

## WSR 21-07-118

## PROPOSED RULES

## WHATCOM COMMUNITY COLLEGE

[Filed March 23, 2021, 11:03 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-03-060.

Title of Rule and Other Identifying Information: Chapter 132U-305 WAC, Whatcom Community College Supplemental Title IX procedures, permanently implement emergency rule chapter 132U-305 WAC based on new Title IX regulations requiring substantial updates to investigative procedures, as well as changes to definitions of key terms.

Hearing Location(s): On April 27, 2021, at 14:00, Zoom. People can attend the meeting by using the following link <https://us02web.zoom.us/j/81756159620?pwd=V2FsOXRqTEV4Ry9EY2hid29BQU1Hdz09>.

Date of Intended Adoption: May 25, 2021.

Submit Written Comments to: Benjamin Reed, 237 West Kellogg Road, Laidlaw 208, Bellingham, WA 98226, email [breed@whatcom.edu](mailto:breed@whatcom.edu), fax 360-383-4000, by March 8, 2020.

Assistance for Persons with Disabilities: Contact Kerri Holferty, phone 360-383-3043, fax 360-383-4000, TTY 360-225-7182, email [ADS@whatcom.edu](mailto:ADS@whatcom.edu), by March 5, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The existing chapter 132U-305 WAC, Supplemental Title IX procedures, do not meet current Title IX regulations including investigative procedures and definitions of key terms.

Reasons Supporting Proposal: The existing WAC does not address the recent federal and state regulations.

Statutory Authority for Adoption: Chapter 28B.50 RCW.

Rule is necessary because of federal law, [no information supplied].

Name of Proponent: Whatcom Community College, governmental.

Name of Agency Personnel Responsible for Drafting: Benjamin Reed, Laidlaw 208, 360-383-3074; Implementation and Enforcement: Benjamin Reed/Becky Rawlings, Laidlaw 208/Laidlaw 235, 360-383-3074/360-383-3400.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute.

March 23, 2021

Barbara Nolze

Administrative Assistant to the  
Vice President for Student Services

OTS-2556.2

**Chapter 132U-305 WAC  
SUPPLEMENTAL TITLE IX PROCEDURES**

NEW SECTION

**WAC 132U-305-005 Introduction.** Whatcom Community College recognizes its responsibility for investigation, resolution, implementation of corrective measures, and monitoring the educational environment and workplace to stop, remediate, and prevent sexual misconduct and harassment as outlined in the Title IX of the Educational Amendments Act of 1972. This policy reflects the Department of Education's final rule, which went into effect August 14, 2020. Whatcom Community College is committed to addressing all allegations of misconduct and harassment, and as such the Title IX coordinator will evaluate each allegation to determine if it fits under the jurisdiction of this policy, this chapter, or chapter 132U-126 WAC.

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NEW SECTION

**WAC 132U-305-010 Definitions.** (1) **Actual knowledge:** 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.

(2) **Complainant:** Employee(s), applicant(s), student(s), or visitors(s) of Whatcom Community College who alleges that she or he has been subjected to discrimination or harassment due to his or her membership in a protected class.

(3) **Complaint:** A description of facts filed by a complainant or signed by the Title IX coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. In complaints where the Title IX coordinator signs a formal complaint, the Title IX coordinator is not a complainant or otherwise a party and must otherwise comply with their regulatory duties.

(4) **Consent:** Knowing, voluntary and clear permission by word or action, to engage in mutually agreed upon sexual activity. Each party has the responsibility to make certain that the other has consented before engaging in the activity. For consent to be valid, there must be at the time of the act of sexual intercourse or sexual contact actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. A person cannot consent if he or she is unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when the individual knows, or should know, that the other person is physically or mentally incapacitated has engaged in nonconsensual conduct. Intoxication is not a defense against allegations that an individual has engaged in nonconsensual sexual conduct.

(5) **Decision maker:** The individual that leads and coordinates the disciplinary phase of these procedures, following a full investigation as outlined below. In cases involving only students as complainants and respondents the decision maker will be the director for student conduct or designee. In cases involving employees as either complainants, respondents, or both the decision maker will be the executive director for human resources or designee. The decision maker cannot be the Title IX coordinator involved in the case, or the investigator.

