



TITLE IX HEARINGS
AND APPEALS FOR
DECISION-MAKERS

GVUTM





TOPICS

- Hearing Basics
- Standard of Evidence
- Relevance
- Weight and Credibility
- CrossExamination and Relevance Determinations
- Prior Bad Acts Evidence
- Hearing Format
- Written Determinations
- Appeals
- Policy Definitions



HEARING BASICS

GVU™



HEARING BASICS

- All cases resolved via a formal investigation under UVU Policy 162 require a live hearing.
- While parties are not required to be in the same room, parties must be able to see and hear each other.
- Audio/audiovisual recordings or transcripts must be created and made available for inspection and review.
- The following people should be present at the hearing:
 - Title IX Investigator
 - Title IX Coordinator (or designee)
 - Hearing Officer/Chair
 - Hearing Panel/Decision-Makers
 - Parties
 - Party Advisors
 - Support Persons (if any)



HEARING BASICS

- The hearing panel will be made up of three members from a pool of faculty, staff, and students trained on evidentiary standards, hearing procedures, and how to determine issues of relevance for questions and evidence.
- Panel members must not:
 - Concurrently be a party to any disciplinary proceedings;
 - Be subject to recent discipline;
 - Faculty members must not work in the same department as any party; and
 - Staff panel members must not work in the same department as any party; and
 - Panel members must not otherwise have any conflicts of interest with serving on the panel.



HEARING BASICS

Hearing panelists are also known as “decision-makers” during Title IX proceedings.

The role of the panel is to:

- Avoid prejudgment of the facts at issue;
- Objectively evaluate all relevant evidence (even if that party or witness does not appear at the hearing or is not subject to cross-examination);
- Apply the standard of evidence to determine whether the respondent engaged in sexual harassment in violation of UVU policy; and
- Issue a written determination.



ADVISORS

- All parties must have a process advisor to conduct crossexamination during the hearing. If they do not designate one of their choice, UVU must provide one to them, free of charge.
- While advisors are required to conduct cross examination on behalf of their party, UVU will not restrict advisors from “full participation” during the hearing. This means advisors can also:
 - Make opening/closing statements
 - Examine and cross-examine witnesses
 - Introduce relevant evidence
 - Provide support and guidance to their party



STANDARD OF
EVIDENCE

GVU™



PRESUMPTION OF “NOT RESPONSIBLE”

Respondents are presumed not responsible until the party
has made a determination following a hearing on the
evidence

The University, rather than a party, bears the burden to prove
that the respondent committed the policy violation

STANDARD OF EVIDENCE

A respondent is not responsible unless there is a preponderance of evidence that respondent committed the alleged policy violation.

In other words :

The evidence **MUST** show that it is more likely than not, or more than 50 percent in favor, that the respondent engaged in the alleged conduct

STANDARD OF EVIDENCE

Many sexual harassment allegations have multiple elements. For a panel to find a policy violation, EACH of the elements MUST be proven by a preponderance of the evidence.

For example, “Stalking” is a:

- 1) Course of conduct
- 2) Directed at a specific person
- 3) That would cause a reasonable person to either:
 - a) Fear for their safety or the safety of others; or
 - b) Suffer substantial emotional distress.

STANDARD OF EVIDENCE

To find a respondent has engaged in stalking, the panel must find a preponderance of evidence supporting elements 1, 2, AND either 3a or 3b.

If there is a preponderance of evidence as to 1 and 2, BUT not 3, the panel cannot find that respondent violated UVU policy as to stalking.



RELEVANCE

GVU™



WHAT IS RELEVANCE?

Relevance is the sole admissibility criterion for evidence set forth in the Title IX regulations.

The regulations do not define “relevant”, so the ordinary meaning of the word should be understood and applied.

RELEVANT EVIDENCE

Relevant evidence is evidence or information that makes something more or less likely to be true.

Evidence may be relevant to:

- An allegation; and/or
- A credibility determination

Examples:

- Interview of a person who saw the parties immediately before and after the incident
- Text messages or emails exchanged between the parties about what happened

EXCULPATORY AND INCULPATORY EVIDENCE

Relevant evidence includes both exculpatory (evidence that proves respondent is not responsible) and inculpatory (evidence that proves respondent is responsible).

