

# Assessing Credibility in Title IX Cases



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## RESOURCES

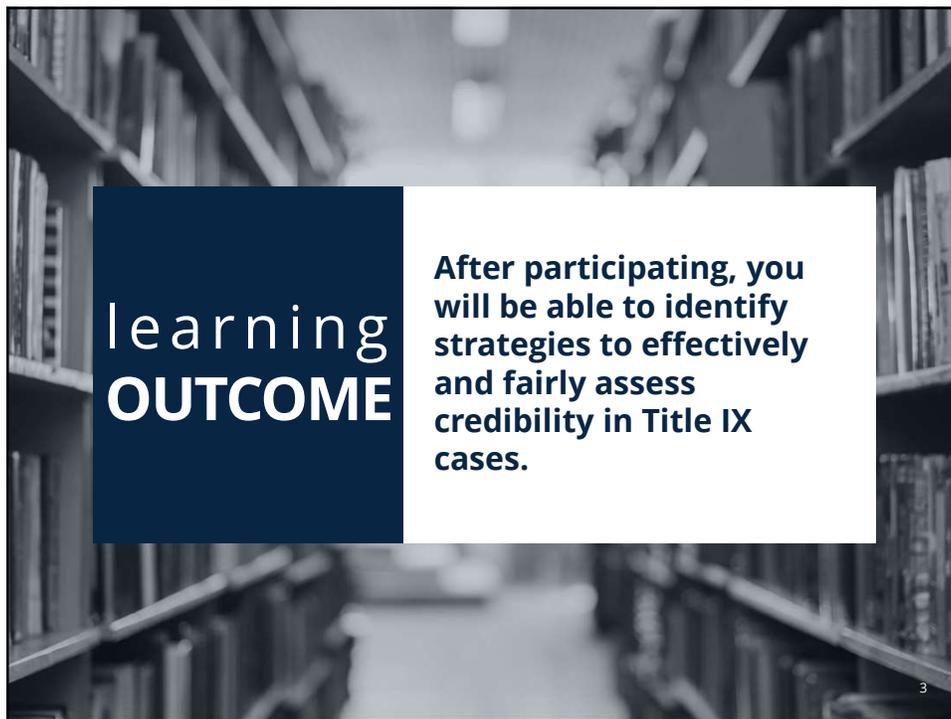
### Welcome to Zoom:



- A. Mics (keep muted please)
- B. Camera (option to keep on or off)
- C. Gallery vs. Speaker View
- D. Participant List with Emojis
- E. Chat Box
  - Use whenever you need it to ask questions or respond
  - Look here for downloadable files during the presentation
  - Option to send private messages to each other or host
  - Chats will be transcribed (not private ones)
- F. Close windows (e.g., polls)
- G. Recording (except during breaks or in small groups)
- H. Changing your name option (hover over your name, select "more" then "rename" to change your name)
  - A. Example: Jess L. | she/her | Academic Impressions

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A photograph of a library aisle with bookshelves on both sides, receding into the distance. The lighting is soft, and the focus is slightly blurred, creating a sense of depth. A dark blue rectangular box is overlaid on the left side, and a white rectangular box is overlaid on the right side.

**learning  
OUTCOME**

After participating, you will be able to identify strategies to effectively and fairly assess credibility in Title IX cases.

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A photograph of various tools including a wrench, pliers, a hammer, a tape measure, and a caliper, arranged on a dark surface. A white rectangular box is overlaid on the right side, and a teal vertical bar is positioned to the left of the word 'AGENDA'.

**AGENDA**

- **Part 1:** Considering Credibility
- **Part 2:** Assessing Credibility
- **Break**
- **Part 3:** Writing about Credibility in Your Decision Rationale
- **Final Q+A and Wrap-Up**

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ai ACADEMIC IMPRESSIONS

#1

Considering Credibility

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This slide features a dark blue background. In the top right corner, the logo for 'ai ACADEMIC IMPRESSIONS' is displayed. On the left side, a vertical orange bar is positioned next to the large white text '#1'. Below this, the title 'Considering Credibility' is written in white. A small white number '5' is located in the bottom right corner of the slide.

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POLL

Does your institution train on credibility assessment to decision-makers?