(6) **Resolution:** The means by which the complaint is finally addressed. This may be accomplished through informal or formal processes, including counseling, mediation, or the formal imposition of discipline.

(7) **Respondent:** Person or persons who are members of the campus community who allegedly discriminated against or harassed another person or persons. Any person alleged to have violated this policy is presumed not responsible until the resolution of the formal or informal process.

(8) **Retaliation:** Harming, threatening, intimidating, coercing, or taking adverse action of any kind against a person because the person reported an alleged violation of this policy or other college policy, provided information about an alleged violation, or participated as a witness or in any other capacity in an investigation or disciplinary proceeding.

(9) **Supportive measures:** Nondisciplinary, nonpunitive 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. The Title IX coordinator is responsible for coordinating these measures. Supportive measures may include: Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus safety 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 (See VAWA Section 304 for additional measures that may be required). These measures are available to complainants without the filing of a formal complaint.

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#### NEW SECTION

**WAC 132U-305-015 Prohibited conduct under Title IX.** Pursuant to RCW 28B.50.140(13) and Title IX of the Education Amendments Act of 1972, 20 U.S.C. Sec. 1681, the college may impose disciplinary sanctions against a student or employee who commits, attempts to commit, or aids, abets, incites, encourages, or assists another person to commit, an act(s) of "sexual harassment."

For purposes of this policy, "sexual harassment" encompasses the following conduct:

(1) Quid pro quo harassment. A college employee conditioning the provision of an aid, benefit, or service of the college on an individual's participation in unwelcome sexual conduct.

(2) Hostile environment. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the college's educational programs or activities, or employment.

(3) Sexual assault. Sexual assault includes the following conduct:

(a) Nonconsensual sexual intercourse. Any actual or attempted sexual intercourse (anal, oral, or vaginal), however slight, with any object or body part, by a person upon another person, that is without consent and/or by force. Sexual intercourse includes anal or vaginal

penetration by a penis, tongue, finger, or object, or oral copulation by mouth to genital contact or genital to mouth contact.

(b) Nonconsensual sexual contact. Any actual or attempted sexual touching, however slight, with any body part or object, by a person upon another person that is without consent and/or by force. Sexual touching includes any bodily contact with the breasts, groin, mouth, or other bodily orifice of another individual, or any other bodily contact in a sexual manner.

(c) Incest. Sexual intercourse or sexual contact with a person known to be related to them, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either wholly or half related. Descendant includes stepchildren and adopted children under the age of eighteen.

(d) Statutory rape. Consensual sexual intercourse between someone who is eighteen years of age or older and someone who is under the age of sixteen.

(4) Domestic violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state of Washington, or by 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 state of Washington, RCW 26.50.010.

(5) Dating violence. Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person:

(a) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(b) 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.

(6) Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or suffer substantial emotional distress.

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#### NEW SECTION

**WAC 132U-305-020 Title IX jurisdiction.** (1) This supplemental procedure applies only if the alleged misconduct:

(a) Occurred in the United States;

(b) Occurred during a college educational program or activity; and

(c) Meets the definition of sexual harassment as that term is defined in this policy.

(2) For purposes of this policy, an "educational program or activity" is defined as locations, events, or circumstances over which the college exercised substantial control over both the respondent and

the context in which the alleged sexual harassment occurred. This definition includes any building owned or controlled by a student organization that is officially recognized by the college.

(3) Proceedings under this policy must be dismissed if the Title IX coordinator or designee determines that one or all of the requirements of subsection (1)(a) through (c) of this section have not been met. Dismissal under this policy does not prohibit the college from pursuing other disciplinary action based on allegations that the respondent violated other provisions of the college's student conduct code, chapter 132U-126 WAC, or the college's discrimination and harassment policy, chapter 132U-300 WAC.

(4) If the Title IX coordinator or designee determines the facts in the investigation report are not sufficient to support Title IX jurisdiction and/or pursuit of a Title IX violation, the student conduct officer will issue a notice of dismissal in whole or part to both parties explaining why some or all of the Title IX claims have been dismissed.

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#### NEW SECTION

##### **WAC 132U-305-025 Confidentiality and right to privacy. (1)**

Whatcom Community College will seek to protect the privacy of the complainant and respondent to the fullest extent possible, consistent with the legal obligation to investigate, take appropriate remedial and/or disciplinary action, and comply with the federal and state law, as well as Whatcom Community College policies and procedures. Although Whatcom Community College will attempt to honor requests for confidentiality, it cannot guarantee complete confidentiality. Determinations regarding how to handle requests for confidentiality will be made by the Title IX coordinator/designee.

