



# TITLE IX HEARINGS AND APPEALS FOR DECISION MAKERS

# TOPICS



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- PRIOR BAD ACTS EVIDENCE
- HEARING FORMAT
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# HEARING BASICS





## 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- Hearing Officer Duties Before the Hearing

- The parties will provide their written statements, list of witnesses and documents to the hearing officer 5 days before the hearing.
- The hearing panel may also submit a list of witnesses to the hearing officer at any time.
- The hearing officer may establish restrictions on advisor participation and ensure the basic rules of decorum are followed.
- Before the Hearing, The hearing officer will:
  - Give the parties and panel access to the witness and exhibit, and statement disclosures at least 3 business days before the hearing
  - Ensure all evidence obtained during the investigation that is directly related to the allegations raised in the formal complaint is available to both parties during the hearing





## Hearing Basics- Hearing Officer During Hearing

- At the hearing, the Hearing Officer will:
- Conduct the hearing
- Give the party's advisors the opportunity for opening and closing statements, cross-examination, and to introduce relevant evidence
- Give the parties a reasonable opportunity to present their positions
- Exclude evidence that is not relevant or unduly repetitious.
- Evidence will not be excluded solely because it is hearsay
- Before letting a person answer a question, determine whether the question is relevant, and explain any decision to exclude the question as not relevant
- Exclude evidence that is privileged in the courts of Utah, unless that privilege is waived.



## 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;
  - 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.





## Hearing Basics- Conflicts of Interest

An Actual Conflict of Interest Exists when a non-party individual with a role in the hearing process:

- Is in a position to gain a personal or self-serving benefit from an action or decision made in their role; or
- Is otherwise unable to participate with objectivity because of a personal or professional relationship with other individuals involved in the process or associated with those involved.
- That an individual with a role in the process works for the University alone is not enough, without more, to establish an actual conflict of interest.
- Always disclose if you have personal or professional ties to one of the parties, or if you have prior knowledge of the case that could affect your ability to participate in the hearing process with objectivity.



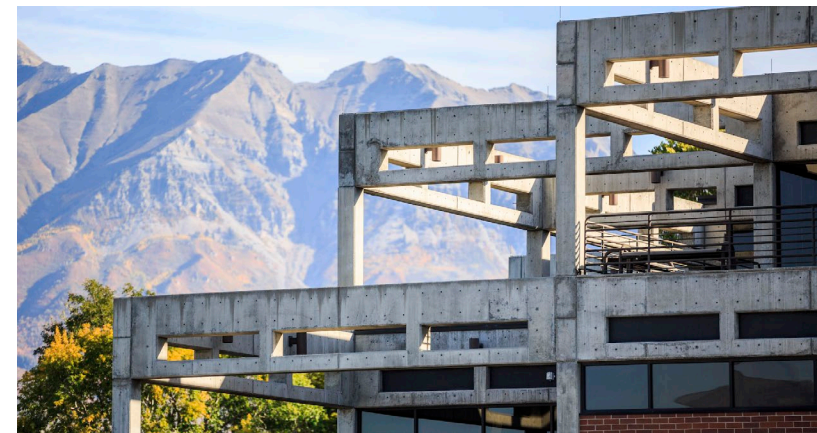
## Hearing Basics- Demonstrated Bias

- Unfair prejudice in favor of or against one group compared with another, including bias against a particular class of parties (e.g. Respondents in the grievance process)
- Individuals with roles in the grievance process are prohibited from considering the party's status as a Claimant or Respondent as a negative factor during consideration of the Formal Complaint
- Don't let a party's race, gender, religion, national origin, disability, etc., influence your beliefs about the case, the evidence, or their credibility.
- A party's account should not be more or less believed because of their identities.
- Focus on what the evidence tells you (including the parties' and witnesses' statements tell you).
- Disregard each party's status as Claimant or Respondent, and render impartial judgment based on the evidence presented



# ADVISORS

- All parties must have a process advisor to conduct cross-examination 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



# PRESUMPTION OF “NOT RESPONSIBLE”



- Respondents are presumed *not responsible* until the panel 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







## 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





# 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.

Questions and Answers Regarding the Department’s Final Title IX Rule, U.S. DEP’T OF EDUC. OFF. OF C.R. 1, 5 (Sept. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix20200904.pdf>.