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This slide has a background image of several hands raised. A dark blue rectangular box on the left contains the word 'POLL' in white, with a white bar chart icon below it. To the right of this box, the question 'Does your institution train on credibility assessment to decision-makers?' is written in dark blue. A small white number '6' is in the bottom right corner.

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## ■ From the Final Rule

- (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that **credibility determinations may not be based on a person's status as a complainant, respondent, or witness**;
- 6) Hearings. (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, **the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility**. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)

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## ■ From the Final Rule

- For reasons described above, relevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain **discretion regarding the weight or credibility to assign to particular evidence**.

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**■ From the Final Rule**

- “The final regulations require decision-makers to explain in writing the reasons for determinations regarding responsibility; [1228] if a decision-maker inappropriately applies pre-existing assumptions that amount to bias in the process of evaluating credibility, such bias may provide a basis for a party to appeal.[1229] The Department expects that decision-makers will be well-trained in how to serve impartially, including how to avoid prejudgment of the facts at issue and avoid bias,[1230] and the Department notes that judging credibility is traditionally left in the hands of non-lawyers without specialized training, in the form of jurors who serve as fact-finders in civil and criminal jury trials, because assessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense rather than legal expertise.”

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## ■ From the Final Rule

- “Whether or not commenters are correct in noting that power differentials between employees (particularly faculty) and students may tempt recipients to treat faculty as more credible than students, the final regulations allow recipients to select one of two standards of evidence consistently to all formal complaints; under either standard selected, **the recipient is obligated to assess credibility based on objective evaluation of the evidence and not due to the party's status as a complainant or respondent,[1429] and without bias for or against complainants or respondents generally or for or against an individual complainant or respondent.[1430]**”

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## ■ From the Final Rule

“The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases.”

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## Bias

- You must avoid bias, conscious or unconscious, based on a witness's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances in your determination of credibility.

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## Assess v. Evaluate

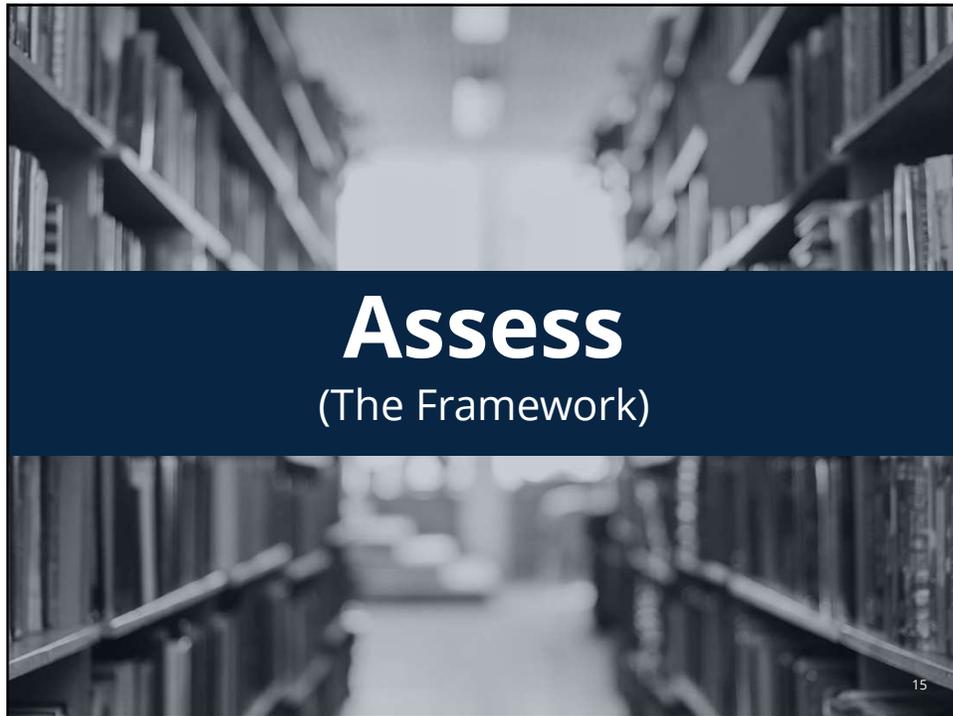
### Assess

- The framework upon which to judge
- You will apply these categories to each piece of evidence

### Evaluate

- The "how to" judge [their credibility]

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**■ From the Final Rule**

- “Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.”

