

**WSR 14-22-102**  
**PERMANENT RULES**  
**BENTON CLEAN AIR AGENCY**

[Filed November 4, 2014, 2:57 p.m., effective December 5, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The changes are primarily housekeeping items such as:

- Aligning sections and wording with the Washington Administrative Code in preparation for submission as part of the state implementation plan.
- Consolidation of rules for fugitive dust in Article 4, and some industrial sources in Article 3.
- Updating outdated references to WAC and/or RCW.
- Clarifying statutory authority citations.
- Aligning language with the current RCW and WAC.
- Updating agricultural burning rule and fees per changes already made to the WAC.

Statutory Authority for Adoption: Chapter 70.94 RCW.

Adopted under notice filed as WSR 14-17-096 on October 23 [August 19], 2014.

Changes Other than Editing from Proposed to Adopted Version: Adopted as submitted:

- Adopted Articles 1 through 3, Articles 5 through 7, Articles 9 and 10 as submitted to the Register.
- Adopted Article 4 Section 4.01 and Section 4.02 Paragraph E in their entirety as submitted to the Register.

Took no action on Article 8 and Article 4 Section 4.02 D.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: October 23, 2014.

Robin Priddy  
 Director/Control Officer

**Policy, Purpose and Applicability**

**ADOPTED: 17-Feb-2005; EFFECTIVE: 9-Apr-2005; AMENDED 23-Oct-2014**

*New*

**Section 1.03 Applicability**

[Statutory Authority: RCW 70.94.141, RCW 70.94.395, and RCW 70.94.422 RCW]

A. The Agency implements and enforces the Washington Administrative Code State Air Pollution Control rules adopted by Ecology in Title 173 under chapter 70.94 RCW, as in effect now and including all future amendments. State air rules apply except where specific provisions of ((BCAA)) Benton Clean Air Agency Regulation 1 apply.

B. The provisions of this regulation ((shall)) apply within Benton County of Washington State.

C. The Agency is authorized to enforce this regulation and may also adopt standards or requirements. These standards or requirements may not be less stringent than the current state air quality rules and may be more stringent than the current regulations.

D. The Agency does not have jurisdiction over the following sources:

Specific source categories over which the State assumes jurisdiction.

Automobiles, trucks, aircraft, chemical pulp mills and primary aluminum reduction facilities.

Sources under the jurisdiction of the Energy Facility Site Evaluation Council (EFSEC) through chapter 80.50 RCW.

**Reviser's note:** The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

Article 3

Industrial Source Regulations

*New*

**ADOPTED: 24 Oct-2014**

[Statutory Authority RCW 70.94.141]

**PURPOSE:** This Article establishes controls on incinerator operations and Surface Coating operations in Benton County in order to reduce particulate emissions, reduce public exposure to Toxic Air Pollutants as listed in Chapter 173-460 WAC, and to encourage pollution prevention in Benton County.

**Reviser's note:** The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

*New*

**Section 3.01 Incinerator Burning and Incineration Hours**

A. The Agency implements and enforces WAC 173-400-050, in Benton County in addition to Parts B through E of this Section. The more stringent requirement in WAC 173-400-050 or Section 3.01 of this Regulation supersedes the lesser.

B. It is unlawful for any person to burn any combustible refuse in any incinerator within the jurisdiction of this Agency except in an approved multiple-chambered incinerator or in equipment found by the Control Officer in advance of such use to be equally effective for the purpose of air pollution control. The Control Officer may require the installation of additional control apparatus on an incinerator of approved design, if he/she finds that it is not effectively controlling air pollution emissions or is the cause of legitimate complaints.

C. It is unlawful for any person to cause or allow the operation of an incinerator at any time other than daylight hours, except with the approval of the Control Officer.

D. Approval of the Control Officer for the operation of an incinerator at other than daylight hours may be granted upon the submission of a written request stating:

1. Full name and address of the applicant;
2. Location of the incinerator;
3. A description of the incinerator and its control equipment;
4. Good cause for issuance of such approval;
5. The hours, other than daylight hours, during which the applicant seeks to operate the equipment; and
6. The length of time for which the exception is sought.

E. No one may install or operate an "Air Curtain Incinerator" or "Wigwam Burner" within the Agency's jurisdiction.

*New*

### Section 3.02 General Surface Coating

A. Purpose. This Section establishes controls on surface coating operations in Benton County in order to:

1. Reduce particulate emissions from coating overspray;
2. Reduce public exposure to Toxic Air Pollutants as listed in Chapter 173-460 WAC;
3. Reduce emissions of precursors to the formation of tropospheric ozone and other photochemical oxidants; and
4. Encourage pollution prevention.

B. Applicability. This Section applies to all surface preparation, surface coating, cleanup, and disposal associated with general surface coating in Benton County, unless specifically exempted.

C. Definitions. Unless a different meaning is clearly required by context, words and phrases used in this Section have the following meaning:

1. Airless Spray means a spraying system that uses hydraulic atomization instead of air atomization. The coating is supplied to the gun under high fluid pressure between 1000 and 3000 psig and the coating is forced through a small orifice.

2. Air-Assisted Airless Spray means a spraying system that combines air and airless features. An airless type fluid tip atomizes the paint and shapes the fan pattern at fluid pressures between 300 and 1000 psig. Lower pressure air from 10 to 30 psig combines at the spray cap to adjust the fan shape to eliminate heavy edges (tails).

3. Automated means the technique, method, or system of operating or controlling a process by mechanical, electrical, hydraulic, or electronic means independent of human intervention.

4. Brush Coat Application means manual application of coatings by use of a paint brush.

5. Coating means a material or formulation of materials that is applied to or impregnated into a surface in order to beautify, protect, enhance the function, or otherwise cover the surface.

6. Container means the individual receptacle that holds a coating or coating component for storage and distribution.

7. Dip Coat Application means application of coatings in which the surface to be coated is immersed in a solution (or dispersion) containing the coating material and withdrawn.

8. Electrostatic Application means application of coatings where an electrostatic potential is created between the part to be coated and the paint particles.

9. Exempt Solvent means a solvent or solvent component, which is not a volatile organic compound (VOC).

10. Flow Coat Application means application of coatings by flowing the coating over the surface to be coated and draining the excess coating to a collection system.

11. High Volume, Low Pressure (HVLP) or Low Volume, Low Pressure (LVLP) coating system means equipment used to apply coatings by means of a spray gun which operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the nozzle and that exhibits a minimum transfer efficiency of 65%, as applied.

12. Light Duty Vehicle means a passenger car, truck, van, or other motor vehicle which has a gross vehicle weight of 8500 pounds or less, or components thereof.

13. Multi-Coat System means a coating system where more than one product or coat is sequentially applied to the same surface and generally consists of a pigmented base coat, one or more semi-transparent mid-coats, and a transparent clear coat. The VOC content for a multi-coat system are calculated as follows:

$$\text{VOC}_{\text{TM}} = \frac{\text{VOC}_{\text{BC}} + \text{VOC}_{\text{X1}} + \text{VOC}_{\text{X2}} + \dots + \text{VOC}_{\text{Xn}} + 2\text{VOC}_{\text{CC}}}{n+3}$$

where:

$\text{VOC}_{\text{TM}}$  is the average sum of the VOC content, as applied to the surface, in a multi-coat system; and

$\text{VOC}_{\text{BC}}$  is the VOC content, as applied to the surface, of the base coat; and

$\text{VOC}_{\text{X}}$  is the VOC content, as applied to the surface, of each sequentially applied mid-coat; and

$\text{VOC}_{\text{CC}}$  is the VOC content, as applied to the surface, of the clear coat (Two coats are applied); and

$n$  is the total number of coats applied to the primer coat(s) surface.

14. Pre-packaged Aerosol Can Application means application of coatings from cans which are sold by the coating supplier as non-reusable, hand-held pressurized containers. The coating is expelled as a finely divided spray when a valve on the container is depressed.

15. Primer means any coating that is applied to a surface to enhance corrosion resistance, protection from the environment, functional fluid resistance, and adhesion of subsequently applied coatings.

16. Reducer means any solvent added to a coating which has the effect of reducing the viscosity of the coating or shortening the drying time.

17. Refinishing means reapplying coating to a surface to repair, restore, or alter the finish.

18. Roll Coat Application means manual application of coatings by the use of a paint roller.

19. Solvent Consumption means the volume of solvent purchased or otherwise procured, less the volume recycled or

disposed. In the absence of records which document the transfer of solvent to an authorized recycler or waste hauler, solvent consumption means the volume of solvent purchased or otherwise procured.

20. Standard engineering practices means that accepted, peer reviewed sets of criteria are used in designing equipment (i.e. Uniform Building, Electrical, and Fire Codes, recommendations of the American Conference of Governmental Industrial Hygienists, guidelines of the Department of Labor and Industry, etc.).

21. Surface Coating means the application of coating to a surface.

22. VOC Content means pounds of VOC per gallon of coating (Lb/Gal) or grams of VOC per liter of coating (G/L), minus water and exempt solvents. The VOC content is calculated as follows:

$$\text{VOC}_{\text{CT}} = \frac{W_V}{V_M - V_W - V_{\text{ES}}}$$

where:

$\text{VOC}_{\text{CT}}$  is the VOC content of the coating, as applied to the surface; and

$W_V$  is the weight of VOC per unit volume of coating, as applied to the surface; and

$V_M$  is the unit volume of coating, as applied to the surface; and

$V_W$  is the volume of water per unit volume of coating, as applied to the surface; and

$V_{\text{ES}}$  is the volume of exempt solvents per unit volume of coating, as applied to the surface.

23. Wash Solvent means any solution, solvent, suspension, compound, or other material, excluding water that is used to clean spray equipment, spray equipment lines, containers, and any other equipment associated with the application of coatings.

24. Wipe-Down Agent means any solution, solvent, suspension, compound, or other material that is applied to a surface exclusively for cleaning the surface or preparing the surface for coating.

#### D. Prohibitions on emissions

1. No person may cause or allow the application of any coating which contains greater than 0.1% by weight of one or more compounds of lead or hexavalent chromium.

2. Light duty vehicle refinishing - prohibitions on VOC content. Except as provided in Section 3.02.F of this Regulation, no person may cause or allow the application of any coating or other agent to any light duty vehicle or light duty vehicle component, with a VOC content in excess of the limits listed in 40 CFR 59, Subpart B, Table 1 - EPA National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings.

E. Requirements. All persons subject to the requirements of Section 3.02 of this Regulation must comply with all of the

following, unless exempted under Section 3.02.F of this Regulation.

1. Enclosure and Controls - Spray application must be conducted in a booth or area which is vented to an operating particulate control system. The particulate control system, including filtration, ducting, and fan must be installed and sized according to standard engineering practices. Acceptable filtration methods may include:

a. Filter banks supplied with filter media designed for spray booth applications.

b. Water baths where the inlet air flow to the water bath is submerged.

c. Water wall systems that form a continuous water curtain through which the particulate flow stream must pass.

d. Other filtration methods that have received the prior written approval of the Control Officer.

The control system must be equipped with a fan which is capable of capturing all visible overspray. Emissions from the booth/area must be vented to the atmosphere through a vertical stack. The top of the exhaust stack/vent must be at least 6 feet above the penetration point of the roof, or if the exhaust stack/vent exits horizontally out the side of the building, then the exhaust stack/vent must vent vertically at least 6 feet above the eave of the roof. A higher stack/vent may be required if the Agency determines that it is necessary for compliance with WAC 173-400-040. There must be no flow obstruction (elbows, tees, or stack caps) inside of, or at the top of, the stack that will impede upward vertical flow of the exhausted air.

It is the owner/operator's responsibility to comply with other applicable federal, state, and local regulations for the stack/vent.

2. Visible Emissions - Visible emissions from the stack may not exceed 10% opacity averaged over any six minute period, as determined by EPA Method 9.

3. Application methods - Except as provided in Section 3.02.F. of this Regulation, no person may cause or allow the application of any coating or other agent containing VOC unless the coating or agent is applied by one of the following methods:

a. High Volume, Low Pressure coating system;

b. Low Volume, Low Pressure coating system;

c. Wet or Dry electrostatic application;

d. Flow coat application;

e. Dip coat application;

f. Brush coat application;

g. Pre-packaged aerosol can application;

h. Roll coat application;

i. A spraying technique that when tested, using the methodology presented in ASTM Standard D 5327-92, or when test documentation, provided to and approved by the Agency, exhibits that the spraying technique has a transfer efficiency of at least 65%;

j. Alternate application methods that have received the written approval of the Control Officer. Such alternate methods may be used, provided that the owner or operator makes a written request to use an alternate method and the Control Officer grants approval. These methods include but are not limited to the following application methods and circumstances:

1) Airless and Air-Assisted Airless Spray systems may be used under any of the following circumstances:

(a) when the volatile organic compound (VOC) emissions are determined by the Control Officer to be no more than VOC emissions that would be generated by a spray application with a transfer efficiency of 65%;

(b) when the spraying operation is automated;

(c) when spray painting structural steel members where the coating, as formulated by the coating manufacturer, does not require addition of reducers to spray, and is delivered under high pressure (> 1,000 psig for airless, or > 300 psig for air-assisted airless) to the application system; or

(d) where the Control Officer has determined that the coating cannot be feasibly applied with a method that has a minimum transfer efficiency of 65%.

4. Equipment Cleanup - Equipment cleanup and any other use of wash solvent must be totally enclosed during washing, rinsing, and draining; or wash solvent, after making contact with the equipment being cleaned, must be immediately drained to a closed sump which is an integral part of the cleaning system.

#### 5. General Clean-up

a. All unused or partially used containers of coatings, wipe-down agents, wash solvents, reducers, and waste materials containing VOC must be closed, except when in use, when being filled or emptied.

b. Spills must be cleaned up upon discovery and the clean-up materials and collected waste must be stored in closed metal containers.

c. All disposable materials which contain VOCs associated with wipe-down or application of coatings and other agents must be stored in closed metal containers for disposal.

6. Recordkeeping. All persons subject to Section 3.02 of this Regulation must maintain the following records for the previous 24-month period at the place of business where surface coating is performed:

a. The most current material safety data sheets (MSDS) or other data sheets which clearly indicate the VOC content of the product and of any multi-coat system.

b. Records of purchases and usage, including unused materials returned to the supplier.

1) Light duty vehicle refinishing. Annual purchases and usage of total primers, total top coats, total clear coats, and total gun cleaner. Usage must be reported "as applied", i.e. after reducing and catalyzing, if applicable.

2) Other surface coating facilities. Annual purchases and usage of individual coatings, coating additives, wipe-down agents, wash solvents, reducers, there materials containing volatile organic compounds or volatile toxic air pollutants.

c. Waste materials disposal records, including volumes of waste solvents and coatings transferred in sealed containers to authorized waste haulers.

F. Exceptions. Exceptions to Section 3.02 of this Regulation must be made as follows:

1. Noncommercial exemption. Nothing in Section 3.02 of this Regulation may apply to surface coating operations conducted solely for personal, noncommercial purposes if, on a facility-wide basis, less than 5 gallons of surface coatings are applied per year.

2. Coating process exemptions. Nothing in Section 3.02 of this Regulation applies to the following coating processes:

a. The application of architectural coatings to stationary structures and their appurtenances, to mobile homes, to pavements, or to curbs;

b. Fiberglass resin application operations;

c. Gel coating operations;

d. The application of asphaltic or plastic liners. This includes undercoating, sound deadening coating, and spray on bed lining for trucks;

e. Spray plasma plating operations; or

f. Application of coatings to farming equipment.

3. Low usage exemption. Nothing in Sections 3.02.E.3 & 4 applies to surface coating operations which, on a facility-wide basis, apply less than 10 gallons per year of surface coatings.

4. Exemption for large objects. Nothing in Subsection 3.02.E.1. of this Regulation applies to the infrequent outdoor surface coating of large objects where the Control Officer determines that it is impractical to totally enclose the object inside a booth or vented area. The request for this exemption must be made in writing to the Control Officer and the approval must be in writing. Infrequent means outdoor spray surface coating that amounts to 10% or less of the total annual gallons of paint applied at the facility in the previous 12 months. Annual records must be kept of the number of gallons of paint that are sprayed outdoors. In such case, a temporary enclosure (tarps) must be maintained around the object during the surface coating operation, sufficient at all times to prevent overspray from remaining airborne beyond the property line of the facility.

5. Wash solvent exemption. Nothing in Subsection 3.02.E.4. of this Regulation applies to:

a. the use of wash solvents with composite vapor pressure of organic compounds less than 45 mm Hg at 20°C as determined by ASTM Method D-2306-81; or

b. wash solvent operations if total wash solvent consumption does not exceed 10 gallons per year.

6. Stack exemption. The stack/vent requirements in Subsection 3.02.E.1. of this Regulation does not apply to surface coating operations where the owner or operator can demonstrate to the satisfaction of the Control Officer that emissions of toxic air pollutants will not exceed the Acceptable Source Impact Levels as defined in WAC 173-460-150 & 160 and emissions will not create a nuisance.

7. Non-spray and aerosol can application exemption. Nothing in Subsection 3.02.E.1 of this Regulation applies to the application of any coating or other agent from pre-packaged aerosol cans, flow coat, dip coat, brush coat, or roll coat applications.

8. Low VOC content exemption. Nothing in Subsection 3.02.E.3 of this Regulation applies to the application of coatings where the VOC content does not exceed 2.1 Lb/Gal or 250 G/L.

9. Lead or Hexavalent Chrome exemption. The prohibition in Subsection 3.02.D.1 of this Regulation does not apply to a surface coating operation where the control officer determines that no practical alternative coating is available.

10. Enclosure and/or particulate control exemption: The enclosure and/or particulate control requirements of Subsec-

tion 3.02.E.1 of this Regulation does not apply to a surface coating operation where the control officer determines that such requirements would be ineffective, or unreasonable in capturing or controlling particulate or volatile organic compounds emissions from the facility.

11. Inside exhaust exemption: If the Department of Labor & Industries or another agency of jurisdiction determines that the emissions from a surface coating operation to an inside work area are below the threshold where an exhaust system is required and the Fire Department or District of jurisdiction has no objection, then the Control Officer may grant an exemption to Subsection 3.02.E.1 of this Regulation.

G. Compliance with other laws and regulations: Compliance with Section 3.02 of this Regulation or qualifying for an exemption in Section 3.02.F. of this Regulation does not necessarily mean that the surface coating operation complies with fire protection, waste disposal, or other federal, state, or local applicable laws or regulations.

**Reviser's note:** The typographical error in the above material occurred in the copy filed by the Benton Clean Air Agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

*New*

### **Section 3.03 General Air Pollution Control for Industrial Sources**

A. Air Pollution sources not specifically regulated in this Section are regulated by the current 173-400 WAC General Regulations for Air Pollution Sources and 173-460 WAC Controls for New Sources of Toxic Air Pollutants.

B. In addition to the source-specific requirements in this Section, requirements of Article 9 Source Registration of this Regulation apply.

#### Article 4

#### General Standards for Particulate Matter

*New*

**ADOPTED: 23-Oct-2014**

[Statutory Authority: RCW 70.94.141]

**PURPOSE:** This Article is intended to prevent and reduce fugitive dust emissions from projects which destabilize soil in Benton County.

**Reviser's note:** The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

*New*

### **Section 4.01 Definitions**

A. "Fugitive dust" means a particulate emission made airborne by forces of wind, human activity, or both. Unpaved roads, construction sites, and tilled land are examples of areas that originate fugitive dust. Fugitive Dust is a type of fugitive emissions.

B. "Fugitive emissions" means emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

C. "Destabilization project" means construction, repair, or demolition of any building or road, or landscaping work on

a property, which destabilizes the soil and thus has potential for fugitive dust emissions.

D. "Emergency" means: 1) Active operations conducted during emergency, life threatening situations, or in conjunction with an officially declared disaster or state of emergency; or 2) Active operations conducted by public service utilities to provide electrical, natural gas, telephone, water, or sewer service during emergency outages.

E. "Facility" means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative).

*New*

### **Section 4.02 Particulate Matter Emissions**

A. **Fallout.** No person may cause or allow the emission of particulate matter from any source to be deposited beyond the property under direct control of the owner or operator of the source in sufficient quantity to interfere unreasonably with the use and enjoyment of the property upon which the material is deposited.

B. **Fugitive emissions.** The owner or operator of any emissions unit or operation engaging in materials handling, construction, demolition or other operation which is a source of fugitive emission.

1. Must take reasonable precautions to prevent the release of air contaminants from the operation located in an attainment or unclassifiable area and not impacting any non-attainment area.

2. Are required to use reasonable and available control methods If the emissions unit has been identified as a significant contributor to the nonattainment status of a designated nonattainment area. The methods must include any necessary changes in technology, process, or other control strategies to control emissions of the air contaminants for which nonattainment has been designated.

#### **C. Fugitive dust**

1. The owner or operator of a source, including developed or undeveloped property, or activity that generates fugitive dust must take reasonable precautions to prevent that fugitive dust from becoming airborne and must maintain and operate the source to minimize emissions.

2. These reasonable precautions may include, but are not limited to watering, chemical stabilizers, physical barriers, compaction, gravel, vegetative stabilization, mulching and keeping open areas to a minimum.

The owner or operator of any existing source or activity that generates fugitive dust that has been identified as a significant contributor to a PM-10 or PM-2.5 nonattainment area is required to use reasonably available control technology to control emissions. Significance will be determined by the criteria found in WAC 173-400-113(4).

#### **D. Project Notification**

RESERVED

#### **E. Dust Control Plans**

1. Applicability. The owner or operator of any destabilization project must maintain a written dust control plan for the project and make the dust control plan readily available.

2. Exemptions.
  - a. Any project at an existing facility.
  - b. Any emergency project.
  - c. Any agricultural operation.
3. Dust Control Plan Requirements.
  - a. Dust control plans must identify management practices and operational procedures which will effectively control fugitive dust emissions.
  - b. Dust control plans must contain the following information:
    - i. A detailed map or drawing of the site;
    - ii. A description of the water source to be made available to the site, if any;
    - iii. A description of preventive dust control measures to be implemented, specific to each area or process; and
    - iv. A description of contingency measures to be implemented in the event any of the preventive dust control measures become ineffective.
  - c. An owner or operator must implement effective dust control measures outlined in dust control plans.
  - d. The owner or operator must provide the Agency with a copy of the plan within two business days of it being requested.
4. Master Dust Control Plan.
  - a. As an alternative to a site dust control plan, an owner or operator may develop a master dust control plan that applies to more than one site or project. The master plan must:
    - i. Address all the requirements in Section 4.02.E.3 of this Regulation; and
    - ii. Provide for effective control of fugitive dust emissions to all sites and projects.
    - iii. Prior to the commencement of work at any site or project covered by the master plan, the owner or operator must notify the Agency according to Section 4.02(D) of this Regulation

Article 5  
Outdoor Burning

**ADOPTED: 17-Feb-2005; AMENDED: 23-Oct-2014**

*New*

**Section 5.04 Benton Clean Air Agency Requirements**

A. The Agency will make a daily decision determining the restriction on all types of outdoor burning.

**WSR 14-23-003A**  
**PERMANENT RULES**  
**HEALTH CARE AUTHORITY**  
(Washington Apple Health)

[Filed November 5, 2014, 2:23 p.m., effective January 1, 2015]

Effective Date of Rule: January 1, 2015.

Purpose: To comply with SSB [ESSB] 6002, section 213 (10) and (11), chapter 221, Laws of 2014, (page 109 of Operating Budget-Supplemental), the agency is amending this section to address the changes noted in the engrossed substitute senate bill which will impact state fiscal year 2015 funds.

Citation of Existing Rules Affected by this Order:  
Amending WAC 182-550-5380.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160, ESSB 6002, section (10) and (11), chapter 221, Laws of 2014.

Adopted under notice filed as WSR 14-20-034 on September 23, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: November 5, 2014.

Kevin M. Sullivan  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 14-08-038, filed 3/26/14, effective 4/26/14)

**WAC 182-550-5380 Payment method—Sole community disproportionate share hospital (SCDSH).** (1) The medicaid agency's sole community disproportionate share hospital (SCDSH) program is a program for in-state hospitals that:

(a) Were certified by the Centers for Medicare and Medicaid Services (CMS) as sole community hospitals as of January 1, 2013;

(b) Had less than one hundred fifty acute care licensed beds in state fiscal year (SFY) 2011;

(c) Qualify under Section 1923(d) of the Social Security Act; ~~(and)~~

(d) Are not participating in the certified public expenditure (CPE) program; and

(e) Are rural hospitals in Lewis County.

(2) The agency pays qualifying hospitals SCDSH payments from a legislatively appropriated pool. This distribution is based on the hospital's medicaid payments. To determine the hospital's SCDSH payments, the agency:

(a) Identifies the sum of the medicaid payments to the individual hospital during the SFY two years prior to the current SFY for which DSH application is being made. These medicaid payment amounts:

(i) Are based on historical data;

(ii) Include payments from the agency; and

(iii) Include payments reported on encounter data supplied by agency-contracted managed care organizations.

(b) Divides the medicaid payment amount in (a) of this subsection by the sum of the medicaid payment amounts for

all qualifying hospitals during the same period to determine the hospital's percentage; and

(c) Applies this percentage to the total dollars in the pool to determine the hospital's SCDSH payment.

(3) The SCDSH payments to a hospital eligible under this program may not exceed the hospital's DSH cap calculated according to WAC 182-550-4900(10).

(4) SCDSH payments are subject to the availability of DSH funds under the statewide DSH cap. If the statewide DSH cap is exceeded, the agency will recoup DSH payments in the order specified in WAC 182-550-4900 (13) and (14).

**WSR 14-23-021**  
**PERMANENT RULES**  
**BOARD OF**  
**PILOTAGE COMMISSIONERS**

[Filed November 7, 2014, 1:14 p.m., effective January 1, 2015]

Effective Date of Rule: January 1, 2015.

Other Findings Required by Other Provisions of Law as Precondition to Adoption or Effectiveness of Rule: All requirements necessary to amend the existing Grays Harbor pilotage district tariff as set forth in chapter 53.08 RCW have been met.

Purpose: To establish a 2015 annual tariff for pilotage services in the Grays Harbor pilotage district.

Citation of Existing Rules Affected by this Order: Amending WAC 363-116-185.

Statutory Authority for Adoption: RCW 88.16.035.

Adopted under notice filed as WSR 14-18-058 on August 29, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: October 16, 2014.

Peggy Larson  
Executive Director

AMENDATORY SECTION (Amending WSR 13-23-110, filed 11/20/13, effective 1/1/14)

**WAC 363-116-185 Pilotage rates for the Grays Harbor pilotage district.** Effective 0001 hours January 1, (~~2014~~) 2015, through 2400 hours December 31, (~~2014~~) 2015.

