

WSR 22-01-121

PROPOSED RULES

LOWER COLUMBIA COLLEGE

[Filed December 13, 2021, 10:16 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-21-044.

Title of Rule and Other Identifying Information: Lower Columbia College's (LCC) code of student conduct rules that pertain to how LCC responds to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination amending portions of their code of student conduct, specifically, WAC 132M-126-115, 132M-126-145, and 132M-126-155.

Hearing Location(s): On February 16, 2022, at 8:30 a.m. Join Zoom meeting <https://lowercolumbia.zoom.us/j/85968228886>. Meeting ID 859 6822 8886, One tap mobile +12532158782,,85968228886# US (Tacoma), +13462487799,,85968228886# US (Houston). Dial by your location +1 253 215 8782 US (Tacoma), +1 346 248 7799 US (Houston), +1 669 900 6833 US (San Jose), +1 646 876 9923 US (New York), +1 301 715 8592 US (Washington DC), +1 312 626 6799 US (Chicago), Meeting ID 859 6822 8886. Find your local number <https://lowercolumbia.zoom.us/j/85968228886>. Join by SIP 85968228886@zoomcrc.com. Join by H.323, 162.255.37.11 (US West), 162.255.36.11 (US East), 115.114.131.7 (India Mumbai), 115.114.115.7 (India Hyderabad), 213.19.144.110 (Amsterdam Netherlands), 213.244.140.110 (Germany), 103.122.166.55 (Australia Sydney), 103.122.167.55 (Australia Melbourne), 149.137.40.110 (Singapore), 64.211.144.160 (Brazil), 149.137.68.253 (Mexico), 69.174.57.160 (Canada Toronto), 65.39.152.160 (Canada Vancouver), 207.226.132.110 (Japan Tokyo), 149.137.24.110 (Japan Osaka), Meeting ID: 859 6822 8886.

Date of Intended Adoption: February 16, 2022.

Submit Written Comments to: Bryanna Smith, 1600 Maple Street, P.O. Box 3010, Longview, WA 98632, email [rulemaking@lowercolumbia.edu](mailto:rulemaking@lowercolumbia.edu), fax 360-442-2129, by February 11, 2022.

Assistance for Persons with Disabilities: Contact Bryanna Smith, phone 360-442-2100, fax 360-442-2129, TTY 800-833-6388, email [rulemaking@lowercolumbia.edu](mailto:rulemaking@lowercolumbia.edu), by February 11, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: LCC must amend WAC 132M-126-115, 132M-126-145, and 132M-126-155 to meet new case law and guidance from the department of education regarding the federal regulations for Title IX of the Education Amendments of 1972 (Title IX) that specify how recipients of federal financial assistance covered by Title IX, including postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. Specifically, the changes include modifications to the appeal process, evidentiary procedure, and appointment of a hearing officer.

Reasons Supporting Proposal: LCC must amend WAC 132M-126-115, 132M-126-145, and 132M-126-155 to meet new case law and guidance from the Department of Education regarding the federal regulations for Title IX of the Education Amendments of 1972 (Title IX) that specify how recipients of federal financial assistance covered by Title IX, including postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination.

Statutory Authority for Adoption: Chapter 34.05 RCW; RCW 28B.50.140(13); 20 U.S.C. § 1092(f); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

Statute Being Implemented: Chapter 34.05 RCW; RCW 28B.50.140(13); 20 U.S.C. § 1092(f); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

Rule is necessary because of federal law, federal court decision, and state court decision, 34 C.F.R. 106; *Nelson v. Spokane Community College*, 14 Wn.App.2d 40, 469 P.3d 317 (2020); *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).

Name of Proponent: LCC, governmental.

Name of Agency Personnel Responsible for Drafting: Kendra Sprague, 1600 Maple Street, P.O. Box 3010, Longview, WA 98632, 360-442-2121; Implementation and Enforcement: Sue Orchard, 1600 Maple Street, P.O. Box 3010, Longview, WA 98632, 360-442-2301.