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## ■ From the Final Rule

- ...assessing demeanor is just one of the ways in which cross-examination tests credibility, which includes assessing **plausibility**, **consistency**, and **reliability**; judging truthfulness based solely on demeanor has been shown to be less accurate than, for instance, evaluating credibility based on consistency.[1360]
- “For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is “evidence of trauma” presents similar risks of inaccuracy.[1362] The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are **consistency**, **plausibility**, and **reliability**. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.”

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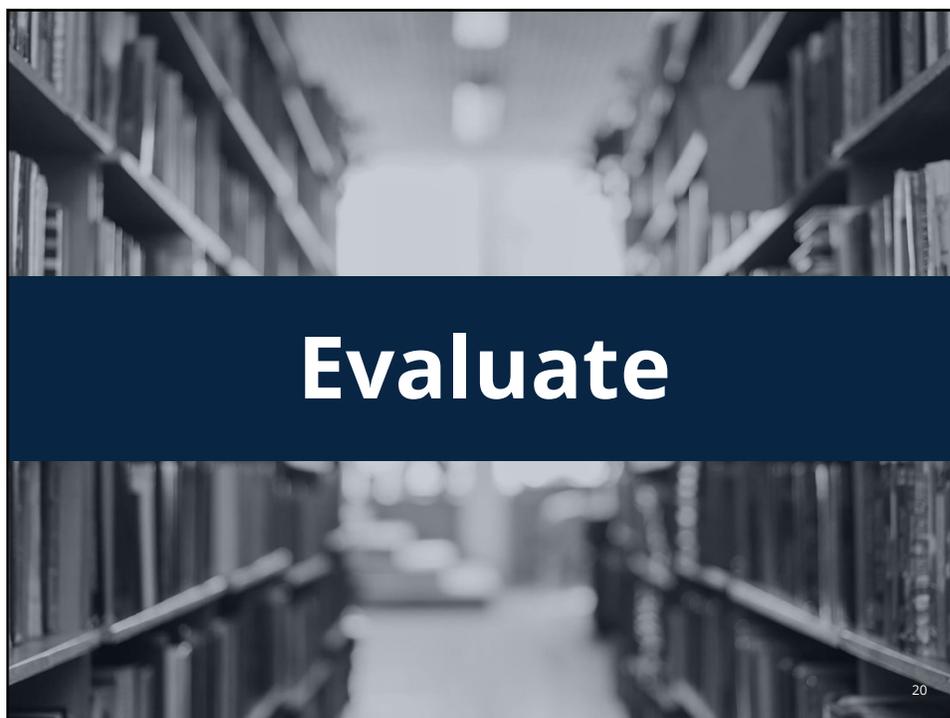
## ■ Assess Credibility

- Reputation for truthfulness/untruthfulness
- Memory
- Perception – Ex: Were they drunk? Couldn't see well?
- Motive to lie - relationships
- Bias
- Demeanor
- Inconsistencies and contradictions/consistencies

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## ■ Differences among types of evidence (non-witness testimony)

- **Primary evidence**
  - Authentic, relevant tangible evidence
  - Firsthand, uninvolved, unimpaired witness reports
- **Secondary or tertiary**
  - Secondhand reports (rumors)
  - Relevant, tangible evidence that can't be authenticated
- **"Anti-evidence"**
  - Fabricated or tainted evidence

**NOT ALL EVIDENCE IS CREATED EQUALLY!**

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## ■ Evaluate Credibility of Evidence

- Example 1: surveillance video or photos/videos
- Example 2: standard forms or database information
- Example 3: e-messages (emails, Instagram/ FB posts, texts)

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## **Evaluate Credibility of Witnesses**

- Other facts corroborate their version of events
- Inconsistencies and explanations to those inconsistencies
- Circumstantial evidence v. direct evidence

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## **Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence; that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

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## **Evaluate Credibility of Witnesses - Tips**

- It's human nature to have imperfect or inconsistent recall.
- Just because it doesn't make sense to you does not mean the person saying it is lying.
- Just because someone is inconsistent (or flat wrong) doesn't mean s/he's a liar.
- You can find a piece of someone's testimony credible and not other portions – it's not an all or nothing proposition.

