

OVERVIEW OF TITLE IX

- Title IX: Hearing Panelist Training Nov. 2021 -

Overview of Title IX: Title IX of the Education Amendments of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681

et seq.

-Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964

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Overview of Title IX: What does it prohibit?

- Discrimination, whether intentional or unintentional, by a recipient of federal funds on the basis of gender in education programs and activities.
- Sex-based employment discrimination.
- Discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.
- Sexual harassment, including forms of sexual violence such as rape, domestic violence, dating violence, sexual assault and stalking.
- Retaliation against persons who report or file a complaint alleging sex discrimination in education programs and activities.

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Overview of Title IX: What does it cover?

- Employment practices and assistance
- Housing policies
- Access to course offerings
- Financial assistance
- Benefits and leave

- Recruitment & admissions
- Marital & parental status
- Health & insurance benefits and services
- Athletics
- Textbook & curricular material

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SOURCE: Title IX Legal Manual, U.S. Department of Justice, <u>http://www.justice.gov/crt/about/cor/coord/ixlegal.php#B</u>.

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Overview of Title IX: Why and how does it affect Rhodes College?

- Title IX applies to all "recipients" of Federal funds.
- Many Rhodes students fund their education by applying for and receiving Federal student financial assistance.
- THEREFORE, THE ENTIRE RHODES COMMUNITY IS REQUIRED TO COMPLY WITH TITLE IX!

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Overview of Title IX: Consequences for Noncompliance

- Loss of federal funding.
- Lengthy state and/or federal investigations.
- Loss of due process for the accused.
- Unsafe education environment for the alleged victim.
- Risks to the campus community.
- Negative media exposure.
- Penalties for violations.
- Private lawsuits against individuals and/or the institution that may result in substantial damages and attorney's fees.



TITLE IX REGULATIONS, RHODES' TITLE IX POLICY, AND BEST PRACTICES

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Foundational Elements

- Due Process
- Fundamental Fairness
- Truth-Seeking
- Supportive Measures
 - Complainant
 - Respondent
 - Third Parties
- Life Span
 - Report \rightarrow Complaint \rightarrow Investigation \rightarrow Adjudication \rightarrow Appeal
 - Informal Resolution

Consent

- **Consent:** The Rhodes Sexual Misconduct Policy defines Affirmative Consent as "an affirmative, conscious decision by each participant to engage in mutually agreed-upon sexual activity." All five of the following elements are essential in order to have affirmative consent:
 - Mutually understandable communication
 - Informed and reciprocal
 - Freely and actively given
 - Not unlimited
 - Not indefinite
- Under Tennessee law, people under the age of 18 may not be able to legally consent under certain circumstances.
- SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

Incapacitation

- <u>The lack of ability to make rational, reasonable judgments</u> as a result of alcohol consumption, other drug use, sleep, the taking of any so-called "date-rape" drug, unconsciousness, or blackout.
- An incapacitated person cannot make rational, reasonable decisions because that person lacks the ability to fully understand the who, what, where, or how of their sexual interaction.
- Incapacitation is a state beyond drunkenness or intoxication, in which alcohol, drugs, or other factors render one unable to make fully informed judgments or have an awareness of consequences.
- Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known of the other individual's incapacitated state.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

Retaliation

- Retaliation is expressly prohibited under the Rhodes Sexual Misconduct Policy. Retaliation includes, but is not limited to, intimidation, harassment, threats, or other adverse action or speech against the person who reported the misconduct, the parties, and their witnesses.
- Rhodes expressly prohibits retaliation against anyone who:
 - In good faith reports what they believe is discrimination or sexual misconduct,
 - Participates in an investigation or proceeding under this Policy, or
 - Opposes conduct that they believe to violate this Policy.
- Anyone who knowingly makes a false accusation of unlawful discrimination, harassment, or retaliation of any form will be subject to an investigation for a potential violation of this Policy and may be subject to disciplinary action, up to and potentially including termination for employees and expulsion for students.

Rhodes Sexual Misconduct Policy IV

Title IX: Who is Involved

- Complainant
- Respondent
- Title IX Coordinator
- Investigator
- Decision-Maker
- Advisors/Confidential Advisors
- Responsible Employees/Mandated Reporters



Policy Scope

- The comprehensive scope of the Rhodes Sexual Misconduct Policy includes procedures to protect and guide individuals who have been affected by sex/gender discrimination and sexual misconduct and to provide fair and equitable procedures for investigation and resolution of Reports and Complaints.
- Sexual misconduct, which is addressed in the comprehensive Sexual Misconduct Policy, is a broader term that covers sex-based conduct beyond the Title IX Regulations' "sexual harassment" definition."
- When sexual misconduct meets the criteria specified in the Title IX Regulations, it must be addressed under the Formal Grievance Policy, and not this overarching Sexual Misconduct Policy, to the extent the processes differ between the two policies.
- Combined, the two policies are intended to ensure that all students impacted by sex/gender discrimination or sexual misconduct receive appropriate support and fair treatment, and that allegations of sex/gender discrimination or sexual misconduct are handled in a prompt, thorough, and equitable manner.

Rhodes Sexual Misconduct Policy I-II

Rhodes Sexual Misconduct Policy & Title IX Regulations

- The Rhodes Sexual Misconduct Policy can be thought of as an "umbrella" policy governing larger categories of conduct than the accompanying Formal Grievance Policy.
- Most cases will be investigated and adjudicated according to the Sexual Misconduct Policy.



Excerpt from Rhodes College's Sex/Gender Discrimination and Sexual Misconduct Policy

SEX/GENDER DISCRIMINATION

- Refers to the unequal treatment of an individual based on their sex, gender, or sexual orientation in any employment decision, education program or educational activity.
- Also covers unlawful discrimination based on gender identity, pregnancy, termination of pregnancy, childbirth or related conditions, and any act which is based on parental, family, or marital status and which is applied differently based on sex.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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Excerpt from Rhodes College's Sex/Gender Discrimination and Sexual Misconduct Policy

"REPORT"

• Refers to any communication that puts a Rhodes Mandatory Reporter on notice of an allegation that sex/gender discrimination or sexual misconduct occurred or may have occurred.

"COMPLAINT"

- Refers to a written complaint filed with the Title IX Coordinator alleging any action, policy, procedure or practice that would be prohibited by Title IX, such as Sex/Gender Discrimination or Sexual Misconduct, and indicating that the Complainant wants the College to take further steps beyond the investigation.
- A report can also become a Complaint if Rhodes determines that, in order to meet its Title IX obligations to provide a safe and nondiscriminatory environment for the broader Rhodes Community, it must take further steps to address and resolve the matter. A Formal Complaint under the Formal Grievance Policy is a type of Complaint.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug 14, 2020).

