

WSR 21-05-002

PROPOSED RULES

THE EVERGREEN STATE COLLEGE

[Filed February 3, 2021, 3:38 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-21-030.

Title of Rule and Other Identifying Information: Chapter 174-123 WAC, Code of student rights and responsibilities. Amending the rules to comply permanently with the 2020 Title IX Regulations.

Hearing Location(s): On Monday, March 15, 2021, at 3:00 p.m., via Zoom <https://evergreen.zoom.us/j/89661207179>. Hearing will be conducted virtually via Zoom due to COVID-19 protocols. Any person interested in providing comments must either attend the virtual session, or provide written comment to Lori Johnson, director of student rights and responsibilities, at studentconduct@evergreen.edu. Comments must be received prior to the hearing on March 15.

Date of Intended Adoption: April 26, 2021.

Submit Written Comments to: Lori Johnson, 2700 Evergreen Parkway N.W., L3009, Olympia, WA 98445, email studentconduct@evergreen.edu, phone 360-867-6298, by March 15, 2021.

Assistance for Persons with Disabilities: Contact access services, The Evergreen State College, phone 360-867-6384, email accessservices@evergreen.edu, by March 9, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Adoption of 2020 Title IX Regulations into the code of student rights and responsibilities. Changes include new procedure, as outlined in the federal regulations, and new definitions of sexual harassment.

Reasons Supporting Proposal: Making the code of student rights and responsibilities a permanent rule-making change will align Evergreen with the Title IX Regulations, as required to be in compliance. Evergreen has submitted emergency rule making for these rules since the implementation of the Title IX Regulations (August 14, 2020), and are seeking to make these rules permanent.

Statutory Authority for Adoption: RCW 28B.40.120.

Rule is necessary because of federal law, United States Department of Education (DOE).

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

Name of Proponent: The Evergreen State College, student rights and responsibilities and the Title IX Office, public.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Lori Johnson, The Evergreen State College, Olympia Campus, 360-860-6298.

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

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

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

Is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Citation of the specific federal statute or regulation and description of the consequences to the state if the rule is not adopted: Title IX Regulations from DOE, implemented August 14, 2020.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. No additional personnel is required; trainings will be internal and/or cost minimal amounts.

February 1, 2021
Daniel B. Ralph
Rules Coordinator

OTS-2577.2

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-170 Prohibited conduct. The code of student rights and responsibilities recognizes two types of prohibited conduct: Conduct related to community, and conduct related to persons. The subsections below outline the basic structures of community that the code seeks to uphold, and the basic rights and expectations of students that the code seeks to support. Conduct prohibited under Title IX of the Education Amendments Act of 1972, 20 U.S.C. Sec. 1681, and associated procedures are set out in WAC 174-123-355 to 174-123-440 (supplemental Title IX student conduct procedures).

(1) Conduct related to community.

The Evergreen State College community is a vibrant and engaged collective of individuals who have committed to the mission of the college. The college's mission statement reads as follows: "As an innovative public liberal arts college, Evergreen emphasizes collaborative, interdisciplinary learning across significant differences. Our academic community engages students in defining and thinking critically about their learning. Evergreen supports and benefits from local and global commitments to social justice, diversity, environmental stewardship and service in the public interest." Students are encouraged to continue to grow individualistically while contributing to and shaping the Evergreen community as each person brings new ideas, new perspectives, and renewed focus that is invaluable at a liberal arts college.

Students in the college community are expected to practice academic integrity: To author their own ideas and critique and evaluate others' ideas in their own voices. The greater learning community of the college can thrive only if each person works with a genuine commitment to make their own authentic intellectual discoveries. To that end it is a community expectation that students and recognized organizations will not engage in the following prohibited conduct, which constitute violations of this code:

(a) **Academic dishonesty** which includes, but is not limited to, the following:

(i) Cheating includes any attempt to give or obtain unauthorized assistance relating to the completion of an academic assignment;

(ii) 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. Plagiarism may also include the un-

authorized submission of academic work for credit that has been submitted for credit in another course;

(iii) 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;

(iv) Using assistance or materials that are expressly forbidden to complete an academic product or assignment;

(v) The unauthorized collaboration with any other person during the completion of independent academic work;

(vi) Knowingly falsifying or assisting in falsifying in whole, or in part, the contents of one's academic work;

(vii) Permitting any other person to substitute oneself to complete academic work; or

(viii) Engaging in any academic behavior specifically prohibited by a faculty member in the course covenant, syllabus, or individual or class discussion.

(b) **Damaging, defacing, destroying, or tampering** with college property or other personal or public property. This includes, but is not limited to, graffiti and vandalism.

(c) **Disorderly conduct** which includes any individual or group behavior which is abusive, obscene, violent, excessively noisy, or which unreasonably disturbs institutional functions, operations, classrooms, other groups or individuals. These behaviors include, but are not limited to, those which obstruct or interfere with institutional activities, programs, events, or facilities, such as:

(i) Any unauthorized occupancy of facilities owned or controlled by the college, or blockage of access to or from such facilities, or the occupation of college property after being given notice to depart;

(ii) Interference with the ability of any authorized person to gain access to any activity, program, event, or facility sponsored or controlled by the college;

(iii) Any obstruction or delay of a public safety officer, police officer, firefighter, EMT, or any official of the college;

(iv) The use of force or violence (actual or threatened) to deny, impede, obstruct, impair, or interfere with the freedom of movement of any person, or the performance of duties of any college employee;

(v) Participation in a disruptive or coercive demonstration. A demonstration is considered disruptive or coercive if it substantially impedes college operations, interferes with the rights of others, or takes place on premises or at times where students are not authorized to be;

(vi) Obstruction of the free flow of pedestrian or vehicular traffic on college property or at college sponsored/supervised functions; or

(vii) Public urination or defecation.

(d) **Disruptive behavior in the classroom** may be defined as, but not limited to, behavior that unreasonably obstructs or disrupts the learning environment (e.g., outbursts which disrupt the flow of instruction or prevent concentration on the subject taught, failure to cooperate in maintaining the learning community as defined in the course syllabus or covenant, and the continued use, after being given notice to stop, of any electronic or other noise or light emitting device which disturbs others, unless use of such technologies are an authorized accommodation for a documented disability for that program).

