

## WSR 21-20-123

## EXPEDITED RULES

## UNIVERSITY OF WASHINGTON

[Filed October 5, 2021, 11:44 a.m.]

Title of Rule and Other Identifying Information: Removing the first and last sentence of WAC 478-121-675(1) Evidence.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 478-121-600(2) states Part VII, which contains WAC 478-121-675(1), applies "only when 34 C.F.R. Part 106 is deemed enforceable by law and/or by United States courts." Accordingly, pursuant to this provision and the *Cardona* decision, the first sentence of WAC 478-121-675(1) no longer applies to proceedings under Part VII or any other part of the university's student conduct code.

The purpose is to remove information that no longer applies to proceedings under Part VII of chapter 478-121 WAC.

Reasons Supporting Proposal: The University of Washington seeks to repeal a portion of its student conduct code on an expedited basis under RCW 34.05.353. Specifically, the university wishes to delete the first sentence of WAC 478-121-675(1) because that provision was enacted only to implement a portion of the 2020 federal Title IX regulations—*viz.*, the first clause of the ninth sentence of 34 C.F.R. § 106.45 (b) (6) (i)—that a United States District Court held to be unlawful and set aside as arbitrary and capricious. *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). On August 24, 2021, the Department of Education issued a letter stating that it would immediately cease enforcement of the part of 34 C.F.R. § 106.45 (b) (6) (i) that was set aside and further clarified that postsecondary institutions were no longer subject to this portion of the provision.

Relevant information:

Court decision: <https://storage.courtlistener.com/recap/gov.uscourts.mad.222276/gov.uscourts.mad.222276.183.0.pdf>.

Department of Education letter: <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>.

Statutory Authority for Adoption: RCW 28B.20.130.

Statute Being Implemented: 34 C.F.R. Part 106.

Rule is necessary because of federal court decision, *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).

Name of Proponent: University of Washington, governmental.

Name of Agency Personnel Responsible for Drafting: Mags Aleks, Deputy Title IX Coordinator, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932; Implementation: Valery Richardson, Title IX Coordinator, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932; and Enforcement: Jane Yung, Executive Compliance and Risk Officer, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

This notice meets the following criteria to use the expedited repeal process for these rules:

The rule is no longer necessary because of changed circumstances.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Barbara Lechtanski, Director of the University Policy and Rules Office, University of Washington, Box 351210, Seattle, WA 98195-1210, email rules@uw.edu, AND RECEIVED BY December 7, 2021.

October 5, 2021  
Barbara Lechtanski  
Director of the University  
Policy and Rules Office

### OTS-3375.1

AMENDATORY SECTION (Amending WSR 21-07-047, filed 3/11/21, effective 4/11/21)

**WAC 478-121-675 Evidence.** (1) ~~((If a party or witness does not submit to questioning or cross-examination at the hearing, the hearing officer cannot rely on any statement of that party or witness in reaching a determination regarding responsibility.))~~ The hearing officer may not draw an inference about determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions or submit to cross-examination. This subsection does not apply to allegations of prohibited conduct under Part II of this code, WAC 478-121-103 through 478-121-173. ~~((The term "statement" does not include statements that constitute verbal conduct.))~~

(2) Questions or evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions or evidence about a party's sexual behavior are offered to prove that someone other than the respondent committed the sexual conduct alleged by the complainant or such questions or evidence concern specific incidents of the parties' prior sexual behavior and such information is relevant to determine the presence or absence of consent.

(3) Except as otherwise provided in this section, evidence may be considered if, in the judgment of the hearing officer, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of such reasonably prudent person's affairs. The relevance of evidence will be determined by the hearing officer at a hearing. The hearing officer may exclude from consideration evidence that is not relevant. Statements of personal opinion or general reputation about a party or witness are generally not considered to be relevant. Evidence that is duplicative of other evidence is generally not considered to be relevant.

(4) An investigator or hearing officer may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has voluntarily waived the privilege in writing. An investigator or hearing officer

also may not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent.

[Statutory Authority: RCW 28B.20.130 and 34 C.F.R. Part 106. WSR 21-07-047, § 478-121-675, filed 3/11/21, effective 4/11/21.]