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Sexual Harassment (USDOE)

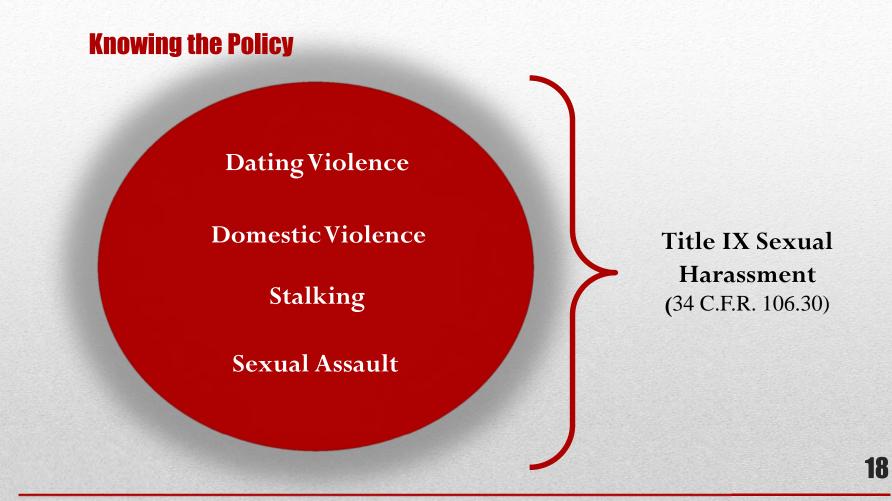
3 categories of misconduct that meet the regulatory definition of "sexual harassment"

- 1) "A Rhodes employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in **unwelcome** sexual conduct;" [*quid pro quo*]
- 2) "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it <u>effectively denies a person equal access to Rhodes'</u> <u>education program or activity;</u>" or
- 3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

34 C.F.R. 106.30(a); See Rhodes FGP II.A

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Excerpt from Rhodes College's Sex/Gender Discrimination and Sexual Misconduct Policy

Sexual Assault

 An act of sexually-motivated physical contact directed towards another person when the other person does not consent or is incapable of giving consent. This includes but is not limited to rape, sodomy, sexual battery, fondling, incest, and statutory rape. See Title IX Regulations, which cite to 20 U.S.C. § 1092(f)(6)(A)(v).

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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Examples of Sexual Assault

- Unwanted kissing, touching or rough or violent sexual activity.
- Keeping someone from protecting themselves from unwanted pregnancies, STIs or STDs ("*stealthing*").
- Sexual contact with someone who is very drunk, drugged, unconscious or unable to give a clear and informed "yes".
- Threatening or pressuring someone into sexual activity.
- Non-consensual sexual contact.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) the length of the relationship,
 - (ii) the type of relationship, and
 - (iii) the frequency of interaction between the persons involved in the relationship

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020); Title IX Regulations by reference to 34 U.S.C. § 12291(a)(10).

Domestic Violence

Felony or misdemeanor crimes of violence committed between:

- individuals who are current or former spouses or intimate partners,
- persons who share a child in common,
- persons who currently live together or have formerly lived together as spouses or intimate partners,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the school's jurisdiction, or
- any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the school's jurisdiction.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020); 34 U.S.C. § 12291(a)(8).

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others, or to suffer substantial emotional distress.
- **Tennessee Law:** Willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
- "Course of conduct" means a pattern of conduct composed of a series of two (2) or more separate non-continuous acts evidencing a continuity of purpose.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020); 34 U.S.C. § 12291(a)(30).

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Examples of Stalking

- Following the targeted person;
- Approaching or confronting that person in a public place or on private property;
- Persistent and unwelcome attempts to contact the person by phone, electronic communication, or regular mail, either anonymously or non-anonymously;
- Vandalizing the person's property or leaving unwanted items for the person;
- Persistently appearing at the person's classroom, residence, or workplace without that person's permission or other lawful purpose;
- Cyber-stalking, in which a person follows, observes, monitors, or surveils another person through the use of electronic media such as the Internet, digital media networks, blogs, cell phones, texts or other similar devices; and
- Using visual or audio recording devices or hidden or remote cameras used without the subject's consent.

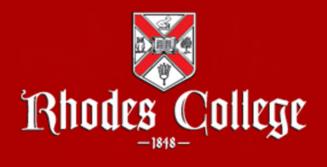
SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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Other Categories of Sexual Misconduct (Examples)

- Non-Consensual Sexual Contact
- Non-Consensual Sexual Penetration
- Sexual Exploitation

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RHODES' TITLE IX SEX/GENDER DISCRIMINATION AND SEXUAL MISCONDUCT POLICY

("RHODES SEXUAL MISCONDUCT POLICY")

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Sexual Misconduct Investigation and Adjudication



Resolution Hearing (or other adjudicatory process)

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Section XII (Aug. 14, 2020).

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Foundational Considerations General Overview

- Assess the Report
- Intake—Initial Meeting
- Offer Supportive Measures to Complainant
 - And/or to Reporter, if different than Complainant
- Provide Notice and Offer Supportive Measures to Respondent
- Decision Tree
 - Report? Complaint?
 - Formal Complaint under Title IX Regulations? (Threshold determination)
- Investigation
- Adjudication
- Appeal

Investigatory Process



The Investigation

- Conducted by an Investigator.
- May include:
 - Conducting substantive interviews of the Complainant, the Respondent, and any witnesses.
 - Reviewing law enforcement investigation documents, if applicable.
 - Reviewing relevant student files;
 - Gathering and examining other relevant documents, texts, emails or other evidence.

<u>SOURCE</u>: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Section XII (Aug. 14, 2020).

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- Neither the Investigator nor the Title IX Coordinator makes recommendations or credibility determinations.
- The Investigator does not filter information that may be necessary to your review but, instead, gathers facts and presents them for your consideration.
- The Hearing Board decides:
 - disputes of facts;
 - weight of evidence; and
 - relevance.





TITLE IX COORDINATORS

TIX Coordinator's Purpose, Authority & Responsibilities

- 1. Know the Formal Grievance Policy, Sexual Misconduct Policy, and related Institutional policies.
- 2. Know and oversee the procedures used to investigate and resolve Title IX reports and complaints.
- 3. Coordinate the implementation and administration of Title IX grievance procedures, which includes:
 - Educating the campus community on how to file a complaint;
 - Overseeing investigations;
 - Working with law enforcement when necessary; and
 - Ensuring prompt and appropriate responses to complaints, including fair and equitable grievance procedures.

TIX Coordinator's Purpose, Authority & Responsibilities

- 4. Promptly take steps (i.e. offer supportive measures) to ensure a complainant's equal access to the school's programs and activities upon learning of a report or complaint of sexual misconduct. Supportive measures also may be offered as needed to respondents and other members of the Rhodes community who may be affected by sexual misconduct.
- 5. Evaluate requests for confidentiality.
- 6. Provide or facilitate regular training, consultation and technical assistance to students, faculty and staff on school policies related to sex discrimination.
- 7. Develop programs, such as assemblies or trainings, on issues related to Title IX to assist the school in making sure that all members of the campus community, including students and staff, are aware of their rights and obligations under Title IX.
- 8. Determine whether campus-wide remedies should be adopted in response to a report or complaint of sexual misconduct, including increased monitoring, supervision or security at locations where sexual misconduct is reported to occur, and increased education and prevention efforts, including to targeted populations.

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures*

"A recipient's response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant. . . ."

"<u>Supportive measures</u> means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the <u>complainant or the</u> <u>respondent</u> before or after the filing of a formal complaint or where no formal complaint has been filed."

"Such measures are designed to restore or preserve equal access to the recipient's education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."

34 C.F.R. 106.30(a).

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

"Supportive measures may include:"

- "counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus; and
- other similar measures."

34 C.F.R. 106.30(a).

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

• Title IX Coordinator must promptly contact complainant to:

- discuss the availability of supportive measures,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- explain to the complainant the process for filing a formal complaint.

