IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 25-0233

MONTANA ACADEMY OF SALONS,

Petitioner and Appellant,

v.

MONTANA BOARD OF BARBERS AND COSMETOLOGISTS and MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondents and Appellees.

APPELLANT'S BRIEF

On Appeal from the Montana First Judicial District Court
Lewis & Clark County, Cause No. DV 2023-0460
Before Hon. Kathy Seeley

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COMES NOW, Appellant Montana Academy of Salons, and hereby submits the following opening brief in support of its appeal in the above-captioned matter.

I. STATEMENT OF ISSUES ON REVIEW

1. Whether the Montana Ac**a**demy of Salons' substantial rights were prejudiced because the Board of Barbers and Cosmetologists**'** modification of the Hearing Officer's Proposed Agency Decision violated Mont. Code Ann. § 2-4-704.

2. Whether the Department of Labor & Industry met its burden of proof to establish "unprofessional conduct" by a preponderance of the evidence in relation to MAS's response to allegations of sexual harassment.

3. Whether Mont. Code Ann. § 37-1-316(18) was an unconstitutionally vague or an unconstitutional delegation of legislative authority, as applied by the Board of Barbers & Cosmetologists to MAS's response to allegations of sexual harassment.

II. STATEMENT OF THE CASE

This matter did not arise as a complaint against the Montana Academy of Salons ("MAS") by a student or member of the public, but from a Department of Labor and Industry's Office of Legal Services' ("the Department") generated complaint to the Board Barbers and Cosmetologists ("the Board"), regarding the conduct of an individual whose employment had been terminated on July 6, 2016. MAS employed, then terminated the employment of, a massage school instructor,

The termination followed the issuance of a "last chance letter" four months prior, based on MAS's investigation into the instructor's conduct and substantiation of his perpetuation of an "environment of hostility and intimidation" and his engagement in "physical contact with students, which [was] not appropriate." Admin. Rec. (1) at 1099–1100 (Hrg. Ex. 51). The last chance letter resulted from a harassment investigation report, dated September 15, 2015, in which Linda McPherson, MAS's Compliance Coordinator, restated factual findings and determined that "clearly, the above [referenced conduct] could fall under the definition of Sexual Harassment." Admin. Rec. (1) at 1097–1098, Hrg. Ex. 50. The Notice of Termination, dated July 6, 2016, referenced findings that the instructor engaged in inappropriate and unprofessional conduct, as well as making body contact with a student, among other things. Admin. Rec. (1) at 1138, Hrg. Ex. 62.

Four years later, on June 11, 2020, the Department served Notice of Proposed Board Action and Opportunity for Hearing on the MAS, which is a barbering and cosmetology school, licensed by the Board. MAS was not licensed as a massage therapy school by the Board or the Board of Massage Therapy because massage therapy schools are unregulated, though massage therapists must be licensed individually.

The allegations were based on MAS's employment and termination of a massage therapy instructor in Great Falls, Montana. Though many of the charges in

the original Notice were voluntarily dismissed by the Department, the Department proceeded on more limited allegations and, again, dismissed others later. Ultimately, the Department discarded charges of administrative rule violations and proceeded to a hearing on a charge of "unprofessional conduct" under Mont. Code Ann. § 37-1-316(8). The unprofessional conduct allegations were based on alleged failings relative to the conduct of investigations and writing of reports relating to the massage therapy instructor's conduct.

The Board of Barbers and Cosmetologists does not license schools to conduct investigations, but to achieve the following:

> It is a matter of legislative policy in the state of Montana that the practice of barbering, barbering nonchemical, cosmetology, electrology, esthetics, and manicuring affects the public, health, safety and welfare and is subject to regulation and control in order to protect the public from ***unauthorized and unqualified*** practice.

Mont. Code Ann. § 37-1-103 (emphasis added).

The Board of Barbers and Cosmetologists is comprised of professionals in these areas, not professional investigators, and licensing of a "school" or any other licensee under the Board's jurisdiction does not involve analysis of the investigational skills of licensees.

At the hearing, MAS presented evidence of administrative regulation by federal agencies (the U.S. Department of Education Civil Rights Division and the Department of Justice), one state agency (the Human Rights Bureau), and an

accreditation entity (the National Accrediting Commission of Career Arts and Sciences, Inc.). MAS demonstrated knowledge of these agencies' establishment of standards relative to investigations of sexual harassment, while no such standards had been promoted by the Board.

After four days of hearing and the admission of 57 exhibits, the Hearing Examiner recommended dismissal of the case, based on the Department's failure to prove a violation of Mont. Code Ann. § 37-1-316 by establishing a "generally accepted standard of practice" by a preponderance of the evidence.

The Department argued that the Board should reject the legal conclusions of the Hearing Officer because he did not agree with the Department's interpretation of the very vague term "unprofessional conduct." This case was a case of first impression, and the Department stipulated that the Board had never disciplined a school for failing to properly investigate claims of sexual harassment before.

Taking advantage of the vagueness of the term "unprofessional conduct" to justify an elevated standard of conduct that also presents an opportunity for arbitrary application to apply elevated standards to all licensees, the Department persuaded the Board Adjudication Panel to disregard the evidence of conflicting standards and to ignore the fact that that the Board has never authorized discipline for a licensee's response to claims of sexual harassment by administrative rule, contested case, or other guidance. The Board modified the findings of the Hearing Officer and

determined to impose discipline based on the Department expert's testimony without regard to cross-examination of the expert or consideration of conflicting authority relating to demonstrably applicable standards for response to Title IX claims.

MAS sought judicial review from the District Court, which determined that the Board's refutation of the Hearing Officer's proposed decision was within the Board's authority and supported by the evidence in the record. This appeal follows.

III. STATEMENT OF THE FACTS

MAS has been licensed by the Board since October 24, 2006. The license has been continually renewed through the present. MAS is located in Great Falls and is owned primarily by Linda and Michael McPherson. MAS offers courses to its students in barbering, cosmetology, esthetics, manicuring, massage therapy, microdermabrasion, and teacher training. In addition, MAS offered instruction in massage therapy, which is not regulated by the Board, nor is MAS required to be licensed as a school in relation to massage therapy instruction.

