



Association of
Title IX Administrators

Writing Outcome Rationales

An ATIXA Best Practices Workshop

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Introduction



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



Practitioners will learn how to approach the rationale writing process and 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.

Introduction to Rationales

Rationale Purpose

- Rationales should clearly identify what information was used in reaching a decision
- Can be a standalone document or part of a larger document
 - There may be other required elements or disclosures if part of a larger document



Types of Rationales

Required

- Dismissals and dismissal appeals
- Final determination and sanctions
- Final determination appeals, if applicable

Implied

- Emergency Removals and Emergency Removal challenges

Permitted

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

Defining Terms

- **Finding:** a determination of the facts that occurred, by the standard of evidence
 - What happened?
- **Determination:** 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
 - May include sanctions or remedies, if appropriate
- **Rationale:** the basis for a decision
 - Can include the explanation of the basis for the finding, the determination, and any sanctions imposed

Best Practices

Best Practice Tips

- For panel decisions
 - 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 5-15 pages in length, depending on complexity
- Write in active voice
- Analyze all policy elements
- Write a separate rationale for each Respondent if more than one is involved
- Even if the investigation report offers a recommended finding/rationale, Decision-Maker (DM) should make an independent finding and provide a rationale

Best Practice Tips, Cont.

- When there are multiple alleged violations, the rationale should address each allegation on its own merits
 - Findings on specific violations (e.g., sexual assault) often inform findings for other violations, such as dating violence
 - 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

Examples & Tips

Findings of Fact

- Presume innocence
- Determine whether the evidence supports that the incident occurred as alleged (applying the appropriate standard of evidence) for each allegation
- Review of all evidence relevant to the allegation
 - Include credibility assessments
- Weigh the evidence for and against
- Parties will typically agree on some evidence but disagree on others
- “The preponderance of the evidence supports that the finding that the incident [did/did not occur] as alleged”

Example Finding Excerpt #1

- Mia and Ava have both alleged Fondling by Kiki
- Mia provided a detailed description of the events involved in her allegation, some of which Ava corroborated. Mia's description of how she, Kiki, and Ava were walking in the hallway during the time of the incident, including her explanation of Kiki's hand starting out on Mia's shoulder before moving to Mia's waist, then ultimately to Mia's butt, was plausible and consistent with her original report. Mia also reported that Kiki was touching Ava's butt at the same time, which Ava corroborated, further bolstering the credibility of Mia's statement.
- Mia's account is both corroborated by Ava and plausible, and therefore credible. I do not find Kiki's denial to be as credible, in part because Kiki did not provide any evidence or information other than denying the allegations during the investigation. Therefore, the preponderance of the evidence supports that the incident occurred as Mia alleged.

Example Finding Excerpt #2

- Although Complainant consistently testified that Respondent grabbed and hit Complainant's groin area over his clothes both in public and in private, his credibility is diminished by the lack of corroborative evidence. Complainant reported several of the alleged incidents occurred in the hallway during passing periods, so it is reasonable to expect that others would have witnessed the alleged incidents. The Investigator interviewed three of Complainant's friends at Complainant's request, as Complainant identified them as witnesses to the alleged behavior. However, none of these witnesses corroborated Complainant's version of the events, nor did any other witnesses. Security video footage from the hallway during the time of the alleged incidents provided no evidence of physical contact between Complainant and Respondent.

Example Finding Excerpt #2, Cont.

- Respondent acknowledged engaging in conduct that violated other school policies but consistently denied engaging in the behavior Complainant alleged. Additionally, Respondent explicitly denied touching Complainant's groin area. All witnesses, including Complainant's friends, supported Respondent's account of the events, bolstering Respondent's credibility. Therefore, the preponderance of the evidence supports a finding that Respondent did not engage in the behavior as alleged.

Determinations

- Apply findings of fact to policy elements
 - Review relevant facts and credibility for each element
 - Weigh evidence against the requirements for each policy element
- Parse the policy into individual elements:
 - (1) Unwelcome conduct
 - (2) on the basis of sex
 - (3) that a reasonable person would find
 - (3a) severe, (3b) pervasive, and (3c) objectively offensive
 - (4) that it effectively denies...
- Clearly define terms like SPOO, violence, consent, etc. to analyze findings of fact
- “The preponderance of the evidence [supports/does not support] the finding that Respondent violated ATIXA U’s Title IX Policy against Sexual Harassment”

Example Rationale Excerpt Part #1

- Given my findings that Kiki touched Mia’s butt, the “private body parts” element is met by the preponderance of the evidence.
- Mia’s statement that Kiki “squished” her butt provides evidence that the touch was intentional; a “squish” in the context described is very unlikely to have been accidental. Kiki did not provide any evidence to the contrary. Kiki only denied the allegation, which provides no evidence to weigh against Mia’s credible account. As a result, the preponderance of the evidence supports that the touch was intentional.