Resources

LAW ENFORCEMENT	LOCAL HOSPITALS
Emergency Assistance: 911	Methodist University Hospital 1265 Union Ave. 901-516-7000
Memphis Police Department Sex Crimes Squad: 901-636-3330	Baptist Memorial Hospital 6019 Walnut Grove Rd. 901-226-5000
Rhodes College Campus Safety: 901-843-3880	St. Francis Hospital 5959 Park Ave. 901-765-1000

For additional off-campus medical services, contact the Shelby County Rape Crisis Center at (901) 222-4350

Rhodes Sexual Misconduct Policy VII

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§ 106.45(b) – Grievance Process: *Determination of Responsibility* (cont.)

"The Title IX Coordinator is responsible for effective implementation of any remedies."

34 C.F.R. 106.45(b)(7)(iv).

Continuing Responsibility Throughout and After the Adjudicative Process











INVESTIGATORS

Title IX Investigations PURPOSE

- To gather facts to allow the decision-maker(s) to determine whether or not the alleged conduct occurred.
- To bolster the concept of fair treatment, including by allowing each involved party an opportunity to be heard.
- To foster confidence in the school's vision and policies by engaging in diligent truth-seeking.

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• To minimize the school's risk of potential exposure to legal challenges, and to strengthen the school's ability to successfully defend against potential Title IX-related claims.

Title IX Investigations

• An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions by the decision-maker(s), synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.

Title IX Investigations vs. Criminal Investigations



Title IX Investigations vs. Criminal Investigations

Title IX Investigation	Criminal Investigation
• Mandatory.	• Discretionary.
• Intended to determine whether an individual violated Title IX.	• Intended to determine whether an individual violated criminal law.
• Will never result in incarceration of an individual.	• Might subject an individual to incarceration or criminal penalties.
 Termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations. "Preponderance of the evidence" 	 Invokes certain constitutional protections, such as the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation. "Beyond a reasonable doubt"

The Investigator

- Experienced.
- Trained.
- Impartial.
- Professional.
- Good Judgment.
- Ability to Competently Testify In Court Proceedings, If Needed.

- Neutral.
- Searches for Facts, Not Opinions or Beliefs.
- Builds Rapport With the Interviewees.
- Prepared to Professionally Handle Uncooperative Persons or Interviewees.

The Investigation

- Conducted by an Investigator.
- May include:
 - -Conducting substantive interviews of the Complainant, the Respondent, and any witnesses.
 - -Reviewing law enforcement investigation documents, if applicable.
 - -Reviewing relevant student files;
 - -Gathering and examining other relevant documents, texts, emails or other evidence.

Investigation Practices

- Neither the Investigator nor the Title IX Coordinator makes recommendations or credibility determinations.
- The Investigator does not filter information that may be necessary to the decisionmaker(s)' eventual review but, instead, gathers facts and presents them for consideration.
- The decision-maker(s) decide:
 - disputes of facts;
 - weight of evidence; and
 - relevance.

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint

- **Burden to investigate on Institution** Must "[e]nsure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties," with the exception of a party's medical records.
- **Opportunity to suggest evidence** Must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence."
- No gag order May not restrict the parties ability to discuss the case and gather evidence.

34 C.F.R. 106.45(b)(5)(i)-(iii).

Investigative Report

- The investigator will then create a final investigative report that fairly summarizes the relevant evidence.
- The investigative report <u>will not</u> make any recommendation as to whether a policy violation has occurred or potential sanctions.



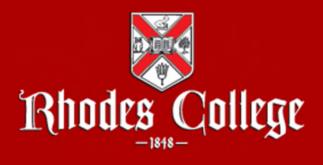
TRAUMA-INFORMED PRACTICES

Using Trauma-Informed Techniques to Evaluate Evidence

- At the beginning, say something like "I'm going to ask a lot of questions to clarify."
- If possible, allow the party to give an uninterrupted narrative. Later, go back and ask questions.
- Avoid "why" questions.
- Asking about sensory information may lead to the details you need: "when _____ happened, what did you see?" "If you did, how did you communicate that you didn't want to do that?" "are there any images, sounds, or smells that keep coming back to you?"
- Listen for course of conduct, power and control.

Using Trauma-Informed Techniques to Evaluate Evidence





THE SEXUAL MISCONDUCT HEARING BOARD

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The Sexual Misconduct Hearing Board: Definition

<u>"Sexual Misconduct Hearing Board</u>: Refers to the three-member decision-making body, composed of trained Rhodes faculty and/or staff, that considers cases brought under this Policy ..."

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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The Sexual Misconduct Hearing Board: Overview

Primary Function?

- Hears the facts and circumstances of an alleged policy violation as presented by the Investigator, a Complainant, a Respondent and/or witnesses at a *Resolution Hearing*.
- Determines if a policy violation has occurred.
- Decides whether/what sanctions and remedial measures are appropriate.

<u>SOURCE</u>: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

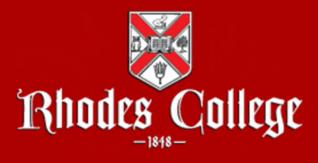
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The Sexual Misconduct Hearing Board: Virtues of a Hearing Board Member

- Be patient.
- Listen.
- Don't cut off questions prematurely.
- Don't draw any conclusions until all evidence and testimony is presented.
- Be thorough and thoughtful.
- Be fair.
- Be mindful of the seriousness of the situation.



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RESOLUTION HEARINGS

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Resolution Hearings

What Are They?

• Refers to the College's disciplinary proceeding through which the Sexual Misconduct Hearing Board evaluates evidence related to a Complaint.

What Are They Designed to Achieve?

• To determine whether a Respondent is responsible or not responsible for a violation of the Sex/Gender Discrimination and Sexual Misconduct Policy or the Formal Grievance Policy, based on the criteria of a "**preponderance of evidence**."

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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Students' Rights: A Balancing Act

The alleged victim and the accused <u>MUST</u> be afforded equal opportunities throughout the grievance process.

- The parties have an equal opportunity to present relevant witnesses (including third-party expert testimony) and other evidence.
- Advisors are allowed to be present for both parties, but they are not allowed to participate in the proceedings (FGP difference).
- Both parties have a right to appeal the results of the hearing.
- Both parties will be notified, in writing, of the outcome of both the hearing and any appeal.

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Hearings: Overview

Why Do We Conduct Hearings For Incidents of Sex Discrimination?

To determine whether or not the alleged conduct occurred. To minimize the school's risk of potential exposure to legal claims. If the conduct occurred, to determine what actions the school will take to end the sexual violence, eliminate the hostile environment and prevent its recurrence

To bolster the concept of fair treatment.

Preparing for the Hearing: The Game Plan

- Plan to determine what facts are in dispute. What are the key issues to resolve this case?
- What's relevant? What information would you like to know? Anything that could make a fact at issue more or less likely is usually worth a look.
- What witnesses may possess key or relevant information? Are they on the witness list?
- Prepare specific questions as needed to clarify items that are unclear and follow up on leads
- Clarify slang or unfamiliar terms.

