

TO: President's Council  
FROM: Jeremy Knee, Deputy General Counsel  
DATE: July 7, 2022  
RE: Compliance Revision to UVU Policy 162 *Title IX Sexual Harassment*

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In the opinion of the Office of General Counsel, UVU should initiate a limited revision to Policy 162 under the streamlined “compliance change policy process” outlined in Policy 101.<sup>1</sup>

#### Background

The Department of Education’s 2020 Title IX rulemaking included a controversial evidentiary restriction: schools were prohibited from considering any statement made by a party or witness, unless that party or witness voluntarily appeared at a hearing and agreed to answer cross-examination questions.<sup>2</sup> UVU’s Policy 162 mirrors this requirement.

Last July, a federal court struck down that narrow section of the Title IX rule due to the Department’s failure to explain or account for potential abuse of that evidentiary restriction by respondents.<sup>3</sup> The question remained, however—*could* universities keep that language embedded in their policies voluntarily, or at least revise at their own pace. On June 28, 2022, the Department of Education issued [amended guidance](#) interpreting its Title IX regulations. Their new interpretation answers the question with a firm “no,” which means that UVU needs to revise that small section of Policy 162 to comply with the regulations, as judicially modified.

#### ED’s New Interpretive Guidance

**“Question D:** *Despite the court’s decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?*

**Answer D:** *No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they must be considered in any postsecondary school’s Title IX grievance process that is initiated after July 28, 2021.”*

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<sup>1</sup> Policy 101 § 4.2.4.

<sup>2</sup> 34 CFR 106.45.

<sup>3</sup> *Victim Rts. L. Ctr. v. Cardona*, 552 F. Supp. 3d 104, 115 (D. Mass. 2021), [order clarified](#) 2021 WL 3516475 (D. Mass. Aug. 10, 2021).

Proposed Revision to Policy 162

738 ~~5.8.5.4.1 If a party or witness does not submit to cross-examination at the live hearing, the~~  
739 ~~hearing panel must not rely on any statement of that party or witness in reaching a determination~~  
740 ~~regarding responsibility. The hearing panel must consider all relevant evidence, including~~  
741 ~~relevant party or witness statements, even if that party or witness does not appear at the hearing~~  
742 ~~or is not subject to cross-examination. The hearing panel, moreover, must not draw an inference~~  
743 ~~about the determination regarding responsibility based solely on a party's or witness's absence~~  
744 ~~from the live hearing or refusal to answer cross-examination or other questions.~~

745 ~~5.8.5.4.2 Parties, through their advisors, and hearing panelists are not obligated to question~~  
746 ~~witnesses or parties. If no cross-examination is requested by either party or the hearing panel,~~  
747 ~~then a party's or witness's absence or silence does not amount to a failure or refusal to submit to~~  
748 ~~cross-examination, as described above.~~

749 ~~5.8.5.4.3~~5.8.5.4.2 ~~Statements shall be excluded under section 5.8.5.4 only for Title IX sexual~~  
750 ~~harassment purposes. All relevant evidence, including statements made by a party or witness~~  
751 ~~who fails to submit to cross-examination, may be considered for purpose of determining~~  
752 ~~responsibility for any non-Title IX policy violations consolidated in the formal complaint and~~  
753 ~~considered under these procedures.~~