## 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

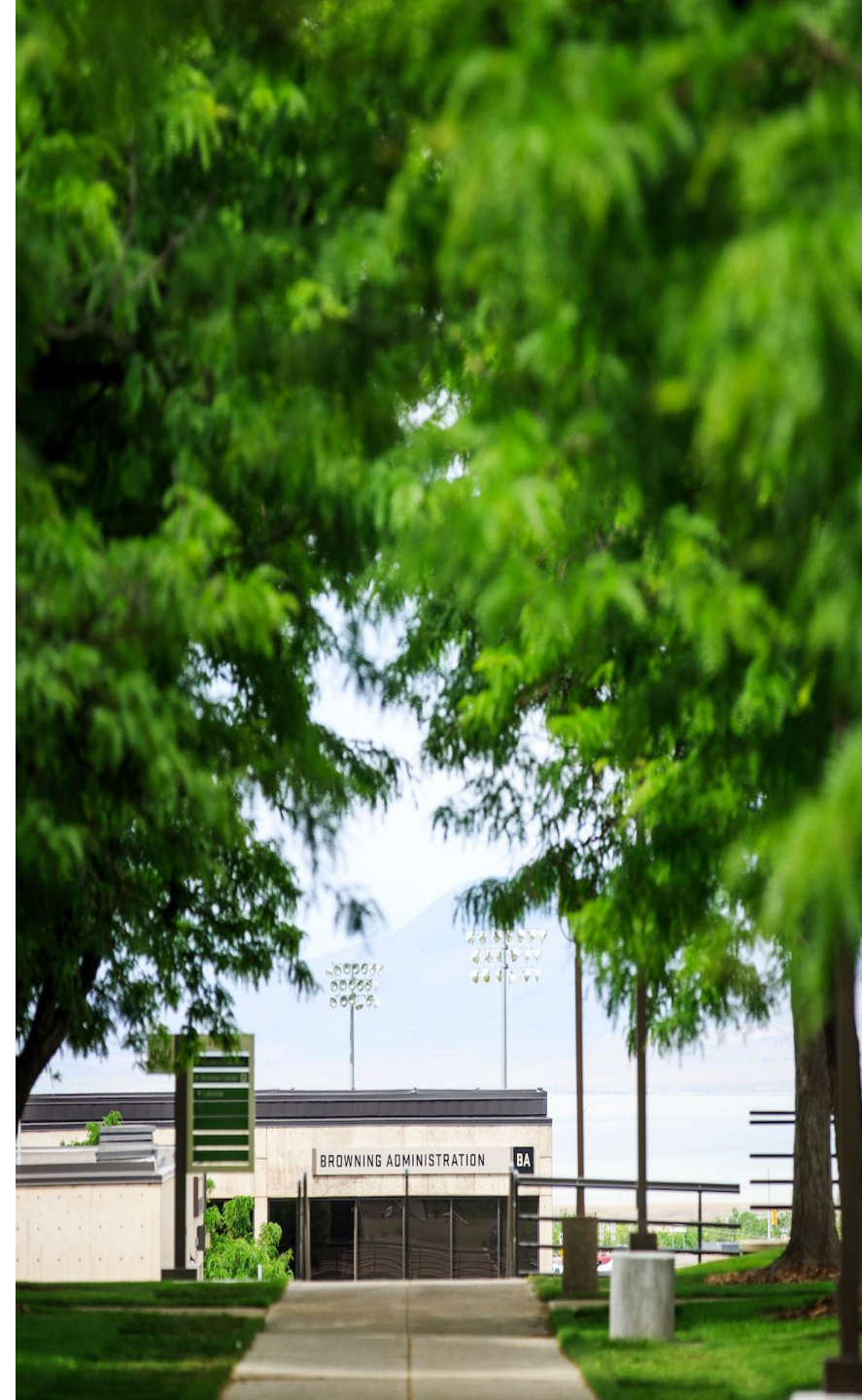


# Weighing Evidence

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.