MAS employed a massage therapy instructor from 2013 through July 6, 2015. In September 2014, two female students approached Linda McPherson with concerns about the instructor's conduct pursuant to MAS's open-door policy. Linda McPherson conducted informal interviews of the students, but did not substantiate all of the allegations reported to her, some of which related to students no longer at the facility or which were denied by others. Regardless, Linda McPherson addressed

the concerns informally with the instructor, admonishing him to quit telling all jokes, not just inappropriate ones.

In October 2015, Linda McPherson conducted another inquiry into allegations regarding the massage instructor's behavior with a student who had recently re-enrolled with MAS, though no formal complaint had been filed. Ultimately, Linda McPherson was unable to substantiate allegations of sexual harassment and/or sexual violence based on information she gathered from the student and the instructor. In September 2015, in response to a formal complaint from one student, MAS conducted a formal investigation regarding the instructor's conduct. Student interviews disclosed that the instructor violated MAS's sexual harassment and other policies on multiple occasions with multiple students. MAS also interviewed the instructor.

MAS considered the information obtained through the investigation, consulted its policies and training materials to make a decision regarding what occurred and the action to be taken. Because the information collected resulted in the conclusion that the instructor engaged in inappropriate conduct under the circumstances, which included inappropriate touching and verbal behaviors, the complaining student's allegations were corroborated and substantiated. MAS decided that the substantiated conduct resulted in a hostile educational environment, and the instructor was disciplined, coached, and monitored. The issue was addressed

with a final warning and notification that further conduct would result in immediate termination. The letter of discipline, issued September 23, 2015, resulted from specific investigation findings articulated as:

> Your attitude in the workplace and approach to others has created an environment of hostility and intimidation, which we cannot tolerate. You have violated confidentiality and privacy by disclosing student identities and grades. You have engaged in physical contact with students, which is not appropriate. You have admitted to some of the behaviors, although you attribute them to frustration, teasing and/or joking.

Admin. Rec. (1) at 1099–1100, Hrg. Ex. 51.

MAS terminated the instructor's employment on July 2, 2016, as a result of a subsequent investigation demonstrating the instructor's non-compliance with restrictions placed on his interactions with students and MAS policies regarding inappropriate conduct.

At the time that MAS was addressing the issues relating to the instructor, the Board had not adopted any rules governing the investigation of claims of instructor misconduct, required responses to such claims, or the substantive requirements governing sexual harassment. The Board of Massage Therapy separately addressed the instructor's individual license, but did not regulate schools or school administration in the field.

The Board has not defined the scope of practice for a licensed school to include investigation and management of claims, which could be construed as claims

of sexual harassment. The Board has not adopted any rules establishing "generally accepted standards" for the investigation of and response to potential claims of sexual harassment. Moreover, the Board has not adopted any rules establishing expected or required discipline of employees at schools.

The massage instructor was not licensed by the Board and was not supervised by MAS within the scope of its licensed activity. In the past, the Board has not previously disciplined a licensed salon school for failing to meet the generally accepted standards of practice in responding to claims of sexual harassment or sexual violence. Outside of this proceeding, there is no civil or administrative judgment against MAS for any conduct associated with its handling of allegations of sexual harassment or its response to sexual harassment.

IV. STANDARD OF REVIEW

Review of the Board's decision in this case is subject to the statutory standard of review of administrative decisions established in Mont. Code Ann. § 2-4-704(2). The statutory standard of review applies to both the District Court's review of an agency's decision and the Montana Supreme Court's appellate review of the District Court's decision. *Blaine Cty. v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159.

This Court must determine whether the Board's determination "findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory

provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Mont. Code Ann. § 2-5-704(2).

A District Court has more flexibility with the lay Adjudication Panel's foray into interpretations of law:

> While the district court "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," the district court may "reverse or modify the [agency's] decision if the substantial rights of the appellant have been prejudiced[.]" Section 2-4-704(2), MCA. Such prejudice occurs by way of administrative findings, inferences, conclusions, or decisions which are in "violation of constitutional or statutory provisions," or which are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 2-4-704(2)(a)(i) and (vi), MCA.

Hill v. Bd. of Plumbers, 2019 MT 146N, ¶ 4, 396 Mont. 550, 455 P.3d 437.

As to constitutionality, the standard of review is founded upon the presumption that a statute is constitutional. *In Re Petition to Transfer Terr.,* 2000 MT 348, ¶ 4, 303 Mont. 249, 16 P.3d 1000. The party attacking the constitutionality of a statute bears the burden of proof of unconstitutionality and must do so "beyond a reasonable doubt." *Id*., *citing Connery v. Liberty Northwest Ins. Corp.,* 1998 MT 125, ¶ 9, 289 Mont. 94, 960 P.2d 288 and *Montanans for Responsible Use of the Sch.*

Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800.

V. SUMMARY OF ARGUMENT

MAS contests the Board's modification of the Hearing Officer's findings to ignore the developed standards of practice applicable to it by virtue of MAS's status as a recipient of federal funds. The Hearing Officer's findings were legally correct and mindful of the standards applicable to expert testimony, as well as the legal limitation on the Board's own authority. MAS argues that the Board's adoption of a contrary agency decision disregarded the law, its own authority, and adopted a "generally accepted standard of practice" that was unsupported in the testimony, based on unreliable grounds, insufficiently supported by rule or past practice, and arbitrarily applied

Initially, MAS asserts that the "standard" adopted by the Board does not incorporate the necessary considerations of Title IX jurisprudence, applicable standards to impose liability, or the necessary burden on the Department to demonstrate the same. The Board's excision of Title IX considerations from its review constituted an arbitrary application of an unknown standard to MAS without notice of the Board's intent to apply a lesser standard to its own disciplinary authority. The lack of a reliable basis for the standards applied by the Board also undermines the Board's modification of the Hearing Officer's proposed decision,

indicating that no standard had been established. Given the conflicting standards referenced by both experts, the Board erred in determining that the Department had established a clear standard. Application of the unknown standard prejudiced MAS's rights in violation of constitutional or statutory provisions, was arbitrary or capricious, characterized by abuse of discretion or clearly unwarranted exercise of discretion, and/or affected by other error of law.