**CLASSIFICATION**

**RATE**

Charges for piloting of vessels in the inland waters and tributaries of Grays Harbor shall consist of the following:

**Draft and Tonnage Charges:**

Each vessel shall be charged according to its draft and tonnage for each vessel movement inbound to the Grays Harbor pilotage district, and for each movement outbound from the district.

|                                |   |
|--------------------------------|---|
| Draft                          | <del>\$(405.29))</del> <u>110.55</u> per meter            |
|                                | or  |
|                                | <del>\$(32.09))</del> <u>33.69</u> per foot               |
| Tonnage                        | <del>\$(0.304))</del> <u>0.316</u> per net registered ton |
| Minimum Net Registered Tonnage | <del>\$(1,055.00))</del> <u>1,108.00</u>                  |
| Extra Vessel (in case of tow)  | <del>\$(591.00))</del> <u>621.00</u>                      |

Provided that, due to unique circumstances in the Grays Harbor pilotage district, vessels that call, and load or discharge cargo, at Port of Grays Harbor Terminal No. 2 shall be charged ~~\$(5,849.00))~~ 6,141.00 per movement for each vessel movement inbound to the district for vessels that go directly to Terminal No. 2, or that go to anchor and then go directly to Terminal No. 2, or because Terminal No. 2 is not available upon arrival that go to layberth at Terminal No. 4 (without loading or discharging cargo) and then go directly to Terminal No. 2, and for each vessel movement outbound from the district from Terminal No. 2, and that this charge shall be in lieu of only the draft and tonnage charges listed above.

**Boarding Charge:**

Per each boarding/deboarding from a boat or helicopter ~~\$(1,000.00))~~ 1,050.00

**Harbor Shifts:**

For each shift from dock to dock, dock to anchorage, anchorage to dock, or anchorage to anchorage ~~\$(735.00))~~ 772.00

Delays per hour ~~\$(173.00))~~ 182.00

| CLASSIFICATION                                | RATE                                    |
|---|---|
| Cancellation charge (pilot only)              | \$(( <del>289.00</del> )) <u>303.00</u> |
| Cancellation charge (boat or helicopter only) | \$(( <del>865.00</del> )) <u>908.00</u> |

**Two Pilots Required:**

When two pilots are employed for a single vessel transit, the second pilot charge shall include the harbor shift charge of \$((~~735.00~~)) 772.00 and in addition, when a bridge is transited the bridge transit charge of \$((~~317.00~~)) 333.00 shall apply.

**Pension Charge:**

Charge per pilotage assignment, including cancellations \$((~~362.00~~)) 403.00

**Travel Allowance:**

Transportation charge per assignment \$((~~400.00~~)) 105.00

Pilot when traveling to an outlying port to join a vessel or returning through an outlying port from a vessel which has been piloted to sea shall be paid \$((~~974.00~~)) 1,023.00 for each day or fraction thereof, and the travel expense incurred.

**Bridge Transit:**

Charge for each bridge transited \$((~~317.00~~)) 333.00

Additional surcharge for each bridge transited for vessels in excess of 27.5 meters in beam \$((~~867.00~~)) 910.00

**Miscellaneous:**

The balance of amounts due for pilotage rates not paid within 30 days of invoice will be assessed at 1 1/2% per month late charge.

**WSR 14-23-022**  
**PERMANENT RULES**  
**OFFICE OF**  
**FINANCIAL MANAGEMENT**

[Filed November 10, 2014, 8:32 a.m., effective December 11, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: SSB 5173 allows employees of the state and its political subdivisions two unpaid holidays per calendar year for a reason of faith or conscience or an organized activity conducted under the auspices of a religious denomination, church, or religious organization. The employer must allow the employee to take this leave unless the employee's absence would impose an "undue hardship" on the employer. The office of financial management was provided authority to establish by rule the definition of "undue hardship." The bill was effective June 12, 2014.

Statutory Authority for Adoption: Section 2, chapter 168, Laws of 2014 (SSB 5173).

Adopted under notice filed as WSR 14-17-098 on August 19, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 3, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 3, Amended 0, Repealed 0.

Date Adopted: November 10, 2014.

Roselyn Marcus  
Assistant Director for Legal  
and Legislative Affairs

**Chapter 82-56 WAC****UNDUE HARDSHIP**NEW SECTION

**WAC 82-56-010 Purpose.** (1) Chapter 168, Laws of 2014, provides that state and political subdivision employees are entitled to two unpaid holidays per calendar year for a reason of faith or conscience or an organized activity conducted under the auspices of a religious denomination, church, or religious organization. The employer must allow the employee to take unpaid leave for up to two such holidays unless the employee's absence would impose an undue hardship on the employer or the employee is necessary to maintain public safety. Chapter 168, Laws of 2014, directs the director of the office of financial management to establish the definition of "undue hardship" by rule.

(2) The purpose of this chapter is to establish the definition of "undue hardship" for purposes of chapter 168, Laws of 2014.

(3) This chapter applies to employees of the state and its political subdivisions, including:

- (a) Employees of school districts;
- (b) Nonclassified employees of institutions of higher education who hold appointments or are employed under contracts to perform services for periods of less than twelve consecutive months;
- (c) Employees of public institutions of higher education; and
- (d) Employees of community colleges, technical colleges, and workforce training programs.

#### NEW SECTION

**WAC 82-56-020 Definition of undue hardship.** For purposes of chapter 168, Laws of 2014, "undue hardship" means an action requiring significant difficulty or expense to the employer. The following factors should be considered in determining whether approving unpaid leave results in an undue hardship to the employer:

- (1) The number, composition, and structure of staff employed by the employing entity or in the requesting employee's program.
- (2) The financial resources of the employing entity or the requesting employee's program.
- (3) The number of employees requesting leave for each day subject to such a request.
- (4) The financial impact on the employing entity or requesting employee's program resulting from the employee's absence and whether that impact is greater than a de minimus cost to the employer in relation to the size of the employing entity or requesting employee's program.
- (5) Impact on the employing entity, the requesting employee's program, workplace safety or public safety.
- (6) Type of operations of the employing entity or requesting employee's program.
- (7) Geographic location of the employee or geographic separation of the particular program to the operations of the employing entity.
- (8) Nature of the employee's work.
- (9) Deprivation of another employee's job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement.
- (10) Any other impact on the employing entity's operation or requesting employee's program due to the employee's absence.

#### NEW SECTION

**WAC 82-56-030 Application of definition of undue hardship to request.** (1) In determining whether the employee's absence would result in an undue hardship to the employing entity, the employer must make a case-by-case determination based on the specific objective facts and circumstances, not assumed information, present at the time of each request.

(2)(a) The existence of a collective bargaining agreement or bona fide seniority system does not in and of itself relieve the employing entity from determining whether there would be an undue hardship if the request was granted.

(b) When an employee is represented by a union, in determining whether the employee's absence would result in an undue hardship, the request must be reconciled, when feasible, with the provisions of the applicable collective bargaining agreement.

(c) If the employee is covered under a collective bargaining agreement, the employing agency must determine whether the request can be granted without violating that agreement.

#### **WSR 14-23-048**

##### **PERMANENT RULES**

#### **GAMBLING COMMISSION**

[Order 709—Filed November 14, 2014, 2:56 p.m., effective December 15, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: To recodify the current version of WAC 230-14-047.

This rule relates to the regulation of licensing, therefore, it requires an affirmative vote of at least three commission members for final approval (RCW 9.46.050(2)). A May 2014 court of appeals decision held that in 2008, WAC 230-14-047 was "adopted without compliance with statutory rule-making procedures" per RCW 34.05.570 (2)(c). The court of appeals found that the rule relates to the regulation of licensing, and thus under RCW 9.46.050(2) required the affirmative vote of at least three commission members for final approval. The rule was improperly promulgated in 2008 because only two of the three commission members present voted to approve the rules. The commissioners voted to recodify this rule at their November 14, 2014, meeting.

Statutory Authority for Adoption: RCW 9.46.070.

Adopted under notice filed as WSR 14-19-060 on September 12, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 1, Amended 0, Repealed 0.

Date Adopted: November 14, 2014.

Susan Newer  
Rules Coordinator

RECODIFY SECTION (Recodifying WSR 14-09-040, filed 4/11/14, effective 5/12/14)

**WAC 230-14-047 Standards for electronic video pull-tab dispensers.** Electronic video pull-tab dispensers must be approved by us prior to use.

(1) Electronic video pull-tab dispensers must dispense a paper pull-tab as defined in WAC 230-14-010 and follow the rules for:

- (a) Pull-tabs; and
- (b) Flares; and
- (c) Authorized pull-tab dispensers.

(2) Electronic video pull-tab dispensers that use a reading and displaying function must:

(a) Use a video monitor for entertainment purposes only; and

(b) Open all, or a portion of, the pull-tab in order to read encoded data that indicates the win or loss of the pull-tab if the dispenser is equipped to automatically open pull-tabs; and

(c) Dispense the pull-tab to the player and not retain any portion of the pull-tab; and

(d) Read the correct cash award from the pull-tab either when it is dispensed or when the pull-tab is reinserted into the dispenser; and

(e) Display the cash award from the pull-tab, one pull-tab at a time; and

(f) Provide:

(i) An electronic accounting of the number of pull-tabs dispensed; and

(ii) A way to identify the software version and name; and

(iii) A way to access and verify approved components; and

(iv) Security on the dispenser to prevent unauthorized access to graphic and prize amount displays.

(3) Cash cards used in electronic video pull-tab dispensers must:

(a) Be purchased with cash, check, gift certificates, or electronic point-of-sale bank transfer before use in the dispenser; and

(b) Be convertible to cash at any time during business hours; and

(c) Subtract the purchase price of the pull-tab one pull-tab at a time.

(4) Electronic video pull-tab dispensers that accept cash cards may award any pull-tab cash prize of twenty dollars or less onto the cash card.

requirements, which is calculated based on the quarterly activity reports they submit. Instead, licensees will need to show a positive cash flow when they submit their annual financial statements to the commission. These financial statements would continue to be prepared in accordance with WAC 230-07-150.

In addition, associated rules allowing a reduction for taxes paid and an automatic twenty-five percent reduction of the cash flow requirements are repealed.

There are currently eight licensees who are impacted by this petition because they have annual gross gambling receipts from bingo and punch board/pull-tab (PB/PT) activities over 1.5 million dollars.

Citation of Existing Rules Affected by this Order: Amending WAC 230-10-375; and repealing WAC 230-10-370 and 230-10-380.

Statutory Authority for Adoption: RCW 9.46.070, 9.46.0209.

Adopted under notice filed as WSR 14-19-113 on September 17, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 1, Repealed 2.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 2.

Date Adopted: November 14, 2014.

Susan Newer  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 07-10-033, filed 4/24/07, effective 1/1/08)

**WAC 230-10-375 Failing to maintain a positive cash flow.** (1) Bingo licensees must measure adjusted cash flow (~~(quarterly)~~) to ensure that they maintain a positive cash flow and are not operating primarily for gambling purposes.

(2) If a licensee does not maintain a positive cash flow from the bingo operation (~~(during any two consecutive license year quarters, measured independently)~~) as reflected in their annual financial statement as prepared in accordance with WAC 230-07-150, the director ((summarily suspends)) will take administrative action to revoke the organization's bingo license.

~~((3) If a licensee fails to meet the adjusted cash flow requirements for any calendar year, we take administrative action to revoke the organization's bingo license.))~~

### WSR 14-23-049

#### PERMANENT RULES

#### GAMBLING COMMISSION

[Order 710—Filed November 14, 2014, 3:00 p.m., effective December 15, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: At their November 2014 meeting, the commissioners adopted a petition for rule change submitted by two bingo licensees. With these rule changes, bingo licensees with annual gross gambling receipts over 1.5 million dollars will no longer have to meet quarterly and yearly "cash flow"

REPEALER

The following sections of the Washington Administrative Code are repealed:

- WAC 230-10-370 Ticket sales and receipting for three number speed bingo income [Adjusted cash flow limits for bingo].
- WAC 230-10-380 Drawings for prizes, good neighbor prizes, and second element of chance prizes as part of bingo games [Relief reduction for minimum annual adjusted cash flow].

**Reviser's note:** The bracketed information above was added by the code reviser's office to display the correct captions of WAC 230-10-370 and 230-10-380.

**WSR 14-23-053****PERMANENT RULES****DEPARTMENT OF AGRICULTURE**

[Filed November 17, 2014, 9:37 a.m., effective December 18, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: In 2014, the governor signed ESSB 6388 to establish a direct seller license for businesses that sell pre-packaged foods obtained from a licensed food processor, collect payment only through a web site, and deliver the food directly to consumers without interim storage. ESSB 6388 directed the department of agriculture to issue a license to operate as a direct seller and to develop an annual license and renewal fee to defray the costs of administering the new licensing and inspection program. This rule making establishes rules in chapter 16-130 WAC for direct seller licensees, providing businesses operating as a direct seller of food products clarity on requirements for sanitation, recordkeeping, record retention, fees and licensing requirements.

Statutory Authority for Adoption: RCW 69.04.345.

Other Authority: Chapter 34.05 RCW.

Adopted under notice filed as WSR 14-19-124 on September 17, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 6, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 6, Amended 0, Repealed 0.

Date Adopted: November 17, 2014.

Don R. Hover  
Director

**Chapter 16-130 WAC****DIRECT SELLERS**NEW SECTION

**WAC 16-130-010 Purpose of this chapter.** The purpose of this chapter is to implement RCW 69.04.345 by establishing rules relating to the issuance of licenses to operate as a direct seller and to establish the requirements that apply to direct sellers.

NEW SECTION

**WAC 16-130-020 Definitions.** (1) In addition to the definitions contained in this section, the definitions found in chapters 69.04 and 69.07 RCW, chapters 16-165, 16-167, and 246-215 WAC, and Title 21 of the Code of Federal Regulations may apply.

(2) For the purposes of this chapter, the following definitions apply:

"Department" means the department of agriculture.

"Direct seller" means an entity licensed by the department that receives prepackaged food from a food processor that is either licensed or inspected, or both, by a state or federal regulatory agency or the department and that delivers the food directly to consumers clients who only placed and paid for an order on the entity's web site, as long as:

(a) The food is delivered by the entity without opening the processor's original packaging and without dividing it into smaller packages;

(b) There is no interim storage by the entity; and

(c) The food is delivered by means of vehicles that are equipped with either refrigeration or freezer units, or both, and that meet the requirements of rules authorized by this chapter.

"Director" means the director of the department of agriculture.

"Food handling area" means all premises and facilities utilized for food transport by a direct seller.

NEW SECTION**WAC 16-130-030 Direct seller license applications.**

(1) All direct sellers must be licensed annually by the department. Licenses expire on December 31st following issuance except that licenses issued during 2014 will not expire until December 31, 2015.

(2) Applications for new and renewal licenses must be submitted on the form provided by the department, and must include:

(a) A completed application form;

(b) The physical address of the business premises within the state of Washington of the direct seller where required records will be maintained;

(c) A current list of all leased, rented or owned vehicles, other than vehicles that are rented for less than forty-five days, intended for use within Washington state by the direct seller to deliver food; and

(d) An annual license fee of five thousand four hundred dollars.

(3) The department will not refund license fees after receipt of a direct seller license or renewal license application.

(4) Prior to licensing, the department may inspect the vehicles and food handling areas of the direct seller to determine them to be in compliance with the requirements of chapter 69.04 RCW and this rule.

(5) Until a license is issued by the department, direct sellers must comply with all applicable permitting requirements contained in food service establishment rules adopted by the state board of health and any local health jurisdiction.

(6) To obtain an application for a direct seller license, contact the department at:

Washington State Department of Agriculture  
Food Safety Consumer Services Division  
P.O. Box 42560  
Olympia, WA 98504-2560  
Phone: 360-902-1876  
Fax: 360-902-2087  
Web site: <http://agr.wa.gov>.

#### NEW SECTION

**WAC 16-130-040 Direct sell requirements.** (1) The license or a copy of the license must be present in all vehicles and food handling areas utilized by the direct seller.

(2) Direct sellers must maintain all areas of vehicles utilized for food transportation and food handling areas in a sanitary manner. Vehicles and food handling areas must be kept clean and inspected each day by the direct seller.

(3) Direct sellers must keep records to document daily cleaning and sanitary inspections of vehicles and food handling areas. Records of daily vehicle inspections must be maintained with the vehicle for the previous thirty days. Food handling area inspection records and vehicle inspection records older than thirty days must be maintained by the direct seller at the direct seller's business premises for twelve months. Vehicle and package temperature logs must be maintained by the direct seller at the direct seller's business premises for twelve months.

(4) Direct sellers are required to protect food from contaminations while in transport.

(a) Food must be transported under conditions that protect food against physical, chemical and microbial contamination.

(b) Food must be protected against deterioration of the food and its container.

(c) Food must be kept in a temperature controlled environment to adequately protect the food from deterioration or degradation and to minimize microbial growth. Refrigerated food temperatures must be maintained at forty-one degrees Fahrenheit or below, and frozen food temperatures must be maintained at thirty-two degrees Fahrenheit or below at all times and a food labeled frozen by the food processor must be received frozen by the consumer.

(d) Ensure the separation of raw materials, including raw seafood, meat, poultry and raw fruits and vegetables in a fashion to avoid cross-contamination of other food products, particularly ready-to-eat foods.

(e) Raw materials may not come in direct contact with other food in the same container or in any other cross-contaminating circumstances.

(5) The direct seller must maintain the following records at the direct seller's business premises and make available for inspection by the department:

(a) A current list of all leased, rented or owned vehicles, other than vehicles that are rented for less than forty-five days, intended for use in Washington state by the direct seller to deliver food;

(b) All records of vehicles intended for use in Washington state rented for less than forty-five days for at least twelve months following the termination of the rental period;

(c) Temperature logs of all vehicles and packages in real time for all food while in transport from initial pickup to delivery;

(d) Consumer client lists indicating what products were purchased, when products were delivered, and location where the product was delivered to consumer client;

(e) Records of product purchases that are offered or sold to consumer clients that include manufacturer of product, distributor of product, date and time of receipt of product by direct seller, and date and time of delivery of product by direct seller; and

(f) Records indicating disposition of any products not sold or received by consumer clients.

(6) All records required under this section must be:

(a) Maintained so that the information they intend to convey is clear and understandable;

(b) Available to the department upon request at the direct seller's business premises or in a vehicle as applicable; and

(c) Retained at the direct seller's business premises for six months after the expiration of the license.

#### NEW SECTION

**WAC 16-130-050 Inspections.** (1) The department will conduct routine inspections of all vehicles, food handling areas, refrigeration equipment, and product packaging used by the direct seller.

(2) The department will conduct audits of all required records including cleaning and sanitary inspections, temperature logs, lists of all leased, rented or owned vehicles, vehicle rental records, purchases, sales, and other food handling and sanitation records as appropriate.

(3) During an investigation, the department may sample food products transported by the direct seller for laboratory testing to ensure food is being handled and maintained in a safe and sanitary manner.

(4) The department may inspect the records, vehicles, food handling areas, refrigeration equipment, and product packaging used by a direct seller whenever the department has reason to believe the direct seller is in violation of the requirements of chapter 69.04 RCW or this chapter. Inspections will be made at reasonable times and, when possible, during regular business hours.

(5) The department will investigate any complaints against a direct seller for violations of chapter 69.04 RCW or this chapter, or for otherwise failing to maintain and distribute food in a safe and sanitary manner.

(6) The department may inspect records, vehicles, food handling areas, refrigeration equipment, and product packaging used by a direct seller in response to a food recall, foodborne illness outbreak, consumer complaint, other public health emergency, or when required by federal, state or local regulation. In such situations, the direct seller will provide to the department its customer list and all known contact information. The direct seller must notify customers of a recall, foodborne illness outbreak, or other relevant event when directed by the department.

#### NEW SECTION

**WAC 16-130-060 Suspension, revocation, and denial of registrations.** (1) A direct seller license and applications for direct seller licenses are governed by the procedures set forth in chapter 34.05 RCW.

(2) The director may deny, suspend, or revoke a direct seller application or license if it is determined that an applicant or direct seller has committed any of the following acts:

(a) Refused, neglected, or failed to comply with the provisions of chapter 69.04 RCW, the rules adopted under this chapter, or any order issued by the director;

(b) Refused, neglected, or failed to keep and maintain required records;

(c) Refused the department access to required records;

(d) Refused the department access to any portion or area of vehicles, food handling areas, refrigeration equipment, and product packaging used by a direct seller; or

(e) Failure to submit an application for a license meeting the requirements of this chapter or failure to pay the annual license or renewal fee.

(3) The director may summarily suspend a license issued under this chapter if the director finds that a direct seller is operating under conditions that constitute an immediate danger to public health or if the director is denied access to the records, vehicles, food handling areas, refrigeration equipment, and product packaging used by a direct seller where the access was sought for the purposes of enforcing or administering this chapter.

tions, and nonquantitative treatment limitations. Compliance is demonstrated by filing supporting documentation used to make parity analysis decisions. In addition, special disclosure requirements apply to obtain reasons for a claim denial.

Citation of Existing Rules Affected by this Order: Repealing chapter 284-53 WAC, Standards for coverage of chemical dependency, WAC 284-53-005 and 284-53-010.

Statutory Authority for Adoption: RCW 48.02.060, 48.43.715, 48.44.050, 48.46.200.

Other Authority: Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) (Pub. L. 110-343).

Adopted under notice filed as WSR 14-20-072 on September 26, 2014.

A final cost-benefit analysis is available by contacting Donna Dorris, P.O. Box 40258, Olympia, WA 98504-0258, phone (360) 725-7040, fax (360) 586-3109, e-mail rules coordinator@oic.wa.gov.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 8, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 8, Amended 0, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 8, Amended 0, Repealed 2.

Date Adopted: November 17, 2014.

Mike Kreidler  
Insurance Commissioner

## SUBCHAPTER K

### MENTAL HEALTH AND SUBSTANCE USE DISORDER

#### NEW SECTION

**WAC 284-43-990 Scope and intent—Parity in mental health and substance use disorder benefits.** This subchapter applies to all health plans and issuers. The purpose of this rule is to consolidate existing state mental health and chemical dependency regulation with federal mental health and substance use disorder parity requirements into state regulation. This rule also provides health plans and issuers with the method of demonstrating compliance with these requirements.

#### NEW SECTION

**WAC 284-43-991 Definitions. Aggregate lifetime limit** means a dollar limitation on the total amount of specified benefits that may be paid under a health plan (or health

#### WSR 14-23-057

#### PERMANENT RULES OFFICE OF

#### INSURANCE COMMISSIONER

[Insurance Commissioner Matter No. R 2012-29—Filed November 17, 2014, 2:22 p.m., effective December 18, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This new rule consolidates existing state mental health and chemical dependency insurance regulations, incorporates the Affordable Care Act (ACA) (Pub. L. 111-148, as amended), and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) (Pub. L. 110-343) and repeals chapter 284-53 WAC.

The new rule provides health carriers (issuers) with instructions on how to perform a parity analysis for provisions relating to financial requirements, treatment limita-

insurance coverage offered in connection with a plan) for any coverage unit.

**Annual dollar limit** means a dollar limitation on the total amount of specified benefits that may be paid in a twelve-month period under a health plan (or health insurance coverage offered in connection with a plan) for any coverage unit.

**Approved treatment program** means a discrete program of chemical dependency treatment provided by a treatment program certified by the department of social and health services as meeting standards adopted under chapter 70.96A RCW.

**Chemical dependency professional** means a person certified as a chemical dependency professional by the Washington state department of health under chapter 18.205 RCW.

**Classification of benefits** means a group into which all medical/surgical benefits and mental health or substance use disorder benefits offered by a health plan must fall. For the purposes of this rule, the only classifications that may be used are: Inpatient, in-network; inpatient, out-of-network; outpatient, in-network; outpatient, out-of-network; emergency care; and prescription drugs.

**Coverage unit** means the way in which a health plan or issuer groups individuals for purposes of determining benefits, or premiums or contributions. For example, different coverage units include self-only, family, and employee-plus-spouse.

**Cumulative financial requirements** means financial requirements that determine whether or to what extent benefits are provided based on accumulated amounts and include deductibles and out-of-pocket maximums. Financial requirements do not include aggregate lifetime or annual dollar limits.

**Cumulative quantitative treatment limitations** means treatment limitations that determine whether or to what extent benefits are provided based on accumulated amounts, such as annual or lifetime day or visit limits.

**Emergency condition, for the purpose of this subchapter**, means a condition manifesting itself by acute symptoms of sufficient severity, including severe emotional or physical distress or a combination of severe emotional and physical distress, that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical or mental health attention to result in a condition placing the health of the individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy.

**Essential health benefits (EHBs)**. EHBs have the same definition as found in WAC 284-43-865. The definition of EHBs includes mental health and substance use disorder services, including behavioral health treatment. For EHBs, including mental health and substance use disorder benefits, federal and state law prohibit limitations or age, condition, lifetime and annual dollar amounts.

**Financial requirements** means cost sharing measures such as deductibles, copayments, coinsurance, and out-of-pocket maximums. Financial requirements do not include aggregate lifetime or annual dollar limits.

**Health carrier or issuer** has the same meaning as RCW 48.43.005(25).

**Health plan** has the same meaning as RCW 48.43.005 (26).

**Medical/surgical benefits** means benefits with respect to items or services for medical conditions or surgical procedures, as defined under the terms of the plan or health insurance coverage and in accordance with applicable federal and state law, but does not include mental health or substance use disorder benefits. Any condition defined by the plan or coverage as being or as not being a medical/surgical condition must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the *International Classification of Diseases* (ICD) or state guidelines).

**Medically necessary or medical necessity:**

(a) With regard to chemical dependency and substance use disorder is defined by the most recent version of *The ASAM Criteria, Treatment Criteria for Addictive, Substance Related, and Co-Occurring Conditions* as published by the American Society of Addiction Medicine (ASAM).

(b) With regard to mental health services, pharmacy services, and any substance use disorder benefits not governed by ASAM, is a carrier determination as to whether a health service is a covered benefit because the service is consistent with generally recognized standards within a relevant health profession.

**Mental health benefits** means benefits with respect to items or services for mental health conditions, as defined under the terms of the plan or health insurance coverage and in accordance with applicable federal and state law. Any condition defined by the plan or coverage as being or as not being a mental health condition must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the most current version of the *International Classification of Diseases* (ICD), or state guidelines).