Example Rationale Excerpt Part #2

- As to whether KiKi touching Mia's butt was without consent, the policy states, "Consent means clear, knowing, and voluntary words or actions that indicate permission for a specific sexual activity." Mia said the contact was without consent, so the question becomes whether Mia gave Kiki consent to touch her butt through clear words or actions. There is no evidence of any discussion of consent, and the record does not contain any evidence that Mia used clear words or actions to consent to Kiki touching her butt. There is likewise no evidence that Kiki asked whether she could touch Mia's butt. Given Mia's credible account and the lack of any evidence that the touching was consensual, I find the preponderance of the evidence supports that the butt touching was without consent.

Example Rationale Excerpt Part #3

- I have found that the preponderance of the evidence supports Mia's allegation that the butt touching constituted contact with a "private body part," was intentional, and was without Mia's consent. Therefore, based on Complainant's consistent and credible testimony, Respondent's statements, and Witnesses 1, 3, and 5's testimony, I determined that the preponderance of the evidence **supports** a finding that Respondent violated ATIXA U's Policy prohibiting Sexual Assault – Fondling.

Additional Tips

- Organize outcome letters into specific sections:
 - Statements of parties and witnesses
 - Additional evidence
 - Credibility assessments segmented by party and witness
 - Segment Findings by policy, and then by each element of a policy, etc.
- For pattern complaints with multiple Complainants, a separate section about pattern evidence can help clarify how the DM used pattern evidence in their decision
- Leverage colleagues
 - Second perspective on thorny findings or analysis
 - Second reader to enhance clarification, identify gaps

Templates and Drafting

Template: Dismissals and Emergency Removals

Dismissals

- Summarize decision, specify whether 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: Determinations

- 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
 - Thoroughness is crucial
 - Parse the policy
 - Highlight the evidence used to make the determination
 - If not relying on something, say so, and state why

Template: Determination, Cont.

- 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 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.
- Add appeal procedures

Template: Appeals and Challenges

Challenges (Emergency Removal)

- Summarize original decision and the party's challenge
- Make and explain determination according to the challenge standard

