

#### **WELCOME!**

- Please log in to your ATIXA Event Lobby to access the training slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by scanning the QR code or by visiting www.atixa.org/atixa-event-lobby.
- You will be asked to enter your registration email to access the Event Lobby.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby.
- If you have not registered for this training, an event will not show on your Lobby. Please email events@atixa.org or engage the ATIXA website chat app to inquire ASAP.









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 training will necessarily engage with sexual harassment, sex 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 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.



## Rationale Purpose

#### **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
- 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, 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 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

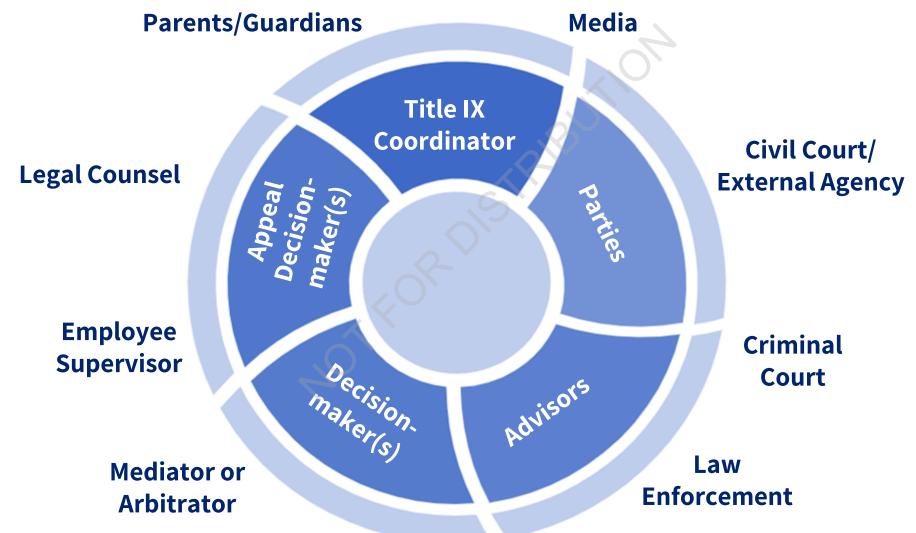


### **Rationale Drafting Protocols**

- 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**

#### **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, 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) can greatly inform findings for broader violations, such as dating violence or hostile environment sexual 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**

- 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.



- 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, 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 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 be 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.
- 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.



- 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



#### **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,
- 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



#### 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?

#### ALL ATIXA PROPRIETARY TRAINING MATERIALS ARE COVERED BY THE FOLLOWING LIMITED LICENSE AND COPYRIGHT.

By purchasing, receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensee to the licensee only, for their use. This license permits the licensee to use the materials personally and/or internally to the licensee's organization for training purposes only.

If these materials are used to train Title IX personnel, they are subject to 34 C.F.R. Part 106. If you have lawfully obtained ATIXA materials by registering for ATIXA training, you are licensed to use the materials provided for that training.

**34 C.F.R. 106.45(b)(10) (2020 Regulations)** requires all training materials to be publicly posted on a Recipient's website. Licensees subject to the 2020 Title IX Regulations may download and post a PDF version of training materials for their completed training to their organizational website to comply with federal regulations. ATIXA will provide licensees with a link to their materials. That link, or links to the materials on that page only, may be posted to the licensee's website for purposes of permitting public access to the materials for review/inspection only.

You are not authorized to copy or adapt these materials without ATIXA's explicit written permission. No one may remove this license language from any version of ATIXA materials. Should any non-licensee post these materials to a public website, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.