**Nonquantitative treatment limitations (NQTL)** means processes, strategies, or evidentiary standards, or other factors that are not expressed numerically, but otherwise limit the scope or duration of benefits for treatment. NQTLs include, but are not limited to:

(a) Medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;

(b) Formulary design for prescription drugs;

(c) For plans with multiple network tiers (such as preferred providers and participating providers), network tier design;

(d) Standards for provider admission to participate in a network, including reimbursement rates;

(e) Plan methods for determining usual, customary, and reasonable charges;

(f) Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as fail-first policies or step therapy protocols);

(g) Exclusions based on failure to complete a course of treatment; and

(h) Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope

or duration of benefits for services provided under the plan or coverage.

**Predominant level:** If a type of financial requirement or quantitative treatment limitation applies to substantially all medical/surgical benefits in a classification, the predominant level is the level that applies to more than one-half of the medical/surgical benefits in that classification subject to the financial requirement or quantitative treatment limitation.

**Quantitative parity analysis** means a mathematical test by which plans and issuers determine what level of a financial requirement or quantitative treatment limitation, if any, is the most restrictive level that could be imposed on mental health or substance use disorder benefits within a classification.

**Quantitative treatment limitations** means types of objectively quantifiable treatment limitations such as frequency of treatments, number of visits, days of coverage, days in a waiting period or other similar limits on the scope or duration of treatment.

**Substance use disorder** includes illness characterized by a physiological or psychological dependency, or both, on a controlled substance regulated under chapter 69.50 RCW and/or alcoholic beverages. It is further characterized by a frequent or intense pattern of pathological use to the extent the user exhibits a loss of self-control over the amount and circumstances of use; develops symptoms of tolerance or physiological and/or psychological withdrawal if use of the controlled substance or alcoholic beverage is reduced or discontinued; and the user's health is substantially impaired or endangered or his or her social or economic function is substantially disrupted. Any disorder defined by the plan as being or as not being a substance use disorder must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the DSM, the most current version of the ICD, or state guidelines).

**Substance use disorder benefits** means benefits with respect to items or services for substance use disorders, as defined under the terms of the plan or health insurance coverage and in accordance with applicable federal and state law. Substance use disorder benefits must include payment for reasonable charges for medically necessary treatment and supporting service rendered to an enrollee either within an approved treatment program or by a health care professional that meets the requirements of RCW 18.205.040(2), as part of the approved treatment plan.

**Substantially all:** A type of financial requirement or quantitative treatment limitation considered to apply to substantially all medical/surgical benefits in a classification of benefits if it applies to at least two-thirds of all medical/surgical benefits in that classification as determined by WAC 284-43-993 (2)(a).

**Treatment limitations** means limits on benefits based on the frequency of treatment, number of visits, days of coverage, days in a waiting period, or other similar limits on the scope or duration of treatment. Treatment limitations include both quantitative treatment limitations, which are expressed numerically (such as fifty outpatient visits per year), and non-quantitative treatment limitations, which otherwise limit the scope or duration of benefits for treatment under a plan or

coverage. A permanent exclusion of all benefits for a particular condition or disorder, however, is not a treatment limitation for purposes of this section.

#### NEW SECTION

**WAC 284-43-992 Classification of benefits.** (1) A health plan providing mental health or substance use disorder benefits, must provide mental health or substance use disorder benefits in every classification in which medical/surgical benefits are provided.

(2) Parity requirements must be applied to the following six classifications of benefits: Inpatient, in-network; inpatient, out-of-network; outpatient, in-network; outpatient, out-of-network; emergency care; and prescription drugs. These are the only classifications of benefits that can be used.

(a) **Inpatient, in-network.** Benefits furnished on an inpatient basis and within a network of providers established or recognized under a plan or health insurance coverage.

(b) **Inpatient, out-of-network.** Benefits furnished on an inpatient basis and outside any network of providers established or recognized under a plan or health insurance coverage. This classification includes inpatient benefits under a plan (or health insurance coverage) that has no network of providers.

(c) **Outpatient, in-network.** Benefits furnished on an outpatient basis and within a network of providers established or recognized under a plan or health insurance coverage.

(d) **Outpatient, out-of-network.** Benefits furnished on an outpatient basis and outside any network of providers established or recognized under a plan or health insurance coverage. This classification includes outpatient benefits under a plan (or health insurance coverage) that has no network of providers.

(e) **Emergency care.** Benefits for treatment of an emergency condition related to a mental health or substance use disorder. Such benefits must comply with the requirements for emergency medical services in RCW 48.43.093. Medically necessary detoxification must be covered as an emergency medical condition according to RCW 48.43.093, and may be provided in hospitals licensed under chapter 70.41 RCW. Medically necessary detoxification services must not require prenotification.

(f) **Prescription drugs.** Benefits for prescription drugs.

(3) In determining the classification in which a particular benefit belongs, a plan must apply the same standards to medical/surgical benefits as applied to mental health or substance use disorder benefits.

An issuer or health plan must assign covered intermediate mental health/substance use disorder benefits such as residential treatment, partial hospitalization, and intensive outpatient treatment, to the existing six classifications in the same way that they assign comparable intermediate medical/surgical benefits to these classifications. For example, if a health plan classifies medical care in skilled nursing facilities as inpatient benefits, then it must also treat covered mental health care in residential treatment facilities as inpatient benefits. If a health plan or issuer treats home health care as an outpatient benefit, then any covered intensive outpatient

mental health or substance use disorder services and partial hospitalization must be considered outpatient benefits as well.

(4) A health plan or issuer may not apply any financial requirement or treatment limitation to mental health or substance use disorder benefits that is more restrictive than the predominant financial requirement or treatment limitation applied to medical/surgical benefits. This parity analysis must be done on a classification-by-classification basis.

(5) Medical/surgical benefits and mental health or substance use disorder benefits cannot be categorized as being offered outside of these six classifications and therefore not subject to the parity analysis.

(a) A health plan or issuer must treat the least restrictive level of the financial requirement or quantitative treatment limitation that applies to at least two-thirds of medical/surgical benefits across all provider tiers in a classification as the predominant level that it may apply to mental health or substance use disorder benefits in the same classification.

(b) If a health plan or issuer classifies providers into tiers, and varies cost-sharing based on the different tiers, the criteria for classification must be applied to generalists and specialists providing mental health or substance use disorder services no more restrictively than such criteria are applied to medical/surgical benefit providers.

**(6) Permitted subclassifications:**

(a) A health plan or issuer is permitted to divide benefits furnished on an outpatient basis into two subclassifications:

(i) Office visits; and

(ii) All other outpatient items and services.

(b) A health plan or issuer may divide its benefits furnished on an in-network basis into subclassifications that reflect network tiers, if the tiering is based on reasonable factors and without regard to whether a provider is a mental health or substance use disorder provider or a medical/surgical provider.

(c) After network tiers are established, the health plan or issuer may not impose any financial requirement or treatment limitation on mental health or substance use disorder benefits in any tier that is more restrictive than the predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in that tier.

(d) If a health plan applies different levels of financial requirements to different tiers of prescription drug benefits based on reasonable factors and without regard to whether a drug is generally prescribed with respect to medical/surgical benefits or with respect to mental health/substance use disorder benefits, the health plan satisfies the parity requirements with respect to prescription drug benefits. Reasonable factors include: Cost, efficacy, generic versus brand name, and mail order versus pharmacy pick-up.

(e) A parity analysis applying the financial requirement and treatment rules found in WAC 284-43-993 and 284-43-994 must be performed within each subclassification.

**(7) Prohibited subclassifications:** All subclassifications other than the permitted subclassification listed in subsection (6) of this section are specifically prohibited. For example, a plan is prohibited from basing a subclassification on generalists and specialists.

NEW SECTION

**WAC 284-43-993 Measuring health plan benefits—Financial requirements and quantitative treatment limitations.** (1) Classification of benefits must be measured as follows:

(a) By type and level of financial requirement or treatment limitation.

(i) A financial requirement or treatment limitation type includes deductibles, copayments, coinsurance, and out-of-pocket maximums. Types of quantitative treatment limitations include annual, episode, and lifetime day and visit limits.

(ii) A financial requirement or treatment limitation level includes the amount of the financial requirement or treatment limitation type. For example, different levels of coinsurance include twenty percent and thirty percent; different levels of a copayment include fifteen dollars and twenty dollars; different levels of a deductible include two hundred fifty dollars and five hundred dollars; and different levels of an episode limit include twenty-one inpatient days per episode and thirty inpatient days per episode.

(b) A health plan or issuer may not apply any financial requirement or quantitative treatment limitation to mental health/substance use disorder benefits in any classification that is more restrictive than the predominant financial requirement or quantitative treatment limitation of that type applied to substantially all medical/surgical benefits in the same classification. Whether a financial requirement or treatment limitation is a predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in a classification is determined separately for each type of financial requirement or treatment limitation.

(c) The determination of the portion of medical/surgical benefits in a classification of benefits subject to a financial requirement or quantitative treatment limitation (or subject to any level of a financial requirement or quantitative treatment limitation) is based on the dollar amount of all plan payments for medical/surgical benefits in the classification expected to be paid under the health plan for the plan year.

(i) The dollar amount of plan payments is based on the amount the plan allows (before enrollee cost sharing) rather than the amount the plan pays (after enrollee cost sharing) because payment based on the allowed amount covers the full scope of the benefits being provided.

(ii) A reasonable actuarial method must be used to determine the dollar amount expected to be paid under a plan for medical/surgical benefits subject to a financial requirement or quantitative treatment limitation.

(d) Clarifications for certain threshold requirements when performing "substantially all" and "predominant" tests.

(i) For any deductible, the dollar amount of plan payments includes all plan payments with respect to claims that would be subject to the deductible if it had not been satisfied.

(ii) For any out-of-pocket maximum, the dollar amount of plan payments includes all plan payments associated with out-of-pocket payments that are taken into account towards the out-of-pocket maximum as well as all plan payments associated with out-of-pocket payments that would have been made towards the out-of-pocket maximum if it had not been satisfied.

(iii) Similar rules apply for any other thresholds at which the rate of plan payment changes.

(2) Application to different coverage units. If a health plan or insurer applies different levels of a financial requirement or quantitative treatment limitation to different coverage units in a classification of medical/surgical benefits, the "predominant" level that applies to "substantially all" medical/surgical benefits in the classification is determined separately for each coverage unit.

(a) Determining "substantially all": A type of financial requirement or quantitative treatment limitation is considered to apply to substantially all medical/surgical benefits in a classification of benefits if it applies to at least two-thirds of all medical/surgical benefits in that classification.

(i) Benefits subject to a zero level for a type of financial requirement are treated as benefits not subject to that type of financial requirement. Benefits with no quantitative treatment limitations are treated as benefits not subject to that type of quantitative treatment limitation.

(ii) If a type of financial requirement or quantitative treatment limitation does not apply to at least two-thirds of all medical/surgical benefits in a classification, the financial requirement or quantitative treatment limitation of that type cannot be applied to mental health or substance use disorder benefits in that classification.

(b) Determining "predominant":

(i) If a type of financial requirement or quantitative treatment limitation applies to at least two-thirds of all medical/surgical benefits in a classification as determined under (a) of this subsection, the level of the financial requirement or quantitative treatment limitation that applies to more than one-half of medical/surgical benefits in that classification subject to the financial requirement or quantitative treatment limitation is the predominant level of that type in a classification of benefits.

(ii) If a type of financial requirement or quantitative treatment limitation applies to at least two-thirds of all medical/surgical benefits in a classification and there is no single level that applies to more than one-half of medical/surgical benefits in the classification subject to the financial requirement or quantitative treatment limitation, the health plan or issuer must combine levels until the combination of levels applies to more than one-half of medical/surgical benefits subject to the financial requirement or quantitative treatment limitation in the classification.

(iii) The least restrictive level within the combination is considered the predominant level of that type in the classification. (For this purpose, a health plan must combine the most restrictive levels first, with each less restrictive level added to the combination until the combination applies to more than one-half of the benefits subject to the financial requirement or treatment limitation.)

(3) Cumulative financial requirements and cumulative quantitative treatment limitations.

(a) A health plan or issuer may not apply cumulative financial requirements (such as deductibles and out-of-pocket maximums) or cumulative quantitative treatment limitations (such as annual or lifetime day or visit limits) for mental health or substance use disorder benefits in a classification that accumulate separately from any cumulative

requirement or limitation established for medical/surgical benefits in the same classification.

(b) Cumulative requirements and limitation must also satisfy the quantitative parity analysis.

#### NEW SECTION

**WAC 284-43-994 Measuring health plan benefits—Nonquantitative treatment limitations.** (1) A health plan or issuer may not impose an NQTL with respect to mental health or substance use disorder in any classification unless, under the terms of the health plan as written and in operation, any processes, strategies, evidentiary standards or other factors used in applying the NQTL to mental health or substance use disorder benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to medical/surgical benefits in the same classification.

(2) All health plan standards, such as in-and-out-of-network geographic limitations, limitations on inpatient services for situations where the participant is a threat to self or others, exclusions for court-ordered and involuntary holds, experimental treatment limitations, service coding, exclusions for services provided by clinical social workers, and network adequacy, while not specifically enumerated in the illustrative list of NQTLs must be applied in a manner that complies with this subsection.

#### NEW SECTION

**WAC 284-43-995 Prohibited exclusions.** (1) Benefits for actual treatment and services rendered may not be denied solely because a course of treatment was interrupted or was not completed.

(2) If a service is prescribed for a mental health condition and is medically necessary, it may not be denied solely on the basis that it is part of a category of services or benefits that is excluded by the terms of the contract.

(3) Benefits for mental health services and substance use disorder may not be limited or denied based solely on age or condition.

(4) Nothing in this section relieves a health plan or an issuer from its obligations to pay for a court ordered substance use disorder benefit or mental health benefit when it is medically necessary.

#### NEW SECTION

**WAC 284-43-996 Required disclosures.** (1) Health plans and issuers must provide reasonable access to and copies of all documents, records, and other information relevant to an individual's claim. Health plans and issuers must provide disclosures consistent with WAC 284-43-620, 284-43-515, 284-43-525, and 284-43-410, within a reasonable time.

(2) Health plans and issuers must provide the criteria, processes, strategies, evidentiary standards and other factors used to make medical necessity determinations of mental health or substance use disorder benefits. These must be made available free of charge by the health plan issuer to any current or potential participant, beneficiary, or contracting

provider upon request, within a reasonable time in compliance with WAC 284-43-410, and in a manner that provides reasonable access to the requestor. This requirement includes information on the processes, strategies, evidentiary standards, and other factors used to apply an NQTL with respect to medical/surgical and mental health or substance use disorder benefits under the health plan.

(3) The reason for any adverse benefit decision for mental health or substance use disorder benefits must be provided with the notification of the adverse benefit decision.

(4) Compliance with these disclosure requirements is not determinative of compliance with any other provisions of applicable federal or state law.

(5) If a health plan is subject to ERISA, it must provide the reason for the claim denial in a form and manner consistent with the requirements of 29 C.F.R. 2560.503-1.

#### NEW SECTION

**WAC 284-43-997 Compliance and reporting of quantitative parity analysis.** (1) Health plans and issuers must file a justification demonstrating the analysis of each plan's financial requirements and quantitative treatment limitations as required under WAC 284-43-993.

(2) Filing of this justification is subject to the requirements of chapters 284-44A, 284-46A, and 284-58 WAC and may be rejected and closed if it does not comply.

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

|                |  |
|----------------|--|
| WAC 284-53-005 | Definitions.                                   |
| WAC 284-53-010 | Standards for coverage of chemical dependency. |

#### **WSR 14-23-060**

##### **PERMANENT RULES**

#### **DEPARTMENT OF REVENUE**

[Filed November 17, 2014, 3:57 p.m., effective December 18, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 458-20-135 (Rule 135) Extracting natural products, is amended to add new language from SB 6505 (chapter 140, Laws of 2014) regarding persons producing marijuana and adds clarifying and updated language regarding wholesale sales. Rule 135 is amended at:

- Subsection (2)(a) by adding the language: "; or (iii) Persons producing marijuana."; and
- Subsection (3) by adding new language clarifying and updating the procedures extractors making wholesale sales must follow regarding resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, obtained from buyers to document the wholesale nature of the transaction.

Citation of Existing Rules Affected by this Order: Amending 1 [WAC 458-20-135].

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Other Authority: RCW 82.04.100.

Adopted under notice filed as WSR 14-18-059 on August 29, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: November 17, 2014.

Dylan Waits  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

**WAC 458-20-135 Extracting natural products.** (1) **Introduction.** This ~~((section))~~ rule explains the application of the business and occupation (B&O), retail sales, and use taxes to persons extracting natural products. Persons extracting natural products often use the same extracted products in a manufacturing process. ~~((The section))~~ This rule provides guidance for determining when an extracting activity ends and the manufacturing activity begins. In addition to all other taxes, commercial fishermen may be subject to the enhanced food fish excise tax levied by chapter 82.27 RCW (Tax on enhanced food fish).

Persons engaging in activities associated with timber harvest operations should refer to WAC 458-20-13501 (Timber harvest operations). Persons engaged in a manufacturing activity should also refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) and 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemptions for machinery and equipment).

(2) **Who is an "extractor"?** RCW 82.04.100 defines the term "extractor" to mean every person who, from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral, or other natural resource product. The term includes a person who fells, cuts, or takes timber, Christmas trees other than plantation Christmas trees, or other natural products. It also includes any person who takes fish, shellfish, or other sea or inland water foods or products.

(a) **Persons excluded from the definition of "extractor."** The term "extractor" does not include:

(i) Persons performing under contract the necessary labor or mechanical services for others (these persons are extractors for hire, see subsection (4) of this section); or

(ii) Persons who are farmers as defined in RCW 82.04.-213. Refer to WAC 458-20-209 and 458-20-210 for tax-reporting information for farmers and persons selling property to or performing horticultural services for farmers; or

(iii) Persons producing marijuana.

(b) **When an extractor is also a manufacturer.** An extractor may subsequently take an extracted product and use it as a raw material in a manufacturing process. The following examples explain when an extracting process ends and a manufacturing process begins for various situations. These examples should be used only as a general guide. A determination of when extracting ends and manufacturing begins for other situations can be made only after a review of all of the facts and circumstances.

(i) **Mining and quarrying.** Mining and quarrying operations are extracting activities, and generally include the screening, sorting, and piling of rock, sand, stone, gravel, or ore. For example, an operation that extracts rock, then screens, sorts, and with no further processing places the rock into piles for sale, is an extracting operation.

(A) The crushing and/or blending of rock, sand, stone, gravel, or ore are manufacturing activities. These are manufacturing activities whether or not the materials were previously screened or sorted.

(B) Screening, sorting, piling, or washing of the material, when the activity takes place in conjunction with crushing or blending at the site where the materials are taken or produced, is considered a part of the manufacturing operation if it takes place after the first screen. If there is no separate first screen, only those activities subsequent to the materials being deposited into the screen are considered a part of the manufacturing operation.

(ii) **Commercial fishing.** Commercial fishing operations, including the taking of any fish in Washington waters (within the statutory limits of the state of Washington) and the taking of shellfish or other sea or inland water foods or products, are extracting activities. These activities often include the removal of meat from the shell and the icing of fish or sea products.

(A) A person growing, raising, or producing a product of aquaculture as defined in RCW 15.85.020 on the person's own land or on land in which the person has a present right of possession is considered a farmer. RCW 82.04.213.

(B) Cleaning (removal of the head, fins, or viscera), filleting, and/or steaking fish are manufacturing activities. The cooking of fish or seafood is also a manufacturing activity. Refer to RCW 82.04.260 and WAC 458-20-136 for information regarding the special B&O tax rate/classification that applies to the manufacturing of seafood products that remain in a raw, raw frozen, or raw salted state.

(C) The removal of meat from the shell or the icing of fish or sea products, when the activity is performed in conjunction with and at the site where manufacturing takes place (e.g., cooking the fish or seafood), is considered a part of the manufacturing operation.

(3) **Tax-reporting responsibilities for income received by extractors.** Extractors are subject to the extracting B&O tax upon the value of the extracted products. (See WAC 458-20-112 regarding "value of products.") Extractors who sell the products at retail or wholesale in this state are subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the extractor must report under both the "production" (extracting) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit (MATC). See also WAC 458-20-19301 (Multiple activities tax credits) for a more detailed explanation of the MATC reporting requirements. Extractors that manufacture tangible personal property that they sell to buyers who will either resell the tangible personal property without any intervening use, or will include the tangible personal property as a component or ingredient in another product for sale by the buyer to another customer, are making wholesale sales. To document the wholesale nature of any transaction, sellers making wholesale sales must obtain from the buyer a resale certificate for sales made before January 1, 2010, or reseller permit for sales made on or after January 1, 2010. See also WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits) for a more detailed explanation of a seller's obligation to document its wholesale sales. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or until December 31, 2014, whichever first occurs.

For example, Corporation quarries rock without further processing. Corporation sells and delivers the rock to Landscaper, who is located in Washington. Landscaper provides Corporation with a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010. Corporation should report under both the extracting and wholesaling B&O tax classifications, and claim a MATC per WAC 458-20-19301. Had Corporation delivered the quarried rock to an out-of-state location, Corporation would have incurred only an extracting B&O tax liability.

(a) **When extractors use their products in a manufacturing process.** Persons who extract products, use these extracted products in a manufacturing process, and then sell the products all within Washington are subject to both "production" taxes (extracting and manufacturing) and the "selling" tax (wholesaling or retailing), and may claim the appropriate credits under the MATC. (See also WAC 458-20-136 on manufacturing.)

For example, Company quarries rock (an extracting activity), crushes and blends the rock (a manufacturing activity), and sells the resulting product at retail. The taxable value of the extracted rock is \$50,000 (the amount subject to the extracting B&O tax). The taxable value of the crushed and blended rock is \$140,000 (the amount subject to the manufacturing B&O tax). The crushed and blended rock is sold for \$140,000 (the amount subject to the retailing B&O tax). Assume the tax rates for the extracting and manufacturing B&O taxes are .00484, and the tax rate for the retailing B&O tax is .00471. Company should compute its tax liability as follows:

(i) **Reporting B&O tax on the combined excise tax return:**

(A) Extracting B&O tax liability of \$242 (\$50,000 x .00484);

(B) Manufacturing B&O tax liability of \$678 (\$140,000 x .00484); and

(C) Retailing B&O tax liability of \$659 (\$140,000 x .00471).

(ii) **Completing the multiple activities tax credit (Part II of Schedule C):**

| Activity which results in a tax credit                   | Taxable Amount | Business and Occupation Tax Reported |               |             |   | Total Credit |     |
|--|----------------|--------------------------------------|---------------|-------------|---|--------------|-----|
|  |                | Extracting                           | Manufacturing | Wholesaling | Retailing   |              |     |
| Washington extracted products manufactured in Washington | 50,000         | 242                                  | 242           |             |   | 242          |     |
| Washington extracted products sold in Washington         |                |                                      |               |             |   |              |     |
| Washington manufactured products sold in Washington      | 140,000        |                                      | 678           |             | 659   | 659          |     |
|  |                |                                      |               |             | Multiple Activities Tax Credit Subtotal of taxes paid to Washington state |              | 901 |
|  |                |                                      |               |             | Credit ID 800   | 901          |     |

Schedule C helps taxpayers calculate and claim the multiple activities tax credit provided by RCW 82.04.440. In the Schedule C example above, materials that a person extracts and then uses in a manufacturing process in Washington are entered at their value when extracting ceases and manufacturing begins (\$50,000 shown on the "Washington extracted products manufactured in Washington" line of the Schedule C). The taxable amount reported on the "Washington manufactured products sold in Washington" line of the Schedule C is the value of products at the point that manufacturing ceases (\$140,000), not simply the value added by the manufacturing activity. For more information and examples that are helpful in determining the value of products, refer to WAC 458-20-112 (Value of products).

(b) **When extractors sell their products at retail or wholesale.** An extractor making retail sales must collect and remit retail sales tax on all sales to consumers, unless the sale is exempt by law (e.g., see WAC 458-20-244 regarding sales of certain food products). Extractors making wholesale sales must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any transaction as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or until December 31, 2014, whichever first occurs.

(4) **Tax-reporting responsibilities for income received by extractors for hire.** Persons performing extracting activities for extractors are subject to the extracting for hire B&O tax upon their gross income from those services.

For example, a person removing ore, waste, or overburden at a mining pit for the operator of the mining operation is an extractor for hire. Likewise, a person drilling to locate or

provide access to a satisfactory grade of ore at the mining pit for the operator is also an extractor for hire. The gross income derived from these activities is subject to the extracting for hire B&O tax classification.

(5) **Mining or mineral rights.** Royalties or charges in the nature of royalties for granting another the privilege or right to remove minerals, rock, sand, or other natural resource product are subject to the service and other activities B&O tax. The special B&O tax rate provided by RCW 82.04.2907 does not apply because this statute specifically excludes compensation received for any natural resource. Refer also to RCW 82.45.035 and WAC 458-61-520 (Mineral rights and mining claims) for more information regarding the sale of mineral rights and the real estate excise tax.

Income derived from the sale or rental of real property, whether designated as royalties or another term, is exempt of the B&O tax.

(6) **Tax liability with respect to purchases of equipment or supplies and property extracted and/or manufactured for commercial or industrial use.** The retail sales tax applies to all purchases of equipment, component parts of equipment, and supplies by persons engaging in extracting or extracting for hire activities unless a specific exemption applies. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department.

(a) **Exemption available for certain manufacturing equipment.** RCW 82.08.02565 and 82.12.02565 provide retail sales and use tax exemptions for certain machinery and equipment used by manufacturers and processors for hire. While this exemption does not extend to extractors or extractors for hire, persons engaged in both extracting and manufacturing activities should refer to WAC 458-20-13601

for an explanation of how these exemptions may apply to them.

(b) **Property manufactured for commercial or industrial use.** Persons manufacturing tangible personal property for commercial or industrial use are subject to both the manufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use.)

If the person also extracts materials used in the manufacturing process, the extracting B&O tax is due on the value of the extracted materials and a MATC may be taken. For example, Quarry extracts rock, crushes the rock into desired size, and then uses the crushed rock in its parking lot. The use of the crushed rock by Quarry in its parking lot is a commercial or industrial use. Quarry is subject to the extracting and manufacturing B&O taxes and may claim a MATC. Quarry is also responsible for remitting use tax on the value of the crushed rock applied to the parking lot.

**WSR 14-23-064**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**LABOR AND INDUSTRIES**

[Filed November 18, 2014, 8:49 a.m., effective January 1, 2015]

Effective Date of Rule: January 1, 2015.

Purpose: Previously, athletic trainers' (AT) scope of practice was limited to care provided to athletes. In 2014, the legislature passed a new law (HB [SHB] 2430) expanding AT scope of practice to include treatment of injured workers. In April 2014, the AT organization requested that the department of labor and industries update its reimbursement rules, consistent with their expanded scope of practice, to allow reimbursement for AT services to injured workers. The effect of the rule change would be to expand the pool of licensed and qualified providers who could (within their scope of practice) provide treatment to injured workers.

