



Association of
Title IX Administrators

Writing Outcome Rationales

An ATIXA Best Practices Workshop

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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this workshop will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

Course Introduction



The primary focus of this workshop is to help participants develop proficiency in composing the written rationales required in the Title IX Formal Grievance Process.



Practitioners will learn how to approach the rationale writing process and will practice weighing and applying evidence, including credibility evidence, with analytical precision.



Our goal is to provide participants with an opportunity to practice writing a rationale and receive constructive feedback in a safe environment for learning.

Purpose of the Rationale

Rationale Purpose

- Rationale should clearly identify what information was used in reaching the decision
- Can be a standalone document or part of a larger document
- When part of a hearing outcome letter, there will be other disclosures required by the regulations in that notice



Types of Rationales

Required

- Rationale for dismissal
- Rationale for (hearing) final determination and sanctions
- Rationale for appeal decision

Implied

- Rationale for emergency removal
This rationale is implied by the regulations, because an individualized assessment must be done and can be challenged

Permitted

- Rationale for Investigator's recommended finding/outcome, if in the report
If it is provided, it must be non-binding on the Decision-maker(s) (DMs)

Defining Terms

- The **rationale** is the basis for a decision
 - Can include the explanation of the basis for the finding, the final determination, and any sanctions imposed
 - A **finding** is a determination of the facts that occurred, by the standard of evidence
 - A **final determination** is an application of relevant evidence to the policy, determining by the standard of evidence whether a policy violation occurred
 - Also referred to as a decision or outcome
 - Yes or no question for each alleged policy violation
 - Can be the result of a hearing and/or an appeal

Rationale Writing

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Template: Hearings

- Summarize allegation(s)
- Include all policies potentially violated (per the Hearing Notice)
- Review evidence, note which evidence was relied upon and which was not
 - If relying upon evidence to make a determination, cite it in the rationale
 - Write from the premise that if it isn't written down, credit won't be given for the thoughtfulness of the analysis
 - If not relying on something, say so, and state why

Template: Hearings

- Summarize and assess credibility
 - Make a relative credibility comparisons and conclusions
- Make and explain the finding (by the standard of evidence)
- Make and explain the final determination (by the standard of evidence)
- State any sanctions imposed and the basis for choosing them
 - May include precedent, prior history, aggravating and mitigating factors, evaluation of cumulative or collateral violations, pattern behavior, acceptance of accountability, Complainant's request, etc.

Template: Dismissals, Removals, & Appeals

- **Dismissals**

- Summarize decision, specify if referring to another process
- Make and explain determination based on jurisdictional grounds

- **Removals**

- Summarize decision
- Make and explain determination based on individualized risk assessment