Additionally, MAS contends that the legal authority conferred on the Board by the Legislature was insufficient to establish Board authority to create new standards in an otherwise settled area of law. MAS supports this argument with past administrative and judicial cases in which the Board has previously been admonished to govern where it affected their licensees' operations within the purposes of the licensure granted. The Board's actions, as a matter of first impression, fell outside of conferred authority. Moreover, MAS, as a licensee, was entitled to notice that the Board would endeavor to engraft additional rules and standards to their operations, if not consistent with the known rules.

MAS additionally argues that the authority upon which the Board relies is unconstitutionally vague and an unlawful delegation of legislative authority, as applied to a school already subject to express standards for response to allegations of sexual harassment. The Board's approach to MAS's investigation and discipline of one of its massage instructors was insufficiently justified by the purposes

associated with the Board's operations. The Legislature's subsequent direction regarding the potential for license discipline based on discrimination laws established the absence of any such direction at the time MAS was disciplined.

VI. ARGUMENT

A. The Board of Barbers & Cosmetologists Modification of the Proposed Findings, Conclusions and Decision Establishes a Novel Standard, not a "Generally Accepted Practice."

1. The Applicable Burden of Proof

In a license discipline proceeding, the Department bore the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Bd of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, the Department prepares and serves the Board's findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

Below, the Department argued that a rebuttable presumption exists in favor of agency decisions, citing *Hoven, Vervick & Amrine, P.C. v. Montana Com'r of Lab.* (1989), 237 Mont. 525, 530, 774 P.2d 995, 998. However, and particularly applicable to this case, this Court disregarded that contention, determining that "if the issue involves a question of law, this Court is not bound by the interpretation of law either by the agency or the District Court." *Id*. at 531, 774 P.2d at 999.

Hoven and the Montana Administrative Procedure Act both recognize that an administrative agency or board is not entitled to deference regarding questions of law. In determining the propriety of the agency's imposition of penalties in this case, it is important to note that the only findings of fact altered by the Adjudication Panel were questions of law relating to legal standards, authority to act, and sufficiency of proof. The Adjudication Panel adjusted the Hearing Officer's factual determinations to exclude reference to the Department's expert's qualifications to offer opinions in relation to Title IX investigations, which triggered MAS's obligations to investigate claims of sexual harassment in the first place. Admin. Rec. (1) at 1496–1508.

2. Disregard of Standards Developed under Title IX Case Law and Administrative Regulations was an Error of Law.

Until the recently concluded 2025 Montana legislative session, a violation of the Montana Human Rights Act (or any other anti-discrimination law) has not been an express basis for license discipline. *See* 2025 Montana Laws Ch. 284 (H.B. 435).[1] Moreover, the Board has never expressly adopted any standard applicable to the conduct of investigations or report writing where allegations of discrimination or harassment are made by a student. In the absence of express guidance from the

[1] The 2025 revision to Mont. Code Ann. § 37-1-316, if considered persuasive to this Court, would have required demonstration that a school discriminated against its students. The standards and requisite proof argued by MAS here mirror the federal law, and are consistent with the standards under the Montana Human Rights Act, given the reference to applicable federal law, when interpreting the MHRA.

licensing authority, MAS has advocated reliance on established standards applicable to sexual harassment as the standards applicable here.

Title IX of the Education Amendments Act of 1972, the federal anti-discrimination in education statutory scheme, prohibits discrimination based on sex in federally funded programs or activities. *See* 20 U.S.C. § 1681, et seq. State law claims, couched in terms of Title IX violations and sexual assault, are claims that are addressed by the Montana Human Rights Act ("MHRA"). Mont. Code Ann. § 49-2-101, et seq. A school district's legal liability for sexual harassment of a student is governed by Mont. Code Ann. §§ 49-2-301 and 307. A school's obligations in the face of alleged discriminatory harassment have historically developed under affirmative statements of law and policy promulgated by Congress, the United States Department of Education Office for Civil Rights, the Montana State Legislature, and the Montana Human Rights Commission.

Specifically, in published guidance applicable at all times material to the Department's complaint, it was the United States Department of Education's guidance that established the requirement to promulgate policies to address sexual harassment. Admin. Rec. (1) at 151; *Dear Colleague Letter, Office for Civil Rights, at 6* (April 4, 2011). Previously, OCR published guidance that established the affirmative obligation to adopt policies prohibiting sexual harassment and to adopt grievance procedures for individuals alleging harassment. Admin. Rec. (1) at 98 –

145, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, Office for Civil Rights* (January 19, 2001). Though OCR's expectations regarding investigations are published, unlike the Board's, both the Department's and MAS's experts agreed that departure from such standards does not generally result in administrative liability from the Department of Education.

The MHRA and rules adopted pursuant to its authority establish an educational institution's obligation to establish policies and practices relative to sexual harassment. The Montana Human Rights Commission ("HRC") promulgated regulations specifically governing sex discrimination in education, citing Mont. Code Ann. § 49-3-106, which approximates the 20 U.S.C. § 1681 standards, as it proscribes discrimination based on sex by Montana educational programs. The HRC's administrative rules establish:

> No student shall be subjected to sexual intimidation or harassment by any school employee, or by the effect of any school policy or practice when any employee or agent of the educational institution knew or reasonably should have known of the activity, policy or practice. No student shall be subject to sexual harassment or sexual intimidation by another student on school-owned or controlled property or at any school sponsored or supervised functions or activities when any agent or employee of the educational institution knew or reasonably should have known of the activity.

Mont. R. Admin. § 24.9.1003(3).

The HRC's rules also define "sexual harassment" and "sexual intimidation." Mont. R. Admin. § 24.9.1002(9) and (10), both of which encompass discriminatory conduct. The obligation to address sexual harassment complaints in the school context is traditionally a function of Title IX, but is overseen by the United States Department of Education Office for Civil Rights. Schools are not directly vicariously liable for sexual harassment of students but may be held administratively liable if students are denied the benefit of their education or if they are deliberately indifferent to claims of sexual harassment, including sexual violence.