Citation of Existing Rules Affected by this Order: Amending WAC 296-21-290 Physical medicine and 296-23-220 Physical therapy rules.

Statutory Authority for Adoption: RCW 51.04.020, 51.04.030.

Adopted under notice filed as WSR 14-19-086 on September 16, 2014.

Changes Other than Editing from Proposed to Adopted Version: Reference to RCW 18.74.180 (3)(a) was added to clarify the level of supervision required of a physical therapist assistant and reference to RCW 18.250.010 (4)(v) was added to clarify the level of supervision required of an athletic trainer. One housekeeping change was made in WAC 296-21-290 changing registered physical therapist to licensed physical therapist.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 2, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 2, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: November 18, 2014.

Joel Sacks  
Director

AMENDATORY SECTION (Amending WSR 00-09-078, filed 4/18/00, effective 7/1/00)

**WAC 296-21-290 Physical medicine. (1) Whom does the department authorize and pay for physical medicine or physical therapy services?** The department or self-insurer may authorize and pay for physical medicine services from the following providers:

- A medical or osteopathic physician who is "board certified or board qualified" in the field of physical medicine and rehabilitation; or
- A licensed physical therapist; or
- The injured worker's attending doctor, within the limitations listed below.

The physical medicine services must be personally performed by the:

- Physical medicine and rehabilitation physician; or
- Attending doctor; or
- Licensed physical therapist; or
- Physical therapist assistant employed by and serving under the direction of a (~~registered~~) licensed physical therapist, physical medicine and rehabilitation physician, or attending doctor as required in RCW 18.74.180 (3)(a); or
- Licensed athletic trainer employed by and serving under the direction of a licensed physical therapist, physical medicine and rehabilitation physician, or attending doctor as required in RCW 18.250.010 (4)(a)(v).

Note: Licensed physical therapy provider rules are contained in chapter 296-23 WAC.

**(2) When may the department or self-insurer pay the attending doctor for physical medicine services?** The department or self-insurer may pay the attending doctor to provide physical medicine modalities and/or procedures in the following situations:

- (a) The attending doctor's scope of practice includes physical medicine modalities and procedures.
- (b) Only the physical medicine modalities and procedures allowed under the department's fee schedules and payment policies will be authorized or paid.
- (c) No more than six physical medicine visits may be authorized and paid to the attending doctor. If the worker requires treatment beyond six visits, the worker must be referred to a licensed physical therapist or a board certified or qualified physical medicine and rehabilitation physician for

such treatment. Payments will be made in accordance with the department's fee schedules and payment policies.

(d) In remote areas, where no physical medicine and rehabilitation specialist, licensed physical therapist or physical therapist assistant is available, physical medicine visits required by the patient's accepted condition(s) may be authorized and paid to the attending doctor. Payments will be made in accordance with the department's fee schedules and payment policies.

(e) The attending doctor may bill for office visits in addition to the physical medicine services only when a separately identifiable office visit service is provided in addition to the physical medicine service.

**(3) What codes and fees are payable for physical medicine services?**

- The codes, reimbursement levels, and other policies for physical medicine services are listed in the department's *Medical Aid Rules and Fee Schedules*. Physicians licensed in physical medicine and licensed physical therapists use CPT and/or HCPCS codes, rules and payment policies as listed in the department's *Medical Aid Rules and Fee Schedules* or provider bulletins.

- Attending doctors must use the local codes, rules and payment policies published in the department's *Medical Aid Rules and Fee Schedules* or provider bulletins.

**AMENDATORY SECTION** (Amending WSR 14-09-094, filed 4/22/14, effective 7/1/14)

**WAC 296-23-220 Physical therapy rules.** Practitioners should refer to WAC 296-20-010 through 296-20-125 for general information and rules pertaining to the care of workers.

Refer to WAC 296-20-132 and 296-20-135 regarding the use of conversion factors.

All supplies and materials must be billed using HCPCS Level II codes. Refer to chapter 296-21 WAC for additional information. HCPCS codes are listed in the fee schedules.

Refer to chapter 296-20 WAC (WAC 296-20-125) and to the department's billing instructions for additional information.

Physical therapy treatment will be reimbursed only when ordered by the worker's attending doctor and rendered by a licensed physical therapist ((~~or~~)), a physical therapist assistant serving under the direction of a licensed physical therapist as required in RCW 18.74.180 (3)(a), or a licensed athletic trainer serving under the direction of a licensed physical therapist as required in RCW 18.250.010 (4)(a)(v). In addition, physician assistants may order physical therapy under these rules for the attending doctor. Doctors rendering physical therapy should refer to WAC 296-21-290.

The department or self-insurer will review the quality and medical necessity of physical therapy services provided to workers. Practitioners should refer to WAC 296-20-01002 for the department's rules regarding medical necessity and to WAC 296-20-024 for the department's rules regarding utilization review and quality assurance.

The department or self-insurer will pay for a maximum of one physical therapy visit per day. When multiple treatments (different billing codes) are performed on one day, the

department or self-insurer will pay either the sum of the individual fee maximums, the provider's usual and customary charge, or \$122.00 whichever is less. These limits will not apply to physical therapy that is rendered as part of a physical capacities evaluation, work hardening program, or pain management program, provided a qualified representative of the department or self-insurer has authorized the service.

The department will publish specific billing instructions, utilization review guidelines, and reporting requirements for physical therapists who render care to workers.

Use of diapulse or similar machines on workers is not authorized. See WAC 296-20-03002 for further information.

A physical therapy progress report must be submitted to the attending doctor and the department or the self-insurer following twelve treatment visits or one month, whichever occurs first. Physical therapy treatment beyond initial twelve treatments will be authorized only upon substantiation of improvement in the worker's condition. An outline of the proposed treatment program, the expected restoration goals, and the expected length of treatment will be required.

Physical therapy services rendered in the home and/or places other than the practitioner's usual and customary office, clinic, or business facilities will be allowed only upon prior authorization by the department or self-insurer.

No inpatient physical therapy treatment will be allowed when such treatment constitutes the only or major treatment received by the worker. See WAC 296-20-030 for further information.

The department may discount maximum fees for treatment performed on a group basis in cases where the treatment provided consists of a nonindividualized course of therapy (e.g., pool therapy; group aerobics; and back classes).

Biofeedback treatment may be rendered on doctor's orders only. The extent of biofeedback treatment is limited to those procedures allowed within the scope of practice of a licensed physical therapist. See chapter 296-21 WAC for rules pertaining to conditions authorized and report requirements.

Billing codes and reimbursement levels are listed in the fee schedules.

**WSR 14-23-065**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**LABOR AND INDUSTRIES**

[Filed November 18, 2014, 8:52 a.m., effective December 19, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The apprenticeship system in this state is authorized under the federal system of apprenticeship, specifically 29 C.F.R. Part 29 and 30. The apprenticeship program needs to proceed with rule making in response to the need for continued federal recognition of our state system of apprenticeship. The United States Department of Labor recently informed the department that there were a couple of areas the department needs to correct in order to be in full compliance with federal regulations. The department is proposed [pro-

posing] language to mitigate the concerns of the United States Department of Labor.

Citation of Existing Rules Affected by this Order: Amending WAC 296-05-003, 296-05-007, and 296-05-321.

Statutory Authority for Adoption: Chapter 49.04 RCW and RCW 19.285.040.

Other Authority: 29 C.F.R., Part 29.

Adopted under notice filed as WSR 14-17-087 on August 19, 2014.

Changes Other than Editing from Proposed to Adopted Version: The adopted language had one change from the text of the proposed rule as published in the CR-102. In WAC 296-05-003, a reference was added to the definition of "federal purposes" for clarification purposes.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 3, Repealed 0; Federal Rules or Standards: New 0, Amended 3, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 3, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 3, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: November 18, 2014.

Joel Sacks  
Director

**AMENDATORY SECTION** (Amending WSR 11-11-002, filed 5/4/11, effective 7/25/11)

**WAC 296-05-003 Definitions.** The following definitions apply to this chapter:

**Adjudicative proceeding:** A proceeding before the WSATC in which an opportunity for a hearing before the WSATC is authorized by chapter 49.04 RCW or these rules before or after the entry of an order by the WSATC.

**Apprentice:** Is a worker at least sixteen years of age who is employed to learn an apprenticeable occupation and is registered with a sponsor in an approved apprenticeship program according to chapter 49.04 RCW and these rules.

**Exception:** Seventeen years is the minimum age allowed for applicants registering in building and construction trade occupations.

**Apprenticeable occupation:** Is a skilled occupation which is recognized by the United States Department of Labor, Employment and Training Administration, Office of Apprenticeship or the WSATC and meets the criteria established in WAC 296-05-305.

**Apprenticeship agreement:** A written agreement between an apprentice and either the apprentice's employer(s), or an apprenticeship committee acting as agent for employer(s), containing the terms and conditions of the employment and training of the apprentice.

**Apprenticeship committee:** A quasi-public entity approved by the WSATC to perform apprenticeship and training services for employers and employees.

**Apprenticeship program:** A plan for administering an apprenticeship agreement(s). The plan must contain all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

**Approved:** Approved by the WSATC or a person or entity authorized by the WSATC to do so.

**C.F.R.:** The Code of Federal Regulations.

**Cancellation:** The termination of the registration or approval status of a program at the request of the supervisor or sponsor. Cancellation also refers to the termination of an apprenticeship agreement at the request of the apprentice, supervisor, or sponsor.

**Certificate of completion:** A record of the successful completion of a term of apprenticeship (see WAC 296-05-323).

**Certification:** Written approval by the WSATC of:

(1) A set of apprenticeship standards established by an apprenticeship program sponsor and substantially conforming to the standards established by the WSATC.

(2) An individual as eligible for probationary employment as an apprentice under a registered apprenticeship program.

**Committee program:** All apprenticeship programs as further described in WAC 296-05-309.

**Competent instructor:** An instructor who has demonstrated a satisfactory employment performance in his/her occupation for a minimum of three years beyond the customary learning period for that occupation and:

(1) Meets the state board for community and technical colleges requirements for a vocational-technical instructor, or be a subject matter expert, which is an individual, such as a journey worker, who is recognized within an industry as having expertise in a specific occupation; and

(2) Has training in teaching techniques and adult learning styles, which may occur before or within one year after the apprenticeship instructor has started to provide the related technical instruction.

**Competitor:** A competing apprenticeship program that provides training in the same or overlapping occupation as the proposed program in the same geographic area proposed. In determining whether an occupation is the same or overlapping as the proposed program's occupation, the council may consider the following:

(1) Washington state apprenticeship and training council approved apprenticeship standards;

(2) Collective bargaining agreements;

(3) Dictionaries of occupational titles;

(4) Experts from organized labor, licensed contractors, and contractors' associations;

(5) Recognized labor and management industry practice;

(6) Scope of work descriptions issued by the department.

**Completion rate:** The percentage of an apprenticeship cohort who receives a certificate of apprenticeship completion within one year of the projected completion date. An apprenticeship cohort is the group of individual apprentices

registered to a specific program during a one year time frame, except that a cohort does not include the apprentices whose apprenticeship agreement has been canceled during the initial probationary period.

**Compliance review:** A comprehensive review conducted by the apprenticeship section of the department of labor and industries regarding all aspects of an apprenticeship program's performance including, but not limited to, determining if apprentices are receiving: On-the-job training in all phases of the apprenticeable occupation; scheduled wage increases consistent with the registered standards; related instruction through appropriate curriculum and delivery systems; and that the registration agency is receiving notification of all new registrations, cancellations, and completions as required in this chapter.

**Current instruction:** The related/supplemental instructional content is and remains reasonably consistent with the latest occupational practices, improvements, and technical advances.

**Department:** The department of labor and industries.

**Employer:** Any person or organization employing an apprentice whether or not such person or organization is a party to an apprenticeship agreement with the apprentice. "Employer" includes both union and open shop employers.

**Federal purposes:** Includes any federal contract, grant, agreement or arrangement dealing with apprenticeship, and any federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship as per 29 C.F.R. Part 29.2.

**File:** To send to:

Supervisor of Apprenticeship and Training  
Department of Labor and Industries  
Apprenticeship Section  
Post Office Box 44530  
Olympia, Washington 98504-4530

Or deliver to and receipt at:  
Department of Labor and Industries  
7273 Linderson Way SE  
Tumwater, Washington 98501

**Individual agreement:** A written agreement between an apprentice and/or trainee and either the apprentice's employer or an apprenticeship committee acting as agent for the employer.

**Industry wide standards:** The current, acceptable practices, including technological advancements, being used in the different occupations.

**Journey level:** An individual who has sufficient skills and knowledge of an occupation, either through formal apprenticeship training or through practical on-the-job work experience, to be recognized by a state or federal registration agency and/or an industry as being fully qualified to perform the work of the occupation. Practical experience must be equal to or greater than the term of apprenticeship.

**Notice:** Where not otherwise specified, notice means posted in United States mail to the last known address of the person to be notified. Notice may be given by telefacsimile where copies are mailed simultaneously or by a commercial parcel delivery company.

**On-the-job training program:** A program that is set up in the same manner as an apprenticeship program with any exceptions authorized by the WSATC and as further described in WAC 296-05-311.

~~((Notice: Where not otherwise specified, notice means posted in United States mail to the last known address of the person to be notified. Notice may be given by telefacsimile where copies are mailed simultaneously or by a commercial parcel delivery company.))~~

**Petitions, requests, and correspondence:** Any written business brought before the WSATC (examples may include: (1) Requests for new committees; (2) Requests for revisions to the standards; and (3) Appeals).

**Probation:** (1) Initial: A period of time reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship. The initial probationary period cannot exceed twenty percent of the term of the program, or one year from the date of registration, whichever is shorter. Initial probationary apprentices are not subject to an appeal under the complaint review procedures as defined in WAC 296-05-009. Transferred apprentices are not subject to additional initial probationary periods.

(2) Disciplinary: A time assessed when the apprentice's progress is not satisfactory. During this time the program sponsor may withhold periodic wage advancements, suspend or cancel the apprenticeship agreement, or take further disciplinary action. A disciplinary probation may only be assessed after the initial probation is completed. During the disciplinary probation, the apprentice has the right to file an appeal of the committee's action with the WSATC (as described in WAC 296-05-009).

**Provisional registration:** The one-year initial approval of newly registered programs that meet the required standards for program registration, after which the program approval may be made permanent, continued as provisional through the first full training cycle/term, or rescinded following a compliance review by the apprenticeship section of the department.

**RCW:** The Revised Code of Washington.

**Registration:** (1) For the purposes of an apprenticeship agreement means the acceptance and recording of an apprenticeship agreement by the apprenticeship section of the department of labor and industries as evidence of the apprentice's participation in a particular registered apprenticeship program.

(2) For the purposes of an apprenticeship program means the acceptance and recording of such program by the WSATC and apprenticeship section of the department of labor and industries, as meeting the basic standards and requirements of the department for approval of such program. Approval is evidenced by a certificate of registration or other written indicia.

**Registration agency:** The apprenticeship section of the Washington state department of labor and industries is responsible for registering apprenticeship programs and apprentices; providing technical assistance; conducting reviews for compliance with 29 C.F.R. parts 29 and 30, chapters 49.04 RCW and 296-05 WAC.

**Regular quarterly meeting:** A public meeting held quarterly by the WSATC as described in WAC 296-05-200.

**Related/supplemental instruction:** An organized and systematic form of instruction designed to provide the apprentice with knowledge of the theoretical and technical subjects related to the apprentice's occupation. Such instruction may be given in a classroom, through occupational or industrial courses, or by correspondence courses of equivalent value, electronic media, or other forms of self-study approved by the registration agency.

**Secretary:** The individual appointed by the director of the department according to RCW 49.04.030.

**Special meeting:** A public meeting of the council as described in WAC 296-05-203.

**Sponsor:** Any person, firm, association, committee, or organization operating an apprenticeship and training program and in whose name the program is registered or is to be registered.

**Standards:** Is a written agreement containing specific provisions for operation and administration of the apprenticeship program and all terms and conditions for the qualifications, recruitment, selection, employment, and training of apprentices, as further defined in WAC 296-05-316.

**Supervision:** The necessary education, assistance, and control provided by a journey-level employee that is on the same job site at least seventy-five percent of each working day, unless otherwise approved by the WSATC.

**Supervisor:** The individual appointed by the director of the department according to RCW 49.04.030 who acts as the secretary of the WSATC. Where these rules indicate a duty of the supervisor or secretary of the WSATC, the supervisor may designate a department of labor and industries' employee to assist in the performance of those duties subject to the supervisor's oversight and direction.

**Trainee:** An individual registered with the supervisor according to WAC 296-05-311.

**Training agent:** Employer of registered apprentices approved by the program sponsor to furnish on-the-job training to satisfy the approved apprenticeship program standards who agrees to employ registered apprentices in that work process. The training agent shall use only registered apprentices to perform the work processes of the approved program standards.

**Training agreement:** A written agreement between a training agent and a program sponsor that contains the provisions of the apprenticeship program applicable to the training agent and the duties of the training agent in providing on-the-job training.

**Transfer:** A shift of apprenticeship registration from one sponsor to another where there is written agreement between the apprentice and the affected apprenticeship committees or program sponsors.

**WAC:** The Washington Administrative Code.

**WSATC:** The Washington state apprenticeship and training council.

**AMENDATORY SECTION** (Amending WSR 13-03-127, filed 1/22/13, effective 3/1/13)

**WAC 296-05-007 Rules of procedure.** All hearings and adjudication, under chapter 49.04 RCW and these rules, shall be conducted according to chapter 34.05 RCW, the

Administrative Procedure Act and chapter 10-08 WAC, Model Rules of Procedure. The chair (or designee) is the presiding officer for adjudicative proceedings, held before the WSATC. The WSATC may either adjudicate matter(s) itself, or refer matter(s) to the office of administrative hearings for initial adjudication.

If the initial adjudication is before the WSATC, the WSATC will enter a final order. If the initial adjudication has been held at the office of administrative hearings, the administrative hearings judge shall issue an initial order. The WSATC, upon review of the initial order shall enter the final order. An initial order shall become final without further WSATC action five business days after the next regular quarterly meeting unless:

(1) The WSATC upon its own motion determines that the initial order should be reviewed; or

(2) A party to the proceedings files a petition for review of the initial order.

The WSATC, upon review of the initial order shall enter the final order. The WSATC may appoint a person to review the initial order and prepare and enter the final WSATC order.

(3) Final WSATC orders or decisions affecting registration and oversight of apprenticeship programs and agreements for federal purposes may be appealed within thirty calendar days to the director of the department pursuant to the following:

(a) An appellant must file with the director an original and four copies of the notice of appeal.

(i) The notice of appeal must specify findings and conclusions at issue in the appeal.

(ii) The director or designee shall serve notice of receipt of the appeal, including copies of the appeal on all parties within five business days from date of receipt.

(iii) The respondent parties may file with the director or designee written arguments within thirty calendar days after the date the notice of receipt of appeal was served upon them.

(b) The director or designee shall review the record in accordance with the Administrative Procedure Act, chapter 34.05 RCW. The director or designee shall issue a final decision affirming, modifying, or reversing the WSATC final order or decision or may remand the matter to the WSATC for further proceedings.

(c) With respect to cancellation of programs only, any aggrieved party may appeal, for federal purposes, a final decision by the director (or director's designee) by following the procedures in WAC 296-05-321(11).

(d) Any aggrieved party may appeal the final decision to superior court pursuant to chapter 34.05 RCW. If no party appeals within the period set by RCW 34.05.542, the director's decision is final and binding on all parties.

**AMENDATORY SECTION** (Amending WSR 11-11-002, filed 5/4/11, effective 7/25/11)

**WAC 296-05-321 Apprenticeship agreement—Cancellation.** The supervisor may recommend that an agreement and program be canceled when a program does not comply with these rules or the program's standards. The procedures for cancellation are as follows:

(1) When any program is found to be operating inconsistently or contrary to these rules or its established program standards, the supervisor must notify the offending committee, person, firm or agency of the violation(s).

(2) The offending committee, firm, or agency has sixty calendar days to correct the violation(s).

(3) If the supervisor does not receive notice, within sixty calendar days, that action has been taken to correct the violations, the supervisor may recommend cancellation of the apprenticeship or training program and agreement to the WSATC.

(4) A recommendation to cancel a program must be in writing, addressed to each WSATC member, and detail the reasons for the recommendation.

(5) A copy of the recommendation, along with a notice that the WSATC will consider the recommendation, must be mailed to the last known address of each member of the committee administering said program, or to those persons responsible for the program.

(6) The WSATC must consider the recommendation at its next regularly scheduled quarterly meeting. However, at least thirty calendar days must pass between the date of the recommendation and the date of the regular quarterly meeting. If thirty calendar days have not passed, the recommendation must be considered at the subsequent regular quarterly meeting.

(7) At the regular quarterly meeting, all interested person(s) may present evidence or testimony regarding the recommendation.

(8) The WSATC must act on the recommendation by a majority vote of the members present and voting.

(9) Once the WSATC has voted, it must give written notification of its decision to all interested parties along with the reasons supporting it.

(10) The cancellation of any program or agreement automatically cancels any agreement(s) registered under them. However, any organization or firm not responsible for the violations that caused the cancellation may petition the WSATC for approval of the canceled agreement or program as a new program.

(11) An apprenticeship program disputing a notice of involuntary cancellation for federal purposes may obtain an administrative hearing from the U.S. Department of Labor by filing a written request for a hearing.

(a) The request for a federal hearing must be filed within fifteen days from the date of the mailing of the notices of involuntary cancellation sent by the department to the apprenticeship program, as provided by 29 C.F.R. 29.8(b)(5). The request for a federal hearing must identify the apprenticeship program and contain a brief description of the reason why the program believes it should not be involuntarily canceled for federal purposes. The written request for a federal hearing must be sent:

(i) If by mail, to:

Apprenticeship Section  
Washington State Department of Labor and Industries  
P.O. Box 44530  
Olympia, WA 98504-4530;

(ii) If by physical delivery, to:

Apprenticeship Section  
Washington State Department of Labor and Industries  
7273 Linderson Way S.W.  
Tumwater, WA 98501-5414;

(iii) If by facsimile (fax), to 360-902-4248; and

(iv) If by e-mail, to [apprentice@lni.wa.gov](mailto:apprentice@lni.wa.gov).

"Filing" or "filed" for purposes of this subsection means actual receipt by the department during regular office hours.

(b) The department must promptly forward the sponsor's request for a federal administrative hearing to the U.S. Department of Labor, Office of Apprenticeship and notify the sponsor that it has done so.

(c) The federal administrative hearing regarding the proposed involuntary cancellation of an apprenticeship program for federal purposes is governed by the provisions of 29 C.F.R. 29.8(b) and by such other federal regulations as deemed applicable by the secretary of the U.S. Department of Labor.

(12) Outcomes of administrative proceedings and appeals under state law only affect the registration status of the program for Washington purposes and projects. Outcomes of administrative proceedings and appeals under federal law only affect the registration status of the program for federal purposes and projects.

## WSR 14-23-068

### PERMANENT RULES

### PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed November 18, 2014, 10:07 a.m., effective December 19, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends WAC 181-78A-264 to clarify requirements for effective recruitment and focus on shortage content areas.

Citation of Existing Rules Affected by this Order:  
Amending WAC 181-78A-264.

Statutory Authority for Adoption: RCW 28A.410.210.

Adopted under notice filed as WSR 14-20-016 on September 19, 2014.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 400, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail [david.brenna@k12.wa.us](mailto:david.brenna@k12.wa.us).

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 1, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: November 13, 2014.

David Brenna  
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 14-07-067, filed 3/17/14, effective 4/17/14)

**WAC 181-78A-264 Approval standard—Program design.** ~~((Building on the mission to prepare educators who demonstrate a positive impact on student learning, evidence shall be evaluated to determine whether each preparation program is in compliance with the program design standard of WAC 181-78A-220(4):))~~

(1) Conceptual framework.

(a) The conceptual framework establishes the shared vision for the unit's efforts in preparing educators to work effectively in P-12 schools.

(b) The conceptual framework:

~~((a))~~ (i) Provides coherence among curriculum, instruction, field experiences, clinical practice, candidate assessment, and program evaluation;

~~((b))~~ (ii) Establishes the philosophy, purpose, goals, and standards of the program or unit;

~~((c))~~ (iii) Reflects renewing commitment to current research and best practices; and

~~((d))~~ (iv) Supports the state's goals for P-12 student learning and program approval Standard V.

(2) ~~((Recruitment, admission, retention, and transition to the field))~~ Transition elements.

(a) Programs recruit, admit, retain, and transition candidates to the field who(~~(=~~

~~(i) Demonstrate the content and pedagogical knowledge and skills for success as educators in schools;~~

~~(ii) Demonstrate the dispositions of a professional educator;~~

~~(iii) Address the program, state and partner districts' goals for increasing underrepresented populations in the workplace;~~

~~(iv) Address the content areas identified by work force data of the state and region))~~ meet program goals and state standards.

(b) Learner expectations for program requirements, progression, and completion are identified, published, and accessible.

(c) Faculty regularly review recruitment and retention data for effectiveness of program.

(i) Programs create, implement and communicate a recruitment and retention plan in response to data.

(ii) Programs annually report the data, the plan, and proposed modifications to the professional educator advisory board and other stakeholder groups supporting the program's efforts.

(iii) Program completers meet the state and partner districts' goals for increasing underrepresented populations in the workplace.

(iv) Program completers hold endorsements in shortage content areas identified by workforce data of the state and region.

(3) Field experiences and clinical practice.

(a) The program(s) and its school partners design, implement, and evaluate field experiences and clinical practices.

(b) Field experiences are integrated throughout the preparation program.

(i) Field experiences provide opportunity to plan, practice and reflect on methods of instruction and differentiation;

(ii) Field experiences provide ~~((opportunity))~~ opportunities to work ((in communities with populations dissimilar to the background of the candidate)) with diverse communities and populations, e.g., racial and ethnic, low socioeconomic, and English language learners;

(iii) Faculty supervision, including on-site visits, will be provided on an on-going basis.

(c) Mentors are instructional leaders identified collaboratively with the partner school of district.

(i) Mentors and principals are provided with a set of internship expectations;

(ii) Mentors receive or provide evidence of training on mentoring of adult learners;

(iii) Mentors must be fully certificated school personnel and have a minimum of three years of professional experience in the role they are supervising;

(iv) Effectiveness of mentor preparation and communication are reviewed annually by faculty.

(d) All Washington educator preparation programs operating field experiences in Washington state shall establish and maintain field placement agreements with all Washington school districts in which candidates are placed for field experiences leading to certification or endorsement under WAC 181-78A-125.