The faculty member has responsibility for maintaining a productive classroom and can order the temporary removal or exclusion from

the classroom of any student engaged in disruptive behavior or behavior that violates the general rules and regulations of the college for each class session during which the behavior occurs. Extended or permanent exclusion from the classroom, beyond the session in which the conduct occurred, or further conduct action can be effected only through appropriate procedures of the college. The faculty member may also report incidents of classroom misconduct to the student conduct office.

(e) **Forgery, alteration, or the misuse** of college documents, records or identification cards.

(f) **Failure to comply** with the direction of or failure to identify yourself to a college official or other public official acting in the performance of their duties.

(g) **Unauthorized entry** into or onto, or the unauthorized remaining in, or upon, any college premises; or the unauthorized possession, duplication, or use of a college key or other access device.

(h) **Sounding of a false alarm** which includes, but is not limited to, initiating or causing to be initiated any false report, warning or threat, such as that of fire, explosion or emergency that intentionally causes a false emergency response; and the improper use or disabling of safety equipment and signs.

(2) Conduct related to persons.

Students of The Evergreen State College are to practice good citizenship in the campus community and beyond. Our collective efforts include implementation of the education, experiential learning, and skills gained through engagement with the faculty, staff, and students of the college. Engagement can be through civil discussions, a free exchange of ideas, participation in events and programs, or through other interactions where the desire to create spaces for learning are present. Students are encouraged to pursue new opportunities to engage and expand their intellectual curiosities and develop an understanding of the global society in which we live.

Students in the college community participate with fellow community members (faculty, staff, students, and members of the community beyond The Evergreen State College) in dialogue, educational activities, social events, and more with a focus on civil engagement and being one's best self. To that end it is a community expectation that students or recognized organizations will not engage in the following prohibited conduct, which constitute violations of this code:

(a) **Alcohol, drug, and tobacco violations.**

(i) Alcohol. The use, possession, delivery, sale, manufacture, or being observably under the influence of any alcoholic beverage, except as permitted by law and applicable college policies.

(ii) Cannabis. The use, possession, delivery, or sale of cannabis or the psychoactive compounds found in cannabis, regardless of form, or being observably under the influence of cannabis or the psychoactive compounds found in cannabis. Cannabis use and possession is illegal under federal law and the college is required to prohibit the possession, use and distribution of illicit drugs, including cannabis, as a condition of receiving federal funding.

(iii) Drugs. The use, possession, delivery, sale, manufacture, or being observably under the influence of any mood altering drug, or any other controlled substance under chapter 69.50 RCW, except as prescribed for a student's use by a licensed practitioner.

(iv) Tobacco, electronic cigarettes, and related products. The use of tobacco, electronic cigarettes, and related products is prohibited except as allowed by college policy in designated smoking

areas. Related products include, but are not limited to, cigarettes, pipes, bidi, clove cigarettes, water pipes, hookahs, chewing tobacco, vaporizers, and snuff.

(b) **Assault.** Unwanted touching, physical harm or abuse, or threats of physical harm or abuse which threaten the health or safety of another person.

(c) **Cyber misconduct.** The term "cyber misconduct" includes, but is not limited to, behavior involving the use of a computer, computer network, the internet, or use of electronic communications including, but not limited to, electronic mail, instant messaging, list serves, electronic bulletin boards/discussion boards, ad forums and social media sites or platforms, to disrupt college function, adversely affect the pursuit of the college's objectives, or to stalk, harm or harass, or engage in other conduct which threatens or is reasonably perceived as threatening the physical or mental safety of another person, or which is sufficiently severe, persistent, or pervasive that it interferes with or diminishes the ability of an individual to participate in or benefit from the services, activities, or privileges provided by the college, or an employee to engage in work duties.

(d) **Failure to be truthful to the college or a college official.** This includes, but is not limited to, knowingly making false charges against another member of the college community; and providing false or misleading information in an application for admission or to gain employment.

(e) **Failure to follow fire safety regulations.** Failure to evacuate during a fire alarm; the improper use or damaging of fire prevention or safety equipment, such as fire extinguishers, smoke detectors, alarm pull stations, or emergency exits; or the unauthorized setting of fires.

(f) **Harm.** Behavior directed at an individual that based on a reasonable person's standard is sufficiently severe, pervasive, or persistent such that it diminishes or interferes with the ability of an individual to participate in or benefit from the services, activities, or privileges provided by the college or an employee to engage in their work duties. This includes, but is not limited to, intimidation, verbal abuse, threat(s), bullying, or other conduct which threatens or is reasonably perceived as threatening the physical or mental safety of another person. Bullying is repeated or aggressive unwanted behavior, not otherwise protected by law that intentionally humiliates, harms, or intimidates another person.

(g) **Harassment.** Conduct against a person on the basis of protected status that is sufficiently severe, pervasive, or persistent as to interfere with or diminishes the ability of a person to participate in or benefit from the services, activities, or privileges provided by the college, or an employee to engage in work duties.

(h) **Hazing.** Conduct that includes any activity or method of initiation into a recognized organization or student social, living, learning, or athletic group that causes, or is likely to cause, bodily danger or physical or mental harm to any member of the college community.

(i) **Knowingly assisting another person to violate the code** or failing to report to a college official conduct that constitutes significant damage to property or a serious danger to the health or physical safety of an individual.

(j) **Lewd conduct.** Behavior which is sexualized or obscene that is not otherwise protected under the law including, but not limited to,

exposing genitalia, and engaging in sexual intercourse or sexual activity in public.

(k) **Obstructive behavior in conduct conferences or hearings.** Any conduct at any stage of a process or investigation that is threatening or disorderly, including:

(i) Failure to abide by the directives of a student conduct official or college official(s) in the performance of their duties;

(ii) Knowing falsification, distortion, or misrepresentation of information before a student conduct official or hearing panel;

(iii) Deliberate disruption or interference with the orderly conduct of a conduct conference or hearing proceeding;

(iv) Making false statements to any student conduct officials or hearing panel;

(v) Attempting to influence the impartiality of a member of a hearing panel or a student conduct official prior to, or during the course of, a proceeding; or

(vi) Harassment or intimidation of any participant in the college conduct process.

