it relate to a fact or issue in dispute?
  - Does it make the fact or issue even a feather more or less likely to be true?

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Scenario

Student #1 alleges that Student #2 has been making inappropriate sexual comments to Student #1 during math class over the past month

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##/## Join at: **vevox.app** ID: **158-512-262** Question slide

What evidence is relevant to the decision about whether sex-based harassment occurred?

Several classmates report overhearing the comments and confirm that they were sexual in nature 0%

Student #1 reported the incidents to the teacher, who documented the complaints but did not take further action 0%

The teacher's grading records show that Student #1's grades have slipped in math class after the conduct allegedly occurred 0%

Student #2 says that Student #1 also made sexual comments in class 0%

None of the above are relevant 0%

All of the above are relevant 0%

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Scenario

After reporting bullying based on gender identity, a non-binary student claims their teacher excluded them from the school's drama club

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##/## Join at: **vevox.app** ID: **158-512-262** Question slide

What is the misconduct alleged?

Different treatment discrimination	0%
Sex-based harassment	0%
Retaliation	0%
Not Title IX sex discrimination	0%

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##/## Join at: **vevox.app** ID: **158-512-262** Question slide

What evidence is relevant to the decision about whether sex-based harassment occurred?

Emails showing the student was removed from the club shortly after reporting bullying 0%

Statements from the parties about the reason for the decision to remove the student from the club 0%

Instances of past misconduct by the student related to drama club 0%

Social media posts from the teacher expressing disagreement with gender transition 0%

None of the above are relevant 0%

All of the above are relevant 0%

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Remember: Privileged Information

2020 Rule: Excluded Evidence #1

Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

2024 Rule: Impermissible Evidence #1

- Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the educational institution's jurisdiction;

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Remember: Medical Treatment Records

2020 Rule: Excluded Evidence #2

Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, without the party's (or their parent's) written consent.

2024 Rule: Impermissible Evidence #2

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Health records) - A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the educational institution obtains that party's voluntary, written consent for use in the educational institution's grievance procedures; and

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Remember: "Rape Shield" Evidence

2020 Rule: Excluded Evidence #3

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

2024 Rule: Impermissible Evidence #3

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Sexual interests or conduct) - Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

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Relevance in Decisions

- Objectively analyze all relevant and permissible evidence, including the credibility of the evidence
- Consider both inculpatory and exculpatory evidence (inculpatory → supports a fact or issue in dispute; exculpatory → refutes a fact or issue in dispute)
- The written determination must explain the **result** and **rationale** for the decision, which may include explanations about the analysis of relevance

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2020 Decision-Making Process

- Each party must be allowed to submit written, relevant questions to any other party or witness through the decision-maker
- The parties and witnesses respond to the questions in writing to the decision-maker, who shares the responses with all parties
- Each party must be allowed to submit written, relevant follow-up questions to any other party or witness through the decision-maker
- Repeat questions and answers until no remaining relevant follow-up questions
- The decision-maker then writes a lengthy written determination with several specific, required elements
- The written determination is provided to both parties and their advisors simultaneously in writing

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2024 Decisionmaking Process

- The written Q&A process from the 2020 Rule **is no longer required**
- The 2024 Rule requires an educational institution to provide a process that allows the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is **both** in dispute **and** relevant to evaluating one or more allegations of sex discrimination

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Options for Decisionmaking Process

- Single investigator-decisionmaker (questioning during interviews)
- Written Q&A
- Individual interviews by the decisionmaker
- Live hearing
- Any other process by which the decisionmaker can adequately assess the credibility of the parties and witnesses to the extent credibility is **both** in dispute **and** relevant to evaluating one or more allegations of sex discrimination

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##/## Join at: **vevox.app** ID: **158-512-262** Question slide

What decisionmaking process will your district use?

Investigator-decisionmaker model	0%
Written Q&A	0%
Individual interviews	0%
Live hearing	0%
Something Else	0%
I'm not sure	0%

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Note!

- If credibility is not in dispute, there is no requirement to offer a questioning process
- When is credibility in dispute? When the educational institution's determination relies on testimonial evidence, including cases in which an educational institution "has to choose between competing narratives to resolve a case"