(e) Entry and exit criteria and a process for mitigating concerns during clinical practice are provided for candidates and the mentor.

(f) Requirements for specific educator preparation programs.

(i) Teacher programs.

(A) Programs shall administer the teacher performance assessment adopted by the professional educator standards board to all candidates in a residency certificate program.

(B) Clinical practice (defined as supervised planning, instruction, and reflection) for teacher candidates should consist of no less than four hundred fifty hours in classroom settings.

(ii) School counselor programs.

(A) Candidates complete a supervised internship in the schools that includes a minimum of four hundred hours of on the job professional service and one hour per week of individual supervision provided by the mentor.

(B) Prior to the internship, the candidate will complete a faculty supervised practicum (a distinctly defined clinical experience intended to enable the candidate to develop basic counseling skills and integrate professional knowledge).

(iii) School psychology programs.

(A) Candidates complete a supervised internship in the schools that includes a minimum of one thousand two hun-

dred hours of on the job professional service and one hour per week of individual supervision provided by the mentor.

(B) Prior to the internship, the candidate will complete a faculty supervised practicum (a distinctly defined clinical experience intended to enable the candidate to develop basic school psychology skills and integrate professional knowledge).

(iv) Administrator programs.

(A) The internship for administrators shall take place in an education setting serving under the general supervision of a certificated practitioner who is performing in the role for which certification is sought.

(B) Components of the required internship shall include demonstration by the candidate that he or she has the appropriate, specific relevant skills pursuant to WAC 181-78A-270.

(C) An approved preparation program for superintendents shall require an internship of at least three hundred sixty hours.

(D) An approved preparation program for principals shall require for those persons beginning their internship August 1, 2009, and after, an internship which requires practice as an intern during the full school year. A "full school year" shall mean five hundred forty hours of which at least one-half shall be during school hours, when students and/or staff are present: Provided further, That an approved preparation program for principals shall require an internship that shall include demonstration by the candidate that she or he has the appropriate, specific skills pursuant to the standards identified in WAC 181-78A-270(2) and meets, at minimum, the standards-based benchmarks approved and published by the professional educator standards board. The benchmarks may not be changed without prior professional educator standards board approval.

(4) (~~(Program and faculty))~~ Collaboration.

(a) Faculty within the program and unit collaborate for continuous program improvement.

(b) Faculty collaborate with content area specialists.

(c) Programs collaborate with P-12 schools to assess and respond to work force, student learning, and professional development needs.

(d) Faculty collaborate with members of the broader professional community.

(e) Faculty collaborate with members of under-represented populations for program improvement.

(5) Diversity in learning experiences.

(a) Candidates have significant interaction with diverse populations including colleagues, faculty, P-12 practitioners, and P-12 students and families.

(i) Candidates reflect on interactions with diverse populations in order to integrate professional growth in cultural competency as a habit of practice.

(ii) Candidates integrate their cultural and linguistic backgrounds into classroom activities in order to build the multicultural capacity of the preparation program cohort.

(b) Faculty model equity pedagogy through:

(i) Interaction with diverse populations;

(ii) Reflective practice on their own professional growth in cultural competency;

(iii) Culturally relevant communication and problem solving; and

(iv) Personalized instruction that addresses cultural and linguistic backgrounds.

**WSR 14-23-072**  
**PERMANENT RULES**  
**SUPERINTENDENT OF**  
**PUBLIC INSTRUCTION**

[Filed November 18, 2014, 11:02 a.m., effective December 19, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The revisions to chapter 392-190 WAC are necessary to clarify the requirements and scope of office of superintendent of public instruction (OSPI) monitoring and provide a more efficient and equitable resolution of discrimination complaints for families, school districts, and public charter schools. The final rules should encourage families, school districts, and public charter schools to resolve concerns about discrimination at the lowest level possible and reduce the likelihood that these matters will be taken to court. OSPI anticipates that the revised rules will result in a less adversarial and more cooperative process to resolve discrimination complaints and will ease the financial and emotional burden on families and school districts when confronting these issues.

Citation of Existing Rules Affected by this Order: Repealing WAC 392-190-015, 392-190-026, 392-190-035 and 392-190-078; and amending WAC 392-190-005, 392-190-010, 392-190-020, 392-190-025, 392-190-030, 392-190-040, 392-190-045, 392-190-050, 392-190-055, 392-190-056, 392-190-057, 392-190-058, 392-190-059, 392-190-0591, 392-190-0592, 392-190-060, 392-190-065, 392-190-070, 392-190-076, 392-190-077, 392-190-079, 392-190-080, 392-190-081, and 392-190-082.

Statutory Authority for Adoption: RCW 28A.640.020 and 28A.642.020.

Adopted under notice filed as WSR 14-15-081 on July 17, 2014.

Changes Other than Editing from Proposed to Adopted Version: The differences between the proposed rules and the final adopted rules are described below. OSPI made these changes in response to comments we received, to ensure clarity and consistency, and to meet the intent of the authorizing statutes (chapters 28A.640 and 28A.642 RCW).

| WAC              | Edit/Change   |
|------------------|---|
| All              | Revised "gender expression or identity" to "gender expression, gender identity" in WAC 392-190-005, 392-190-010, 392-190-020, 392-190-025, 392-190-046, 392-190-050, 392-190-055, 392-190-0555, 392-190-0591, 392-190-0592, and 392-190-060.  |
| WAC 392-190-005  | WAC 392-190-005 has been revised to state: "In accordance with RCW 28A.640.020 and 28A.642.020, the office of superintendent of public instruction will develop guidelines to supplement this chapter and to guide its interpretation and administrative enforcement of chapters 28A.640 and 28A.642 RCW <u>under WAC 392-190-060 through 392-190-081</u> . <u>Under RCW 28A.640.050 and 28A.642.050</u> , the office of superintendent of public instruction has the authority to enforce the <u>guidelines and this chapter</u> ."  |
| WAC 392-190-007  | WAC 392-190-005 [WAC 392-190-007] has been revised to state: "For purposes of administrative enforcement of this chapter <u>under WAC 392-190-060 through 392-190-081</u> , and unless otherwise provided in this chapter <u>or in the guidelines adopted under WAC 392-190-005</u> , the office of superintendent of public instruction adopts the definitions, requirements, and procedural safeguards set forth <u>by the United States Department of Education pursuant to</u> Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964."   |
| WAC 392-190-010  | <p>In WAC 392-190-010(2), the words "based on factors other than" have been replaced with "regardless of."</p> <p>WAC 392-190-010(5) has been revised to state: "If a school district or public charter school concludes that the use of <u>tests and appraisal</u> instruments, <u>career and vocational guidance</u> materials, <u>work/study</u> programs, <u>or educational scheduling or placement</u> has resulted in a substantially disproportionate number of students who are members of one of the groups identified in WAC 392-190-005 in any particular course of study or classification, the school district or charter school must take prompt action to ensure that the disproportion is not the result of discrimination in the instrument or material, or its application."</p> <p>The words "by counselors" have been removed from WAC 392-190-010 (6)(f).</p>  |
| WAC 392-190-020  | In WAC 392-190-020, the words "offer or" have been removed and the word "all" has been added before "administrators and certificated and classroom personnel." WAC 392-190-020 has also been revised to provide that "all administrators and certificated and classroom personnel" includes the school district or public charter school employee designated under WAC 392-190-060.   |
| WAC 392-190-025  | The following language has been removed from WAC 392-190-025(2): "unless the sport involved is a contact sport. For the purposes of this section, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports in which the purpose or major activity involves bodily contact."  |
| WAC 392-190-048  | The words "and corrective action" have been added to the title of WAC 392-190-048 and the section has been revised to state: "... review data on <u>corrective and</u> disciplinary actions taken against students within each school disaggregated by sex, race, limited-English proficiency (i.e., English language learners), and disability, including students protected under Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. This review must include, but is not limited to, short-term suspensions, long-term suspensions, expulsions, and <u>emergency expulsions</u> . In reviewing this data, each school district or public charter school must determine whether it has disciplined <u>or applied corrective action</u> to a substantially disproportionate number of students within any of the categories identified in this section. If a school district or public charter school finds that it has disciplined <u>or applied corrective action</u> to a substantially disproportionate number of students ...". |
| WAC 392-190-0555 | <p>The following subsections of WAC 392-190-0555 have been revised to state:</p> <p>WAC 392-190-0555(1): "For purposes of administrative enforcement of this chapter <u>under WAC 392-190-060 through 392-190-081</u>, a school district or public charter school violated a student's rights regarding discriminatory harassment, including sexual harassment <u>under WAC 392-190-056</u> ...".</p>   |

| WAC             | Edit/Change  |
|-----------------|--|
|                 | <p>WAC 392-190-0555 (1)(c): "The school district or public charter school, upon notice, fails to <u>take prompt and appropriate action to investigate or fails to take prompt and effective steps reasonably calculated to end the harassment ...</u>".</p> <p>WAC 392-190-0555(2): "For purposes of administrative enforcement of this chapter <u>under WAC 392-190-060 through 392-190-081 ...</u>".</p>   |
| WAC 392-190-058 | <p>The following language has been added to WAC 392-190-058(2): "School districts and public charter schools that do not provide such a publication must provide written information about the district's or charter school's sexual harassment policy and complaint procedure to each student, parent or guardian, employee, and volunteer."</p>  |
| WAC 392-190-059 | <p>WAC 392-190-059(2), the words "the school district staff member who receives the report" have been replaced with "the school district's harassment, intimidation, and bullying compliance officer, designated under RCW 28A.300.285" to ensure consistency with RCW 28A.300.285.</p> <p>WAC 392-190-059 (2) and (3) have been revised to state:</p> <p>"(2) Upon receipt of this information, the designated employee must notify the complainant that their complaint will <u>also</u> proceed under the discrimination complaint procedure in WAC 392-190-065 through 392-190-075, <u>in addition to the procedures adopted under RCW 28A.300.285. School districts must provide this notice in a language that the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964 ...</u></p> <p>(3) This section is not intended to limit the scope of RCW 28A.300.285 <u>or the use of a school district's procedures adopted under RCW 28A.300.285.</u>"</p>  |
| WAC 392-190-060 | <p>WAC 392-190-060 has been revised to state, "The employee designated under this section is also responsible for <u>ensuring that all</u> complaints communicated to the school district or public charter school under WAC 392-190-065 <u>are promptly investigated and resolved.</u>"</p>   |
| WAC 392-190-065 | <p>WAC 392-190-065(4) has been revised to provide that, "Upon receipt of the complaint, the employee or employees designated under WAC 392-190-060 must:</p> <p>(a) Provide the complainant a copy of the school district's or public charter school's discrimination complaint procedure <u>in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964; and</u></p> <p>(b) <u>Ensure that the school district or public charter school conducts a prompt and thorough investigation into the allegations in the complaint.</u>"</p> <p>The following language was added to WAC 392-190-065(5): "this notice must be provided in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964."</p> <p>The following sentence was added to WAC 392-190-065(9): "The school district and public charter school must provide this notice in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964."</p> |
| WAC 392-190-075 | <p>The words "or public charter school" have been added to WAC 392-190-075(1). The following sentence was also added to WAC 392-190-075(3): "The office of superintendent of public instruction will provide this written decision in a language that the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964."</p>   |

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 5, Amended 24, Repealed 4.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 5, Amended 24, Repealed 4.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 5, Amended 24, Repealed 4.

Date Adopted: August 29, 2014.

Randy Dorn  
Superintendent of  
Public Instruction

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-005 Purpose—Elimination of unlawful discrimination in public schools.** The purpose of this chapter is to establish rules ~~((and regulations which))~~ to implement chapters 28A.640 and 28A.642 RCW. ~~((The referenced enactments))~~ Chapters 28A.640 and 28A.642 RCW prohibit discrimination on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal by a person with a disability in Washington public schools, including public charter schools. Broad federal regulations implementing Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Titles VI and VII of the Civil Rights Act of 1964 similarly prohibit discrimination based on sex, race, creed, religion, color, national origin, and disability~~((;))~~ in federally assisted education programs or activities. As a result, several substantive areas have been similarly identified and addressed by both state and federal enactments.

~~((It is the intent of this chapter to encompass those similar substantive areas addressed by federal civil rights authorities and in some aspects extend beyond those authorities. Accordingly, compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter, but school districts should be aware that compliance with federal civil rights laws alone may not constitute compliance with this chapter.))~~

In accordance with chapters 28A.640 and 28A.642 RCW and RCW 28A.710.040, it is unlawful for any public school district or public charter school to discriminate on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal with regard to any program or activity conducted by or on behalf of a school district or public charter school including, but not limited to, recreational and athletic activities, extracurricular activities, preschool, adult education, community education, and vocational-technical program activities.

In accordance with RCW 28A.640.020 and 28A.642.020, the office of superintendent of public instruction will develop guidelines to supplement this chapter and to guide its

interpretation and administrative enforcement of chapters 28A.640 and 28A.642 RCW under WAC 392-190-060 through 392-190-081. Under RCW 28A.640.050 and 28A.642.050, the office of superintendent of public instruction has the authority to enforce the guidelines and this chapter.

#### NEW SECTION

**WAC 392-190-007 Compliance with federal law.** For purposes of administrative enforcement of this chapter under WAC 392-190-060 through 392-190-081, and unless otherwise provided in this chapter or in the guidelines adopted under WAC 392-190-005, the office of superintendent of public instruction adopts the definitions, requirements, and procedural safeguards set forth by the United States Department of Education pursuant to Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964.

#### **COUNSELING AND GUIDANCE SERVICES**

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-010 Counseling and guidance services—~~((Career opportunities—Internal procedures))~~ Course and program enrollment.** (1) ~~((No school district shall engage in discrimination))~~ School districts and public charter schools must not discriminate against any person on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal in the counseling or guidance of students ~~((in grades K-12)).~~

(2) Each school district and public charter school must ~~((devise))~~ develop and use materials, orientation programs, and counseling techniques that ~~((will))~~ encourage participation in all school programs and courses of study ~~((based on factors other than))~~, including career and vocational technical programs and employment opportunities, regardless of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal. School districts and public charter schools must encourage students to explore subjects ~~((and))~~, activities, and occupations not traditional for their sex.

(3) Each school district ~~((which))~~ and public charter school that uses testing and other materials for counseling students must not use different materials for students based on their sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal. A school district or public charter school may use different materials for students on the basis of their sex, race, creed, religion, color,

national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal if:

(a) ~~((Such))~~ The different materials ~~((cover))~~ address the same occupations and interest areas; and

(b) The use of ~~((such))~~ different materials is ~~((demonstrated to be))~~ essential to eliminate bias based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal.

(4) Each school district and public charter school must develop and use internal procedures ~~((for ensuring))~~ to ensure that all tests and appraisal instruments related to guidance counseling, career and vocational guidance materials, work/study programs and opportunities, and educational scheduling ~~((and/or))~~ or placement do not discriminate on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal.

(5) If a school district or public charter school concludes that the use of ~~((such))~~ tests and appraisal instruments, career and vocational guidance materials, ~~((or))~~ work/study programs ~~((results))~~, or educational scheduling or placement has resulted in a substantially disproportionate number of students who are members of one of the groups identified in WAC 392-190-005 ~~((to be placed))~~ in any particular course of study or classification, the school district or charter school must take ~~((such immediate))~~ prompt action ~~((as is necessary to assure))~~ to ensure that ~~((such))~~ the disproportion is not the result of discrimination in the instrument ~~((;))~~ or material, or its application.

(6) At least annually, each school district and public charter school must review student enrollment data within courses and programs disaggregated by sex, race, limited-English proficiency (i.e., English language learners), and disability, including students protected under Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. In its review of this data, the school district or public charter school must determine whether a substantially disproportionate number of students within these categories are enrolled in a particular course or program. Where a school district or public charter school finds that a particular ~~((class))~~ course or program contains a substantially disproportionate number of students who are members of any one of the ~~((groups))~~ categories identified in ~~((WAC 392-190-005))~~ this section, the district or charter school must take ~~((such immediate))~~ prompt action ~~((as is necessary to assure))~~ to ensure that ~~((such))~~ the disproportion is not the result of discrimination ~~((on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal))~~, including in:

- (a) The identification and selection of students;
- (b) Course and program enrollment criteria;
- (c) Tests and appraisal instruments;
- (d) Academic, career, and vocational guidance materials ~~((;))~~;
- (e) Work/study programs and opportunities ~~((; and))~~;
- (f) Educational scheduling ~~((and/or))~~ or placement ~~((by counselors))~~; and
- (g) Other factors related to course and program enrollment.

## TRAINING

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

WAC 392-190-020 ~~((In-service))~~ Training—Staff responsibilities—Bias awareness. Each school district ~~((must, where appropriate, include sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal, bias awareness and elimination training sessions in such in-service training programs as are conducted or provided for certificated and/or classroom personnel))~~ and public charter school must provide training to all administrators and certificated and classroom personnel, including the school district or public charter school employee designated under WAC 392-190-060, (1) regarding their responsibilities under this chapter, and (2) to raise awareness of and eliminate bias based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal.

## RECREATIONAL AND ATHLETIC ACTIVITIES

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

WAC 392-190-025 Recreational and athletic activities. ~~((No person shall))~~ (1) Except as provided under this section, school districts and public charter schools must not, on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal, ~~((be excluded))~~ exclude any person from participation in, ~~((be denied))~~ deny any person the benefits of, or otherwise ~~((be discriminated))~~ discriminate against any person in any inter-scholastic, club, or intramural athletics or recreational activity offered or sponsored by ~~((or))~~ the school district ~~((; and no school district shall))~~ or charter school. School districts and public charter schools must not provide any ~~((such))~~ athletic ~~((s))~~ or recreational activity separately on such basis, except as provided in this section.

(2) A school district or public charter school may operate or sponsor separate teams for members of each sex where

selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a school district or public charter school operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered.

(3) A school district or public charter school that operates or sponsors interscholastic, club, or intramural athletics must provide equal athletic opportunities for members of both sexes within each school. The following factors must be considered when determining whether equal opportunities are available:

(a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(b) Provision of equipment and supplies;

(c) Scheduling of games and practice time, including the use of playfields, courts, gyms, and pools;

(d) Travel and per diem allowances, if any;

(e) Opportunity to receive coaching and academic tutoring;

(f) Assignment and compensation of coaches, tutors, and game officials;

(g) Provision of locker rooms and practice and competitive facilities;

(h) Provision of medical and training facilities and services, including the availability of insurance;

(i) Provision of housing and dining facilities and services, if any; and

(j) Publicity and awards.

(4) Unequal aggregate expenditures within a school district or public charter school for members of each sex or unequal expenditures for separate male and female teams alone will not constitute noncompliance with this section, but the failure to provide necessary funds for recreational and athletic activities for members of one sex may be considered in assessing the equality of opportunity for members of each sex.

(5) Where individual students with disabilities cannot participate in existing activities even with reasonable modifications and necessary accommodations, aids, or services, a school district or public charter school may offer opportunities for students with disabilities to participate in separate or different recreational or athletic activities.

**AMENDATORY SECTION** (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-030** (~~General~~) **Recreational and athletic activities**—(~~Sex discrimination—Equal opportunity factors considered~~) **Annual athletic evaluation.** Each school district and public charter school must evaluate ((#s)) the recreational and athletic program at each school at least once each year to ensure that equal opportunities are available to members of both sexes with respect to interscholastic, club, or intramural athletics ((which)) that are operated, sponsored, or otherwise provided by the school district or charter school.

In determining whether equal opportunities are available to members of both sexes ((with respect to interscholastic, club or intramural athletics)), each school district and public charter school conducting an evaluation required by this section((, and the office of superintendent of public instruction upon receipt of a complaint pursuant to WAC 392-190-075;)) must consider ((several factors, including but not limited to the following where provided by a school district:

(1) Whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) The scheduling of games and practice times including the use of playfields, courts, gyms, and pools;

(4) Transportation and per diem allowances, if any;

(5) The opportunity to receive coaching and academic tutoring;

(6) The assignment and compensation of coaches, tutors, and game officials;

(7) The provision of medical and training facilities and services including the availability of insurance;

(8) The provision of housing, laundry, and dining facilities and services, if any; and

(9) Publicity and awards.

Unequal aggregate expenditures within a school district for members of each sex or unequal expenditures for separate male and female teams will not alone constitute noncompliance with this chapter, but the failure to provide the necessary funds for recreational and athletic activities for members of one sex may be considered in assessing the equality of opportunity for members of each sex)) each of the factors listed under WAC 392-190-025(3).

**AMENDATORY SECTION** (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-040 Recreational and athletic activities**—(~~Sex discrimination~~) **Student athletic interest**—(~~Required survey instrument~~) **survey.** (1) The superintendent of public instruction must develop a survey instrument to assist each school district ((in the determination of)) and public charter school in determining male and female student interest ((for male/female)) in participation in specific sports. With the office of superintendent of public instruction's approval, school districts and public charter schools may modify or amend the content of the survey instrument if necessary to clarify and assist in evaluating student interest.

(2) ((A survey instrument must be administered by each school district at all grade levels where interscholastic, intramural and other sports and recreational activities are conducted.) Each school district and public charter school must administer the survey developed under this section at least once every three years at each school and grade level where interscholastic, intramural, and other athletics are conducted. The school district or public charter school must consider the results of the survey ((must be considered in the program)) when planning and ((development in the area of)) developing recreational and athletic activities offered within the school district or charter school and when determining whether

equal opportunities are available to members of both sexes under WAC 392-190-025 and 392-190-030.

~~((3) A survey instrument developed pursuant to this section must be administered at least once every three years within each school district. School districts may modify or amend the content of the survey instrument if the district deems it necessary to clarify and assist in the evaluation of student interest. If a school district intends to modify or amend the instrument, the district must provide the office of superintendent of public instruction with a copy of the proposal for approval prior to its administration.))~~

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-045 Recreational and athletic activities—~~((Sex discrimination—))~~Facilities.** A school district ~~((which))~~ or public charter school that provides athletic facilities for members of one sex, including showers, toilets, and training room facilities for athletic purposes, must provide comparable facilities for members of the opposite sex. ~~((Such facilities may be provided as either separate facilities or must be scheduled and used separately by members of each sex.))~~ A school district or public charter school may provide separate facilities for male and female students or schedule the facilities equitably for separate use. This section ~~((shall not be interpreted to))~~ does not require the construction of additional facilities.

#### ACCESS TO COURSE OFFERINGS

##### NEW SECTION

**WAC 392-190-046 Access to course offerings.** (1) Each school district and public charter school must ensure that no student is denied or limited in their ability to participate in or benefit from its course offerings on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal.

(2) Course offerings include all education programs and activities offered or sponsored by a school district or public charter school, whether those programs or activities take place in a school district's or charter school's facilities or elsewhere.

##### NEW SECTION

**WAC 392-190-048 Access to course offerings—Student discipline and corrective action.** At least annually, each school district and public charter school must review data on corrective and disciplinary actions taken against students within each school disaggregated by sex, race, limited-English proficiency (i.e., English language learners), and disability, including students protected under Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. This review must include, but is not limited to, short-term suspensions, long-term suspensions, expulsions, and emergency expulsions. In reviewing this

data, each school district or public charter school must determine whether it has disciplined or applied corrective action to a substantially disproportionate number of students within any of the categories identified in this section. If a school district or public charter school finds that it has disciplined or applied corrective action to a substantially disproportionate number of students who are members of one of the categories identified in this section, the school district or charter school must take prompt action to ensure that the disproportion is not the result of discrimination.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-050 Access to course offerings—~~((Generally—))~~Separate ~~((sessions or groups—When permissible))~~ programs or activities.** ~~((No school district shall))~~ Except as provided under this section, school districts and public charter schools must not provide any course or otherwise carry out any of its ~~((education))~~ programs or activities separately on the basis of ~~((sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation (including), gender expression ((or)), gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal or require or refuse participation therein by any of its students on such basis. This section ((shall)) does not ((be construed to)) prohibit:~~

(1) The grouping of students in physical education classes and activities by demonstrated ability as assessed by objective standards of individual performance developed and applied without regard to sex. Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the school district or public charter school must ((immediately)) promptly implement appropriate standards ~~((which))~~ that do not have such effect;

(2) The separation of students by sex within physical education classes or activities offered for students ~~((in grades 7 through 12))~~ if:

(a) It can ~~((clearly))~~ be shown under the factual circumstances involved in the particular case~~((s))~~ that ~~((the maintenance of))~~ maintaining a separate physical education class or activity for boys and girls ~~((truly constitutes))~~ is the best method of providing both sexes~~((, as a whole,))~~ with an equal opportunity to participate in ~~((such))~~ the class or activity; and

(b) ~~((At the same time, a test of substantial equality between the two classes or activities can be found to have been met;))~~ The separated classes or activities are substantially equal;

(3) ~~((Separate sessions for boys and girls with respect to those))~~ The separation of students by sex for classes or portions of classes ((which)) that deal ((exclusively)) primarily with human sexuality;

(4) Classes ~~((and/or))~~ and activities ~~((which a school district may establish or maintain))~~ with requirements based on vocal range or quality, which may result in a chorus or choruses of one or predominantly one sex; and

(5) Classes, courses, or placement of students based on the student's individual language skill development ~~((and/or))~~

or based on the student's needs as identified in the student's individualized education program under the Individuals with Disabilities Education Act.

## TEXTBOOKS AND INSTRUCTIONAL MATERIALS

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-055 Textbooks and instructional materials—(Scope) Instructional materials policy—Elimination of bias.** (1) ~~(It is the intent of this section to eliminate bias pertaining to)~~ School districts and public charter schools must not discriminate on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation (including), gender expression (or), gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal (in connection with any form of instruction provided by a school district) through the use of any textbooks or instructional materials, including reference materials and audio-visual materials.

(2) ~~(The)~~ Each school district and public charter school must adopt an instructional materials policy (of each school district required by RCW 28A.320.230 must incorporate therein, as part of the selection criteria, a specific statement requiring the elimination of) that includes selection criteria designed to eliminate bias (pertaining to) based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation (including), gender expression (or), gender identity, the presence of any sensory, mental, or physical disability, (or) and the use of a trained dog guide or service animal in all textbooks and instructional materials including reference materials and audio-visual materials. Each school district and public charter school must use the screening criteria adopted under this section to identify and eliminate bias in all textbooks and instructional materials, including reference materials and audio-visual materials.