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. Pursuant to RCW 34.05.328 (5)(a)(i), this agency is not mandated to comply with RCW 34.05.328. Further, the agency does not voluntarily make that section applicable to the adoption of this rule pursuant to subsection (5)(a)(ii), and to date the joint administrative rules committee has not made that section applicable to the adoption of this rule.

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

Is exempt under RCW 19.85.025(3) and 34.05.310 (4)(g)(i).

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. This change is not anticipated to impose any additional cost on business.

December 10, 2021

Kendra Sprague

Vice President of Foundation

Human Resources and Legal Affairs

## OTS-3298.1

AMENDATORY SECTION (Amending WSR 21-01-145, filed 12/17/20, effective 1/17/21)

**WAC 132M-126-115 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 the college's standard disciplinary procedures, WAC 132M-126-005 through 132M-126-110, these supplemental procedures shall take precedence. The college may, at its discretion, contract with an administrative law judge or other person to act as presiding officer and assign such presiding officer to exercise any or all of the duties in lieu of the student conduct committee and committee chair.

[Statutory Authority: RCW 28B.50.140. WSR 21-01-145, § 132M-126-115, filed 12/17/20, effective 1/17/21.]

AMENDATORY SECTION (Amending WSR 21-01-145, filed 12/17/20, effective 1/17/21)

**WAC 132M-126-155 Appeals.** (1) ~~((The parties shall have the right to appeal from the initial order's determination of responsibility and/or dismissal of an allegation(s) of sexual harassment in a formal complaint. The right to appeal will be subject to the same procedures and time frames set forth in WAC 132M-126-090.~~

(2)) All parties, including the student conduct officer, in their capacity as a representative of the college, have the right to appeal from the determination of responsibility and/or from a dismissal, in whole or part, of a formal complaint during the investigative or hearing process. Appeals must be in writing and filed with the president's office within 21 days of service of the initial order or notice of dismissal. Appeals must identify the specific findings of fact and/or conclusions of law in the initial order or dismissal that the appealing party is challenging and must contain argument as to why the appeal should be granted. Failure to file a timely appeal constitutes a waiver of the right to appeal and the initial order or dismissal shall be deemed final.

(2) Upon receiving a timely appeal, the president's office will serve a copy of the appeal on all parties, who will have 10 days from the date of service to submit written responses to the president's office addressing issues raised in the appeal. Failure to file a timely response constitutes a waiver of the right to participate in the appeal. Upon receipt of written responses, the president's office shall serve copies of the responses to the other parties.

(3) Parties receiving a copy of the responses shall have five days in which to submit a written reply addressing issues raised in the responses to the president's office.

(4) The president or their delegate, based on their review of parties' submissions and the hearing or investigative record, will determine whether the grounds for appeal have merit, provide the rationale for this conclusion, and state whether a dismissal is affirmed or denied, or if the disciplinary sanction(s) and condition(s) imposed in the initial order are affirmed, vacated, or amended, and, if amended, set forth any new disciplinary sanction(s) and/or condition(s).

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

(6) All administrative decisions reached through this process are and may be judicially appealed pursuant to applicable provisions of chapter 34.05 RCW including, but not limited to, the timelines set forth in RCW 34.05.542. No decisions or recommendations arising from this disciplinary procedure will be subject to grievance pursuant to any collective bargaining agreement.

[Statutory Authority: RCW 28B.50.140. WSR 21-01-145, § 132M-126-155, filed 12/17/20, effective 1/17/21.]

OTS-3305.1

AMENDATORY SECTION (Amending WSR 21-01-145, filed 12/17/20, effective 1/17/21)

**WAC 132M-126-145 Evidence.** The introduction and consideration of evidence during the hearing is subject to the following procedures and restrictions:

(1) Relevance: The committee 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 committee must not rely on any statement by that party or witness in reaching a determination of responsibility.~~

~~(5))~~ No negative inference: The committee 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))~~ (5) Privileged evidence: The committee 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.

[Statutory Authority: RCW 28B.50.140. WSR 21-01-145, § 132M-126-145, filed 12/17/20, effective 1/17/21.]