(l) **Recording.** The recording of any private conversation, by any device, without the voluntary permission of all persons engaged in the conversation except as permitted by state law, chapter 9.73 RCW. For purposes of this section, the term "permission" will be considered obtained only when one party has announced to all other parties engaged in the communication or conversation that such communication or conversation will be recorded or transmitted; and the announcement itself is recorded as part of the conversation or communication.

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

(n) **Theft** (attempted or actual) of property, services, or identity. This includes, but is not limited to, using, taking, attempting to take, possessing, or aiding another to take college property or services, or property belonging to any person, without express permission. Identity theft is the use of another person's name and personal information including, but not limited to, private identifying information, without their permission in order to gain a financial advantage or obtain credit or other benefits in the other person's name.

(o) **Viewing,** distributing, photographing, or filming another person without that person's knowledge and voluntary permission, while the person being photographed, viewed, or filmed is in a place where they would have a reasonable expectation of privacy. The term "permission" will be considered obtained if there are signed waivers, written permission, or verbal agreement recorded with specificity to the content.

(p) **Violation of any college policy** including, but not limited to, residential and dining services policies, appropriate use of information technology resources policies, and WAC 174-136-043 regarding weapons.

(q) **Violation of federal, state, or local law** including being charged by law enforcement, or convicted of a felony or misdemeanor, under circumstances where it is reasonable to conclude that the presence of the person on college premises would constitute a danger to the physical or mental safety of a member(s) of the college community.

(r) **Stalking** is a course of conduct directed at a specific person or group that would cause a reasonable person to feel fear for their physical or mental safety, or the physical or mental safety of another. A course of conduct includes two or more acts including, but not limited to, those in which a person directly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about the complainant, or interferes with the complainant's property.

(s) **Sexual misconduct.** The term "sexual misconduct" includes sexual harassment, sexual exploitation, sexual violence, relationship violence, domestic violence, and stalking. Sexual harassment as prohibited by Title IX is defined in the supplemental Title IX student conduct procedures. See WAC 174-123-355.

(3) Sexual misconduct and consent.

In order to understand the definitions of prohibited conduct in this section, and to adjudicate complaints of sexual misconduct, it is necessary to provide a further definition of consent. This section provides information about consent related to sexual misconduct.

~~(Consent is permission expressed by words or actions that is clear, knowing, and voluntary, regarding willingness to engage in sexual activity. Consent is active, not passive. Each party has the responsibility to make certain that the other has consented before engaging in the activity. Consent to any one form of sexual activity does not automatically imply consent to any other forms of sexual activity. Previous relationship or prior consent does not imply consent to future sexual acts; this includes "blanket" consent (i.e., permission in advance for any/all actions at a later time or place). Consent can be withdrawn once given, as long as that withdrawal is communicated. There is no requirement for a party to resist the sexual advance or request, and resistance is a clear demonstration of nonconsent.~~

~~A person cannot consent if they are incapacitated. Incapacitation is a state where someone cannot make reasoned decisions because they lack the capacity to give consent (e.g., to understand the "who, what, when, where, why or how" of their sexual interaction). A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when the individual knows, or should know, that the complainant is physically or mentally incapacitated has engaged in nonconsensual conduct. The question of what a person should have known is objectively based on what a reasonable person in the place of the participant(s), sober and exercising good judgment, would have known about the condition of the complainant.~~

~~Consent cannot be obtained by force or coercion. Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats or intimidation (implied threats) that overcomes free will or resistance. Coercion is unreasonable pressure for sexual activity. When someone makes clear to another person that they do not want sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point is coercive.~~

~~Intoxication is not a defense against allegations that an individual has engaged in nonconsensual sexual activity.~~

~~This code is applicable regardless of the sexual orientation and/or gender identity of individuals engaging in sexual activity. Conduct is determined a violation as per the reasonable person standard.) Consent means knowing, voluntary, and clear permission by word~~

or action, to engage in mutually agreed upon sexual activity. Each party has the responsibility to make certain that the other has consented before engaging in the activity. For consent to be valid, there must be at the time of the act of sexual intercourse or sexual contact actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

A person cannot consent if they are unable to understand what is happening or are disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when the individual knows, or should know, that the other person is physically or mentally incapacitated has engaged in nonconsensual conduct.

Intoxication is not a defense against allegations that an individual has engaged in nonconsensual sexual conduct.

Consent cannot be obtained by force or coercion. Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats or intimidation (words or actions that cause an individual to submit to or comply with sexual contact or intercourse due to fear for their safety and/or implied threats) that overcomes free will or resistance. Coercion is unreasonable pressure for sexual contact or sexual intercourse. When someone makes clear to another person by word or action that they do not want to engage in sexual contact or intercourse, that they want to stop, or that they do not want to go past a certain point of sexual contact or intercourse, continued pressure beyond that point is coercive.

(a) **Sexual harassment.** The term "sexual harassment" means unwelcome sexual or gender-based conduct (~~(of a sexual nature)~~), including unwelcome sexual advances, requests for sexual favors, quid pro quo harassment, and other verbal, nonverbal, or physical conduct of a sexual or a gendered nature that is sufficiently severe, pervasive, or persistent as to:

(i) Deny or limit ((based on sex,)) the ability of a person to participate in or benefit from the services, activities, or privileges provided by the college ((or an employee to engage in their work duties, that creates)); or

(ii) Alter the terms or conditions of employment for a college employee or employees; and/or

(iii) Create an intimidating, hostile, or offensive environment for other community members.

(b) **Sexual exploitation.** The term "sexual exploitation" means conduct that takes nonconsensual or abusive sexual advantage of another for their own or another's benefit. Sexual exploitation includes, but is not limited to, nonconsensual recording of sexual activity or the nonconsensual distribution of a consensual or nonconsensual recording or image; going beyond the boundaries of consent; forcing another person to engage in sexual activity for payment; or knowingly exposing someone to or transmitting a sexually transmitted infection.

(c) **Sexual violence.** "Sexual violence" is a type of sexual discrimination and harassment. The term "sexual violence" means an act or acts of a sexual nature against a person without their consent. Non-consensual sexual intercourse, nonconsensual sexual contact, domestic violence, relationship violence, and stalking are all types of sexual violence.