(2) **Confidentiality requests and sexual violence complaints:** The Title IX coordinator/designee will inform and obtain consent from the complainant before commencing an investigation into a sexual violence complaint. If a sexual violence complainant asks that his or her name not be revealed to the respondent or that the college not investigate the allegation, the Title IX coordinator/designee will inform the complainant that maintaining confidentiality may limit the college's ability to respond fully to the allegations and that retaliation by the respondent and/or others is prohibited. If the complainant still insists that his or her name not be disclosed or that the college not investigate, the Title IX coordinator/designee will determine whether the college can honor the request and at the same time maintain a safe and nondiscriminatory environment for all members of the college community, including the complainant. Factors to be weighed during this determination may include, but are not limited to:

- (a) The seriousness of the alleged sexual violence;
- (b) The age of the complainant;
- (c) Whether the sexual violence was perpetrated with a weapon;
- (d) Whether the respondent has a history of committing acts of sexual violence or has been the subject of other sexual violence complaints;
- (e) Whether the respondent threatened to commit additional acts of sexual violence against the complainant or others; and

(f) Whether relevant evidence can be obtained through other means (e.g., security cameras, other witnesses, physical evidence).

(3) If the college is unable to honor a complainant's request for confidentiality, the Title IX coordinator/designee will notify the complainant of the decision and ensure that complainant's identity is disclosed only to the extent reasonably necessary to effectively conduct and complete the investigation.

(4) If the college decides not to conduct an investigation or take disciplinary action because of a request for confidentiality, the Title IX coordinator/designee will evaluate whether other measures are available to limit the effects of the harassment and prevent its recurrence and implement such measures if reasonably feasible.

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#### NEW SECTION

**WAC 132U-305-030 Initiation of investigation.** Any employee, student, applicant, or visitor who believes that he or she has been the subject of discrimination or harassment should report the incident or incidents to the college's Title IX coordinator identified below. If the complaint is against that coordinator, the complainant should report the matter to the president's office for referral to an alternative designee.

The college encourages the timely reporting of any incidents of discrimination or harassment. Complaints may be submitted in writing or verbally. For complainants who wish to submit a written complaint, a formal complaint form is available online at <http://www.whatcom.edu/home/showdocument?id=360>. Hardcopies of the complaint form are available in the Human Resource Office, Laidlaw Center (LDC) 235.

The following college officials are designated to handle inquiries regarding this policy:

Name: Benjamin Reed  
Title: Title IX & ADA Coordinator  
Office: Laidlaw Center (LDC) 208  
Contact: [breed@whatcom.edu](mailto:breed@whatcom.edu)  
Address: 237 W. Kellogg Rd., Bellingham, WA 98226

Name: Becky Rawlings  
Title: Executive Director for Human Resources, Title IX/EEO Coordinator  
Office: Laidlaw Center (LDC) 235  
Contact: [brawlings@whatcom.edu](mailto:brawlings@whatcom.edu)  
Address: 237 W. Kellogg Rd., Bellingham, WA 98226

The Title IX coordinator(s) or designee:

- Will accept all complaints and referrals from college employees, applicants, students, and visitors;
- Will make determinations regarding how to handle requests by complainants for confidentiality;
- Will keep accurate records of all complaints and referrals for the required time period;

- May conduct investigations or delegate and oversee investigations conducted by a designee;
- May impose interim remedial measures to protect parties during investigations of discrimination or harassment;
- May recommend specific corrective measure to stop, remediate, and prevent the recurrence of inappropriate conduct.

Any employee, applicant, student, or visitor of Whatcom Community College may file a complaint. Complaints may be submitted in writing or verbally. The college encourages the timely reporting of any incidents of discrimination or harassment. Complaints may be submitted in writing or verbally. For complainants who wish to submit a written complaint, a formal complaint form is available online at <http://www.whatcom.edu/home/showdocument?id=360>. Hardcopies of the complaint form are available in the Human Resource Office, Laidlaw Center (LDC) 235. Any person submitting a discrimination complaint shall be provided with a written copy of the college's antidiscrimination policies and procedures, as well as a copy of this policy.