Here, in the face of known and published applicable standards governing a school's response to sexual harassment, the Hearing Examiner's proposed decision properly determined that the Department did not satisfactorily establish a "generally accepted practice" which would qualify as sanctionable "unprofessional conduct," pursuant to Mont. Code Ann. § 33-1-316(18).[2] To escape this finding, the Department proposed that the Board look away from ample, well-established legal authority and administrative guidance governing how schools must address sexual

[2] In 2020, the applicable statutory provision described the following as "unprofessional conduct" relative to professional licensees generally: "conduct that does not meet the generally accepted standards of practice. A certified copy of a malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards. Mont. Code Ann. § 37-1-316(18).

harassment complaints and when schools become liable for sex discrimination. In short, if the Board ignored the primary, known principles of school liability for sexual harassment, driven by Title IX and state law, then the Board's determination that MAS engaged in "unprofessional conduct" is that much easier and more palatable to the lay-person board member with no experience or training in Title IX or the Montana Human Rights Act.

Expanding ***known*** accountability standards and explicit guidance to include new, more expansive, and easily established standards is a tempting prospect for an administrative agency, but a dangerous one for those subject to its jurisdiction. This approach does not establish what is "generally accepted" in the profession but elevates the standard to require a school administrator to produce investigation reports comparable to those produced by a trained lawyer with several years of experience in conducting Title IX investigations would produce, like the Department's proffered expert witness, Emily Stark. Stark's focus on the composition of the investigative reports and approach to interviews limited the inquiry to the subjective question of how one might produce an unassailable investigation report, rather than the objective question of whether the school accepted complaints, looked into the matter, and acted on information gathered.

By way of example, Stark inferred that MAS ***did not use*** a "preponderance of the evidence standard" solely because it was not expressly stated in a report

generated by Linda McPherson. This was deemed to be a violation of "generally accepted" standards of practice, according to Stark, a point reiterated by the Board adjudication panel in its final order, Admin. Rec. (1) at 1505. The District Court additionally referred to the Hearing Officer's reference to MAS's obligation to use a preponderance of evidence standard in its determination. Ord. on Jud. Rev. at 11. On cross-examination, Stark admitted that, because her review was limited to the writings provided to her, she really couldn't identify whether the preponderance standard was utilized, as the investigator could have used the preponderance standard without including it in the report. Admin. Rec. (2) at 219, ll. 641:3–643:9. Moreover, Stark admitted that as far as guidance provided to schools by OCR, there was no "prescriptive requirement" regarding the components of a written report, though Stark advocated her own preferences in her testimony. Admin. Rec. (2) at 219, ll. 643:25–644:24. McPherson testified that she was aware of the standard required because it was included in MAS's policies, though she wasn't aware of any obligation to include which standard she was using in her report. Admin. Rec. (2) at p. 75, ll. 294:9–22. Despite these admissions and McPherson's uncontroverted testimony, the District Court and the Board felt comfortable adopting Stark's conclusions that the preponderance standard was not applied because it was not expressly stated in McPherson's report.

Stark, an attorney, acknowledged that investigators of sexual harassment in schools are not practicing attorneys or law enforcement, typically. Admin. Rec. (2) at 681, ll. 681:5–682:6. Regardless, the overriding complexion of this matter involves several lawyers, a hearing examiner, and a judge taking the opportunity to pick apart reports generated by an individual without legal training or substantial experience conducting investigations. All have disregarded that Linda McPherson's training and education regarding the response to sexual harassment issues were informed by established Title IX standards. McPherson, who was primarily reliant on Title IX guidance to address allegations of sexual harassment in their school, utilized those standards with no notice from the Board that more detailed reports or specific interview techniques would be required. The pitfalls of this approach were expressly considered by the Hearing Officer:

The Hearing Officer, based on the record before him, identified Stark's failure to identify any professional guideline (other than Title IX) that formed the basis for her opinions regarding MAS's alleged failings and found that she had not established a "generally accepted standard of practice:"

> The Department's own expert had no basis upon which to make a legal argument that the Title IX standards to which she was testifying are, in fact, accepted standards of practice for educational institutions which should therefore be applied as accepted standards of practice for purposes of professional licensing. This argument feeds into MAS's ultimate position that it cannot be disciplined anything having to do with Title IX standards.

Admin. Rec. (1) at 1400.

Until May 31, 2024, when the Board issued its Final Agency Decision, the Board has **never** directly addressed allegations of sexual harassment within the context of a licensee school's operations, by rule or otherwise. It is an easy thing for the Hearing Examiner and the District Court to identify and point out all of the ways that MAS could have produced a better investigative report or communicated findings to the massage therapy student who was the only one to file a formal complaint regarding her instructor's behavior. Only the Hearing Examiner did not get caught up in the "how to do it better" debate, while the Board and the District Court arrived at different conclusions based on the same information. This, in itself, is indicative of the Department's failure to establish a "generally accepted standard of practice."

While the Hearing Examiner understood that the threshold question was whether the Department established a "generally accepted standard of practice" regarding a school's response to student complaints of sexual harassment, the District Court and Board missed the mark, focusing instead on the peripheral questions of how MAS should have done things better. Though he acknowledged the deficiencies in Linda McPherson's reports, as did MAS, the Hearing Examiner did not equate a finding of investigational or report-writing deficiencies with a departure from an established generally accepted standard:

> As evidenced by the disparity between the testimony of the parties' experts, what constitutes a generally accepted standard of practice

> under Title IX was not firmly established by the Department. What was apparent to the Hearing Officer is that this disparity resulted from the Department's expert testifying to what were, in fact, best practices and not generally accepted standards of practice.

Admin. Rec. (1) at 1399.

The Adjudication Panel disregarded the Hearing Officer's recommendation by modifying Findings of Fact Nos. 35, 36, and 38 to limit the Department's expert's expertise to "common sense investigative principles." Admin. Rec. (1) at 1503–1504. The excision of "Title IX" from the Hearing Officer's proposed decision doesn't cure the Department's failure to demonstrate a standard but exacerbates it. Stark acknowledged that any of her opinions outside Title IX were simply "common sense" principles that she developed through investigational experience at MSU in her Title IX capacity, as an attorney, and conducting intake for a law firm. Admin. Rec. (1) at 227, ll. 674:14–680:10.