Both types of evidence should be considered in the determination.

RELEVANT EVIDENCE

The investigation report should include a summary of all relevant evidence.

However, the Title IX regulations do not deem the investigation report or the parties' responses to it to be relevant evidence. Panel members have an independent obligation to evaluate the relevance of available evidence.

IRRELEVANT EVIDENCE

Irrelevant evidence is inadmissible and includes:

- A party's medical, psychiatric, or psychological treatment records without the party's prior written consent;
- Information protected by a legal privilege unless specifically waived by the party to whom it attaches:
 - Attorney/client
 - Spousal
 - Priest/penitent
 - Doctor/patient

IRRELEVANT EVIDENCE

- Evidence of a complainant's sexual predisposition or prior sexual behavior, UNLESS:
 - The questions and/or evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; OR
 - The questions and/or evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove complainant consented to the conduct
- Repeated cross-examination questions; and
- Evidence that is unduly repetitious (e.g., four witnesses with the same information)

IRRELEVANT EVIDENCE

- Repeated cross-examination questions; and
- Evidence that is unduly repetitious (e.g., four witnesses with the same information)



WEIGHT AND
CREDIBILITY

GVU™



WEIGHING EVIDENCE

Weighing evidence means assessing the accuracy, impact, and importance of the evidence in the Record.

As a panelist, you determine how much weight or importance to give particular evidence. What weight you give depends on how credible the evidence is.

You may give a piece of evidence (including a statement by a party or witness) no weight, little weight, or a lot of weight.

WHAT IS CREDIBILITY?

Not defined by Title IX regulations.

Credibility is the quality that makes someone or something (a witness or some evidence) worthy of belief – Black's Law Dictionary (11th ed. 2019).

Credibility is determined by logic and comparisons to evidence in the Record, not based on a hunch or a feeling.

Credibility **CANNOT** be based on a person's status as a complainant, respondent, or witness.

WHAT IS CREDIBILITY?

In making weight and credibility determinations, factors you might consider include whether:

- The evidence is corroborated,
- There is a reason that the source of the evidence may or may not be reliable, and/or
- The evidence is logical given the other established facts.

Corroborating evidence is the strongest indicator of credibility.

WHAT IS CREDIBILITY?

Credibility issues should be assessed when:

- The parties disagree on the materially relevant facts of the case and there is no external evidence that supports one of the parties' version of events over the other;
- A person makes statements that are self-inconsistent;
- A person makes statements that are inconsistent with the Record;
- A person makes statements that are implausible or incoherent in light of the Record;
- There is existence of evidence of a motive by a person to lie;
and/or
- A person engages in personal attacks or other "defenses" that are not supported by the Record.

HEARSAY

Hearsay is a statement provided by someone who does not testify in the hearing.

Hearsay is not excluded solely because it is hearsay but panelists should assess it for credibility.

ABSENCE OR REFUSAL TO ANSWER

Panelists may not:

- Draw an inference regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions. However, a person's absence may make it more difficult to assess their credibility.
- Render a determination of responsibility against the respondent, when such determination depends on complainant or witness credibility, without first providing the respondent an opportunity at a live hearing to ask the complainant and adverse witnesses relevant questions.



CROSS-EXAMINATION AND
RELEVANCE
DETERMINATIONS

GVU™



CROSS EXAMINATION

- All hearings must allow for cross-examination that is direct, oral, and made in real time.
- Cross-examination of the opposing party and witnesses is conducted on behalf of each party by the process advisor and the process advisor must be allowed to ask all relevant questions and follow-up questions, including those challenging credibility.
- Parties must never personally question each other.
- Only relevant cross-examination and other questions may be asked.

CROSS EXAMINATION

The hearing officer shall exclude irrelevant questions directed at a party or witness.

Before a party or witness answers a cross-examination or other question, the hearing officer must:

- Determine whether the question is relevant, and
- Explain any decision to exclude a question as not relevant on the record.

QUESTIONING

During the examination portion of the hearing, ask questions of the parties and witnesses to determine:

Who engaged in the conduct?

What was the conduct?

When did it happen?

Where did it happen?

How did it happen?

