



Association of
Title IX Administrators

Writing Outcome Rationales

An ATIXA Best Practices Workshop

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The content and discussion in this training will necessarily engage with sex- and gender-based harassment, discrimination, 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. It is not used gratuitously, and no offense is intended.

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 final determination, there are other required elements or disclosures



Types of Rationales

Required

- Rationale for dismissals and dismissal appeals
- Rationale for final determination and sanctions
- Rationale for final determination appeal decision, if applicable

Implied

- Rationale for emergency removals and challenges

Permitted

- Rationale for Investigator's recommended finding/outcome, if in the report

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
 - What happened?
- A **final determination** is made by applying relevant evidence to the policy and determining whether a policy violation has occurred, based on the standard of evidence:
 - Did what happened violate policy?
 - Also referred to as a **decision** or **outcome**
 - Yes or no question for each alleged policy violation
 - May result from a decision/hearing process and/or an appeal

Rationale Writing

Template: Determination

- Summarize allegation(s)
- Include all policies potentially violated
- Review evidence, noting which evidence was relied upon and which was not:
 - If relying upon evidence to make a determination, cite it in the rationale
 - If it is not written down, the analysis did not happen
 - Credit will not be given for the thoughtfulness of the analysis
 - Analysis may be incomplete
 - If not relying on something, say so, and state why

Template: Determination

- Summarize and assess credibility
 - Make credibility comparisons and conclusions, if required by policy
- Make and explain the finding, according to the standard of evidence
- Make and explain the final determination, according to 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 responsibility, Complainant's request, etc.
- Appeal procedures, if applicable

Template: Dismissals and Emergency Removals

- **Dismissals**

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

- **Emergency Removals**

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

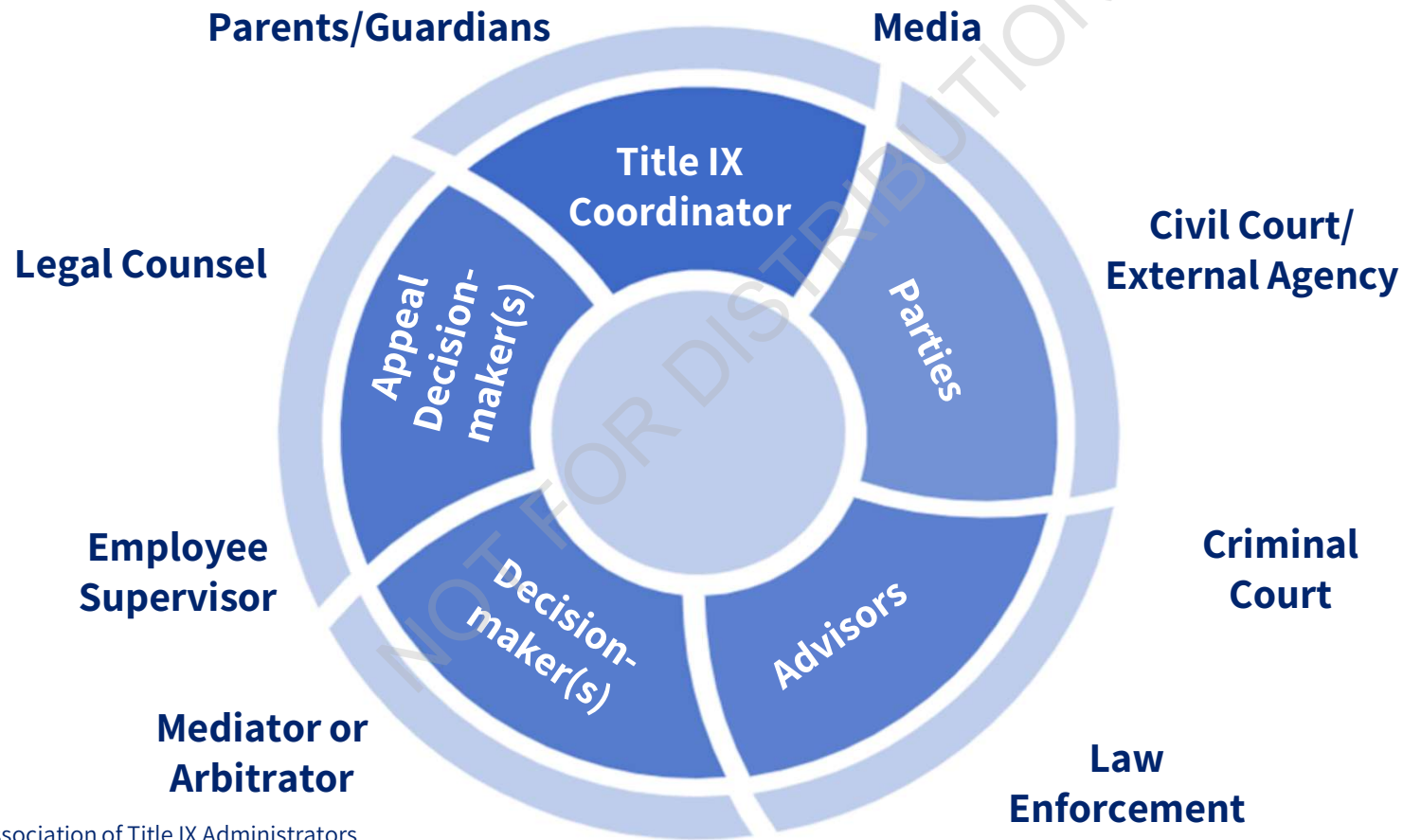
Template: Appeals and Challenges

- **Appeals (Dismissal and Final Determination)**
 - Summarize original decision and each party's appeal
 - Make and explain determination according to the appeal grounds
 - Include remand instructions or directions, if applicable
- **Challenges (Emergency Removal)**
 - Summarize original decision and the party's challenge
 - Make and explain determination according to the challenge standard

Rationale Drafting Protocols

- Title IX Coordinator (TIXC) or designated administrator making the decision writes the rationale for **dismissal** or **emergency removal**
 - TIXC and/or legal counsel can/should **review** (not write or rewrite) prior to issuance
- Chair or Decision-Maker (DM) writes **Final Determination or appeal rationale:**
 - If more than one DM, either appoint a writer from panel (recommended) or share the writing collaboratively
 - TIXC and/or legal counsel can/should **review** (not write or rewrite) prior to issuance
 - If using more than one DM (e.g., hearing panel), 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
- Do **not** issue dissents, concurring opinions, 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 (example: 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 address each allegation on its own merits
 - Findings on specific violations (e.g., sexual assault) can greatly inform findings for broader violations, such as dating violence or hostile environment harassment
 - Include a rationale for each alleged policy violation
- Ensure that the DM(s) arrive at the rationale independently and impartially:
 - TIXC and legal counsel:
 - Act as guardrails for the process
 - Ask probing questions about the analysis
 - Do 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

Phoebe and Simon: A Bridge Too Far?

- He said to her, “Wait,” twice as he became increasingly distressed that he would not be able to pull out in time
- 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

Phoebe and Simon: A Bridge Too Far?

- 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 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

Phoebe and Simon: A Bridge Too Far?

- 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
- 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 of 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

▪ Rape:

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

Phoebe and Simon: A Bridge Too Far?

Consent, as 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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