

Title IX:


A District's Responsibility in Sexual Harassment Cases.



Title IX provides that . . .

“ [n]o 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 . . . ”



A blurred photograph of a classroom. In the foreground, a male teacher in a light blue shirt is looking towards the right. Behind him, several female students are seated at desks, looking in the same direction. The background shows rows of desks and a whiteboard. The overall scene is dimly lit and out of focus.

**Title IX Prohibits Sexual Harassment within
the Scope of the School's Education
Program or Activity**

Sexual Harassment

106.30 Sexual Harassment means conduct on the basis of sex that satisfies one or more of the following:

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
- 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
- "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).

Education Program or Activity

A school's education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs...

What is the district's responsibility?

The new rule went into effect August 14, 2020. What does your district need to do?

Policy

- ✓ The district must adopt a grievance procedure that comports with the new rules.
- ✓ The district must publish the grievance procedure for all applicants for admission and employment, students, parents or legal guardians, employees and all unions or professional organizations holding collective bargaining or professional agreements with the school/district.
- ✓ The district must provide to persons entitled to notification how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district will respond.

Title IX Coordinator

- ✓ The district must appoint at least one Title IX Coordinator.
- ✓ The district must notify applicants for admission and employment, students, parents or legal guardians, employees and all unions or professional organizations holding collective bargaining or professional agreements with the school/district, of the name or title, office address, email address, and telephone number of the employee or employees designated as the Title IX Coordinator(s).
- ✓ The name and contact information for the Title IX Coordinator(s) must be published on the district's websites, if any, and in each handbook or catalog that the district makes available to persons entitled to notification.

Training

- ✓ Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be trained on:
 1. The definition of sexual harassment;
 2. The scope of the district/school's education program or activity;
 3. How to conduct an investigation and grievance process including appeals, and informal resolution processes;
 4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
 5. Decision-makers must be trained on issues of relevance of questions and evidence, including when questions and evidence about a Complainant's prior sexual history are relevant; and
 6. Investigators must be trained on issues of relevance to create an investigative report that fairly summarizes the relevant evidence.

Training

- ✓ Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be made publicly available on the district/school's website, or if they do not have a website they must make the materials available upon request for inspection by members of the public.

Record Keeping

Each district must create and maintain for a period of seven years, records of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment. In each case the district must document the basis for its conclusion that the district was not deliberately indifferent and document that it has taken measures designed to restore or preserve equal access to the district's education program or activity.

Key Individuals

Parties

Complainant: an individual participating or attempting to participate in the school's education program or activity who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.



Complainants and Respondents may be male or female, of the same gender as one another or different genders. Complainants and Respondents may be students, teachers, staff members, other employees, or anyone participating in or attempting to participate in the school's education program

Title IX Coordinator: the responsible employee of the school with major responsibility for Title IX compliance efforts

Investigator: an individual who investigates formal complaints

Facilitator: an individual who facilitates the informal resolution process

Decision-Maker: an individual who makes a determination of responsibility after a formal investigation or an individual who reviews an appeal of a determination and makes a ruling on the appeal

Advisor: Complainants and Respondents are permitted to have an advisor of his/her choice throughout the process. The advisor may be, but does not need to be, an attorney

Grievance Process Overview

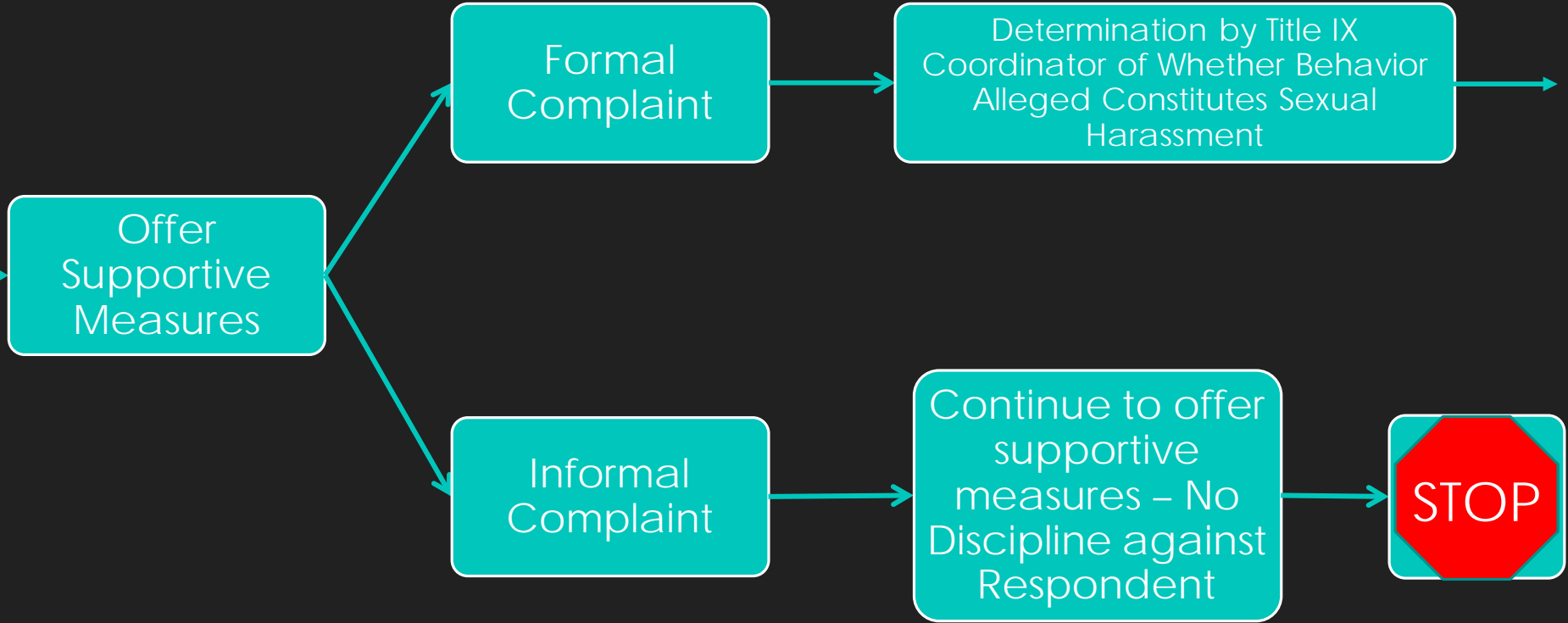
Notice

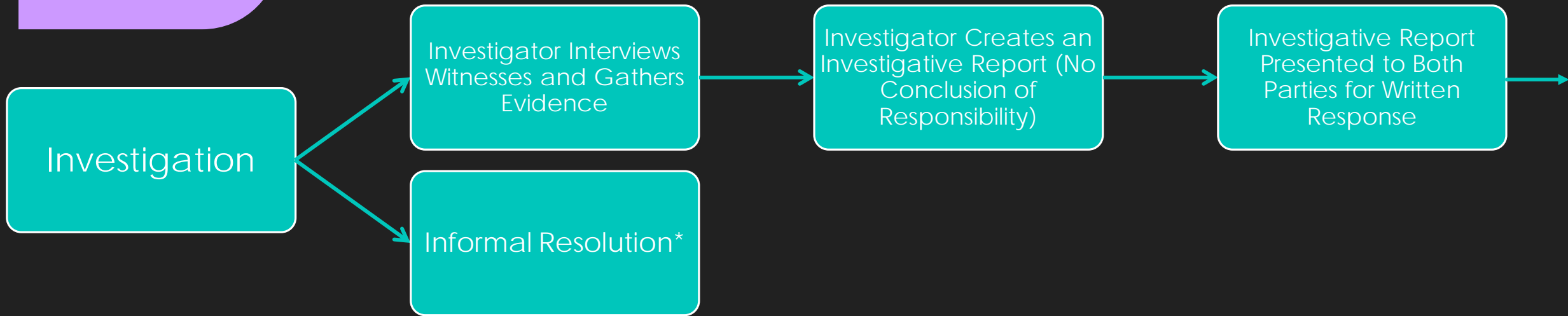
The K-12 schools are deemed to be on notice whenever any employee has notice of sexual harassment, including allegations of sexual harassment. Notice to any employee triggers the school's response obligations and triggers liability if the school does not act appropriately.

Supportive Measures

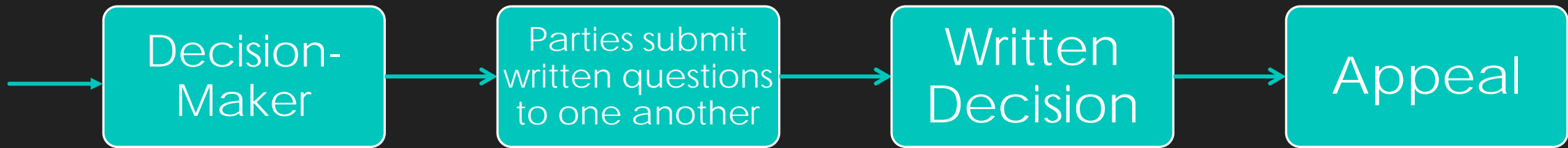
Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Examples: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas on campus, and other similar measures.





*Not available if the Respondent is an employee and the Complainant is a student



Decision-Makers



MAKE A RULING

OR



REVIEW AN APPEAL
AND MAKE A RULING

Burden of Proof

In recognition that Title IX governs schools, not parties, the Department obligates the school to carry both the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, while also providing parties equal opportunity (but not the burden or obligation) to gather and present witnesses and other evidence, review and challenge the evidence collected, and question other parties and witnesses.



Remedies

Remedies must be designed to restore or preserve equal access to the school's education program or activity. Such remedies may include "supportive measures" or discipline for Respondents only *after* a determination of responsibility for sexual harassment has been made against the Respondent.



Throughout the Process...