(3) ~~(The instructional materials committee of each school district must establish and maintain appropriate screening criteria designed to identify and eliminate bias pertaining to sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of trained dog guide or service animal in all textbooks and instructional materials including reference materials and audio-visual materials. Such selection criteria must be consistent with the selection criteria identified in chapter 392-204 WAC, as now or hereafter amended. One of the aids to identification of bias in instructional materials is the *Washington Models for the Evaluation of Bias Content in Instructional Materials* published by the superintendent of public instruction.~~

(4) ~~In recognition of the fact that current instructional materials which)~~ If instructional materials that contain bias (may not) cannot be replaced immediately, each school district (should) and public charter school must acquire supplemental instructional materials or aids to be used concur-

rent with existing materials ~~((for the purpose of countering)) to counter the bias content (thereof).~~

~~((5))~~ (4) Nothing in this section is intended to prohibit the use or assignment of supplemental instructional materials, such as classic and contemporary literary works, periodicals, and technical journals ~~((which, although)), that are educationally necessary or advisable even though they contain bias(, are educationally necessary or advisable).~~

## HARASSMENT

### NEW SECTION

#### **WAC 392-190-055 Discriminatory harassment. (1)**

For purposes of administrative enforcement of this chapter under WAC 392-190-060 through 392-190-081, a school district or public charter school violates a student's rights regarding discriminatory harassment, including sexual harassment as defined under WAC 392-190-056, when the following conditions are met:

(a) The alleged conduct is based on a student's sex, race, creed, religion, color, national origin, sexual orientation, gender expression, gender identity, honorably discharged veteran or military status, presence of any sensory, mental, or physical disability, or use of a trained dog guide or service animal;

(b) The alleged conduct is sufficiently severe, persistent, or pervasive that it limits or denies a student's ability to participate in or benefit from the school district's or public charter school's course offerings, including any educational program or activity (i.e., creates a hostile environment); and

(c) The school district or public charter school, upon notice, fails to take prompt and appropriate action to investigate or fails to take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

(2) For purposes of administrative enforcement of this chapter under WAC 392-190-060 through 392-190-081, the office of superintendent of public instruction deems a school district or public charter school to have notice of discriminatory harassment if a reasonable employee knew, or in the exercise of reasonable care should have known, about the harassment.

(3) Nothing in this chapter is intended to diminish or otherwise modify an individual's right to bring an action under state or federal law alleging that the individual has been harmed by conduct or communication related to the individual's sex, race, creed, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, presence of any sensory, mental, or physical disability, or use of a trained dog guide or service animal that creates a hostile or abusive educational or workplace environment.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

#### **WAC 392-190-056 Sexual harassment—Definitions.**

(1) As used in this chapter, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, sex-

ually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature between two or more individuals if:

(a) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;

(b) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(c) That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

(2) For the purpose of this definition, sexual harassment may include conduct or communication that involves adult to student, student to adult, student to student, adult to adult, male to female, female to male, male to male, and female to female.

~~((3) School districts must be guided by federal and state case law in their interpretation of sexual harassment complaints and will need to determine sexual harassment on a case-by-case basis. Nothing in this chapter should be construed as diminishing or otherwise modifying an individual's right to bring an action under state or federal law alleging that the individual has been harmed by conduct or communication related to the individual's sex, race, creed, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal that creates a hostile or abusive educational or workplace environment.)~~

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-057 Sexual harassment policy—**~~(Adoption date—)~~**Required criteria.** In order to eliminate sexual harassment in connection with any responsibility, function, or activity within the jurisdiction of a school district or public charter school, a sexual harassment policy must be adopted and implemented by each district ~~((no later than June 30, 1995))~~ and charter school. This policy must apply to all school district and public charter school employees, volunteers, parents, and students~~(;)~~ including, but not limited to, conduct between students. This policy must incorporate the following criteria:

(1) Definitions consistent with ~~((the categories in RCW 28A.640.020 (2)(f)))~~ WAC 392-190-056;

~~(2) ((District and staff responsibilities;~~

~~(3) Informal grievance procedures;~~

~~(4) Grievance))~~ Responsibilities of employees and volunteers;

(3) Investigative and complaint procedures consistent with WAC 392-190-065 through 392-190-075 ~~((of this chapter))~~;

~~((5) Investigative procedures and reasonable and prompt timelines;~~

~~(6))~~ (4) Remedies available to ((victims)) targets of sexual harassment;

~~((7))~~ (5) Disciplinary actions against violators, which must conform with collective bargaining agreements and state and federal laws;

~~((8))~~ (6) Reprisal, retaliation, and false accusations prohibition;

~~((9))~~ (7) Dissemination and implementation of the policy; and

~~((10))~~ (8) Internal review of the policy.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-058 Sexual harassment**~~(—Procedures))~~ **policy—Notification.** ~~((1) School district policies on sexual harassment must be reviewed by the superintendent of public instruction considering the criteria established under WAC 392-190-057 as part of the monitoring process established in RCW 28A.640.030. The superintendent of public instruction must supply upon request sample sexual harassment policies to school districts.~~

~~(2))~~ (1) The school district's or public charter school's sexual harassment policy must be easily understood and conspicuously posted throughout each school building~~(;)~~ and provided to each employee~~(, volunteer and student.~~

~~(3) Reasonable efforts must be made to inform all students and their parents about the district's sexual harassment policy and procedures.~~

~~(4) A copy of the))~~.

(2) Information about the school district's or public charter school's sexual harassment policy and complaint procedure must appear in any publication of ((the)) a school ((or)), school district ((setting)), or public charter school that sets forth the rules, regulations, procedures, and standards of conduct for the school ((or)), school district, or charter school. School districts and public charter schools that do not provide such a publication must provide written information about the district's or charter school's sexual harassment policy and complaint procedure to each student, parent or guardian, employee, and volunteer.

~~((5))~~ (3) Each school district and public charter school must develop a process for discussing the district's or charter school's sexual harassment policy. The process must ensure the discussion addresses the definition of sexual harassment and issues covered in the sexual harassment policy.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-059 Harassment, intimidation, and bullying prevention policy and procedure—**~~(Adoption date))~~ **School districts.** (1) ~~((By August 1, 2011,))~~ Each school district must adopt ~~((or amend if necessary))~~ a harassment, intimidation, and bullying prevention policy and procedure as provided for in RCW 28A.300.285.

~~(2) ((When monitoring school districts' compliance with this chapter pursuant to WAC 392-190-076, the office of superintendent of public instruction will review such policies and procedures to ensure that they provide that students will not be harassed, intimidated, or bullied because of their sex, race, creed, religion, color, national origin, sexual orientation including gender expression or identity, the presence of any~~

sensory, mental, or physical disability, or the use of a trained dog guide or service animal.) If the allegations in a written report of harassment, intimidation, or bullying pursued under the school district's procedure adopted under RCW 28A.300.285 indicate a potential violation of this chapter or the guidelines adopted under WAC 392-190-005, the school district's harassment, intimidation, and bullying compliance officer, designated under RCW 28A.300.285, must promptly notify the district employee designated under WAC 392-190-060. Or, if during the course of an investigation of harassment, intimidation, or bullying, the district becomes aware of a potential violation of this chapter or the guidelines adopted under WAC 392-190-005, the school district staff member investigating the report must promptly notify the district employee designated under WAC 392-190-060. Upon receipt of this information, the designated employee must notify the complainant that their complaint will also proceed under the discrimination complaint procedure in WAC 392-190-065 through 392-190-075, in addition to the procedures adopted under RCW 28A.300.285. School districts must provide this notice in a language that the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964. In these cases, the investigation and response timeline set forth in WAC 392-190-065 begins when the school district knows or should have known that a written report of harassment, intimidation, or bullying involves allegations that the school district has violated this chapter or the guidelines adopted under WAC 392-190-005.

(3) This section is not intended to limit the scope of RCW 28A.300.285 or the use of a school district's procedures adopted under RCW 28A.300.285.

## EMPLOYMENT

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-0591 Public school employment and contract practices—Nondiscrimination.** (1) ~~((No school district shall))~~ School districts and public charter schools must not, on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal ~~((by a person with a disability))~~, exclude any person from participation in, deny any person the benefit of, or subject any person to discrimination in employment, recruitment, promotion ~~((or))~~, advancement, consideration, or selection, whether full time or part time, in connection with employment by a school district or public charter school.

(2) Each school district and public charter school must make all employment decisions in a nondiscriminatory manner and ~~((shall))~~ must not limit, segregate, or classify any person in any way ~~((which))~~ that could adversely affect a person's employment opportunities or status on the basis of sex, race, creed, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any

sensory, mental, or physical disability, or the use of a trained dog guide or service animal ~~((by a person with a disability))~~.

(3) ~~((No school district shall))~~ School districts and public charter schools must not enter into any contractual or other relationship that directly or indirectly has the effect of subjecting any person to discrimination in connection with employment on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation ~~((including))~~, gender expression ~~((or))~~, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal ~~((by a person with a disability))~~ including, but not limited to, relationships with employment and referral agencies, ~~((with))~~ labor unions, and ~~((with))~~ organizations providing or administering fringe benefits to employees.

(4) ~~((No school district shall))~~ School districts and public charter schools must not grant preferential treatment to applications for employment ~~((on the basis of))~~ based on an applicant's enrollment at any education institution or entity ~~((which))~~ that only or predominately admits ~~((as))~~ students ~~((only or predominately individuals or groups))~~ on the basis of sex, race, color, or national origin ~~((or))~~ if the giving of such preferences has the effect of discriminating on the basis of sex, race, color, or national origin.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-0592 Public school employment—Affirmative action program.** (1) ~~((Each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions which are consistent with the intent of chapters 28A.640 and 28A.642 RCW.))~~ Each school ~~((district's))~~ district and public charter school must develop an affirmative action employment plan or program ~~((must include at least the following provisions respecting discrimination on the basis of sex))~~ that includes appropriate provisions designed to eliminate discrimination on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.

(2) With respect to sex discrimination, a school district's or public charter school's affirmative action employment plan or program must include:

(a) The requirement to:

(i) Maintain credential requirements for all personnel without regard to sex;

~~((b))~~ (ii) Make no differentiation in pay scale on the basis of sex;

~~((c))~~ (iii) Make no differentiation in the assignment of school duties on the basis of sex except where such assignment would involve duty areas or situations such as, but not limited to, a shower room ~~((s))~~, where persons might be disrobed;

~~((d))~~ (iv) Provide the same opportunities for advancement for males and females;

~~((e))~~ (v) Make no difference in conditions of employment on the basis of sex including, but not limited to, hiring practices, leaves of absence, hours of employment, and assignment of ~~(;)~~ or ~~((pay))~~ payment for ~~(;)~~ instructional and noninstructional duties; and

~~((f))~~ (b) Such other provisions as may be required by the superintendent of public instruction ~~((designed))~~ to facilitate ~~((the effective achievement of all))~~ reasonable affirmative action goals and objectives and to eliminate discrimination in public school employment ~~((respecting the elimination of discrimination on the basis of sex.~~

~~(2) Notwithstanding the requirements of this chapter respecting discrimination on the basis of sex, each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions to eliminate discrimination on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.~~

~~(3) Each affirmative action employment program of a school district must be filed with the office of superintendent of public instruction.~~

~~(4) The board of directors of each school district must adopt and implement an affirmative action employment program required by this section as expeditiously as possible but in no event later than September 30, 2011).~~

## COMPLIANCE AND COMPLAINT PROCEDURES

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-060 Compliance—~~(Local)~~ School district or public charter school—Designation of responsible employee—Notification.** (1) The superintendent of each school district or the public charter school governing board must ~~((immediately))~~ designate at least one employee who ~~((shall be))~~ is responsible ~~((directly to the superintendent))~~ for monitoring and coordinating the district's or charter school's compliance with this chapter and the guidelines adopted under WAC 392-190-005. The employee designated ~~((pursuant to))~~ under this section ~~((shall also be charged with the responsibility to investigate any complaint(s)))~~ is also responsible for ensuring that all complaints communicated to the school district ~~((pursuant to))~~ or public charter school under WAC 392-190-065 are promptly investigated and resolved.

(2) Each school district and public charter school must, once each year or more often as deemed necessary, publish notice in a manner ~~((which))~~ that is reasonably calculated to inform all students, students' parents and guardians, and employees of ~~((the name, office address and telephone number of the employee or employees appointed pursuant to this section and))~~ the complaint ~~((and appeal))~~ procedure set forth in WAC 392-190-065, 392-190-070 and 392-190-075 ~~((as now or hereafter amended)).~~ School districts and public charter schools must provide this notice in a language that each parent and guardian can understand, which may require lan-

guage assistance for parents and guardians with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(3) Each school district and public charter school must include a nondiscrimination statement in written announcements, notices, recruitment materials, employment application forms, and other publications made available to all students, parents, or employees. The statement must include:

(a) Notice that the district or public charter school may not discriminate in any programs or activities on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal;

(b) The name or title, office address, and telephone number of the employee or employees designated under this section, as well as the employees designated to ensure compliance with Section 504 of the Rehabilitation Act of 1973 and Title IX of the Education Amendments of 1972; and

(c) Pursuant to the Boy Scouts of America Equal Access Act, notice that the school district or public charter school provides equal access to the Boy Scouts of America and any other youth group listed in Title 36 of the United States Code as a patriotic society.

(4) School districts and public charter schools must not adopt any policy, procedure, or practice that would limit a person's right to file a complaint under this chapter or have the effect of discouraging any person from utilizing the complaint procedure in WAC 392-190-065 through 392-190-075. School districts and public charter schools must not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right secured by this chapter or the guidelines adopted under WAC 392-190-005 or because the individual has made a complaint or participated in an investigation under this chapter.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-065 Compliance—Complaint procedure—School district ~~((superintendent))~~ or public charter school.** Each school district and public charter school must establish a discrimination complaint procedure that, at a minimum, includes the following requirements:

(1) Anyone may file a complaint with a school district or public charter school alleging that the district or charter school has violated this chapter or the guidelines adopted under WAC 392-190-005. The complaint must be ~~((:~~

~~((a) Written;~~

~~((b) Signed by the complainant; and~~

~~((c) Set forth))~~ written and describe the specific acts, conditions, or circumstances alleged to violate this chapter or the ~~((specific acts, conditions, or circumstances that would be prohibited by this chapter))~~ guidelines adopted under WAC 392-190-005.

(2) A school district or local charter school may establish a complaint filing deadline. The filing deadline must be no less than one year after the occurrence that is the subject matter of the complaint. A complaint filing deadline may not be

imposed if the complainant was prevented from filing a complaint due to:

(a) Specific misrepresentations by the school district or public charter school that it had resolved the problem forming the basis of the complaint; or

(b) Withholding of information by the school district or public charter school that was required to be provided under this chapter or the guidelines adopted under WAC 392-190-005.

(3) Complaints may be submitted by mail, fax, electronic mail, or hand delivery to any district, school, or charter school administrator or to any employee designated under WAC 392-190-060. Any district, school, or charter school administrator who receives a complaint that meets the criteria in this section must promptly notify the employee designated under WAC 392-190-060.

(4) Upon receipt of the complaint, the employee or employees designated ((pursuant to)) under WAC 392-190-060 must ((investigate the allegation and effect a prompt resolution of the complaint)):

(a) Provide the complainant a copy of the school district's or public charter school's discrimination complaint procedure in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964; and

(b) Ensure that the school district or public charter school conducts a prompt and thorough investigation into the allegations in the complaint.

((2)) (5) Following the completion of the investigation, the designated employee or employees must provide the district superintendent, charter school administrator, or designee with a full written report of the complaint and the results of the investigation. The district superintendent, charter school administrator, or designee must respond in writing to the complaining party ((as expeditiously as possible but in no event later than)) within thirty calendar days ((following receipt of such complaint by the school district)) after the school district or public charter school received the complaint, unless otherwise agreed to by the complainant or if exceptional circumstances related to the complaint require an extension of the time limit. If an extension is needed, the school district or public charter school must notify the complainant in writing of the reasons for the extension and the anticipated response date; this notice must be provided in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964. At the time the school district or public charter school responds to the complainant, the school district or charter school must send a copy of the response to the office of superintendent of public instruction.

((3)) (6) The response of the school district superintendent, charter school administrator, or designee required by this section must include:

(a) A summary of the results of the investigation;

(b) Whether the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005;

(c) Notice of the complainant's right to appeal ((to the school board, as set forth in)) under WAC 392-190-070, ((and must identify)) including where and to whom the appeal must be filed((-The superintendent's response must also clearly state either:

(a) That the school district denies the allegations contained in the complaint received; or

(b) The reasonable); and

(d) If the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005, the corrective measures deemed necessary to ((eliminate any such act, condition, or circumstance within the school district)) correct the noncompliance. Any ((such)) corrective measures ((deemed necessary)) must be instituted as expeditiously as possible but ((in)) no ((event)) later than thirty calendar days ((following)) after the school ((district superintendent's mailing of a) district's or public charter school's written response to the complainant ((required by this section)), unless otherwise agreed to by the complainant.

((4) The complaint procedure required by this section must not prohibit the processing of grievances by an employee bargaining representative and/or a member of a bargaining unit pursuant to grievance procedures established at the school district level by local bargaining agreement.

(5)) (7) The school district's or public charter school's response to the complainant must be in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(8) The complainant and the school district ((and complainant)) or public charter school may agree to resolve the complaint in lieu of an investigation. If the complaint is resolved to the satisfaction of the parties involved, no further action is necessary under this section.

(9) Nothing in this section prohibits a school district or public charter school from adopting a separate procedure to resolve informal (i.e., verbal) complaints or allegations. An informal complaint procedure must not limit a complainant's right to file a formal complaint under this section. When utilizing an informal complaint procedure, school districts and public charter schools must notify complainants about their right to file a formal complaint under this section. The school district or public charter school must provide this notice in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(10) Nothing in this section is intended to modify or supersede any grievance procedure provided for in a school district or public charter school collective bargaining agreement.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-070 Compliance—Appeal procedure—((Local school board)) School district or public charter school.** ((1) A complainant has a right to appeal the school district superintendent's response provided in WAC

392-190-065(2), to the school district board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the date upon which the complainant received the superintendent's response.

(2) In the event a school district superintendent fails to timely respond to a complaint communicated pursuant to WAC 392-190-065, a complainant has a right to an appeal to the board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the expiration of the response period provided by WAC 392-190-065(2).

(3) An appeal to the board of directors pursuant to this section shall require the board of directors to schedule a hearing to commence on or before the twentieth calendar day following the filing of the written notice of appeal, unless otherwise agreed to by the complainant and the school district superintendent, or for good cause. The complainant and the school district superintendent must be allowed to present such witnesses and testimony as the board deems relevant and material. Unless otherwise agreed to by the complainant and the school district superintendent, or for good cause, the board of directors must render a written decision on or before the tenth calendar day following the termination of the hearing, and must provide a copy to all parties involved. The written decision must include notice of the complainant's right to appeal to the superintendent of public instruction as set forth in WAC 392-190-075, and must identify where and to whom the appeal must be filed.) (1) A school district's or public charter school's complaint procedure required under WAC 392-190-065 must provide an option to appeal the decision of the school district superintendent, charter school administrator, or designee to a party or board that was not involved in the initial complaint or investigation.

(2) A school district or public charter school may establish a time limit to file appeals. Appeal time limits must be no less than ten calendar days from the date the complainant received the school district's or public charter school's response under WAC 392-190-065.

(3) The school district or public charter school must provide a written appeal decision to the complainant in a timely manner, not to exceed thirty calendar days from the date the school district or charter school received the appeal, unless otherwise agreed to by the complainant. The appeal decision must include notice of the complainant's right to file a complaint with the superintendent of public instruction under WAC 392-190-075. The school district or charter school must send a copy of the appeal decision to the office of superintendent of public instruction.

(4) The school district's or public charter school's appeal decision must be provided in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-075 Compliance—(~~Contested case—Duty of the~~) Complaint procedure—Office of superin-**

**tendent of public instruction.** (~~(1) In the event a complainant disagrees with the decision of a school district board of directors rendered pursuant to WAC 392-190-070, the complainant may appeal the board's decision to the superintendent of public instruction. For purpose of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal. Decisions in cases appealed pursuant to this section may be made by an administrative law judge selected by the chief administrative law judge if the superintendent of public instruction delegates this authority pursuant to RCW 28A.300.120.~~

(2) ~~A notice of appeal must be received by the superintendent on or before the twentieth calendar day following the date upon which the complainant received written notice of the school board's decision. The notice is deemed received when the notice is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, to the superintendent of public instruction. The notice must be in writing and must set forth (a) a concise statement of the portion or portions of the school board's decision which is appealed from, and (b) the relief requested by the complainant/appellant.~~

(3) ~~Appeals to the superintendent shall be conducted de novo. The complainant/appellant must have the responsibility for prosecuting the appeal and the school district/respondent shall have the duty of defending the school district's decision or the portion of the decision appealed.) (1) If a complainant disagrees with the school district's or public charter school's appeal decision under WAC 392-190-070, or if the school district or public charter school fails to comply with the procedures in WAC 392-190-065 or 392-190-070, the complainant may file a complaint with the office of superintendent of public instruction. A complaint must be received by the office of superintendent of public instruction within twenty calendar days after the complainant received the school district's or public charter school's written appeal decision, unless the office of superintendent of public instruction grants an extension for good cause. Complaints may be submitted by mail, fax, electronic mail, or hand delivery. A complaint must be in writing and include:~~

~~(a) A description of the specific acts, conditions, or circumstances alleged to violate this chapter or the guidelines adopted under WAC 392-190-005 and the facts on which the complaint is based;~~

~~(b) The name and contact information, including an address, of the complainant;~~

~~(c) The name and address of the school district or public charter school subject to the complaint;~~

~~(d) A copy of the school district's or public charter school's complaint and appeal decisions under WAC 392-190-065 and 392-190-070;~~

~~(e) A proposed resolution of the complaint or relief requested; and~~

~~(f) If the allegations regard a specific student, the complaint must also include:~~

(i) The name and address of the student, or in the case of a homeless child or youth, contact information for the student; and

(ii) The name of the school and school district, or public charter school, the student attends.

(2) Upon receipt of a complaint, the office of superintendent of public instruction may initiate an investigation, which may include reviewing relevant information or conducting an independent on-site review. The office of superintendent of public instruction may, at its discretion, investigate additional issues related to the complaint that were not included in the initial complaint or appeal to the school district or public charter school under WAC 392-190-065 or 392-190-070.

(3) Following an investigation, the office of superintendent of public instruction will make an independent determination as to whether the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005. The office of superintendent of public instruction will issue a written decision to the complainant and the school district or public charter school that addresses each allegation in the complaint and any other noncompliance issues that the office of superintendent of public instruction has identified in the investigation. The written decision will include the corrective actions deemed necessary to correct any noncompliance and any documentation the school district or public charter school must provide to ensure that the corrective action is completed. The office of superintendent of public instruction will provide this written decision in a language that the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(4) All corrective actions must be completed within the timelines established in the written decision unless the office of superintendent of public instruction grants an extension. If timely compliance by a school district or public charter school is not achieved, the office of superintendent of public instruction may take actions to ensure compliance. Such actions may include, but are not limited to, referring the school district or public charter school to appropriate state or federal agencies empowered to order compliance with the law or the initiation of sanctions or corrective measures under WAC 392-190-080.

(5) A complaint may be resolved at any time when, before the conclusion of an investigation, the complainant, the school district, or the public charter school voluntarily agrees to resolve the complaint. The office of superintendent of public instruction may provide technical assistance and dispute resolution methods necessary to resolve a complaint.

#### NEW SECTION

**WAC 392-190-0751 Mediation.** (1) A school district or public charter school may offer mediation, at the district's or charter school's expense, to resolve complaints at any time during the complaint procedure set forth in WAC 392-190-065 through 392-190-075. The purpose of mediation is to offer both the complainant and the school district or public charter school an opportunity to resolve disputes and reach a

mutually acceptable agreement concerning the complaint through the use of an impartial mediator.

(2) Mediation must be voluntary and requires the agreement of both parties. It may be terminated by either party at any time during the mediation process.

(3) Mediation cannot be used to deny or delay a complainant's right to utilize the complaint procedure set forth in WAC 392-190-065 through 392-190-075 or to deny any other rights afforded under this chapter or under chapters 28A.640 or 28A.642 RCW.

(4) Mediation must be conducted by qualified and impartial mediators. An individual who serves as a mediator:

(a) May not be an employee of any school district, public charter school, or other public or private agency that is providing education or related services to a student who is the subject of the mediation process; and

(b) Must not have a personal or professional conflict of interest.

(5) A person who otherwise qualifies as a mediator is not an employee of a school district, public charter school, or other public agency solely because he or she is paid by the school district, charter school, or agency to serve as a mediator.

(6) If the parties resolve a dispute through the mediation process, the parties may execute a legally binding agreement that:

(a) Sets forth that resolution;

(b) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent complaint, due process hearing, or civil proceeding; and

(c) Is signed by both the complainant and a representative of the school district or public charter school who has the authority to bind the district or charter school.

(7) The complainant and the school district or public charter school may agree to extend the timelines set forth in WAC 392-190-065 through 392-190-075 to pursue mediation.

(8) The office of superintendent of public instruction does not sign, approve, or endorse any mediation agreements reached by the parties. However, the office of superintendent of public instruction may assist both parties in understanding pertinent legal standards and possible remedies.

#### **MONITORING**

**AMENDATORY SECTION** (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-076 Monitoring—Duty of the superintendent of public instruction.** (1) The office of superintendent of public instruction must monitor school districts' and public charter schools' compliance with this chapter, chapters 28A.640 and 28A.642 RCW, and the ~~((rules and))~~ guidelines adopted ~~((in furtherance thereof))~~ under WAC 392-190-005.

(2) Procedures for monitoring school districts and public charter schools may include, but are not limited to:

(a) Investigation of complaints under WAC 392-190-075:

(b) Collection, review, and analysis of data and other information;

~~((b) Conduct)~~ (c) Performance of on-site visits and interviews; and

~~((c))~~ (d) Review of any compliance issues, including reviews by those agencies referenced in WAC 392-190-077.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-077 Monitoring ~~((results—Compliance))~~ Procedures—Results.** (1) Following its monitoring of a school district ~~((pursuant to))~~ or public charter school under WAC 392-190-076, the office of superintendent of public instruction must notify the district~~((s))~~ or charter school of any findings of ~~((identified))~~ noncompliance with this chapter, chapters 28A.640 and 28A.642 RCW ~~((and)), or the ((rules and))~~ guidelines adopted ~~((in furtherance thereof))~~ under WAC 392-190-005. This notification of noncompliance must initiate a process of correction, verification, and validation to ensure that the noncompliance is corrected within a compliance period identified by the office of superintendent of public instruction. The compliance period must be no longer than one year from the identification of noncompliance. If noncompliance is systemic in nature, a systemic corrective action plan ~~((is))~~ will be required. The school district or public charter school will have thirty calendar days after its receipt of the notice of noncompliance to:

(a) Accept the findings contained in the notification of noncompliance; ~~((or))~~

(b) Provide the office of superintendent of public instruction with supplemental information that may serve as a basis for amending the notification of noncompliance; or

(c) Provide any revisions to the proposed corrective action plan.