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

penis, tongue, finger or another body part or object, or oral copulation by mouth to genital contact. Nonconsensual sexual intercourse also includes forcing a person to engage in vaginal or anal penetration by a penis, object, tongue or finger, or oral copulation by mouth to genital contact.

(ii) **Nonconsensual sexual contact** is any intentional sexual touching, however slight, with any object or body part, by a person upon another person that is without consent and/or by force. Sexual contact includes intentional contact with the lips, breasts, buttock, groin, or genitals, or clothing covering any of those areas, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts, or any other intentional bodily contact in a sexual manner.

(d) **Domestic violence.** The term "domestic violence" means the infliction of physical harm, bodily injury, assault, or the fear of imminent physical harm, bodily injury, or assault committed against a current or former spouse or intimate partner, current or former cohabitant, a person with whom the person shares a child in common, or a person with whom one resides.

(e) **Relationship violence.** The term "relationship violence," also known as dating violence, means the infliction of physical harm, bodily injury, assault, or the fear of imminent physical harm, bodily injury or assault committed against a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship will be presumed based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(f) **Stalking.** The term "stalking" means a course of conduct directed at a specific person or group that would cause a reasonable person to feel fear for their physical or mental safety, or the physical or mental safety of another. A course of conduct includes two or more acts including, but not limited to, those in which a person directly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about the complainant, or interferes with the complainant's property.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-170, filed 8/15/18, effective 9/15/18; WSR 12-03-040, § 174-123-170, filed 1/10/12, effective 2/10/12.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-200 Interim measures. (1) **Interim restrictions.** The student conduct official or designee may institute interim restrictions prior to, or at any stage during, a student conduct proceeding when the physical or mental safety of any member of the college community is deemed at risk. The interim restriction may include a no contact order and/or loss of privileges.

(a) A student issued an interim restriction that includes loss of privileges will receive written notice of the interim restriction, the reason for instituting an interim restriction, and advised of the date, time, and place for a hearing regarding the interim restriction

before the student conduct official, or their designee. The hearing will take place no later than five business days from the effective date of the interim restriction.

(b) The interim restriction has immediate effect and will remain in place during any procedural review process, until an agreement of accountability exists, a student conduct official issues a determination of responsibility, an appeal panel issues a final determination, or the student conduct official notifies the respondent in writing that the interim restriction has been modified or is no longer in effect.

(2) **Interim suspension.** This is a temporary exclusion from enrollment, including exclusion from college premises or denial of access to all activities or privileges for which a respondent might otherwise be eligible, while ((a)) an investigation or student conduct proceeding is pending. The senior college official or their designee may impose an interim suspension, which has immediate effect, if there is probable cause to believe that the respondent has violated any provision of the code and presents a substantial or ongoing danger to the physical or mental safety of any member of the college community; or poses an ongoing threat of substantial disruption of, or interference with, teaching, learning, or the operations of the college.

(a) Any student assigned an interim suspension will be provided oral or written notice of the interim suspension. If oral notice is given, a written notification will be served on the respondent within two business days of the oral notice.

(b) The written notice will be entitled "Notice of Interim Suspension" and will include:

(i) The reasons for imposing the interim suspension, including a description of the conduct giving rise to the interim suspension and reference to the provisions of the code allegedly violated;

(ii) The date, time, and location when the respondent must appear before the senior college official or their designee for a hearing on the interim suspension; and

(iii) 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 barred from the campus, a notice will be included that warns the student that their privilege to enter into or remain on college premises has been withdrawn, and that the respondent will be considered trespassing if the respondent enters the college campus other than as approved by the senior college official or their designee.

(c) The senior college official or their designee will conduct a hearing on the interim suspension within five business days after imposition of the interim suspension.

(d) During the interim suspension hearing, the issue before the senior college official or their designee is whether there are reasonable grounds to believe that the interim suspension should be continued pending the conclusion of student conduct proceedings and/or whether the interim suspension should be less restrictive in scope.

(e) The student will be afforded an opportunity to explain why interim suspension should not be continued while conduct proceedings are pending or why the interim suspension should be less restrictive in scope.

(f) If the student fails to appear at the designated hearing time, the senior college official or their designee may order that the interim suspension remain in place pending the conclusion of the investigation and conduct or Title IX proceedings.

(g) As soon as practicable following the hearing, the senior college official or their designee will issue a written decision which will include a brief explanation for any decision continuing and/or modifying the interim suspension.

(h) To the extent permissible under applicable law, the senior college official or their designee will provide a copy of the decision to all persons or offices who may be bound or protected by it.

(i) In cases involving allegations of assault, non-Title IX sexual misconduct, or Title IX sexual harassment, the complainant will be notified that an interim suspension has been imposed on the same day that the interim suspension notice is served on the student. The college will also provide the complainant with same day notice of any subsequent changes to the interim suspension order.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-200, filed 8/15/18, effective 9/15/18; WSR 12-03-040, § 174-123-200, filed 1/10/12, effective 2/10/12.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-220 Informal resolution and agreement of accountability. The student conduct official will attempt to resolve a complaint informally using an agreement of accountability. If a complaint is not resolved using an agreement of accountability, the student conduct official will resolve the complaint by issuing a determination of responsibility and required resolution and sanction(s) as described in WAC 174-123-230.

(1) The student conduct official may work with any respondent who acknowledges responsibility for engaging in prohibited conduct to identify the resolution and sanction(s). If an agreement is reached, the resolution and sanction(s) will be contained in a written agreement of accountability signed by both the respondent and the student conduct official.

(2) A respondent who enters into an agreement of accountability will comply with the resolution and sanction(s) set forth in the agreement and will have no further right of appeal under the code. A respondent's failure to comply with an agreement of accountability may be the basis for a separate violation of misconduct under the code. A separate violation will be addressed using a conduct hold and/or initiating a conduct conference as described in WAC 172-123-210. The conduct hold will remain in effect until such time that the student satisfactorily completes all of the requirements of the agreement of accountability. If a complaint alleges non-Title IX sexual misconduct or assault, the informal resolution and agreement of accountability will not be used and a notice of determination of responsibility and required resolution and sanctions process (WAC 174-123-230) is used.