- The school must provide reasonably prompt time frames to complete the grievance process
- All evidence must be evaluated objectively
- Complainants and Respondents are to be treated equally throughout the process
 - Respondents are presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- All Title IX Coordinators, Investigators, Facilitators, and Decision-Makers must be properly trained



Family Educational Rights and Privacy Act (FERPA)

A Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

“...FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.”

2001 Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties - Department of Education

Confidentiality

The school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or regulations, 20 U.S.C. 1232g and 34 CFR part 99, or as required by law, or to carry out the purposes of [34 CFR part 106], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.





Why?

Because it's the law.

Questions?



Christine Hashimoto

Assistant Utah Attorney General
Litigation Division, Employment Section

160 E 360 S, 6th Floor

Salt Lake City, Utah 84114-0856

Tel: 801-366-0100

Email: chashimoto@agutah.gov

Title IX: The Process of Deciding



Why do we have this process?

The purpose of the hearing is to ascertain truth through evidence and vet action through argument. We want to give the parties a chance to be heard.



Bias and Conflicts of Interest

- Am I biased?
- Do I have a conflict?
- Disclose potential conflicts to the District and the parties.



Control, control, you
must learn control!



Who's the Boss?

You control what comes in

You control the parties

You control the process

You make the decision

Do you have a conflict?



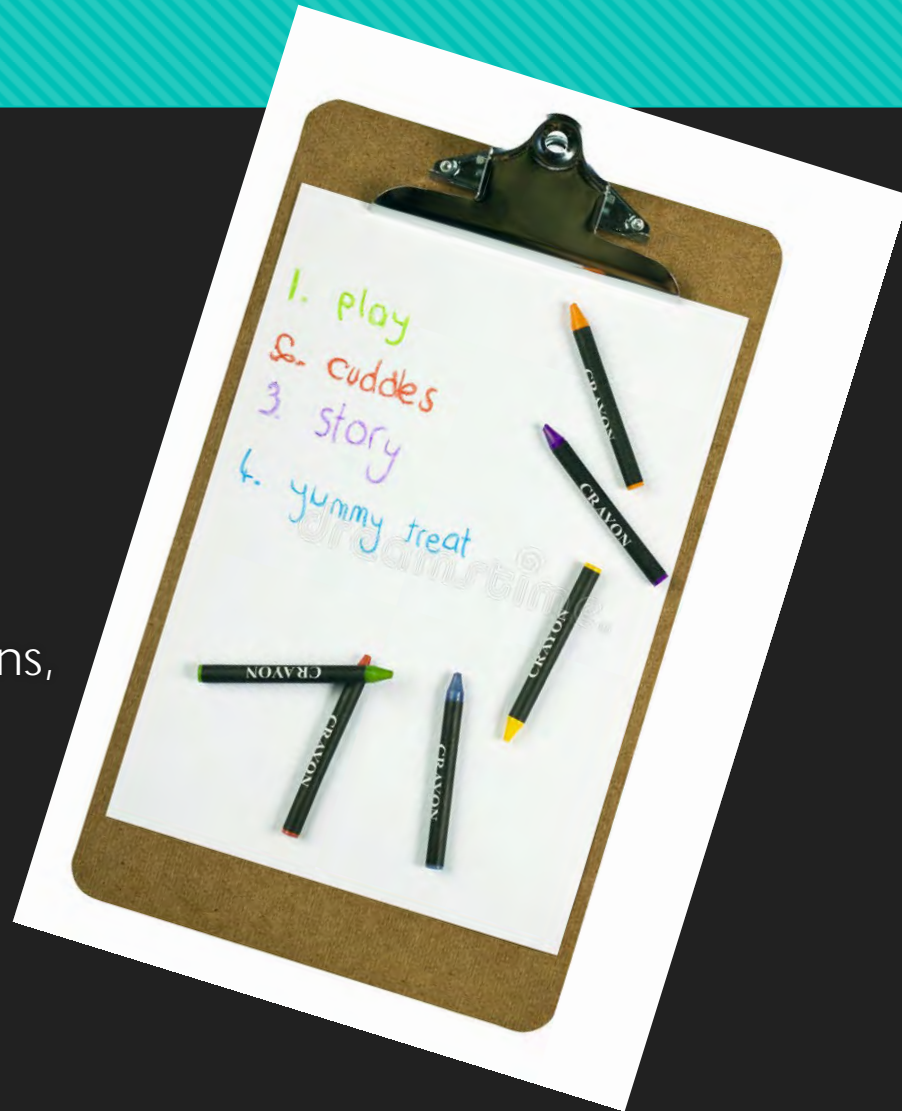
Ex Parte Communications

Occur when the decision maker communicates with one party, but not the other.

- Avoid ex parte communications
- If they do occur, promptly inform the other side
- Include the parties or their representatives on every communication

Write it down

- Take notes
- Keep track of the parties' submissions
- Keep track of your rulings
- Inform the parties of your orders, decisions, and rulings in writing



What does this look like?

- No in person hearing
- Conducted in writing
- Set by school policy
- Back and forth exchanges in writing between parties and you



Evidence

- Witnesses
- Documents
- Audio/Visual Materials



Excluding Evidence

- Not Evidence
- Irrelevant
- Inadmissible



We're going to learn about these legal-sounding things today:

- Evidence:
 - Relevance
 - Admissibility
- Witnesses:
 - Credibility
 - Testimony
- Due Process



Relevance

Batman is always relevant.



What is relevant?

- Utah Rule of Evidence 401 states:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.



**Decision Makers
are required to
rule on the
relevance of
evidence.**

- Follow the rules set out by your institution in policy.
- Carefully read the description of the evidence being introduced.
- Ask yourself, does this evidence make a fact more or less probable?



An Example

- I built C-3PO.
- You know that lightsaber that was in your hand when I cut it off? Somehow, 30 years in the future, it will magically reappear in an unguarded chest in the downstairs of a bar that Han Solo apparently loves, but never visited once during any of the other movies.
- You stayed on your uncle's lame moisture farm that has the grave of your grandmother.

Allegation: No, I am your father.



Another Example

Allegation: Joe Exotic hired a meth head to kill Carol Baskin.

Evidence:

- I threatened to kill Carol Baskin on my show like 30 times.
- I think Carol Baskin killed her husband.



An example from a hearing:

Issues:

- Engineer was brutally mean to his coworkers, calling them incompetent or corrupt. He scrutinized all of their work, even if it wasn't his job. When dealing with his own clients, he was overly critical, obstructionist, and antagonistic. The agency has a policy of cooperation and teaching with its clients.
- Did he engage in the conduct alleged?

Question:

- Am I a competent engineer?
- Was I ever wrong?
- Daniel is a liar and is known to be "untethered from the truth".
- Just because I'm pompous, here's what the hearing officer said, and the Court of Appeals repeated:

The CSRO Decision noted that [employee] "did not provide, and has not yet provided, any evidence whatsoever in support of this remarkable accusation" but commented "that throughout th[e] proceeding, [Daniel] has acted as an honest, ethical, and capable member of the bar."

Investigative Report

You can consider it, but you are not bound by it.
You may make up your own mind about its
reliability, credibility, and conclusions.



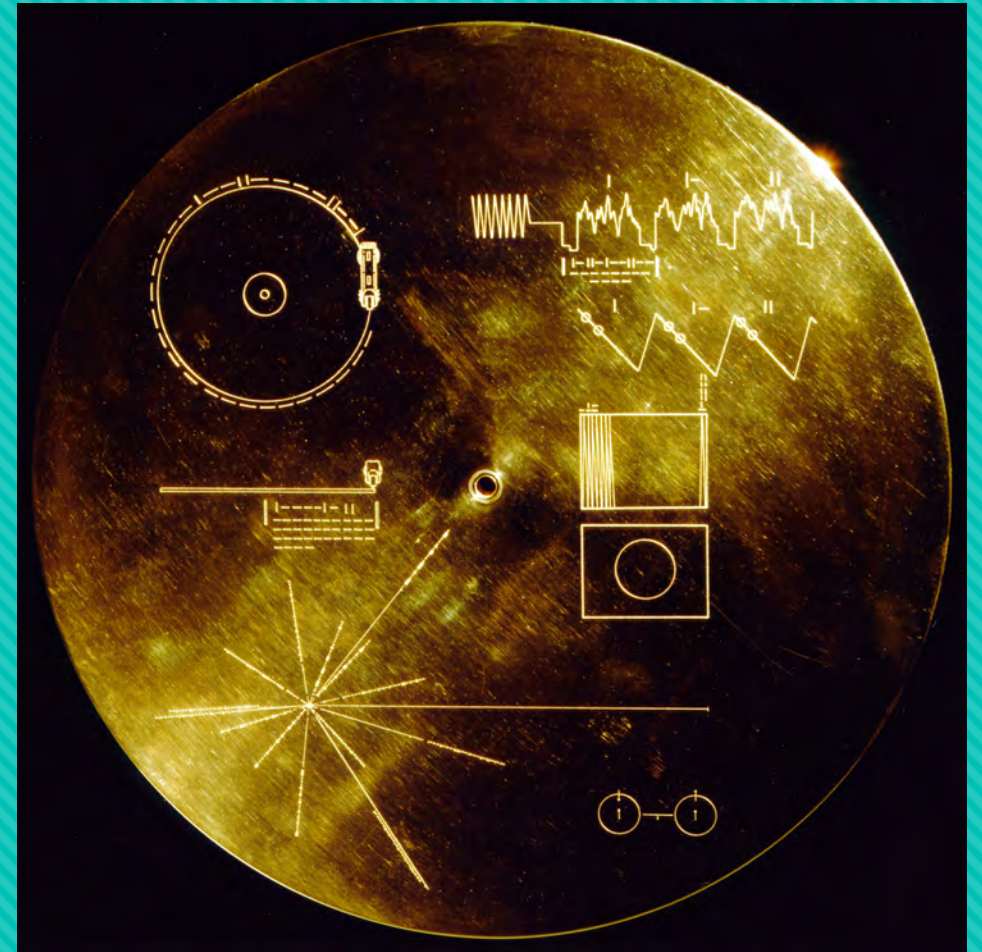
How do you announce your decision?