(2) If the school district or public charter school provides the office of superintendent of public instruction with supplemental information, the office of superintendent of public instruction must respond to the school district or charter school with a final monitoring report within thirty calendar days after receipt of the supplemental information.

(3) If the school district or public charter school does not timely address the identified noncompliance with corrective actions, the superintendent of public instruction may, at his or her discretion, undertake actions to ensure the school ~~((district))~~ district's or charter school's compliance. Such actions may include, but are not limited to, referring the school district or public charter school to appropriate state or federal agencies empowered to order compliance with the law, or the initiation of ~~((an office of superintendent of public instruction complaint against the school district))~~ sanctions or corrective measures under WAC 392-190-080.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-079 ~~((Complaints issued by superintendent of public instruction))~~ Monitoring—Appeal procedure.** (1) A complainant, school district, or public charter school that desires to appeal the written decision of the office of superintendent of public instruction issued ~~((pursuant to~~

~~WAC 392-190-078))~~ under WAC 392-190-075 or 392-190-077 may file an appeal with the superintendent of public instruction in accordance with the adjudicative proceedings in RCW 34.05.413 through 34.05.494, and the administrative practices and procedures of the superintendent of public instruction in chapter 392-101 WAC. To initiate review under this section, a complainant, school district, or public charter school must file a written notice with the superintendent of public instruction within thirty calendar days following the date of receipt of the office of superintendent of public instruction's written decision under WAC 392-190-075 or 392-190-077.

(2) For purposes of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with the office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-080 ~~((Compliance—))~~ Violations—Permissible sanctions.** In the event a school district or public charter school is found to be in violation of the requirements of this chapter, the superintendent of public instruction may, by appropriate order pursuant to chapter 34.05 RCW, impose an appropriate sanction or institute appropriate corrective measures including, but not limited to:

(1) The termination of all or part of state apportionment or categorical moneys to the offending school district or public charter school;

(2) The termination of specified programs wherein ~~((such))~~ the violation or violations are found to be flagrant in nature;

(3) The institution of a mandatory affirmative action program within the offending school district or public charter school; and

(4) The placement of the offending school district or public charter school on probation with appropriate sanctions until such time as compliance is achieved or is assured, whichever is deemed appropriate in the particular case by the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 11-09-024, filed 4/13/11, effective 5/14/11)

**WAC 392-190-081 Concurrent claims and remedies ~~((—Other remedies))~~.** (1) Except as provided in subsections (2) and (3) of this section, nothing in this chapter ~~((shall be construed as denying))~~ is intended to deny an aggrieved person from simultaneously pursuing other available administrative, civil, or criminal remedies for an alleged violation of the law.

(2) A complaint made ~~((pursuant to))~~ under WAC 392-190-065 ~~((or))~~ through 392-190-075 ~~((with))~~ may be held in abeyance ~~((during the pendency))~~ pending the outcome of any proceeding in state or federal court or before a local, state or federal agency in which the same claim or claims are at

issue, whether under RCW 28A.640.040, 28A.642.040, or any other law.

(3) Where the complainant elects to pursue simultaneous claims in more than one forum, the factual and legal determinations issued by the first tribunal to rule on the claims may, in some circumstances, be binding on all or portions of the claims pending before other tribunals.

### REPEALER

The following sections of the Washington Administrative Code are repealed:

- WAC 392-190-015 Counseling and guidance—Sex discrimination—Duty of certificated and classroom personnel—Coordination of effort.
- WAC 392-190-026 Recreational and athletic—Sex discrimination—Equal opportunities—Separate teams.
- WAC 392-190-035 Recreational and athletic activities—Elementary and secondary level.
- WAC 392-190-078 Monitoring results—Complaints issued by superintendent of public instruction.

### **WSR 14-23-082**

#### **PERMANENT RULES**

#### **PROFESSIONAL EDUCATOR**

#### **STANDARDS BOARD**

[Filed November 19, 2014, 8:22 a.m., effective December 20, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends WAC 181-78A-255 to clarify the program requirements for data collection.

Citation of Existing Rules Affected by this Order: Amending WAC 181-78A-255.

Statutory Authority for Adoption: RCW 28A.410.210.

Adopted under notice filed as WSR 14-19-081 on September 15, 2014.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 400, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail david.brenna@k12.wa.us.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 1, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: November 13, 2014.

David Brenna  
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 14-07-064, filed 3/17/14, effective 4/17/14)

**WAC 181-78A-255 Approval standard—Accountability.** Building on the mission to prepare educators who demonstrate a positive impact on student learning, the following evidence shall be evaluated to determine whether each preparation program is in compliance with the program approval standards of WAC 181-78A-220(2).

(1) ~~((Each approved educator preparation program shall maintain an assessment system that:~~

~~(a) Assesses outcomes in alignment with the conceptual framework and state standards;~~

~~(b) Systematically and comprehensively gathers evidence on:~~

~~(i) Candidate learning;~~

~~(ii) Program operations, including placement rates, clinical experiences, and candidate characteristics;~~

~~(c) Collects candidate work samples that document positive impact on student learning;~~

~~(d) Aggregates key data over time;~~

~~(e) Incorporates perspectives of faculty, candidates, and P-12 partners;~~

~~(f) Includes processes and safeguards that ensure fair and unbiased assessment of candidates;~~

~~(g) Provides for regular analysis of assessment results;~~

~~(h) Is systematically linked to program decision-making processes;~~

~~(2))~~ Each approved program shall maintain a data system that exhibits:

(a) Data structure ~~((, including a table structure, the ability to utilize university data systems, data entry protocols and codes, unique record identifiers, the ability to provide repeatable reports with efficiency, and strategies to ensure data quality));~~

~~(b) Standards for security and access ((, including guidelines for data access by users and system back-up protocols)); and~~

~~(c) Guidelines for data governance ((, system documentation, and the processing of assessment scores from external sources)).~~

~~((3))~~ (2) Each approved education preparation program shall collect and report data in accordance with the data manuals adopted by the professional educator standards board.

### **WSR 14-23-084**

#### **PERMANENT RULES**

#### **BELLEVUE COLLEGE**

[Filed November 19, 2014, 8:25 a.m., effective December 20, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This proposal repeals the previous chapter on student code and replaces it with a chapter that is in compliance with the Violence Against Women Act (VAWA) and is consistent with the recommendations for model language for community and technical colleges. The new version of the student code: Updates the student conduct code to reflect recent changes in the law regarding personal use of marijuana, bullying, and sexual violence and to bring the code into compliance with requirements imposed by VAWA; updates and clarifies disciplinary sanctions and terms and conditions that the college can impose against students who are found to have violated the student conduct code; updates the student conduct procedures and bring[s] them into compliance with VAWA; expands the jurisdiction of the student conduct code to include off campus conduct; makes appeals from disciplinary reprimands and disciplinary probation to brief adjudicative proceedings; retains review by the student conduct committee for appeals from disciplinary suspensions and dismissals; makes the preponderance of the evidence the applicable standard of proof for disciplinary matters; and makes available the same procedural rights to alleged victims of sexual misconduct as are available to student respondents accused of sexual misconduct.

Citation of Existing Rules Affected by this Order: Repealing WAC 132H-120-010, 132H-120-020, 132H-120-030, 132H-120-040, 132H-120-050, 132H-120-200, 132H-120-210, 132H-120-220, 132H-120-225, 132H-120-235, 132H-120-245, 132H-120-300, 132H-120-305, 132H-120-310, 132H-120-335, 132H-120-350, 132H-120-360, 132H-120-405, 132H-120-410, 132H-120-420, 132H-120-430, 132H-120-440, 132H-120-450, 132H-120-460, and 132H-120-475.

Statutory Authority for Adoption: RCW 28B.50.140.

Adopted under notice filed as WSR 14-13-116 on June 18, 2014.

Changes Other than Editing from Proposed to Adopted Version: WAC 132H-125-030 (13)(c) **Sexual violence**, was rewritten with qualifying definitions.

Number of Sections Adopted in Order to Comply with Federal Statute: New 21, Amended 0, Repealed 25; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: September 10, 2014.

Lisa Corcoran  
Rules Coordinator

## REPEALER

The following chapter of the Washington Administrative Code is repealed:

- WAC 132H-120-010 Title.
- WAC 132H-120-020 Preamble.
- WAC 132H-120-030 Definitions.
- WAC 132H-120-040 Jurisdiction.
- WAC 132H-120-050 Student rights and freedoms.
- WAC 132H-120-200 Student responsibilities.
- WAC 132H-120-210 Purpose of disciplinary action.
- WAC 132H-120-220 Responsibility of college discipline committee.
- WAC 132H-120-225 Disciplinary terms.
- WAC 132H-120-235 Initial disciplinary proceedings.
- WAC 132H-120-245 Appeals of disciplinary action—Generally.
- WAC 132H-120-300 Discipline committee procedure.
- WAC 132H-120-305 Evidence admissible in hearings.
- WAC 132H-120-310 Decision by the college discipline committee.
- WAC 132H-120-335 Final appeal.
- WAC 132H-120-350 Readmission after expulsion.
- WAC 132H-120-360 Reporting, recording and maintenance of records.
- WAC 132H-120-405 Summary suspension proceedings.
- WAC 132H-120-410 Permission to enter or remain on campus.
- WAC 132H-120-420 Notice of summary suspension proceedings.
- WAC 132H-120-430 Procedures of summary suspension hearing.
- WAC 132H-120-440 Decision by the dean of student services.
- WAC 132H-120-450 Notice of suspension.
- WAC 132H-120-460 Suspension for failure to appear.
- WAC 132H-120-475 Appeals from summary suspension hearing.

## Chapter 132H-125 WAC STUDENT CONDUCT CODE OF BELLEVUE COLLEGE

### NEW SECTION

**WAC 132H-125-010 Authority.** The board of trustees, acting pursuant to RCW 28B.50.140, delegates to the president of Bellevue College the authority to administer disciplinary action. Administration of the disciplinary procedures is the responsibility of the vice-president of student services

and/or designated student conduct officer. The student conduct officer shall serve as the principal investigator and administrator for alleged violations of this code.

#### NEW SECTION

**WAC 132H-125-020 Statement of student rights.** As members of the academic community, students are encouraged to develop the capacity for critical judgment and to engage in an independent search for truth. Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community. Students should exercise their freedom with responsibility. The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the college community.

The following enumerated rights are guaranteed to each student within the limitations of statutory law and college policy which are deemed necessary to achieve the educational goals of the college:

(1) Academic freedom.

(a) Students are guaranteed the rights of free inquiry, expression, and assembly upon and within college facilities that are generally open and available to the public.

(b) Students are free to pursue appropriate educational objectives from among the college's curricula, programs, and services, subject to the limitations of RCW 28B.50.090 (3)(b).

(c) Students shall be protected from academic evaluation which is arbitrary, prejudiced, or capricious, but are responsible for meeting the standards of academic performance established by each of their instructors.

(d) Students have the right to a learning environment which is free from unlawful discrimination, inappropriate and disrespectful conduct, and any and all harassment, including sexual harassment.

(2) Due process.

(a) The rights of students to be secure in their persons, quarters, papers, and effects against unreasonable searches and seizures is guaranteed.

(b) No disciplinary sanction may be imposed on any student without notice to the accused of the nature of the charges.

(c) A student accused of violating this code of student conduct is entitled, upon request, to procedural due process as set forth in this chapter.

#### NEW SECTION

**WAC 132H-125-030 Prohibited student conduct.** The college may impose disciplinary sanctions against a student who commits, or aids, abets, incites, encourages or assists another person to commit, an act(s) of misconduct, which include, but are not limited to, the following:

(1) **Academic dishonesty.** Any act of academic dishonesty including, but not limited to, cheating, plagiarism, and fabrication.

(a) **Cheating** includes any attempt to give or obtain unauthorized assistance relating to the completion of an academic assignment.

(b) **Plagiarism** includes taking and using as one's own, without proper attribution, the ideas, writings, or work of another person in completing an academic assignment. May also include the unauthorized submission for credit of academic work that has been submitted for credit in another course.

(c) **Fabrication** includes falsifying data, information, or citations in completing an academic assignment and also includes providing false or deceptive information to an instructor concerning the completion of an assignment.

(2) **Other dishonesty.** Any other acts of dishonesty. Such acts include, but are not limited to:

(a) Forgery, alteration, submission of falsified documents or misuse of any college document, record, or instrument of identification;

(b) Tampering with an election conducted by or for college students; or

(c) Furnishing false information, or failing to furnish correct information, in response to the request or requirement of a college officer or employee.

(3) **Obstruction or disruption.** Obstruction or disruption of:

(a) Any instruction, research, administration, disciplinary proceeding, or other college activity, including the obstruction of the free flow of pedestrian or vehicular movement on college property or at a college activity; or

(b) Any activity that is authorized to occur on college property, whether or not actually conducted or sponsored by the college.

(4) **Assault.** Assault, physical abuse, verbal abuse, threat(s), intimidation, harassment, bullying, stalking or other conduct which harms, threatens, or is reasonably perceived as threatening the health or safety of another person or another person's property. For purposes of this subsection:

(a) **Bullying** is physical or verbal abuse, repeated over time, and involving a power imbalance between the aggressor and victim.

(b) **Stalking** is intentional and repeated following of another person, which places that person in reasonable fear that the perpetrator intends to injure, intimidate, or harass that person. Stalking also includes instances where the perpetrator knows or reasonably should know that the person is frightened, intimidated, or harassed, even if the perpetrator lacks such an intent.

(5) **Cyber misconduct.** Cyberstalking, cyberbullying or online harassment. Use of electronic communications including, but not limited to, electronic mail, instant messaging, electronic bulletin boards, and social media sites, to harass, abuse, bully, or engage in other conduct which harms, threatens, or is reasonably perceived as threatening the health or safety of another person. Prohibited activities include, but are not limited to, unauthorized monitoring of another's e-mail communications directly or through spyware, sending threatening e-mails, disrupting electronic communications with spam or by sending a computer virus, sending false messages to third parties using another's e-mail identity, nonconsensual recording of sexual activity, and nonconsensual distribution of a recording of sexual activity.

(6) **Property violation.** Damage to, or theft or misuse of, real or personal property or money of:

- (a) The college or state;
- (b) Any student or college officer, employee, or organization;
- (c) Any other member of the college community or organization; or
- (d) Possession of such property or money after it has been stolen.

(7) **Failure to comply with directive.** Failure to comply with the direction of a college officer or employee who is acting in the legitimate performance of his or her duties, including failure to properly identify oneself to such a person when requested to do so.

(8) **Weapons.** Possession, holding, wearing, transporting, storage or presence of any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, explosive device, or any other weapon apparently capable of producing bodily harm is prohibited on the college campus, subject to the following exceptions:

(a) Commissioned law enforcement personnel or legally authorized military personnel while in performance of their duties; or

(b) Students with legally issued concealed weapons permits may store their weapons in vehicles parked in accordance with RCW 9.41.050 on campus provided the vehicle is locked and the weapon is concealed from view; or

(c) The president or his delegate may authorize possession of a weapon on campus upon a showing that the weapon is reasonably related to a legitimate pedagogical purpose. Such permission shall be in writing and shall be subject to any terms or conditions incorporated therein.

(9) **Hazing.** Hazing includes, but is not limited to, any initiation into a student organization or any pastime or amusement engaged in with respect to such an organization that causes, or is likely to cause, bodily danger or physical harm, or serious mental or emotional harm to any student.

(10) **Alcohol, drug, and tobacco violations.**

(a) **Alcohol.** The use, possession, delivery, sale, or being visibly under the influence of any alcoholic beverage, except as permitted by law and applicable college policies.

(b) **Marijuana.** The use, possession, delivery, sale, or being visibly under the influence of marijuana or the psychoactive compounds found in marijuana and intended for human consumption, regardless of form. While state law permits the recreational use of marijuana, federal law prohibits such use on college premises or in connection with college activities.

(c) **Drugs.** The use, possession, delivery, sale, or being under the influence of any legend drug, including anabolic steroids, androgens, or human growth hormones as defined in chapter 69.41 RCW, or any other controlled substance under chapter 69.50 RCW, except as prescribed for a student's use by a licensed practitioner.

(d) **Tobacco, electronic cigarettes, and related products.** Tobacco, electronic cigarettes, and related products: The use of tobacco, electronic cigarettes, and related products in any building owned, leased or operated by the college or in any location where such use is prohibited, including twenty-five feet from entrances, exits, windows that open, and ventilation intakes of any building owned, leased, or operated by the college. "Related products" include, but are not limited to,

cigarettes, pipes, bidi, clove cigarettes, waterpipes, hookahs, chewing tobacco, and snuff.

(11) **Lewd conduct.** Conduct which is lewd or obscene.

(12) **Discriminatory conduct.** Discriminatory conduct which harm or adversely affect any member of the college community because of her/his race; color; national origin; sensory, mental or physical disability; use of a service animal; gender, including pregnancy; marital status; age (40+); religion; creed; genetic information; sexual orientation; gender identity; veteran status; or any other legally protected classification.

(13) **Sexual misconduct.** The term "sexual misconduct" includes sexual harassment, sexual intimidation, and sexual violence.

(a) **Sexual harassment.** The term "sexual harassment" means unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature that is sufficiently serious as to deny or limit, and that does deny or limit, based on sex, the ability of a student to participate in or benefit from the college's educational program or that creates an intimidating, hostile, or offensive environment for other campus community members.

(b) **Sexual intimidation.** The term "sexual intimidation" incorporates the definition of "sexual harassment" and means threatening or emotionally distressing conduct based on sex including, but not limited to, nonconsensual recording of sexual activity or the distribution of such recording.

(c) **Sexual violence.** "Sexual violence" is a type of sexual harassment and includes nonconsensual intercourse, non-consensual sexual contact, sexual coercion, sexual exploitation, and stalking. The term further includes acts of dating or domestic violence.

(i) Consent requires 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 may be incapable of giving consent by reason of age, threat or intimidation, lack of opportunity to object, disability, drug or alcohol consumption, or other cause.

(ii) Nonconsensual sexual intercourse is any sexual intercourse (anal, oral, or vaginal), however slight, with any object, 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.

(iii) Nonconsensual sexual contact is any intentional sexual touching, however slight, with any 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.

(iv) Domestic violence includes asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant, person

similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law.

(v) Dating violence means violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such relationship will be gauged by its length, type, and frequency of interaction.

(vi) Stalking means intentional and repeated harassment or following of another person, which places that person in reasonable fear that the perpetrator intends to injure, intimidate, or harass that person. Stalking also includes instances where the perpetrator knows or reasonably should know that the person is frightened, intimidated, or harassed, even if the perpetrator lacks such intent.

(14) **Harassment.** Unwelcome and offensive conduct, including verbal, nonverbal, or physical conduct, that is directed at a person because of such person's protected status and that is sufficiently serious as to deny or limit, and that does deny or limit, the ability of a student to participate in or benefit from the college's educational program or that creates an intimidating, hostile, or offensive environment for other campus community members. Protected status includes a person's race; color; national origin; sensory, mental or physical disability; use of a service animal; gender, including pregnancy; marital status; age (40+); religion; creed; genetic information; sexual orientation; gender identity; veteran status; or any other legally protected classification. See "Sexual misconduct" for the definition of "sexual harassment." Harassing conduct may include, but is not limited to, physical conduct, verbal, written, social media, and electronic communications.

(15) **Retaliation.** Retaliation against any individual for reporting, providing information, exercising one's rights or responsibilities, or otherwise being involved in the process of responding to, investigating, or addressing allegations or violations of federal, state, or local law, or college policies including, but not limited to, student conduct code provisions prohibiting discrimination and harassment.

(16) **Misuse of electronic resources.** Theft or other misuse of computer time or other electronic information resources of the college. Such misuse includes, but is not limited to:

(a) Unauthorized use of such resources or opening of a file, message, or other item;

(b) Unauthorized duplication, transfer, or distribution of a computer program, file, message, or other item;

(c) Unauthorized use or distribution of someone else's password or other identification;

(d) Use of such time or resources to interfere with someone else's work;

(e) Use of such time or resources to send, display, or print an obscene or abusive message, text, or image;

(f) Use of such time or resources to interfere with normal operation of the college's computing system or other electronic information resources;

(g) Use of such time or resources in violation of applicable copyright or other law;

(h) Adding to or otherwise altering the infrastructure of the college's electronic information resources without authorization; or

(i) Failure to comply with the college's electronic use policy.

(17) **Unauthorized access.** Unauthorized possession, duplication, or other use of a key, keycard, or other restricted means of access to college property, or unauthorized entry onto or into college property.

(18) **Safety violations.** Safety violation includes any nonaccidental conduct that interferes with or otherwise compromises any college policy, equipment, or procedure relating to the safety and security of the campus community, including tampering with fire safety equipment and triggering false alarms or other emergency response systems.

(19) **Violation of other laws or policies.** Violation of any federal, state, or local law, rule, or regulation or other college rules or policies, including college traffic and parking rules.

(20) **Ethical violation.** The breach of any generally recognized and published code of ethics or standards of professional practice that governs the conduct of a particular profession for which the student is taking a course or is pursuing as an educational goal or major.

In addition to initiating discipline proceedings for violation of the student conduct code, the college may refer any violations of federal, state, or local laws to civil and criminal authorities for disposition. The college shall proceed with student disciplinary proceedings regardless of whether the underlying conduct is subject to civil or criminal prosecution.

#### NEW SECTION

**WAC 132H-125-040 Disciplinary sanctions—Terms and conditions.** The following disciplinary sanctions may be imposed upon students found to have violated the student conduct code.

(1) **Disciplinary warning.** A verbal statement to a student that there is a violation and that continued violation may be cause for further disciplinary action.

(2) **Written reprimand.** Notice in writing that the student has violated one or more terms of this code of conduct and that continuation of the same or similar behavior may result in more severe disciplinary action.

(3) **Disciplinary probation.** Formal action placing specific conditions and restrictions upon the student's continued attendance depending upon the seriousness of the violation, and which may include a deferred disciplinary sanction. If the student subject to a deferred disciplinary sanction is found in violation of any college rule during the time of disciplinary probation, the deferred disciplinary sanction, which may include, but is not limited to, a suspension or a dismissal from the college, shall take effect immediately without further review. Any such sanction shall be in addition to any sanction or conditions arising from the new violation. Probation may be for a limited period of time or may be for the duration of the student's attendance at the college.

(4) **Disciplinary suspension.** Dismissal from the college and from the student status for a stated period of time. There will be no refund of tuition or fees for the quarter in which the action is taken.

(5) **Dismissal.** The revocation of all rights and privileges of membership in the college community and exclusion from

the campus and college-owned or controlled facilities without any possibility of return. There will be no refund of tuition or fees for the quarter in which the action is taken.

(6) Disciplinary terms and conditions that may be imposed in conjunction with the imposition of a disciplinary sanction include, but are not limited to, the following:

(a) Restitution. Reimbursement for damage to or misappropriation of property, or for injury to persons, or for reasonable costs incurred by the college in pursuing an investigation or disciplinary proceeding. This may take the form of monetary reimbursement, appropriate service, or other compensation.

(b) Professional evaluation. Referral for drug, alcohol, psychological or medical evaluation by an appropriately certified or licensed professional may be required. The student may choose the professional within the scope of practice and with the professional credentials as defined by the college. The student will sign all necessary releases to allow the college access to any such evaluation. The student's return to college may be conditioned upon compliance with recommendations set forth in such a professional evaluation. If the evaluation indicates that the student is not capable of functioning within the college community, the student will remain suspended until future evaluation recommends that the student is capable of reentering the college and complying with the rules of conduct.

(7) **Not in good standing.** A student may be deemed "not in good standing" with the college. If so, the student shall be subject to the following restrictions:

(a) Ineligible to hold an office in any student organization recognized by the college or to hold any elected or appointed office of the college.

(b) Ineligible to represent the college to anyone outside the college community in any way, including representing the college at any official function, or any forms of intercollegiate competition or representation.

#### NEW SECTION

**WAC 132H-125-200 Statement of jurisdiction.** The student conduct code shall apply to student conduct that occurs on college premises, to conduct that occurs at or in connection with college-sponsored activities, or to off-campus conduct that in the judgment of the college adversely affects the college community or the pursuit of its objectives. Jurisdiction extends to, but is not limited to, locations in which students are engaged in official college activities including, but not limited to, foreign or domestic travel, activities funded by the associated students, athletic events, training internships, cooperative and distance education, online education, practicums, supervised work experiences or any other college-sanctioned social or club activities. Students are responsible for their conduct from the time of application for admission through the actual receipt of a degree, even though conduct may occur before classes begin or after classes end, as well as during the academic year and during periods between terms of actual enrollment. These standards shall apply to a student's conduct even if the student withdraws from college while a disciplinary matter is pending. The college has sole discretion, on a case-by-case basis, to

determine whether the student conduct code will be applied to conduct that occurs off campus.

#### NEW SECTION

**WAC 132H-125-210 Definitions.** The following definitions shall apply for the purposes of this student conduct code:

(1) **"Business day"** means a weekday, excluding weekends and college holidays.

(2) **"College premises"** shall include all campuses of the college, wherever located, and includes all land, buildings, facilities, vehicles, equipment, and other property owned, used, or controlled by the college.

(3) **"Conduct review officer"** is the vice-president of student services or other college administrator designated by the president to be responsible for receiving and for reviewing or referring appeals of student disciplinary actions in accordance with the procedures of this code. The president is authorized to reassign any and all of the conduct review officer's duties or responsibilities, as set forth in this chapter, as may be reasonably necessary.

(4) **"Disciplinary action"** is the process by which the student conduct officer imposes discipline against a student for a violation of the student conduct code.

(5) **"Disciplinary appeal"** is the process by which an aggrieved student can appeal the discipline imposed by the student conduct officer. Disciplinary appeals from a suspension in excess of ten instructional days or an expulsion, are heard by the student conduct committee. Appeals of all other appealable disciplinary action shall be reviewed through brief adjudicative proceedings.

(6) **"Filing"** is the process by which a document is officially delivered to a college official responsible for facilitating a disciplinary review. Papers required to be filed shall be deemed filed upon actual receipt during office hours at the office of the specified college official. Unless otherwise provided, filing shall be accomplished by:

(a) Hand delivery of the document to the specified college official or college official's assistant; or

(b) Sending the document by e-mail and first class mail to the specified college official's office and college e-mail address.

(7) **"Respondent"** is the student against whom disciplinary action is initiated.

(8) **"Service"** is the process by which a document is officially delivered to a party. Service is deemed complete upon hand delivery of the document or upon the date the document is e-mailed and deposited in the mail. Unless otherwise provided, service upon a party shall be accomplished by:

(a) Hand delivery of the document to the party; or

(b) Sending the document by e-mail and by certified mail or first class mail to the party's last known address.

