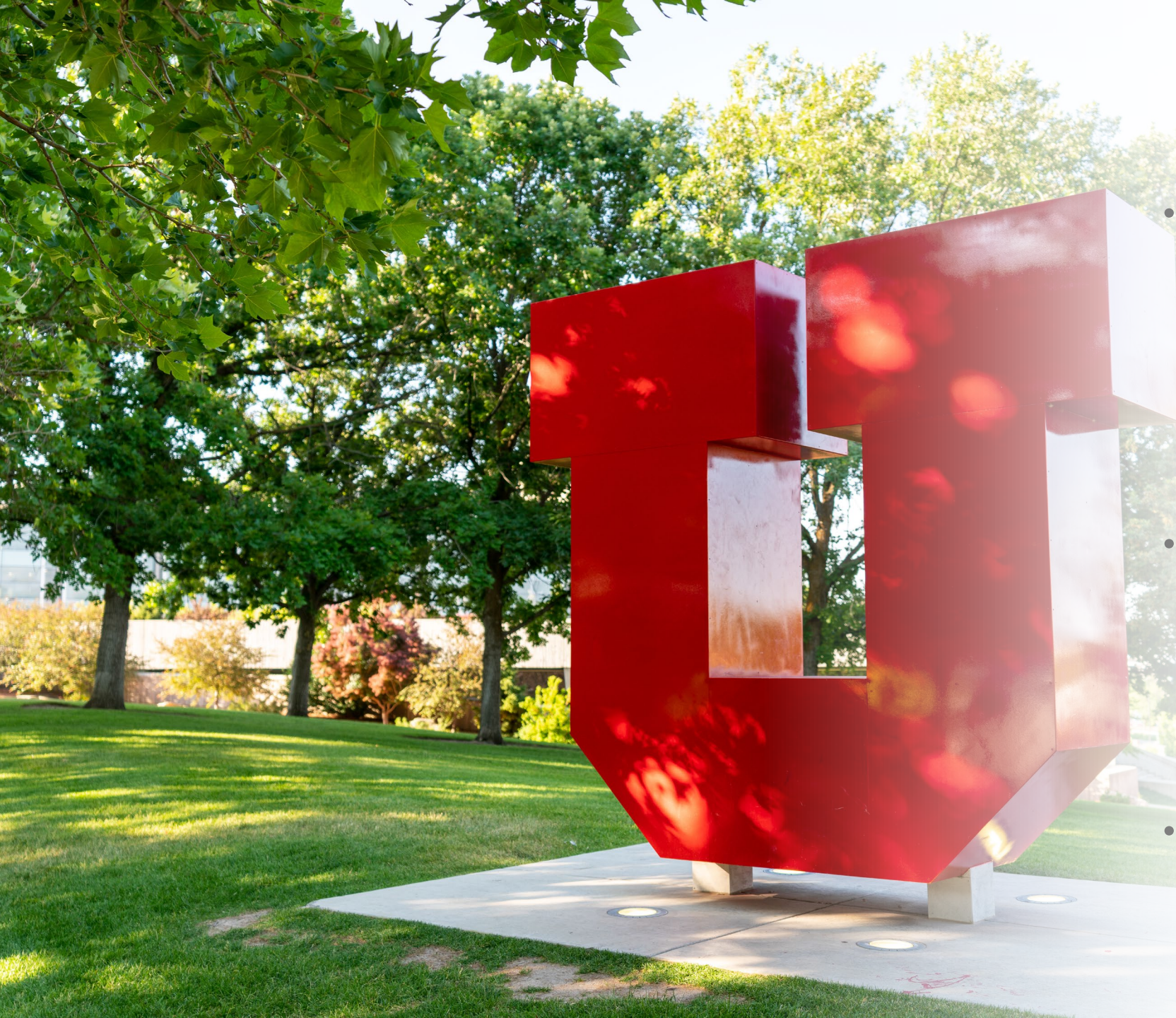




# Hearing Committee and Advisor Training



# Agenda

- Compliance (Jess Morrison)
  - Protected Classes
  - Title IX
  - Regulatory Training Requirements
    - Bias
    - Sexual Harassment
    - Hearings
    - Relevance
    - Cross Examination
- Best Practices and Practical tips
  - Hearings
  - Party time
  - Hearing Control
  - Commonly asked questions
  - Pre-scheduled hearings
- Open Discussion and Questions

## [Interim] Policy 1-012: *University Non-discrimination Policy*

“This Policy applies to all academic and administrative units of the University, and to all members of the University community, including faculty, staff, students, patients, visitors, and participants in University programs or activities.”