When you rule on relevance, you need to state your ruling on the record, especially if there is an objection.

- Make sure the parties have been heard. Sometimes, parties object to the same evidence or category of evidence multiple times. If the reason for the objection is already clear, you do not need to let the parties restate their positions. If you don't know, invite them to clarify.
- State your decision clearly, on the record, so there is no misunderstanding. "I rule that the evidence is relevant because..."



Make a Record



Smile, you're on Candid Camera.

Rape Shield

Federal Rule of Evidence 412:

○ **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) **Omitted.**

(2) **Civil Cases.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

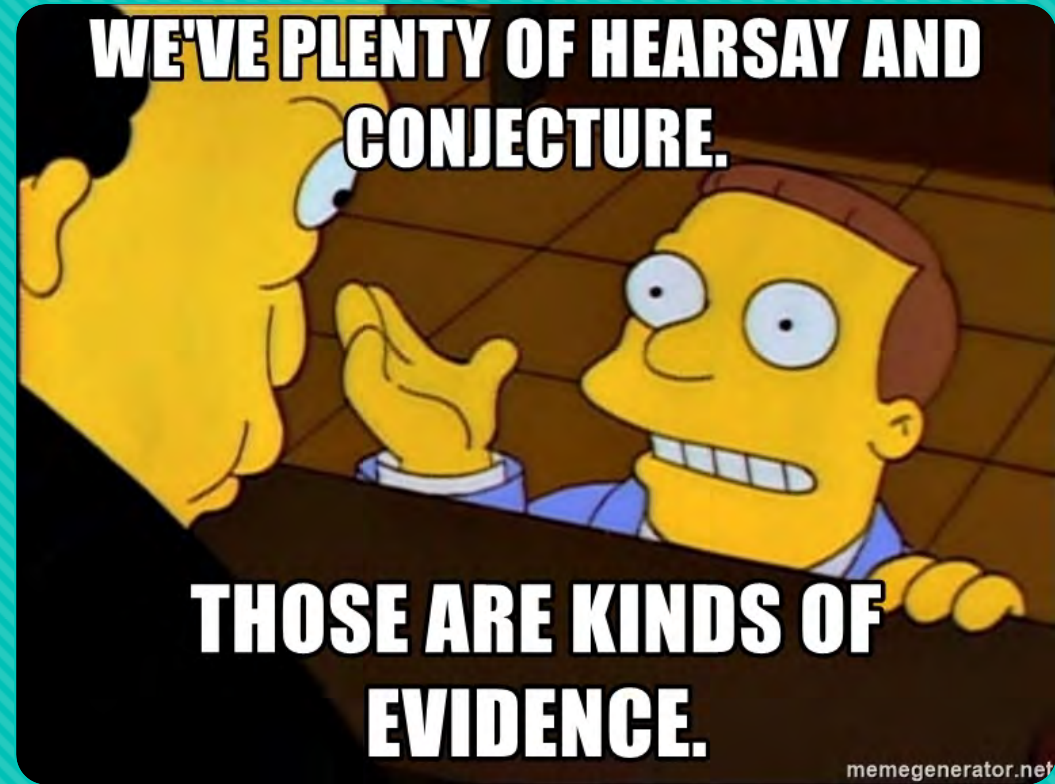
(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.

Hearsay



I heard her say...

What is hearsay?

An out of court statement offered to prove the truth of the matter asserted.

Example of Hearsay

What is the statement?

"On the night of the incident, I heard Brad say he saw Respondent at the party and he was following Complainant up the stairs."

Is it hearsay?

- Is it an out of court statement?

Yes. It was heard somewhere else.

- Is it offered to prove the truth of the matter asserted?

Yes. It is being offered to show the Respondent was alone with Complainant on the night the incident occurred.



But, is it
admissible?

Hearsay is almost
always admissible in
administrative
proceedings like this.

But...

- It cannot be the only basis for your decision, but it can be used to reinforce your decision.
- If a person is unwilling to testify in person, any evidence they offer cannot be considered.
- Hearsay is generally inadmissible in court because it is not reliable but is very persuasive.
- This means that when you admit or are presented with hearsay evidence, you can assign it evidentiary value based on its credibility.

Some things are not hearsay

- A party's own statement:

I heard the accused say, "No one can say 'no' to me!"

I heard the victim say, "Oh, I totally hooked up with him last night and it was amazing!"

- A statement being offered to show the effect on the listener:

"I heard the victim say that he was worried the accuser would hurt him."

"What did you do next?"

"I reported it to campus security and they opened an investigation."

Remember:

- A statement by a person who has refused to testify cannot be admitted into evidence
- Do not base your decision on hearsay alone
- Not all statements are hearsay



Prejudicial v. Probative Value

All evidence is subject to this rule.

Rule Against Prejudicial Evidence

If evidence is more prejudicial than probative, then it may be excluded.

This is a subset of relevance, if you're into nerdy law stuff.



Probative Value

- Evidence is probative if it tends to prove a fact.
- The more reliable the evidence, the more it tends to prove a fact.
- Unreliable evidence does not tend to prove a fact.
- Example:

I saw the victim right after the incident and he was acting strange, worried, upset, and out of it.



Prejudicial Effect

Evidence that is compelling, but not reliable or of only limited relevance can cause prejudice, such as:

- Past behavior
- Scandalous allegations
- Rumors
- A person's history

The word "SCANDALOUS" is written in large, bold, 3D metallic letters. The letters are dark with a bright, glowing highlight along the top edge, giving them a three-dimensional appearance. They are placed on a dark, highly reflective surface that creates a clear, inverted reflection of the word. The background is dark and slightly blurred, suggesting a desk or a similar surface with some papers or objects in the distance. The overall lighting is dramatic, with strong highlights and deep shadows.

Other Evidence Stuff



There are like...100 rules. Even a whole class on it in law school.

Other Categories of Basic Evidentiary Rules

- Personal Knowledge
- Foundation
- Expert Opinion
- Lay Opinion
- Exceptions to the Hearsay Rule
- Authentication



More Kinds of Objections:

- Argumentative
 - Isn't it true that you have always been a jerk?
- Duplicative
 - Did you know the victim?
 - But you knew the victim?
 - You knew the victim, right?
- Compound
 - You saw the victim at the party and at the dorm?
- Badgering the Witness
 - Did you order the Code Red?!
- Narrative
 - You want me on that wall, you need me on that wall.



Controlling the Process

- Announce your expectations at the start of the process.
- Have a hearing order (if the policy allows it).
- Try to resolve as many issues as you can before the first witness or presentation.
- Do not be afraid to assert your authority and chastise misbehavior.
- Be assertive and polite.
- Try not to hold it against the individual if their attorney is a jerk.

The End...

Or is it?

Daniel Widdison

Utah Attorney General's Office

Litigation Division

Employment Section

dwiddison@agutah.gov

(801)366-0571



Due Process in Disciplinary Suspensions and Expulsions

Darin B. Goff

Assistant Utah Attorney General
Section Director, Civil Rights Section
Litigation Division



“In case of dissension, never dare to judge till you've heard the other side.”

— Euripides, *The Children of Herakles*

What is Due Process?

The State may not deprive any person of:
 life,
 liberty, or
 property,
without due process of law. . . .
–The Constitution of the United States,
Amendment XIV.

Due Process Clause

Why Does the Due Process Clause Apply to Academic Dismissals or Disciplinary Suspensions or Expulsions?

- A Legitimate entitlement to public education is a property interest.
- Reputation, honor, or integrity are forms of liberty.

Due Process Clause

How Does a School Satisfy the Due Process Clause When Implementing Disciplinary Suspensions or Expulsions?

- The Basic Requirements of Due Process Are:
 - Notice, and
 - An Opportunity to be Heard.

Notice:

- Advises of the sanction(s) sought, i.e. suspension/expulsion
- Advises of the allegations against the student.

