



Association of
Title IX Administrators

Title IX Rationale Writing Best Practices

For Investigators and Decision-makers



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. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course 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.

TOPIC OVERVIEW

- 1 Purpose of the Rationale
- 2 Who Crafts/Approves the Rationale?
- 3 What Should a Rationale Include?
- 4 What Shouldn't a Rationale Include?
- 5 Defensible Documentation of a Fair Process
- 6 Who is the Audience for the Rationale?

DEFINING TERMS

- The **rationale** is the basis for a decision
- In an outcome letter, the rationale includes the explanation of the basis for the finding, the final determination, and any sanctions imposed
- A **finding** is a determination that the facts occurred as alleged, by the standard of evidence
- A **final determination** (also: decision, outcome) is an application of the policy to the evidence in the case, to determine by the standard of evidence whether policy was violated
 - Yes or no question for each alleged policy violation
 - Can be the result of a hearing and/or an appeal

PURPOSE OF THE RATIONALE

- The rationale is either a stand-alone document or a section of a larger document:
 - Rationale for dismissal (or non-dismissal)
 - Rationale for emergency removal
 - Rationale for Investigator's recommended finding/outcome, if included within the investigation report
 - Rationale for hearing final determination and sanctions, within the hearing outcome letter
 - Rationale for appeal decision within appeal outcome letter
- When part of a letter of outcome, there will be other disclosures required by the regulations in that notice
- Rationale should clearly identify what information was used in reaching the finding and final determination, including sanctions

RATIONALES - 2020 TIX REGULATIONS

Required

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

Implied

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

Permitted

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

RATIONALE TEMPLATE

- Summarize allegation(s)
- Include all policies potentially violated (per the Hearing Notice)
- Review evidence, then note which evidence was relied upon and which was not
 - If you are relying on evidence to make a determination, it needs to be cited in the rationale
 - Write from the premise that if you don't write it down, you will not get credit for the thoughtfulness of your analysis
 - If you did not rely on something, you need to say so, and state why

RATIONALE TEMPLATE (CONT.)

- Summarize and assess credibility; make a relative credibility comparison and conclusion
- Make and explain your finding (by the standard of evidence)
- Make and explain your final determination (by the standard of evidence)
- State any sanctions imposed and the basis for choosing them
 - Include: precedent, prior history, aggravating and mitigating factors, evaluation of cumulative or collateral violations, pattern behavior, Complainant's request, etc.

RATIONALE DRAFTING PROTOCOL

- Rationale for **dismissal** or **emergency removal** should be written by the Title IX Coordinator or designee (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 Decision-maker. If more than one Decision-maker, 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
 - No matter what, all panel members should see, review, and sign off on final version

RATIONALE DRAFTING PROTOCOL (CONT.)

- **Appeal rationale** should be written by Appeal Decision-maker. If more than one Decision-maker, 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
 - No matter what, all panel members should see, review, and sign off on final version

KEEP YOUR AUDIENCE IN MIND

Write with the following audiences in mind:

- TIXC and/or legal counsel - can/should review all rationales
- The parties (and their Advisors, who are often attorneys) - receive copies of outcome letters
- The hearing Decision-maker(s) and/or Investigator(s) may see rationales from earlier or later stages in the process
- The Appeal Decision-maker - will review all rationales

Assume that what you write can/may be reviewed by parents/guardians, litigation counsel, your insurance company, OCR, reporters, judges, juries, the public, etc.

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 (2 to 1)
- Commonly 1-15 pages in length, depending on complexity
- Write in active voice (Ex. I determined vs. it was determined)
- If more than one Respondent, write a separate rationale for each one
- If the investigation report offers a rationale, and you simply adopt it as the final determination, it will be harder to defend the objectivity of the hearing decision

BEST PRACTICE TIPS (CONT.)

- 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 (if more than one)
- Ensure that the Decision-maker(s) arrive at the rationale independently and impartially. Your TIXC and legal counsel are there as guardrails, and to ask probing questions, but should not exert untoward influence on the outcome (assuming the TIXC is not a Decision-maker, though they may be for dismissals or emergency removal).

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.

CASE STUDY

In discussing life goals generally, Simon has made it clear to Phoebe that he doesn't ever see himself having kids.

During all of their sexual interactions, as intercourse was headed toward climax, Simon has pulled out 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.

CASE STUDY

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, 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.

CASE STUDY

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.

CASE STUDY

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.

CASE STUDY

You have now been placed into a position of having to decide this matter 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.

POLICY

Sexual assault, defined as:

- Any sexual act directed against the Complainant,
 - without their consent,
 - including instances in which the Complainant is incapable of giving consent.

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?

Thanks for joining us today.



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