Stark's testimony was informed by her experience as a Title IX Coordinator for a large university, and she considered guidance from the federal Office of Civil Rights when formulating her opinions regarding MAS's response to harassment allegations. Admin. Rec. (2) at 159, ll. 513:15–517:10 and 227, ll. 674:10–677:6. The bulk of Stark's investigational experience is wrapped up in Title IX, and she relied on guidance propounded for the purposes of Title IX enforcement. As to what makes up a Title IX violation, Stark's experience is broad, and she appropriately relies on OCR guidance in the form of Dear Colleague letters (2001, 2011, and

2014). Admin. Rec. (1) at 308–309, ll. 69:22–70:11. Regardless, Stark declined to offer ***any*** opinions regarding whether MAS conformed to Title IX in its response to allegations of sexual harassment under the known OCR standards. Moreover, Stark declined to opine whether MAS was "deliberately indifferent" in its response to alleged sexual harassment.

Even if it were possible to untangle Stark's opinions from Title IX jurisprudence, as the Department and the Board have tried to do, expositions of "common sense" rules are insufficient to establish unprofessional conduct. The Department consistently argues that they are empowered to utilize expert testimony in this context, but "common sense" rules are not generally demonstrated through expert testimony. The Hearing Officer correctly characterized Stark's "common sense" rules as her own best practices and insufficient to establish a generally accepted practice. Admin. Rec. (1) at 1399.

Though the record is clear that MAS disputed the application of standards outside the context of Title IX investigations, the District Court misinterpreted MAS's non-objection to Stark's qualifications to provide expert testimony with acceptance of Stark's supplementation of Title IX standards with her own best practices. Order on Petition for Judicial Review (Jan. 30, 2025) at 6. To the contrary, MAS rejected the Department's use of Stark's subjective "common sense" standards in favor of applying known Title IX standards utilized by the Office for Civil Rights

or the "deliberate indifference standard," applicable in the context of Title IX tort claims, both of which MAS's expert indicated were ***not*** violated by MAS. Admin. Rec. (1) at 310, ll. 77:3–9 and ll. 98:1–99:15.

Under Montana law, presentation of an expert does not automatically establish that opinions provided are reliable or valid, nor is an expert excludable simply because they can be impeached. Indeed, as both the trier of fact and law, the Hearing Officer was permitted to listen and reject the "common sense" opinions that did not have a reliable basis:

> M. R. Evid. 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify "in the form of an opinion or otherwise" if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." This rule requires testing an expert's reliability against "(1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts." *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489. A district court must determine whether the field is reliable and whether the expert is qualified, but "[t]he last question is for the finder of fact." Beehler, ¶ 35.

McClue v. Safeco Ins. Co. of Illinois, 2015 MT 222, ¶ 16, 380 Mont. 204, 354 P.3d 604.

Despite agreement that Stark was an expert in her field, neither MAS nor the Hearing Examiner was bound to accept her opinions as dispositive of whether MAS engaged in unprofessional conduct in the face of competing and conflicting standards applied to sexual harassment of students. On cross-examination, Stark herself testified consistently with MAS's arguments. To the extent the Board limited

its own findings to Stark's "common sense" rules, rather than the broader Title IX application of law, practice, guidance, and requirements, Stark was no longer acting as an expert but as an advocate.

Stark further admitted to the existence of several different standards applicable to school responses to claims of harassment:

- "Each institution has to make a determination of how they're going to handle this with the resources they have available…" Admin. Rec. (2) at 229, ll. 681:22–24.
- OCR guidance "recognizes the difference in schools and size." *Id. at* ll. 682:3–6.
- OCR may threaten federal funding for noncompliant schools but may also engage in voluntary resolution to bring a school into compliance with expectations. *Id.* at ll. 682:7–17.
- Deliberate indifference is the standard applied in private actions and in the newest OCR regulations associated with rules regarding school response to investigations. *Id. at* ll. 683:14–684:4.
- In the older OCR guidance, OCR considered a "whole list of things" which included "did they stop the behavior and prevent a recurrence and remedy the effects." *Hrg. Tr*. at ll. 684:5–13.
- The deliberate indifference standard is a "very, very high bar" which is "clearly unreasonable in light of the new circumstances." *Id*. at 230, ll. 685:19–686:1.
- Stark acknowledged that she was not aware whether the Board accepted or rejected the "deliberate indifference" standard. *Id.* at ll. 685:9–18.

Stark's acknowledgment of the different standards applied under various regulatory schemes underscores the Department's failure to bear the burden of proof regarding what constitutes the "generally accepted." The Board's final order simply

disregarded this fact by excising the words "Title IX" and imposing discipline that the Department would be unable to support if adherence to known standards were required.

B. The Board of Barbers & Cosmetologists Lacks Authority to Impose License Discipline in the Context of a School's Response to Title IX Sexual Harassment Allegations.

1. Proof of Unprofessional Conduct.

Though Mont. Code Ann. § 37-1-316(18) establishes that a judgment in tort may constitute conclusive evidence of an error or omission occurring in the course and scope of practice, there is no such evidence presented here. The judicial standard for Title IX liability requires proof of the school's actual knowledge of the harassment and proof that the school acted with deliberate indifference when it failed to respond. *Davis v. Monroe Cnty. Bd. of Ed.* 526 U.S. 629, 643 (1999). To establish deliberate indifference, one asserting deviation from that standard must show that a school's response "was clearly unreasonable in light of the known circumstances" and, at a minimum, caused a student to "undergo harassment" or "make them liable or vulnerable to it." *Id.* at 644-45.