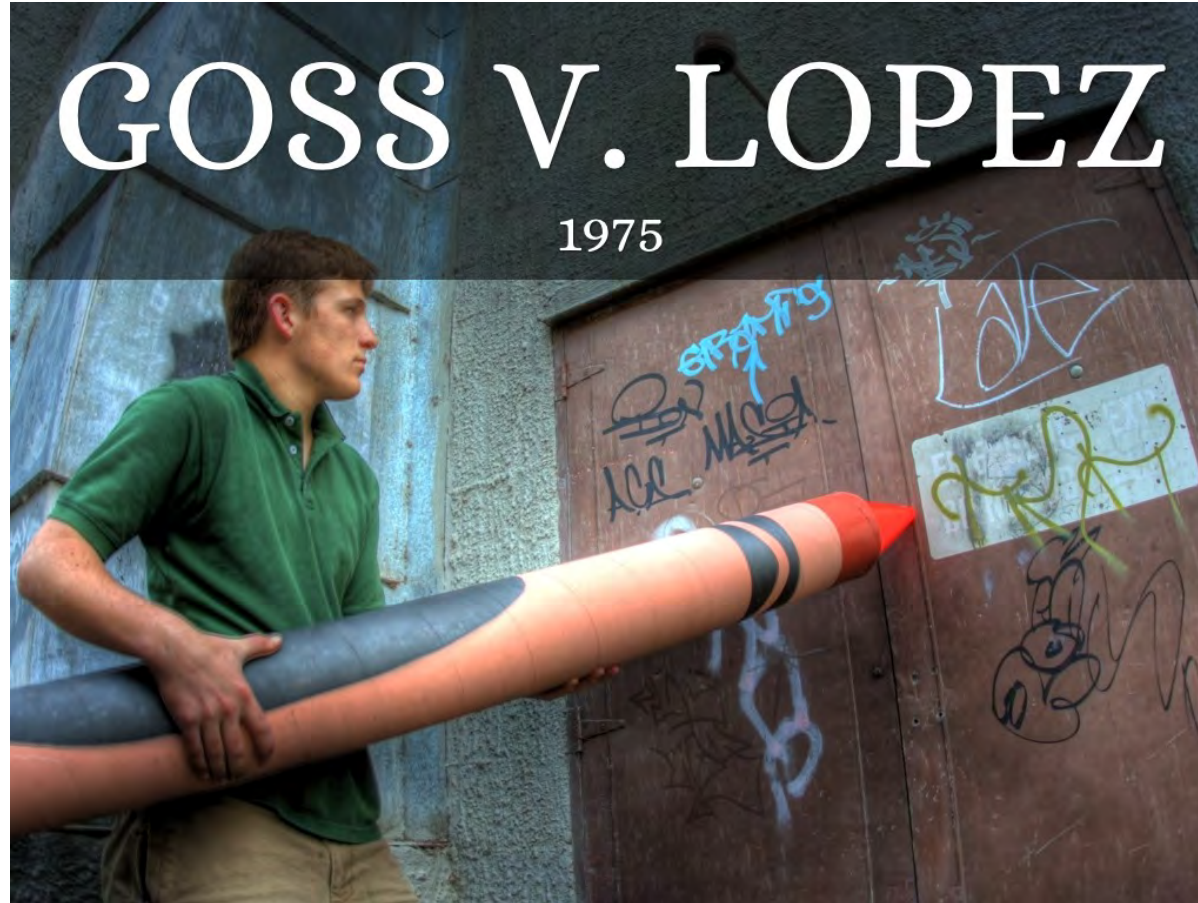
Opportunity to Be Heard

- Due process may require some opportunity to counter allegations.

How Much Due Process is DUE?

- Two distinct scenarios:
 - Disciplinary Suspensions of Ten Days or Less
 - Disciplinary Suspensions/Expulsions for More than Ten Days

Disciplinary Suspensions for Ten Days or Less



Goss v. Lopez Facts

- Nine students suspended for ten days for destroying school property and disrupting learning environment
- Ohio law allowed principal to suspend the students for 10 days or expel them
- Expelled students entitled to a hearing under state law
- Suspended students were not entitled to a hearing

Quotable

“Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not ‘shed their constitutional rights at the schoolhouse door.’”

Goss v. Lopez Decision

- Ten-day expulsion is not *de minimis* and may not be imposed in complete disregard of the Due Process Clause
- School must give oral or written notice of allegation.
- If the allegation is denied:
 - An explanation of the evidence
 - Opportunity to present student's side
 - Notice and the “hearing” can be simultaneous

Goss v. Lopez Decision (Cont.)

- Disciplinary Suspensions of Less Than Ten Days Do Not Require:
 - Opportunity to secure counsel;
 - Opportunity to cross examine witnesses;
 - Opportunity to present your own witnesses.

Suspensions of Ten Days or Less, Cont.

West

v.

Derby Unified

School District no. 260

West v. Derby Unified Facts

- District Policy prohibited racial and ethnic harassment including displays or possession of materials associated with hate-groups such as Klu Klux Klan, Arayan Nations, Black Power, Confederate flags.
- Middle-school student suspended for three days for drawing picture of confederate flag during math class.

West v. Derby Unified Decision

- Suspension of three days entitled student to due process
- Student received due process when the assistant principal gave student notice of the violation of policy by confronting him regarding the drawing of the flag and gave the student an opportunity to respond and the student did so in writing.
- T.W. knew the flag violated the policy because he'd signed an acknowledgment of the student handbook.

Longer Suspensions/Expulsions

Watson v. Beckel

2001

Watson v. Beckel Facts

- Student at State Military School assaulted Roommate
- During investigation student was advised that:
 - The assault was the subject of the investigation
 - The school believed the assault was racially motivated
 - Advised of hearing concerning the assault and his motivation
 - Given opportunity to have an advisor at hearing, call witnesses, testify, or remain silent
 - Expelled after hearing where he admitted assault and that the assault was racially motivated

Watson v. Beckel Decision

The Due Process provided for in *Goss* is the minimum amount of due process that must be afforded for longer suspensions and expulsions.

Watson v. Beckel Decision (Cont.)

- Notice required is that which allows the student to “prepare for the hearing and defend the charges.”
- Notice specifying the written charges was unnecessary because the student knew that the hearing:
 - Was about the assault
 - That the school believed the assault was racially motivated.

Watson v. Beckel Decision (Cont.)

- Due process does not require:
 - written notice specifying charges
 - legal counsel
 - presentation of evidence
 - the right to cross examine
 - an impartial board
 - a transcript,
 - independent review of the decision

Dangerous or Threatening Behavior, or Threats of Ongoing Disruption

- The Supreme Court in *Goss* states:
 - The school may immediately remove the student
 - After removing student University must:
 - Provide necessary notice
 - Provide a hearing “as soon as practicable”

District Procedures

- Failure to follow \neq due process violation.
-however-
- Courts will uphold School decision if:
 - The School follows procedure, and
 - Procedure provides more than sufficient procedural protection.

The Takeaway

- For students suspended due to danger or threats:
 - Immediately provide written notice of
 - Allegation
 - Known Supporting Facts and Evidence
 - Identify Student Code Provisions Violated
 - Provide rudimentary hearing within 5 business days

The Takeaway (Cont.)

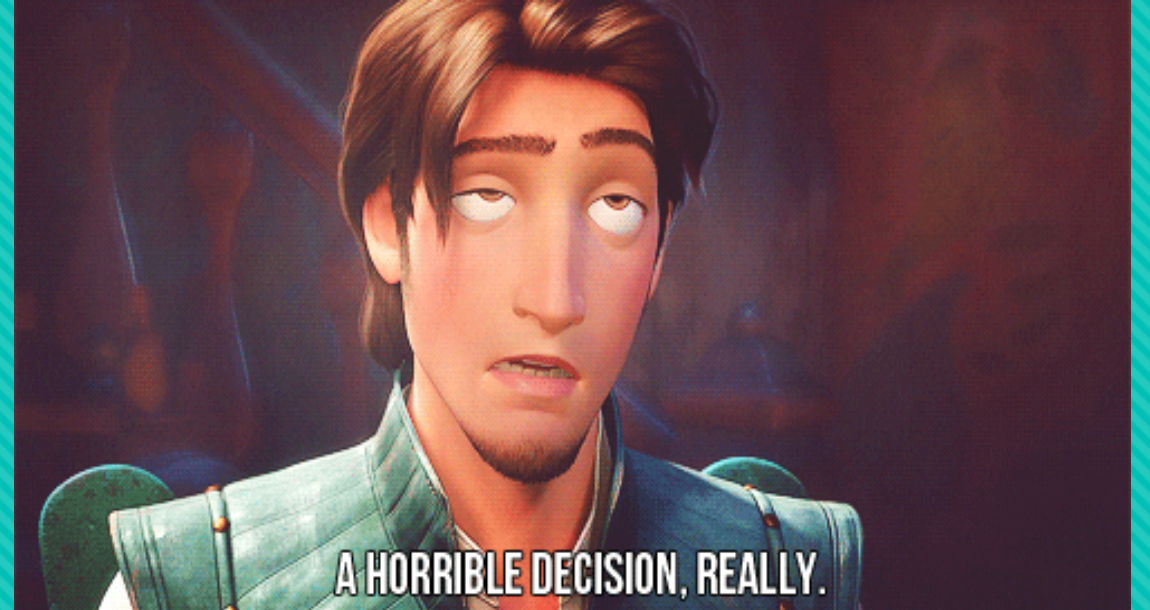
- All other complaints:
 - Provide Written Notice Whenever Possible
 - State Allegation
 - Identify Facts and Supporting Evidence
 - Identify Student Code Provisions that Were Violated
 - For Suspensions of Ten Days or Less
 - Hearing may occur at the same time that notice is given
 - All that is required is an “informal give-and-take” that gives student the opportunity to characterize his or her conduct and put it in what the student considers proper context
 - Longer Suspensions/Expulsions
 - Provide a hearing that offers the student an opportunity to explain
 - “Trial” type hearing procedures are not constitutionally required but student should be permitted to rebut allegations

WRITING DECISIONS

A Matter of Judgment

The Decision:

Title IX Regulatory Requirements....



Decision maker(s) must issue a written "determination regarding responsibility."

What is Your Responsibility? ...

Decisionmakers must **objectively evaluate** the evidence and **reach a conclusion** regarding the sexual harassment claims.



YES
 NO
 MAYBE
SO



Knowing the law is not enough.

A Title IX decision maker must be able to organize the issues, find facts and apply the law to the facts in order to resolve the issues and, it must be done in language ordinary people can understand.

Primary Challenge. . .

Anatomy of a Written Determination:

Justice Is Not There Unless There is Also Understanding

The structure of the decision can either help or hinder its communicative purpose. Generally, a decision should consist of the following:

- *Title*
- *Introduction*
- *Authority*
- *Statement of Issues*
- *Procedural Matters*
- *Findings of Facts*
- *Conclusions*
- *Appeal Rights*



**The written
decision
must include
the following
“key”
elements:**

1. The allegations that could constitute sexual harassment;
2. A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;
3. Findings of fact that support the determination regarding responsibility;
4. Conclusions about the application of the institution’s code of conduct to the facts;
5. An explanation regarding the result of each allegation, with a determination regarding responsibility, any disciplinary actions against the respondent, and whether any remedies will be provided to the complainant; and
6. Procedures and bases for appeal.