Upon receiving a discrimination complaint, and determining that the requirements of WAC 132U-305-020 (1)(a) through (c) have been met, the college shall commence an impartial investigation. The Title IX coordinator/designee shall be responsible for overseeing all investigations. Investigations may not be conducted by the Title IX coordinator, and the college may contract with a third-party as investigator. Once the investigation is assigned to someone other than the Title IX coordinator, the Title IX coordinator shall inform the complainant and respondent(s) of the appointment of an investigator.

(1) **Supportive measures:** The Title IX coordinator/designee will promptly contact all necessary parties to coordinate supportive measures.

(2) **Interim measures:** The Title IX coordinator/designee may impose measures to protect the complainant and/or respondent pending the conclusion of the investigation. Interim measures may include, but are not limited to, imposition of no contact orders, rescheduling classes, temporary work reassignments, referrals for counseling or medical assistance, and imposition of summary discipline on the respondent consistent with the college's student conduct code or the college's employment policies and collective bargaining agreements.

(3) **Investigation:** Complaints shall be thoroughly and impartially investigated. The investigation shall include, but is not limited to, interviewing the complainant and the respondent, relevant witnesses, and reviewing relevant documents. The investigation shall be concluded within a reasonable time, normally ninety days barring exigent circumstances. At the conclusion of the investigation, the investigator shall set forth his or her findings and recommendations in writing. The investigator shall send a copy of the findings and recommendations to the Title IX coordinator/designee. The Title IX coordinator/designee shall send that final investigation report to the decision maker.

(4) **Written notice of conclusion:** The Title IX coordinator/designee will provide each party and the appropriate student services administrator or appointing authority with written notice of investigative findings, along with access to the report. All parties will have up to ten days to submit, in writing, a meaningful response to the findings of fact in the report.

(5) **Final investigation report:** Ten days after the written notice of conclusion, the investigator will submit the final investigation report, with findings of fact using a preponderance of evidence standard, to the Title IX coordinator.

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NEW SECTION

**WAC 132U-305-035 Initiation of discipline.** (1) Upon receiving the final investigation report from the investigator, the Title IX coordinator/designee will forward the report to the decision maker, who will independently review the report to determine whether there are sufficient grounds to pursue a disciplinary action against the respondent for engaging in prohibited conduct under Title IX.

(2) If the decision maker determines that there are sufficient grounds to proceed under these supplemental procedures, the decision maker will initiate a Title IX disciplinary proceeding by serving the notice on the respondent and the complainant, and their respective advisors. The notice must:

(a) Set forth the basis for Title IX jurisdiction;

(b) Identify the alleged Title IX violation(s);

(c) Set forth the facts underlying the allegation(s);

(d) Identify the range of possible sanctions that may be imposed if the respondent is found responsible for the alleged violation(s); and

(e) Explain that the parties are entitled to be accompanied by their chosen advisors during the hearing and that:

(i) The advisors will be responsible for questioning all witnesses on the party's behalf;

(ii) An advisor may be an attorney; and

(iii) The college will appoint the party an advisor of the college's choosing at no cost to the party, if the party fails to do so.

(3) Explain that if a party fails to appear at the hearing, a decision of responsibility may be made in their absence.

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NEW SECTION

**WAC 132U-305-040 Prehearing procedure.** (1) Upon sending the disciplinary notice, the decision maker will send a hearing notice to all parties, in compliance with WAC 132U-300-090. In no event will the hearing date be set less than ten days after the Title IX coordinator or designee provided the final investigation report to the parties.

(2) A party may choose to have an attorney serve as their advisor at the party's own expense. This right will be waived unless, at least five days before the hearing, the attorney files a notice of appearance with the decision maker. The decision maker will then forward copies to all parties.

(3) In preparation for the hearing, the parties will have equal access to all evidence gathered by the investigator during the investigation, regardless of whether the college intends to offer the evidence at the hearing.

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NEW SECTION

**WAC 132U-305-045 Rights of parties.** (1) The college's student conduct procedures, chapter 132U-126 WAC, as well as college policies, practices, faculty negotiated agreements, and collective bargaining agreements and this policy shall apply equally to all parties.

