

WSR 22-07-043

PERMANENT RULES

WASHINGTON STATE UNIVERSITY

[Filed March 14, 2022, 1:29 p.m., effective April 14, 2022]

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

Purpose: The university is modifying, clarifying, and updating the university's standards of conduct for students, specifically the rules regarding evidence in student conduct proceedings.

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.

Citation of Rules Affected by this Order: Amending WAC 504-26-045.

Statutory Authority for Adoption: RCW 28B.30.150.

Adopted under notice filed as WSR 22-02-066 on January 5, 2022.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: March 11, 2022.

Deborah L. Bartlett  
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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.]