“The University of Utah does not discriminate against individuals on the basis of **[Protected Class]**... in employment, treatment, admission, access to educational programs and activities, or other University benefits or services. Additionally, the University provides reasonable accommodations to ensure equal access to qualified persons with disabilities.”

# Title VII of the Civil Rights Act of 1964

Discrimination means treating someone differently, i.e., **disadvantaging the person**, on the basis of being a **member of a protected class** described in University Policy 1-012 when:

- such conduct **adversely affects** a term or condition of an individual's employment, education, living environment, or participation in a university program or activity; or
- a person's membership in a protected class is used as **the basis for or a factor in decisions** affecting that individual's employment, education, living environment, health care, or other participation in a university program or activity.

Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law.

**Trivia:** What current SCOTUS justice was the Chairman of the EEOC for eight years?

# Protected Classes

- Race
- Ethnicity
- Color
- National Origin
- Age
- Religion
- Disability
- Protected Veteran's Status
- Sex
- Sexual Orientation
- Gender
- Gender Identity
- Gender Expression
- Genetic Information
- Pregnancy
- Pregnancy-Related Conditions

The EEOC enforces laws that prohibit discrimination based on race, color, religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment.

Isn't the EEOC missing some protected classes?

# Title IX of the Education Amendments of 1972

“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[.]”

The Department of Education’s Office for Civil Rights (OCR) is responsible for enforcing Title IX.

**Trivia:** What current SCOTUS justice was the Assistant Secretary at OCR?

See 20 U.S.C. § 1681

# Title IX Regulations Require Training

A recipient's grievance process must—Require that **any individual designated by a recipient** as a Title IX Coordinator, investigator, **decision-maker**, or any person designated by a recipient to facilitate an informal resolution process, not have a **conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on **the definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, how to conduct an investigation and grievance process including **hearings**, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by **avoiding prejudgment of the facts at issue**, conflicts of interest, and bias.

# Title IX Regulations Require Training

A recipient's grievance process must—Require that **any individual designated by a recipient** as a Title IX Coordinator, investigator, **decision-maker**, or any person designated by a recipient to facilitate an informal resolution process, not have a **conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent.

- No conflict of interest or bias
- Cannot make presumptions about the role of a Party
- Cannot have a connection (positive or negative) with an individual Party



# Title IX Regulations Require Training

...A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on **the definition of sexual harassment** in § 106.30...

- What is Sexual Harassment?
- In regulation?
- In policy?

# Sexual Harassment (§ 106.30)

*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient **conditioning the provision of an aid, benefit, or service** of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

# University Policy defines Sexual Harassment

*Sexual or Gender-Based Harassment* means conduct, on the basis of sex/gender, that satisfies either of the following:

1. An employee **conditioning the provision of an aid, benefit, or service** on an individual's participation in otherwise unwelcome sexual conduct;
2. Unwelcome conduct which a reasonable person would determine to be:
  - a. so **severe, pervasive, AND objectively** offensive that it effectively denies a person equal access to the University's Programs or Activities (**Title IX**); or
  - b. sufficiently **severe OR pervasive** that it has the purpose or effect of interfering with or creating an intimidating, hostile or offensive environment in a University Program or Activity (**Title VII or University Policy**); or
3. Conduct which constitutes Sexual Assault/Sex Offenses, Dating Violence, Domestic Violence or Stalking...

# Title IX Regulations Require Training

the **scope of the recipient's education program or activity**, how to conduct an investigation and grievance process including **hearings**, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by **avoiding prejudgment of the facts at issue**, conflicts of interest, and bias.

- “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs...
- Farmer v. Kansas State University (10th Cir. 2019)
- Avoid prejudgment of facts (allegations)

# Title IX Regulations Require Training (continued...)

...A recipient must ensure that **decision-makers receive training** on **any technology** to be used at a live hearing and on **issues of relevance of questions and evidence**, including **when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant**, as set forth in paragraph (b)(6) of this section....

**Any materials used to train** Title IX Coordinators, investigators, **decision-makers**, and any person who facilitates an informal resolution process, **must not rely on sex stereotypes** and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

# Relevance

**Is a school permitted to limit questions that may be asked by each party of the other party or witness?**

**Yes.** Questions must be relevant.

During cross-examination, “only relevant cross-examination questions and other questions may be asked of a party or witness” and the decision-maker must determine the relevance of a question before a party or a witness answers.” Any school may exclude as not relevant questions that are duplicative or repetitive.