(2) The college bears the burden of offering and presenting sufficient testimony and evidence to establish that the respondent is responsible for a Title IX violation by a preponderance of the evidence.

(3) The respondent will be presumed not responsible until such time as the disciplinary process has been finally resolved.

(4) During the hearing, each party shall be represented by an advisor. The parties are entitled to an advisor of their own choosing and the advisor may be an attorney. If a party does not choose an advisor, then the Title IX coordinator or designee will appoint an advisor of the college's choosing on the party's behalf at no expense to the party.

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NEW SECTION

**WAC 132U-305-050 Evidence.** The introduction and consideration of evidence during the hearing is subject to the following procedures and restrictions:

(1) Relevance: The decision maker or designee shall review all questions for relevance and shall explain on the record their reasons for excluding any question based on lack of relevance.

(2) Relevance means that information elicited by the question makes facts in dispute more or less likely to be true.

(3) Questions or evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant and must be excluded, unless such question or evidence:

(a) Is asked or offered to prove someone other than the respondent committed the alleged misconduct; or

(b) Concerns specific incidents of prior sexual behavior between the complainant and the respondent, which are asked or offered on the issue of consent.

(4) Cross-examination required: If a party or witness does not submit to cross-examination during the live hearing, the decision maker must not rely on any statement by that party or witness in reaching a determination of responsibility.

(5) No negative inference: The decision maker may not make an inference regarding responsibility solely on a witness's or party's absence from the hearing or refusal to answer questions.

(6) Privileged evidence: The decision maker shall not consider legally privileged information unless the holder has effectively waived the privilege. Privileged information includes, but is not limited to, information protected by the following:

(a) Spousal/domestic partner privilege;

(b) Attorney-client and attorney work product privileges;

(c) Privileges applicable to members of the clergy and priests;

(d) Privileges applicable to medical providers, mental health therapists, and counselors;

- (e) Privileges applicable to sexual assault and domestic violence advocates; and
- (f) Other legal privileges identified in RCW 5.60.060.

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NEW SECTION

- WAC 132U-305-055 Initial order.** (1) In addition to complying with chapter 132U-126 WAC, the decision maker will be responsible for conferring and drafting an initial order that:
- (a) Identifies the allegations of sexual harassment;
  - (b) Describes the grievance and disciplinary procedures, starting with filing of the formal complaint through the determination of responsibility, including notices to parties, interviews with witnesses and parties, site visits, methods used to gather evidence, and hearings held;
  - (c) Makes findings of fact supporting the determination of responsibility;
  - (d) Reaches conclusions as to whether the facts establish whether the respondent is responsible for engaging in sexual harassment in violation of Title IX;
  - (e) Contains a statement of, and rationale for, the decision maker's determination of responsibility for each allegation;
  - (f) Describes any disciplinary sanction or conditions imposed against the respondent, if any;
  - (g) Describes to what extent, if any, complainant is entitled to remedies designed to restore or preserve complainant's equal access to the college's education programs or activities; and
  - (h) Describes the process for appealing the initial order to the college president.
- (2) The committee chair will serve the initial order on the parties simultaneously.

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NEW SECTION

- WAC 132U-305-060 Appeals.** (1) The parties shall have the right to appeal from the initial order's determination of responsibility and/or dismissal of an allegation(s) of sexual harassment in a formal complaint. The right to appeal will be subject to the same procedures and time frames set forth in WAC 132U-126-090.
- (2) The president or their delegate will determine whether the grounds for appeal have merit, provide the rationale for this conclusion, and state whether the disciplinary sanction and condition(s) imposed in the initial order are affirmed, vacated, or amended, and, if amended, set forth any new disciplinary sanction and/or condition(s).
- (3) President's office or designee shall serve the final decision on the parties simultaneously.

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NEW SECTION**WAC 132U-305-065 Nonretaliation, intimidation, and coercion.**

Retaliation by, for, or against any participant (including complainant, respondent, witness, Title IX coordinator/designee, or investigator) is expressly prohibited. Retaliatory action of any kind taken against individual(s) as a result of seeking redress under the applicable procedures or serving as a witness in a subsequent investigation or any resulting disciplinary proceedings is prohibited and is conduct subject to discipline. Any person who thinks he/she has been the victim of retaliation should contact the Title IX coordinator/designee immediately.

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