(3) A restorative practice process may be a component of an agreement of accountability in cases where the student has taken responsibility for their actions and a violation of the code. An agreement may be entered into as part of an agreement of accountability that the student is choosing to voluntarily participate in a restorative practice process. A restorative practice is intended to provide resolution and restoration for those negatively impacted by the code

violation, as well as, give the respondent an opportunity to make the situation as right as possible.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-220, filed 8/15/18, effective 9/15/18; WSR 12-03-040, § 174-123-220, filed 1/10/12, effective 2/10/12.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-230 Notice of determination of responsibility and required resolution and sanctions. (1) If a complaint is not resolved by entering into an agreement of accountability, the student conduct official will issue a determination of responsibility based on a preponderance of the evidence standard. Preponderance of the evidence standard means it is more likely than not that the information and evidence shows that an alleged policy violation did or did not occur.

(2) The student conduct official may take any of the following actions:

(a) Determine the respondent is not responsible for violating the code and end the conduct proceedings.

(b) Determine the available information is inconclusive at this time. The student conduct official may revisit the determination if additional relevant information becomes available.

(c) Determine the respondent is responsible for violating the code and issue required resolution(s) and sanction(s) as described in WAC 174-123-240.

(3) The determination of responsibility will identify the specific conduct that has violated the code. The required resolution and sanction(s) will state the tasks or actions, and associated deadlines, the respondent must execute to address violations of the code.

(4) The student conduct official's determination of responsibility and required resolution and sanction(s) will be final unless the respondent files a timely appeal to the senior college official. If a complaint alleges assault, non-Title IX sexual misconduct, or (~~assault~~) Title IX sexual harassment, the complainant is to be informed of the final determination and any required resolution and sanction imposed against the respondent and may file a timely appeal to the senior college official.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-230, filed 8/15/18, effective 9/15/18; WSR 12-03-040, § 174-123-230, filed 1/10/12, effective 2/10/12.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-260 Filing of appeal. (1) A respondent may appeal a student conduct official's determination of responsibility and required resolution and sanction(s) by filing a written notice of appeal to the senior college official within ten calendar days of service of the student conduct official's determination. Failure to file a notice of appeal within the time period constitutes the waiver of the right

to appeal and the student conduct official's determination of responsibility and required resolution and sanction(s) will be final.

(2) The student filing the notice of appeal must include a brief statement explaining why they are seeking review of the determination of responsibility and/or required resolution and sanction(s).

(3) Except in cases of ~~((an))~~ interim measures, including interim suspension and/or interim restriction(s), the required resolutions and sanction(s) will be on hold pending the outcome of an appeal. Interim measures will remain in place pending the outcome of the appeal.

(4) The parties to an appeal will be the appellant and the student conduct official.

(5) On appeal, the college bears the burden of establishing the evidentiary facts underlying the determination of responsibility and required resolution by a preponderance of the evidence.

(6) The appellant has a right to a prompt and fair hearing as provided for in these procedures.

(7) Student conduct appeal to determinations in which the required resolution and sanction(s) include the following will be reviewed through a brief adjudicative proceeding:

- (a) Suspensions of ten days or less;
- (b) College housing suspension or eviction;
- (c) Deferred action;
- (d) Probation; and

(e) Any conditions or terms imposed in conjunction with one of the foregoing resolution and sanctions.

(8) Student conduct appeal to determinations in which the required resolution and sanction(s) include the following will be reviewed by the student conduct appeal panel:

- (a) Suspensions in excess of ten days;
- (b) College expulsions; and

(c) Complaints referred to the panel by the student conduct review officer or senior college official, or designee.

(9) Except as provided elsewhere in this code, warnings and findings of no responsibility are final and are not subject to appeal.

(10) In cases involving allegations of assault or non-Title IX sexual misconduct ~~((or assault))~~, the complainant has the right to appeal the following outcomes using the same procedures as set forth above for the respondent:

- (a) The determination of responsibility; or

(b) Any required resolutions and sanction(s) imposed including a disciplinary warning.

(11) If the respondent appeals a decision imposing discipline for ~~((a))~~ an assault or non-Title IX sexual misconduct violation, the college will notify the complainant of the appeal and provide the complainant an opportunity to participate in the appeal.

(12) Except as otherwise specified in the code, a complainant who appeals a determination of responsibility and required resolution and sanction(s) within ten calendar days of notice of the determination, or who participates as a party to a respondent's appeal of a determination of responsibility and required resolution and sanction(s) will be afforded the same procedural rights as are afforded the respondent.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-260, filed 8/15/18, effective 9/15/18.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-270 Brief adjudicative appeal proceedings—Initial hearing. Brief adjudicative proceedings will be conducted by a conduct review officer. Conduct review officers shall be designated by the senior college official. The conduct review officer will not participate in any case in which they are or have been involved; or in which there is direct or personal interest, prejudice, or bias.

(1) The parties to a brief adjudicative proceeding are the respondent, the student conduct official, and the complainant in cases involving assault or non-Title IX sexual misconduct (~~(or assault)~~). Before taking action, the conduct review officer will conduct an informal hearing and provide each party:

(a) An opportunity to be informed of the college's view of the matter; and

(b) An opportunity to explain the student's view of the matter.

(2) The conduct review officer will schedule an informal hearing and serve written notice of the hearing to the parties at least seven calendar days in advance of the hearing. The notice of informal hearing will include the following:

(a) The date, time, location, and nature of the hearing;

(b) A date by which the parties must identify advisors as well as requests for reasonable accommodations, if any;

(c) A date on which the parties may review documents held by the student conduct official; and

(d) A date by which the parties must provide a list of witnesses and copies of any documents to other parties and to the conduct review officer.

(3) The conduct review officer will serve an initial decision upon the parties within ten calendar days of the completion of the informal hearing. The initial decision will 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 ten business days of service of the initial decision, the initial decision will be deemed the final decision.