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Resolution Hearings

Mechanics of the Resolution Hearing

- 1. Introductions and Opening Statements
- 2. Questioning of the Investigator
- 3. Facilitated Q&A Between the Parties
- 4. Calling and Questioning of Witnesses (Pursuant to the Title IX Regulations, crossexamination to be conducted by a Party's Advisor)
- 5. Closing Statements
- 6. Deliberations

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The Sexual Misconduct Hearing Board: Hearing Procedure

1. INTRODUCTIONS AND OPENING STATEMENTS:

• From the Complainant and the Respondent: Each party will have the option to provide an introduction and an opening statement, summarizing his or her position.

2. QUESTIONING OF THE INVESTIGATOR:

- By the Hearing Board: The Sexual Misconduct Hearing Board will have an opportunity to question the Investigator.
- By the Complainant and the Respondent: The Complainant and Respondent will have an opportunity to question the Investigator.



3. FACILITATED Q&A BETWEEN THE PARTIES:

- Under the Sexual Misconduct Policy, the Sexual Misconduct Hearing Board will be allowed to question each witness who appears, and the parties will be allowed to ask questions through the Sexual Misconduct Hearing Board. <u>Live, verbal, and direct cross-examination of a party or witness is not permitted under this Policy by a party or that party's Advisor</u> (unlike in the Formal Grievance Process required for addressing defined sexual harassment).
 - Rhodes Sexual Misconduct Policy XII.C
- Title IX Regulations dictate that, in instances adjudicated <u>under the Title IX Formal Grievance Procedure, cross-</u> <u>examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a</u> <u>party personally.</u> The Hearing Board should still ask its questions first.
- The Board Chair will be responsible for ensuring the questioning is fair and complies with the terms of the policy.
 - Relevancy determinations
 - Rape shield
 - Do not invade privilege
- The Board Chair will not substantively limit the scope of the parties' questions.

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4. WITNESSES:

- Calling Witnesses: Each party is allowed to call and is responsible for the attendance of his or her own witnesses. Board has discretion as to order of called witnesses, although typically Complainant's witnesses will precede Respondent's witnesses.
- Obtain Witnesses' Affirmations: Ask all witnesses to affirm adherence to the Honor Code.
- Exclusion of Prospective Witnesses: Prospective witnesses, other than the Complainant and the Respondent, <u>may</u> be excluded from the hearing room during the statements of the Investigator and all other witnesses.



- 5. CLOSING STATEMENTS:
 - From the Complainant and the Respondent: Give each party the option and chance to provide a closing statement at his or her option.

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6. DELIBERATIONS

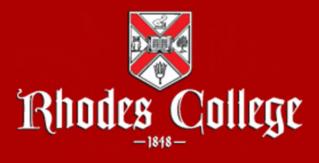
- All parties, the witnesses and the public will be excluded during Board deliberations, which <u>will not</u> be recorded or transcribed.
- In all cases, the Hearing Board must consider all relevant evidence presented by the Complainant, the Respondent, and/or others and determine by a <u>preponderance of the evidence</u> whether a violation of the Sexual Misconduct or Formal Grievance Policy occurred, i.e., whether it is more likely than not that a Respondent violated the Policy, and impose sanctions, if any.
- The Title IX Coordinator will collect all hearing packets and your notes at the conclusion of the hearing because they typically contain students' sensitive, confidential and FERPA-protected information.

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GAUGING CREDIBILITY & EVALUATING EVIDENCE

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The Sexual Misconduct Hearing Board: Evaluating the Evidence

- Know the definitions of "affirmative consent," "incapacitation," and any other relevant terms defined in the policy.
- Focus on the facts.
- Do not consider irrelevant information or allow it to impact your deliberations.
 - Relevant: any evidence that may tend to make the allegations at issue more or less likely to be true (corroborating and exculpatory or contradicting evidence)
- Determine the credibility of witnesses by considering:
 - Sensibility/reasonableness
 - Demeanor
 - Motive to Falsify
 - Corroborating Évidence (especially in cases involving incapacitation)
 - Contradictory evidence
 - Common Sense

Facts > gut instincts or beliefs.

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Preponderance of the Evidence

- Is it "more likely than not" that the Respondent is responsible for having violated the Policy?
- "In a he-said-she-said situation ... finding one party to be more credible than the other satisfies [the preponderance of the evidence] standard."
- One party's presenting more evidence than the other party does not alone mean that it is "more likely than not" that a violation occurred.
- When an issue boils down to conflicting or inconsistent testimony, "the touchstone for the factfinder ... is a determination of credibility."
- Determinations of credibility are "wholly within the discretion of the panel."



"50% and a feather"

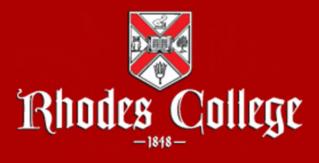
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Full Report and Recommendation, Appeal of Phi Delta Theta of Suspension Held in Abeyance, submitted to Georgia Institute of Technology by former Chief Justice Leah Ward Sears (ret.) on February 22, 2016.

OBTAINING AND REVIEWING VARIOUS FORMS OF EVIDENCE: Hearings

- Do familiarize yourself with relevant rape shield protections (evidence about the complainant's prior sexual behavior).
- **Do NOT** allow irrelevant testimony about a person's character. Testimony should pertain only to the allegations related to the hearing.
- **DO** be patient in allowing questioning that may initially appear irrelevant or duplicative. However, at a certain point, the hearing board chair should decline to continue irrelevant or duplicative questioning.
- **DO** permit parties to testify in separate rooms, if requested. However, a party must still give testimony in the presence of the panel whenever possible. In such cases, the opposing party will be given an opportunity to view the testimony remotely and to submit follow-up questions. Where such a determination is made, special measures must be put in place to ensure no party is unfairly disadvantaged.
- **DO** clarify ambiguous responses.
- **DO** observe and note non-verbal behavior.

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OTHER CONSIDERATIONS

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Resolution Hearings – Other Considerations

✓ All hearings will be recorded and closed to the public.



✓ Legal rules of evidence or criminal or civil procedure will not apply.

The parties may be accompanied by an Advisor and/or a Supporter of their choosing, subject to the restrictions contained in the section of the policy governing the selection and use of Advisors and Supporters.

Resolution Hearings

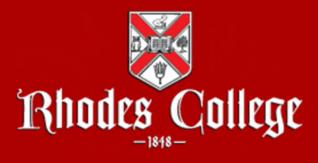
In all cases, the Sexual Misconduct Hearing Board <u>must consider all</u> <u>relevant evidence</u> presented by the Complainant, the Respondent, and/or others and determine by a preponderance of the evidence whether a violation of this policy occurred, i.e., whether it is more likely than not that a Respondent is responsible for having violated the Sexual Misconduct Policy or the Formal Grievance Policy.

Determinations Regarding Responsibility

The parties will be provided notice of the outcome of the Hearing Board's deliberations, including the determination of whether the Respondent was found responsible or not responsible for the alleged violation(s) and applicable sanction(s).

Decisions made in a Resolution Hearing may be appealed.