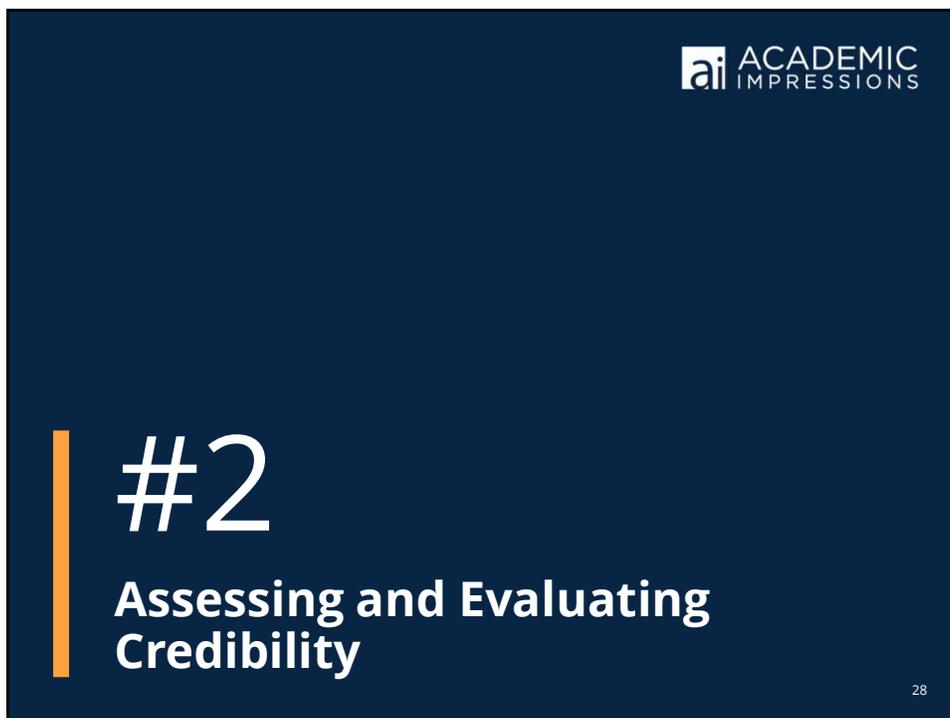
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## ■ From the Final Rule

- “A critical feature of a fair grievance process is that Title IX personnel refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process; therefore, the Department declines to impose a presumption that either party (or both parties) are credible or truthful.”

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## ACTIVITY

### Sam and Alex — Rollercoaster

- Met in April 2021 - agree
- Started friends with benefits in May 2021; Sam dated around too and Alex was jealous - agree
- Sam tried to break-up with Alex x3 in a month, but Alex threatened suicide each time and even tried once; they continued to be physical - agree
- On June 1, Alex asked Sam to hang out; Sam told Alex that they're just friends; Alex went to Sam's apt and the two kissed on couch even though they were officially broken up - agree

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## ■ Witness Testimony (continued)

- Alex then rooted around Sam's dresser for sex toys and Sam said don't do that – **disagree** – Alex claims Sam suggested it
- Alex then blocked bedroom door and pushed Sam on bed and performed oral sex – **disagree** – Alex claims consent
- Title IX interview - Sam told investigator that they could not remember how they got on the bed; that they dissociate and have Borderline Personality Disorder, which affects memory and perception – **agree**

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## ■ Documentary Evidence — **agree**

- Text message from Sam to BFF day after assault – “I hate people and I want to get them all in trouble.”
- Text from Sam to Alex day after assault – “here's a cute meme – I know it's your humor!”
- Text from Sam to Alex one week later – “Why did you take advantage of me last weekend? You hurt me and you know I said no.” Alex responds, “I'm sorry. I didn't know.”