Title

Introduction:
Setting the
Stage

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW OFFICE

<p>[REDACTED]</p> <p>Grievant,</p> <p style="text-align: center;">v.</p> <p>UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY,</p> <p>Agency.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER</p> <p>Case No. 2010 CSRO/HO 147 Hearing Officer Geoffrey Leonard</p>
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Who?
What?
When?
Witnesses?
Exhibits?

Career Service Review Office Hearing Officer Geoffrey Leonard (Hearing Officer) held a Step 4 evidentiary hearing in this case on July 17-19, September 10-12, and September 20, 2018. Agency Utah Department of Environmental Quality (Agency) was represented by Assistant Attorneys General Daniel Widdison and Alain Balmanno. Grievant [REDACTED] appeared *pro se*. A certified court reporter made a verbatim record of the proceedings. Witnesses¹ were placed under oath and examined, and testimony and documentary exhibits² were received into the record. At the conclusion of the hearing, the Hearing Officer directed the parties to make

Agency's witnesses included: [REDACTED]
[REDACTED]
[REDACTED] For reasons set out herein, Grievant did not testify at the Step 4 hearing.

² The Hearing Officer admitted as evidence Agency exhibits: A-1, A-1, A-2, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-16, A-18, A-23, A-24, A-31, A-32, A-33, A-34, A-35, A-36, A-37, A-39, A-40, A-41, A-42, and A-43. The Hearing Officer admitted Grievant exhibits: G-112, G-113, G-114, G-117, G-118, G-119, G-123, G-128, G-130, G-131, G-133, G-136, G-139 G-141, G-146, G-147, G-149, G-154, G-158, G-175, G-255, 272, G-319, G-343, G-348, G-364, G-376 (first page only), G-380, G- 389, G-419 (pages 4, 7, and 13 only), G-422 (demonstrative purposes only), G-430, G-461 (first three pages only), G-467, G-486, G-489, and G-493.

INTRODUCTION

Pursuant to negotiated district policy and the Utah Public Education Human Resource Management Act ("PEHRMA") (Utah Code Ann. 53G-11-501 et. seq.), the Hearing Officer herein was appointed and adjudicated this matter between the parties involved in an employment termination appeal. The Appellant requested a fair hearing according to statute and policy and the Hearing Officer was appointed by the School District (District). Pursuant to District Policy, the commission of the Hearing Officer was to make "factual findings" and to provide an advisory recommendation to the District Board of Education as to the resolution of this matter. The District Board of Education will ultimately make the final determination as to the essential issues of the case as explained further detail below.

Authority

MEMORANDUM – CASE SCENARIO #2 - SAMPLE

**TO: Complainant’s Parents/Legal Guardian
Respondent – Older Student’s Parents/Legal Guardian**

**FROM: Alice Hanson
Director of Student Services
XYZ School District**

DATE: October 27, 2020

SUBJECT: Decision Related to Formal Complaint of Sexual Harassment Under Title IX

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Pursuant to the District XYZ’s Title IX Policy, [Number], I have been appointed to make factual findings and a determination of responsibility regarding the formal complaint of sexual harassment filed on behalf of student SH (Complainant) against older student (Respondent). Based on my objective evaluation of all relevant evidence, including the questions and answers provided by or on behalf of the parties during the decision-making, I have reached the following determination:

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Based on the foregoing determinations, I am recommending that Respondent be disciplined as follows: I am also recommending remedies for the Complaint. Specifically,

The written
decision
must include
the following
“key”
elements:

“Statement of the Issues”

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1. The allegations that could constitute sexual harassment;

Case Scenario #1

"A problem well stated is a problem half solved"

Example 1

1. Did Respondent attempt to touch Complainant inappropriately?
2. Did Respondent make sexual comments to Complainant?
3. Did Respondent act in a sexually suggestive manner toward Complainant?
4. Did Complainant welcome or consent to any of Respondent's comments or touching?

Example 2

1. Did Respondent tell Complainant "I want to get in bed with you"?
2. Did Respondent tell Complainant "I want to feel your boobs"?
3. Did Respondent attempt to touch Complainant's breasts and genital area?
4. Did Respondent place a door stop in his pants and proceed to act in a sexually suggestive manner towards Complainant?
5. Did Respondent rub his body against Complainant in the school cafeteria?
6. Did Complainant welcome any of Respondent's behavior?

Statement of Issues –

"The allegations that could constitute sexual harassment"

ALTERNATIVE SAMPLE - NARRATIVE

I. Identification of the Allegations Potentially Constituting Sexual Harassment

On September 1, 2020, Complainant high school student Jane Smith (Complainant) filed a formal complaint against Respondent high school student Peter Jones (Respondent), alleging sexual harassment under Title IX. In her formal complaint, Complainant alleged that Respondent made multiple comments to her and others at the school related to an alleged sexual incident on August 29, 2020, between Complainant and another high school male student that occurred off-campus during a party at a private home. Specifically, according to her formal complaint, Complainant alleged that, on August 31, 2020, Respondent shouted at her in the high school south hallway during school that she was a “slut” and that she should “watch her back.” Respondent also allegedly told another high school female student, Amanda Johnson, on August 31, 2020, during a high school class, that Complainant needed to stop “leading guys on” or she would “get what she deserved.”

*This example comes from <https://www.blackhawk.k12.wi.us/District/Links-Forms>

The written
decision
must include
the following
“key”
elements:

“Procedural Matters”

=

2. A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;

Procedural Matters

Regulations expressly require:

“A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings.”

1. Formal Complaint and Notice of Formal Complaint

Complainant filed the formal complaint on September 1, 2020, with the Title IX Coordinator. Upon receipt of the formal complaint, the Title IX Coordinator provided written notice on September 2, 2020, by hand delivery to Complainant and Respondent. The written notice included (1) xxx, (2) xxx, and (3) xxx.

2. Selection of Investigator and Overall Investigation Approach

Upon receipt of this formal complaint, the District contacted [Investigator] on September 2, 2020, to conduct an investigation under the grievance process. He/She determined that they did not have a conflict of interest or a bias against Complainant(s) or Respondent(s).

3. Investigation Procedure

- Pre-Investigation Gathering of Evidence
 - emails, texts, audio/video recordings
 - witness statements
 - other student info such as prior disciplinary records
- Witness Interviews
 - Should include who, when, where or how (live, via Zoom)
 - Who all was present at each interview
- Any on-site visits
- Delivery of Relevant Evidence and Written Responses
- Statement whether parties submitted written responses
- Investigation Report

4. Question and Answer Period

After receipt of the investigative report, I (decisionmaker) afforded each party the opportunity to submit written, relevant questions that the party wanted asked of any party or witness. Identify any excluded evidence.

BEST PRACTICES – What Else to Include:

Beyond what the Title IX Regulations require, you may want to include a summary of any significant procedural decisions that could have a substantive impact on the outcome. Such as:

- Limits on time to respond;
- Identify witnesses suggested by Complainant or Respondent;
- State any significant evidentiary rulings, particularly if you find certain evidence irrelevant and will not be considering
- Similarly, you should mention if you did not, or could not, interview certain witnesses

EXAMPLE: At his originally scheduled testimony in his case in chief, Grievant brought a binder of notes and documents to the witness table to use in testifying. The Hearing Officer asked Grievant to not use the documents in the binder while testifying. After explanation and discussion, Grievant allowed the Hearing Officer to inspect his notes *in camera*. The Hearing Officer determined that the notes were Grievant's notes and work product, intended to guide Grievant's testimony, with the exception of copies of several documents. The Hearing Officer directed Grievant to remove those documents, or identify, or provide copies of those documents to Agency, before testifying. Grievant refused. The Hearing Officer explained to Grievant the consequences of his refusal; Grievant reiterated his refusal and did not testify.

The written
decision
must include
the following
“key”
elements:

“ Findings of Fact ”

=

3. Findings of fact that support the determination regarding responsibility;

The written
decision
must include
the following
“key”
elements:

“Conclusions”

=

5. An explanation regarding the result of each allegation, with a determination regarding responsibility;

What Are Findings of Fact?

NO

Not to be confused with a summary of the timeline, general facts, or other information that gives context to the case.

++such information is often helpful and can be included as part of the written determination, but is not generally what is meant by the term “Findings of Fact” – also called “Findings of Fact and Conclusions of Law”