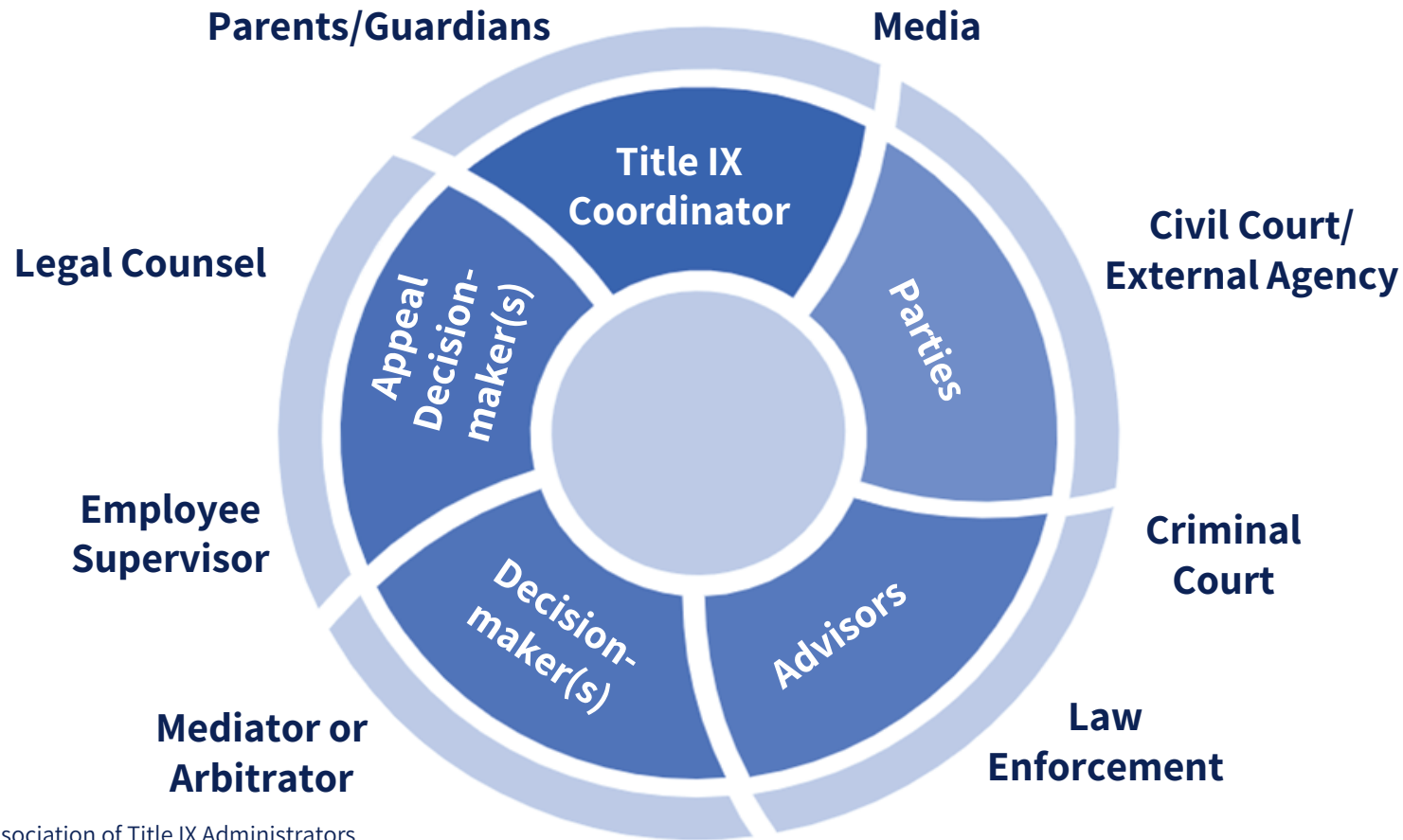
Appeals (Dismissal and Final Determination)

- Summarize original decision and each party's appeal
- Make and explain determination according to the appeal grounds
- Include next steps (e.g., remand instructions), if applicable
- Indicate whether the dismissal and/or Final Determination is final

Rationale Drafting Protocols

- Title IX Coordinator (TIXC) or designated individual 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 DM writes the **determination**
 - 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
- Appeal Chair/DM drafts **appeal rationale** using the same considerations

Keep the Audience in Mind



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Activity: Case Study

Activity: Phoebe and Simon

- Read the following fact pattern
 - Download slide deck for easy reference
 - Available as a PDF in your event lobby
- Allegations
 - Sexual Assault: Rape
 - Sexual Assault: Fondling
 - Dating Violence
- Draft a short finding of facts section
- Draft a short rationale
- Develop a list of sanctions you would consider, if you find a violation

Phoebe and Simon: History

- Simon and Phoebe have been dating for several months
- They have been sexually active, including vaginal intercourse, multiple times
 - All instances of intercourse prior to the night in question were consensual
- Both agree they have never discussed protection or contraception, but they have never used any during their mutual sexual activities

Phoebe and Simon: Future Children

- Simon reports that he has made it clear to Phoebe that he doesn't ever see himself having kids
 - Phoebe disputed this characterization, stating that Simon had said “God, who would want raise kids? They are disgusting.”
 - Simon said this after spending Christmas with Phoebe's family, during which a few of her nieces and nephews had coughs and colds. Simon did not mention not wanting kids otherwise.
 - Phoebe's brother Benedict provided a written statement, corroborating Phoebe's statement.

Phoebe and Simon: Alleged Incident

- During their sexual interactions, Simon has always withdrawn his penis before ejaculating
 - Phoebe reports that Simon has not told her why he pulls out
- On the night of the alleged assault, Phoebe positioned herself on top of Simon
 - Previously, they had only engaged in missionary-style sex with Simon on top
 - As they had recently told each other they loved each other, Phoebe decided she wanted the experience of Simon ejaculating inside of her, to be as close to him as she possibly could
- As they neared climax, Simon realized he was pinned beneath Phoebe and was going to be unable to pull out prior to orgasm

Phoebe and Simon: Alleged Incident, Cont.