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SANCTIONS

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I NELSON MULLINS

Title IX Context: Sanctions

Rhodes' Formal Grievance Process will "treat complainants and respondents equitably by [1] offering supportive measures ... to a complainant, and [2] by following a grievance process that complies with [the new Title IX Regulations] before the imposition of any disciplinary sanctions or other actions that are not supportive measures ... against a respondent." 106.44(a); 106.45(b)(1)(i)

Title IX Context: Sanctions

Based on the **preponderance of the evidence**, the adjudicator(s) will decide if the respondent is responsible for engaging in the conduct alleged, and if so, what disciplinary action may be appropriate. The adjudicator(s) will issue a written determination following a hearing under the FGP, or following any other adjudication under the Sexual Misconduct Policy. The FGP written determination will include:

- a. Identification of the allegations potentially constituting sexual harassment as defined in 106.30;
- b. A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;
- c. Findings of fact supporting the determination;
- d. Conclusions regarding the application of this Policy to the facts;
- e. A statement of, and rationale for, the result as to each allegation, including:
 - i. A determination regarding responsibility;
 - ii. Any disciplinary sanctions the adjudicator(s) imposes on the respondent; and
 - iii.Whether remedies designed to restore or preserve equal access to Rhodes' education program or activity will be provided to the complainant; and
- f. Procedures and permissible bases for the parties to appeal the determination. (106.45(b)(7)(ii).)

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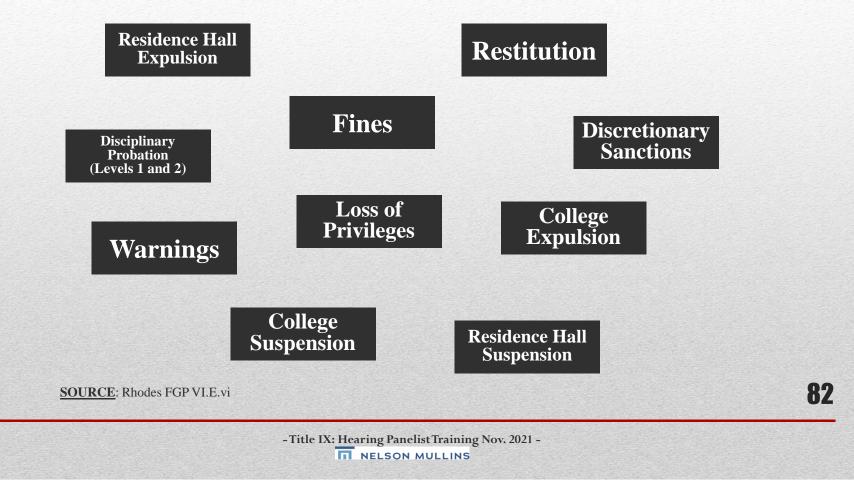
The Sexual Misconduct Hearing Board: Sanctions

If the Board finds an individual in violation of the policy, the following criteria **may** be considered, among other factors, when determining sanctions:

- ✓ The nature and severity of the violation(s);
- The College's responsibility to ensure appropriate behavioral standards for the Rhodes Community;
- The requests of the Complainant and the impact of the violation(s) on the Complainant;
- The level of cooperation of the Respondent during the disciplinary processes;

- Any prior disciplinary action of the Respondent or violations of this policy by the Respondent (prior discipline will be considered only when determining sanctions); and
- Whether other judicial measures have been taken to protect the Complainant or discipline the Respondent (e.g., civil protection orders).

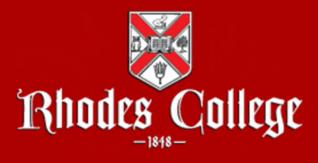
The Sexual Misconduct Hearing Board: Recommending Sanctions (continued)



Potential Effect of Sanctions

- Reinforces school's vision and mission.
- Instills trust/distrust in school administration.
- Influences future behavior.
- Promotes a perception of safe campus learning environment.
- Likelihood of withdrawal/transfer (if expulsion or suspension).
- Consider the effect of the sanctions on the individual and the campus community.







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The Appeals Board: Overview

Authority?

- Affirm, alter, reverse or remand the original findings and/or sanctions recommended by the Sexual Misconduct Hearing Board.
- Once issued, the Appeals Board's decision is final.

Primary Function?

• To hear and decide appeals of findings and sanctions imposed by the Sexual Misconduct Hearing Board.

Note:

- Rhodes must offer both parties an appeal from:
 - A determination regarding responsibility; and
 - The dismissal of a formal complaint or any allegation therein. 34 C.F.R. 106.45(b)(8).

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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The Appeals Board: Appeals Procedure (continued)

✓ GROUNDS

- A procedural irregularity, meaning an alleged failure to follow the process outlined in this Policy, that affected the outcome of the matter;
- New evidence *that was not reasonably available to the appealing party at the time of the hearing or dismissal*, that could affect the outcome of the matter; and
- The Title IX Coordinator, Investigator, or adjudicator(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. The notice of appeal must describe specifically the basis upon which such conflict of interest or bias is alleged and how it allegedly affected the outcome.
- Rhodes reserves the right to offer an appeal equally to both parties on additional bases in its discretion. (106.45(b)(8)(i-ii).)

SOURCE: Rhodes FGP IV.F.

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The Appeals Board: Appeals Procedure (continued)

STANDARD ON APPEAL

- Not a *de novo* appeal. You are not simply substituting your judgment for the Hearing Board's judgment.
- Instead you are answering the following question: Did the Hearing Board make an error on the grounds suggested in the appeal?





Appeals

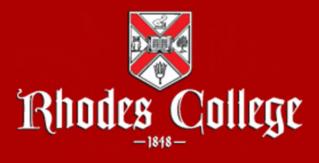
- As to all appeals, Rhodes should, at a minimum:
 - Notify the other party in writing when the appeal is filed and implement appeal procedures equally for both parties;
 - Ensure the decision maker(s) for the appeal **is/are not** the same individual(s) who reached the determination regarding responsibility or dismissal, the Investigator(s) or the Title IX Coordinator;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide a written decision simultaneously to both parties.

Rhodes FGP IV.F

✓ Appeals Board Decisions Are Final and Conclusive

*But, a private right of action remains.

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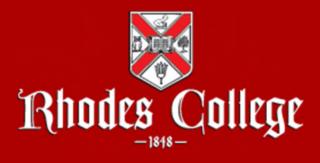
INFORMAL RESOLUTION

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INFORMAL RESOLUTION

- An Informal Resolution involves a remedies-based, non-judicial process designed to eliminate or address potential sexual misconduct.
- This process aims to assure fairness, to facilitate communication, and to maintain an equitable balance of power between the parties.
- Rhodes will not compel face-to-face confrontation between the parties or participation in any particular form of Informal Resolution.

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CONSENT AND INCAPACITATION

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Affirmative Consent

"Means an affirmative, conscious decision by each participant to engage in mutually agreed-upon sexual activity. All five of the following elements are essential in order to have affirmative consent. If one or more of the following is absent, there is no affirmative consent."

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

Affirmative Consent

- Consists of Mutually Understandable Communication
 - Silence or an absence of resistance does not imply consent
- Informed and Reciprocal
- Freely and Actively Given
- Not Unlimited Absent when the activity in question exceeds the scope of consent previously given
- Not Indefinite Past consent does not imply present or future consent.

• SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

Incapacitation

- <u>The lack of ability to make rational, reasonable judgments</u> as a result of alcohol consumption, other drug use, sleep, the taking of any so-called "date-rape" drug, unconsciousness, or blackout.
- An incapacitated person cannot make rational, reasonable decisions because that person lacks the ability to fully understand the who, what, where, or how of their sexual interaction.
- Incapacitation is a state beyond drunkenness or intoxication, in which alcohol, drugs, or other factors render one unable to make fully informed judgments or have an awareness of consequences.
- Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known of the other individual's incapacitated state.