YES

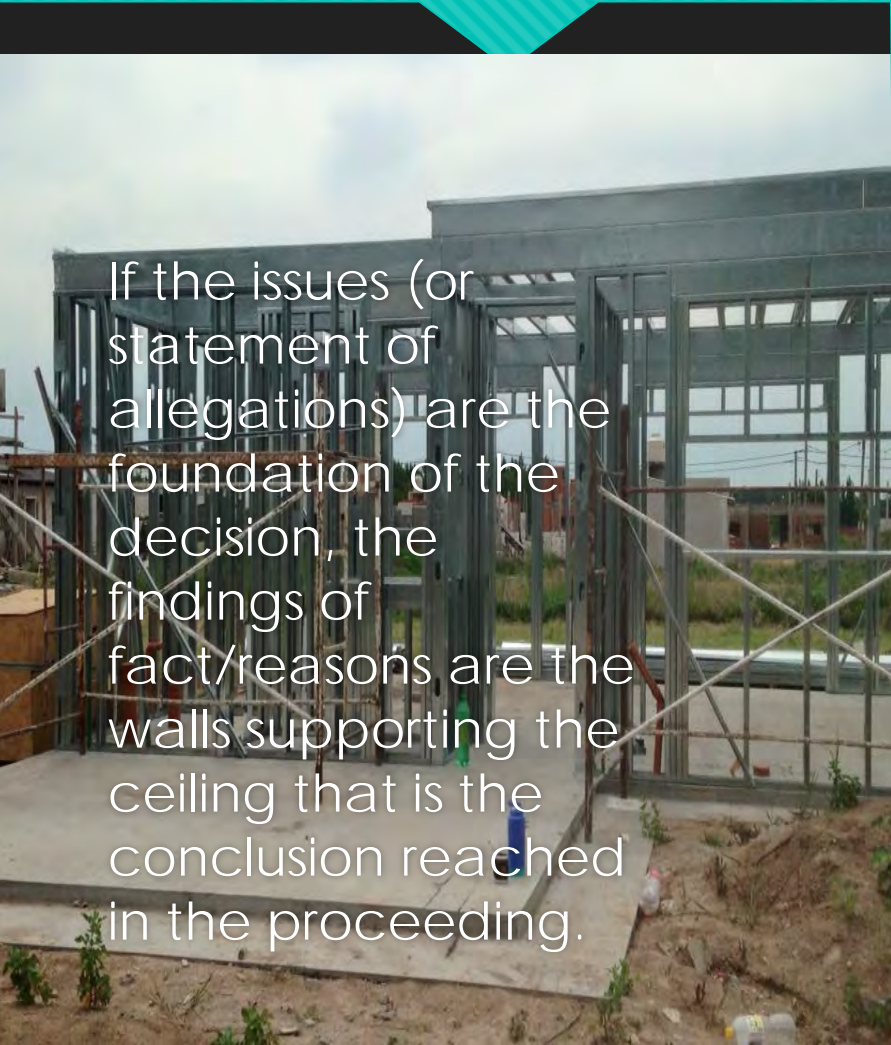
“Findings of Fact” refer to the real meat or substance of the written determination – that is, the facts that you find to be true, along with your reasons, which lead you to arrive at your decision that the respondent either was or was not responsible for sexual harassment.

++allows the parties to know how and why you reached your decision, and in some instances, whether an appeal is warranted.

“Findings of Fact” that support the determination regarding responsibility.



Analogous to Building a House:



If the issues (or statement of allegations) are the foundation of the decision, the findings of fact/reasons are the walls supporting the ceiling that is the conclusion reached in the proceeding.

Findings of fact are based upon the evidence; they are deduced or inferred from the evidence.

Evidence is "any species of proof," and may include testimony, records, documents, and exhibits that are present at the hearing and made a part of the record for purposes of reaching a decision.

The **conclusions of law or reasons** for the decision are, in turn, based on the findings of fact and to which relevant statutes, regulations and case law are applied.

The Law

- Briefly discuss the law on the subject;
- Just pick what's applicable;
- Be very very precise;

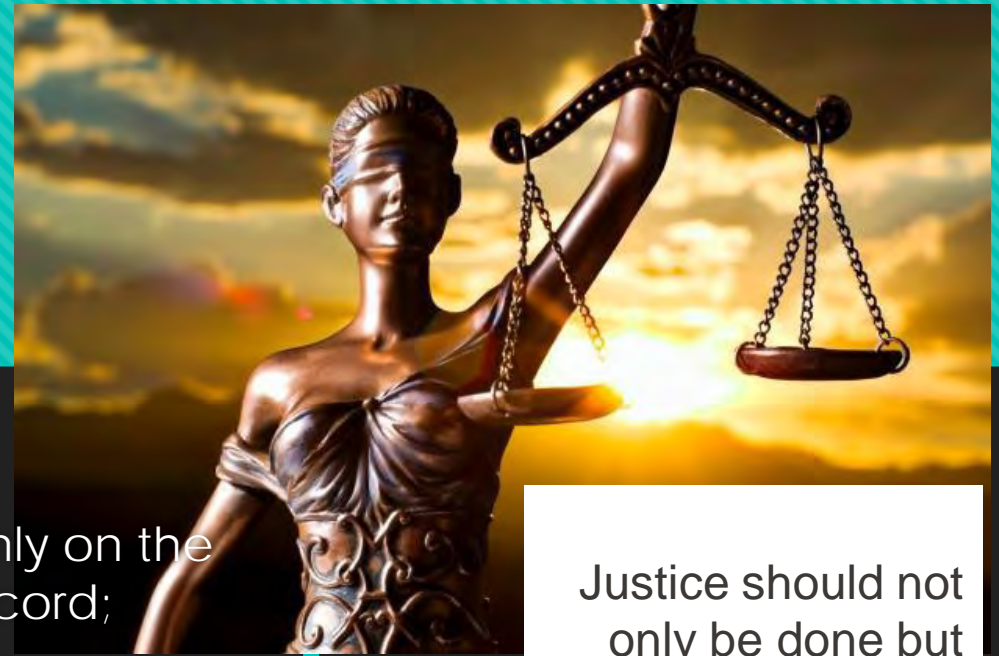
The idea is to lay down a legal standard, a benchmark to be satisfied - then juxtaposing it with facts of the case.

The Facts

Should:

- Be made based only on the evidence in the record;
- Explain why evidence has or has not been accepted;
- Include only those facts that are accepted as true and credible; and
- Address credibility issues based on quality of testimony

In all, the Findings must be factual, and not conclusory.



Justice should not only be done but seen to be done. You can't make the everyone happy, but you can ensure that each party feels heard. This makes the decision more objective.



REASONING: The written determination must contain enough information to show the reasoning process for the result reached, and to allow the parties (and any appellate decisionmaker) to understand the basis for the decision. In very simple cases less explanation is required; in more complex ones a more detailed explanation is necessary.

Explanation Regarding Each Allegation

With:

- A determination regarding responsibility,
- Any disciplinary actions against the respondent, and
- Whether any remedies will be provided to the complainant.



EXAMPLES:



**FACT or
OPINION?**

Issue or Allegation

Applicable Law

Was the Appellant Afforded Sufficient Procedural Due Process?

Fundamental requisites of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. (See for example *Trinity Episcopal Corp. v. Romney*, D.C.N.Y., 387 F. Supp. 1044, 1084). Both the District Orderly Termination Policy (specifically 3.1000 et. seq.) and Utah state law (specifically 530-11- 12 et. seq.) are firm in the procedural due process that they demand in the case of contractual career employment termination. (See Exhibits L and N). In order to comply with both statutory and policy procedural due process, the District would have to show:

Findings of Fact

1. A written statement specifying the causes under which a career employee's contract may be terminated ... (53G-11-513.1.b.): The District met this requirement by adopting and publishing District Policy 3.0900.02 Causes for Dismissal or Non-Renewal. (See Exhibit L). It appears that this policy was updated on 4/14/2016 and contains a list of 23 explicit causes for dismissal.
2. Written notice of the District's intent to discontinue the employee's contract ... (53G11.513.5.a.): The District met this requirement by drafting and delivering to the Appellant its Notice of Termination for Cause in a letter dated July 16, 2018, to the Appellant. Statute and policy require that this written notice be delivered either by personal delivery or certified mail. The HR Director personally delivered this written notice to the Appellant which the which the Appellant admittedly received. (See Transcript 285:7-12).
3. Time Frames ... (53G-11-513.5.c.): The District was required to serve notice of its intent to terminate the Appellant's employment at least (emphasis added) 30 days prior to date of the proposed termination. Again, this requirement was met as the July 16, 2018, notice indicated that the Appellant's pending date of termination was August 15, 2018. Ultimately, the District effectuated its intent to terminate on September 18, 2018, when it sent its final written confirmation that the Appellant's employment was terminated. (See Exhibit 11).

CAUSE TO TERMINATE GRIEVANT'S EMPLOYMENT:

The Agency based the decision to terminate Grievant's employment in large part on the findings of **abusive conduct in the Investigation Report**. Agency also relied on the repetitive nature of Grievant's conduct including prior discipline, the likelihood that Grievant's conduct would not improve the effect of Grievant's conduct on Division morale.

The Investigative Report concluded that Allegations (i) through (iv) of Ms. X's abusive conduct complaint constituted abusive conduct under the Rule's standard and that Allegations (v) through (vii) did not constitute abusive conduct under this standard. There is substantial evidence supporting the conclusion that the conduct alleged in each of the seven individual allegations did occur.

Allegation (i) Grievant, immediately after receiving the December 16, 2016 Written Reprimand, told Ms. X that he intended to file a criminal complaint regarding the circumstances of the document's December 16th delivery. Although he did not specifically name Ms. X or Ms. Y, there is no doubt as to the intended target of this criminal complaint. Even assuming arguendo that a criminal complaint was appropriate, there was no need for Grievant to tell Ms. X of his intention. Ms. X and Ms. Y testified that Grievant's statement upset them and caused them "intimidation, humiliation or unwarranted distress." A reasonable person would react similarly. A reasonable person would also conclude that Grievant's statement was intended to cause them, and would cause them, "intimidation, humiliation, or unwarranted distress."

The conduct of Grievant here clearly constituted abusive conduct.

Allegation

Determination of Responsibility

Applicable Law

Abusive Conduct Rule:

Abusive conduct includes physical, verbal or nonverbal conduct, such as derogatory remarks, insults, or epithets made by an employee that a reasonable person would determine:

- was intended to cause intimidation, humiliation, or unwarranted distress;
- exploits a known physical or psychological disability; or
- results in substantial physical or psychological harm caused by intimidation, humiliation or unwarranted distress.

Findings of Fact

Determination of Responsibility

The written
decision
must include
the following
“key”
elements:

“Conclusions”

=

4. Conclusions about the application of the institution’s code of conduct to the facts;

SAMPLE:

Conclusions Regarding Application of the District's Policy to the Facts / Statement and Rationale Concerning the Allegations

The District's Title IX Sexual Harassment policy states that sexual harassment includes conduct based on sex that includes "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 district's education program or activity." The District must find that such sexual harassment occurred by a preponderance of the evidence.

In this instance, the Respondent on two different occasions made comments about Complainant that were based on the sex of the Complainant, calling her a "slut" and telling one of Complainant's friends to stop "leading guys on." Further, the Respondent made very serious statements related to the Complainant, telling her that she should "watch her back" and that she "would get what she deserved."