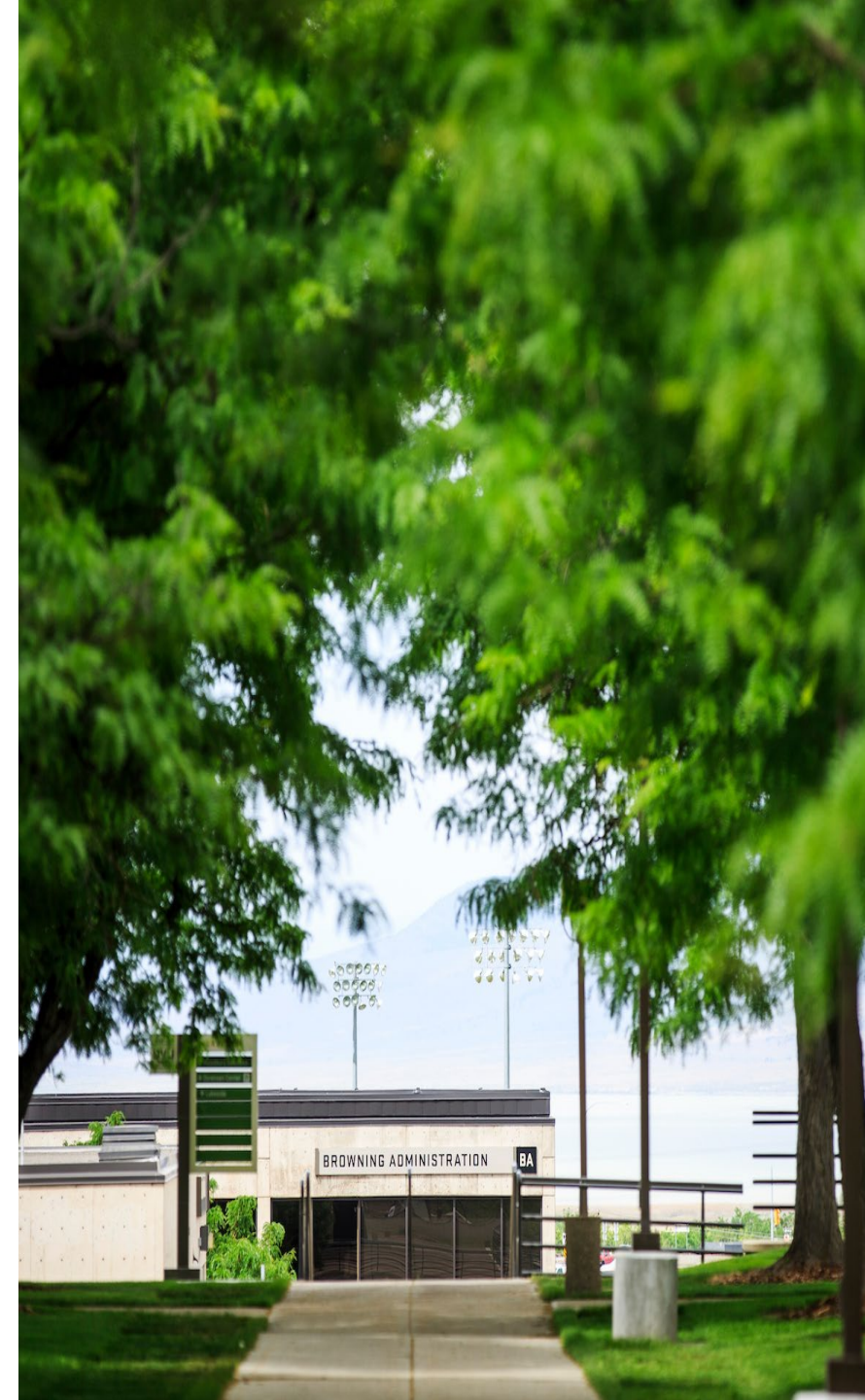
Corroborating evidence is the strongest indicator of credibility.