(4) If the conduct review officer determines that the respondent's conduct may warrant imposition of a college or college housing suspension of more than ten days or college expulsion or college housing eviction, the matter will be referred to the student conduct appeal panel for a new hearing.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-270, filed 8/15/18, effective 9/15/18.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-280 Brief adjudicative appeal proceedings—Administrative review of initial decision. (1) An initial decision may be appealed to the senior college official or designee, provided a party files a written request including the grounds for appeal for review with the conduct review officer within ten calendar days of service of the initial decision. The grounds for appeal are limited to new infor-

mation not available at the time of the initial process, procedural error that impacted the outcome of the process, and/or bias of the student conduct official, or the conduct review officer.

(2) The senior college official or designee will not participate in any case in which they are or have been involved as a complainant or witness, or in which there is direct or personal interest, prejudice, or bias.

(3) During the appeal, the senior college official or designee will give each party an opportunity to file written responses explaining their view of the matter and will make any inquiries necessary to ascertain whether the sanctions should be modified or whether the proceedings should be referred to the student conduct appeal panel for a hearing.

(4) The decision on appeal must be in writing and must include a brief statement of the reason for the decision and must be served on the parties within twenty calendar days of the request for appeal. The decision will contain a notice whether appeal to Thurston County superior court is available.

(5) If the senior college official or designee determines that the respondent's conduct may warrant imposition of a college (~~or college housing~~) suspension of more than ten days or college expulsion (~~or college housing eviction~~), the matter will be referred to the student conduct appeal panel for a hearing.

(6) In cases involving allegations of assault or non-Title IX sexual misconduct (~~or assault~~), the senior college official or designee, on the same date as the final decision is served on the respondent, will serve a written notice upon the complainant informing the complainant whether the allegations of assault or non-Title IX sexual misconduct or (~~assault~~) were found to have merit and describing any resolution and sanctions and/or conditions imposed upon the respondent, including suspension or expulsion of the respondent. The decision will contain a notice whether appeal to Thurston County superior court is available.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-280, filed 8/15/18, effective 9/15/18.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-290 Appeal panel proceedings—Hearing procedures.

(1) If not addressed in the code, the proceedings of the student conduct appeal panel will be governed by the Administrative Procedure Act, chapter 34.05 RCW.

(2) The senior college official, or designee, will schedule a hearing before the student conduct appeal panel and serve written notice of the hearing to the parties at least ten calendar days in advance of the hearing. The notice period may be shortened by the senior college official, or designee, with the parties' permission; and the senior college official may reschedule a hearing to a later time for good cause.

(3) The notice of hearing will include the following:

(a) The date, time, location, and nature of the hearing;

(b) A date by which the parties must identify advisors as well as requests for reasonable accommodations, if any;

(c) A date by which the parties must provide a list of witnesses and copies of any documents to be provided to the appeal panel. The date for providing documents must be at least five business days prior to the hearing date. Documents and witness names submitted after the deadline stated in the hearing notice will be admitted at the discretion of the appeal panel. Documents and witness names submitted after the deadline may be excluded from the hearing absent a showing of good cause;

(d) A date on which the parties to the appeal may review documents and witness lists submitted to the panel, which must be no less than three business days prior to the hearing.

(4) The panel chair is authorized to make determinations regarding requests for postponement, release of information, or other procedural requests, provided that good cause for the request is shown. Requests for reasonable accommodations based on disability will be determined by the college's disability compliance officer.

(5) The panel chair may provide to the panel members in advance of the hearing copies of:

(a) The student conduct official's determination of responsibility and required resolution and sanction(s);

(b) The decision of the conduct review officer, if any;

(c) The review on appeal of the senior college official, if any;
and

(d) The notice of appeal by the respondent or complainant.

If doing so, the chair should remind the members that these documents 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 panel chair may provide copies of these admissible exhibits to the panel members before the hearing.

(7) Only those materials and information presented at the hearing will be considered. The chair may exclude or limit ineffectual, irrelevant, or unduly repetitious information.

(8) The student conduct official or designee, upon request, will provide reasonable assistance to the parties in obtaining relevant and admissible evidence that is within the college's control.

(9) Communications between panel 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. Any improper communication, as further provided in RCW 34.05.455, is prohibited.

(10) Each party may be accompanied at the hearing by an advisor of the party's choice. A respondent, or complainant in a case involving allegations of non-Title IX sexual misconduct or assault may elect to be represented by an attorney at the their own cost, and will be deemed to have waived that right unless, at least five business days before the hearing, written notice of the attorney's identity and participation is filed with the panel chair with a copy to the student conduct official. The panel will ordinarily be advised by an assistant attorney general. (~~(If the respondent or the complainant is represented by an attorney,)~~) The student conduct official may (~~(also)~~) be represented by an assistant attorney general.

(11) The complainant and the respondent are neither encouraged nor required to be assisted by an advisor of their choosing at their

own expense. Both the respondent and the complainant will be provided the option to have a trained procedural advisor provided by the college to assist them prior to and during the hearing in order to understand their rights in the appeal process. A college procedural advisor may not represent an individual in the appeal proceeding. Proceedings will not be automatically delayed due to the scheduling conflicts of any advisor.

(12) Each party is expected to present all information during the proceedings.

(13) In cases where the complaint alleges non-Title IX sexual misconduct or assault, the complainant may present information during the proceedings.

(14) Upon the failure of any party to attend or participate in a hearing, the student conduct appeal panel may either:

(a) Proceed with the hearing and issue a determination; or

(b) Serve a decision of default in accordance with RCW 34.05.440.

(15) The hearing is a closed proceeding which includes only members of the panel; the advisor to the panel, if any; the student conduct official and their advisor, if any; the complainant and the respondent and their advisor(s), if any; and persons requested to provide information at the hearing. Admission of any other person to the hearing is at the discretion of the panel chair.

(16) All procedural questions and other decisions are subject to the final decision of the panel chair unless otherwise provided for in these rules. The chair will ensure that the proceeding is held in an orderly manner such that the rights of all parties to a full, fair, and impartial proceeding that adheres to the code is achieved.

(17) There will be a single verbatim sound recording of the hearing, and the record will be on file with the senior college official and is the property of the college in accordance with RCW 34.05.449.

(18) All testimony will be given under oath or affirmation. Evidence will be admitted or excluded at the discretion of the panel chair.