SOURCE: Rhodes College Sex/Gender Discrimination and Sexual Misconduct Policy, Definitions (Aug. 14, 2020).

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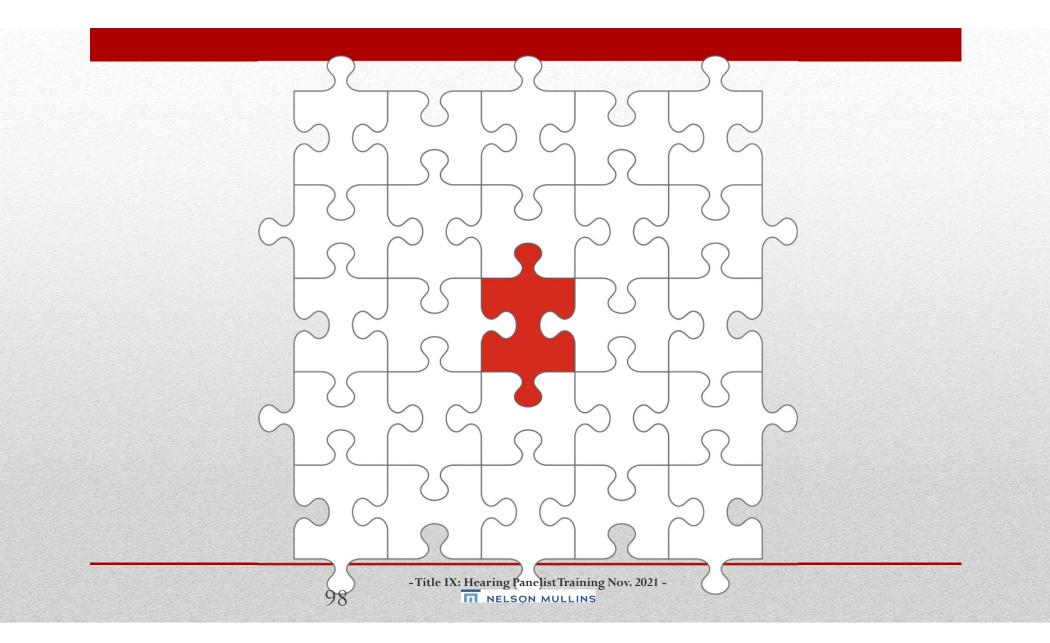
The Sexual Misconduct Hearing Board: Evaluating the Evidence – Consent, Intoxication and Incapacitation



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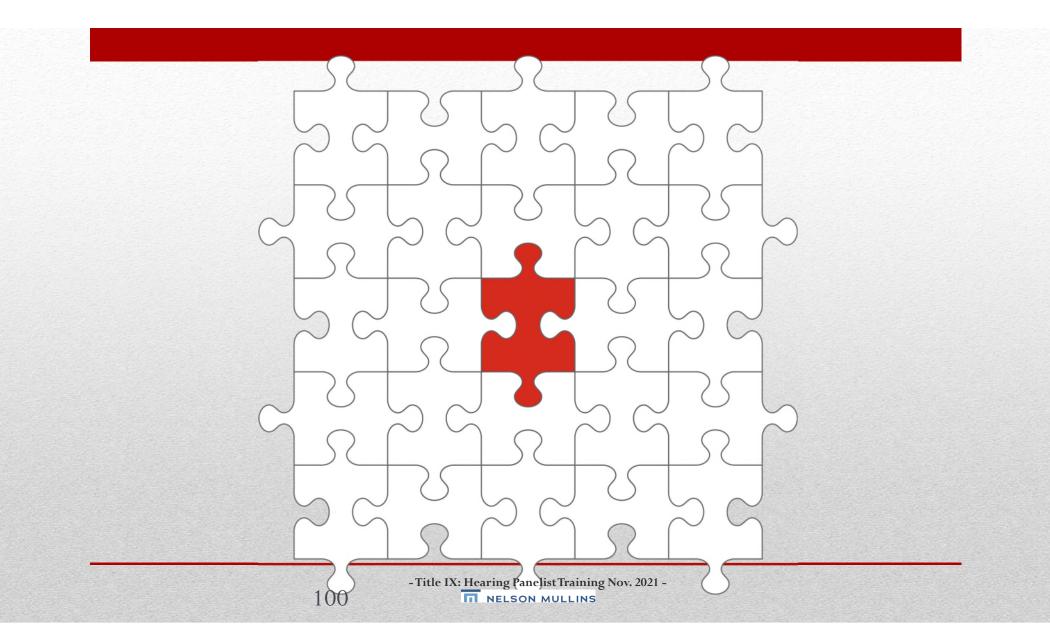
The Sexual Misconduct Hearing Board: Evaluating the Evidence –Incapacitation

- The physical and/or mental inability to make make rational, reasonable judgments as a result of alcohol consumption, other drug use, sleep, the taking of any so-called "date-rape" drug, unconsciousness, or blackout.
- Whether someone is incapacitated is typically judged from the perspective of an objectively reasonable person.



Consent v. Incapacitation

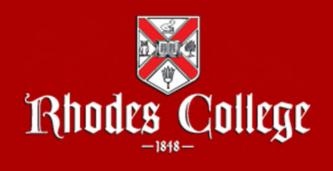








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USDOE'S 2020 TITLE IX REGULATIONS

Overview of Amendments to Part 106, Title 34 of the Code of Federal Regulations

New Regulatory Provisions:

- 106.30 Definitions
- 106.44 Recipient's Response to Sexual Harassment, Generally
- 106.45 Recipient's Response to Formal Complaints

Amendments to Existing Regulations:

- 106.3(a) Remedial Action
- 106.6(d) Constitutional Protections
- 106(d)(1) First Amendment
- 106.6(d)(2) Due Process
- 106.6(d)(3) Other Constitutional Rights
- 106.6(e) FERPA
- 106.6(f) Title VII and Directed Question 3 (Application to Employees)
- 106.6(g) Exercise of Rights by Parents/Guardians
- 106.6(h) Preemptive Effect
- 106.8(a) Designation of Coordinator
- 106.8(b) Dissemination of Policy
- 106.8(c) Adoption and Publication of Grievance Procedures

- 106.8(d) Application Outside the United States
- 106.9(c) [DELETED]
- 106.71 Retaliation Prohibited

§ 106.44(a) – General Response to Sexual Harassment

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond promptly in a manner that is not deliberately indifferent.

§ 106.44(a) – General Response to Sexual Harassment: *Narrowed Title IX Jurisdiction*

- Alleged Sexual Harassment must involve conduct that occurred "<u>under an</u> <u>education program or activity</u> receiving federal funds." (U.S. Code Title 20 Chap. 38 § 1681).
- Sexual Harassment must have been perpetrated against a person "*in the United* <u>States</u>."

34 C.F.R. 106.44(a); See Rhodes Formal Grievance Policy ("FGP") Section II

§ 106.44(a) – General Response to Sexual Harassment: *Sexual Harassment*

3 categories of misconduct that meet the regulatory definition of "sexual harassment"

- 1) "A Rhodes employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in **unwelcome** sexual conduct;" [quid pro quo]
- 2) "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it <u>effectively denies a person equal</u> <u>access to Rhodes' education program or activity;</u>" or
- 3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

34 C.F.R. 106.30(a); See Rhodes FGP II.A

§ 106.30 – Definitions

"<u>Complainant</u> means an individual who is alleged to be the victim of conduct that **could** constitute sexual harassment."