QUESTIONING

You may use questions to:

- Learn the facts
- Establish a timeline
- Consider:
 - What do I need to know, e.g., what are the elements of the alleged misconduct?
 - Why do I need to know it?
 - Does the question elicit information relevant to whether a policy violation occurred?
 - What is the best way to ask the question?
 - Who is the best person to get this information from? The investigator? A party? A witness?



PRIOR BAD ACTS EVIDENCE

GVUTM



PRIOR BAD ACTS EVIDENCE

Some cases may involve evidence of a prior complaint or evidence of similar behavior against the respondent. Not only are institutions allowed to consider such “prior bad acts” evidence, but they also must not adopt a rule that prohibits the consideration of such evidence so long as it is relevant.

85 Fed. Reg. 30,026, at 30,248 (May 19, 2020) (explaining that institutions “may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence”).



HEARING FORMAT

GVU™



HEARING FORMAT

A hearing could be organized as follows:

- The hearing officer resolves various procedural matters (such as confirming receipt of the required investigation report, introducing those who are present at the hearing, outlining expectations for the hearing, etc.)
- Presentation of Investigation Report by Investigator/Title IX Coordinator
 - Questions from Hearing Panel
 - Questions from Complainant/Complainant's Advisor
 - Questions from Respondent/Respondent's Advisor

HEARING FORMAT

- Opening Statements
 - Complainant/Complainant's Advisor
 - Respondent/Respondent's Advisor
- Complainant's Case
 - Testimony by Complainant and Complainant's Witnesses
 - Questions after each witness from Panel
 - Questions after each witness from Respondent's Advisor
- Respondent's Case
 - Testimony by Respondent and Respondent's Witnesses
 - Questions after each witness from Panel
 - Questions after each witness from Complainant's Advisor
- Closing Statements
 - Complainant/Complainant's Advisor
 - Respondent/Respondent's Advisor

HEARING FORMAT

Following the conclusion of the live hearing, the hearing panel will deliberate to determine if the respondent is responsible and if sanctions, if any, are appropriate.

If the hearing panel determines the respondent is responsible, they shall consult with the sanctioning official to obtain updated recommended sanctions.

The hearing panel shall defer to the sanctioning official's recommended sanctions unless it is clearly unreasonable in light of the evidence and known circumstances



WRITTEN
DETERMINATION

GVU™



WRITTEN DETERMINATION

The hearing panel will provide a written determination simultaneously to the Title IX Coordinator, the sanctioning official, and the parties within 20 business days after the live hearing concludes.

The written determination must include:

- 1) Identification of the allegations potentially constituting sexual harassment;
- 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 the parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- 3) Findings of fact supporting the determination;
- 4) Conclusions regarding the application of this policy to the facts;

WRITTEN DETERMINATION

- 5) A statement of, and rationale for, the result as to each allegation, including
 - (a) a determination regarding responsibility based on a preponderance of the evidence;
 - (b) disciplinary sanctions imposed on the respondent; and
 - (c) whether the University will provide remedies designed to restore or preserve equal access to the University's education program or activity to the complainant; and
- 6) The University's procedures and permissible bases for the complainant and respondent to appeal.

The determination regarding responsibility and sanctions become final either on the date that an appeal decision is provided if an appeal is filed, or if an appeal is not filed, on the date on which an appeal would no longer be timely.



APPEALS

GVU™



APPEALS ON WRITTEN DETERMINATION

- Within 10 business days of written notification, any party may submit to the Title IX Coordinator a written notice of intent to appeal a hearing panel determination regarding responsibility.
- The appeal officer will consider a notice of intent to appeal only if the appeal officer determines one or more of the following conditions are satisfied:
 - A procedural irregularity affected the outcome of the hearing;
 - New evidence that was not reasonably available at the time of the hearing or dismissal could affect the outcome of the hearing or dismissal; or
 - The Title IX Coordinator, the investigators, or the hearing panel had a conflict of interest or bias for or against the parties generally, or an individual complainant or respondent, that affected the outcome.

FOLLOWING THE APPEAL

- Within 5 business days of receiving a party's written notice of intent to appeal, the Title IX Coordinator shall send to both parties:
 - The contact information for the appeal officer who will decide the appeal, and
 - Instructions on filing written statements with the appeal officer.
- The appeal officer shall be the Provost, appropriate vice president, or their designee. The appeal officer must be free of any bias or conflict of interest with respect to any party and must not have been the hearing officer, a member of the hearing panel, the Title IX Coordinator, or the investigator under this policy.