(9) **"Student"** includes all persons taking courses at or through the college, whether on a full-time or part-time basis, and whether such courses are credit courses, noncredit courses, online courses, or otherwise. Persons who withdraw after allegedly violating the code, who are not officially enrolled for a particular term but who have a continuing rela-

tionship with the college, or who have been notified of their acceptance for admission are considered "students."

(10) "**Student conduct officer**" is a college administrator designated by the president or vice-president of student services to be responsible for implementing and enforcing the student conduct code. The president or vice-president of student services is authorized to reassign any and all of the student conduct officer's duties or responsibilities, as set forth in this chapter, as may be reasonably necessary.

(11) "**The president**" is the president of the college. The president is authorized to delegate any and all of his or her responsibilities, as set forth in this chapter, as may be reasonably necessary.

#### NEW SECTION

##### **WAC 132H-125-220 Initiation of disciplinary action.**

(1) All disciplinary actions will be initiated by the student conduct officer. If that officer is the subject of a complaint initiated by the respondent, the president shall, upon request and when feasible, designate another person to fulfill any such disciplinary responsibilities relative to the complainant.

(2) The student conduct officer shall initiate disciplinary action by serving the respondent with written notice directing him or her to attend a disciplinary meeting. The notice shall briefly describe the factual allegations, the provision(s) of the conduct code the respondent is alleged to have violated, the range of possible sanctions for the alleged violation(s), and specify the time and location of the meeting. At the meeting, the student conduct officer will present the allegations to the respondent and the respondent shall be afforded an opportunity to explain what took place. If the respondent fails to attend the meeting, the student conduct officer may take disciplinary action based upon the available information.

(3) Within ten days of the initial disciplinary meeting and after considering the evidence in the case, including any facts or argument presented by the respondent, the student conduct officer shall serve the respondent with a written decision setting forth the facts and conclusions supporting his or her decision, the specific student conduct code provisions found to have been violated, the discipline imposed, if any, and a notice of any appeal rights with an explanation of the consequences of failing to file a timely appeal.

(4) The student conduct officer may take any of the following disciplinary actions:

(a) Exonerate the respondent and terminate the proceedings.

(b) Impose a disciplinary sanction(s), as described in WAC 132H-125-040 and BC Policy 2050.

(c) Refer the matter directly to the student conduct committee for such disciplinary action as the committee deems appropriate. Such referral shall be in writing, to the attention of the chair of the student conduct committee, with a copy served on the respondent.

#### NEW SECTION

**WAC 132H-125-230 Appeal from disciplinary action.** (1) The respondent may appeal a disciplinary action by filing a written notice of appeal with the conduct review officer within twenty-one days of service of the student con-

duct officer's decision. Failure to timely file a notice of appeal constitutes a waiver of the right to appeal and the student conduct officer's decision shall be deemed final.

(2) The notice of appeal must include a brief statement explaining why the respondent is seeking review.

(3) The parties to an appeal shall be the respondent and the conduct review officer.

(4) A respondent, who timely appeals a disciplinary action or whose case is referred to the student conduct committee, has a right to a prompt, fair, and impartial hearing as provided for in these procedures.

(5) On appeal, the college bears the burden of establishing the evidentiary facts underlying the imposition of a disciplinary sanction by a preponderance of the evidence.

(6) Imposition of disciplinary action for violation of the student conduct code shall be stayed pending appeal, unless respondent has been summarily suspended.

(7) The student conduct committee shall hear appeals from:

(a) The imposition of disciplinary suspensions in excess of ten instructional days;

(b) Dismissals; and

(c) Discipline cases referred to the committee by the student conduct officer, the conduct review officer, or the president.

(8) Student conduct appeals from the imposition of the following disciplinary sanctions shall be reviewed through a brief adjudicative proceeding:

(a) Suspensions of ten instructional days or less;

(b) Disciplinary probation;

(c) Written reprimands; and

(d) Any conditions or terms imposed in conjunction with one of the foregoing disciplinary actions.

(9) Except as provided elsewhere in these rules, disciplinary warnings and dismissals of disciplinary actions are final action and are not subject to appeal.

#### NEW SECTION

##### **WAC 132H-125-240 Brief adjudicative proceedings—Initial hearing.**

(1) Brief adjudicative proceedings shall be conducted by a conduct review officer designated by the president. The conduct review officer shall not participate in any case in which he or she is a complainant or witness, or in which they have direct or personal interest, prejudice, or bias, or in which they have acted previously in an advisory capacity.

(2) Before taking action, the conduct review officer shall conduct an informal hearing and provide each party:

(a) An opportunity to be informed of the agency's view of the matter; and

(b) An opportunity to explain the party's view of the matter.

(3) The conduct review officer shall serve an initial decision upon both the parties within ten days of consideration of the appeal. The initial decision shall contain a brief written statement of the reasons for the decision and information about how to seek administrative review of the initial decision. If no request for review is filed within twenty-one days

of service of the initial decision, the initial decision shall be deemed the final decision.

(4) If the conduct review officer, upon review, determines that the respondent's conduct may warrant imposition of a disciplinary suspension of more than ten instructional days or expulsion, the matter shall be referred to the student conduct committee for a disciplinary hearing.

#### NEW SECTION

**WAC 132H-125-250 Brief adjudicative proceedings—Review of an initial decision.** (1) An initial decision is subject to review by the president, provided the respondent files a written request for review with the conduct review officer within twenty-one days of service of the initial decision.

(2) The president shall not participate in any case in which he or she is a complainant or witness, or in which he/she has direct or personal interest, prejudice, or bias, or in which he/she has acted previously in an advisory capacity.

(3) During the review, the president shall give each party an opportunity to file written responses explaining their view of the matter and shall make any inquiries necessary to determine whether the sanctions should be modified or whether the proceedings should be referred to the student conduct committee for a formal adjudicative hearing.

(4) The decision on review must be in writing and must include a brief statement of the reasons for the decision and must be served on the parties within twenty days of the initial decision or of the request for review, whichever is later. The decision on review will contain a notice that judicial review may be available. A request for review may be deemed to have been denied if the president does not make a disposition of the matter within twenty days after the request is submitted.

(5) If the president, upon review, determines that the respondent's conduct may warrant imposition of a disciplinary suspension of more than ten instructional days or expulsion, the matter shall be referred to the student conduct committee for a disciplinary hearing.

#### NEW SECTION

**WAC 132H-125-260 Student conduct committee.** (1) The student conduct committee shall consist of six members:

(a) Two full-time students appointed by the student government;

(b) Two faculty members appointed by the president;

(c) Two administrative staff members, other than an administrator serving as a student conduct or conduct review officer, appointed by the president prior to the beginning of the academic year for alternating two-year terms.

(2) One of the administrative staff members shall serve as the chair of the committee and may take action on preliminary hearing matters prior to convening the committee. The administrative staff members shall receive annual training on protecting victims and promoting accountability in cases involving allegations of sexual misconduct.

(3) Hearings may be heard by a quorum of three members of the committee, so long as one faculty member, one student, and one administrative staff member are included on

the hearing panel. Committee action may be taken upon a majority vote of all committee members attending the hearing.

(4) Members of the student conduct committee shall not participate in any case in which they are a party, complainant, or witness, in which they have direct or personal interest, prejudice, or bias, or in which they have acted previously in an advisory capacity. Any party may petition for disqualification of a committee member pursuant to RCW 34.05.425(4).

#### NEW SECTION

**WAC 132H-125-270 Appeal—Student conduct committee.** (1) Proceedings of the student conduct committee shall be governed by the Administrative Procedure Act, chapter 34.05 RCW, and by the Model Rules of Procedure, chapter 10-08 WAC. To the extent there is a conflict between these rules and chapter 10-08 WAC, these rules shall control.

(2) The student conduct committee chair shall serve all parties with written notice of the hearing not less than seven days in advance of the hearing date, as further specified in RCW 34.05.434 and WAC 10-08-040 and 10-08-045. The chair may shorten this notice period if both parties agree, and also may continue the hearing to a later time for good cause shown.

(3) The committee chair is authorized to conduct prehearing conferences and/or to make prehearing decisions concerning the extent and form of any discovery, issuance of protective decisions, and similar procedural matters.

(4) Upon request, filed at least five days before the hearing by any party or at the direction of the committee chair, the parties shall exchange, no later than the third day prior to the hearing, lists of potential witnesses and copies of potential exhibits that they reasonably expect to present to the committee. Failure to participate in good faith in such a requested exchange may be cause for exclusion from the hearing of any witness or exhibit not disclosed, absent a showing of good cause for such failure.

(5) The committee chair may provide to the committee members in advance of the hearing copies of (a) the conduct officer's notification of imposition of discipline, or referral to the committee, and (b) the notice of appeal, or any response to referral, by the respondent. If doing so, however, the chair should remind the members that these "pleadings" are not evidence of any facts they may allege.

(6) The parties may agree before the hearing to designate specific exhibits as admissible without objection and, if they do so, whether the committee chair may provide copies of these admissible exhibits to the committee members before the hearing.

(7) The student conduct officer, upon request, shall provide reasonable assistance to the respondent in obtaining relevant and admissible evidence that is within the college's control.

(8) Communications between committee members and other hearing participants regarding any issue in the proceeding, other than procedural communications that are necessary to maintain an orderly process, are generally prohibited without notice and opportunity for all parties to participate, and

any improper "ex parte" communication shall be placed on the record, as further provided in RCW 34.05.455.

(9) Each party may be accompanied at the hearing by a nonattorney assistant of his/her choice. A respondent may elect to be represented by an attorney at his or her own cost, but will be deemed to have waived that right unless, at least four business days before the hearing, written notice of the attorney's identity and participation is filed with the committee chair with a copy to the student conduct officer. The committee will ordinarily be advised by an assistant attorney general. If the respondent is represented by an attorney, the student conduct officer may also be represented by a second, appropriately screened assistant attorney general.

#### NEW SECTION

**WAC 132H-125-280 Student conduct committee hearings—Presentations of evidence.** (1) Upon the failure of any party to attend or participate in a hearing, the student conduct committee may either:

(a) Proceed with the hearing and issuance of its decision;  
or

(b) Serve a decision of default in accordance with RCW 34.05.440.

(2) The hearing will ordinarily be closed to the public. However, if all parties agree on the record that some or all of the proceedings be open, the chair shall determine any extent to which the hearing will be open. If any person disrupts the proceedings, the chair may exclude that person from the hearing room.

(3) The chair shall cause the hearing to be recorded by a method that he/she selects, in accordance with RCW 34.05.449. That recording, or a copy, shall be made available to any party upon request. The chair shall assure maintenance of the record of the proceeding that is required by RCW 34.05.476, which shall also be available upon request for inspection and copying by any party. Other recording shall also be permitted, in accordance with WAC 10-08-190.

(4) The chair shall preside at the hearing and decide procedural questions that arise during the hearing, except as overridden by majority vote of the committee.

(5) The student conduct officer, unless represented by an assistant attorney general, shall present the case for imposing disciplinary sanctions.

(6) All testimony shall be given under oath or affirmation. Evidence shall be admitted or excluded in accordance with RCW 34.05.452.

#### NEW SECTION

**WAC 132H-125-290 Student conduct committee—Initial decision.** (1) At the conclusion of the hearing, the student conduct committee shall permit the parties to make closing arguments in whatever form it wishes to receive them. The committee also may permit each party to propose findings, conclusions, and/or a proposed decision for its consideration.

(2) Within twenty days following the later of the conclusion of the hearing or the committee's receipt of closing arguments, the committee shall issue an initial decision in accordance with RCW 34.05.461 and WAC 10-08-210. The initial

decision shall include findings on all material issues of fact and conclusions on all material issues of law, including which, if any, provisions of the student conduct code were violated. Any findings based substantially on the credibility of evidence or the demeanor of witnesses shall be so identified.

(3) The committee's initial order shall also include a determination on appropriate discipline, if any. If the matter was referred to the committee by the student conduct officer, the committee shall identify and impose disciplinary sanction(s) or conditions, if any, as authorized in the student code. If the matter is an appeal by the respondent, the committee may affirm, reverse, or modify the disciplinary sanction and/or conditions imposed by the student conduct officer and/or impose additional disciplinary sanction(s) or conditions as authorized herein.

(4) The committee chair shall cause copies of the initial decision to be served on the parties and their legal counsel of record. The committee chair shall also promptly transmit a copy of the decision and the record of the committee's proceedings to the president.

#### NEW SECTION

**WAC 132H-125-300 Appeal from student conduct committee initial decision.** (1) A respondent who is aggrieved by the findings or conclusions issued by the student conduct committee may appeal the committee's initial decision to the president by filing a notice of appeal with the president's office within twenty-one days of service of the committee's initial decision. Failure to file a timely appeal constitutes a waiver of the right and the initial decision shall be deemed final.

(2) The notice of appeal must identify the specific findings of fact and/or conclusions of law in the initial decision that are challenged and must contain argument why the appeal should be granted. The president's review shall be restricted to the hearing record made before the student conduct committee and will normally be limited to a review of those issues and arguments raised in the notice of appeal.

(3) The president shall provide a written decision to all parties within forty-five days after receipt of the notice of appeal. The president's decision shall be final and shall include a notice of any rights to request reconsideration and/or judicial review.

(4) The president may, at his or her discretion, suspend any disciplinary action pending review of the merits of the findings, conclusions, and disciplinary actions imposed.

(5) The president shall not engage in an ex parte communication with any of the parties regarding an appeal.

#### NEW SECTION

**WAC 132H-125-310 Summary suspension.** (1) Summary suspension is a temporary exclusion from specified college premises or denial of access to all activities or privileges for which a respondent might otherwise be eligible, while an investigation and/or formal disciplinary procedures are pending.

(2) The student conduct officer may impose a summary suspension if there is probable cause to believe that the respondent:

(a) Has violated any provision of the code of conduct; and

(b) Presents an immediate danger to the health, safety, or welfare of members of the college community; or

(c) Poses an ongoing threat of substantial disruption of, or interference with, the operations of the college.

(3) Notice. Any respondent who has been summarily suspended shall be served with oral or written notice of the summary suspension. If oral notice is given, a written notification shall be served on the respondent within two business days of the oral notice.

(4) The written notification shall be entitled "Notice of Summary Suspension" and shall include:

(a) The reasons for imposing the summary suspension, including a description of the conduct giving rise to the summary suspension and reference to the provisions of the student conduct code or the law allegedly violated;

(b) The date, time, and location when the respondent must appear before the conduct review officer for a hearing on the summary suspension; and

(c) The conditions, if any, under which the respondent may physically access the campus or communicate with members of the campus community. If the respondent has been trespassed from the campus, a notice against trespass shall be included that warns the student that his or her privilege to enter into or remain on college premises has been withdrawn, that the respondent shall be considered trespassing and subject to arrest for criminal trespass if the respondent enters the college campus other than to meet with the student conduct officer or conduct review officer, or to attend a disciplinary hearing.

(5) The conduct review officer shall conduct a hearing on the summary suspension as soon as practicable after imposition of the summary suspension.

(a) During the summary suspension hearing, the issue before the conduct review officer is whether there is probable cause to believe that the summary suspension should be continued pending the conclusion of disciplinary proceedings and/or whether the summary suspension should be less restrictive in scope.

(b) The respondent shall be afforded an opportunity to explain why summary suspension should not be continued while disciplinary proceedings are pending or why the summary suspension should be less restrictive in scope.

(c) If the respondent fails to appear at the designated hearing time, the conduct review officer may order that the summary suspension remain in place pending the conclusion of the disciplinary proceedings.

(d) As soon as practicable following the hearing, the conduct review officer shall issue a written decision which shall include a brief explanation for any decision continuing and/or modifying the summary suspension and notice of any right to appeal.

(e) To the extent permissible under applicable law, the conduct review officer shall provide a copy of the decision to all persons or offices who may be bound or protected by it.

#### NEW SECTION

**WAC 132H-125-320 Discipline procedures for cases involving allegations of sexual misconduct.** Both the respondent and the complainant in cases involving allegations of sexual misconduct shall be provided the same procedural rights to participate in student discipline matters, including the right to participate in the initial disciplinary decision-making process and to appeal any disciplinary decision.

Application of the following procedures is limited to student conduct code proceedings involving allegations of sexual misconduct by a student. In such cases, these procedures shall supplement the student disciplinary procedures in WAC 132H-125-005 through 132H-125-060. In the event of conflict between the sexual misconduct procedures and the student disciplinary procedures, the sexual misconduct procedures shall take precedence.

#### NEW SECTION

**WAC 132H-125-330 Supplemental definitions.** The following supplemental definitions shall apply for purposes of student conduct code proceedings involving allegations of sexual misconduct by a student:

(1) A "**complainant**" is an alleged victim of sexual misconduct, as defined in subsection (2) of this section.

(2) "**Sexual misconduct**" is prohibited sexual- or gender-based conduct by a student including, but not limited to:

(a) Sexual activity for which clear and voluntary consent has not been given in advance;

(b) Sexual activity with someone who is incapable of giving valid consent because, for example, she or he is under-age, sleeping, or otherwise incapacitated due to alcohol or drugs;

(c) Sexual harassment;

(d) Sexual violence which includes, but is not limited to, sexual assault, domestic violence, intimate violence, and sexual- or gender-based stalking; and

(e) Nonphysical conduct such as sexual- or gender-based digital media stalking, sexual- or gender-based online harassment, sexual- or gender-based cyberbullying, nonconsensual recording of a sexual activity, and nonconsensual distribution of a recording of a sexual activity.

#### NEW SECTION

**WAC 132H-125-340 Supplemental complaint process.** The following supplemental procedures shall apply with respect to complaints or other reports of alleged sexual misconduct by a student:

(1) The college's Title IX compliance officer shall investigate complaints or other reports of alleged sexual misconduct by a student. Investigations will be completed in a timely manner and the results of the investigation shall be referred to the student conduct officer for disciplinary action.

(2) Informal dispute resolution shall not be used to resolve sexual misconduct complaints without written permission from both the complainant and the respondent. If the parties elect to mediate a dispute, either party shall be free to discontinue mediation at any time. In no event shall media-

tion be used to resolve complaints involving allegations of sexual violence.

(3) College personnel will honor requests to keep sexual misconduct complaints confidential to the extent this can be done without unreasonably risking the health, safety, and welfare of the complainant or other members of the college community or compromising the college's duty to investigate and process sexual harassment and sexual violence complaints.

(4) The student conduct officer, prior to initiating disciplinary action, will make a reasonable effort to contact the complainant to discuss the results of the investigation and possible disciplinary sanctions and/or conditions, if any, that may be imposed upon the respondent if the allegations of sexual misconduct are found to have merit.

(5) The student conduct officer, on the same date that a disciplinary decision is served on the respondent, will serve a written notice informing the complainant whether the allegations of sexual misconduct were found to have merit and describing any disciplinary sanctions and/or conditions imposed upon the respondent for the complainant's protection, including disciplinary suspension or dismissal of the respondent. The notice will also inform the complainant of his or her appeal rights. If protective sanctions and/or conditions are imposed, the student conduct officer shall make a reasonable effort to contact the complainant to ensure prompt notice of the protective disciplinary sanctions and/or conditions.

#### NEW SECTION

##### **WAC 132H-125-350 Supplemental appeal rights. (1)**

The following actions by the student conduct officer may be appealed by the complainant:

- (a) The dismissal of a sexual misconduct complaint; or
- (b) Any disciplinary sanction(s) and conditions imposed against a respondent for a sexual misconduct violation, including a disciplinary warning.

(2) A complainant may appeal a disciplinary decision by filing a notice of appeal with the conduct review officer within twenty-one days of service of the notice of the discipline decision provided for in WAC 132H-125-110(5). The notice of appeal may include a written statement setting forth the grounds of appeal. Failure to file a timely notice of appeal constitutes a waiver of this right and the disciplinary decision shall be deemed final.

(3) If the respondent timely appeals a decision imposing discipline for a sexual misconduct violation, the college shall notify the complainant of the appeal and provide the complainant an opportunity to intervene as a party to the appeal.

(4) Except as otherwise specified in this supplemental procedure, a complainant who timely appeals a disciplinary decision or who intervenes as a party to the respondent's appeal of a disciplinary decision shall be afforded the same procedural rights as are afforded the respondent.

(5) An appeal by a complainant from the following disciplinary actions involving allegations of sexual misconduct against a student shall be handled as a brief adjudicative proceeding:

- (a) Exoneration and dismissal of the proceedings;

- (b) Disciplinary warning;

- (c) Written reprimand;

- (d) Disciplinary probation;

- (e) Suspensions of ten instructional days or less; and/or

- (f) Any conditions or terms imposed in conjunction with one of the foregoing disciplinary actions.

(6) An appeal by a complainant from disciplinary action imposing a suspension in excess of ten instructional days or an expulsion shall be reviewed by the student conduct committee.

(7) In proceedings before the student conduct committee, respondent and complainant shall have the right to be accompanied by a nonattorney assistant of their choosing during the appeal process. Complainant may choose to be represented at the hearing by an attorney at his or her own expense, but will be deemed to have waived that right unless, at least four business days before the hearing, he or she files a written notice of the attorney's identity and participation with the committee chair, and with copies to the respondent and the student conduct officer.

(8) In proceedings before the student conduct committee, complainant and respondent shall not directly question or cross examine one another. All questions shall be directed to the committee chair, who will act as an intermediary and pose questions on the parties' behalf.

(9) Student conduct hearings involving sexual misconduct allegations shall be closed to the public, unless respondent and complainant both waive this requirement in writing and request that the hearing be open to the public. Complainant, respondent and their respective nonattorney assistants and/or attorneys may attend portions of the hearing where argument, testimony, and/or evidence are presented to the student conduct committee.

(10) The chair of the student conduct committee, on the same date as the initial decision is served on the respondent, will serve a written notice upon complainant informing the complainant whether the allegations of sexual misconduct were found to have merit and describing any disciplinary sanctions and/or conditions imposed upon the respondent for the complainant's protection, including suspension or dismissal of the respondent. The notice will also inform the complainant of his or her appeal rights.

(11) The complainant may appeal the student conduct committee's initial decision to the president subject to the same procedures and deadlines applicable to other parties.

(12) The president, on the same date that the final decision is served upon the respondent, shall serve a written notice informing the complainant of the final decision. This notice shall inform the complainant whether the sexual misconduct allegation was found to have merit and describe any disciplinary sanctions and/or conditions imposed upon the respondent for the complainant's protection, including suspension or dismissal of the respondent.

**WSR 14-23-092**  
**PERMANENT RULES**  
**OFFICE OF**

**INSURANCE COMMISSIONER**

[Insurance Commissioner Matter No. R 2014-04—Filed November 19, 2014, 11:42 a.m., effective December 20, 2014]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This proposed rule revision is a clarification of an essential health benefit as specified in the Affordable Care Act.

The rule making on essential health benefits defined pediatric vision screening as "Routine vision screening and eye exam for children, including dilation as professionally indicated, and with refraction every calendar year."

Under the current definition, when a pediatrician bills for an eye screening, this exhausts the annual insurance benefit for a comprehensive pediatric eye exam even though the child didn't receive one. Clarifying which services are included in a pediatric vision screening should prevent this problem from occurring in the future.

Citation of Existing Rules Affected by this Order: Amending WAC 284-43-880 (2)(a).

Statutory Authority for Adoption: RCW 48.02.060, 48.44.050, 48.46.200.

Adopted under notice filed as WSR 14-17-049 on August 14, 2014.

A final cost-benefit analysis is available by contacting Bianca Stoner, P.O. Box 40258, Olympia, WA 98504-0258, phone (360) 725-7041, fax (360) 586-3109, e-mail rules coordinator@oic.wa.gov.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 1, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 1, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: November 19, 2014.

Mike Kreidler  
Insurance Commissioner

AMENDATORY SECTION (Amending WSR 13-15-025, filed 7/9/13, effective 7/10/13)

**WAC 284-43-880 Pediatric vision services.** A health benefit plan must include "pediatric vision services" in its essential health benefits package. The base-benchmark plan covers pediatric services for the categories set forth in WAC 284-43-878 (1) through (9), but does not include pediatric vision services. Pediatric vision services are vision services delivered to enrollees under age nineteen.

(1) A health benefit plan must cover pediatric vision services as an embedded set of services.

(2) **Supplementation:** The state EHB-benchmark plan requirements for pediatric vision benefits must be offered at a substantially equal level and classified consistent with the designated supplemental base-benchmark plan for pediatric vision services, the Federal Employees Vision Plan with the largest enrollment and published by the U.S. Department of Health and Human Services at www.cciioo.cms.gov on July 2, 2012.

(a) The vision services included in the pediatric vision services category are:

(i) Routine vision screening; and

(ii) A comprehensive eye exam for children, including dilation as professionally indicated((-)) and with refraction every calendar year;

((+)) (iii) One pair of prescription lenses or contacts every calendar year, including polycarbonate lenses and scratch resistant coating. Lenses may include single vision, conventional lined bifocal or conventional lined trifocal, or lenticular lenses;

((+)) (iv) One pair of frames every calendar year. An issuer may establish networks or tiers of frames within their plan design as long as there is a base set of frames to choose from available without cost sharing;

((+)) (v) Contact lenses covered once every calendar year in lieu of the lenses and frame benefits. Issuers must apply this limitation based on the manner in which the lenses must be dispensed. If disposable lenses are prescribed, a sufficient number and amount for one calendar year's equivalent must be covered. The benefit includes the evaluation, fitting and follow-up care relating to contact lenses. If determined to be medically necessary, contact lenses must be covered in lieu of eyeglasses at a minimum for the treatment of the following conditions: Keratoconus, pathological myopia, aphakia, anisometropia, aniseikonia, aniridia, corneal disorders, post-traumatic disorders, and irregular astigmatism;

((+)) (vi) Low vision optical devices including low vision services, training and instruction to maximize remaining usable vision as follows:

(A) One comprehensive low vision evaluation every five years;

(B) High power spectacles, magnifiers and telescopes as medically necessary, with reasonable limitations permitted; and

(C) Follow-up care of four visits in any five year period, with prior approval.

(b) The pediatric vision supplemental base-benchmark specifically excludes, and issuer must not include in its actuarial value for the category:

(i) Visual therapy, which is otherwise covered under the medical/surgical benefits of the plan;

(ii) Two pairs of glasses may not be ordered in lieu of bifocals;

(iii) Medical treatment of eye disease or injury, which is otherwise covered under the medical/surgical benefits of the plan;

(iv) Nonprescription (Plano) lenses; and

(v) Prosthetic devices and services, which are otherwise covered under the rehabilitative and habilitative benefit category.