The federal Title IX regulations expressly prohibit some questions as NOT relevant.

# Prior sexual behavior

**Are questions and evidence about the complainant's sexual history relevant?**

**Yes, but only in (very) limited circumstances.**

The 2020 Amendments state that “questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

**UNLESS** [emphasis added] 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” or

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.”

# Medical and mental-health records

**Can cross-examination include questions about an individual's medical or mental-health records?**

**Only with permission.**

Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent. Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.<sup>164</sup> The preamble also explains that “[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process.”



# Cross-Examination

**Can a hearing committee consider statements by a party or witness that does not submit to cross-examination?**

**Yes.** A committee may not make any decisions about a party's credibility based solely on their decision not to participate in a hearing or submit to cross-examination.

For example, a committee may consider statements made by the parties and witnesses during the investigation. A committee may also consider emails or text exchanges between the parties leading up to the alleged sexual harassment and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. Additionally, a committee may consider police reports, Sexual Assault Nurse Examiner (SANE) documents, medical reports, and other documents that satisfy the regulation's relevance rules even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.





# Best Practices and Practical tips

S.J. QUINNEY  
COLLEGE OF LAW

# Hearings

- **Closed Hearing:** Hearings shall be closed to the public.
- **Witnesses:** The Committee, Complainant, and Respondent may all call witnesses. It is the responsibility of the party or the committee to encourage a particular witness to attend. Committee called witnesses are notified by the Hearing Coordinator.
- **Documentary Evidence:** The parties may submit documentary evidence. The Committee may also request documentary evidence. Additional evidence is uploaded to the box folder prior to the hearing.
- **Rules of Evidence:** The Committee shall not be bound by strict rules of legal evidence or procedure and may consider any evidence it deems relevant.
- **Privacy:** Committee Chairs and Committee members are prohibited from discussing any matter related to the hearing (including parties, and witnesses); this applies before and after the hearing.
- **Role of Office of General Counsel:** The Office of General Counsel may provide a staff attorney to be present at hearings in order to provide guidance to the Committee on substantive law and procedural matters.

# Hearings

- **Disruptive Behavior:** The Committee has the authority to exclude from the hearing any party, advisor, or other participant whose behavior the Committee finds disruptive after having provided a warning.
- **Sanctions:** The Committee is the decision maker on sanctions.
- **Remedies:** The Committee is the decision maker on remedies. Often overlap with Sanctions.
- **Scheduling:** The Hearing must be held no less than 15 calendar days and no more than 40 calendar days after the final report is issued to the parties.
- **Hearing Documents:** Are uploaded into a box folder prior to the hearing. All documents must be reviewed by the Committee prior to the hearing.

# What counts against a parties time?

**Each party** is given 45 minutes in total to present their case:

- What counts against their time?
  - Opening statement
  - Presentation of Evidence
    - Testimony by witnesses
    - Cross-examination of other party or their witnesses
  - Closing statement/ rebuttal
- Can a party request additional time prior to the hearing?
- What if there are multiple parties?

# Hearing Control

- Distractions
  - Location of a party during the hearing
  - Connection issues
  - Others coming into the room
  - Noise
- Disruptive hearing participants
  - Repetitive questioning
  - Name calling
- Focusing on the allegations

# Commonly asked questions

- What is a conflict of interest or Bias?
  - First-hand knowledge of the facts and circumstances
  - Unable to consider facts in an unbiased manner
  - Biased for/against a party Bias does not include developing an opinion after a review of the evidence
- When can Committee members ask questions during the hearing?
  - Serving as an Alternate Committee member
    - Can an Alternate ask questions during the Hearing?
- How are hearings held?
  - Remotely via Zoom
  - All hearings recorded
    - Committee members and parties must remain on camera during the recording of the hearing
- Box access and issues
  - Blank box folder
  - Error when trying to access



# Pre-scheduled Hearing Dates

- All hearings through the end of the year have been pre-scheduled
  - Chair's have already been assigned
  - **Committee members** accept 2 pre-scheduled dates per month through the end of the year
  - **Advisors** accept 2 pre-scheduled dates per month through the end of the year
- Pre-scheduled hearing dates that **do not** have a case assigned will be canceled and removed from your calendar



# Questions

# SIGN IN ELECTRONICALLY!

## Training Title "Combo" "Session 1"

### EMPLOYEES:

[bit.ly/oeoemployee1](https://bit.ly/oeoemployee1)



### STUDENTS:

[bit.ly/oeostudent1](https://bit.ly/oeostudent1)