FOLLOWING THE APPEAL

- The parties may submit a written statement to the appeal officer supporting or opposing the hearing panel's written determination of responsibility.
- The appeal officer must receive any written statements within 10 business days of the Title IX Coordinator sending the notice to the parties.
- The appeal officer will review all written statements, reports, evidence, and recordings and make a final written determination within 20 business days.

FOLLOWING THE APPEAL

- In cases where a hearing panel's determination is appealed, the appeal officer's final written determination may (1) uphold the hearing panel's written determination(s) of responsibility; (2) modify the hearing panel's written determination(s) of responsibility; or (3) reverse the hearing panel's written determination(s) of responsibility.
- The appeal officer will issue the final written determination simultaneously to both parties providing a detailed rationale for the appeal officer's determination.
- The appeal officer's final written determination is final; no further internal university reviews, appeals, or grievances are available to the parties.



POLICY DEFINITIONS

GVU™



POLICY 162

Title IX

“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 education program or activity receiving Federal financial assistance.”



POLICY 162

Policy Scope

- UVU Policy 162 applies to all persons participating in UVU education programs and activities.
- Education program or activity: all operations of the University, including locations, events, or circumstances over which UVU exercised substantial control over both the respondent and the context in which the sexual harassment occurred. (3.5)



POLICY 162

Sexual Harassment (3.17)

Prohibited verbal or nonverbal conduct on the basis of sex (including sex, pregnancy, pregnancy-related conditions, sexual orientation, gender identity, or gender expression)

Includes:

- Any instance in which a UVU employee conditions the provision of an aid, benefit, or service of UVU on an individual's participation in unwelcome sexual conduct;
- Any unwelcome conduct that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a UVU education program or activity;
- Any instance of sexual assault, dating violence, domestic violence, or stalking.



POLICY 162

Sexual Assault (3.16)

Any sexual act directed against another person without the consent of the victim, including instances in which the victim is incapable of giving consent; and also unlawful sexual intercourse including the following:

- Rape—Any penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim
- Sodomy—Oral or anal sexual intercourse with another person without the consent of the victim
- Sexual assault with an object—To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person without the consent of the victim.
- Fondling—The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim.
- Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Utah law.
- Statutory Rape—Nonforcible sexual intercourse with a person who is under Utah’s statutory age of consent.



POLICY 162

Consent (3.2)

“An affirmatively communicated willingness through words and/or actions to participate in sexual activity. Consent is active, not passive, and silence, in and of itself, may not be interpreted as consent. Consent must be given by all participating parties; must be clear, knowing, and voluntary; and can be given only by someone who is 18 years of age or older and is not mentally and/or physically incapacitated”

Consent cannot be assumed based on silence, the absence of “no” or “stop”, the existence of a prior or current relationship, or prior sexual activity. Consent can be indicated verbally and non-verbally (with a head nod, thumbs up, pulling someone closer, nodding yes, making direct eye-contact, actively touching someone, initiating sexual activity, etc.).

There is no consent in the presence of coercion, incapacitation, force, or where the sexual activity violates state law relating to the age of consent.



POLICY 162

Incapacitation (3.9)

The physical and/or mental inability to make informed, rational judgments.

Factors that could be indications of incapacitation include, but are not limited to:

- Mental or physical disability;
- Lack of sleep; use of alcohol, drugs, or other substances, including illegal or prescription medications;
- Unconsciousness;
- Blackout; or
- Involuntary physical restraint.

An individual who is incapacitated cannot give consent to engage in sexual activity, and being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent. The factors to be considered when determining whether consent was given include whether the respondent knew, or whether a reasonable person should have known, that the complainant was incapacitated



POLICY 162



Stalking (3.18)

Engaging in a course of conduct (multiple incidents) directed at a specific person, on the basis of sex, that would cause a reasonable person to (1) fear for their safety or the safety of others; or (2) suffer substantial emotional distress.

Dating Violence (3.3)

Violence committed by a person (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (2) where the existence of such a relationship shall be determined based on a consideration of the following factors: (a) the length of the relationship; (b) the type of relationship; and (c) the frequency of interaction between the persons involved in the relationship.