The Hearing Officer relied appropriately on what administrative enforcement of Title IX would look like, citing 20 U.S.C. § 1682 and *Smith v. Metro. Sch. Dist. Perry Twp*., 128 F.3d 1014, 1028 (7th Cir. 1997) (tort liability under Title IX requires a showing of intent to discriminate). Admin. Rec. (1) at 1402. Moreover, courts have

held that Title IX does not require school districts "to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective – whether the institution's response evaluated in light of the known circumstances, is so deficient to be clearly unreasonable." *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007). In the Department's experts' own words, deliberate indifference is a "very, very high bar" which was delineated as "clearly unreasonable in light of the circumstances." Admin. Rec. (2) at 230, ll. 685:19–686:1.

It is simply insufficient to demonstrate that MAS should have done things differently, where applicable authority requires much more for the imposition of tort liability or federal administrative liability under known standards and guidance.

2. In the Absence of Proof Which Might Result in a Malpractice or Other Judgment, Board's Final Order Exceeds Its Authority.

The Hearing Officer properly noted that neither massage therapy nor the component of the school that relates to teaching massage therapy students falls under the licenses granted by the Board. Admin. Rec. (1) at 1401. This fact is especially relevant to the Board's overall authority relative to this litigation.

Occupational licensing boards are granted only such authority expressly delegated to them by the legislature. *Bell v. Dep't of Licensing*, 182 Mont. 21, 22, 594 P.2d 331, 332 (1979)(*citing Anaconda Co. v. Dept. of Revenue* (1978), 178 Mont.

254, 583 P.2d 421 and *Polson v. Public Service Commission* (1970), 155 Mont. 464, 473 P.2d 508.

The legislature conferred general discretionary rule-making authority granted to all boards for the purposes of "defining acts of unprofessional conduct, in addition to those contained in 37-1-316, that constitute a threat to the public health, safety, or welfare and that are inappropriate to the practice of the profession or occupation." Mont. Code Ann. § 37-1-319. However, the stated legislative purpose circumscribes that authority to "protecting the public from unauthorized and unqualified practice." Mont. Code Ann. § 37-31-103.

MAS is licensed by the Board of Barbers and Cosmetologists as a "school" pursuant to § 37-31-311. This statute establishes the minimum requirements for licensure, including the obligation to comply with the Board's rules governing the course of training and technical instruction. Mont. Code Ann. § 37-31-311(c). In conferring authority to the Board for the regulation of schools, the Legislature mandated Board promulgation of administrative rules specifically addressing "the regulation and instruction of students", "the conduct of schools for students," and "generally the conduct of the persons, firms, or corporations affected by this chapter." Mont. Code Ann § 37-31-203.

The Board adhered to this mandate, establishing requirements for inspection and layout, instruction, administration, facilities, curriculum, and hours credited to

students. Mont. R. Admin. 24.121.801–811. Notably absent are any rules establishing standards for investigation of or response to sexual harassment complaints. The rule does not even require adoption of such policies. The Board was not granted authority beyond that which is necessary to ensure that barbering, barbering nonchemical, cosmetology, electrology, esthetics, and manicuring are performed by those authorized and qualified in the occupation. Mont. Code Ann. § 37-1-103. Moreover, authorization for school licensure and associated administrative rules were limited to specified functions under § 37-31-203.

This Court recognized these limits before:

> "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government." *Smith v. Industrial Commission* (1976), 113 Ariz. 304, 552 P.2d 1198, 1200; *Swift and Co. v. State Tax Commission* (1969), 105 Ariz. 226, 462 P.2d 775, 779.
>
> The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; *State of Montana ex rel. Charles W. Swart v. Casne* (1977), 172 Mont. 302, 564 P.2d 983; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; *Arizona State Board of Funeral Directors v. Perlman* (1972), 108 Ariz. 33, 492 P.2d 694.

Bell v. Dep't of Licensing, 182 Mont. 21, 22–23, 594 P.2d 331, 332–33 (1979).

Prior incidents of the Board of Barbers and Cosmetologists overreach, especially with schools, are instructive here. In *Bell*, the Board attempted to enforce

a rule requiring barber college instructors to pass an examination given by the Board with a score of 75% or greater. Invalidating the rule, the Court recognized that legislatively established requirements were more limited. The statute provided only that a "barber college operator satisfy two personal requirements of ten years of experience and passing a character investigation. *Id.* at 333. The Montana Supreme Court opined "[a]ny additional administrative requirements, such as those found in sections 40-3.18(6)-S18030(2)(c) and (e), are beyond the scope of the Board's power, and are therefore void and unenforceable." *Id.*

Endorsing the *Bell* test for administrative overreach, cited above, the Montana Supreme Court again struck down the Board of Barbers and Cosmetologists' efforts to exercise authority never delegated and impose requirements on licensees that were never contemplated by the legislature:

> We apply the same MAPA standards in this case. Here the statute requires a year of apprenticeship served "under the immediate personal supervision of a licensed barber" in order to qualify for examination and licensing as a barber. The Board's rule requires an apprentice to serve "one normal work year, or its equivalent at the discretion of the board" before a person becomes eligible for examination and licensing as a barber. "Normal work year" as interpreted by the Board under its rule means an apprenticeship served in a commercial barbershop setting, while the statute simply requires a year's apprenticeship served "under the immediate personal supervision of a licensed barber." Thus the Board's rule engrafts an additional requirement on apprenticeship not contained in the statute. In our view, this additional requirement that apprenticeship be served in a commercial barbershop does not satisfy the test of "reasonable necessity to effectuate the purpose of the statute," section 2-4-305(5), MCA, viz. requiring a period of training prior to qualifying for examination and licensing as a barber. It engrafts

> additional, noncontradictory requirements on apprenticeship prohibited by *Bell* and *Michels*. We hold the rule as interpreted by the Board invalid.

Bd. of Barbers of Dep't of Pro. & Occupational Licensing v. Big Sky Coll. of Barber-Styling, Inc., 192 Mont. 159, 162, 626 P.2d 1269, 1271 (1981).

Another attempt to enforce unexpressed standards by the Board of Barbers and Cosmetologists was invalidated by Hearing Officer David Scrimm. The administrative determination held that the Board was unable to demonstrate "unprofessional conduct" when a licensee offered tooth whitening services at his salon. Admin Rec. (1) at 1484–1495, *In the Matter of Docket No. Cc-10-0021-cos Regarding: the Proposed Disciplinary Treatment of the Salon License of Burtello Salon, License No.* 3471, 2010 WL 1348444, at *3. In *Burtello Salon*, the Board sought to impose sanctions against a salon license for performing "services outside the licensee's area of training, expertise, competence, or scope of practice or licensure unless such services are not licensed or inspected by the State of Montana." *Id.* at *1.