- He said to her, “I’m almost there,” twice as he became increasingly distressed that he would not be able to pull out in time
- Phoebe continued until Simon ejaculated inside of her
- Simon neither struggled nor physically attempted to remove Phoebe from her position
 - He did not pull his penis out before ejaculating. He later claimed it would be futile.
 - Phoebe pointed out that Simon is twice her size and “has nice muscles” so he easily could have thrown her off if he wanted.
- Simon became furious and broke up with Phoebe
 - Word spread and soon many of their friends and classmates knew about Simon and Phoebe’s dispute, and Simon was furious because he is a private person
 - Phoebe suspects this is why Simon made these allegations

Phoebe and Simon: Title IX Complaint

- Simon then filed a Title IX complaint alleging that Phoebe sexually assaulted him by forcing him to ejaculate inside of her, thus risking pregnancy that she knew he did not want
- Phoebe said that things happened quickly, she was nearing climax herself, and that she did not interpret “I’m almost there” as “stop,” or she would have stopped if she had known he did not want to ejaculate inside of her
- She reported did not know that he was unwilling to ejaculate inside her, as they had never discussed it
 - Simon’s friend Will provided a statement that Will and his partner had overheard a conversation between Phoebe and Simon in which Simon said, “Kids are so limiting, and I want to be able to travel and explore the world like your brother, Colin”

Phoebe and Simon: Investigation Interviews

- Upon reflection, Phoebe stated to investigators that she interpreted “I’m almost there” as encouragement to keep doing what she was doing
 - Phoebe noted that it was her first time on top, so she was focused on making sure Simon enjoyed it
- Simon clarified for Investigators that his insistence in saying “I’m almost there” 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
- Phoebe also clarified that she was not pregnant
 - Phoebe reported that she was not ovulating on the night in question, so the odds of a pregnancy were extremely low
 - Had she been ovulating, she probably wouldn’t have allowed Simon to ejaculate inside her

Phoebe and Simon: Finding and Determination

- 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?

Provide a detailed, clear rationale

Model Rape Definition

Sexual Assault: Rape

- Penetration, no matter how slight,
- of the vagina or anus of a person,
- with any body part or object, or
- oral penetration
 - of a sex organ of the Complainant, or
 - by the Respondent's sex organ, or
 - by a sex-related object
- without the consent of the Complainant,
- including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental or physical incapacity

Model Dating Violence Definition

Dating Violence

- Violence,
- committed by a Respondent,
- who is in or has been in a social relationship of a romantic or intimate nature with the Complainant
- The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
 - Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
 - Dating Violence does not include acts covered under the definition of Domestic Violence

Model Violence Definition

Violence:

- Includes situations where the Respondent intentionally or recklessly causes the Complainant serious physical, emotional, or psychological harm
 - Evidenced when a Reasonable Person would be more likely to act with the purpose of causing serious harm rather than for any other reason
 - Recklessness is evidenced by a disregard of obvious risk to the safety of the Complainant
- Legitimate use of violence for self-defense is not chargeable under the Policy because the purpose is safety, not harm. Self-defense is only to be considered if it is prompted by physical violence or the threat thereof.

Model Violence Definition, Cont.

- Consensual use of violence, such as in kink relationships, would also not meet this definition
- Threats to seriously harm the Complainant or people they care about may be chargeable under this definition if doing so causes serious emotional or psychological harm
- Threats to harm oneself, even if made to cause emotional or psychological harm, are not considered violence under this definition (but may be addressable under the Threat Policy)

Model Fondling Definition

Sexual Assault: Fondling

- The intentional touching of the clothed or unclothed genitals, buttocks, groin, breasts, or other body parts of the Complainant by the Respondent,
 - without the consent of the Complainant,
 - for the purpose of sexual degradation, sexual gratification, or sexual humiliation
- Or, the Respondent caused or directed the Complainant's intentional touching of the Respondent's clothed or unclothed genitals, buttocks, groin, breasts, or other body parts,
 - without the consent of the Complainant,
 - for the purpose of sexual degradation, sexual gratification, or sexual humiliation

Model Consent Definition

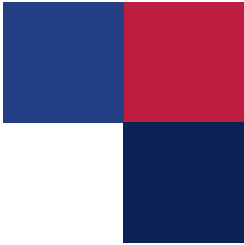
Consent, as defined as:

- 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

Questions?



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