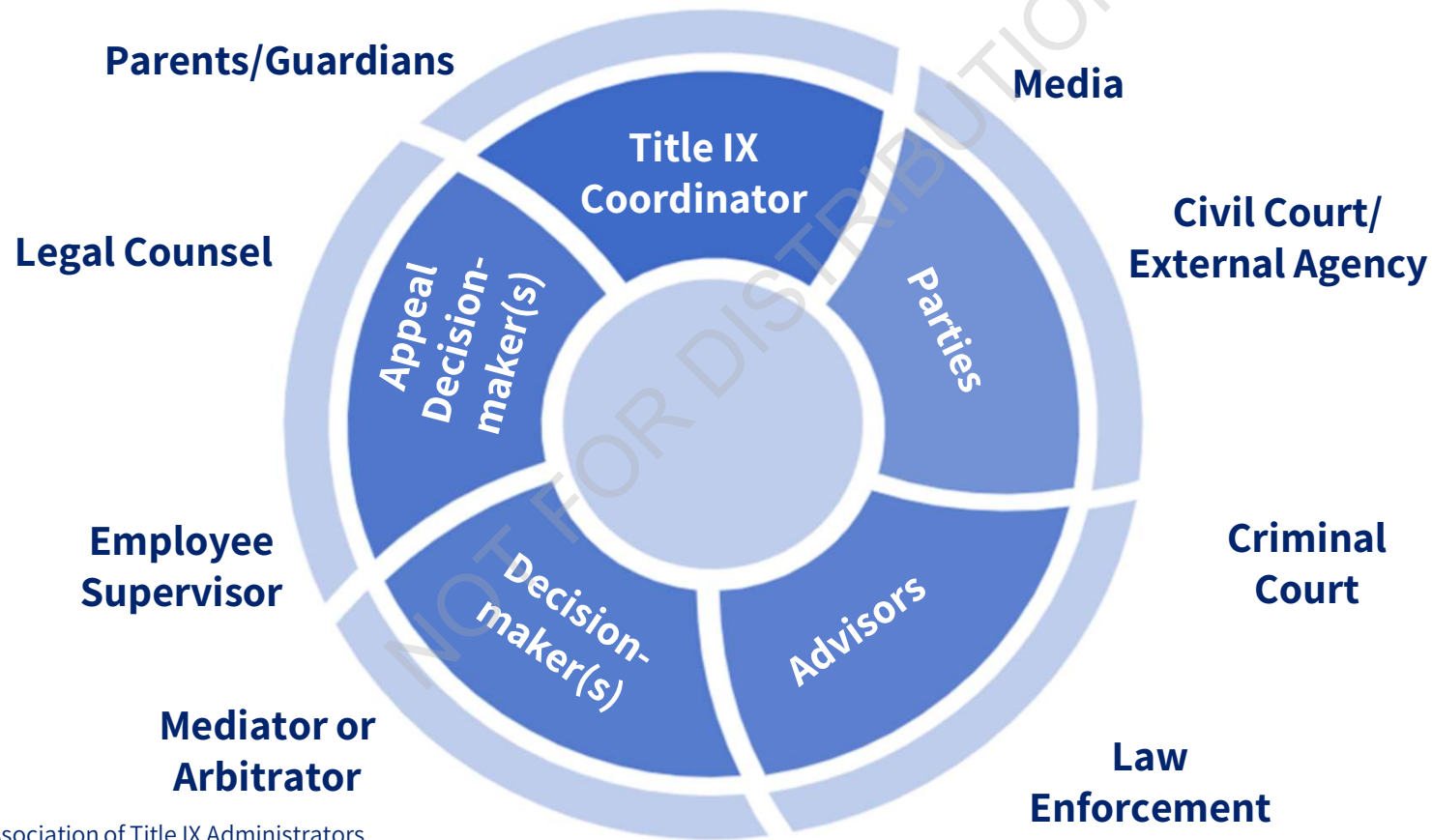
- **Appeals**

- Summarize original decision and party appeal
- Make and explain determination according to the grounds for appeal
- Include remand directions, if applicable

Rationale Drafting Protocols

- Rationale for **dismissal** or **emergency removal** should be written by the Title IX Coordinator (TIXC) or designated administrator who makes the decision
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
- **Hearing rationale** should be written by the Chair or DM
 - If more than one DM, either appoint a writer from panel, or share the writing collaboratively (not recommended)
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
 - All panel members should review and sign off on final version
 - Same considerations for **appeal rationales**

Keep the Audience in Mind



Best Practices

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Best Practice Tips

- Write with one voice, not a committee
- All panelists should contribute to and/or review the rationale
- Don't issue dissents, or indicate what the vote was (e.g., 2 to 1)
- Commonly 1-15 pages in length, depending on complexity
- Write in active voice and third person (Ex. The Panel determined vs. it was determined)
- Write a separate rationale for each Respondent if more than one is involved in the complaint
- If the investigation report offers a rationale, and the DM simply adopts it as the final determination, it will be harder to defend the objectivity of the hearing decision

Best Practice Tips

- When there are multiple alleged violations, the rationale should typically flow from analysis of the broadest offense to the narrowest
 - Rather than from most severe to least severe
 - Include a rationale for each policy violation
- Ensure that the DM(s) arrive at the rationale independently and impartially
 - TIXC and legal counsel are there as guardrails, and to ask probing questions about the analysis, but should not exert untoward influence on the outcome

Activity: Case Study

Phoebe and Simon: A Bridge Too Far?

- Simon and Phoebe have been dating for several months
- They have been sexually active, including vaginal intercourse, multiple times
- They have never discussed protection or contraception, but neither has ever used any during their sexual activities with each other
- Phoebe is clear that Simon has never worn a condom during sex with her
- Simon is unaware whether Phoebe has ever used any form of contraception
- In discussing life goals generally, Simon has made it clear to Phoebe that he doesn't ever see himself having kids

Phoebe and Simon: A Bridge Too Far?

- During all of their sexual interactions, as intercourse was headed toward climax, Simon has withdrawn his penis before ejaculating
- On the night in question, in the heat of their romantic intimacy, which had always involved missionary position consensual sexual intercourse, Phoebe instead positioned herself on top of Simon, and decided she wanted the experience of Simon ejaculating inside of her, to be as close to him as she possibly could
- As their lovemaking neared climax, Simon realized he was pinned beneath Phoebe by the position, and that he was losing control
- He said to her, “Wait,” twice as he became increasingly distressed that he would not be able to pull out in time

Phoebe and Simon: A Bridge Too Far?

- Phoebe, caught up in the ecstasy of the moment, continued until Simon ejaculated inside of her
- Simon neither struggled nor physically attempted to remove Phoebe from her position or to pull his penis out before ejaculating because he realized it would be futile
- Simon became furious and broke up with Phoebe
- He then filed a Title IX complaint alleging that she sexually assaulted him by forcing him to ejaculate inside of her, thus risking pregnancy that she knew he did not want

Phoebe and Simon: A Bridge Too Far?

- Phoebe responded that she was simply caught up in the moment, wanted to be close to the man she loved, did not know if she would become pregnant, and was unclear what Simon meant when he said “wait”
- She did not know that he was unwilling to ejaculate inside her, as they had never discussed it
- She said she really didn’t think about it much, as she was in the throes of climax herself, but that she did not interpret “wait” as “stop,” or she would have stopped
- Upon reflection, Phoebe stated to investigators that “wait” could have meant, “wait so that we can climax simultaneously,” “wait, I want this to last longer,” or “wait you’re going too fast,” but that she really did not consider what it meant in the moment

Phoebe and Simon: A Bridge Too Far?

- Simon clarified for Investigators that his insistence in saying “wait” twice, plus the clear distress on his face should have made it clear to Phoebe that he meant to stop
- Phoebe responded to this evidence by stating that the look on his face was one of extreme pleasure, and that this was very clear to her
- She also clarified that she was not pregnant

Phoebe and Simon: A Bridge Too Far?

You have now been placed into a position deciding whether Phoebe violated policy and stating your rationale.

By a preponderance of the evidence, did Phoebe sexually assault Simon by having non-consensual sexual activity with him?

- If yes, why?
- If no, why not?

Be very clear in your reasoning

Phoebe and Simon: A Bridge Too Far?

Sexual assault, defined as:

- **Rape:**

- Penetration, no matter how slight,
- of the vagina or anus,
- with any body part or object, or
- oral penetration by a sex organ of another person,
- without the consent of the Complainant

Phoebe and Simon: A Bridge Too Far?

Consent, defined as:

- knowing, and
 - voluntary, and
 - clear permission
 - by word or action
 - to engage in sexual activity
- Consent can be withdrawn once given if that withdrawal is clearly communicated
 - Once withdrawn, sexual activity must stop reasonably immediately



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Questions?

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