The Hearing Examiner noted four bases supporting his finding that the Department failed to sustain its burden of proof and recommendation for dismissal, all of which are present here. First, while the Board was mandated to adopt rules for "generally the conduct of the persons, firms, or corporations affected by this chapter" under § 37-31-303, MCA, it did not do so prior to the attempt to impose discipline. *Id.* at *4. Moreover, the mandatory obligation to proscribe conduct constituting

unprofessional conduct under § 37-1-303 controlled over the permissive language of Montana Code Annotated § 37-1-319. Second, the Board failed to notify the licensee of a change in unpublished policies. Third, a Board may not impose sanctions on a case-by-case basis where there is no affirmative duty to adopt a rule and the alleged unprofessional conduct is a professional's treatment of his patients. *Id.* at *6. Finally, the Hearing Officer determined that the Board failed to prove that the licensee practiced outside the scope of practice for his salon license.

The bases for invalidating the Board's efforts were many, but those centered on the lack of notice to the licensee of the Board's change in policy are clearly applicable in the instant case. In addition to the Board's abdication of its obligation to define unprofessional conduct, the administrative rules which invalidated the proposed discipline in *Burtello*, the Department has failed to establish the necessary proof to establish that MAS engaged in conduct violative of applicable standards, which will be addressed in more detail below.

The problem with the Department's and the Board's approach here, which probably didn't sit well with either, was recognized by the Hearing Officer:

> MAS argues that the logical conclusion of the Department's position is that, in the absence of any clear standard, the Department is arguing that the Board should have the discretion and latitude to impose license discipline in the instant case by securing paid expert testimony to establish standards in the absence of clear communication of such standards. While generally accepted standards are often established through testimony, as discussed above, when they are applied to

> nebulous and unclear rules, ***it seriously risks arbitrary imposition of discipline without prior notice of standards.***

Admin. Rec. (1) at 1400.

The Board's imposition of discipline is basically a critique of investigation and reporting techniques, in which none of the Board's adjudication panel members professed any experience or interest. The massage instructor at issue had been terminated years prior. The federal law regarding the composition of due process proceedings relating to Title IX has changed markedly since this matter arose, and the legislature has expressed a desire to impose disciplinary liability only if a violation of the Montana Human Rights Act has been demonstrated.[3] The Board's actions here are not only outside the scope of its authority, but essentially irrelevant to any future circumstance that may arise for its licensees.

Ironically, the Board seeks to penalize MAS for departing from its own policies when the Board has departed from their own relative to the establishment of "unprofessional conduct." When Board members are trained, the manual in effect at

[3] Had the current version of the statute been in effect in 2020, the standards applicable to the Board's action would mirror the standards being argued here, based on *Campbell v. Garden City Plumbing and Heating, Inc.*, 2004 MT 231, ¶ 6, 322 Mont. 434, 97 P.3d 546 ("Reference to federal case law is appropriate in employment discrimination cases filed under the Montana Human Rights Act (MHRA), Title 49, MCA, because the provisions of Title 49 parallel the provisions of Title VII.").

the time the proposed license discipline was issued dictates the circumstances under which the Board may address "unprofessional conduct." As noted in the manual:

> …enabling statutes may authorize a board to sanction a licensee for engaging in "unprofessional conduct," but rather than define "unprofessional conduct," the legislature may authorize the board to define in rule what specific conduct constitutes "unprofessional conduct." This delegation of legislative authority recognizes the legislature lacks the expertise to provide such a level of detail or be responsive to new developments within a profession.

Admin. Rec. (2) at 636, Ex. R13 at 21.

Though no members on the Board at the time the Notice of Proposed License Discipline was issued profess any expertise in the arena of investigations and sexual harassment, no rule defining "unprofessional conduct" as applied here was issued by the Board, despite the stated necessity to do so in the board training materials. Contrast the actions of the Board of Barbers and Cosmetologists with the Montana Human Rights Commission, to which the Legislature actually conferred authority to adjudicate discrimination in education, which will be discussed in more detail below.

Additionally, the Department's Business Standards Division employs procedures applicable to the processing of complaints. Admin. Rec. (2) at 686–786, Ex. R14. The procedures apply to all governor-appointed professional and occupational licensing boards (boards) and department programs (programs) in the Business Standards Division. Within the procedures, the Department includes

reference to frequently asked questions, answered by the Department and made available on its website. The public, including licensees, is instructed as follows:

> How do I know what constitutes unprofessional conduct?
>
> It may be helpful to look at how the Board or Program defines unprofessional conduct or scope of practice of the particular license type involved before you file the complaint. These definitions and standards are located in the Montana Code Annotated and the Administrative Rules of Montana, and may be accessed under the individual board or program website at bsd.dli.mt.gov.

Id., Ex. R14 at 53.

The Department *actually defines* "Generally Accepted Standards of Practice" in its procedures as "as evidenced by a rule of unprofessional conduct or adopted professional standards." *Id.* at Ex. R14, at 58. The definition of "generally accepted standards of practice" does not reference standards that may be articulated after the fact by a professional Title IX investigator who is neither licensed in the occupation regulated nor a representative of a licensee.

C. The Final Agency Decision Rests On An Unconstitutional Delegation Of Legislative Authority

1. Mont. Code Ann. § 37-1-316(18) is Unconstitutionally Vague As Applied to MAS

If this Court determines that the Panel is not confined to its own area of professional practice when enforcing license discipline, the Panel's decision should be reversed because, as applied to MAS, the statute unconstitutionally delegates

legislative authority without the requisite guidance on how that authority should be exercised as it pertains to negative impacts on the ability to serve students.

The Montana Constitution provides:

> The power of the government of this state is divided into three distinct branches-legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.
>
> The legislative power is vested in a legislature consisting of a senate and a house of representatives.