# 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.



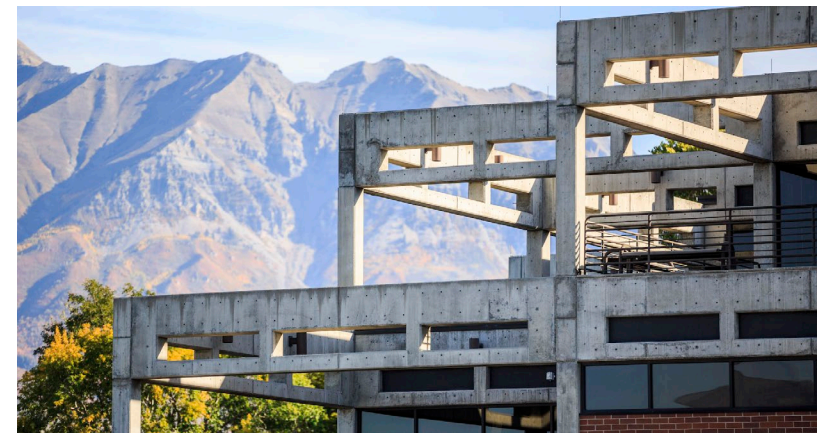




# CROSS-EXAMINATION AND RELEVANCE DETERMINATIONS

# 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



## 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





## 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

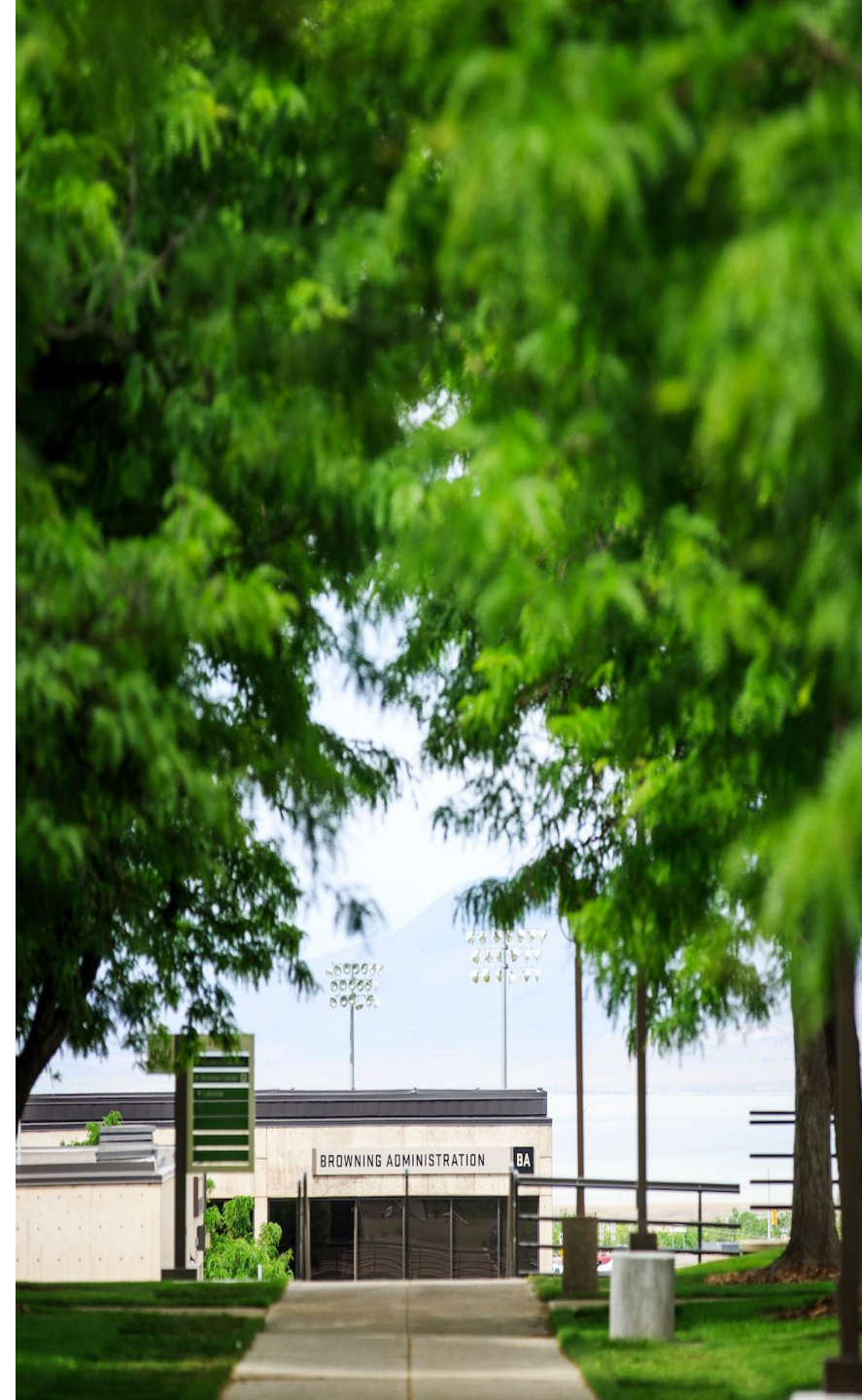


## Written Determination

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
  1. a determination regarding responsibility based on a preponderance of the evidence;
  2. disciplinary sanctions imposed on the respondent; and
  3. 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





## 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.