Based on a review of all relevant evidence, the comments were unwelcome in nature. There is no evidence to indicate that the comments were invited or welcomed by the Complainant. Instead, the comments appeared to be prompted solely by the Respondent's frustration and anger toward the Complainant based on the incident that occurred between the Complainant and one of his friends.

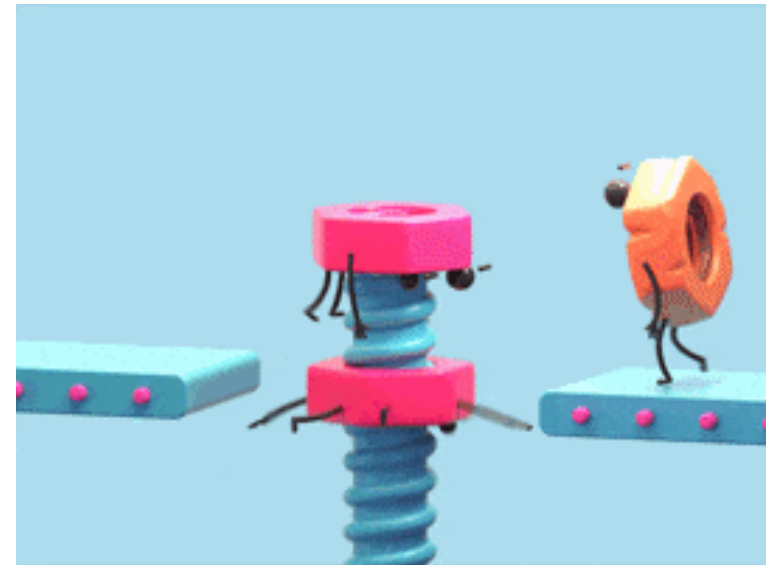
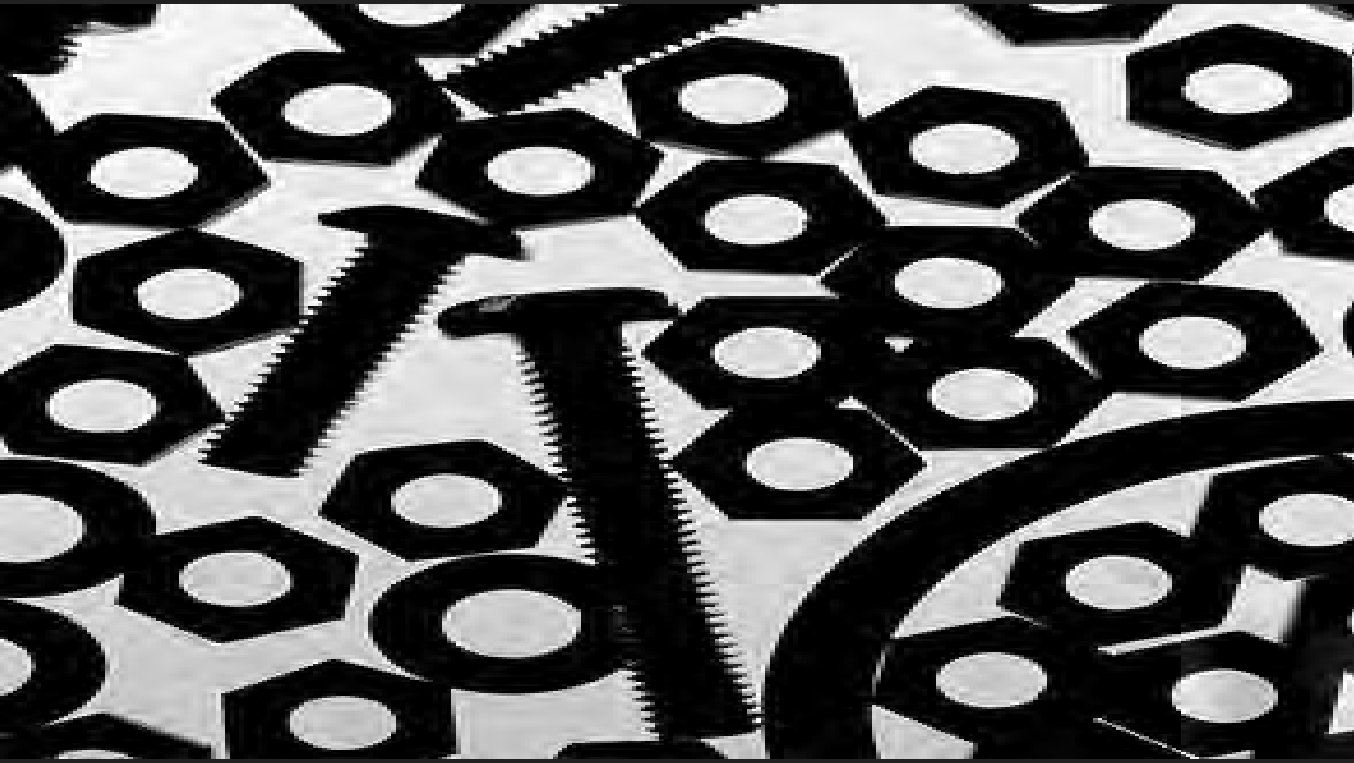
The collective comments were certainly based on the sex of the Complainant. Further, standing alone, the isolated "slut" and stop "leading guys on" comments were inappropriate, but would not rise to the level of comments that a reasonable person would find so severe, pervasive, and objectively offensive to deny the Complainant equal access to the District's program or activity. However, when such comments are also combined with very threatening statements that the Complainant must "watch her back" and that she "would get what she deserved," then such comments become increasingly closer to the standard in the District's policy.

*This example comes from <https://www.blackhawk.k12.wi.us/District/Links-Forms>

PRACTICAL CONSIDERATIONS

To assist in writing your decision.

THE NUTS & BOLTS



Write for your Audience:

- Basic rules for writing decisions are driven by the audience to whom the decision is addressed.
- Thus, the first rule of decision writing is to write for your audience.



Be Succinct: Flee Verbosity



- Why waste words?
- You can enhance readability through shorter sentences.
- Choose the simplest word that expresses the idea.

Example:

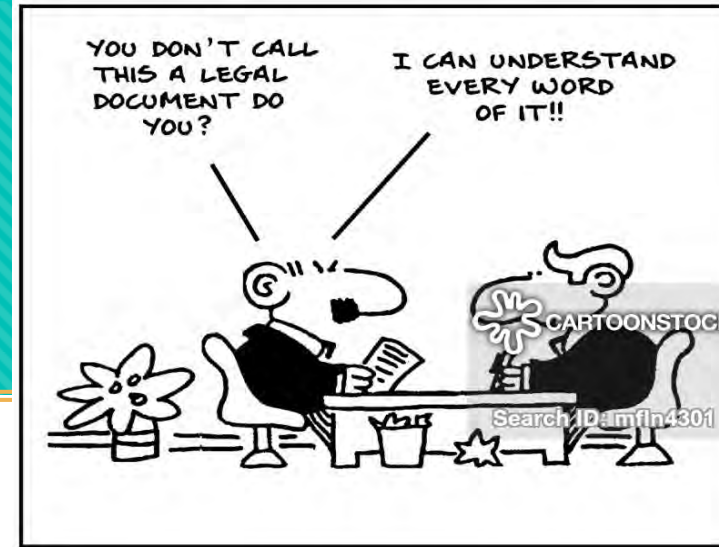
The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe*. He didn't. We couldn't. Affirmed. Costs to appellee.

Denny v. Radar Industries, Inc., 184 N.W.2d 289 (Mich. App. 1970).

"Your résumé is only 8 words long!
You're hired!"

No Need for Legalese

Legal writing shouldn't be lethal reading.



Example:

Grievant's conduct throughout this proceeding demonstrates that his preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party. He consistently demonstrated a lack of courtesy and respect, and other conduct, that would make collaborative interaction with others impossible. Such conduct, which is objectively intimidating to others, would also tend to adversely affect the morale of coworkers and others. In exhibiting the same conduct towards the tribunal, he demonstrated a reasonable likelihood that this conduct would also extend to supervisors and superiors. If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment. Grievant's conduct in the hearing thus tends to corroborate the testimony of Agency witnesses as to the disruptive, morale-breaking, and intimidating nature of Grievant's conduct.

Substantial evidence supports the conclusion that Grievant's conduct adversely affected Agency customers, productivity, and morale.

"THERE IS NOTHING IN THE LAW THAT'S SO COMPLICATED THAT YOU COULDN'T MAKE IT CLEAR TO ANY LITERATE NON-LAWYER".

RODELL ON LEGAL WRITING

Other Suggestions:

- Don't use unnecessarily long phrases or obscure words;
- Short sentences;
- Recite only those facts and legal authorities that are relevant to the issues and necessary to your ultimate decision;
- Have a strong clear structure;
- Don't use superfluous words;
- Try not to be redundant, repetitive, or duplicative unless you need to emphasize a key point;
- Be respectful; candid but not necessarily outspoken
- Have someone else proof your spelling and grammar, if possible.

