

WSR 22-02-066

PROPOSED RULES

WASHINGTON STATE UNIVERSITY

[Filed January 5, 2022, 8:57 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-23-101.

Title of Rule and Other Identifying Information: Chapter 504-26 WAC, Standards of conduct for students, specifically WAC 504-26-045 Evidence.

Hearing Location(s): On February 10, 2022, at 4:00 p.m., Zoom meeting. Join from PC, Mac, Linux, iOS, or Android <https://wsu.zoom.us/j/95177761871?pwd=Q05uczlodFM1cjVOTlk2MXVrN1NiUT09>, Meeting ID 951 7776 1871, Passcode 021022; or join by telephone (long distance) +1-253-215-8782, or 95177761871# US (one tap mobile call). For international telephone number, see <https://wsu.zoom.us/j/95177761871?pwd=Q05uczlodFM1cjVOTlk2MXVrN1NiUT09> (enter the meeting ID and passcode when prompted). Due to the public health emergency resulting from COVID-19 and guidance/directives from the Washington department of health, no in-person hearing locations are being scheduled for this hearing.

Date of Intended Adoption: March 11, 2022.

Submit Written Comments to: Deborah Bartlett, Rules Coordinator, P.O. Box 641225, Pullman, WA 99164-1225, email prf.forms@wsu.edu, fax 509-335-3969, by February 10, 2022.

Assistance for Persons with Disabilities: Contact Joy Faerber, phone 509-335-2005, fax 509-335-3969, email prf.forms@wsu.edu, by February 8, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The university is modifying, clarifying, and updating the university's standards of conduct for students, specifically the rules regarding evidence in student conduct proceedings.

Reasons Supporting Proposal: The proposed amendment removes the requirement for written or verbal evidence to be subject to cross examination in order to be considered by the university conduct board.

On August 24, 2021, the United States Department of Education's Office of Civil Rights (OCR) announced that it would not enforce the part of 34 C.F.R. § 106.45 (b)(6)(i) regarding the prohibition against statements not subject to cross-examination and that postsecondary institutions are no longer subject to this part of the provision. OCR's announcement came as a result of a July 28, 2021, decision by the federal district court in Massachusetts. The court vacated the part of 34 C.F.R. § 106.45 (b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing and imposed a nationwide injunction.

Statutory Authority for Adoption: RCW 28B.30.150.

Statute Being Implemented: RCW 9.41.345(5).

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington State University (WSU), public.

Name of Agency Personnel Responsible for Drafting: Karen Metzner, Director, Center for Community Standards, French Administration 130, Pullman, WA 99164-1012, 509-335-4532; Implementation and Enforcement: Ellen Taylor, Interim Vice President for Student Affairs, French Administration 134, Pullman, WA 99164-1013, 509-335-4531.

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. The university does not consider these rules to be significant legislative rules.

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

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Is exempt under RCW 19.85.025.

Explanation of exemptions: The amendments to WSU student conduct code only apply to students at WSU, and therefore do not effect [affect] business or commerce in any way.

January 5, 2022
Deborah L. Bartlett, Director
Procedures, Records, and Forms
and University Rules Coordinator

OTS-3529.1

AMENDATORY SECTION (Amending WSR 21-07-057, filed 3/15/21, effective 4/15/21)

WAC 504-26-045 Evidence. (1) (~~Except as provided in subsection (2) of this section,~~) Evidence, including hearsay evidence, is admissible in student conduct proceedings if, in the judgment of the conduct officer or presiding officer, it is the kind of evidence that reasonably prudent persons are accustomed to rely on in the conduct of their affairs. The conduct officer or presiding officer determines the admissibility and relevance of all information and evidence.

(2) (~~In conduct board hearings to resolve allegations that, if proven, would constitute Title IX sexual harassment within the university's Title IX jurisdiction, witnesses, including parties, must submit to cross-examination for their written or verbal statements to be considered by the university conduct board.~~

~~(3))~~) The sexual history of a complainant is not relevant and not admissible in a student conduct proceeding unless such evidence about the complainant's sexual predisposition or prior sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

~~((4))~~) (3) Students may choose to remain silent during conduct proceedings, recognizing that they give up the opportunity to explain their version of events and that the decision is made based on the information presented at the hearing. No student must be compelled to give self-incriminating evidence, and no negative inference will be drawn from a student's refusal to participate in any stage of the conduct proceeding. If either party does not attend or participate in a

hearing, the conduct officer or conduct board may resolve the matter based on the information available at the time of the hearing.

[Statutory Authority: RCW 28B.30.150. WSR 21-07-057, § 504-26-045, filed 3/15/21, effective 4/15/21; WSR 18-23-083, § 504-26-045, filed 11/19/18, effective 12/20/18.]