(19) In cases involving allegations of non-Title IX sexual misconduct or assault, neither party will directly question or cross examine one another. Attorneys for the parties are also prohibited from questioning the other party. All cross examination questions will be directed to the panel chair, who has the discretion to pose the questions on the party's behalf.

(20) In cases involving Title IX sexual misconduct or assault, the senior college official may designate an external hearing panel chair to preside over the hearing. The external hearing panel chair will perform all of the functions of a presiding officer under the code of student rights and responsibilities and WAC 174-108-910, unless otherwise specified in the appointment letter.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-290, filed 8/15/18, effective 9/15/18.]

AMENDATORY SECTION (Amending WSR 18-17-102, filed 8/15/18, effective 9/15/18)

WAC 174-123-310 Appeal panel proceedings—Determination. (1) At the conclusion of the hearing, the student conduct appeal panel will

permit the parties to make closing statements in whatever form it wishes to receive them. The panel also may permit each party to propose findings, conclusions, and/or a proposed decision for its consideration.

(2) Only members of the student conduct appeal panel and the advisor to the panel, if any, will be present for deliberations. Deliberations are not recorded.

(3) Within fifteen calendar days following the conclusion of the hearing, or the panel's receipt of closing arguments, whichever is later, the panel will issue a decision in accordance with RCW 34.05.461 and WAC 10-08-210 or written notice specifying the date by which it will issue a decision. The decision will include findings on all material issues of fact and conclusions on all material issues of law, including which, if any, provisions of the code were violated. Any findings based substantially on the credibility of evidence or the demeanor of witnesses will be so identified.

(4) The panel's decision will also include a determination on appropriate resolution and sanction(s), if any. The panel may affirm, reverse, or modify the required resolution and sanction(s) issued by the student conduct official and/or issue additional sanction(s) or condition(s) as authorized herein.

(5) The panel's decision will also include a statement of the available procedures and time frames for seeking reconsideration. The decision will also include a notice whether appeal to Thurston County superior court is available.

(6) The panel chair will serve copies of the decision on the parties through the senior college official's office. It is the responsibility of the student to forward any notice or communication to their advisor. If a student signs a release of information, the chair of the panel will provide the decision to legal counsel representing a student.

(7) In cases involving allegations of assault, non-Title IX sexual misconduct, or ~~((assault))~~ Title IX sexual harassment, the chair of the student conduct appeal panel, on the same date as the decision is served to the respondent, will serve a written notice to the complainant informing the complainant of the panel's decision and describing any sanction(s) and/or condition(s) issued to the respondent, including suspension or expulsion of the respondent. The complainant may request reconsideration of the panel's decision subject to the same procedures and deadlines applicable to other parties. The notice will also inform the complainant of the available procedures and time frames for seeking reconsideration. The decision will also include a notice whether appeal to Thurston County superior court is available.

[Statutory Authority: RCW 28B.40.120. WSR 18-17-102, § 174-123-310, filed 8/15/18, effective 9/15/18.]

SUPPLEMENTAL TITLE IX STUDENT CONDUCT PROCEDURES AND PROHIBITED CONDUCTNEW SECTION

WAC 174-123-355 Order of precedence. This supplemental procedure applies to allegations of sexual harassment subject to Title IX jurisdiction pursuant to regulations promulgated by the United States Department of Education. See 34 C.F.R. Part 106. To the extent these supplemental hearing procedures conflict with Evergreen's standard disciplinary procedures, WAC 174-123-110 through 174-123-340, these supplemental procedures shall take precedence.

[]

NEW SECTION

WAC 174-123-360 Title IX definitions. For purposes of the supplemental Title IX student conduct procedure, the following terms used have the definitions contained in the Title IX policy and procedure and the terms below are defined as follows:

(1) **Consent** means knowing, voluntary, and clear permission by word or action, to engage in mutually agreed upon sexual activity. Each party has the responsibility to make certain that the other has consented before engaging in the activity. For consent to be valid, there must be at the time of the act of sexual intercourse or sexual contact actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

A person cannot consent if they are unable to understand what is happening or are disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs. An individual who engages in sexual activity when the individual knows, or should know, that the other person is physically or mentally incapacitated has engaged in nonconsensual conduct.

Intoxication is not a defense against allegations that an individual has engaged in nonconsensual sexual conduct.

Consent cannot be obtained by force or coercion. Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats or intimidation (words or actions that cause an individual to submit to or comply with sexual contact or intercourse due to fear for their safety and/or implied threats) that overcomes free will or resistance. Coercion is unreasonable pressure for sexual contact or sexual intercourse. When someone makes clear to another person by word or action that they do not want to engage in sexual contact or intercourse, that they want to stop, or that they do not want to go past a certain point of sexual contact or intercourse, continued pressure beyond that point is coercive.

(2) **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

(3) **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

(4) **Formal complaint** means a writing submitted by the complainant or signed by the Title IX coordinator alleging sexual harassment against a respondent and requesting that the college conduct an investigation.

(5) **Education program or activity** includes locations, events, or circumstances over which Evergreen exercised substantial control over both the respondent and the context in which the alleged sexual harassment occurred. It also includes any building owned or controlled by a student organization officially recognized by the college.

(6) **Determination of responsibility** means a decision of the hearing panel regarding whether the respondent is responsible for the alleged violation(s) of this Title IX policy. If the respondent is found responsible for the alleged violations, the determination of responsibility will include discipline and sanctions, as appropriate.

(7) **Interim suspension** means a temporary exclusion from enrollment, including exclusion from college premises or denial of access to all activities or privileges for which a respondent might otherwise be eligible, pending investigation and resolution of disciplinary proceedings pursuant to the procedure and standards set forth in WAC 174-123-200(2).

[]

NEW SECTION

WAC 174-123-370 Prohibited conduct under Title IX. Pursuant to RCW 28B.50.140(13) and Title IX of the Education Amendments Act of 1972, 20 U.S.C. Sec. 1681, Evergreen may impose disciplinary sanctions against a student who commits, attempts to commit, or aids, abets, incites, encourages, or assists another person to commit, an act(s) of "sexual harassment."