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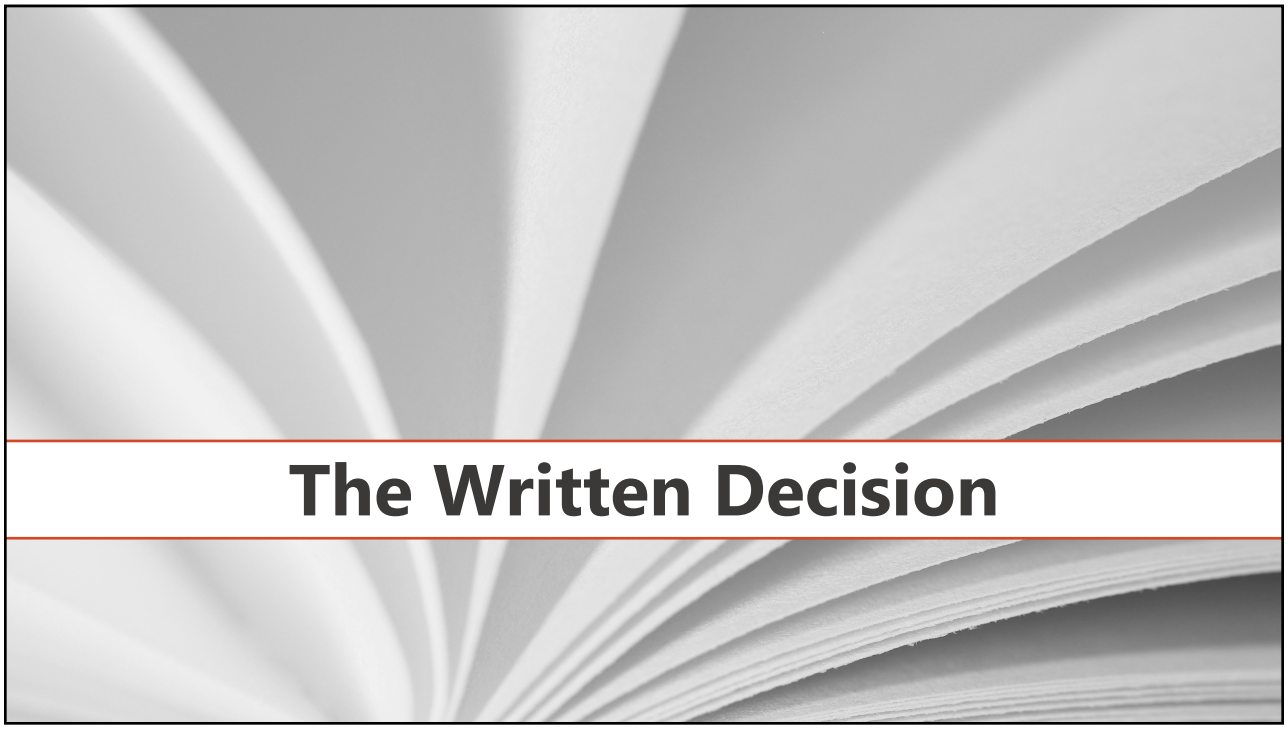

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Decision

2020 Rule: Written Determination

- Written determination required for all cases
- Must include:
  - Allegations
  - Procedural steps taken
  - Findings of fact
  - Conclusions regarding application of code of conduct to the facts
  - Statement and rationale for the result as to each allegation, including determination regarding responsibility
  - Any disciplinary sanctions imposed
  - Whether remedies will be provided
  - Appeal procedures

2024 Rule: Determination

- Sufficient to notify parties of the outcome
- Must include
  - The determination of whether sex discrimination occurred under Title IX
  - The reasons for the decision, and
  - Appeal rights

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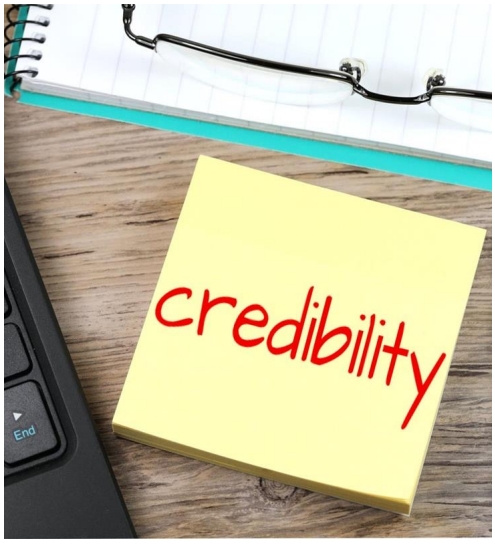
Credibility - 2020 Preamble

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.



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Remedies and Disciplinary Sanctions

2020 Rule: Written Determination

- Must be included in the written determination

2024 Rule: Notice of Outcome

- Institution—not Decisionmaker—responsible for deciding remedies and disciplinary sanctions
- Title IX Coordinator to provide and implement remedies and other appropriate prompt and effective steps to ensure sex discrimination does not continue

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Serving Impartially

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Bias, Conflicts of Interest, and Prejudgment

- Both the 2020 and 2024 Rules require Title IX team members to be impartial
- Let's look at some examples Title IX Decisionmakers might face

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Bias in Title IX Decisions

- Personal bias and conflicts of interest
- Reliance on evidence that is not relevant
- Reliance on evidence that is impermissible

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Avoiding Impartiality Concerns in Title IX Appeals

- Regularly participate in training on impartiality, conflict of interest, and bias.
- Follow documented procedures and guidelines strictly.
- Documenting reasons for all decisions (SHOW YOUR WORK!)

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Don't Forget Your Records & Trainings

- Under both the 2020 and 2024 Rules, educational institutions must maintain records related to Title IX cases for no less than 7 years
- The 2020 Rule requires posting of all trainings for Title IX Team members (including these!) on your educational institution's website
- The 2024 Rule would only require that the training materials be maintained and made available if requested (you can still post online but are not required)

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Questions?

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