Mont. Const. art. III, § 1; Mont. Const. art. V, § 1.

This Court has limited the ability to delegate the legislature's authority to require a statement of policy, a standard, or a rule – none of which have been established applicable to the facts of this case:

> The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion… A statute granting legislative power to an administrative agency will be held to be invalid if the legislature has **failed to prescribe a policy, standard, or rule** to guide the exercise of the delegated authority. If the legislature fails to prescribe with **reasonable clarity the limits of power delegated** to an administrative agency, or if those limits are too broad, the statute is invalid.

Williams v. Bd. of County Comm'rs, 2013 MT 243, ¶ 44, 371 Mont. 356, 308 P.3d 88, (citing *Bacus v. Lake County* (1960), 138 Mont. 69, 78, 354 P.2d 1056, 1061) (emphasis added).

Though MAS has argued the limits of delegated authority above, to the extent that this Court believes an administrative agency is deemed authorized to seek out

expert testimony to establish a standard, other precedent dictates otherwise:

> Concerning adequate standards and guides in delegation of legislative power, this court has stated the rule as follows: If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.
>
> On the other hand a statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative agency, and its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations.

Huber v. Groff (1976), 171 Mont. 442, 457, 558 P.2d 1124, 1132

.

When standards or guidelines are not present, the exercise of the delegated power may result in "arbitrary and capricious" actions, as recognized by the Hearing Officer and ignored by the Board, and may also be "dependent wholly on the will and whim" of others. *Williams* at ¶ 45. The Hearing Officer was mindful of this caution when he opined:

> However, a professional licensing action based on a loosely-worded statute which can only be defined by expert testimony, and which must be read into after-the-fact to determine what violation occurred is simply untenable.

Admin. Rec. (1) at 1400 and 1402.

Though it was apparent to the Hearing Officer that the license discipline exceeded the authority allowed by the Board, the unconstitutionality of the application of unclear or unknown standards to a property right (a license) is well-

established under the facts of this case. The Final Agency Decision, based on an alleged "generally accepted standard of practice" which was never previously announced, conflicts with known standards, and is unrelated to the practice for which MAS was licensed, demonstrates the unconstitutionally vagueness of the statute under the facts of this case.

2. The Unlawful Panel Composition Deprived MAS of Due Process

Under the Due Process clause of the United States Constitution, MAS was entitled "to a fair and impartial hearing in any disciplinary proceeding conducted against [it] by the Board." *Friedman v. Rogers*, 440 U.S. 1, 18 (1979). The Montana Constitution broadly guarantees that "no person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. The procedural protections required depend on the particular situation. To determine what protections are afforded, the court considers the following: (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

The Montana Supreme Court recognized that, under both state and federal law, this standard can be flexible under the requirements of each situation:

> As such, "the process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." *McDermott v. McDonald,* 2001 MT 89, ¶ 10, 305 Mont. 166, 24 P.3d 200 (citation omitted). Otherwise stated, due process requirements of notice and a meaningful hearing are "flexible" and are adapted by the courts to meet the procedural protections demanded by the specific situation. *Geil v. Missoula Irr. Dist.,* 2002 MT 269, ¶ 58, 312 Mont. 320, 59 P.3d 398 (citation omitted).

Montanans for J. v. State ex rel. McGrath, 2006 MT 277, ¶ 30, 146 P.3d 759.

This case is emblematic of the concerns associated with potential erroneous deprivation of interests in property, as recognized by the Hearing Officer and by the legislature when imposing the requirement that the Board include two members affiliated with a school under Mont. Code Ann. § 2-15-1747. Neither the Adjudication Panel nor the Screening Panel included a person affiliated with a school, and no such members were appointed at the time the Department's complaint was authorized to proceed. The absence of school-affiliated membership at either panel proceeding materially affected MAS's procedural rights, as MAS was denied statutorily required preconditions to effective and lawful Board governance over its school licensees.

The District Court glossed over this allegation; however, board representation with some background or knowledge of school investigations and an interest in clarifying, rather than obscuring, standards applied to school licensees could have been critical to MAS and the Board's willingness to simply accept arbitrary

standards applied in the educational environment. At the very least, such membership could have resulted in rules or policies that the Department seeks to apply after the fact. MAS was denied a meaningful opportunity for hearing because the requisite Board composition ensured that the Department's proposal for license discipline and modification of the Hearing Examiner's findings would go unchecked by Board members with knowledge of barbering and cosmetology school administration. Given the failure to ensure a meaningful opportunity for hearing at the screening panel and adjudication panel levels, MAS was deprived of due process relative to encumbrances on its license.

VII. CONCLUSION

Viewing the evidence as a whole, the Department, at best, demonstrated conflicting standards applicable to a school's obligations to respond to claims of sexual harassment, as well as conflicting law governing consequences related thereto. Given that both experts, the Hearing Officer, and the Board arrived at differing conclusions relating to whether "generally accepted standards of practice" exist, no apparent "generally accepted" standard can be applied. This failure in proof requires invalidation of the Board's Final Agency Decision and dismissal of the Department's complaint.

For the sake of argument, even if a generally accepted practice had been established solely by personal opinion, without reference to any law, rule, or Board

policy, the Board navigated outside the express authority granted to it, unchecked by any ascertainable standard. This rendered the Final Agency Decision invalid because the Board lacked to define the appropriate response to sex discrimination. The Decision was invalid because of the unconstitutionally vague language from which the Board drew surplus authority. The Final Agency Decision was also arbitrary, capricious, and affected by other error of law.

MAS respectfully requests that the Board's Final Agency Decision be vacated based on the Board's failure to adhere to MAPA's restrictions on modification of a proposed agency determination. MAS further requests that this matter be remanded to the Board, with instruction to adopt Hearing Officer Vanisko's correctly proposed decision, which correctly addressed the absence of any basis for discipline against MAS's license.

Dated this 2nd day of June, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(a), I hereby certify that this Appellee's Response Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and the word count, excluding tables and certificates, is 9606 as calculated by Microsoft Word.

Dated this 2nd day of June, 2025.

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I, Elizabeth O'Halloran, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-02-2025:

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