Domestic Violence (3.4)

Includes felony or misdemeanor crimes of violence committed by (1) a current or former spouse, or intimate partner of the victim; (2) a person with whom the victim shares a child in common; (3) a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner; (4) a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies; or (5) any other person against an adult or youth (ages 11–24) victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

POLICY 165



- Policy 165 prohibits **protected-class** discrimination, harassment, and retaliation that violate Title VII of the Civil Rights Act of 1964 (Title VII), Title IV of the Higher Education Amendments Act of 1972 (Title IV), and Title VI of the Higher Education Amendments of 1972 (Title VI).(4.2.1)
- The University promptly responds to reports of protected-class discrimination, harassment, and retaliation, and shall take appropriate action to stop and prevent the recurrence of such conduct on the complainant and/or the University Community. (4.2.1)

POLICY 165



What is a Protected Class?

Race, color, religion, national origin, sex, sexual orientation, gender identity, gender expression, age (40 and over), disability, veteran status, pregnancy, childbirth, or pregnancy-related conditions, genetic information, or other bases protected by applicable law. (3.11)

POLICY 165

Policy Scope

Policy 165 applies to all persons employed by or affiliated with Utah Valley University in any way and persons participating in any university program or activity, including but not limited to trustees, administrators, faculty, staff, students, independent contractors, volunteers, and guests or visitors (sometimes referred to as “third parties”) to a university campus or any property owned or leased by the University.

(4.1.1)

POLICY 165

Discrimination (3.2)

Treating someone differently on the basis of their inclusion (or perceived inclusion) in one or more protected classes when:

- (1) that conduct adversely affects a term or condition of employment (e.g., compensation, benefits, duties, position classification, etc.), education, or participation in a UVU program, activity, or service; or
- (2) a person's membership in a protected class serves as the basis or motivating factor in a decision adversely affecting the terms or conditions of employment, education, or participation in a UVU program, activity, or service.



POLICY 165

Harassment (3.6)

- Any unwelcome verbal, physical, written, electronic, or non-verbal conduct (whether directly, indirectly, or through a third party) based on that person's inclusion in one or more protected classes that is sufficiently severe, persistent, or pervasive to alter the conditions of employment of an employee or to limit, interfere with, or deny educational benefits or opportunities of a student, from both a subjective and objective viewpoint based on a totality of the circumstances.
- The circumstances establishing potential harassment may include the frequency and severity of the conduct, whether the conduct was physically threatening or humiliating, the effect of the conduct on the individual's mental or emotional state, whether the conduct was directed at more than one person, whether the conduct arose in the context of other discriminatory conduct, and whether the speech or conduct deserves the protections of academic freedom or the First Amendment.

POLICY 165

Retaliation (3.13)

- An action, performed directly or through others, that is aimed to dissuade a reasonable person from engaging in a protected activity or is done in retribution for engaging in a protected activity.
- An Action in response to a **protected activity** is not retaliatory unless (1) it has a materially adverse effect on the working, academic, or other university-related environment of an individual; and (2) it would not have occurred in the absence of (but for) the protected activity.



POLICY 165



Protected Activity

- Opposing or reporting any violation of this policy, or participating in any manner in an investigation, hearing, or any proceeding under this policy. (3.10)
- Examples of protected activities include reporting (internally or externally) a complaint of protected-class discrimination or harassment in good faith, assisting others in making such a report, or honestly participating as an investigator, witness, decision maker, or otherwise assisting, in an investigation or proceeding related to suspected protected-class discrimination or harassment. (3.13)

POLICY 165



Sexual Conduct with Subordinate Employees or Students (4.5)

- UVU prohibits employees from engaging in sexual conduct with subordinate employees or subordinate students amid the potential for the abuse of power. Reports of such conduct will be handled in accordance with the procedures under this policy.
- Sexual Conduct: Any sexual relationship or the sharing of any sexually explicit or lewd communication, image, or photograph. Sharing sexually explicit or lewd communication, image, or photograph does not include any communication, image, or photograph that a faculty member shares with students as part of a legitimate academic exercise. (3.14)
- A subordinate student is an applicant for admission or currently enrolled student whose access to education programs and activities could be impacted or influenced by the employee.