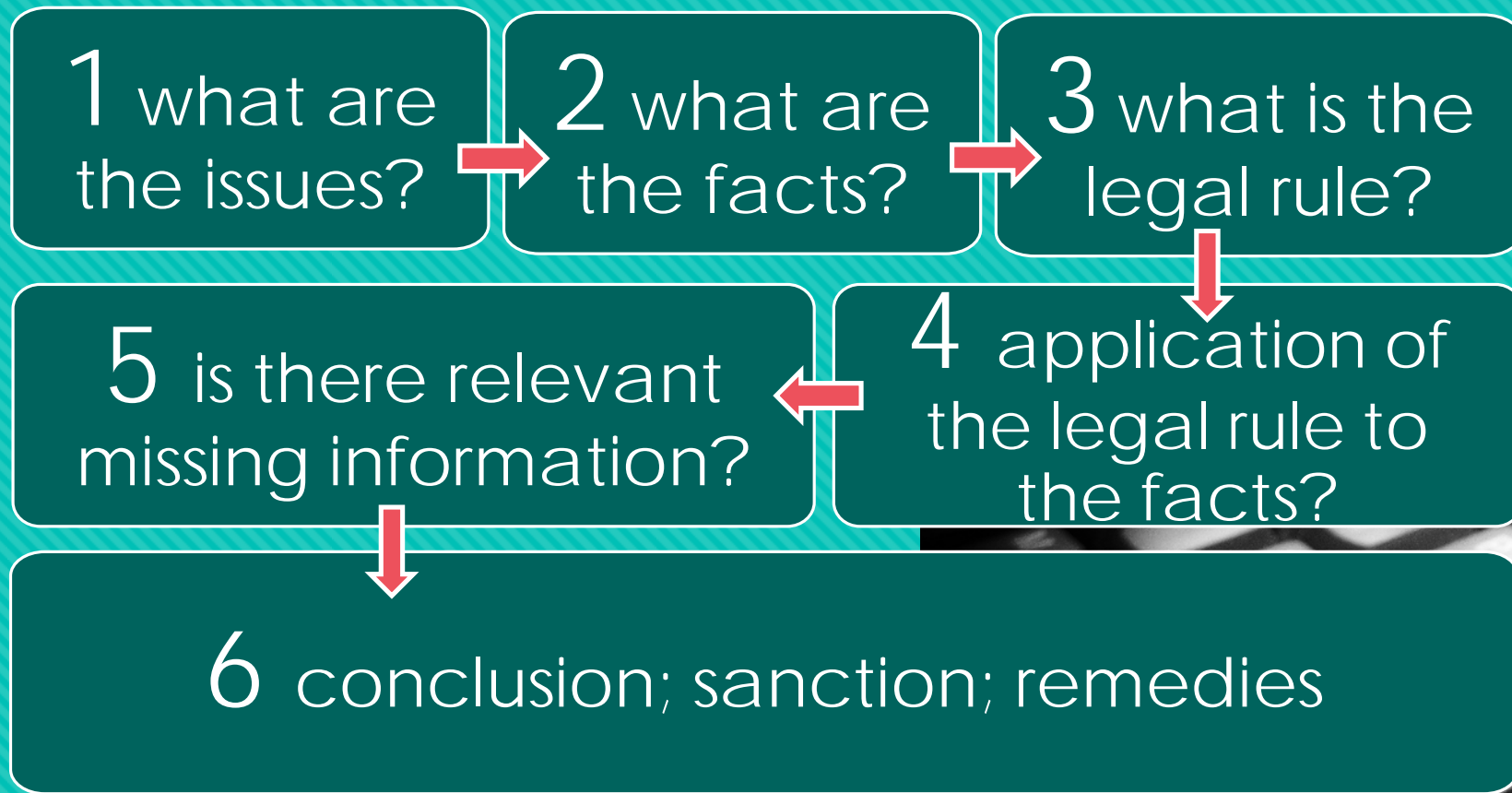


Re-examine what you write

**Always
ask
yourself:**

- Does this Written Determination provide guidance?
- Is it clear?
- Does it effectively communicate both the decision and the process leading to the decision?
- Do you have to explain it for it to be understood?





Let's Review...





Now what?

The written
decision
must include
the following
“key”
elements:

“Appeal Rights”

=

6. Procedures and bases for appeal.

Appeals

Note: the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case. This ensures the recipient's appeal decision reviews the underlying case independently.

Mandatory

&

Offered Equally to Both Parties

Mandatory on 3 Bases:

- Procedural irregularity;
- Newly discovered evidence;
and
- Bias or conflict of interest.

*Recipients may offer appeals on additional grounds as long as they do so equally for both parties.

*Also, Regs expressly permit both parties to appeal a recipient's dismissal of a formal complaint (or allegations therein), whether the dismissal was mandatory or discretionary.

Appeal decision must be written.



Thank you!

Any Questions?

📍 **Jaqualin Friend Peterson**

📍 Assistant Utah Attorney General

📍 Litigation Division, Employment Section

📍 160 E 360 S, 6th Floor

📍 Salt Lake City, Utah 84114-0856

📍 Tel: 801-366-0100

📍 Email: jfpeterson@agutah.gov

A dark, irregular ink blot with the word "SCENARIOS" written in white capital letters in the center. The blot has a textured, splattered appearance with some lighter areas and small droplets around the edges.

SCENARIOS

Scenario One

In December, GF, a 13-year-old boy, attempted to touch LS's breasts and genital area and made vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs." LS told Teacher and her mother. Similar conduct occurred on or about January 4 and January 20. LS again told her mother and her classroom teacher that GF was "being gross." In January, LS's parents in turn, also contacted Teacher, who assured parents that the school principal, had been informed of the incidents. In early February, GF placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LS during physical education class. LS reported GF's behavior to her physical education teacher. Approximately one week later, GF again engaged in harassing behavior, this time while under the supervision of the computer lab librarian. LS reported the incident to the computer librarian, and again LS's parents contacted Teacher to follow up. In early March, GF once more directed sexually harassing conduct toward LS in physical education class. LS reported the incident to both the PE teacher and the Principal, saying "GF is bothering me again." In mid-April, GF rubbed his body against LS in the school cafeteria in what LS considered a sexually suggestive manner, and LS complained to the lunchroom cashier. During the December to May timeframe, LS's grades dropped from A average to D average.

Scenario two

SH is a kindergarten student at Elementary School of School District. SH rode the public-school bus to and from school. From September to February, an older student on the bus, coerced her into lifting her dress, pulling down her underwear, and spreading her legs. This occurred every time SH wore a dress, which was approximately two to three times per week. There are no allegations that the incidents involved any touching. On February 14, SH told Mom and Dad what was happening on the bus. Mom promptly called Principal. SH does not know the name of the older student, but the bus only carries students from grades K-3. As of February 14, SH has not ridden the bus, but her parents have driven her to school.



Scenario three

When ASG was an eighth-grade student at a middle school in the School District, she joined a high school book discussion group led by FW, a teacher at District high school. During the book discussion sessions, FW often made sexually suggestive comments to the students. ASG entered high school that next fall and was assigned to classes taught by FW in both semesters. FW continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward ASG, including during the substantial amount of time that the two were alone in his classroom. He initiated sexual contact with ASG in the spring, when, while visiting her home ostensibly to give her a book, he kissed and fondled her. The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.

In October of the second year, the parents of two other students complained to the high school principal about FW's comments in class. The principal arranged a meeting, at which, according to the principal, FW indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised FW to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to the District's superintendent, who was the district's Title IX coordinator. A couple of months later, in January, a police officer discovered FW and ASG engaging in sexual intercourse and arrested FW. During this time, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy. ASG did not report the relationship to school officials, testifying that while she realized FW's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher.



Scenario Four

During the 2016-2017 school year, W.J.L. suffered “intense, persistent, and malicious bullying” from fellow students. The bullying involved “unwanted and unwarranted physical contact,” “persistent and pervasive ridicule,” “threats of violence,” and statements that W.J.L. was “better off dead” and should commit suicide. Much of the bullying that W.J.L. suffered involved his “not being perceived to be masculine enough relative to his peers and not having the ideal appearance for a male in his age group.” W.J.L. was effeminate, acted like a girl, and was rejected by both the boys, for not being macho, and by the girls for being weird.

Students bullied W.J.L. “on school property during educational hours.” W.J.L. also experienced bullying off of school grounds, such as while walking back to his house or online through social media. W.J.L. also experienced bullying in the presence of the Junior High staff. In fact, “[i]t was well known throughout the school that W.J.L. was persistently picked on by his peers.” Furthermore, it was known that many of the students who bullied W.J.L. were members of the school’s sports teams, baseball players, wrestlers, basketball players. W.J.L. had often complained to the guidance counselor, to the vice-principal, and to various teachers.

On one occasion, W.J.L. was being bullied in a male teacher's classroom and asked to leave the classroom and go to the guidance counselor's office. Rather than allow W.J.L. to see the guidance counselor, the male teacher told W.J.L. that he “needed to stop being a baby.” Despite the fact that students and school personnel knew about the severe and persistent bullying that W.J.L. suffered, Junior High staff and faculty failed to take any action to address the problem. Further, in violation of District policy, school officials never notified W.J.L.'s parents about the persistent bullying their son experienced.

W.J.L. killed himself on May 18, 2017. W.J.L. took his life after a “particularly brutal day of bullying” at school.



Scenario Five

A 12 years employee, a custodian at District's High School contends that she was subjected to sexual harassment from April 2018 to March 2020 by Custodial Supervisor JG and another custodian, CBB. Custodian states she complained to the principal and a vice principal who told her she worked for the District custodial staff and not for the school, so they could not help her. Custodian also complained to members of the District custodial management team, including WE, and KM, but nothing was done to stop or deter the conduct. Her complaints were made at different times between May 2018 and January 2020.

In February 2020, Custodian complained about the ongoing sexual harassment to the District's Director of Equal Opportunity and Affirmative Action. This is an additional duty assigned to the junior Assistant Superintendent for the District. Custodian alleges her supervisors failed to properly investigate the complaints. The District's Director of EOAA refused to interview witnesses, telling Custodian that investigating her complaint would start a "firestorm" in the community. After all, "we live in a very conservative, highly religious community." Custodian alleges that she did not receive sexual harassment training until after the alleged harassment took place. Custodian claims she suffered emotional distress damages as a result of the sexual harassment she endured.





Questions?