"<u>*Respondent*</u> means an individual who has been reported to be the perpetrator of conduct that **could** constitute sexual harassment."

34 C.F.R. 106.30; Rhodes FGP II.C

§ 106.44(a) – General Response to Sexual Harassment: *Actual Knowledge*

"<u>Actual knowledge</u> means notice of sexual harassment or allegations of sexual harassment to a recipient's **Title IX Coordinator** or **any official of the recipient who has authority to institute corrective measures on behalf of the recipient**"

- "Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge."
- "This standard is not met when the only official of the recipient with actual knowledge is also the respondent."
- "The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient."

34 C.F.R 106.30(a).

§ 106.44(a) – General Response to Sexual Harassment: *Deliberate Indifference*

"A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

34 C.F.R. 106.44(a).

The Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate informal resolution process may not have a conflict of interest or bias—either for or against complainants, respondents, or individual parties.

34 C.F.R. 106.45(b)(1)(iii); See Rhodes FGP III.E

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures*

"A recipient's response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant. . . ."

"<u>Supportive measures</u> means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed."

"Such measures are designed to restore or preserve equal access to the recipient's education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."

34 C.F.R. 106.30(a); See Rhodes FGP III.A-B

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

"Supportive measures may include:"

- "counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus; and
- other similar measures."

34 C.F.R. 106.30(a); Rhodes FGP III.B

§ 106.44(a) – General Response to Sexual Harassment: *Supportive Measures* (cont.)

• Title IX Coordinator must promptly contact complainant to:

- discuss the availability of supportive measures,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- explain to the complainant the process for filing a formal complaint.

§ 106.44(a) – General Response to Sexual Harassment: *Grievance Process*

 "A recipient's response must treat complainants and respondents equitably .
 .. by <u>following a grievance process that complies with § 106.45 before</u> <u>the imposition of any disciplinary sanctions</u> or other actions that are not supportive measures . . . against a respondent."

§ 106.44(b) – Recipient's Response to Sexual Harassment: *Response to Formal Complaint*

"In response to a **formal complaint**, a recipient <u>must</u> follow a **grievance process that complies with § 106.45**. With or without a formal complaint, a recipient must comply with § 106.44(a)."

Formal Complaints

- "*Formal complaint* means a **document <u>filed by a complainant</u> or <u>signed by the</u> <u>Title IX Coordinator</u> alleging sexual harassment against a respondent and requesting that [Rhodes] investigate the allegation of sexual harassment."**
 - "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."*
 - "A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient."

34 C.F.R. 106.30(a); Rhodes FGP IV.A

Filing a Formal Complaint— Title IX Coordinator

- A Title IX Coordinator may sign a Formal Complaint to initiate or continue the Title IX Formal Grievance Procedure, if necessary, to fulfill Rhodes' duty under Title IX to not be deliberately indifferent to actual knowledge of sexual misconduct.
- Signing a Formal Complaint does not make a Title IX Coordinator a Complainant or otherwise a party.

Rhodes FGP IV.A.iv

Withdrawal/Dismissal

• Withdrawal

• After filing a Formal Complaint, a Complainant may withdraw their Formal Complaint at any time by providing written notice to the Title IX Coordinator. That withdrawal concludes the Title IX Formal Grievance Procedure process unless the Title IX Coordinator takes action [and signs the Formal Complaint].

<u>Mandatory Dismissal</u>

• If the conduct alleged in the Formal Complaint does not satisfy the requirements of sexual harassment as defined by \$106.30, Rhodes must dismiss the Formal Complaint under this grievance process. However, the Title IX Coordinator will transfer the Complaint to the Rhodes Sexual Misconduct Policy and/or Rhodes Anti-Discrimination and Harassment Policy for review and possible investigation and resolution.

Permissive Dismissal

- Rhodes may dismiss a Formal Complaint...if at any time during the investigation or hearing:
 - A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
 - The Respondent is no longer enrolled in or employed by the institution; or
 - Specific circumstances prevent Rhodes from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.
- Notice must be given to the parties simultaneously upon dismissal. Rhodes FGP IV.A-D

§ 106.44(c) – Recipient's Response to Sexual Harassment: *Emergency Removal*

- *Emergency removal*. Nothing in this section precludes Rhodes from removing a respondent from Rhodes' education program or activity on an emergency basis, provided that the Title IX Coordinator:
 - undertakes an individualized safety and risk analysis,
 - determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - provides the respondent with **notice and an opportunity to challenge** the decision immediately following the removal.

§ 106.44(c-d) – Recipient's Response to Sexual Harassment: *Emergency Removal, Administrative Leave* (cont.)

Emergency removal is subject to the student's rights under the IDEA, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.

Institutions may place non-student employee-respondents on administrative leave during the pendency of a formal grievance process subject to the employee's rights under Section 504 and the ADA.

§106.71 – Retaliation

Prohibited retaliation:

- "No recipient or other person may intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title IX or its regulations], or because the individual has made a report or complaint, testified, assisted, or participated <u>or refused to participate</u> in any manner in an investigation, proceeding, or hearing under this part."
- "Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by [Title IX or its regulations], constitutes retaliation."

34 C.F.R. 106.71(a).

§ 106.71 – Retaliation (cont.)

• Exceptions:

- **First Amendment** "The exercise of rights protected under the First Amendment does not constitute retaliation. . . ."
- Materially False Statements "Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding . . . does not constitute retaliation . . . , provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith."

34 C.F.R. 106.71(b).

§ 106.45 – Grievance process for formal complaints of sexual harassment

"A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute" sex discrimination under Title IX.

34 C.F.R. 106.45(a).

§ 106.45(b) – Grievance Process

"For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section."

"Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaint of sexual harassment . . . must apply equally to both parties."

"A recipient's grievance process must—

"Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent."

34 C.F.R. 106.45(b)(1)(i); Rhodes FGP III

"Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness."

34 C.F.R. 106.45(b)(1)(ii); Rhodes FGP IV.D

The respondent is **presumed not responsible** until a determination regarding responsibility is made at the conclusion of the grievance process.

34 C.F.R. 106.45(b)(1)(iv); Rhodes FGP III

• Reasonably prompt timeframes:

- Must have reasonably prompt timeframes for conclusion of the entire grievance process, including informal resolution process and appeals.
- Must have process that allows for temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the parties.
- "Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities."

34 C.F.R. 106.45(b)(1)(v).

• Uniform standard of evidence

- Must choose between 2 permissible standards of evidence:
 - (1) **preponderance of the evidence**; or
 - (2) clear and convincing evidence.
- Must apply that standard to all formal complaints, including against both students and employees.

34 C.F.R. 106.45(b)(1)(vii).

Must describe the **range of supportive measures** available to the parties.