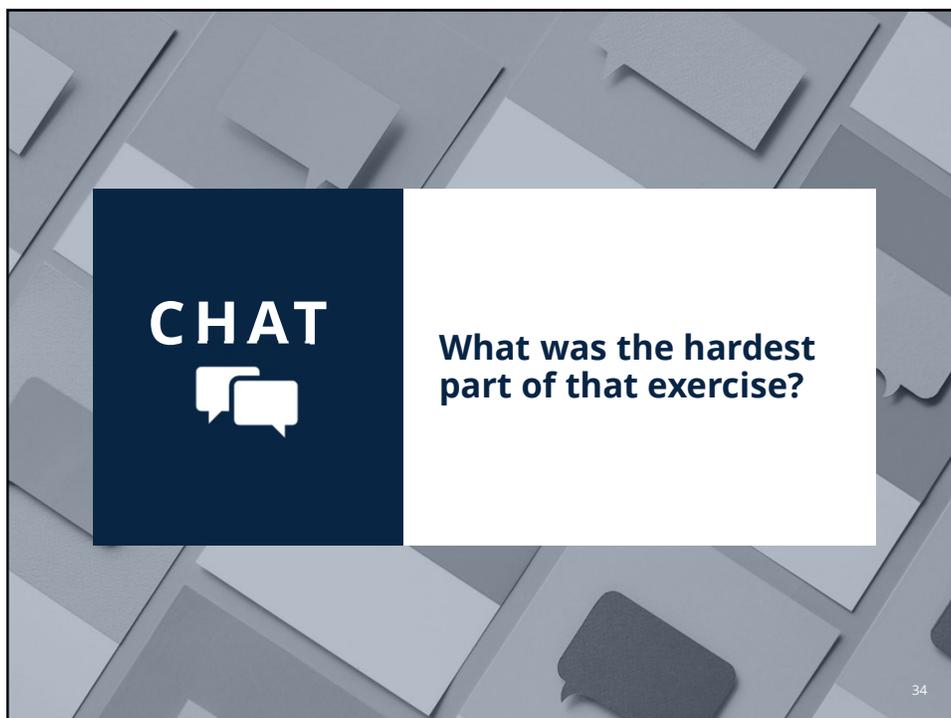
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## ■ Putting it Together

1. Assess the person's testimony standing alone.
2. Assess the person's testimony with evidence received from that person over time.
3. Assess the person's testimony with testimony from others (consistent/inconsistent?).
4. Assess the person's testimony with evidence received from others (e.g., video, documents, etc.).

 ACADEMIC IMPRESSIONS 33

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 A graphic for a chat box. It features a dark blue square on the left with the word "CHAT" in white, bold, uppercase letters, and a white icon of two overlapping speech bubbles below it. To the right of this square is a white rectangular area containing the text "What was the hardest part of that exercise?" in a dark blue, sans-serif font. The background of the entire graphic is a light gray with a pattern of overlapping, slightly offset rectangular shapes, resembling a stack of papers or a grid.

**CHAT**

What was the hardest part of that exercise?

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## ACTIVITY

### Swim Coach – Bob and Beth

- Coached for 10 years from age 13 to 23 – agree
- Bob took photos of Beth in bathing suit – agree
  - Disagree on purpose
- Bob massaged Beth when her hamstrings were tight – agree
  - Disagree on purpose
  - Disagree on timing – Bob says Beth was 18; Beth says 17
- During massage, Bob touched Beth’s vagina - disagree
- Beth still mad she didn’t make elite team – agree, but Bob says Beth blames him; Beth says “true” but still he touched me

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## Corroboration

- Photos of Beth in bathing suit
- Business cards for Bob’s photography business
- Beth remembers camera he used with great detail; manufactured the year before Beth turned 17; Photos depict Bob with camera around his neck at swim meets
- Beth remembers the assault when she was 17 because she got a new watch for her 17<sup>th</sup> birthday; photos depict her bday party with her showing off watch
- Bob remembers Beth being 18 when Beth’s hamstring was hurt – newspaper articles when Beth was 18 allude to Beth’s injuries but don’t mention hamstring
- Bob’s expert witness describe duties of swim coach including photography of their bodies to document and massaging injuries


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## ■ Putting it Together

1. Assess the person's testimony standing alone.
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4. Assess the person's testimony with evidence received from others (e.g., video, documents, etc.).

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**POLL**



**Which scenario was more difficult to evaluate?**

**Why?**

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# #3

## Writing about Credibility in Your Decision Rationale

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### From the Final Rule

- “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). It is precisely this objective evaluation that provides the basis for the decision-maker's “rationale” for “the result” of each allegation, which must be described in the written determination under § 106.45(b)(7)(ii)(E).”

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## ■ What's required in the written determination?

### 6 Areas Must Be Included

- (1) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (2) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- (3) Findings of fact supporting the determination;

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## ■ What's required in the written determination?

