

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.

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.

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

=====

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:

*

*

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”

=

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 doorstop 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.

The Reasons

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:

Issue or Allegation

Applicable Law

Findings of Fact

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:

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.

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 *Renfro*. He didn't. We couldn't. Affirmed. Costs to appellee.

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

No Need for Legalese

Legal writing shouldn't be like that reading.

“THERE IS
NO THING IN
THE LAW THAT'S
SO
COMPLICATED
THAT YOU
COULDN'T
MAKE IT CLEAR
TO ANY
LITERATE NON-
LAWYER”.

RODELL ON
LEGAL WRITING

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.

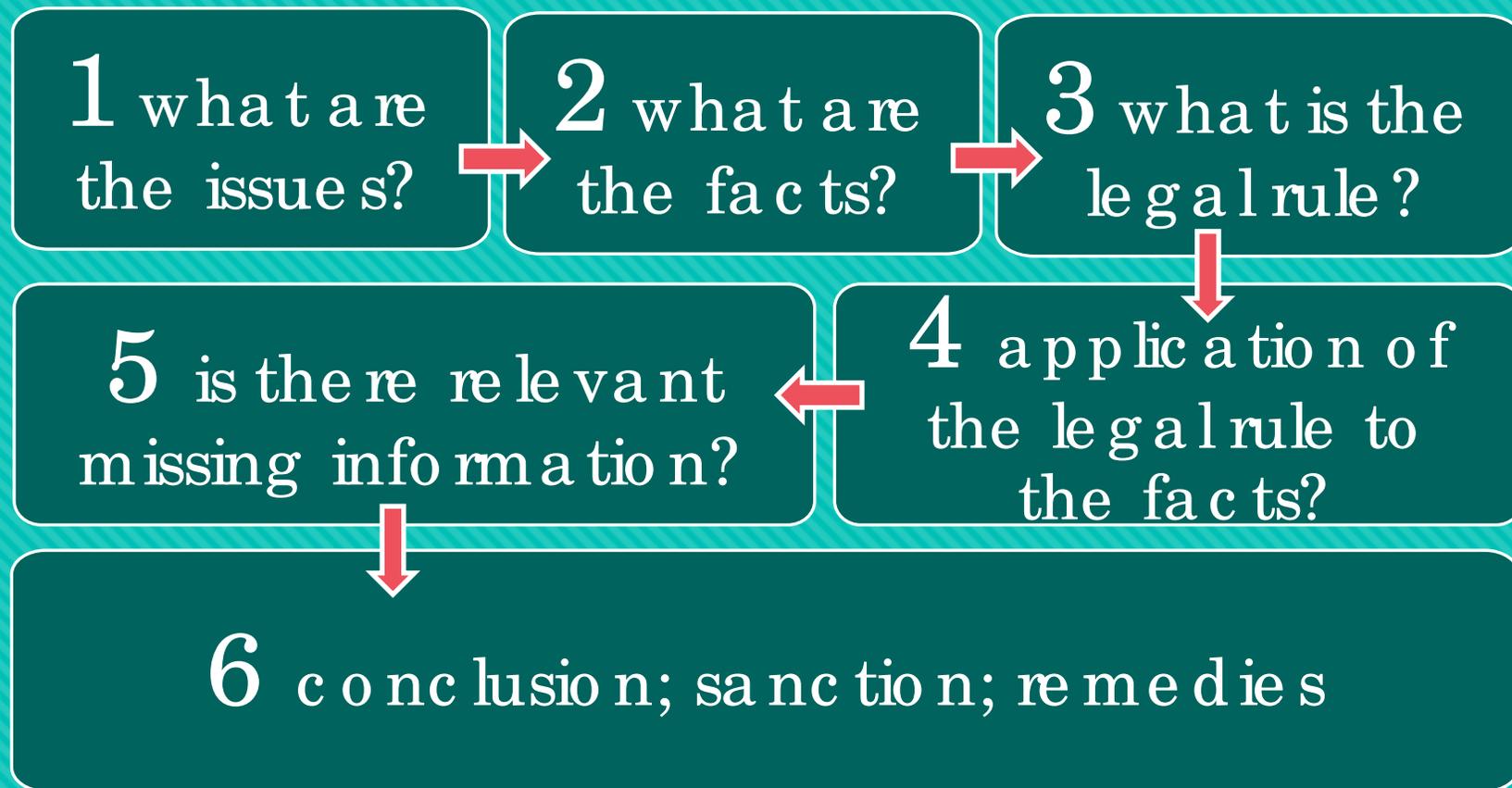
Other Suggestions:

- 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?

④ **Jaqualin Friend Peterson**

④ Assistant Utah Attorney General

④ Litigation Division, Employment Section

④ 160 E 360 S, 6th Floor

④ Salt Lake City, Utah 84114-0856

④ Tel: 801-366-0100

④ Email: jfpeterson@agutah.gov