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

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

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

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

(a) Nonconsensual sexual intercourse. Any actual or attempted sexual intercourse (anal, oral, or vaginal), however slight, with any object or body part, by a person upon another person, that is without consent and/or by force. Sexual intercourse includes anal or vaginal penetration by a penis, tongue, finger, or object, or oral copulation by mouth to genital contact or genital to mouth contact.

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

or other bodily orifice of another individual, or any other bodily contact in a sexual manner.

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

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

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

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

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

(b) Where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship;

(ii) The type of relationship; and

(iii) The frequency of interaction between the persons involved in the relationship.

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

[]

NEW SECTION

WAC 174-123-380 Title IX jurisdiction. (1) This supplemental procedure applies only if the alleged misconduct:

(a) Occurred in the United States;

(b) Occurred during an Evergreen educational program or activity; and

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

(2) For purposes of this procedure, an "educational program or activity" is defined as locations, events, or circumstances over which Evergreen exercised substantial control over both the respondent and the context in which the alleged sexual harassment occurred. This definition includes any building owned or controlled by a student organization that is officially recognized by Evergreen.

(3) Proceedings under this procedure must be dismissed if the Title IX coordinator determines that one or all of the requirements of subsection (1)(a) through (c) of this section have not been met. Dis-

missal under this procedure does not prohibit the college from pursuing other disciplinary action based on allegations that the respondent violated other provisions of Evergreen's code of student rights and responsibilities, WAC 174-123-170.

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

[]

NEW SECTION

WAC 174-123-390 Initiation of discipline. (1) Upon receiving the Title IX investigation report from the Title IX coordinator, the student conduct official will independently review the report to determine whether there are sufficient grounds to pursue a disciplinary action against the respondent for engaging in prohibited conduct under Title IX.

(2) If the student conduct official determines that there are sufficient grounds to proceed under these procedures, the student conduct official will initiate a Title IX disciplinary proceeding by filing a written disciplinary notice with the chair of the hearing panel. The hearing panel chair will serve the notice on the respondent and the complainant, and their respective advisors. The notice must:

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

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

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

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

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

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

(ii) An advisor may be an attorney; and

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

(iv) A party may select to have an individual as emotional support with them during Title IX processes. This individual is separate from an advisor, and will serve the purpose of providing care and emotional support for the party, but will not participate during the processes.

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

[]

NEW SECTION

WAC 174-123-400 Prehearing procedure. (1) Upon receiving the disciplinary notice, the hearing panel chair will send a hearing notice to all parties, in compliance with WAC 174-123-290(3). In no event will the hearing date be set less than ten days after the Title IX coordinator provided the final investigation report to the parties.

(2) A party may choose an advisor to be at the hearing with them. The advisor will be conducting the cross-examination of parties and witnesses. The full names and contact information for all advisors selected by the parties to appear at the hearing must be submitted to the hearing panel chair at least five days before the hearing.

(3) A party may choose to have an attorney serve as their advisor at the party's own expense. This right will be waived unless, at least five days before the hearing, the attorney files a notice of appearance with the hearing panel chair, with copies to all parties and the student conduct official.

(4) Parties may also select an individual to serve as emotional support during the hearing. This individual will not have a formal role in the hearing, and will serve the purpose of providing care and emotional support for the party.

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

[]

NEW SECTION

WAC 174-123-410 Rights of parties. (1) The Evergreen State College's code of student rights and responsibilities, this chapter, and this supplemental procedure shall apply equally to all parties.

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

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

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

[]

NEW SECTION

WAC 174-123-420 Evidence. The introduction and consideration of evidence during the hearing is subject to the following procedures and restrictions:

(1) **Relevance:** The hearing chair shall review all questions for relevance and shall explain on the record their reasons for excluding any question based on lack of relevance.

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

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

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

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

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

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

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

(a) Spousal/domestic partner privilege;

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

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

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

(e) Privileges applicable to sexual assault and domestic violence advocates; and

(f) Other legal privileges identified in RCW 5.60.060.

(7) **Recording of live hearing:** The live hearing will be audio-recorded, and copies may be provided to the parties, upon written request.

[]

NEW SECTION

WAC 174-123-430 Initial order. (1) In addition to complying with WAC 174-123-310, the hearing panel will be responsible for conferring and drafting an initial order that:

(a) Identifies the allegations of sexual harassment;

(b) Describes the grievance and disciplinary procedures, starting with filing of the formal complaint through the determination of responsibility, including notices to parties, interviews with witnesses and parties, site visits, methods used to gather evidence, and hearings held;

(c) Makes findings of fact supporting the determination of responsibility for each charge;

(d) Reaches conclusions as to whether the facts establish whether the respondent is responsible for engaging in sexual harassment in violation of Title IX;

(e) Contains a statement of, and rationale for, the hearing panel's determination of responsibility for each allegation;

(f) Describes any disciplinary sanction or conditions imposed against the respondent, if any;

(g) Describes to what extent, if any, the complainant is entitled to remedies designed to restore or preserve the complainant's equal access to Evergreen's educational programs or activities; and

(h) Describes the process for appealing the initial order.

(2) The hearing panel chair will serve the initial order on the parties simultaneously.

[]

NEW SECTION

WAC 174-123-440 Appeals. (1) The parties shall have the right to appeal from the initial order's determination of responsibility and/or dismissal of an allegation(s) of sexual harassment in a formal complaint. The parties may by filing a written notice of appeal with the hearing panel chair within ten calendar days of service of the student conduct official's, or hearing panel's decision. Failure to timely file a notice of appeal constitutes a waiver of the right to appeal and the decision shall be deemed final.

Either party may appeal based on the following criteria: Procedural irregularity that affected the outcome of the determination; new evidence discovered that was not reasonably available at the time of the determination; a conflict of interest from a Title IX administrator; or severity of sanctioning is not consistent with the violation.

(2) The president or their designee will determine whether the grounds for appeal have merit, provide the rationale for this conclusion, and state whether the disciplinary sanction and condition(s) imposed in the initial order are affirmed, vacated, or amended, and, if amended, set forth any new disciplinary sanction and/or condition(s).

(3) The president's office shall serve the final decision on the parties simultaneously.

[]

NEW SECTION

The following section of the Washington Administrative Code is decodified and recodified as follows:

Old WAC Number	New WAC Number
174-123-350	174-123-450