### 6 Areas Must Be Included

- (4) Conclusions regarding the application of the recipient's code of conduct to the facts;
- (5) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- (6) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

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## ■ Sam and Alex Scenario

- EXERCISE – Writing rationale section
- Who found Alex credible?
  - Write credibility about Sam and Alex.
  - Include what facts you found credible, not credible, and why.
- Who found Alex not credible?
  - Write credibility about Sam and Alex.
  - Include what facts you found credible, not credible, and why.

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## ■ Swim Coach Scenario

- EXERCISE – Writing rationale section
- Who found Bob credible?
  - Write credibility about Bob and Beth.
  - Include what facts you found credible, not credible, and why.
- Who found Bob not credible?
  - Write credibility about Bob and Beth.
  - Include what facts you found credible, not credible, and why.

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**RESOURCE**

- 1. Jury instructions
- 2. Sample credibility evaluation tool

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ai ACADEMIC IMPRESSIONS

**#4**

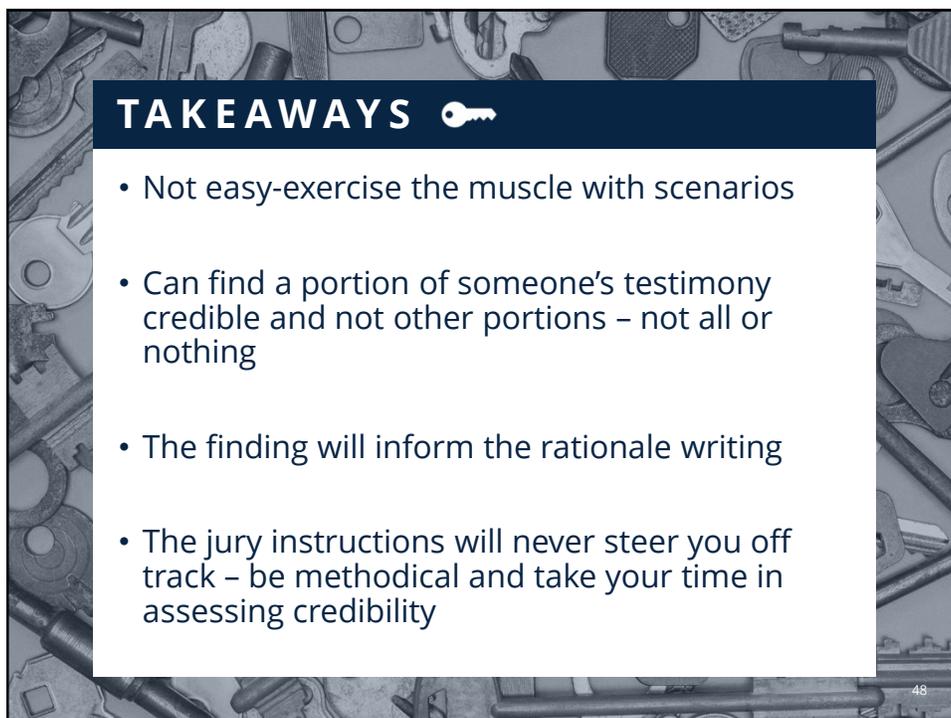
**Final Q+A and Wrap-Up**

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## Online Membership Quick Facts

### What You Get

- Access to all online learning resources – membership covers both live and recorded webcasts
- Over 500 higher ed experts contributing case studies, examples, sample plans/templates, tools
- Short lessons and quizzes targeting critical areas of compliance. Dozens of new resources added each month

### What are the Benefits?

- Improved employee engagement and retention
- Plug Academic Impressions resources directly into existing training programs or leadership academies for faculty, staff, and administrators
- Monitor training activity and usage through reporting

				
LIVE WEBCAST <b>Defining Your Role as Chief of Staff</b>	VIRTUAL TRAINING <b>Get Comfortable Being Uncomfortable: Engaging in Dialogue About Race and Bias</b>	LIVE WEBCAST <b>Enhancing Medical Education Curriculum to Mitigate Healthcare Disparities: A Case Study</b>	VIRTUAL TRAINING <b>Showing Vulnerability as a Leader</b>	LIVE WEBCAST <b>Increasing Gift Processing Capacity by Moving to Paperless</b>

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Please remember to complete the [event evaluation](#).  
Your comments will help us continually improve the quality of our programs.

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