34 C.F.R. 106.45(b)(1)(ix).

May not allow any evidence or questions that would invade a **legally recognized privilege**, unless the privilege holder waives it. ^{34 C.F.R. 106.45(b)(1)(x).}

§ 106.45(b) – Grievance Process: *Notice of Allegations*

- Upon receipt of a formal complaint, a recipient must provide known parties with written notice of various matters, including:
 - the formal complaint's allegations;
 - the formal grievance procedures; and
 - any code-of-conduct provision that prohibits knowingly making false statements or submitting false information during the grievance process.

34 C.F.R. 106.45(b)(2); Rhodes FGP IV.C

Must describe range of potentially available disciplinary sanctions and remedies.

34 C.F.R. 106.45(b)(1)(vi); Rhodes FGP IV.E.vi

Must include procedures and permissible bases for parties to appeal.

34 C.F.R. 106.45(b)(1)(viii).



INVESTIGATIONS

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint

- **Burden to investigate on Institution** Must "[e]nsure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties," with the exception of a party's medical records.
- **Opportunity to suggest evidence** Must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence."
- **No gag order** May not restrict the parties' ability to discuss the case and gather evidence. 34 C.F.R. 106.45(b)(5)(i)-(iii).

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint (cont.)

- Advisors Must "[p]rovide the parties with the same opportunities to have others present during any grievance proceeding," including an advisor of their choice, who may be an attorney.
 - May not limit choice or presence of an advisor.
 - May establish restrictions on the extent to which advisors may participate, provided the restrictions apply equally to both parties.

34 C.F.R. 106.45(b)(5)(iv).

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint (cont.)

• Notice of meetings – Must provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate.

34 C.F.R. 106.45(b)(5)(v).

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint (cont.)

- **Opportunity to review pre-report evidence** Must "[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. . . . "
 - Before completion of investigative report, must send the evidence to the parties and their advisors and give them 10 days to submit a written response.
 - Investigator must consider the written response before completing the final report.

34 C.F.R. 106.45(b)(5)(vi).

§ 106.45(b) – Grievance Process: Investigation of a Formal Complaint (cont.)

• Investigative report –

- Must "[c]reate an investigative report that fairly summarizes relevant evidence. . . ."
- At least 10 days before hearing, must provide the parties and their advisors with a copy, "for their review and written response."

34 C.F.R. 106.45(b)(5)(vii).



HEARINGS

§ 106.45(b) – Grievance Process: *Hearings*

"For postsecondary institutions, the recipient's grievance process must provide for a live hearing."

34 C.F.R. 106.45(b)(6)(i).

§ 106.45(b) – Grievance Process: *Hearings*

• Hearing panelists:

- The live hearing may be adjudicated by one or more decision-makers.
- The decision-maker(s), however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s). . . ."

34 C.F.R. 106.45(b)(7)(i); See Rhodes FGP IV.E

§ 106.45(b) – Grievance Process: *Hearings* (cont.)

- Cross-examination must be allowed Decision-makers "must permit each party's advisor to ask the other party and any other witnesses all relevant questions and follow-up questions, including those challenging credibility."
 - Cross-examination only by the advisor "Such cross-examination . . . must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally. . . ."
 - School-appointed advisors "If a party does not have an advisor present at the live hearing, the recipient <u>must</u> provide without fee or charge to that party, an advisor of the <u>recipient's</u> choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."

34 C.F.R. 106.45(b)(6)(i); Rhodes FGP IV.E.iv

§ 106.45(b) – Grievance Process: *Hearings* (cont.)

• Relevance required – "Only relevant cross-examination and other questions may be asked of a party or witness."

- **Decision-makers must screen for relevance in real-time** "Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."
- Rape shield protections "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, <u>unless</u> such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent <u>and</u> are offered to prove consent."

34 C.F.R. 106.45(b)(6)(i); Rhodes FGP IV.E

§ 106.45(b) – Grievance Process: *Hearings* (cont.)

"If a party or witness does not submit to cross-examination at the live hearing, the decision maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility...

The adjudicator(s) may rely, if appropriate, on a statement of a party or a witness even if that party or witness does not submit to cross-examination. However, the adjudicator(s) **cannot draw an inference** about the determination regarding responsibility based solely on a party's or a witness's absence from the live hearing or refusal to answer cross-examination or other questions."

34 C.F.R. 106.45(b)(6)(i); BOR Title IX Grievance Procedure VIII(C)

§ 106.45(b) – Grievance Process: *Hearings* (cont.)

• Virtual hearings:

- "At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions."
- "Live hearings . . . may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other."

34 C.F.R. 106.45(b)(6)(i); Rhodes FGP IV.I.i.3

§ 106.45(b) – Grievance Process: *Hearings* (cont.)

Hearing record – "Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review."

34 C.F.R. 106.45(b)(6)(i); Rhodes FGP IV.E.i.3

§ 106.45(b) – Grievance Process: *Determination of Responsibility*

- The decision-maker(s) must issue a <u>written determination regarding responsibility</u>, which must include:
 - The allegations constituting sexual harassment;
 - A description of the matter's procedural history;
 - Findings of fact supporting the determination;
 - Conclusions reached by applying the school's code of conduct to the facts;
 - An explanation of the rationale for the conclusions, including a determination of responsibility, disciplinary sanctions, and remedies; and
 - The school's appellate procedures.

34 C.F.R. 106.45(b)(7)(i)-(ii); Rhodes FGP IV.E.v

§ 106.45(b) – Grievance Process: *Determination of Responsibility* (cont.)

- **Simultaneous publication** "The recipient must provide the written documentation to the parties simultaneously."
- **Finality** "The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would not longer be considered timely."

34 C.F.R. 106.45(b)(7)(iii); Rhodes FGP IV.E.v-vii

§ 106.45(b) – Grievance Process: *Determination of Responsibility* (cont.)

"The Title IX Coordinator is responsible for effective implementation of any remedies."

34 C.F.R. 106.45(b)(7)(iv); Rhodes FGP IV.E.v.4





§ 106.45(b) – Grievance Process: *Appeals*

- Rhodes must offer both parties an appeal from:
 - a determination regarding responsibility; and
 - the dismissal of a formal complaint or any allegation therein.

34 C.F.R. 106.45(b)(8); Rhodes FGP IV.F

§ 106.45(b) – Grievance Process: *Appeals* (cont.)

Mandatory grounds for appeal:

- "Procedural irregularity that affected the outcome of the matter;"
- "New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and"
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter."
- "A recipient **may** offer an appeal equally to both parties on additional bases."

34 C.F.R. 106.45(b)(8)(i)-(ii).



INFORMAL RESOLUTION

§ 106.45(b) – Grievance Process: Informal Resolution

"At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication..."

Before doing so, however, the recipient must provide written notice to the parties of their rights, including the right to withdraw from the process at any time, and it must obtain both "parties' voluntary, written consent" to informal measures.

Informal resolution processes are not allowed to resolve allegations that an employee sexually harassed a student.

34 C.F.R. 106.45(b)(9); Rhodes FGP IV.G



RECORD-KEEPING

§ 106.45(b) – Grievance Process: *Record-Keeping*

• For 7 years, Rhodes must maintain records of:

- Each sexual harassment investigation, including determination, sanctions, and remedies resulting therefrom;
- Any appeals therefrom;
- Any informal resolutions thereof; and
- All training materials, which the recipient must also make available for public inspection.

Rhodes also must maintain records of any other actions it takes, including supportive measures, in response to reports or formal complaints of sexual harassment.

34 C.F.R. 106.45(b)(10).